

Memorandum re Proposed Amendments to Chapter 2-56
March 2, 2010
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ethics commission codes and from the Sullivan Report.²

The Board stresses that its purposes in submitting this Memorandum are to examine certain implications of proposed amendments to Chapter 2-56 of the City's Municipal Code submitted to City Council on February 10, and to make legislative recommendations (specifically but not exclusively relating to investigative, adjudicatory, and referral procedures) as to those proposed amendments that pertain to the City's Governmental Ethics and Campaign Financing Ordinances. Our purpose in conducting this research and making these recommendations is *not* to address whether the City should consider extending the authority of the IGO to City Council, or should establish a separate legislative inspector general (like, for example, the State of Illinois).³ Rather, the Board believes that the City's interests will be best served if the addressees duly and carefully consider the procedures, practices and protections of other municipalities' ethics and campaign financing laws and commissions, as well as of others who have thought and written about similar issues, and the Board's recommendations thereon, *before* enacting that February 10 ordinance or any substitute ordinance thereto. As Caesar Augustus wisely counseled: *Festina lente*: "make haste slowly."

CONFIDENTIALITY. The matters discussed in this Memorandum are sensitive, and the Board's research and frank recommendations thereon are made with respect to legislative matters currently pending in the City Council's Rules and Ethics Committee. Thus, the Board considers and requests that the addressees also consider this Memorandum to be confidential, subject to disclosure only to the addressees listed above, and to those other City officials, employees or agents duly authorized by the addressees to receive, review, consider and deliberate upon it on a "need to know basis" and on their acknowledgment of its confidential nature. The Board has made its frank recommendations based on these considerations.

BACKGROUND. On February 10, 2010, a proposed amendment to Chapter 2-56 of the City's Municipal Code was introduced to City Council and referred to the City Council's Rules and Ethics Committee. If adopted, this proposal would, among other things:

- (1) extend the jurisdiction and authority of the City's Inspector General (IGO) to all elected and appointed city officers in the performance of their official duties (which jurisdiction, under §2-56-030, includes the power to receive complaints and information concerning misconduct, and investigate the performance of governmental officers and employees either in response to a complaint or on the inspector general's own initiative, to detect and prevent

2. The Full title of this document, which was submitted to the City on March 16, 1987 by former U.S. Attorney Thomas Sullivan, is "Proposals for Reform, Report of Special Assistant Corporation Counsel Thomas P. Sullivan."

3. The Board notes that serious consideration of the issues and recommendations it raises in this Memorandum is warranted given its nearly quarter-century of expertise in administering, interpreting and enforcing the Governmental Ethics and Campaign Financing Ordinances, responsibilities it is charged with under City law. Such consideration is also consistent with a basic principle of administrative law, namely the principle of deference, in which courts defer to the judgments and expertise of governmental agencies in interpreting and reviewing statutes that they are charged by law (and thus by the legislature) with interpreting, administering and enforcing—especially where, as here, the Board exercises great care and thoroughness in issuing its advisory opinions and investigative reports, and has a 24-year old jurisprudential history during which time it has issued more than 550 formal opinions and 1,000 informal opinions and 750 formal investigations interpreting and enforcing both Ordinances. See *United States v. Mead Corporation*, 533 U.S. 218 (2001); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

misconduct); and

(2) require the IGO to issue a report upon the conclusion of an investigation resulting in sustained findings or recommendations or both; and

(3) leave unchanged Chapters 2-156 and 2-164 of the Municipal Code (respectively, the City's Governmental Ethics (GEO) and Campaign Financing Ordinances (CFO)).

At its February 17 meeting, the Board of Ethics recognized the implications to existing law of the proposal as introduced, most specifically to the Board's own practices and procedures under the GEO and CFO. It then directed its legal staff, pursuant to §§ 2-156-380(e)-(g) of the GEO, and §§ 2-164-070 (d)-(f) of the CFO, to:

(i) research laws, due process protections and practices of municipal ethics commissions with powers and duties similar to this Board's—namely, to render advice or guidance and to receive and/or initiate and refer or investigate complaints alleging violations of the relevant ethics or campaign financing statutes—to enable the Board to make recommendations for legislative action it deems appropriate and forward those recommendations to the Mayor, Corporation Counsel, Inspector General, Director of Intergovernmental Affairs and Chair and Vice Chairs of the City Council's Committee on Rules and Ethics; and

(ii) include in this research the laws and practices of the New York City Conflicts of Interest and Campaign Finance Boards, the Philadelphia and Atlanta Boards of Ethics, the Los Angeles, San Francisco and San Diego Ethics Commissions, and the Executive and Legislative Ethics Commissions and respective Inspectors General of the State of Illinois (pursuant to recently enacted amendments to the Illinois Governmental Ethics Act), the Sullivan Report, and any model governmental ethics codes deemed appropriate by legal staff.⁴

The Board's research and recommendations were, subsequently on February 23, formally requested by the Chair and Vice Chairs of the City Council's Rules and Ethics Committee.

APPENDICES. Attached to this Memorandum are the following:

1. Article 4 of the GEO and Board Rules 4 and 4a;
2. Pages 64-78 of the Sullivan Report;
3. Relevant provisions from New York City Charter, Chapter 68, and Conflict of Interest Board Rules;
4. Philadelphia Code §20/20-606 and Regulations;
5. Atlanta Code of Ordinances, §§ 2-801 to 2-824, and Rules of the Board of Ethics;
6. Los Angeles City Charter Article 7; Investigative Rules of the Los Angeles City Ethics Commission;
7. San Francisco Charter, Appendix C (selections); Selected Regulations;
8. San Diego Municipal Code §§ 26, 27 (selections);

4. These include the Model Ethics Commission Code promulgated by the Council on Governmental Ethics Laws (COGEL) in 2000, and the Model Ethics Code promulgated by the organization known as cityethics.org in 2006.

9. State Officials and Employees Ethics Act, 5 ILCS 430/1-1 et seq. (selections);
10. Council on Governmental Ethics Laws (COGEL) Model Code (2000) (selections);
11. Cityethics.org Model Code (2006) (selections).

EXECUTIVE SUMMARY.

A. Research Findings. The Board's research indicates that:

1. The prevailing practice among surveyed jurisdictions with respect to investigations of elected legislative officers for potential or alleged violations of ethics or campaign financing laws is that ***only signed and verified or sworn complaints are acceptable and investigable***. This is true even with respect to those jurisdictions that (unlike Chicago) authorize their ethics commissions to initiate investigations into possible violations of these laws by elected legislative officers, or grant other investigative agencies authority to investigate elected legislative officers with respect to alleged violations of these laws; and
2. The prevailing legal structure, at least in those surveyed ethics commissions east of the Mississippi River (i.e. the non-California jurisdictions),⁵ is that all City investigative agencies (or non-investigative agencies, for that matter)—including but not limited to inspector general-like agencies like the New York City Department of Investigations, ***must, by law, refer any matters they are investigating or considering investigating which involve interpretation or adjudication of the relevant ethics or campaign financing laws to the ethics commission legally charged with and authorized to interpret, adjudicate and enforce those laws***. These ethics commissions may in turn refer matters back to (or refer them in the first place to) these investigative for investigative assistance, but they reserve the exclusive right to adjudicate these matters and enforce their findings and determinations under these laws. These investigative agencies may, of course, investigate the same facts in order to determine whether other laws and rules were violated (cf. "misconduct" or violations of Chicago's Personnel Rules) and make findings and recommendations thereon—but they do not and are not authorized to make conclusions, findings, adjudications or recommendations based on violations of the relevant ethics and campaign financing laws. Even in the California jurisdictions surveyed, there appears to an enviably collaborative relationship between the surveyed ethics commissions and local prosecutorial and investigative agencies, which defer to these commissions for interpretations of ethics and campaign financing laws and for assistance in conducting their own criminal investigations of the same facts under the same laws. These ethics commissions, in turn, have the exclusive authority to pursue administrative enforcement actions. We note that this is the same division of responsibilities envisioned and recommended in the Sullivan Report; and

5. This curious geographical "split" appears coincidental, but is, we surmise, likely related directly to the nature of California's ethics and campaign financing laws and its local and state agencies' administrative and regulatory structures, which assume a closer interrelationship between federal, state and local officials than do those of other states, certainly Illinois's. Determining the reason for this apparent "split," while likely interesting to a political scientist or sociologist of jurisprudence, is well beyond the scope of this Memorandum or of the Board's direction.

3. Every surveyed jurisdiction provides that no person may be found or determined to have violated an ethics or campaign financing law *except after having been afforded due process rights and protections, including the right to be heard by a ethics tribunal or commission authorized to interpret and make findings under the ethics or campaign finance law and the right to examine evidence and witnesses and to be represented by counsel at one or more hearings, and the right to be found in violation of these laws only by a majority of ethics commission members.* Current City law provides this, but the February 10 proposal, by granting the IGO the ability to investigate aldermen, could, the Board strongly cautions, very likely lead to a confused dual system in which aldermen investigated by the Board (let alone other City officials or employees or others) for alleged violations of the GEO or CFO under current law would continue to be afforded due process rights and protections, including the right to be found in violation only by a majority vote of the Board of Ethics, but those investigated by the IGO would not—and yet both the Board and the IGO would be effectively able to make findings and recommendations under the GEO or CFO. Such a system of “concurrent jurisdiction,” with different agencies interpreting the GEO and CFO and applying disparate standards and procedures for determining violations and making recommendations pursuant to those laws, could, in our view, weaken the City’s legal enforcement apparatus, and also give rise to a perception of confusion, “double jeopardy,” inefficiency or unfairness at best, and to potentially serious violations of the rights to equal protection and due process of law guaranteed by the Illinois Constitution at worst.

B. Recommendations. Based on its research, the Board recommends that:

1. Chapters 2-156 and 2-164 of the Municipal Code (the GEO and CFO, respectively), and any other similar provisions of the Municipal Code be amended concomitantly with any amendments to chapter 2-56 to:
 - a) require the IGO, and any other City agency with investigative authority, when the IGO or other such agency has, either as a result of a complaint received, or of information it possesses, or of an ongoing investigation it is conducting, a reasonable belief that a violation of either the GEO or CFO may have occurred, to refer the matter—as to these possible violations only—to the Board of Ethics for consideration and a determination as to whether there is reasonable cause to investigate; then
 - b) after the Board makes that determination, the Board shall, if it concludes that there is reasonable cause to investigate the complaint:
 - i) refer the matter back to the IGO or other agency for further investigation into whether either of these Ordinances were violated, provided that the IGO files a verified written complaint to that effect; or
 - ii) itself investigate the matter for potential violations of these laws, or take such other action as it deems appropriate, such as settlement; or,

- iii) if the Board makes a determination that there does not exist reasonable cause to commence an investigation, close the matter as to potential violations of the GEO or CFO unless and until the investigating agency, such as the IGO, later develops, during the course of its investigation into other legal violations or misconduct, a reasonable belief that either of these Ordinances may have been violated, at which time, it shall again refer the matter to the Board as described above; and
2. Chapters 2-156 and 2-164 of the Municipal Code, and any other similar provisions of the Municipal Code, be amended concomitantly with any amendments to chapter 2-56 to provide that no alderman or other person shall be determined or found to have violated the GEO or CFO unless a majority of the sitting members of the Board of Ethics so determines, after a hearing in which due process rights are afforded, including, in the case of aldermen, the subsequent right to appeal to the City Council, pursuant to current law, and provided further that no other City department, including the IGO, shall make any recommendations as to discipline or sanctions regarding violations of the GEO or CFO; and
 3. Consistent with the recommendations made in the Sullivan Report, specifically Proposal 24, the Board of Ethics and IGO shall together develop and execute an intergovernmental agreement, with the written approval and witness of the Mayor's Office and the Rules and Ethics Committee of the City Council, which shall be made public and shall, prospectively:
 - a) authorize the Board, at its discretion, to refer to the IGO, for investigation only, reserving the authority to adjudicate the matter after receiving the IGO's report thereon, any complaint as to which the Board has determined there is reasonable cause for investigation into whether the GEO or CFO was violated;
 - b) require that whenever, either as a result of a complaint received, or of information it possesses, or of an ongoing investigation it is conducting, the IGO reasonably believes that a violation of either the GEO or CFO may have occurred, it shall refer that matter—as to these possible violations only—to the Board of Ethics for consideration and a determination as to whether there is reasonable cause to investigate such possible violations;
 - c) provide that only authorized personnel from the Board and IGO shall have access to such matters on a need to know basis;
 - d) provide that the Board of Ethics shall refer to the IGO any complaint over which the Board does not have jurisdiction, unless the reason for the Board's want of jurisdiction is either that: i) a complaint involves conduct by a person not subject to the GEO or CFO (e.g., a County employee, a private attorney, etc.); or ii) the complaint alleges a violation of the GEO or CFO by an alderman but is not signed and sworn; or iii) the complaint otherwise alleges conduct by an alderman which does not involve a possible violation of the GEO or CFO; and providing that all

complaints falling under categories ii) or iii) above shall be referred simultaneously to the IGO and to City Council's Committee on Rules and Ethics; and

e) consistent with the Sullivan Report and the administrative law principle of deference, discussed in footnote 2, above, provide that the IGO shall not make findings, conclusions or recommendations as to discipline or sanctions regarding violations of the GEO or CFO⁶; and

4. consideration be given as to whether Chapters 2-156 and 2-164 should be amended to provide that the Board may, upon majority vote of its members, make public summary reports of its concluded investigations and recommendations thereon within 6 months after they are closed, provided that Board investigations shall remain confidential until that time, and all dismissed or referred complaints shall remain confidential.

Comments:

(1) The Board emphasizes that its recommendations are not intended to hamper or curtail the IGO's ability to investigate "misconduct" or violations of any laws or rules other than the GEO or CFO, whether in response to a complaint or on its own initiative. Rather, its recommendations are designed to ensure uniformity of interpretation of these two Ordinances by a tribunal constituted by law to provide them, based on its unique knowledge of these Ordinances and their "special character," and to ensure uniformity of process for all persons investigated for such violations, specifically that: a) any investigation into violations of these laws may be commenced only after the Board has made a determination that there is reasonable cause to commence the investigation; b) to ensure that persons can be found or determined to have violated these laws only upon majority vote of the members of a tribunal with expertise in these laws, that is, the Board of Ethics; and c) only after being afforded due process rights pursuant to announced procedures and rules. In this way, the City's legal enforcement mechanism of these two laws will be most robust and fair.

(2) We note that our recommendations are consistent with those of the Sullivan Report. That Report's authors are clear that they "believe it appropriate, in light of the special character of the ethics ordinance, to have a Board of Ethics charged specifically with the administration and enforcement of that ordinance. This involves administration of financial disclosure and lobbyist registration programs, as well as enforcement of the code of conduct." *Id.*, page 68. The Report also recommends that, to avoid the potential for confusion or "unhealthy competition over turf," an interagency agreement or mayoral directive be established between the IGO [actually, its predecessor] and Board. It envisions that the IGO would conduct field investigative activity for the Board of Ethics, and submit the factual report on that aspect of the investigation to the Board. *Id.*, at 70. As discussed in the next section of this Memorandum, that is in fact the precise legal structure and division of interagency responsibility under which the New York City Conflicts of Interests Board

6. The Sullivan Report, though written in 1987, contains insights and recommendations as wise and timely now as they were then. We note here that it recommends that both the Board of Ethics and the Office of Municipal Investigations--the forerunner to the IGO--be granted the authority to investigate all City officials and employees, including all 53 elected City officials--as to each agency's respective purview. Sullivan Report, pp. 72-74.

and its Department of Investigations operate.

The Board and its staff stand ready to meet with each of the addressees to discuss these findings and recommendations, and also to assist in drafting statutory language that expresses them.

RESEARCH SUMMARY. We now summarize, by jurisdiction, the manner in which each of those other jurisdictions' laws, regulations, practices, procedures and protections address these questions:

(1) which municipal agency or agencies have legal authority to investigate elected legislators for violations of the relevant ethics and campaign financing laws?

(2) must investigative agencies (like inspectors general) that are separate from ethics (or campaign finance) commissions refer matters to these ethics commissions for findings or determinations as to whether they may investigate potential violations of the ethics or campaign financing laws? can these investigative agencies make their own findings or conclusions under these laws, based on their own investigations? if so, are these findings or conclusions reviewable? if so, by which body? Put another way: do these duly constituted municipal ethics (or campaign finance) commissions have the *exclusive* authority to adjudicate complaints and make determinations with respect to allegations, conclusions, or findings that governmental personnel (including elected legislators) have violated either the relevant ethics or campaign financing laws?

(3) as to investigations of violations of the relevant ethics or campaign financing laws, are there publicly announced due process protections and requirements? Must an investigative agency or ethics commission make a preliminary determination that there is reasonable or probable cause to commence an investigation before investigations into potential violations of these ethics or campaign finance laws can proceed?

I. Chicago. As a baseline for comparison, we review current City law on these questions.

(1) The Board of Ethics is authorized to receive and investigate any complaint alleging violations of the GEO by any individual or person subject to that law (including aldermen), provided the complaint is in writing, and includes the identity of the person against whom the complaint is filed and of the complainant, and a clear description of the essential facts and circumstances constituting the alleged violation, and further provided that the Board can investigate alleged violations by aldermen if and only if it receives a complaint that is signed and sworn to by the complainant. Rule 4-1. The Executive Director must then consider any received complaint to determine whether there is reasonable cause for investigation. As the Board has construed this test over 24 years, the Executive Director must ask and answer the following: i) is the complaint proper, or defective on its face (e.g. it insufficiently identifies the subject or complainant, is against an alderman but not signed and sworn, etc.); and ii) if all of the allegations in the complaint turn out to be true, resolving all inferences in favor of the complainant, would those allegations constitute a violation of the GEO or CFO? If his answer is yes to both questions, then there is reasonable cause to investigate and he then shall recommend that the Board commence an investigation. If his answer is no, the Executive Director shall "withdraw" (i.e. dismiss) a complaint, but may refer it to the appropriate department

head or another City agency with investigative authority, such as the IGO, Chicago Police Department, or Independent Police Review Authority, or recommend that the complainant file the complaint with another agency, or, if appropriate, recommend that the Board or staff itself become the complainant and initiate its own investigation. Rule 4-1. However, the Board or staff may not themselves initiate a complaint or investigation into an alleged violation of the GEO by an alderman—the Board has the authority to investigate only signed and sworn complaints that the Executive Director determines, in consultation with his legal staff, allege a violation of the GEO⁷ that occurred not more than two years prior to the date of filing of the complaint. Rule 4-1; § 2-156-408. All other written complaints concerning alderman must be referred to the City Council's Rules and Ethics Committee. Rule 4-1.

Pursuant to § 2-8-290, the City Council shall at all times maintain a standing committee having jurisdiction over the conduct of its members and employees, and this committee is responsible for investigating allegations of misconduct by alderman and City council employees, including violations of the GEO and CFO. It is also responsible for recommending appropriate corrective or disciplinary action for any such conduct.

Under current City law, as has now become relatively well-known, the Inspector General shall have no power or authority over any member, employee of staff person of any City Council member or committee. § 2-56-050. If the IGO receives any complaint alleging misconduct, waste or inefficiency against any City Council member or staff, it shall transmit the complaint to the City Council's Rules and Ethics Committee, which shall conduct an investigation thereon. The IGO may refer a complaint or information received concerning a City Council member or staff to the appropriate law enforcement authority.⁸ Note that in neither current law nor in the February 10 amendments introduced to City Council is there a provision analogous to the two-year statute of limitations as to Board investigations of signed and sworn complaints alleging violations by aldermen of the GEO.

(2) Under current City law, the Board of Ethics does not explicitly have the exclusive authority either to interpret, enforce, or make determinations with respect to allegations, conclusions, or findings that governmental personnel have violated either the GEO or CFO, nor to make recommendations thereon. We note here that the Board is vested with the authority to exercise appropriate discretion in determining whether to investigate and whether to act upon any particular complaint or conduct. § 2-156-380(b). Moreover, the Board also may request the assistance of other "appropriate agencies" in conducting investigations. However, the Board has no authority to refer a complaint against an alderman which it cannot (for any reason) investigate to any body other than the City Council's Rules and Ethics Committee. Rules 4-1, 4-3.

As noted above, the City Council's Rules and Ethics Committee has the authority to make, take or

7. The Board has no authority to investigate alleged violations by an alderman of the CFO.

8. By contrast, the Board has no corresponding authority to refer a complaint or information to law enforcement. Rather, the Board's authority to refer a matter to an appropriate law enforcement agency is limited to instances in which it "has a reasonable basis for concluding that an investigation has revealed criminal conduct"—in that event, the Board is obligated to refer the matter to law enforcement. This presupposes, however, that the Board has already commenced an investigation. See § 2-156-405(b).

commence any of the actions described in the preceding paragraph as to the members of the City Council. In fact, it is the exclusive body within the City that has such authority with respect to the alleged violations of CFO by an alderman.

Similarly, nothing in the IGO's enabling Ordinance prohibits it from interpreting, making findings, conclusions or determinations under, or recommending disciplinary or corrective action for violations of the GEO (or any other law or rule), except as to aldermen. In fact, the few summary reports of its investigations that the IGO has provided to the Board indicate that the IGO does draw conclusions that City personnel under its jurisdiction have engaged in conduct in violation of the GEO, but in some cases these violations then have become subsumed into findings by the IGO of "misconduct," which then cause the IGO to make recommendations to the Board. The IGO's Press Release dated February 16, 2010 regarding the proposed amendments states that "the proposed ordinance would allow and require the Inspector General's Office to provide more information to the public, including of each investigation resulting in 'sustained' findings of misconduct. Such reports would disclose the nature of the allegations, the sustained violations, the IGO's recommendation for discipline or other measures, as well as the City's response to and final decision on those recommendations."

We point out here, however, that the Board of Ethics is the sole agency within City government that is legally authorized to render confidential advisory opinions interpreting the GEO and CFO—neither the City Council, IGO nor Law Department are granted this statutory authority. In contrast to these other City agencies, the Board's sole statutory authority is, in fact, to administer, interpret and enforce these and only these Ordinances, and it has performed developed a 24-year body of jurisprudence of prior advisory opinions and investigations.

Note: As was discussed in the Executive Summary above, we believe that it is in the City's best interests to ensure, by amendment to the Municipal Code (and by amendment of the Board's and IGO's Rules, and by intergovernmental agreement), that whenever another City agency receives a complaint alleging a violation of the GEO or CFO, or, during the course of an ongoing investigation, comes to have a reasonable belief that either of these laws may have been violated, it shall: i) refer such matter to the Board for a determination that there is reasonable cause to believe that the Ordinance may have been violated; and ii) shall not continue to investigate such potential violations until it the Board has determined that there is reasonable cause to proceed and referred the "factual phase" of the investigation into these violations to the IGO or other investigative agency of the City; and iii) that the IGO or other investigative agency shall, at the conclusion of investigation, refer its report to the Board, which shall then make conclusions of fact and law and determinations, findings or recommendations under these two Ordinances. We note that this is procedure envisioned by the Sullivan Report, and, as the research will show, is consistent with the laws and procedures in New York City, Philadelphia, Atlanta, and in part, San Diego—as well as with the procedures under the Illinois Governmental Ethics Act. Only in this way can uniformity of interpretation of the GEO or CFO be guaranteed, and the due process rights of persons being investigated for violations of these two laws be uniformly guaranteed. We believe that any amendment not containing such provisions would weaken the City's legal position in the event of litigation challenging a recommendation for discipline based in part or in whole on an interpretation of or finding under the GEO or CFO.

(3) The GEO provides, in § 2-156-380(h), that the Board shall promulgate rules for the conduct of its activities, including procedural rules consistent with the requirement of due process of law. Board Rules 4, 4A. Board Rules 4-8 through 4-10 describe in detail the procedures that guarantee such due process, including hearings, etc. The GEO itself provides that, prior to the conclusion of an investigation, the Board shall give the person under investigation notice of the substance of the complaint and an opportunity to present information the person may desire (§ 2-156-390(a)). Specifically with respect to complaints against aldermen, the alderman under investigation shall, within 7 days of the Board's commencement of a Board investigation, be given notice of the substance of the complaint and an opportunity to present information he or she may desire. If, after that "factfinding" investigation is complete, it is determined that a violation may have occurred, the matter is referred to the full Board of Ethics for a full hearing, consistent with the principles of due process, explicitly including the alderman's right to be present at the hearing, testify on his or her own behalf and present witnesses and documents supporting his or her position. § 2-156-395(a), (b). Last, should the Board determine that an alderman has violated one or more provisions of the GEO, it shall impose a fine, which the alderman may appeal in writing to the Rules and Ethics Committee within 90 days. The Committee shall then hold a hearing to determine whether the Board's decision is supported by the weight of the evidence and affirm or overturn it as appropriate. At that hearing, the alderman has the right to identify witnesses from whom the Committee may hear. § 2-156-395(d).

We are unable to locate any rules or Ordinances that provide for findings of reasonable cause, due process or hearing rights for investigations conducted by the City Council's Rules and Ethics Committee, and a staff member of the Committee stated to Board staff that there are none.

§ 2-56-030(l) grants the IGO the power and duty to promulgate rules and regulations for the conduct of investigations and public hearings consistent with the requirements of process of law and equal protection under the law. That chapter does not address whether the IGO must make a finding of reasonable or probable cause before investigating a potential or alleged violation of these or any other laws. However, we were unable to locate such rules and regulations, and a representative from the IGO stated to Board staff last week that there are none.

II. New York City. Unlike Chicago, which consolidates the administration, interpretation and (at least partial) enforcement of its ethics and campaign financing laws into a single Board of Ethics, New York bifurcates these responsibilities into two separate agencies: the Conflicts of Interest Board and the Campaign Finance Board. Each has its own enabling law under the New York City Charter.

A. Conflicts of Interest Board (COIB)

(1) Under the New York City Charter, Article 68, § 2602, COIB members are appointed by the Mayor and confirmed by City Council. The COIB is charged with determining whether violations of the conflicts of interest provisions of the City Charter have been committed by any City employee or official. § 2603(e). Members of City Council have no separate or distinct investigators. Rather, the New York City Department of Investigations (DOI, analogous to the IGO) maintains a dedicated legislative investigative branch. Upon receipt of a complaint alleging violations of the conflicts of

interest law, the COIB refers the matter to the DOI for a factual investigation, that is, in the words of the COIB's Executive Director, to prepare a "police report" for the COIB. § 2603(f). Otherwise, the COIB's Executive Director may dismiss a complaint for failure to allege a possible violation of the conflicts of interest law. The COIB does no actual investigation. §§2603(e), (f).

(2) The COIB has exclusive jurisdiction to adjudicate all complaints alleging violations of the conflict of interest law, including those in which elected officials are the subjects. § 2603(g)(2). The DOI provides assistance in investigating the complaint, but presents the COIB only with a factual report, and has no authority to make factual or legal findings, determinations, recommendations or conclusions as to violations of the conflict of interest law. Only the COIB is authorized to make such findings, determinations, conclusions, and recommendations. Its recommendations or levy of fines (which must be enforced in court) are reviewable by the New York Superior Court.

(3) After COIB receives the DOI's investigative report, it will make a finding as to whether it believes there is probable cause to determine whether a violation of the conflicts of interest law occurred. If it so determines, it then sends formal notice to the subject for a hearing (with usual due process protections, i.e. the right to counsel, to present witnesses, etc.) at a NYC independent administrative hearing board. § 2603(h). The hearing officer makes only recommendations to the COIB, which is the final adjudicator. As to complaints received against City Council members, COIB staff presents the complaint to the COIB members, who determine whether to refer the factual phase to DOI or dismiss it. In all investigations the COIB refers to the DOI, the COIB prepares a detailed referral letter to the DOI, containing three discrete instructions: (i) a description of the area of concentration for investigation; (ii) the relevant section of the conflicts of interest law, with an explanation as to how the COIB has interpreted it in the past; and (iii) questions (and likely possible answers) to ask during the investigation. The COIB's Executive Director explained that his agency regularly offers to work directly with DOI investigators, including ongoing communication, and has also offered regular training by COIB staff in COIB law and procedure to the DOI investigators.

B. Campaign Finance Board.

(1) Under the New York City Charter, Chapter 46, the Campaign Finance Board has jurisdiction as to the campaign financing law over the City Council, which has no self-investigation. It is a non-partisan Board made up of two members appointed by City Council Speaker, two by the Mayor, and the Chair appointed by the Mayor after consulting with the Speaker.

(2) The NYC Campaign Finance Board has exclusive jurisdiction over candidates for elected City office (including incumbents) to investigate and adjudicate complaints alleging violations of the Campaign Finance law. It has no authority to send these matters to the DOI. If the Board determines that an investigation is "complex" or sensitive (e.g. requiring poll watchers), it has authority to request assistance, and currently has a contract to obtain assistance from a private outside investigation agency. As with the COIB, the Campaign Finance Board makes its own fact findings, determinations and recommendations for penalties or corrective action. If necessary, the Board may request that the City attorney file an enforcement action in New York Superior Court. The Board's determinations are reviewable under the New York Civil Practice Law & Rules, Article 78,

which provides that an aggrieved party may challenge the findings of an administrative agency, such as the Board, by filing a civil suit to determine whether an administrative agency's adjudication was "arbitrary and capricious." New York Civil Practice Laws, Article 78, § 7803(1).

(3) The Campaign Finance law has built-in time limits for the Board to give notice of an excessive political contribution, and for an incumbent or candidate to take corrective action (that is, reimburse the excessive amount of the contribution). If corrective action is not effected by the time limits, then the person under investigation is entitled to choose either a Board hearing or hearing by an administrative law judge (both are subject to rules consistent with the requirements of due process). The administrative law judge will make fact findings and recommendations, then send the matter back to the Board for a final adjudication.

III. Philadelphia

(1) The Board of Ethics is responsible for administering, interpreting and enforcing both the campaign financing and ethics laws. Philadelphia Code title 20, chapter 20-606 (1) et seq.; chapter 20-1000. The Board is appointed by the Mayor, without confirmation by the City Council. It is solely authorized to investigate all complaints alleging violations of the ethics or campaign financing ordinances by any City official or employee. § 20/20-606(g)(i). City Council members have no internal investigators.

(2) The Board of Ethics has exclusive jurisdiction to make findings of fact, conclusions of law and adjudicate all complaints alleging violations of the ethics or campaign financing laws, including those filed against City Council members. §20/20-606(h). The Mayor has established an Inspector General, with authority over all executive branch personnel, but this Inspector General must—as must any other City agency that receives a complaint alleging a violation of the ethics or campaign financing laws—refer the matter to the Board, as clearly delineated in §20/20-606(1)(g)(.2):

"Whenever a City agency receives a complaint alleging a violation of the provisions of [the ethics or campaign finance law] or determines that a violation of [these laws] may have occurred, it shall refer such matter to the Board. Such referral shall be reviewed and acted upon by the Board in the same manner as a complaint received by the Board under [the paragraph authorizing to Board to dismiss a complaint, investigate it internally, make an initial probable cause determination and proceed to adjudicate the matter, refer it to the appropriate department head, e.g. if the Board deems it a de minimis violation, or refer it to the Inspector General, which is § 20/20-606(1)(f)]."

In the words of the Board's Executive Director, there "cannot [be] two authorities concurrently interpreting" these laws. Until recently, the Board has submitted its few received complaints to City courts, employing pro bono attorneys; the courts draw conclusions of fact and make findings as to whether violations were committed (all cases were settled). Under recent legislation, Board staff will submit preliminary investigative reports to the Board (following a Pennsylvania state model). The Board may then, at its discretion, refer the case to the Inspector General. §20/20-606(1)(f)(5). A

referral to other appropriate authorities may include a "partial referral," in which the Board retains jurisdiction in the matter but shares file information, subject to appropriate controls to maintain confidentiality and limit access to information on a "need to know" basis for appropriate personnel in both agencies, or a "complete referral," in which the Board concludes that the matter is not appropriate for Board action and transfers the entire file to the other enforcement agency for possible action. Regulation 3.3.

Any Board adjudication is reviewable in the Court of Common Pleas, pursuant to the Pennsylvania Administrative Review Act.

(3) Procedures are still being drafted, but under current regulations, the Board sends written notice of a hearing, containing the allegations, facts, and probable violations to the subject of a complaint it has investigated. The Board schedules a hearing before itself on the investigation, providing the subject an opportunity to be represented by counsel. Based on the hearing and evidence presented, the Board makes its determinations, findings, conclusions and recommendations.

IV. Atlanta

(1) The City of Atlanta Board of Ethics has limited jurisdiction over campaign-related issues, but has jurisdiction to consider matters raised in connection with §§ 2-801 to 2-824 of the City of Atlanta's Code of Ordinances (the "Code of Ethics"). Rule 1 of the City of Atlanta Board of Ethics. Any person or entity may report a violation of the Code of Ethics by filing a sworn written complaint with the Ethics Office or Board of Ethics. Rule 4.1 The City's Ethics Officer (similar to our Executive Director) may receive anonymous complaints that are made in good faith and with sufficient specificity to provide salient and investigable facts. Rule 4.3

(2) The Board is authorized to adjudicate all complaints, determine whether there have been violations, assess administrative sanctions, and recommend disciplinary sanctions. The Ethics Officer may herself initiate an investigation; the Board may also investigate any alleged violation based on a sworn written complaint by any person, or upon majority vote. If another City employee, department, or agency is investigating the same complaint or similar allegations, the Ethics Officer may defer any investigation until the other investigation or proceeding is completed, or may refer the Board's complaint for investigation to other departments or agencies. However, the Board of Ethics has exclusive jurisdiction as to the interpretation and administrative enforcement of the Code of Ethics. Other governmental or law enforcement agencies may have civil or criminal enforcement over the same matters, but not with respect to the Code of Ethics violations contained therein. The Board of Ethics makes its own findings under the Code of Ethics. The Board communicates any penalty it imposes on an employee to the employee's department head and Commissioner of Human Resources, any penalty imposed on any City board member or hearing officer to the appointing authority, and any penalty imposed on a neighborhood planning unit officer to the Commissioner of Planning and Community Development, the neighborhood planning unit coordinator, and the officers of that neighborhood planning unit. Rule 5.3.

(3) There are due process rights in the Board's investigation procedures of alleged ethics and campaign financing violations. When the Ethics Officer determines that a complaint meets the requirements in the relevant rules, she shall send written notice by the next business day to the respondent against whom the complaint was filed. Rule 4.6. The Ethics Officer shall conduct a preliminary investigation of any complaint over which the Board of Ethics has exclusive jurisdiction. (Rule 5.1). After conducting an investigation, the ethics officer shall provide a written report which shall state her findings and recommendations concerning whether there is probable cause to believe that the Code of Ethics has been violated. "Probable cause" means cause that would induce a reasonably intelligent and prudent person to believe that a person has committed a violation of the City's Code of Ethics. Rule 5.6. Once the Ethics Officer sends written notice of the probable cause finding to the respondent and gives notice of a hearing date, any respondent who wishes to appear before the Board must file a written response to the probable cause report, stating the facts and issues on which the respondent disagrees with the report. Rule 5.7 After hearing arguments and reviewing the probable cause report and response(s), the Board determines whether there is probable cause to conclude that there has been a violation. (Rule 5.9). After a finding of probable cause, the matter is set for a public enforcement hearing before the Board to determine whether a violation occurred. Rule 6.1. There is a pretrial conference between the Ethics Officer and respondent. Rule 6.2 The respondent has the right to attend the hearing; be represented by counsel or another representative; present oral or written documentary evidence that is not irrelevant, immaterial, or unduly repetitious; and examine and cross-examine witnesses. Rule 6.7. At the end of the enforcement hearing, the board, if a violation is found, may impose any penalties provided by law and can recommend disciplinary actions for violations by employees. Rule 7.1. The decision of the Board is final and is subject to review by writ of certiorari to the Fulton County Superior Court. Rule 7.5.

V. Los Angeles

(1) The Los Angeles City Ethics Commission has the authority to investigate sworn complaints, and to initiate its own investigations. However, its mandate is broad—it can investigate alleged violations of state law of City laws relating to campaign financing, lobbying, conflicts of interest and governmental ethics. L.A. City Charter Article 7, §706(a) (1).

(2) The Commission does not have exclusive adjudicatory authority. In fact, it is small and "chronically understaffed and underfunded" (though with its own investigative unit) and has developed a highly cooperative relationship with the D.A. (The County attorney, analogous to the Cook County State's Attorney), and the U.S. Attorney. The Commission can refer to and work with these other law enforcement or governmental agencies, which likewise have the authority to investigate, interpret and enforce Los Angeles's ethics and campaign financing laws. The Commission's law grants the Executive Director discretion to refer a matter to another appropriate agency for enforcement or investigation, regardless of whether the Executive Director makes a formal determination concerning probable cause. The Commission's Director of Enforcement explained that the agency has developed a good working relationship with the D.A, which obviously has a much larger investigative staff. In any event, the penalties for violation of Los Angeles's ethics laws include

finer of \$5,000 per violation, or three times the amount which the subject failed to report properly, or unlawfully contributed, expended, gave or received, whichever is greater. As a matter of leveraging expertise, other investigative authorities perceive the Commission as a resource for interpreting the ethics, lobbying and campaign financing laws, and rely on the Commission for advice frequently.

Note: The good working relationship that Los Angeles's City Ethics Commission has with the prosecutorial arms of County and Federal Governments is enviably "symbiotic," and contains numerous *quid pro quos* that have been worked out over time. In exchange for referrals of complaints which otherwise would not necessarily come to them (and thus priority in law enforcement actions), these prosecutorial arms serve effectively as investigatory arms of the Commission and, recognizing the Commission's expertise interpreting the City's ethics, campaign financing and lobbying laws, pay it respectful deference during these investigations and prosecutions. We also note that, unlike this Board and what it is authorized to provide under Chicago's GEO, the Los Angeles City Ethics Commission is authorized to provide both non-binding informal advice and binding formal advisory opinions that are public, and which, in the case of formal opinions, confer upon the recipient immunity from civil or criminal penalties in an enforcement action if he or she acts in good faith upon that advice. L.A. City Charter Article 7, § 705(b).

(3) The Commission's rules have many built-in due process protections: subjects of written complaints that are sworn, signed and dated by the complainant and contain sufficient information for a the Commission to determine that it should be investigated are notified within 14 days after of the complaint. Administrative Code §24.1.2(b)(2). The respondent is then served with: i) a copy of the probable cause report; and ii) notification that the respondent has the right to respond in writing and request a probable cause conference at which the respondent may be present in person and represented by legal counsel or any other representative. Probable cause conferences are held if requested by a respondent, and conducted informally by the Executive Director. Los Angeles Administrative Code §24.1.2(d)(6). The Executive Director makes a determination as to probable cause based solely on the probable cause report, any responses or rebuttals filed, and any argument and evidence presented at the probable cause conference by the parties. Los Angeles Administrative Code §24.1.2(6)(F).

VI. San Francisco

(1) The San Francisco Ethics Commission has the authority to investigate sworn complaints, and to initiate its own investigations of alleged violations of the to campaign financing, lobbying, conflicts of interest and governmental ethics laws (including those who cause others to violate the law or who aid and abet others to violate the laws in connection therewith). San Francisco Charter, Appendix C, Section C3.699-13(d). The Commission's jurisdiction encompasses investigating, adjudicating and assessing penalties for violations.

(2) The Commission does not have exclusive adjudicative authority. Although it has personnel who can and do investigate, the Commission is a small agency with very limited resources. The Charter

mandates that, should the Commission's Executive Director determine that a complaint has apparent merit, staff must "forward the complaint or information in its possession" to the district attorney (the County's criminal legal arm, with its own investigators), and to the City attorney (analogous to our Law Department, with its own investigators). Charter (a) "Investigations"; Regulation IV (c). Although the Commission can continue its own investigation, it works closely with these other agencies, which have the authority to investigate, interpret and enforce the campaign financing, lobbying, conflicts of interest and governmental ethics laws. Under Preamble 5 and Regulation XIII (H), the Commission's law grants the Executive Director discretion to refer a matter to another appropriate agency for enforcement or investigation, particularly when the Executive Director finds the matter does not fall within the Commission's jurisdiction. In addition, under Regulation VIII, "Probable Cause Hearing," B(4), upon the Commission making a formal determination (after an investigation has led to a "probable cause" hearing) that there is no probable cause to believe there is a violation of law, the Commission may "refer the complaint to another agency for its appropriate action." The Commission's Executive Director explained that the Commission has developed a good working relationship with the city and district attorneys, e.g., sharing investigative material after the Commission has completed a probable cause hearing. Obviously the city and district attorneys have noticeably larger investigative staffs, but recognize the Commission's expertise in campaign financing, lobbying, conflicts of interest and governmental ethics laws. In fact, it is the Commission that provides two kinds of advice to others on campaign financing, lobbying, conflicts of interest and governmental ethics laws: written formal opinions and informal advice. S.F. Charter §§ C3.699-12, the former of which can provide the requester immunity from subsequent enforcement action. The Commission may impose penalties, including cease and desist orders and fines of \$5,000 per violation or treble the amount the subject failed to report properly, or unlawfully contributed, expended, gave or received, whichever is greater. Under Charter §8.107, the Commission may recommend to an appointing officer that an officer be removed.

Note: As with the Los Angeles City Commission, the San Francisco Ethics Commission maintains enviable working relationships with both City and County prosecutors. The Executive Director explained that upon her mandatory referral of a complaint to the city and district attorneys, they will determine if they are working on the same matter, or have an interest in the matter (though not currently under investigation), or have no interest presently in the matter. Commission staff may or may not discontinue an investigation after that referral. Regulation IV (c). As part its work on an adjudicative hearing, Commission staff often consults with these prosecutorial arms, which in turn relieve the Commission of investigatory work. What is recognized to be within the Commission's purview is its expertise in interpreting the campaign financing, lobbying, conflicts of interest and governmental ethics laws. S.F. Charter §§ C3.699-12.

(3) The S.F. Charter affords the full panoply of due process rights: the subject shall receive, via certified mail, at least 21 days prior to the Commission's consideration of a matter and any probable cause finding, a notice setting forth the subject's rights to be present and be represented by counsel, and a summary of the evidence. Charter (b). The Commission will send the subject a probable cause report and notice of the probable cause hearing 45 days prior to the scheduled hearing. Regulation VII (B). The subject may respond in writing to the report prior to the hearing. *Id.* (c). The subject is not subject to a probable cause hearing if he or she had obtained a written opinion from the

Commission concurred in by the city and district attorneys; truthfully presented all facts in the matter; and acted in good faith reliance upon the opinion. Regulation VIII (B) (3). If there is a finding of probable cause, the Executive Director shall issue to the subject an "accusation" 10 days after the determination. Regulation IX (A). The Executive Director shall give a statutory notice to the subject about the hearing on the merits 45 days prior to the commencement of the hearing, which notice will state the subject's rights to be present and with counsel, to examine witnesses (compelling them by subpoena), as well as the production of documents. The subject may present his or her own evidence. Regulation IX (B). The subject may take pre-hearing discovery. Regulation X (A). Both the subject and Executive Director have rights to address various pre-hearing procedural matters, e.g., disqualification of a Commission member. Regulation X (B) and each may present briefs. *Id.* The hearing has procedural requirements that each side must follow. Regulation XII (A) and the votes of at least three Commissioners are required to find a violation of law.

VII. San Diego

(1) The Commission has the authority to receive complaints, but is not required to review unsworn complaints. No action or inaction by the San Diego Ethics Commission or its Executive Director prevents any other governmental or law enforcement agency from pursuing a separate enforcement action based on the same allegations and facts presented to the Commission. However, these other governmental or law enforcement agencies do not interpret the ethics portion of the municipal code, nor do they draw conclusions or impose administrative sanctions thereon. The other agencies or law enforcement agencies may make findings of fact and violations under other laws covered by the same matter, and impose civil or criminal penalties based on the violations they find during their investigation. Only the Commission may pursue administrative sanctions; that may occur at the same time another governmental or law enforcement agency is pursuing criminal sanctions from the same situation. There is no statutory duty on the part of the Commission or the Executive Director to refer any matter to any other governmental or law enforcement agency. The Commission has the authority to receive complaints.

(2) Nothing in the governmental ethics portion of the Municipal Code limits the authority of the City attorney, any law enforcement authority, or any prosecuting attorney to enforce these provisions under circumstances in which the city attorney, law enforcement agency, or prosecuting attorney otherwise have lawful authority to do so. San Diego Municipal Code §27.3581(c). The Executive Director makes recommendations that the Commission: initiate a formal investigation of the allegations contained in a complaint; that the commission take no further action on the complaint; or that the Commission takes no further action on the complaint, but instead refer the complaint or complainant to another governmental or law enforcement agency. San Diego Municipal Code §26.0423(a). The Ethics Commission enforces governmental ethics laws through administrative enforcement. San Diego Municipal Code §27.3581(b).

California's Fair Political Practices Commission (FPPC) investigates alleged violations of the Political Reform Act. The Ethics Commission operates locally, and its jurisdiction extends to City officials, candidates for elective City office, and entities that lobby City officials. The Ethics Commission, not

FPPC, regulates City's contributions limits.

A Commission representative explained that there is currently no written protocol governing matters in which there is concurrent jurisdiction. The DA for the County of San Diego investigates the same matters; there is some overlap.

(3) If the Commission determines that there is cause to believe a respondent violated governmental ethics laws, and decides to pursue administrative remedies against the respondent, the Commission shall order that a Probable Cause Hearing be conducted. San Diego Municipal Code §26.0425(b)(3).

A probable cause hearing is conducted by a presiding authority, which is: one Commissioner; an ad hoc subcommittee composed of three commissioners; or an individual selected from a list of volunteers who have been pre-qualified to meet or exceed minimum qualifications criteria for training and experience as established by the Commission. San Diego Municipal Code §26.0430(b)(2). If probable cause is determined to exist, the Commission will announce in open session its termination and that the matter shall be heard at a public administrative hearing. The presiding authority for an administrative hearing consists of: the entire Commission sitting as a hearing panel; an ad hoc subcommittee composed of three Commissioners; or an individual selected from a list of volunteers who have been pre-qualified to meet or exceed minimum qualifications criteria for training and experience as established by the Commission. San Diego Municipal Code §26.04035(b)(2). The respondent is entitled to representation, cross-examination, call witnesses, and right of rebuttal. selected from a list of volunteers who have been pre-qualified to meet or exceed minimum qualifications criteria for training and experience as established by the Commission. San Diego Municipal Code §26.04035(c)(2). The Commission shall discuss and vote, in open session, whether or not the respondent committed a violation of governmental ethics laws. selected from a list of volunteers who have been pre-qualified to meet or exceed minimum qualifications criteria for training and experience as established by the Commission. San Diego Municipal Code §26.0438(a). The Administrative Enforcement Order shall become final on the date it is served on the respondent. San Diego Municipal Code §26.0439 (c). There is a ninety-day statute of limitations contained in California Code of Civil Procedure §1094.6 which shall apply to judicial review of enforcement decisions. San Diego Municipal Code §26.0439(e).

VIII. State of Illinois

(1) All campaign financing complaints or other enforcement matters are handled by the Attorney General (AG) or State Board of Elections. All other ethics matters involving members of the General Assembly and its staff or support agencies are within the exclusive jurisdiction of the Legislative Ethics Commission, established by the State Officials and Employees Ethics Act, 5 ILCS 430/1-1 et seq. (all citations to this Act herein will list only the section numbers), Sec. 25-5, and the Legislative Inspector General (who is appointed by the Legislative Ethics Commission, upon joint resolution of the General Assembly, and can be removed by the Commission for cause, with the consent of the General Assembly). Sec. 25-10. Similarly, there is an Executive Ethics Commission, and five other inspectors

general, who are appointed respectively by the Governor, the AG, the Secretary of State, the Comptroller and the Treasurer. Secs. 20-5; 20-10.⁹ The respective IGs have authority to investigate employees, officers, vendors and others doing business with their appointing authority as to "allegations of fraud, waste, abuse, mismanagement, misconduct, nonfeasance, misfeasance, malfeasance, or violations of the [State Officials and Employees Ethics Act] or other related law and rules." Secs. 20-10(c); 25-10 (c). Note that neither IG may initiate an investigation more than one year after the most recent act of the alleged violation, except where there is reasonable cause to believe that there has been fraudulent concealment. Secs. 20-20(1); 25-20(1).

(2) The Legislative and Executive Ethics Commissions have exclusive authority to adjudicate all complaints arising under the State Officials and Employees Ethics Act, and the respective IGs are vested with the exclusive authority to investigate such complaints. Should either ethics commission receive a complaint, it forwards the complaint to the appropriate IG. But an IG cannot commence an investigation unless it has in writing sought and received approval from the appropriate ethics commission (in this request, an IG may redact identifying information). Ethics Commissions have not, in practice, withheld such approval. Upon completion of its investigation, the appropriate IG completes its written investigative report, containing its determination as to whether reasonable cause exists to believe that a violation of the ethics act occurred, its factual conclusions, and a description of any alleged misconduct discovered in the course of the investigation, and its recommendations as to any corrective or disciplinary action ("including but not limited to discharge"), and forwards it to the subject's department head. Secs. 20-50; 25-50. In practice, the Legislative Inspector General explained, if the subject is a General Assembly member or head of a legislative support agency, he or she receives the report. The department shall respond within 20 days as to actions taken, if any, on the IG's recommendations. The IG may then, within 10 days of receiving a response, recommend a resolution; if it does, this recommendation is forwarded to the Ethics Commission, which may accept or reject it. If the Commission rejects it, or the IG has, instead of recommending a resolution, determined that there is reasonable cause to believe that a violation occurred, then the IG may recommend that the AG act as or retain the IG's attorney to file a complaint with the appropriate Ethics Commission, which then adjudicates the matter after hearing. The AG may reject an IG's recommendation to file such a complaint. An Ethics Commission's adjudication to impose a fine is subject to judicial review; all other adjudications are final and not subject to review. Secs. 20-60; 25-60.

(3) Upon receipt of a complaint, the IG reviews it and responds to complainant and dismisses it if the allegations set forth would not constitute an ethics violation; or, if facts approach this standard but the complaint is not coherent, the IG will contact the complainant to determine his/her credibility; or, finally, if the allegations disclose facts that, if true, would constitute a violation, the IG proceeds as described above, first making a "reasonable cause" determination. If an investigation requires speaking to a subject (or the IG's report is complete and sent to the subject), then the IG sends a notice advising the subject of the right to retain counsel. Thereafter, if the AG files a complaint with

9. Note that the Executive Ethics Commission or the Legislative Ethics Commission may appoint a special inspector general if it finds that an IG's reason for not completing an investigation within six months is insufficient, or to investigate the IG himself for real or apparent conflicts of interest. IG's themselves are removable only for cause by the appointing authority, who must report the justification for such removal to the proper Ethics Commission. Secs. 20-21; 20-10(f).

the appropriate Ethics Commission, the Commission sends notice of the hearing and of the subject's due process rights therein.

IX. COGEL Model Code

(1) The Council on Governmental Ethics Law's (COGEL) Model Code (2000) provides that the relevant ethics/campaign financing commission have (like this Board) a panoply of investigative and adjudicative authority, including the powers and duties to: conduct investigations, inquiries and hearing, determine whether to investigate or act on a complaint (complaints must be verified to be investigable), initiate its own investigations, adopt rules, turn over (in the exercise of its discretion) the appropriate agency apparent evidence of a violation of law for criminal prosecution or actions not under the ethics law, make determinations as to whether there is probably cause to believe that a violation of the ethics laws occurred, hold hearings therefor, make recommendations—after a hearing and determination—as to penalties, including recommendations that an elected official subject to impeachment be removed from office, or a legislator be censured, suspended or removed from office, refer matters to the attorney general (analogous in this instance to the Law Department) for recovery of fees, compensations, gifts, etc. as a result of violations of the Act). See, e.g., Model Code §§ 506.01; 506.05; 510.01(1); 502.03; 502.04; 504.06; 506.04(1); 506.06(2) and 506.08.

(2) The COGEL Model Code does not address whether an ethics commission should have the exclusive jurisdiction to interpret and make findings and recommendations under the relevant ethics and campaign financing laws.

Note: The COGEL Model Code is informed by flexibility: it contemplates that ethics boards be granted maximum discretion to resolve matters or complaints filed with it or of which it becomes aware. For example, a commission may enter into a settlement agreement with an official or employee under investigation (§ 506.10), or may "[s]ecure voluntary compliance with the provisions of this Act through informal means of persuasion and conciliation." § 511.01(3), or may waive further proceedings, even after a finding of probable cause, because of the subject's rehabilitative actions. § 506.04(3). As can our Board, ethics commissions contemplated by the Model Code have authority to initiate their own investigations. § 510.01(1). Particularly in this respect, the Model Code creates the proper "check and balance" during the important process in which an ethics commission deliberates whether to initiate its own investigation: the Code section clearly provides that: (i) the commission must make a decision; and (ii) that decision requires a vote of a majority of commission members before an investigation can be commenced. In this juridical manner, an ethics commission, which is in the best position to judge whether an investigation should be undertaken, ensures that no other agency (including its own staff) may initiate an ethics investigation (or make findings thereon) *sua sponte* — the ethics commission constitutes the initial and sole arbiter to begin investigations (as well as adjudicate them, see § 511.01(5)). Moreover, the Board may waive further proceedings, even after a finding of probable cause, because of the subject's rehabilitative actions. Model Code §§ 506.04(3).

(3) The respondent to a complaint and/or the subject of a Board investigation is entitled to the full

array of due process rights at all phases of the investigation, adjudication and enforcement phases: right to prompt notice of a complaint and applicable law, right to both a probable cause and final (on the merits) hearing, right to be represented by counsel at the hearing, and appeal to the local court. Model Code §§ 504.04; 506.05(3), (4) and (6); 506.06(1); 506.07; 511.01(5).

X. Cityethics.org Model Code

(1) This Model Code (2006) similarly contemplates that a City ethics commission have the authority to investigate sworn complaints containing allegations that, if true, would constitute one or more violations of the ethics or campaign financing laws by any employee or official subject to those laws, as well as initiate such complaints and investigations. Other complaints must be dismissed (the Code is silent on whether such complaints can or must be referred). In the comment to § 213(1), the drafters state that “there is an argument for the allowance of complaints made via a hotline, even for anonymous complaints, so long as they are investigated by the ethics commission and then brought in the form of an ethics commission complaint.”

(2) Similarly, this Model Code does not directly address whether ethics commissions have the sole authority to investigate—or more importantly—adjudicate ethics complaints. Nonetheless, given the equally wide range of authority that this Code would grant to an ethics commission to resolve matters (settlement agreements, full hearings, allowing the subject to perform corrective action with a reprimand, e.g.), and the fact that this Code explicitly states that a finding of a violation “requires the affirmative vote of three members of the Ethics Commission that there is clear and convincing evidence that the respondent has violated this code,” it seems a quite reasonable inference that the authority to adjudicate investigations into whether a person violated the ethics or campaign financing law can be made only by the commission, not by another investigative agency. §215.

(3) This Model Code provides for the full array of due process rights: within 7 days, the commission sends notification of the complaint to the respondent (with a copy of the complaint, which our GEO does not require); a public hearing to determine whether the law was violated after a determination of probable cause, at which hearing the respondent may be represented by counsel, examine and cross-examine witnesses, and last, judicial review of commission determinations. §§ 214; 216.

CONCLUSION. The Board believes that considered analysis of the points and recommendations that it has made in this Memorandum is critical. “Make haste slowly.” This is precisely the time to examine the Board’s research and recommendations—before the City takes precipitate action which might jeopardize its ability to administer its laws and policies in accordance with the principles of due process and in conformance with accepted practices throughout the nation. The Board trusts that its recommendations, which are based not only on its research but also on 24 years of careful, juridical application of the City’s Governmental Ethics and Campaign Financing Ordinances, will be taken in the collaborative spirit in which they are offered. In light of what Former U.S. Attorney Tom Sullivan called the “special character of the Ethics Ordinance,” we believe it critical that the City integrally utilize this Board with regard to investigations carried out by the IGO that might involve

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issues under the two Ordinances that the Board is charged by law with administering, interpreting and enforcing.

Respectfully submitted,

The Board of Ethics