

Date: May 26, 2009

Item No. 14  
File No. \_\_\_\_\_

## SUNSHINE ORDINANCE TASK FORCE

### AGENDA PACKET CONTENTS LIST\*

- Amendments to Ethics Commission regulations
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Completed by: Chris Rustom

Date: May 15, 2009

**\*This list reflects the explanatory documents provided**

~ Late Agenda Items (documents received too late for distribution to the Task Force Members)

\*\* The document this form replaces exceeds 25 pages and will therefore not be copied for the packet. The original document is in the file kept by the Administrator, and may be viewed in its entirety by the Task Force, or any member of the public upon request at City Hall, Room 244.

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San Francisco  
Ethics Commission



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**ETHICS COMMISSION  
REGULATIONS FOR INVESTIGATIONS  
AND ENFORCEMENT PROCEEDINGS**

*Effective Date: July 5, 1997*

*Includes technical amendments effective April 13, 2002;*

*Streamlined Process for Complaints Alleging a Failure to File Campaign Finance Disclosure  
Reports effective August 15, 2004; amendments effective October 10, 2005;  
amendments effective March 10, 2006; and amendments effective November 10, 2006.*

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## I. PREAMBLE

These Regulations of the San Francisco Ethics Commission are promulgated in order to ensure the fair, just, and timely resolution of complaints presented to the Commission that allege violations of State and City laws within the Commission's jurisdiction relating to campaign finance, lobbying, campaign consulting, campaign consulting, conflicts of interest and governmental ethics by:

- A. Setting and maintaining objective standards for the investigation and prosecution of matters brought before the Commission;
- B. Eliminating any political or improper influence in the investigation and prosecution of persons accused of ethics violations;
- C. Protecting the privacy rights of those accused of ethics violations by maintaining the confidentiality of complaints filed with, and investigations conducted by, the Commission;
- D. Setting and enforcing reasonable time limits within which enforcement proceedings should be completed;
- E. Coordinating and sharing with other governmental agencies the responsibility for investigations and prosecutions of complaints, whenever consistent with the interests of justice;
- F. Delegating to the Commission staff maximum discretion in the handling and resolution of complaints at staff level, while retaining oversight of those staff activities.

## II. DEFINITIONS

For purposes of these Regulations, the following definitions shall apply:

- A. "Business day" means any day other than a Saturday, Sunday or City holiday.
- B. "City" means the City and County of San Francisco
- ~~B. "City laws relating to campaign finance, lobbying, campaign consulting, conflicts of interest, and governmental ethics" include, but are not limited to: San Francisco Charter section 15.100 et seq. and Appendix C (ethics), and the San Francisco Campaign and Governmental Conduct Code.~~ "Commission" means the Ethics Commission.
- D. "Complainant" means a person or entity that makes a complaint.
- E. "Day" means calendar day unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next working business day.
- F. "Deliver" means transmit by U.S. mail or personal delivery to a person or entity or to an agent authorized to accept service on behalf of the person or entity. For purposes of these Regulations, delivery may be made by leaving copies of the material with a responsible person at either the residence or place of business of the person or entity to whom the material is directed. The Commission, the Executive Director or a respondent receiving material may consent to any other means of delivery, including delivery by email or fax. In any proceeding, following a determination of probable cause, the

Commission Chair or designated Commissioner or hearing officer may order that delivery of briefs or other materials be accomplished by email, serve, as defined in this Section, or transmit by registered mail, return receipt requested.

G. “Enforcement action” means an action pursuant to San Francisco Charter section C3.699-13.

H. “Exculpatory information” means information tending to show that the respondent is not guilty of the alleged violations.

I. “Executive Director” means the Executive Director of the Ethics Commission or the Executive Director’s designee.

J. “Mitigating information” means information tending to excuse or reduce the significance of the respondent’s conduct.

K. “Probable cause” means that based on the evidence presented there is reason to believe that the respondent committed a violation of ~~City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics.~~

L. “Respondent” means a person or entity that is alleged in a complaint to have violated ~~State or City committed a violation of laws relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics.~~

M. “Service” means actual receipt by the person or entity to whom the material is directed, or by an agent authorized to accept service on behalf of the person or entity to whom the material is directed. For purposes of these Regulations, service may be made by leaving copies of the material with a responsible person at either the residence or place of business of the person or entity to whom the material is directed.

N. “State laws relating to campaign finance, conflicts of interest, and governmental ethics” include, but are not limited to the Political Reform Act of 1974, Government Code section 81000 et seq., Government Code section 1090, and Government Code section 3201 et seq.

OM. “Stipulated order” means an order regarding a complaint the terms of which have been agreed to by both the Executive Director and the respondent.

PN. “Violation of law” means a violation of City laws relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics, and State laws relating to campaign finance, conflicts of interest, or governmental ethics, including, but not limited to: San Francisco Charter section 15.100 et seq. and Appendix C (ethics); the San Francisco Campaign and Governmental Conduct Code; the San Francisco Sunshine Ordinance, S.F. Administrative Code Ch. 67; the Political Reform Act of 1974, Government Code section 81000 et seq.; Government Code section 1090, et seq.; and Government Code section 3201, et seq. “Working day” is any day other than a Saturday, Sunday or City holiday.

### III. COMPLAINTS

#### A. Formal Complaints

1. Any person or entity may file a formal complaint alleging a violations of State or City laws relating to campaign finance, lobbying, campaign consulting, conflicts of

~~interest, or governmental ethics law.~~ Formal complaints must be made in writing on a form specifically provided by the Commission staff, ~~and must be dated, verified and signed by the complainant under penalty of perjury. If the complainant is an entity, the complaint must be verified and signed under penalty of perjury by an authorized officer or agent of the entity.~~ Formal complaints must include the following information, upon the complainant's information and belief:

- (a) the name and address of the respondent;
- (b) the provision(s) of law allegedly violated;
- (c) the facts constituting the alleged violation(s);
- (d) the names and addresses of witnesses, if any; and
- (e) identification of documents or other evidence which may prove the facts constituting the alleged violation(s), if any.

2. Formal complaints may be filed anonymously. Any formal complaint not filed anonymously must be verified and signed by the complainant under penalty of perjury. If the complainant is an entity, the complaint must be verified and signed under penalty of perjury by an authorized officer or agent of the entity.

- (f) ~~the name and address of the complainant; and~~
- (g) ~~the telephone number at which the complainant may be reached during normal business hours.~~<sup>23</sup> The Executive Director shall process and review all formal complaints, following the process described in section IV.

#### **B. Informal Complaints**

Any person or entity may file an informal complaint alleging a violation of law by submitting a complaint by telephone, in person, or in writing other than on the form prescribed by the Commission. The Executive Director shall have no obligation but has the discretion to process and review informal complaints. ~~Informal complaints include the following: written complaints that are not verified or signed under penalty of perjury; and/or that do not contain the information required by Section III, subsection A, above; unwritten complaints; and referrals from other governmental agencies.~~

#### **C. Complaints Initiated by the ~~Commission~~ Executive Director**

The Executive Director may initiate ~~Complaints may be initiated by the Commission, its staff, or any individual Commissioner.~~ These complaints need not conform to the requirements for formal complaints specified in subsection A of this Section. ~~The Executive Director shall review and process all complaints initiated by the Commission and individual Commissioners. The Executive Director shall have no obligation but has the discretion to process and review complaints initiated by Commission staff.~~

#### **D. Complaints Made at Public Meetings**

The Commission shall not receive complaints at public meetings. The Commission shall urge the public in the strongest terms possible not to make complaints at public meetings.

### **IV. REVIEW OF COMPLAINTS**

A. Preliminary Review. The Executive Director may conduct a preliminary review of each complaint. This inquiry may include reviewing relevant documents, communicating with the complainant, communicating with the respondent, and any other inquiry to determine whether a full investigation is warranted.

~~1B. There is No Reason to Believe a Violation Occurred~~Dismissal of Complaint. If, ~~b~~Based on the allegations and information contained in a complaint, and the Executive Director's preliminary review, the Executive Director may dismiss the complaint if the allegations do not warrant further action for reasons that may include, but are not limited to:

1. The evidence does not support the allegations.
2. The allegations, if true, do not constitute a violation of law within the Commission's jurisdiction.
3. The complaint contains an expression of opinions, rather than specific allegations.
4. The allegations contained in the complaint are already under investigation, or already have been resolved, by the Commission or another governmental or law enforcement agency, determines that there is no reason to believe that a violation of State or City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest or governmental ethics has occurred, the Executive Director may dismiss the complaint and

If the Executive Director dismisses a complaint under this section, the Executive Director shall take no further action on the complaint, except: 1) inform the complainant of the Executive Director's decision; 2) at his or her discretion, issue a warning letter to the respondent; and or 3) at his or her discretion, refer the complaint to another agency for its appropriate action.

A.2.—The Executive Director shall provide a monthly summary to the Commission of each complaint dismissed, including the reasons for dismissal, provided that such information shall comply with the confidentiality requirements of the Charter.

~~1.C. There is Reason to Believe a Violation May Have Occurred.~~ If, based on the allegations and information contained in a complaint, and the Executive Director's preliminary review, the Executive Director determines that there is reason to believe that a violation of State or City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest or governmental ethics may have occurred, the Executive Director shall immediately forward the complaint to the District Attorney and the City Attorney. ~~The Executive Director may commence an investigation and notify respondent(s) that a complaint has been filed by providing a brief summary of the allegations, excluding the name of the complainant.~~

B.2.—Within ten business days after receipt of the complaint, the District Attorney and City Attorney shall inform the Commission whether the District Attorney or City Attorney has initiated or intends to pursue an investigation of the complaint.

If neither the District Attorney nor City Attorney intends to pursue an investigation, within 14 days of such notification, the Executive Director shall inform the complainant



in writing of the action, if any, that he or she has taken or plans to take on the complaint, together with the reasons for such action or non-action. If the Executive Director has not informed the complainant of the action that he or she has taken or plans to take on the complaint within 14 days, the complainant shall be notified of the reasons for the delay and shall subsequently receive notification as provided above.

## **V. CONDUCT OF INVESTIGATIONS**

**B.3A. Factual Investigation.** ~~An~~ The Executive Director's investigation may include, but shall not be limited to, the interview of the respondent(s) and any witnesses, the deposition of respondent(s) and/or witnesses, and the review of documentary and other evidence.

**B.4. Subpoenas.** During an investigation, the Executive Director may if necessary compel by subpoena the testimony of witnesses and the production of documents relevant to the investigation.

## **V.VI. DETERMINATION THAT THERE IS NOT PROBABLE CAUSE TO BELIEVE A VIOLATION OF LAW HAS OCCURRED**

**A. Executive Director Determination and Calendaring.** ~~At the conclusion of the investigation, if~~ the Executive Director determines that there is not probable cause to believe that a violation of ~~state or local law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics~~ has occurred, the Executive Director shall inform the Commission of that determination and provide clear and concise reasons supporting that determination. Thereafter any two or more members of the Commission may cause the item to be calendared for consideration by the full Commission in a closed session at the next Commission meeting held no sooner than ~~10~~ ten days after the date the Executive Director informs the Commission of the Executive Director's determination. Commissioner's requests that a complaint be calendared for consideration by the full Commission must be received by the Executive Director not less than ~~5-five~~ days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements.

**A.1B. Commission Decision Not To Dismiss.** If the matter is calendared for consideration by the Commission, and if the Commission decides that there is ~~probable cause~~ reason to believe that a violation of ~~State or City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest or governmental ethics~~ may have occurred, the Commission shall direct the Executive Director ~~either to either further investigate the matter further or to prepare a probable cause report and schedule a probable cause hearing.~~

**CA.2. Commission Decision To Dismiss.** If the matter is calendared for consideration by the Commission, and if the Commission decides that there is not ~~probable cause~~ reason to believe that a violation of law ~~has~~ may have occurred, the Commission shall take no further action on the complaint other than: 1) inform the complainant and respondent of the Commission's decision; 2) at the the Commission's discretion, issue a warning letter to the respondent; or 3) at the Commission's discretion, refer the complaint to another agency for its appropriate action.

~~A.3D. **Commission Decision Not To Calendar.** If the Executive Director determines that there is not probable cause to believe that a violation of State or City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest or governmental ethics has occurred, and if after the Executive Director informs the Commission of the determination, the Commission does not calendar the matter for consideration pursuant to section VI(A), the Executive Director shall take no further action except: 1) inform the complainant and respondent of the Executive Director's decision; 2) at his or her discretion, issue a warning letter to the respondent; or 3) at his or her discretion, refer the complaint to another agency for its appropriate action.~~

~~VI.VII.....R~~

~~**RECOMMENDATION THAT THERE IS PROBABLE CAUSE TO BELIEVE A VIOLATION OF LAW HAS OCCURRED**~~

~~A. **Probable Cause Report.** When If the Executive Director concludes an investigation, and determines there is probable cause to believe a violation of state or local law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics has occurred, the Executive Director shall prepare a written "probable cause report" and schedule a probable cause hearing. The probable cause report shall contain a summary of the laws that the Executive Director believes the respondent(s) violated and evidence gathered through the investigation, including any exculpatory and mitigating information. In the probable cause report, The Executive Director may consider as evidence present statements including hearsay, declarations of investigators or others relating to the statements of witnesses, or the examination of physical evidence. Unless otherwise permitted by the Commission Chair or the Commission Chair's designee for good cause shown, the probable cause report shall not exceed 25 pages excluding attachments.~~

~~B. **Delivery of Probable Cause Report and Notice of Probable Cause Hearing.** The Executive Director shall deliver to the respondent a copy of the probable cause report. The complaint is deemed to have been brought by the Commission on the date of service. The Executive Director shall deliver to each respondent a copy of the probable cause report, with written notice of the date, time and location of the probable cause hearing, together with a copy of the probable cause report, at least 30-45 days in advance of the hearing date. The notice shall include a statement that inform each respondent that he or she has the right to be present and represented by counsel at the probable cause hearing.~~

~~C. Unless otherwise decided by the Commission, the Commission shall sit as a hearing panel to conduct the probable cause hearing. The Commission may assign one of its members or an outside hearing officer to conduct the probable cause hearing and submit a report and recommendation to the Commission.~~

~~VII. **RESPONSE TO THE PROBABLE CAUSE REPORT; REBUTTAL**~~

~~AC. **Response to the Probable Cause Report**~~

~~1. Each respondent may submit a written response to the probable cause report. The response may contain legal arguments, a summary of evidence, and any mitigating or exculpatory information. Unless otherwise permitted by the Commission Chair or the~~

Commission Chair's designee for good cause shown, the response shall not exceed 25 pages excluding attachments.

2. Each respondent who chooses to submit a response must deliver the response no later than ~~15-20~~ days prior to the date of the probable cause hearing. Unless the parties agree to deliver materials by email, the respondent must deliver a total of eight copies of the response to the Commission and Executive Director. The Executive Director must then immediately distribute copies of the response to the Commission. The respondent must also deliver one copy of the response to ~~each~~ every other respondent named in the probable cause report.

#### **BD.** Rebuttal

The Executive Director may submit evidence or argument in rebuttal to a response. If the Executive Director chooses to do so, the Executive Director must ~~serve~~ deliver the rebuttal ~~on to the Commission members and each respondent named in the probable cause report no later than 7-seven~~ days prior to the date of the probable cause hearing. Unless otherwise permitted by the Commission Chair or the Commission Chair's designee for good cause shown, the rebuttal shall not exceed ~~15-ten~~ pages excluding attachments.

### **VII.VIII.** .....

#### **PROBABLE CAUSE HEARING; DETERMINATION OF WHETHER AND HOW TO PROCEED WITH A HEARING ON THE MERITS**

##### **A. General Rules and Procedures**

1. Unless otherwise decided by the Commission, the Commission shall sit as a hearing panel to conduct the probable cause hearing. The Commission may assign one of its members to conduct the probable cause hearing and submit a report and recommendation to the Commission.

~~2.~~ Unless the respondent requests that the probable cause hearing be held in public, Except for hearings regarding allegations of willful violations of the Sunshine Ordinance, the hearing shall be closed to the public to the extent permitted by state law, unless the respondent requests that the probable cause hearing be held in public. Probable cause hearings regarding allegations of willful violations of the Sunshine Ordinance shall be held at a public meeting unless otherwise provided in state or local law.

~~23.~~ Unless otherwise decided by the Commission, Formal-formal rules of evidence shall not apply to the probable cause hearings held pursuant to these Regulations. Neither the Executive Director nor the respondent(s) may present live witness testimony during the probable cause hearing.

~~34.~~ The Commission may find that there is probable cause to believe a violation of City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics has occurred only if a person of ordinary caution and prudence would conclude, based on if the evidence, that shows there is a reasonable ground to suspect that the respondent has committed the violation is sufficient to lead a person of ordinary caution and prudence to believe that a violation has been committed and that the respondent committed or caused the violation.

## B. Probable Cause Determination

1. If the Commission as a whole conducts the probable cause hearing, the Commission shall make the probable cause determination no later than 45 days after the date the hearing is concluded. If the Commission assigns one of its members ~~or an outside hearing officer~~ to conduct the probable cause hearing, the assigned member ~~or hearing officer~~ shall submit a report and recommendation to the Commission no later than 30 days after the date the hearing is concluded, and the Commission shall make the probable cause determination no later than 45 days after the assigned member delivers his or her report and recommendation is delivered.

2. A determination that there is probable cause to believe that a violation of law has occurred shall be based on the entire record of the proceedings. Each Commissioner who participates in the decision shall certify on the record that he or she personally heard or read the testimony (either in person or by listening to a tape or reading the transcript prepared by a court reporter) and reviewed the evidence, or otherwise reviewed the entire record.

3. The Commission shall not make a finding of probable cause if it is presented with clear and convincing evidence that, prior to the alleged violation:

- (a) the respondent had requested and obtained a written opinion from the Commission ~~or its staff~~; and
- (b) the respondent, in requesting the opinion, disclosed truthfully all the material facts pertinent to the case; and
- (c) the Commission or its staff issued a formal, written opinion with which both the District Attorney and City Attorney concurred; and
- (d) the respondent committed the acts or violations alleged in the complaint in good-faith reliance upon the formal, written opinion of the Commission ~~or its staff~~.

4. If the Commission determines that there is not probable cause to believe a violation has occurred, the Commission shall dismiss the complaint and take no further action on the complaint, except: ~~the Executive Director~~ 1) inform the complainant and each respondent of the Commission's decision; 2) at the Commission's discretion ~~direction of the Commission~~, issue a warning letter to the respondent; ~~and~~ 3) at the Commission's discretion ~~direction of the Commission~~, refer the complaint to another agency for its appropriate action.

5. If the Commission determines that there is probable cause to believe a violation of ~~City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics~~ has occurred, the Commission shall announce its this determination shall be announced in open session by the Commission. The announcement shall contain a summary of the allegations for which the Commission determines there is probable cause to believe a violation of law occurred and a cautionary statement that each respondent is presumed to be innocent unless and until such time that the allegations are proved in a subsequent hearing on the merits.

## C. Determination How to Proceed with Hearing on Merits

1. Following a determination of probable cause by the Commission, the Commission shall proceed with a hearing on the merits of the complaint. Unless otherwise decided by the Commission, the Commission shall sit as the hearing panel to hear the merits of the case. The Commission also may sit as the hearing panel to hear the case, with an outside hearing officer presiding, or designate an individual Commissioner or an outside hearing officer to hear the case and file a report and recommendation for decision by the Commission.

2. The Commission shall provide for resolution of preliminary matters; in advance of the hearing on the merits, ~~of preliminary matters~~. Unless otherwise decided by the Commission, the Commission Chair shall hear and decide preliminary matters pursuant to Section X subsection B. The Commission alternatively may designate an individual Commissioner or an outside hearing officer to hear and decide preliminary matters.

3. The Commissioner or hearing officer assigned to decide preliminary matters shall also be authorized to shall also provide for the issuance of subpoenas.

**D. Amending Probable Cause Determination**

Before the Executive Director has scheduled the hearing on the merits, or no later than 60 days prior to the date the hearing on the merits is scheduled to commence, the Executive Director may request that the Commission amend the probable cause determination to add or amend allegations or charges against the respondent. If the Executive Director seeks to amend the probable cause determination, the Executive Director, the respondent(s) and the Commission shall follow the procedures set forth in Sections VII and VIII, and the Executive Director shall issue an amended accusation and notice of the hearing on the merits following the procedures set forth in Section IX.

**VIII-IX. .... I**

**ISSUANCE OF ACCUSATION; SCHEDULING AND NOTICE OF HEARING ON MERITS**

**A. Issuance of Accusation**

Except as provided in Section XI, following a determination of probable cause by the Commission, the Executive Director shall issue an accusation. The accusation shall clearly specify the provisions of the City Charter or ordinances ~~which were that each respondent allegedly violated~~ and shall set forth the acts or omissions with which each respondent is charged. The accusation shall list only those charges for which the Commission made a determination of probable cause. The Executive Director shall deliver a copy of the accusation to each respondent at least 45 days prior to the date of the hearing on the merits within ten days after the Commission's probable cause determination. The accusation is a public document.

The Executive Director shall present the case in support of the accusation at the hearing on the merits. The accusation shall be the charging document for the purpose of the hearing on the merits. The Commission shall not find that any respondent has committed a violation of law if the accusation does not allege such a violation and provide the respondent notice of the basis for the allegation.

**B. Scheduling and Notice of Hearing on Merits**

The Executive Director shall schedule the hearing on the merits, and deliver written notice of the date, time and location of the commencement of the hearing to each respondent at least 45 days prior to the ~~date-commencement~~ of the hearing. The notice shall be in substantially the following form:

“You are hereby notified that a hearing will be held before the Ethics Commission (or name of hearing officer or assigned Commissioner) at \_\_\_ on the \_\_\_ day of \_\_\_, 20\_\_\_, at the hour of \_\_\_, at (location of \_\_\_\_\_), upon the charges made in the accusation. You may be present at the hearing, may, but need not, be represented by counsel, may present any relevant evidence, and will be given an opportunity to cross-examine all witnesses testifying against you. You may request the issuance of subpoenas to compel the attendance of witnesses and the production of books, documents or other things by applying to the Commission on or before (date).”

#### **IX.X. DISCOVERY; HEARING BRIEFS; PRELIMINARY MATTERS.**

##### **A. Discovery**

The Executive Director and each respondent shall be entitled to pre-hearing discovery in accordance with the provisions of California Administrative Procedure Act, Government Code, Title 2, Division 3, Part 1, Chapter 5, section 11500 et seq.

##### **B. Resolution of Preliminary and Procedural Matters**

1. The Executive Director and any respondent may present preliminary matters, unrelated to the merits of the accusation, to the assigned Commissioner or hearing officer designated to hear such matters pursuant to Section VIII subsection C(2). Preliminary matters may include, but are not limited to, the following:

- (a) procedural matters;
- (b) disqualification of any member of the Commission from participation in the hearing on the merits;
- (c) requests for dismissal of any charges in the accusation because, even if the allegations set forth in the accusation are true, those charges do not state a violation of law as alleged;
- (d) discovery motions; and
- (ee) \_\_\_\_\_ any other matters not related to the truth or falsity of the factual allegations in the accusation.

2. A request for resolution of preliminary matters must be delivered to the assigned Commissioner or hearing officer no later than 25 days prior to the date-commencement of a hearing on the merits. At the same time that the request is delivered to the assigned Commissioner or hearing officer, the requester must deliver copies of the request to the Executive Director and ~~each~~every other respondent named in the accusation.

3. The request for resolution of preliminary matters may contain legal arguments and a summary of the facts underlying the request. Unless otherwise permitted by the assigned Commissioner or hearing officer for good cause shown, the request shall not exceed 15 pages excluding attachments.

4. The Executive Director and ~~each~~ respondent may submit a written opposition to a request for resolution of preliminary matters. The opposition must be delivered to the assigned Commissioner or hearing officer no later than ~~15 days prior to the date of a hearing on the merits~~ ten days after the date of delivery of the request. At the same time that the opposition is delivered to the assigned Commissioner or hearing officer, the party submitting the opposition must deliver copies of the opposition to the Executive Director and ~~each~~ every other respondent named in the accusation. Unless otherwise permitted by the assigned Commissioner or hearing officer for good cause shown, the opposition shall not exceed ~~10 ten~~ pages excluding attachments.

5. The requestor may submit a written reply to an opposition. The reply must be delivered to the assigned Commissioner or hearing officer no later than five days after the date of delivery of the opposition. At the same time that the reply is delivered to the assigned Commissioner or hearing officer, the party submitting the reply must deliver copies of the reply to the Executive Director and every other respondent named in the accusation. Unless otherwise permitted by the assigned Commissioner or hearing officer for good cause shown, the reply shall not exceed five pages excluding attachments.

56. ——— The assigned Commissioner or hearing officer shall issue a written decision on each request for resolution of preliminary matters no later than five days prior to the date commencement of the hearing on the merits.

67. The Executive Director or any respondent may submit a written request for reconsideration, by the Commission, assigned Commissioner or hearing officer who will conduct the hearing on the merits, of any decision made on preliminary matters. A party requesting reconsideration shall serve the request on the Commission, assigned Commissioner or hearing officer, and the Executive Director and any other respondent, no less than 3 three days prior to the hearing on the merits.

98. Before or during the hearing on the merits, the Executive Director and any respondent may file a request for resolution of a procedural matter affecting the conduct of the hearing. This request shall be directed to the Commissioner or hearing officer designated to hear preliminary matters pursuant to Section VIII subsection C(2). The request shall follow the process outlined by paragraphs 2 through 5 of this section, except that the request may be submitted later than 25 days prior to the commencement of the hearing on the merits but may not be submitted after the conclusion of the hearing on the merits. If either party requests a written decision, the assigned Commissioner or hearing officer shall issue a written decision no later than 20 days after the date of the request.

### C. Hearing Briefs

The Executive Director shall, and any respondent may, submit a hearing brief. The brief shall outline significant legal arguments and list evidence and witnesses to be presented

at the hearing. The brief is not required to list anticipated rebuttal evidence or rebuttal witnesses. Six Unless the Commission or outside hearing officer agrees to accept briefs by email, six copies of the brief shall be delivered to the Commission, assigned Commissioner, or outside hearing officer no later than 20 days prior to the date of the hearing on the merits commences. The Executive Director shall deliver a copy of the Executive Director's brief to each respondent named in the accusation. Each respondent who chooses to submit a brief shall deliver copies of the respondent's brief to the Executive Director and to ~~each~~ every other respondent named in the accusation.

#### **D. Issuance of Hearing Subpoenas**

The Executive Director and any respondent named in the accusation may request the issuance of subpoenas for the attendance of witnesses and for the production of documents at the hearing on the merits. Requests for the issuance of subpoenas should be delivered no later than 20 days prior to the commencement of the hearing on the merits. The request shall be accompanied by a declaration specifying the name and address of the witnesses and setting forth the materiality of their testimony. If the request is for a document subpoena, it shall be accompanied by a declaration which includes the following information: a specific description of the documents sought; an explanation of why the documents are necessary for the resolution of the complaint; and the name and address of the witness who has possession or control of the documents. Subpoenas may be issued only upon approval of the Commission or the Commissioner or hearing officer designated by Section VIII subsection C(2).

### **X.XI. DISCOVERY OF EXCULPATORY EVIDENCE INFORMATION AND DISMISSAL OF COMPLAINT PRIOR TO HEARING ON THE MERITS**

**A. Discovery of Exculpatory Information.** Following the delivery of the probable cause report, if the Executive Director is aware of or discovers any exculpatory information with respect to any charge listed in the accusation, the Executive Director shall notify the Commission and the respondent(s) of this information.

**B. Dismissal Recommendation.** If the Executive Director discovers information which exonerates the respondent(s) a After a determination of probable cause and before a hearing on the merits, the Executive Director may present this exculpatory information to the Commission and recommend that the Commission dismissal of the complaint. The Executive Director may make such a recommendation based on the Executive Director's discovery of exculpatory information or other good cause. In such situations, if he or she has not done so already, the Executive Director is not required to issue an accusation and the Commission need not hold a hearing on the merits, unless the Commission overrides the Executive Director's dismissal recommendation, pursuant to Section XIB.

**BC. Commission Consideration of Dismissal Recommendation.** The Executive Director shall present the exculpatory information and dismissal recommendation and the reasons for that recommendation to the Commission in a public memorandum. Thereafter, any two or more members of the Commission may cause the complaint to be calendared for consideration by the full Commission in open session at the next Commission meeting occurring no sooner than ten ~~10~~ days from the date the Executive



Director informs the Commission of the Executive Director's recommendation. A Commissioner's request that a complaint be calendared must be received by the Executive Director no fewer than ~~5~~ five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements. If two or more members of the Commission do not cause the complaint to be calendared, or if in open session a majority of the Commission does not vote to override the dismissal recommendation, the Commission shall take no further action on the complaint except: 1) inform the complainant and each respondent of the Commission's decision; 2) at the Commission's discretion, issue a warning letter to the respondent; or 3) at the Commission's discretion, refer the complaint to another agency for its appropriate action.

**D. Dismissal or Removal of Specific Charges.** After a determination of probable cause and before a hearing on the merits, the Executive Director may decide not to proceed with a specific charge or allegation listed in the accusation. If the Executive Director makes such a determination, the Executive Director immediately shall notify in writing the respondent(s) and the Commission or hearing officer. If the Executive Director provides such notice, the Commission shall not find a violation based on the specific charge or violation after a hearing on the merits.

**XI.XII.....H**

**HEARING ON THE MERITS**

**A. General Rules and Procedures**

1. Public Hearing

The hearing on the merits shall be open to the public, provided that either the Executive Director or the respondent(s) may request that the Commission, assigned Commissioner or hearing officer exclude any witnesses. witnesses may be excluded at the discretion of the Commission, assigned Commissioner, or hearing officer.

2. Standard of Proof

The Commission may determine that a respondent has committed a violation of City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics has occurred only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the respondent has committed the violation has occurred.

3. Rules of Evidence

All evidence admissible in an administrative proceeding governed by the California Administrative Procedure Act shall be admissible in a hearing on the merits. The Executive Director and each respondent shall have the right to call and examine witnesses under oath or affirmation, to introduce exhibits, to cross-examine and impeach witnesses, and to rebut any evidence presented.

4. Exhibits

Where both parties stipulate to the admissibility of an exhibit, the parties shall so advise the Commission in advance of the hearing. For all other exhibits, each party may move

to admit a particular exhibit at the hearing, and the other party shall have an opportunity to object prior to the ruling on admission.

#### 5. Witnesses

Witnesses shall be examined by the parties as follows: direct examination, cross-examination, re-direct. After the parties have concluded their examination of a witness, Commissioners shall have an opportunity to pose questions to the witness.

#### 6. Oral Argument

At the hearing, the Executive Director and ~~each~~ every respondent shall be allowed oral argument. The Commission, assigned Commissioner, or hearing officer shall determine the appropriate length for the arguments.

### **B. Finding of Violation**

If the Commission as a whole conducts the hearing on the merits, the Commission shall determine, no later than 475 days after the date the hearing is concluded, whether ~~a~~ the respondent has committed a violation of City law has occurred. If the Commission assigns one of its members or an outside hearing officer to conduct the hearing on the merits, the assigned member or hearing officer shall submit a report and recommendation to the Commission no later than 30 days after the date the hearing is concluded. Thereafter, the Commission shall determine, no later than 45 days after the date the report and recommendation is delivered, whether the respondent has committed a violation of City law has occurred.

The votes of at least three Commissioners are required to find a violation of ~~City law relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics.~~ - The finding of a violation shall be supported by findings of fact and conclusions of law and shall be based on the entire record of the proceedings. Each Commissioner who participates in the decision shall certify on the record that he or she personally heard the testimony (either in person or by listening to a tape or recording of the proceeding) and reviewed the evidence, or otherwise reviewed the entire record of the proceedings.

### **C. Administrative Orders and Penalties**

1. The votes of at least three Commissioners are required to impose orders and penalties for a violation. The Commission may issue orders and penalties requiring the respondent(s) to:

- (a) cease and desist the violation;
- (b) file any reports, statements or other documents or information required by law; and/or
- (c) pay a monetary penalty to the general fund of the City in an amount permitted under the law that the Commission finds the respondent has violated, or, if the law does not specify the amount of the monetary penalty, in an amount of up to five thousand dollars (\$5,000) for each violation, or three times the amount which the respondent failed to report properly or unlawfully contributed, expended, gave or received, whichever is greater.

2. When deciding on an order and penalties, the Commission shall consider all the relevant circumstances surrounding the case, including but not limited to:

- (a) the severity of the violation;
- (b) the presence or absence of any intention to conceal, deceive, or mislead;
- (c) whether the violation was deliberate, negligent or inadvertent;
- (d) whether the violation was an isolated incident or part of a pattern;
- (e) whether the respondent has a prior record of violations of City law under the jurisdiction of the Commission relating to campaign finance, lobbying, campaign consulting, conflicts of interest, or governmental ethics; and
- (f) the degree to which the respondent cooperated with the investigation and demonstrated a willingness to remedy any violations.

3. Unless otherwise ordered by the Commission, any penalties imposed by the Commission must be paid in full by the respondent within 30 days of the Commission's decision.

#### **D. Finding of No Violation**

If the Commission determines that there is insufficient evidence to establish that the respondent has committed a violation ~~has occurred~~, or if the Commission determines that there is sufficient evidence to establish that the respondent has not committed a violation ~~has occurred~~, the Commission shall publicly announce this fact. Thereafter, the Commission shall take no further action on the complaint. The Executive Director shall inform each respondent and complainant of the Commission's determination.

### **XII. XIII. .... M**

#### **ISCELLANEOUS PROVISIONS**

#### **A. Ex Parte Communications**

Once a complaint is filed, no Commissioner or staff member shall engage in oral or written communications outside of a hearing Commission meeting, interview or settlement conference regarding the merits of an enforcement action with the respondent or complainant or any person communicating on behalf of the respondent or complainant unless the communication is necessary for the conduct of the investigation or enforcement action.

#### **B. Access to Complaints and Related Documents and Deliberations**

1. Except as described in Subsection 3 for complaints alleging violations of the San Francisco Sunshine Ordinance, nNo complaint, response thereto, investigative file or information contained therein, or Commissioner and staff deliberations about complaints shall be disclosed to any person other than a respondent or respondent's representative, the City Attorney, District Attorney, a court, a law enforcement agency, or ~~otherwise~~ except as necessary to the conduct of an investigation, prior to a probable cause determination concerning probable cause.

2. After a determination of probable cause, complaints, related documents, and investigative files shall not be disclosed except as required by the California Public

Records Act (Government Code section 6250)– the probable cause report, the response, and the rebuttal shall be confidential, unless the respondent requested that the probable cause hearing be public. All investigative documents, including notes and memoranda, created prior to the probable cause determination, such as the complaint, shall remain confidential, except that the Executive Director may provide a copy of the complaint to the respondent(s) if the Executive Director determines that disclosure is necessary to the conduct of the investigation. All investigative documents, including notes and memoranda, created by the Executive Director and his or her staff after the probable cause determination shall be confidential, except for the accusation, until any such documents are either delivered to the Commission or respondent(s), introduced as evidence or an exhibit, or distributed for public consumption, such as an agenda or press release.

3. For complaints alleging willful violations of the San Francisco Sunshine Ordinance (S.F. Administrative Code Ch. 67), no complaint, investigative file or information contained therein, or Commissioner or staff deliberations shall be disclosed except as necessary to the conduct of an investigation or as required by the California Public Records Act (Government Code section 6250, et seq.) or the San Francisco Sunshine Ordinance. Deliberations by a quorum of the Commission regarding such a complaint shall be conducted at a public meeting. In order to guarantee the integrity of the investigation, internal notes taken by the Executive Director or his or her staff shall not be disclosed until after the dismissal of a complaint or the Commission has issued its final decision following the hearing on the merits.

24. In addition to the prohibition on ex parte communications stated in Section XIII subsection A, except at a public meeting of the Commission, Commissioners and Commission staff are prohibited, prior to a final determination on the merits of a complaint, from engaging in oral or written communications regarding the merits of a complaint or enforcement action with any person or entity unless the communication is necessary for the conduct of the investigation or enforcement action. After a final determination on the merits of a complaint, Commissioners and staff members may discuss matters in the public record.

#### **C. Oaths and Affirmations**

The Commission, and individual Commissioners and hearing officers assigned to conduct hearings, may administer oaths and affirmations.

#### **D. Selection of Designee by the Executive Director**

Whenever the Executive Director designates an individual other than a member of the Commission staff to perform a duty arising from the Charter or these Regulations, the Executive Director shall notify the Commission of the designation no later than the next business day.

#### **E. Powers and Duties of Hearing Officers**

1. Unless otherwise provided, whenever the Commission assigns an individual Commissioner or hearing officer to hear any matter under these Regulations, the assigned Commissioner or hearing officer shall have the same authority, and be subject to the same restrictions, as the Commission.

2. When an individual Commissioner or a hearing officer is assigned to hear and decide preliminary matters in advance of a hearing on the merits, he or she shall make an actual determination. This determination may be reviewed by the Commission upon request by the Executive Director or a respondent, pursuant to the procedures specified in Section XI subsection B(67).

3. When an individual Commissioner or a hearing officer is assigned to conduct a probable cause hearing or hearing on the merits, he or she shall submit a report and recommendation for decision by the Commission. The report and recommendation shall contain proposed findings of fact and conclusions of law. Copies of the report and recommendation shall be delivered to the Commission, Executive Director, and each respondent no later than 30 days after the date the hearing is concluded. Thereafter, the Executive Director shall calendar the matter for consideration at the next Commission meeting not less than 15 days after the date the report and recommendation is delivered to the Commission.

4. ~~When the Commission sits as the hearing panel to hear a case, with an outside hearing officer presiding, a hearing officer presides over a hearing conducted by the Commission, the hearing officer shall rule on procedural matters and on the admission and exclusion of evidence only, and shall have no role in the decision on the merits.~~

#### F. Statute of Limitations

1. Unless otherwise stated in local or State law, for statute of limitations purposes, an action or proceeding for administrative penalties is brought or commenced by the Executive Director on the date the Executive Director delivers the probable cause report.

~~A probable cause report must be served within the period specified in the applicable statute of limitations.~~ 2. If there is no statute of limitations for violations of the law allegedly violated, the probable cause report must be served-delivered within five-four years of the date of events which form the basis of the complaint, or the date that the events constituting the basis of the complaint were discovered by the Ethics Commission, whichever is later.

~~For statute of limitations purposes, a complaint is filed by the Executive Director upon the date of service of the probable cause report.~~

#### G. Extensions of Time and Continuances

Whenever the Executive Director, a respondent, or a witness, an assigned Commissioner or hearing officer is required to complete an act or produce materials pursuant to these Regulations, that party may request an extension of time. Requests for extensions of time may be made to the Commission Chair or the Commission Chair's designee. The requester must serve-deliver the request on-to the Commission Chair or designee and provide a copy of the request to the opposing all other parties no later than 10-ten working business days before the deadline to complete an act or produce materials. The Commission Chair or designee shall have the discretion to consider untimely requests. The Commission Chair ~~or the Commission Chair's designee~~ shall approve or deny the request within five working business days of the submission of the request. The

Commission Chair or ~~the Commission Chair's~~ designee may grant the request only upon a showing of good cause.

The Executive Director or any respondent may request the continuance of a hearing date. The requester must ~~serve~~ deliver the request ~~on to~~ the Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing, and provide a copy of the request to all other parties the opposing party no later than ~~10 ten~~ ten working business days before the date of the hearing. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing shall have the discretion to consider untimely requests.

The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing ~~or the Commission Chair's designee~~ shall approve or deny the request within five ~~working~~ business days of the submission of the request. The Commission Chair or the individual Commissioner or hearing officer assigned to hold the hearing ~~the Commission Chair's designee~~ may grant the request only upon a showing of good cause.

#### **H. Referrals to Other Enforcement Agencies**

At any time after the ~~Commission takes jurisdiction over~~ filing of a complaint, the Commission or Executive Director may refer the matter to another government agency or official if the Commission or Executive Director determines that the agency or official may more appropriately resolve the allegations in the complaint or enforce the applicable provisions of law. A copy of all information gathered by the Commission staff shall be sent to the agency or official together with the referral.

A determination by the Executive Director or the Commission that no further action should be taken on a matter shall not prevent any other government agency from initiating its own enforcement action, including disciplinary action, based on the same allegations and facts.

#### **I. Recordings and Transcripts**

Every probable cause hearing and hearing on the merits shall be tape-recorded. Where the Commission assigns a commissioner to conduct a probable cause hearing, and where the Commission assigns a commissioner or hearing officer to conduct a hearing on the merits, the hearing shall also be recorded stenographically, and the ~~the~~ The Commission shall retain the tapes shall be retained by the Commission until the opportunity for appeal legal challenge has been exhausted. Copies of a tape shall be available to the respondent upon request. ~~Where the Commission assigns a commissioner or a hearing officer to determine probable cause or hear a case on the merits, the hearing shall also be recorded by a court reporter.~~

#### **J. Place of Service ~~or~~ Delivery**

1. Whenever these Regulations require ~~service on or~~ delivery to the Commission, its members, or the Executive Director, ~~service and~~ delivery shall be effected at the Commission office.

2. Whenever these regulations require ~~service on or~~ delivery to a respondent, or his or her committee, ~~service and~~ delivery shall be effective and sufficient if made by U.S.

Mail and Certified Mail, mail, or via personal delivery or any other means of delivery agreed upon by the parties under section II subsection F, to:

(a) If the respondent is a City employee, to the address listed with the (Controller/ Payroll) as the employee's current address.

(b) If the respondent is a former City employee, to the address listed with the City's retirement system.

(c) If the respondent is a current or former candidate or committee registered with the Ethics Commission, to the address provided to the Ethics Commission by that candidate or committee.

(d) If subsections (a) through (c) are not applicable, to an address reasonably calculated to give notice to and reach the respondent.

It is the responsibility of City employees, or candidates or committees ~~registered who file reports~~ with the Ethics Commission, to maintain accurate addresses with relevant City ~~D~~departments. The Executive Director therefore may rely on those addresses in carrying out the objectives of the Commission.

3. ~~Service and delivery are~~Delivery is effective upon the date of ~~service~~delivery, not the date of receipt.

#### **K. Page Limitations and Format Requirements**

Whenever these Regulations impose a page limitation, a "page" means one side of an 8½ inch by 11 inch page, with margins of at least one inch at the left, right, top and bottom of the page, typewritten and double-spaced in no smaller than ~~11~~12 point type. Each page and any attachments shall be consecutively numbered.

#### **L. Public Summary of Dismissed Complaints**

Notwithstanding any other provision of these regulations, the Executive Director may provide a public summary of dismissed complaints. Such summary may include, but ~~is~~ need not be limited to, a generic description of each dismissed complaint and a summary of the reasons for dismissal, provided that such information shall comply with the confidentiality requirements of the Charter.

#### **M. Conclusion of Hearing on the Merits**

For the purposes of these Regulations, a hearing on the merits concludes on the last date on which the Commission hears argument or testimony in the proceeding.

### ~~XIII~~XIV.....~~Stipulated Orders~~STIPULATED ORDERS.....~~S~~

~~1~~A. At any time after the Commission takes jurisdiction over a complaint, the Executive Director may enter into negotiations with a respondent for the purpose of resolving the factual and legal allegations in a complaint by way of a stipulation, decision and order. Any proposed stipulation, decision and order shall explicitly state that:

(a) the proposed stipulation, decision and order is subject to approval by the Commission;

(b2) the respondent knowingly and voluntarily waives any and all procedural rights under the law and these Regulations;

(e3) the respondent understands and acknowledges that the stipulation is not binding on any other law enforcement agency, and does not preclude the Commission or its staff from referring the matter to, cooperating with, or assisting any other government agency with regard to the matter, or any other matter related to it;

(d4) the respondent agrees that in the event the Commission refuses to approve the proposed stipulation, it shall become null and void; and

(e5) in the event the Commission rejects the proposed stipulation and a full evidentiary hearing before the Commission becomes necessary, no member of the Commission shall be disqualified because of prior consideration of the stipulation.

2B. The stipulated order shall set forth the pertinent facts and may include an agreement as to anything that could be ordered by the Commission under its authority pursuant to Charter section C3.699-13~~1~~.

3C. Once the Executive Director enters into a stipulated agreement with a respondent, the Executive Director shall inform the Commission of this stipulation. Thereafter, any two or more members of the Commission may cause the stipulation to be calendared for consideration by the full Commission in a closed session at the next Commission meeting occurring no sooner than ~~10~~ten days from the date the Executive Director informs the Commission of the stipulated agreement. If there is a vacancy on the Commission or if a member must recuse himself or herself from consideration of the stipulated order, one member of the Commission may cause the stipulation to be calendared. Commissioners' requests that a stipulated agreement be calendared for consideration by the full Commission must be received by the Executive Director no fewer than ~~5~~five days prior to the date of the meeting, so that the Executive Director may comply with the applicable notice and agenda requirements. If the stipulated agreement is not calendared for consideration by the full Commission, the stipulated agreement is deemed approved by the Commission.

~~(b)~~D. Stipulated orders must be approved by the Commission and, upon approval, must be announced publicly. The stipulated order shall have the full force of an order of the Commission.

~~XIV.XV.~~ .....S

#### EVERABILITY

If any provision of these Regulations, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Regulations and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

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# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

JAMIENNE S. STUDLEY  
CHAIRPERSON

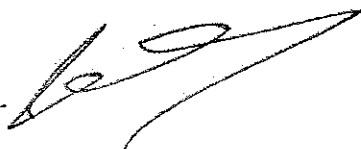
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COMMISSIONER

CHARLES L. WARD  
COMMISSIONER

JOHN ST. CROIX  
EXECUTIVE DIRECTOR

**Date:** May 8, 2009  
**To:** Members, Ethics Commission  
**From:** John St. Croix, Executive Director  
**By:** Richard Mo, Chief Enforcement Officer   
**Re:** Proposed Changes to Investigations and Enforcement Regulations

## I. Introduction

The Ethics Commission's Regulations for Investigations and Enforcement Proceedings ("Regulations") were last amended in November 2006. Those changes to the Regulations focused on streamlining the investigations and enforcement process. At that time, enforcement staff had not yet advanced a complaint beyond a probable cause hearing. Recently, the Commission completed a full complaint cycle, which included a probable cause hearing, a four-day hearing on the merits, numerous briefs and orders, and several hundred pages of exhibits. This process took place over the course of over 14 months.

As a result of advancing a complaint through the full administrative hearing process for the first time, enforcement staff recommends several changes to the Regulations. The proposed changes would further streamline the investigations and enforcement process, including the hearing procedures, and provide clarity and uniformity in the Regulations. This memo discusses all of the proposed substantive changes. While it does not discuss proposed technical changes, staff will be pleased to answer any questions from the Commissioners during the May 11 meeting.

## II. Proposed Substantive Changes

- 1) Clarifying Effective Means of Delivery – Sections II.F,M; XIII.J.

*Existing practice:* Under the current Regulations, the terms "delivery" and "service" are used interchangeably, and the Regulations do not allow for the use of e-mail for purposes of delivery. Also, for delivery to respondent(s), the Regulations require the Commission to effectuate such delivery via U.S. certified mail.

*Proposed change:* Eliminating the term “service” from the Regulation’s definitions and using “delivery” instead will eliminate past difficulties encountered by staff when trying to deliver documents to an unwilling recipient. Because the U.S. Postal Service requires an individual to sign for certified mail or pick up the mailing at a post office, this requirement has led to delays in the handling of complaints. In addition, certified mail is costly. Eliminating the requirement of delivery by certified mail will alleviate an unnecessary impediment to the efficient processing of complaints. Allowing the parties to agree to an alternate method of delivery, such as e-mail, will provide for quicker delivery as well as help the Commission save costs and materials.

- 2) Clarifying the Preliminary Review Process and Setting Forth Possible Reasons that the Executive Director May Dismiss a Complaint – Section IV.A-B.

*Existing practice:* Under the current Regulations, any complaint submitted on a Commission form that is signed under penalty of perjury by the complainant and alleges a violation of law under the Commission’s jurisdiction must be processed and reviewed by the Executive Director. The Executive Director may dismiss the complaint if there is no reason to believe that a violation of law occurred. However, the Regulations do not specify the grounds upon which the dismissal can be based, nor do they specify what constitutes a preliminary review of the complaint.

*Proposed change:* The proposed change specifies the actions that the Executive Director may take during the preliminary review of a complaint. The Executive Director would have the ability to conduct a preliminary review of each complaint, which may include reviewing relevant documents, speaking with the complainant and/or respondent, and making any other inquiry to ascertain if a full investigation is warranted.

The proposed change also provides reasons for which the Executive Director may dismiss a complaint. Although the list is not exhaustive, it provides a basic framework and sets forth the parameters for dismissing a complaint at this stage. After initial review, the Executive Director may dismiss the complaint when, for example: 1) the evidence does not support the allegations; 2) the allegations, if true, do not constitute a violation of law within the Commission’s jurisdiction; 3) the complaint contains an expression of opinions, rather than specific allegations; or 4) the allegations are already under investigation by enforcement staff, or have already been resolved by the Commission or another governmental or law enforcement agency.

- 3) Increasing the Amount of Time for a Respondent to File a Response to the Probable Cause Report – Section VII.B.-C.

*Existing practice:* Under the current Regulations, the Executive Director must deliver the probable cause report to the respondent at least 30 days before the hearing date. If the respondent chooses to prepare a response, the respondent must deliver the response within 15 days of the hearing.

*Proposed change:* Under the current Regulations, the respondent may have only 15 days to review the probable cause report, prepare a response and effectuate delivery. Staff believes that the respondent should be provided a longer time period in which to prepare his or her response. By changing the deadlines so that the probable cause report is due at least 45 days before the hearing and the response is due no later than 20 days before the hearing, the respondent receives an extra ten days, for a total of 25 days, to prepare and deliver his or her response.

4) Making Public Probable Cause Hearings Regarding Alleged Willful Violations of Sunshine Ordinance – Section VIII.A.2.

*Existing practice:* Under the current Regulations, all probable cause hearings are held in closed session, unless the respondent requests that the hearing be held in public. There are no regulations that specifically address complaints alleging violations of the Sunshine Ordinance.

*Proposed change:* Probable cause hearings regarding alleged willful violations of the Sunshine Ordinance will be held in public, unless otherwise provided by state or local law. The Commission routinely receives referrals from the Sunshine Ordinance Task Force (“SOTF”) that allege a willful violation of the Sunshine Ordinance. These referrals contain Orders of Determinations issued by the SOTF, as well as underlying documentation regarding the alleged violation of the Sunshine Ordinance. Because all of the materials forwarded from the SOTF to the Commission are already public documents, staff believes that any probable cause hearing where the allegation concerns a willful violation of the Ordinance should be held in open session. Under Section XIII.B.3, the proposed regulations clarify that the handling of complaints alleging a willful violation of the Sunshine Ordinance will be handled like other complaints, but internal notes by staff may not be disclosed until after the complaint is dismissed or the Commission has issued its decision following the hearing on the merits.

For all other complaints, the probable cause hearing will continue to be held in closed session, unless the respondent requests that the hearing be public.

5) Eliminating the Possibility of Live Witness Testimony at the Probable Cause Hearing – Section VIII.A.3.

*Existing practice:* The current Regulations do not address whether either party may present live witness testimony during a probable cause hearing. In practice, attorneys for respondents have sometimes requested and received permission to speak on behalf of the respondent during the probable cause hearing.

*Proposed change:* During a probable cause hearing, the Commission has already received and reviewed briefs from both parties. Staff believes that the additional probative value of any testimony by live witnesses would be outweighed by the extra consumption of time. Adopting a provision that neither party will be allowed to provide

live witness testimony during the probable cause hearing will expedite the Commission's hearing process. The respondent's right to appear and be represented by counsel at the probable cause hearing remains intact.

- 6) Maintaining Consistency in the Standards of Proof at Probable Cause Hearings and Hearings on the Merits – Sections VIII.A.4.; XII.A.2.

*Existing practice:* Under current Regulation VIII.A.3, the Commission “may find there is probable cause to believe a violation of City law... has occurred only if the evidence is sufficient to lead a person of ordinary caution and prudence to believe that a violation has been committed and that the respondent committed or caused the violation.” Under Regulation XII.A.2, after a hearing on the merits the Commission may determine that a violation of City law occurred “only if a person of ordinary caution and prudence would conclude, based on a preponderance of the evidence, that the violation has occurred.” Staff believes that the use of different language in both standards creates confusion.

*Proposed change:* The proposed changes use the same language (“the respondent has committed the violation”) as the standard in both the probable cause hearing and the hearing on the merits. This change will help eliminate any confusion.

A probable cause finding requires the Commission to determine that a person of ordinary caution and prudence would conclude, “based on the evidence, that there is a reasonable ground to suspect that the respondent has committed the violation.” A finding after a hearing on the merits, however, requires that the Commission determine that the same prudent person would conclude, based on a preponderance of the evidence, that the respondent has committed the violation. Both standards provide a measurable, objective basis for making a determination at the respective stages of the complaint process.

- 7) Clarifying the Probable Cause Hearing Procedures – Section VIII.B.1.

*Existing practice:* Under the current Regulations, in the section concerning general rules and procedures for probable cause hearings, the Commission shall sit as a hearing panel to conduct the probable cause hearing. In the alternative, the Commission may decide to assign one of its members to conduct the probable cause hearing and submit a report and recommendation to the full Commission. However, the next section, which governs the timeline for the making of a probable cause determination, references the possibility of having an outside hearing officer conducting the hearing or preparing a report.

*Proposed change:* Deleting the reference to the outside hearing officer will clarify that for a probable cause hearing, the only option other than the Commission sitting as a hearing panel is for the Commission to assign one of its members to conduct the hearing. Because no witness testimony is taken at the probable cause hearing, there is no need to have an outside hearing officer.

8) Allowing Amendments to Probable Cause Determinations – Section VIII.D.

*Existing practice:* The current Regulations do not provide any mechanism by which staff may add new charges to a probable cause determination. If staff were to discover additional alleged violations after a determination of probable cause and before the hearing on the merits, the only recourse would be to initiate a separate complaint against the respondent.

*Proposed change:* After a determination of probable cause but prior to scheduling a hearing on the merits, the Executive Director may request that the Commission amend the probable cause determination to add or amend charges against the respondent. Such request must be made no later than 60 days prior to a scheduled hearing on the merits. In situations where staff discovers additional allegations during an investigation, staff will be permitted to amend and/or add such additional allegations to the existing complaint, provided that respondent(s) will have an opportunity to file a response to the additional allegations and the Commission must determine that probable cause exists that respondent(s) committed the additional violations. The process will save time by dispensing with the requirement that staff initiate a new complaint based on the same nucleus of underlying facts.

9) Designating the Accusation as the Official Charging Document – Section IX.A.

*Existing practice:* The current Regulations do not designate any specific document as the official charging document. This creates the potential for ambiguity and may lead a respondent to be confused about the exact charges he or she is facing.

*Proposed change:* After a determination of probable cause and prior to a hearing on the merits, the Executive Director must issue an accusation. The accusation must be issued within ten days of the Commission's probable cause determination rather than 45 days prior to the hearing on the merits. This proposed change provides not only earlier notice to respondent(s), but also specifies the provisions of each law allegedly violated, in addition to setting forth the acts or omission with which the respondent is charged.

10) Request for Resolution of Procedural Matters Affecting Conduct of Hearing on the Merits – Section X.B.

*Existing practice:* For a hearing on the merits, the current Regulations provide for the resolution of preliminary and procedural matters, but the Regulations do not specifically identify what constitutes a procedural matter. In the past, Respondents have submitted requests for resolution of preliminary and procedural matters that were considered even though they did not comply with the required 25-day advance notification.

*Proposed change:* The new provisions broaden and clarify the availability for resolution of preliminary and procedural matters. They also change the time for a written opposition from 15 days prior to the hearing to ten days after delivery of the request and permit a

written reply due no later than five days after the delivery of the opposition. Finally, they allow a party to request resolution of a procedural matter affecting the conduct of the hearing on the merits, either before or during the hearing on the merits; but no later than the conclusion of a hearing on the merits. This would allow, for example, the assigned Commissioner or hearing officer to consider motions in limine and other matters that are not procedural in nature. If either party requests a written decision, the assigned Commissioner or hearing officer must issue a written decision no later than 20 days after the date of the request for resolution of the matter.

11) Requiring Executive Director to Notify Commission of Exculpatory Information – Section XI.A-C.

*Existing practice:* Under the current Regulations, if the Executive Director discovers exculpatory evidence after a probable cause determination and prior to a hearing on the merits, he or she may present the exculpatory information to the Commission and recommend dismissal of the complaint. There is no language that allows for the Executive Director to recommend the dismissal of specific charges instead of dismissal of the entire complaint.

*Proposed change:* After the issuance of the Commission's probable cause determination, if the Executive Director becomes aware of or discovers any exculpatory information with respect to any of the charges listed in the accusation, the Executive Director may recommend that the Commission dismiss the complaint, based on the discovery of the exculpatory evidence or other good cause. Upon the issuance of a public memorandum setting forth reasons for the dismissal, if two or more Commissioners do not calendar the dismissal recommendation, or if in open session a majority of the Commission does not vote to reject the dismissal recommendation, the complaint will be deemed dismissed. Along the same lines, if the Executive Director determines not to proceed with a specific charge listed in the accusation, the Executive Director must so inform the Commission and respondent in writing, and the Commission will not find a violation of the specific charge.

12) Allowing Either Party to Request that the Commission Exclude a Witness During the Hearings on the Merits – Section XII.A.1.

*Existing practice:* The current Regulations provide that witnesses may be excluded at the hearing on the merits at the discretion of the Commission, assigned Commissioner or hearing officer.

*Proposed change:* Under current court practice, either party may request that a witness be excluded from the courtroom during the proceedings. The proposed changes track this practice and permits any party to request the exclusion of a witness.

13) Access to Complaints and Related Documents and Deliberations – Section XIII.B.1-3.

*Existing practice:* Under the current Regulations, after a determination of probable cause, a complaint and related documents may not be disclosed except as required by the California Public Records Act. In practice, staff has encountered situations where respondents, after the Commission had made a finding of probable cause in a closed probable cause hearing, requested that the probable cause report be made public.

*Proposed change:* The proposals provide clarity on what documents remain confidential. For example, unless the respondent had requested that the probable cause hearing be held in public, the probable cause report, response, and rebuttal are confidential. All investigative documents created prior to the probable cause determination shall also remain confidential, unless the Executive Director determines that disclosure of the complaint to the respondent is necessary to the conduct of the investigation. All investigative documents created after the probable cause determination are confidential, until any such document is either delivered to the Commission or respondent, introduced into evidence or as an exhibit, or distributed for public consumption, via an agenda or a press release.

For complaints alleging willful violations of the Sunshine Ordinance, no documents may be disclosed except as necessary to the conduct of an investigation or as required by the California Public Records Act or the Sunshine Ordinance. Internal staff notes related to alleged Sunshine Ordinance violations may not be disclosed until after the dismissal of the complaint or the issuance of a final decision by the Commission.

14) Changing the Statute of Limitations From Five Years to Four Years – Section XIII.F.

*Existing practice:* Under the current Regulations, if there is not existing statute of limitations for the law allegedly violated, the probable cause report must be delivered within five years of the date of the events which form the basis of the complaint, or the date that the events constituting the basis of the complaint were discovered by the Commission, whichever is later.

*Proposed change:* The proposal changes the statute of limitations from five to four years, which is consistent with the statute of limitations for enforcement of conflict of interest, lobbyist and campaign consultant laws. (The statute of limitations under CFRO is five years).

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