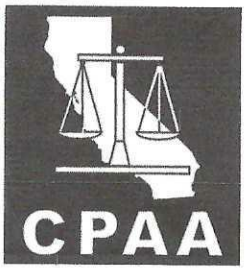

California Political Attorneys Association

August 5, 2025

VIA ELECTRONIC MAIL

Chair Argemira Flórez Feng
Vice-Chair Yaman Salahi
Commissioners Tsai, Francois, and Yeh
Ethics Commission
City and County of San Francisco
25 Van Ness Ave., STE. 220
San Francisco, CA 94102
ethics.commission@sfgov.org

RE: Comments on Ethics Commission Agenda Item 6, August 8, 2025 – Discussion and Possible Action on Proposed Amendments to the Ethics Commission's Enforcement Regulations

Dear Chair Flórez Feng, Vice Chair Salahi, and Commissioners:

The executive committee of the California Political Attorneys Association ("CPAA") writes to comment on Ethics Commission ("Commission") Agenda Item 6: Discussion and Possible Action on Proposed Amendments to the Ethics Commission's Enforcement Regulations, scheduled for hearing at the August 8, 2025 Commission meeting.

1. Further Discussion About the Substantive Amendments Is Warranted

Given the substantive nature of several of the proposed amendments, CPAA encourages the Commission to direct Staff to hold an additional Interested Persons Meeting prior to adopting the changes. The previous Interested Persons meetings, held in March 2025 and May 2025, preceded the publication of the specific proposals pending before the Commission, and we believe that a follow-up meeting to discuss the specific language and some alternative formulations would be beneficial.

Specifically, we would encourage a follow-up meeting to discuss the following items:

(1) The proposal to allow the Director of Enforcement to re-open dismissed and closed cases, in certain circumstances (Section 4(F) and Section 6);

(2) The proposal to bar the use of Legal Defense funds to pay assessed administrative penalties (Section 13(C));

(3) The proposal to allow Commission Staff to bring a separate charge for withholding information or refusing to fully comply with a subpoena (Section 5(C)(4)(iii)); and

(4) The proposal to remove Probable Cause decision-making from the scope of the Commission's power and lodge that power with the Executive Director (Section 7(C)).

We also ask for the Commission to include in the agenda for the Interested Persons Meeting the proposal to introduce a preliminary review stage to the enforcement procedures, as we believe such a procedure could lead to improved efficiency and outcomes for both respondents and the Commission, without sacrificing any investigative or enforcement prerogatives.

2. The Proposal to Re-Open Cases Should be Further Refined in the Interest of Due Process

We appreciate the language added in the most recent version of the proposed amendments stating that any investigation of a reopened case may only be conducted pursuant to Sections 5 through 10 of the Regulations. However, more changes are needed to protect the due process rights of respondents who previously had their cases dismissed or closed.

First, the Director of Enforcement should be required to notify a respondent in writing of any proposal to reopen the respondent's case. This written notification should track with the new factors listed in Section 4(F) and include (1) a specific description of the newly discovered material facts or evidence; (2) identify how such newly discovered facts or evidence were in the actual or constructive possession of the respondent and fairly encompassed in prior requests for information or subpoenas, and how Staff had no reasonable means to discover the facts or evidence except through disclosure by a respondent; and (3) state why such facts or evidence would have altered the outcome of the case. Respondents, likewise, should be given an opportunity to respond to the specific allegations, correct any errors that may have occurred, and work with the Director of Enforcement toward a swift and final resolution.

Providing notice identifying the specific grounds for reopening a case and offering the respondent an opportunity to reply will allow for a more efficient resolution, rather than starting over at the beginning of the investigation process. As discussed further below, good-faith errors in document production may occur and there may be legitimate legal disagreements that should be addressed directly if the Director of Enforcement is considering reopening a case.

Second, the authority to reopen a case should not extend to cases resolved by Stipulated Orders pursuant to Section 13. As stated in the Section 13(A), "Settlement saves time and resources for both the Commission and respondent(s)." The efficiency and efficacy of resolving a case by Stipulated Order would be severely diminished if the Director of Enforcement is granted unilateral

authority to reopen a case. Excluding cases resolved by Stipulated Order from Section 4(F) preserves the incentives for both the Commission and respondents to resolve cases via settlement.

Third, the standard in the third prong of the test for when a case may be reopened—the "facts or evidence [] would have altered the outcome of the case"—should be limited to instances where the newly discovered facts or evidence would have "materially" or "substantially" altered the outcome of the case, such as when an entirely new charge could have been brought or when an assessed penalty would have been significantly higher. Such a standard would ensure that cases would not be reopened based on technical or minor issues.

Fourth, the Director of Enforcement's authority to reopen a case should only apply prospectively to cases dismissed or closed after the date the Commission adopts amendments to the Enforcement Regulations. Basic due process principles dictate that respondents who previously had their cases dismissed or closed should be able to rely on those final decisions issued under the Regulations in effect at the time their cases were resolved.

The proposed authority to reopen a case is rightly constrained by the statute of limitations pursuant to Section 14, but more protections are required to ensure this power is only exercised against respondents whose cases have not already reached a final decision.

3. The Proposal to Limit the Use of Legal Defense Funds Should Be Narrowed

We support the Commission Staff's elimination of the proposal in the initial draft of the proposed regulations to bar the use of donor funds to pay administrative penalties, but we encourage further refinement of Section 13(C) (proposed) to ensure that it does not chill First Amendment activity and to make the provision more consistent with state law and prevailing practices.

The proposed language—to prohibit the use of Legal Defense Funds to pay any assessed administrative penalties—would constitute a significant change to San Francisco law, which has long permitted various sources of funds to be used to pay administrative penalties. It also deviates significantly from state law, federal law, and municipal rules for a number of comparable jurisdictions that permit the use of Legal Defense Funds to pay fines in most circumstances.

For instance, although the current draft of the proposed regulations cites Government Code section 85304.5 and FPPC Regulation 18530.45, the proposed amendment would impose a far more significant restriction on the use of Legal Defense Funds, as compared to state law. State law, by contrast, permits respondents to use such funds for most administrative and other penalties "arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties."[1] Beyond the scope of this allowance are penalties and judgments related to claims of sexual assault, sexual harassment, and

[1] FPPC Reg. 18530.45(h)(1)(B); *see also* Cal. Gov. Code § 89513(c) (permitting use of campaign funds for penalties, judgments, and settlements in various circumstances).

sexual abuse; instances where a candidate or officer received a personal benefit from the expenditure of campaign funds; and liability arising from the solicitation or receipt of a bribe, embezzlement of public money, or perjury.[2] Similarly, federal law broadly allows legal defense funds to pay administrative and other penalties, but restricts the use of campaign funds to cover legal fees in circumstances when the violation at issue resulted in a personal benefit for the candidate. Finally, the ethics rules for the City of Los Angeles and City of Oakland broadly permit legal defense funds to cover administrative penalties arising from electoral activities and the performance of official duties.[3]

We recommend the Commission narrow the proposed amendment and make the provision more consistent with state law and prevailing municipal practices by identifying circumstances where such funds cannot be used to pay administrative penalties. Specifically, the proposal could be limited to penalties arising from: (1) improper uses of campaign funds conferring a personal benefit; (2) actions involving bribery; (3) claims of sexual assault or sexual harassment; and (4) actions involving intentional fraud or malfeasance.

In addition, as a matter of basic fairness and notice, the proposed regulation should be amended to clarify that the limitation only applies prospectively to conduct that occurs after the date the Commission adopts the regulation.

4. **The Proposal to Authorize Staff to Bring a Separate Charge for Withholding Information or Refusing to Fully Comply with a Subpoena**

The proposed language—to allow the Director of Enforcement to bring a separate charge for concealing or withholding information, or for "failure to cooperate with an investigation"—would also constitute a significant substantive change to San Francisco law. The proposal could place an insurmountable financial burden on respondents, particularly candidates, committees, and non-profit entities that are not well-funded. Accordingly, it warrants additional discussion and consideration prior to adoption.

While we agree that local law prohibits the provision of false or fraudulent information, the concealment of information, and the failure to furnish records required to be provided,[4] the proposed amendment would materially alter the procedures governing compelled productions. Under current law, in the event of a dispute between respondents and Commission investigators about the scope of a subpoena (e.g., the relevancy of records to alleged misconduct), the parties typically enter informal discussions and attempt to reach a compromise that balances the Commission's investigative needs against the associational and privacy interests of respondents, who are engaged in First Amendment activity. In the event the parties cannot reach agreement, the Executive Director has authority under current law to pursue a court order compelling compliance,

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[2] FPPC Reg. 18530.45(h)(1)(B); Cal. Gov. Code §§ 89513(c)(1)-(3) (citing Penal Code § 86 and Elec. Code § 20).
[3] LA Munic. Code § 49.7.20; Oakland Munic. Code § 3.12.170.
[4] S.F. Campaign and Gov't Conduct Code § 1.170(f).

although in practice we are not familiar of many instances when such authority needs to be exercised.[5]

The proposed amendment, in contrast, would shift the burden to the respondent in the event of a dispute about the appropriate scope of a subpoena or the possibility that compelled production would compromise constitutional prerogatives of a respondent. This shift would require the respondent to seek a court order to quash the subpoena or narrow its scope, which can be a prohibitively expensive undertaking for all but the most well-financed respondents. It also may tend to reduce incentives for Commission investigators to work with respondents to ensure subpoenas are appropriately tailored.

In our view, the language in the current enforcement regulations appropriately balances the investigative interests of the Commission and the procedural rights of respondents, and as a practical matter, it enables compromise and open discussion to determine an appropriate scope for compelled productions in the sensitive zone in which the Commission operates. Further, even without the proposed amendment, the Commission possesses authority to penalize concealment or failure to comply with subpoenas, thus ensuring the Commission has tools to protect its investigative prerogatives.

The Commission's proposal would place it outside of prevailing practices. For instance, state law authorizes the Fair Political Practices Commission to issue subpoenas, but it does not authorize the imposition of a separate charge for withholding, instead requiring the FPPC to seek a court order to mandate compliance.[6] This is consistent with federal campaign finance law,[7] as well as the laws and regulations governing ethics proceedings before the Los Angeles City Ethics Commission, the San Jose Board of Fair Campaign and Political Practices, the Sacramento Ethics Commission, the Oakland Public Ethics Commission, and the Long Beach Ethics Commission.

Given the significance of the proposed change and its status as an outlier compared to state law, federal law, and local law in comparable jurisdictions, additional study and discussion is warranted prior to adoption.

Further, we believe three specific changes and issues should be considered before this proposal is adopted. *First*, as a basic matter of fairness, the proposed amendment should be modified to clarify that it solely applies prospectively to conduct that occurs after adoption of the amendment. *Second*, the language should be narrowed to eliminate authority to bring a charge for "failure to cooperate with an investigation." This is an amorphous and undefined term that would provide the Commission with too much discretion in a context where respondents must have the ability to mount appropriate defenses and protect their rights. *Third*, relatedly, given the possibility of good-faith errors in document productions, the Commission should narrow the scope of this provision to only apply in egregious circumstances, following notice from the Commission of an

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[5] S.F. Ethics Regulation 5(C)(4).
[6] FPPC Reg. 18361.1; FPPC Reg. 18361.7.
[7] *See* 52 U.S.C. § 30109.

allegedly withheld record and an allowance for respondents to cure the situation through a supplemental production or other means of satisfying their obligations. We believe this more measured approach would better foster cooperation between Commission investigators and respondents.

5. **The Proposal to Move Probable Cause Decision-Making to the Executive Director.**

We also encourage the Commission to spend additional time with interested parties to discuss and consider the merits of the proposal to move the important power of probable cause decision-making from the Commission to the Executive Director.

While we understand that there might be efficiency improvements in streamlining the process of determining probable cause, it is worth noting potential disadvantages to the proposed amendment. Underscoring these concerns is the fact that a determination of probable cause is not a minor procedural detail, but rather one of the two most impactful and substantive steps in the enforcement process (second only to the ultimate finding of a violation). This determination triggers the first public disclosure of the existence of a government investigation, in addition to the government's investigative findings and interim conclusions of wrongdoing. For obvious reasons, such releases of information can cause significant reputational and financial harm to respondents and other persons named in the probable cause determination. In addition, the determination commences the costly and burdensome process of preparing for the hearing on the merits, which can involve pre-hearing motions on preliminary matters, discovery, hearing briefs, and preparation for witness examination and argument. Given the significant impact of a probable cause finding, this power should reside with the full group of Commissioners.

Maintaining decision-making with Commissioners also provides a check and balance in the enforcement process, which is an important value when dealing with sensitive proceedings to review the propriety of electoral and associational activities conducted pursuant to the First Amendment. Current practices ensure that Commissioners—who are not involved in the day-to-day push and pull of an investigation—can independently review the work of Commission staff and reach their own judgment about the sufficiency of evidence and the application of the law, among other considerations. The proposal to eliminate this check and balance would reduce the number of reviewers of the facts of an investigation, which raises the possibility that errors or weaknesses in a case will not be detected prior to a determination of probable cause.

These considerations highlight why the prevailing practice is to place probable cause decision making in the hands of board members and commissioners. For instance, at the state level, the staff of the Fair Political Practices Commission has the power to prepare a probable cause report, but authority to determine the existence of probable cause rests with a hearing officer who is not involved in overseeing staff that conducted the investigation.[8] Similarly, federal campaign finance law places the comparable power to find "reason to believe" a violation has occurred in

[8] FPPC Reg. 18361.4.

the hands of appointed FEC commissioners, with the recommending power residing in the Office of General Counsel.[9]

In our view, the Commission should continue to have the power to review and ratify recommendations from the Executive Director, who has supervisorial authority over Commission staff that conducted the investigation at issue. Based on our experience, this step in the process is not so protracted that it warrants a departure from widespread practice or a compromise of the checks and balances that the City's enforcement process has long provided.

In fact, we believe that the regulations should be amended to provide additional authority for respondents to place arguments and evidence before Commissioners when they are tasked with reviewing probable cause determination recommendations. The current regulations do not authorize respondents to directly provide their arguments to commissioners. Rather, they provide the Executive Director with the authority to unilaterally brief commissioners, including to characterize the evidence and argument presented by respondents. This issue should be further discussed with interested parties prior to adoption of the proposed amendments.

Thank you for the opportunity to provide comments and we look forward to continued discussion with the Commission and Staff regarding the proposed changes to the Enforcement Regulations.

Respectfully submitted,

James W. Carson
Chair, CPAA Enforcement and
Filing Officer Oversight Committee

Matthew C. Alvarez
CPAA President

[9] 52 U.S.C. § 30109(a)(2).

Olson | Remcho

August 7, 2025

VIA EMAIL

Chair Argemira Flórez Feng
Vice-Chair Yaman Salahi
Commissioners Tsai, Francois, and Yeh
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ethics.commission@sfgov.org

RE: Ethics Commission Agenda, August 8, 2025, Item 6 – Discussion and Possible Action on Proposed Amendments to the Ethics Commission's Enforcement Regulations

Dear Chair Flórez Feng and Commissioners:

As practitioners who practice regularly for the Commission, we are writing to express our support for the public comment letter submitted by David J. Lazarus and Silvio Renna, dated July 10, 2025, regarding proposed amendments to Section 5(D) – Confidentiality of the Ethics Commission's Enforcement Regulations. These comments represent the views of our firm and not of any particular client of the firm.

We strongly agree with the authors' recommendation that the Commission adopt a policy requiring that respondents be provided a copy of the complaint at the outset of an investigation. Ensuring that individuals are informed of the allegations against them is fundamental to due process and is critical to the fair, efficient, and transparent enforcement of ethics laws.

As the letter thoroughly explains, such a policy would bring the Commission's practices in line with other major ethics enforcement agencies and would help both respondents and investigators resolve matters more effectively and efficiently. Our firm has represented respondents in matters where (contrary to the statement in the Director of Enforcement's August 4 memorandum) the respondents were not provided with the allegations that had been raised against them in advance. The result was multiple unnecessary interviews with witnesses who did not have knowledge of the operative facts. If respondents had received a copy of the complaint at the outset, or even a formal statement of the allegations, the Commission and respondents could have worked cooperatively towards a more efficient resolution, with respondents better able to identify to the Commission which witnesses had information about the relevant facts. Such a process would conserve valuable public resources -- not to mention the resources of the grassroots organizations who were the subjects of the complaints.

Additionally, we did not find persuasive the rationale provided for failing to disclose complaints to respondents. Particularly, the Commission's goal of protecting whistleblowers is already satisfied through the Commission's current policy of permitting the submission of anonymous complaints through their informal complaint process. Anonymous complaints provides the option to safeguard the privacy of individuals who report potential violations while still ensuring fairness and transparency for respondents.

Moreover, the fact that not all investigations are complaint-based should not impact how the Commission handles those matters that are. And, for those matters that are not complaint-based, in lieu of providing the respondents with the complaint, the Commission should promote fairness and efficiency by providing the respondents with a written statement of the allegations under investigation.

We urge the Commission to incorporate these recommendations into the final amendments to the Enforcement Regulations. Thank you for considering this important issue.

Sincerely,

Andrew H. Werbrock
Partner, Olson Remcho LLP

From: sfneighborhoods.net
To: Ethics Commission, (ETH)
Subject: 148 words for inclusion in August 8, 2025, Minutes Item #6 under Sunshine Ordinance Sec 67.16 Minutes for my public comment.
Date: Friday, August 8, 2025 3:34:10 PM

Below is 148 words by MS word count for inclusion in the Ethic Commission, August 8, 2025, Minutes Item #6 under Sunshine Ordinance Sec 67.16 Minutes for my public comment.

SF AC, Section 14.101, INITIATIVES (*part of the city charter*)

> "No initiative or declaration of policy approved by the voters shall be subject to veto, or to amendment or repeal except by the voters, unless such initiative or declaration of policy shall otherwise provide."

The Sunshine Ordinance was approved by the voters. There is nothing in the Sunshine Ordinance allowing the Ethics Commission to veto, to amend or repeal any part of the Sunshine Ordinance. The Ethics Commission does not have the power to defacto ignore or repeal any policy in the Sunshine Ordinance.

AC Section 4.102 Boards and Commissions – Power and Duties (8). Commission is to "Exercise such other powers and duties as shall be prescribed by the Board of Supervisors;" The BOS passed the Sunshine Ordinance, voters amended by initiative the Ethics Commission is required to exercise all duties prescribed in the Sunshine Ordinance, not some.

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sullivan