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JOHN ST. CROIX
EXECUTIVE DIRECTOR

Date: November 5, 2009
To: Members, Ethics Commission
From: John St. Croix, Executive Director
By: Richard Mo, Chief Enforcement Officer
Re: Proposed Amendments to Investigations and Enforcement Regulations

Background

At its October 19, 2009 meeting, the Commission continued its consideration of possible amendments to its Regulations for Investigations and Enforcement Proceedings ("Regulations"). Staff presented the Commission with 14 decision points, and the Commission approved 13 of the 14 decision points. The Commission did not approve or reject Decision Point 2.

Attached for your reference is a copy of the proposed Regulations, with the changes already approved by the Commission in regular font and staff's remaining proposals in underlined or strike-through font. The Regulations include additional proposed changes reflecting Decision Point 2, new Decision Points 15-25, and a host of technical and clean-up amendments. References to page numbers in this memorandum are to the draft Regulations.

This memorandum contains four parts:

- 1) Decision Point 2 (recast as Decision Points 2A, 2B, 2C, and 2D), regarding the preliminary review process and the Executive Director's authority to dismiss a complaint;
- 2) Clarification of actions taken at the October 19 meeting regarding complaints alleging violation of the Sunshine Ordinance.
- 3) List/guide of the remaining proposed changes, most of which are technical and/or clean-up language. Staff has included ten new Decision Points regarding proposed changes that are a bit more than technical, which the Commission may wish to consider.
- 4) Summary of the amendments approved by the Commission on October 19 and forwarded to the Board of Supervisors on October 20.

I. The Preliminary Review Process and the Executive Director’s Dismissal of Complaints (Section IV.A.-B., pages 4-5)

At its October 19 meeting, the Commission discussed but did not vote on Decision Point 2. The Commission’s discussion focused on two areas: 1) whether the Regulations should mandate that during the course of a preliminary investigation, the Executive Director must communicate with the respondent; and 2) whether the Executive Director should have the power to dismiss a complaint during the preliminary review stage when “the evidence does not support the allegations.”

Preliminary Review

Proposed Section IV.A. (“Preliminary Review”) expands on language in the current Regulations that “The Executive Director shall review and process all complaints initiated by the Commission and individual Commissioners.” The proposed addition explains that the Executive Director’s preliminary review may include document review, communication with the complainant or respondent, and other initial inquiries. As discussed during the Commission meeting, the activities described in Section IV.A. are not intended to be an exhaustive or comprehensive list of what the Executive Director must do for every single complaint. Instead, the proposed regulation sets forth the general parameters for conducting a preliminary investigation.

Because complaints received by the Commission cover a wide range of allegations, it is impractical to mandate a particular set of actions that enforcement staff must take for every single preliminary investigation. For example, as mentioned at the last meeting, if the complaint alleges that a City officer did not file a Form 700, staff can discern the validity of the allegations simply by viewing filed Form 700s.

Please note that the Regulations require the Executive Director to provide a monthly summary of each complaint dismissed (see paragraph 3 on page 5), so the Commission can monitor enforcement staff’s handling of all complaints and the Executive Director’s use of his authority at this preliminary stage.

Decision Point 2A: Shall the Commission approve section IV.A. as drafted on page 4?

Reasons for Dismissing a Complaint at the Preliminary Investigation Stage

Proposed Section IV.B. sets forth the reasons that the Executive Director may dismiss a complaint after the preliminary investigation.

At the October 19 meeting, staff proposed that the Executive Director should be permitted to dismiss a complaint when “the evidence does not support the allegations” in the complaint. Granting the Executive Director this discretion will allow staff to dismiss plainly meritless complaints without expending the resources involved with requesting dismissal from the Commission. Although the Commissioners did not express concerns about the thrust of the proposal at the October 19 meeting, Commissioners debated how it should be phrased. Based on

the Commission’s discussion during its last meeting, staff presents the following four options to replace or insert in Section IV.B.1.:

- a) Credible evidence does not support the allegations.
- b) Credible evidence refutes the allegations.
- c) Credible evidence clearly refutes the allegations.
- d) The evidence does not support the allegations. (This was staff’s original recommendation.)

Decision Point 2B: Shall the Commission adopt option a, b, c, or d as the criterion under section IV.B.1. on page 4?

The remaining subsections IV.B.2, 3, and 4 are unchanged from staff’s recommendations as set forth in the October memo and draft Regulations. Thus, under the proposed Regulations, the Executive Director may dismiss a complaint at the preliminary review stage because in addition to subsection No. 1 (to be approved under Decision Point 2B), when “2. The allegations, if true, do not constitute a violation of law within the Commission’s jurisdiction”; or “3. The complaint contains an expression of opinions, rather than specific allegations”; or “4. The allegations contained in the complaint are already under investigation, or already have been resolved, by the Commission or another law enforcement agency.”

Decision Point 2C: Shall the Commission adopt subsections 2, 3, and 4 of section IV.B. as set forth on pages 4-5?

Section IV.C. sets forth the procedure that applies if the Executive Director does not dismiss a complaint after preliminary review – because he or she determines that there is reason to believe a violation of law under the Commission’s jurisdiction may have occurred. Under San Francisco Charter Section C3.699-13(a), the Executive Director must forward the complaint to the District Attorney and City Attorney. If neither the District Attorney nor the District Attorney intends to pursue an investigation, within 14 days of such notification, the Executive Director must 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. The proposed language in section IV.C simply restates those Charter requirements. Staff recommends including the language in the Regulations to provide clarity for respondents, complainants and members of the public.

Decision Point 2D: Shall the Commission approve the additional language of the last paragraph in Section IV.C. as set forth on page 5?

II. Complaints Alleging Violation of the Sunshine Ordinance

At its October 19 meeting, the Commission approved amendments making enforcement matters regarding alleged willful violations of the Sunshine Ordinance public. The language approved by the Commission applied only to complaints “referred to the Ethics Commission by the Sunshine Ordinance Task Force.” This language was inserted in three places in the Regulations: 1) Section VIII.A.2.: the first sentence of the paragraph (page 8); 2) Section VIII.A.2.: the second sentence of the paragraph (page 8); and 3) Section XIII.B.3. (page 18): the first sentence of the paragraph.

However, upon further reconsideration, staff believes that *all* complaints alleging a violation of the Sunshine Ordinance, whether filed by a complainant directly with the Commission or originally filed with the SOTF and then referred by the SOTF to the Commission, should be treated the same. To advance the goal of transparency, staff recommends that the Commission strike the language “referred to the Ethics Commission by the Sunshine Ordinance Task Force”

Decision Point 15: Shall the Commission approve striking “referred to the Ethics Commission by the Sunshine Ordinance Task Force” in Section VIII.A.2 and Section XIII.B.3, as set forth on pages 8 and 18?

III. Technical and Clean-up Proposals

The proposed Regulations circulated to the Commission in advance of the October 19 meeting included a number of technical, non-substantive proposals. Staff’s October 13, 2009 memorandum to the Commission did not specifically address all of the non-substantive proposals, as these were all technical and clean-up items, intended either to clarify, conform or simplify existing language. Per the Commission’s request, the following is a summary, by section, of all such non-substantive proposals. In summarizing these proposals, staff noted that some are more than mere technical; thus, staff has identified them as decision points for the Commission to consider. All of these proposals are included in the attached redline of the Regulations. Deletions are indicated by ~~striketrough~~ and additions are indicated by underline.

Section I – Preamble (page 1)

* The Regulations apply only to enforcement of laws identified in Section II.N. on page 2. This proposed technical edit clarifies that the Regulations apply to enforcement of laws within the Commission’s jurisdiction.

Section II – Definitions (pages 1-3)

* “Business day”: added to clarify calculation of deadlines and eliminate any confusion with “working day.” Throughout the document, we have replaced the term “working day” with “business day.”

* Deletion of “City laws”: incorporated in Section II.N. under “Violation of law.”

- * “Probable cause”: Conforming language.
- * “Respondent”: Conforming language.
- * Deletion of “State laws”: incorporated in Section II.N. under “Violation of law.”
- * “Violation of law”: identifies laws over which the Commission has jurisdiction.

Section III – Complaints (pages 3-4)

- * Subsection III.A.2.: Clarifies that formal complaints (submitted on the Commission’s official complaint form) may be filed anonymously. Current Regulations are silent as to anonymous complaints and the Executive Director is not required to review anonymous complaints. Under current practice, the Executive Director does review and process anonymous complaints. This amendment will require the Executive Director to review all anonymous formal complaints.

<p>Decision Point 16: Shall the Commission adopt Section III.A.2., as set forth on page 3?</p>

- * Subsection III.C.: Clarifies that the Executive Director, but not the Commission or individual Commissioners, may initiate complaints, reflecting the Commissioner’s role as adjudicators rather than prosecutors.

<p>Decision Point 17: Shall the Commission adopt Section III.C., as set forth on page 4?</p>

- * All other changes in this section are clean-up and clarification.

Section IV – Review of Complaints (page 4-5)

- * Subsection C: These changes are discussed above in Decision Points 2A through 2D.

Section V – Conduct of Investigation (pages 5-6)

- * Subsection A: Conforms with recent Commission practice.
- * All other changes in this section are clean-up language.

Section VI – Determination That There is Not Probable Cause (page 6)

- * Subsections B & C: Replaces “probable cause to believe” with “reason to believe.” Clarifies that the Commission should not be making a finding of probable cause when there has not yet been a probable cause hearing.
- * All other changes in this section are clean-up language.

Section VII – Recommendation That There Is Probable Cause (pages 7-8)

- * New Subsection C: Specifies that the parties may agree to deliver response to the probable cause report via email.
- * Old Subsection C: Paragraph moved to new Section VIII.A.1.
- * All other changes in this section are clean-up language.

Section VIII – Probable Cause Hearing (pages 8-19)

- * Subsection VIII.A.3.: The proposed changes allow the Commission to decide to use the formal rules of evidence for probable cause hearings.
- * Subsection VIII.B.3.: Deletes “or its staff” which clarifies current practice that the Commission issues formal opinions.
- * All other changes in this section are clean-up and clarification language.

Section IX – Issuance of Accusation (pages 10-11)

- * Subsection IX.A. contains the additional language: “The accusation shall list only those charges for which the Commission made a determination of probable cause.” In situations where the Commission makes a determination of probable cause for some, but not all, of the allegations listed in a probable report and presented by staff at a probable cause hearing, this language helps to eliminate any potential confusion regarding the exact charges that a respondent is facing at the hearing on the merits stage.

Decision Point 18: Shall the Commission adopt Section IX.A., as set forth on page 10?

- * Subsection IX.B.1.: Addition of “commencement” reflects the fact that the hearing on the merits may occur over several meetings.
- * All other changes in this section are clean-up and clarification language.

Section X – Discovery; Hearing Briefs; Preliminary Matters (page 11-13)

- * Section X.C. on page 13 requires the parties to list anticipated witnesses and adds that “The brief is not required to list anticipated rebuttal evidence or rebuttal witnesses.” This additional language specifies the required information for each party’s hearing brief, which conforms with the Commission’s practice at its most recent hearing on the merits. The changes also specify that unless the Commission or outside hearing officer agrees to accept briefs by email, six copies of the brief are required.

Decision Point 19: Shall the Commission adopt Section X.C., as set forth on page 13?

* All changes are clarification and clean-up language.

Section XI – Discovery of Exculpatory Information (page 14)

* Addition of “immediately” in Section XI.D. This proposal preserves respondent’s due process rights by requiring the Executive Director to give the respondent timely notice of the Executive Director’s decision not to proceed with a particular allegation, after a finding of probable cause has already been made.

Decision Point 20: Shall the Commission adopt Section XI.D., as set forth on page 14?

Section XII – Hearing on the Merits (pages 15-17)

* Subsections A.4.-5., “Exhibits” and “Witnesses”: clarifies procedures; based on the Commission’s practice at its recent hearing.

Decision Point 21: Shall the Commission adopt Sections XII.A.4 & 5, as set forth on page 15?

* Section XII.C.1.(c): These changes clarify that the underlying law violated dictates amount of penalty as a general rule, and sets default penalties if the law is silent.

Decision Point 22: Shall the Commission adopt Section XII.C.1.(c), as set forth on page 16?

* Deadline for paying administrative penalty under Section XII.C.3.: These changes require a respondent to pay any penalty within 90 days. Current Regulations are silent on this issue.

Decision Point 23: Shall the Commission adopt Section XII.C.3., as set forth on page 17?

* All changes are clean-up and clarification language.

Section XIII – Miscellaneous Provisions (pages 17-22)

* Subsection M – “Conclusion of Hearing on the Merits”: On page 22, this change clarifies when a hearing on the merits concludes. Current Regulations are silent on this issue.

Decision Point 24.: Shall the Commission adopt Section XIII.M., as set forth on page 22?

* All other changes are clean-up and clarification language.

Section XIV- Stipulated Orders (pages 22-23)

* All changes technical.

Decision Point 25: Unless otherwise decided, shall the Commission approve the proposed technical, clean-up and clarifying proposals discussed in this memorandum as set forth in the draft regulations?

IV. Summary of Amendments Approved By Commission and Forwarded to the Board of Supervisors

The following is a summary of the thirteen decision points approved by the Commission at its October 19 meeting. Staff forwarded these changes to the Board of Supervisors on October 20 and these amendments become effective December 18, 2009.

1. Definition of “Delivery”

- * Conforms use of “delivery” throughout the Regulations.
- * Streamlines actual delivery process and reduces financial cost incurred by staff.

3. Deadline for Responses to Probable Cause Reports

- * Provides respondent additional notice of hearing and additional time to prepare response.

4. Probable Cause Hearings for Sunshine Ordinance Violations

- * Maintains transparency of complaints referred to Commission by the SOTF.

5. Eliminate Live Witness Testimony at Probable Cause Hearing

- * Expedites hearing process and preserves respondent’s right to appear and have counsel.

6. Standards of Proof for Probable Cause Hearing (“PCH”) and Hearing on the Merits (“HOTM”)

- * Uses conforming language for both standards.
- * Provides objective basis for making determination at both stages.
- * Clarifies that HOTM has higher threshold of proof than PCH.

7. Probable Cause Procedures

- * Deletes unnecessary and confusing reference to outside hearing officer at PCH.

8. Amendments to Probable Cause Determinations

- * Provides for situations where staff discovers additional allegations during investigation.

9. Designating Accusation as Official Charging Document

- * Clarifies exact charges that the respondent is facing.

* Provides timely notice for respondent.

10. Resolution of Procedural Matters for Hearing on the Merits

* Broadens and clarifies process of resolution of preliminary and procedural matters.

11. Exculpatory Information

* Allows staff to dismiss charges that it does not intend to pursue.

12. Exclusion of Witnesses During Hearing on the Merits

* Conforms with current court practice and recent Commission practice.

13. Access to Complaints and Related Documents and Deliberations

* Provides clarity on Charter's confidentiality rules for Ethics investigations.

* Distinguishes complaints referred to the Commission by the SOTF.

14. Changing Statute of Limitations from Five Years to Four Years

* Conforms with statute of limitations for conflict of interest, lobbying and campaign consultant laws.

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