CITY OF OAKLAND
Public Ethics Commission
Jonathan Stanley, *Chair*
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Daniel D. Purnell, Executive Director

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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: March 1, 2010

RE: A Staff Report And Action To Be Taken Regarding Proposed Amendments To O.M.C. Chapter 2.24 (Powers And Duties Of The Public Ethics Commission)

At its meeting of February 1, 2010, the Commission directed staff to address a number of additional concerns with the redline draft of proposed amendments to the Commission's "enabling ordinance", O.M.C. Chapter 2.24. ***Attachment 1.*** This memorandum addresses those concerns.

A. Proposed Section 2.24.010(B) -- "Doing Business With An Oakland Agency"

The Commission previously proposed an amendment that would add the following definition to the enabling ordinance:

> *B. "Doing business with an Oakland Agency" shall mean soliciting, bidding on, submitting proposals or qualifications for, or entering into or performing, a contract for goods, equipment, services or financial assistance with an Oakland Agency. "Doing business with an Oakland Agency" shall also mean the soliciting, applying for or receiving more than $500 in public funds from an Oakland Agency."*

The above definition is applicable to previously proposed Section 2.24.050(D), which reads:

> *D. During his or her tenure, no member of the Commission shall have a substantial financial interest in any work, business, property or official action of an Oakland agency. For purposes of this section, a substantial financial interest includes, but is not limited to, the following situations: 1) the member has a controlling ownership interest in a business entity* ***doing business with an***

***Oakland agency**; or 2) the member serves as a director, officer, general partner, or trustee of any business entity **doing business with an Oakland agency**. In determining whether a substantial financial interest exists, the Commission shall be guided by the laws, opinions and advice pertaining to financial conflicts of interest pursuant to the California Political Reform Act.*

At the meeting of February 1, 2010, a question arose whether there should be a time period within which the solicitation, application or receipt of more than $500 in public funds from an Oakland agency would apply. There was general consensus by Commission members that the time period should be for one year. Commission staff proposes therefore that the following language be adopted:

*B. "Doing business with an Oakland Agency" shall mean soliciting, bidding on, submitting proposals or qualifications for, or entering into or performing, a contract for goods, equipment, services or financial assistance with an Oakland Agency. "Doing business with an Oakland Agency" shall also mean the soliciting, applying for or receiving more than $500 in public funds from an Oakland Agency **within a consecutive twelve-month period."***

B. Proposed Section 2.24.040(E) And (G) -- Length Of Commissioner Terms

The Commission previously proposed changes to existing language and proposed additional language pertaining to the length and number of Commissioner terms:

E. Members of the Commission shall be appointed to overlapping terms beginning on January 22 and ending on January 21. Each Commission term of office shall be three (3) years. The tenure of a member on the Commission shall terminate when the member's term expires or upon resignation.[1]
and

G. There shall be no limit on the number of terms a person may serve on the Commission provided that any term be separated by a period of at least one year from the last date of service on the Commission. No person removed from the Commission pursuant to Sections 2.24.040(H) or 2.24.040(I) shall be eligible to serve on the Commission after his or her removal.

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Deleted: *terms, to commence upon date of appointment, except that an appointment to fill a vacancy shall be for the unexpired term only. Members of*

Deleted: *serve for a term of three (3) years, except that for terms*

Deleted: *commencing immediately preceding adoption of this Ordinance, two (2) members shall be appointed for a one year term, two (2) members shall be appointed for a two year term, and three (3) members shall be appointed for a three year term. No member may serve more than one consecutive three year term. ¶*

A question arose whether Commissioner terms should be greater than three years and whether Commissioners should be entitled to serve more than one term. These questions were the subject of much debate and discussion by members of the Commission's Task Force On Commission Authority And Organization and previous Commission members. Upon its formation, Commission staff provided the Task Force with an informational survey of comparable "ethics commissions" that included

[1] This sentence also should provide that tenure on the Commission terminates upon "removal" as well: *"The tenure of a member on the Commission shall terminate when the member's term expires or upon resignation or removal."*

information on the length and number of allowable terms. ***Attachment 2.*** The Task Force ultimately recommended that the Commission retain the current three-year term and focus on educating Commission members on Commission laws and procedures. ***Attachment 3.*** The 2007 Commission modified the Task Force recommendation to provide for a four-year term with no opportunity for re-appointment unless a Commissioner's initial appointment was to fill an unexpired term with fewer than two years remaining on the term. The 2008 Commission subsequently modified that proposal to the currently proposed language of a three-year term with the opportunity for re-appointment as long as service on the commission is separated by a period of at least one year.

The debate over the length and number of terms involves compelling yet sometimes conflicting interests. Arguments in favor of longer terms and/or with an opportunity for reappointment tend to emphasize the value of Commissioner experience and "institutional memory." Arguments in favor of shorter terms emphasize the benefits of new and varied opportunities for service on the Commission, with the goal of expanding the Commission's diversity of membership and of ideas. The current proposal (multiple three-year terms separated by at least a one-year period) was an attempt to reconcile those respective objectives. Given its long history and extensive prior debate, the Commission is encouraged to weigh the relative merits of whether to "re-open" this issue.

C. Proposed Section 2.24.050(B) -- Commissioner Qualifications And Restrictions

The Commission proposed changes to existing language and proposed additional language pertaining to Commissioner qualifications and restrictions:

2.24.050 QUALIFICATIONS AND RESTRICTIONS

A. Each member of the Commission shall be an individual whose domicile is located within the City of Oakland.

B. During his or her tenure, no member of the Commission shall:

1. Be employed by an Oakland Agency, or hold or seek election to public office;

2. Receive income otherwise reportable on a Statement of Economic Interests from an Oakland Agency, from a local governmental lobbyist, from an elected or appointed official of an Oakland Agency, or from a candidate for election to an Oakland office;

3. Publicly endorse, support, oppose, or campaign for or against, including making a contribution or an expenditure supporting or opposing: (a) any Oakland official seeking election or appointment to

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Deleted: *B. Seek election to any other public office, or participate in or contribute to an Oakland municipal campaign.*

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public office, (b) any candidate for election to an Oakland office, or (c) an Oakland ballot measure;

4. accept a gift from an Oakland elected or appointed official of any Oakland agency, from a candidate for election to any Oakland office, from a designated employee of any Oakland agency, or from a local governmental lobbyist. As used in this subsection, "gift" shall have the same meaning, and be subject to the same exceptions, as provided in the California Political Reform Act and the regulations adopted thereto, as amended. For purposes of illustration, exceptions to the definition of "gift" include, but are not limited to, informational materials, returned, donated or reimbursed gifts, gifts from family members, any devise or inheritance, personalized plaques or trophies, tickets to certain non-profit fundraisers, gifts of home hospitality, certain holiday or birthday presents, and certain intra-state travel payments. Payments or benefits which the California Political Reform Act and the regulations adopted thereto define as a "gift" but which are not subject to the annual gift limitation shall not constitute a gift for purposes of this subsection.

C. During his or her tenure and for one year thereafter no member of the Commission shall act as a local governmental lobbyist.

D. During his or her tenure, no member of the Commission shall have a substantial financial interest in any work, business, property or official action of an Oakland agency. For purposes of this section, a substantial financial interest includes, but is not limited to, the following situations: 1) the member has a controlling ownership interest in a business entity doing business with an Oakland agency; or 2) the member serves as a director, officer, general partner, or trustee of any business entity doing business with an Oakland agency. In determining whether a substantial financial interest exists, the Commission shall be guided by the laws, opinions and advice pertaining to financial conflicts of interest pursuant to the California Political Reform Act.

E. The provisions of subsection 2.24.050(B)(2) and 2.24.050(B)(4) shall only apply to those Commissioners appointed after the effective date of this section.

A question arose whether some of the qualifications and restrictions contained in Section 2.24.050 could be addressed not as a matter affecting a person's ongoing qualifications to serve on the Commission (for which a violation could potentially result in a person's resignation or removal), but addressed as a matter of ***recusal*** (such that a Commissioner would not be permitted to participate in a decision affecting one or more of the specified restrictions or interests.)

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In reviewing the set of qualifications and restrictions contained in proposed Section 2.25.050, Commission staff suggests that the Commission decide which of the restrictions should be fundamental to a Commissioner's qualifications to serve on the Commission, and which of the restrictions can be addressed by way of recusal. For example, an argument can be made that issues of a Commissioner's domicile [Section 2.24.050(A)]; employment by an Oakland agency or election to public office [Section 2.24.050(B)(1)]; and work as a regulated local governmental lobbyist [Section 2.24.050(C)]; should be matters that determine whether a person is fit to serve as a Commissioner. The remaining restrictions -- The receipt of income from a lobbyist, an elected or appointed official or candidate [Section 2.24.050(B)(2)]; endorsing, contributing to or expending money for or against an Oakland ballot measure [Section 2.24.050(B)(3)]; accepting a gift from a lobbyist, official, candidate or designated employee [2.24.050(B)(4)]; and having a "substantial financial interest" in the work, business, property or official action of an Oakland agency [2.24.050(D)]; can be made matters addressed by a timely recusal when and if a decision presents itself regarding those interests.

For discussion purposes only, the following language demonstrates how the above distinctions could be approached:

Section 2.24.050 Qualifications And Restrictions

A. During his or her tenure, each member of the Commission:

1. shall be an individual whose domicile is located within the City of Oakland;
2. shall not be employed by an Oakland Agency, or hold or seek election to public office; and
3. shall not act as a local governmental lobbyist.

B. During his or her tenure, no member of the Commission shall make, participate in making, or influence a Commission decision that directly involves:

1. an Oakland Agency, an elected or appointed official of an Oakland Agency, a local governmental lobbyist, or a candidate for election to an Oakland office, that or who is (a) the source of income to a Commissioner, or (b) the source of a gift to a Commissioner, in an amount that would require the Commissioner to report such income or gift on a Statement of Economic Interest; or

2. any Oakland official seeking election or appointment to public office, any candidate for election to an Oakland office, or any Oakland ballot measure, in or for which the Commissioner publicly endorsed, supported, opposed or campaigned for or against such an Oakland official, candidate or Oakland ballot measure; or

3. any work, business, property or official action of an Oakland Agency in which the Commissioner has a substantial financial interest. For purposes of this subsection, a substantial financial interest includes, but is not limited to, the following situations: (a) the Commissioner has a controlling ownership interest in a business entity doing business with an Oakland Agency; or (b) the member serves as a director, officer, general partner, or trustee of any business entity doing business with an Oakland Agency.

As used in this subsection, "gift" shall have the same meaning , and be subject to the same exceptions, as provided in the California Political Reform Act and the regulations adopted thereto, as amended. {Cite examples of exceptions.} Payments or benefits which the California Political Reform Act and the regulations adopted thereto define as a "gift" but which are not subject to the annual gift limitation shall not constitute a "gift" for purposes of this subsection.

C. For purposes of 2.24.050(B), a Commissioner shall, at any noticed public meeting of the Commission, state the nature of any interest or action specified in subsection 2.24.050(B) that prohibits him or her from making, participate in making, or from attempting to influence a Commission decision. Such Commissioner shall leave the room until the Commission has completed its consideration of the Commission decision in question.

D. In determining whether a Commissioner shall be prohibited from making, participate in making or attempting to influence the making of a Commission decision, the Commissioner shall be guided by the laws, opinions and advice pertaining to financial conflicts of interest pursuant to the California Political Reform Act.

D. Proposed Section 2.24.040(I) -- Removal Of Commission-Appointed Members

The Commission previously proposed the following amendment to existing language:

I. A member appointed by the Commission may be removed by the affirmative vote of at least four (4) members of the Commission. No member of the Commission shall be removed except for one or more of the following reasons as determined by the Commission: 1) conviction of a felony, 2) willful or corrupt misconduct in office, 3) inability or unwillingness to perform the duties of office, 4) absence from three (3) regular meetings during a twelve month period unless because of illness or when excused by the Commission chairperson, or 5) failure to abide by the qualifications and restrictions set forth in Section 2.24.050.

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A question was raised whether the above language should clarify that 1) any removal is subject to the Commission's discretion, and 2) any removal due to the *"failure to abide by*

the qualifications and restrictions set forth in Section 2.24.050" require a showing of intent or willingness not to comply. The first concern can be addressed simply by striking the word "shall" and inserting the word "may" in the second sentence. Addressing the second concern is largely dependent on whether the Commission conceptually approves of the approach suggested in Section C, above. If so, subsection (5) can be amended to read: "failure to abide by the provisions of Section 2.24.050(A)" [as proposed above]. Since Section 2.24.050(A) lists the matters that would be fundamental to a person's qualifications to serve on the Commission, it does not necessarily require a showing of intent or willingness not to comply.

Commission staff recommends that the Commission provide staff with specific direction how it would like to proceed with the above issues so that staff can produce a final version for adoption at the April, 2010, meeting.

Respectfully submitted,

Daniel D. Purnell
Executive Director

ORDINANCE AMENDING CHAPTER 2.24 OF THE OAKLAND MUNICIPAL CODE PERTAINING TO THE FUNCTIONS, DUTIES, AUTHORITY, AND COMPOSITION OF THE PUBLIC ETHICS COMMISSION

WHEREAS, City Charter Section 202(5) provides that the City Council shall "by ordinance" prescribe the function, duties, powers, jurisdiction and the terms of office for the Public Ethics Commission; and

WHEREAS, the amendments set forth below will achieve greater consistency with the provisions of City Charter Section 202 and further clarify and articulate the functions and duties of the Public Ethics Commission; now, therefore

THE COUNCIL OF THE CITY OF OAKLAND DOES ORDAIN AS FOLLOWS:

SECTION 1. The City Council finds and determines the foregoing recitals to be true and correct and hereby adopts and incorporates them into this Ordinance.

SECTION 2. The Municipal Code is hereby amended to add, delete, or modify sections as set forth below (section numbers and titles are indicated in **bold type**; additions are indicated by underscoring and deletions are indicated by ~~strike-through type~~; portions of the regulations not cited or not shown in underscoring or strike-through type are not changed.

SECTION 3. Chapter 2.24 of the Oakland Municipal Code is hereby amended to read as follows:

2.24.010 DEFINITIONS

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For purposes of this chapter, the following definitions shall apply:

A. "Commission" shall mean the Oakland Public Ethics Commission as established pursuant to Oakland City Charter Section 202.

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B. "Doing business with an Oakland Agency" shall mean soliciting, bidding on, submitting proposals or qualifications for, or entering into or performing, a contract for goods, equipment, services or financial assistance with an Oakland Agency. "Doing business with an Oakland Agency" shall also mean the soliciting, applying for or receiving more than $500 in public funds from an Oakland Agency."

C. "Governmental ethics laws" shall mean local laws governing campaign finance and communications, public financing of campaigns, lobbyist registration, public meetings and records, elections, conflicts of interest, disclosure of economic interests, use of public resources, incompatible office holding and employment, nepotism and ethical behavior.

D. "Oakland Agencies" shall mean the City of Oakland, Oakland Redevelopment Agency, Port of Oakland, and the Oakland Unified School District.

2.24.020 FUNCTIONS AND DUTIES

It shall be the function and duty of the Public Ethics Commission, for and on behalf of Oakland Agencies, residents of the City of Oakland and its elected officials, officers, employees, boards and commissions to:

A. Monitor, administer and enforce governmental ethics laws as authorized to the Commission by ordinance.

B. Review and make recommendations to the City Council regarding governmental ethics laws and to report periodically to the City Council concerning the application and effectiveness of governmental ethics laws.

C. Set salary for the office of City Councilmember pursuant to Oakland City Charter Section 202 and advise the City Council regarding issues pertaining to City Council salaries.

D. Provide the City Administrator with an assessment of the Commission's staffing and budgetary needs.

E. Issue opinions, advice and instruction, in consultation with the City Attorney when necessary, regarding governmental ethics laws as authorized to the Commission by ordinance.

F. Prescribe forms, reports, statements, notices, and other documents related to governmental ethics laws as authorized to the Commission by ordinance.

G. Develop informational resources and training programs pertaining to governmental ethics laws.

H. Solicit, promote and receive public comment on governmental ethics laws.

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¶
B. Oversee compliance with the City of Oakland Code of Ethics.¶
¶
C. Oversee compliance with Conflict of Interest regulations as they pertain to City of Oakland elected officials, officers, employees, and members of boards and commissions.¶
¶
D. Oversee the registration of lobbyists in the City of Oakland should the City Council adopt legislation requiring the registration of lobbyists.

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I. Perform such other functions and duties as may be prescribed by ordinance consistent with Commission responsibilities under the City Charter.

In prescribing the above duties and functions of the Commission, it is not the intent of the City Council to duplicate or overlap the functions, duties, or responsibilities heretofore or hereafter assigned to any other City board or commission or to a City department. As to such functions or responsibilities of another board or commission or of a department of the City, the Commission will render assistance and advice to such board, commission or department as may be necessary. Nothing in this section shall be construed to prevent City of Oakland officers, employees, and elected or appointed officials from seeking advice directly from the City Attorney, or, when appropriate, the Fair Political Practices Commission, concerning governmental ethics laws.

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Deleted: Campaign Reform Ordinance.

Deleted: regulations and ordinances related to campaign financing, conflicts of interest, lobbying, and public ethics.

2.24.030 AUTHORITY

In furtherance of the above enumerated duties and functions, the Oakland Public Ethics Commission is hereby authorized to:

A. Initiate and conduct investigations, audits and public hearings.

B. Issue subpoenas to compel the production of books, papers and documents and take testimony on any matter pending before the Commission. The Commission may find a person in contempt as provided by the general law of the State for failure or refusal to appear, testify, or to produce required books, papers and documents.

C. Determine the merits of complaints alleging violations and impose penalties, fines and other remedies as authorized to the Commission by ordinance. The Commission's decision to impose penalties, fines or other remedies for violation of any regulation or ordinance over which the Commission has authority shall be final. Parties cannot appeal to the City Council. A party may seek judicial review of a final decision of the Commission pursuant to California Code of Civil Procedure Section 1094.5 within the time frames set forth therein.

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D. Issue letters of guidance or concern to Oakland Agencies, their officials, officers, candidates for elected office, employees, local bodies and any other persons regarding an alleged violation of a governmental ethics law that the Commission is authorized to enforce where it appears, after an investigation, that there is an issue sufficient to justify a formal evidentiary hearing but the Commission chooses not to proceed with a hearing.

E. Issue written opinions and written advice with respect to a person's duties under governmental ethics laws that the Commission is authorized to enforce so long as the procedures for issuing such opinions and advice have been approved pursuant to Section 2.24.070. No person who relies in good faith upon a written opinion issued by the Commission shall be subject to enforcement proceedings by the Commission provided that the material facts are as stated in the opinion request. The good faith reliance upon

written advice from Commission staff shall be a complete defense in enforcement proceedings by the Commission provided that the material facts are as stated in the advice request.

2.24.040 COMPOSITION, TERMS OF OFFICE

A. The Oakland Public Ethics Commission shall have seven (7) members.

B. Members of the Commission shall be appointed as follows: Three (3) members who represent local civic organizations with a demonstrated history of involvement in local governance issues shall be nominated for appointment by the Mayor, with confirmation by the City Council, pursuant to Section 601 of the City Charter. Four (4) members shall be appointed, following a public recruitment and application process, by the affirmative vote of at least four (4) members of the Commission. Commission-appointed members shall reflect the interests and diversity of the greater Oakland neighborhood and business communities. Commissioners shall serve without compensation.

C. Prior to the nomination of a Commission member by the Mayor, each member of the City Council may provide the Mayor with a list of up to three individuals qualified to serve on the Commission. In appointing members to the Commission, the Mayor may consider the recommendations of the City Council.

D. Four (4) members shall constitute a quorum of the Commission.

E. Members of the Commission shall be appointed to overlapping terms beginning on January 22 and ending on January 21. Each Commission term of office shall be three (3) years. The tenure of a member on the Commission shall terminate when the member's term expires or upon resignation.

F. A vacancy on the Commission will exist whenever a member dies, resigns, or is removed. For vacancies caused by the normal expiration of a Mayoral appointee's term, the Mayor shall submit his or her nomination to the City Council no later than 30 days before the end of the term. For vacancies caused by a Mayoral appointee's death, resignation or removal from office, the Mayor shall submit his or her nomination to the City Council within 60 days after the death, resignation or removal from office.

G. There shall be no limit on the number of terms a person may serve on the Commission provided that any term be separated by a period of at least one year from the last date of service on the Commission. No person removed from the Commission pursuant to Sections 2.24.040(H) or 2.24.040(I) shall be eligible to serve on the Commission after his or her removal.

H. A member appointed by the Mayor may be removed pursuant to Section 601 of the Oakland City Charter.

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Deleted: such vacancy occurs. Any member of the City Council who chooses to recommend a person or persons to fill a vacancy of a position appointed by the Mayor and confirmed by the City Council pursuant to section 4(a) shall forward such recommendation to the Mayor for consideration no later than thirty days from the date that a vacancy occurs.

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I. A member appointed by the Commission may be removed by the affirmative vote of at least four (4) members of the Commission. No member of the Commission shall be removed except for one or more of the following reasons as determined by the Commission: 1) conviction of a felony, 2) willful or corrupt misconduct in office, 3) inability or unwillingness to perform the duties of office, 4) absence from three (3) regular meetings during a twelve month period unless because of illness or when excused by the Commission chairperson, or 5) failure to abide by the qualifications and restrictions set forth in Section 2.24.050.

2.24.050 QUALIFICATIONS AND RESTRICTIONS

A. Each member of the Commission shall be an individual whose domicile is located within the City of Oakland.

B. During his or her tenure no member of the Commission shall:

1. Be employed by an Oakland Agency, or hold or seek election to public office;

2. Receive income otherwise reportable on a Statement of Economic Interests from an Oakland Agency, from a local governmental lobbyist, from an elected or appointed official of an Oakland Agency, or from a candidate for election to an Oakland office;

3. Publicly endorse, support, oppose, or campaign for or against, including making a contribution or an expenditure supporting or opposing: (a) any Oakland official seeking election or appointment to public office, (b) any candidate for election to an Oakland office, or (c) an Oakland ballot measure;

4. accept a gift from an Oakland elected or appointed official of any Oakland agency, from a candidate for election to any Oakland office, from a designated employee of any Oakland agency, or from a local governmental lobbyist. As used in this subsection, "gift" shall have the same meaning, and be subject to the same exceptions, as provided in the California Political Reform Act and the regulations adopted thereto, as amended. For purposes of illustration, exceptions to the definition of "gift" include, but are not limited to, informational materials, returned, donated or reimbursed gifts, gifts from family members, any devise or inheritance, personalized plaques or trophies, tickets to certain non-profit fundraisers, gifts of home hospitality, certain holiday or birthday presents, and certain intra-state travel payments. Payments or benefits which the California Political Reform Act and the regulations adopted thereto

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define as a "gift" but which are not subject to the annual gift limitation shall not constitute a gift for purposes of this subsection.

C. During his or her tenure and for one year thereafter no member of the Commission shall act as a local governmental lobbyist.

D. During his or her tenure, no member of the Commission shall have a substantial financial interest in any work, business, property or official action of an Oakland agency. For purposes of this section, a substantial financial interest includes, but is not limited to, the following situations: 1) the member has a controlling ownership interest in a business entity doing business with an Oakland agency; or 2) the member serves as a director, officer, general partner, or trustee of any business entity doing business with an Oakland agency. In determining whether a substantial financial interest exists, the Commission shall be guided by the laws, opinions and advice pertaining to financial conflicts of interest pursuant to the California Political Reform Act.

E. The provisions of subsection 2.24.050(B)(2) and 2.24.050(B)(4) shall only apply to those Commissioners appointed after the effective date of this section.

2.24.060 ELECTION OF CHAIRPERSON AND MEETINGS

At the first regular meeting of each year the members shall elect a chairperson and a vice chairperson. The Commission shall hold regular meetings at an established time and place suitable for its purpose. Other meetings scheduled for a time or place other than for regular meetings shall be designated as special meetings. Written notice of special meetings shall be provided the members, the Council, and the public press at least seventy-two hours before the meeting is scheduled to convene.

2.24.070 RULES, REGULATIONS AND PROCEDURES

The Commission shall establish rules, regulations and procedures for the conduct of its business by a majority vote of the members present. The Commission must vote to adopt any motion or resolution. The Commission shall transmit to the City Council any rules, regulations and procedures adopted by the Commission within seven calendar days of adoption. A rule, regulation or procedure adopted by the Commission shall become effective 60 days after the date of adoption by the Commission unless before the expiration of this 60 day period two-thirds of all the members of the City Council vote to veto the rule, regulation or procedure.

2.24.080 STAFF ASSISTANCE

The Office of the City Administrator shall provide the Commission with staff and financial assistance to permit the Commission to fulfill the functions and duties as set forth above including, but not limited to, staffing and funding the positions of Executive Director, an Executive Assistant, and additional personnel as circumstances require. The Executive Director shall be a classified position subject to the civil service rules of the City of

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Oakland however the City Administrator, or his or her designee, should use his or her best efforts to consult with the Commission prior to the hiring or termination of the Executive Director.

2.24.090 LEGAL ASSISTANCE

The City Attorney is the Commission's legal advisor. The City Attorney shall provide the Commission with legal assistance in conformity with the California Rules of Professional Responsibility and applicable state law. In the event of a conflict, the City Attorney, after consultation with the Commission, shall retain outside counsel.

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2.24.100 PROTECTION AGAINST RETALIATION

A. No officer or employee of the City shall use or threaten to use any official authority or influence to effect any action as a reprisal against a City officer or employee for acting in good faith to report or otherwise bring to the attention of the Commission or other appropriate agency, office or department, information regarding the violation of any regulation or ordinance over which the Commission has authority.

B. No officer or employee of the City shall use or threaten to use any official authority or influence to discourage, restrain or interfere with any other person for the purpose of preventing such person from acting in good faith to report or otherwise bring to the attention of the Commission or other appropriate agency, office or department, information regarding the violation of any regulation or ordinance over which the Commission has authority.

2.24.110 SEVERABILITY

The provisions of this ordinance are severable. If any word, clause, sentence, paragraph, provision, or part of this ordinance, or the application of this ordinance to any person, is declared invalid, preempted or unconstitutional by any court, the court's ruling shall not impair or invalidate any other portion of this ordinance. The City Council finds and declares that it would have adopted this ordinance without the invalid, preempted or unconstitutional word, clause, sentence or provision.

CITY OF OAKLAND
Public Ethics Commission
Caryn Bortnick, *Chair*
Sukey Wilder, *Vice-Chair*
Ralph Kanz
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TO: Public Ethics Commission
FROM: Advisory Task Force On Commission Authority And Organization
DATE: June 5, 2006

I. BACKGROUND

In November, 2005, the Commission formed an Advisory Task Force On Commission Authority And Organization ("Task Force"). The Commission requested the Task Force to review issues related to Commission authority and organization, and to make recommendations for any legislative or administrative change that would improve the Commission's effectiveness.

The Task Force met five times between February and April, 2006. The following individuals kindly devoted their time and talent to serve on the Task Force: Caryn Bortnick (Chair), Curtis Below (Commission alternate), Greg Chan, Judy Cox, Harold Jones, Maziar Movassaghi, Victor Ochoa and David Stein.

The following report contains the specific recommendations from the Task Force:

II. TASK FORCE RECOMMENDATIONS

A. Commission Composition And Method Of Appointment

Current status: The Commission has a total of seven members. Each member serves one, three-year term. Three Commission seats are appointed by the Mayor and confirmed by the City Council. Four Commission seats are appointed by the Commission without City Council or Mayoral confirmation. Terms are staggered, meaning that two members (one mayoral and one Commission-selected) are retired and two new

members are added every January. The staggered terms are intended to provide the Commission with continuity and experience. [Charter §202(b)]

- **Recommendation: Retain Commission membership at 7 seats**

  The Task Force considered whether the number of Commission seats should be reduced to promote greater efficiency, or increased to promote greater public participation. The Task Force concluded that there was little evidence that a seven-member board created problems obtaining a quorum or performing its duties.

- **Recommendation: 1) Retain three-year Commission terms; 2) Improve Commissioner training and recruitment**

  The Task Force considered arguments that the current three-year term does not provide enough time to learn about the Commission and the laws over which it has authority. Discussions focused on whether longer terms would place greater demands on Commission members, and whether training might provide a more effective solution towards improving Commissioner knowledge and experience. The Task Force also recommends that the Commission emphasize recruiting people with pre-existing knowledge and skills appropriate for membership on the Commission.

- **Recommendation: Retain current appointment process**

  There was little argument or support in favor of changing the current process for appointing Commissioners. The Task Force concluded that the current law providing three Mayoral appointments and four Commission appointments strikes an appropriate balance of City oversight and Commission independence.

B. Commissioner Qualifications

Current status: The Commission has only two qualifications for appointment: The member must be an Oakland resident and must "reflect the interest of the greater Oakland neighborhood and business communities." [Charter §202(b)]

- **Recommendation: Retain existing membership qualifications**

  The Task Force expressed no need to change the existing requirements of Oakland residency and that Commissioners reflect the "interest of the greater Oakland neighborhood and business communities." Again, the Committee expressed its belief that a greater emphasis on Commissioner training and recruitment would

likely be a more effective way to produce qualified and knowledgeable Commission members.

C. Restriction On Commissioner Activities

Current status: Oakland Commissioners are prohibited during their terms, and for one year thereafter, from: 1) having employment with the City or having any "direct and substantial financial interest" in any work, business or official action by the City; 2) seeking election to any other public office or participating in or contributing to an Oakland campaign; and 3) endorsing, supporting, opposing or working on behalf of any campaign or measure in an Oakland election. [O.M.C. §2.24.050]

- **Recommendation: 1) Amend the Commission's enabling ordinance to use the terminology and minimum thresholds within the Political Reform Act to establish the extent of financial interests that a Commissioner may have with the City and still remain eligible to serve on the Commission; and 2) Retain existing prohibition on seeking office and working on political campaigns while serving on the Commission and for one year thereafter.**

  There was complete agreement for Commissioners to be free from any taint of bias, real or perceived. However argument was made that restrictions on Commissioner activities reflect the practical realities of living and working in Oakland. Two main questions emerged: 1) whether Commissioners should be allowed to have some limited financial dealings with the City, and 2) whether Commissioners should be permitted to participate in campaigns relating to issues over which the Commission has or could have authority.

  The Task Force determined that the standards and thresholds governing financial conflicts of interest under the California Political Reform Act should govern the extent of financial interests that a Commissioner may have with the City and still remain eligible to serve on the Commission. This was determined to be consistent with the existing qualification that Commission members represent the "greater interests of the Oakland neighborhood and business communities."

  The Task Force also deliberated on whether the Commission should be permitted to have some educational or informational role in Oakland campaigns on issues or laws over which the Commission has (or would have) jurisdiction. The Task Force concluded that it would be too difficult to distinguish between "advocacy" and

"education" in the course of a campaign and therefore Commissioners should not be permitted to engage in either. The Task Force determined that the one-year restriction on financial dealings, seeking office and participating in local campaigns should remain.

D. Filling Vacancies

Current status: Vacancies on the Commission must be filled no sooner than thirty days and no later than sixty days from the date the vacancy occurs. [O.M.C. §2.24.040] For mayoral appointments, if the Mayor does not nominate a candidate to fill the vacancy within 90 days from the date the vacancy occurred, the City Council may fill the vacancy. [Charter §601]

- **Recommendation: Conform the enabling ordinance to the 90-day period for Mayoral appointments as provided in City Charter Section 601.**

  The Task Force noted the discrepancy between the Commission's enabling ordinance requiring Commission seats to be filled within 60 days of a vacancy and the City Charter providing the Mayor with 90 days to fill a vacancy or risk losing the power of appointment to the City Council. Most comments approved of a 90-day appointment period on grounds that Mayoral appointments are not crucial to the Commission to achieve and maintain a quorum.

E. Commission Relationship With Administrative Staff

Current status: The Commission is currently staffed by a full-time executive director and an administrative assistant. The Office of Personnel reports that the executive director is classified as a civil service position; the administrative assistant is classified as an at-will, non-civil service position. The executive director reports to the Office of the City Administrator. [O.M.C. §2.24.080]

- **Recommendation: Future candidates for the position of executive director should be solicited and screened by the City so that the Commission can select the executive director from a pool of qualified candidates; 2) the Commission should be consulted in the annual review of the executive director; 3) the executive director position continue to maintain civil service status; and 4) the administrative assistant position retain its "at-will" status.**
  There was general consensus that the executive director should operate as independently as possible from the City Administrator and Mayor, especially under the City's "strong mayor" system in which the

Mayor could potentially influence personnel decisions through the City Administrator. There was also general consensus to keep the executive director within the civil service system. The consensus was to recommend that the Commission have a role in hiring and reviewing the performance of the executive director and, at the same time, maintain civil service status for the position.

F. Commission Relationship With Legal Counsel

Current status: The Commission receives legal counsel from the Office of the City Attorney. In the event of a conflict, the City Attorney is required to obtain outside counsel. [O.M.C. §2.24.090] In the few cases in which the City Attorney has identified a conflict, outside counsel has been provided by the San Francisco City Attorney's Office pursuant to a reciprocal agreement between the two offices.

- **Recommendation: 1) Retain the Office of the City Attorney as legal counsel for the Commission; 2) Amend the enabling ordinance to provide that that the Commission shall select its own legal counsel in the event of a declared conflict by the City Attorney.**

  The Task Force considered whether the City Attorney's Office can provide the Commission with independent legal counsel given its duty to represent the City. The Task Force also discussed the "reciprocal agreement" with the San Francisco City Attorney's Office to provide counsel to the Commission in those instances when the Oakland City Attorney declares a conflict.

  A consensus emerged that the City Attorney's Office continue to provide legal counsel to the Commission. However, the Task Force specifically recommends that O.M.C. Section 2.24.090 be amended to read: "In the event of a conflict, the City Attorney shall retain outside counsel <u>selected by the Commission</u>." This amendment clarifies that the Commission, and not the City Attorney, shall select its legal counsel whenever matters are of such a nature that the City Attorney's Office cannot, by its own admission, effectively discharge its duty to represent the Commission.

G. Commission Duties And Authority

Current Status: City Charter Section 202(a) formally establishes the Commission and broadly sets forth the scope of its authority. City Charter Section 202(b) further provides that "the City shall by ordinance prescribe the function, duties, powers, jurisdiction and the terms of members of the Commission, in accordance with this Article." These so-called "functions,

duties, powers (and) jurisdiction" are specified in the Commission's so-called "implementing ordinance," O.M.C. Chapter 2.24, and in the various "policy" ordinances the City Council has adopted, such as OCRA, the Sunshine Ordinance, Lobbyist Registration Act, etc. Finally, City Charter Section 202(c) specifically authorizes the Commission to establish and adjust City Council salaries.

1. <u>Commission Authority Under City Charter Section 202(a)</u>

City Charter §202(a) formally establishes the Commission and provides that the Commission "shall be responsible for responding to issues with regard to compliance by the City of Oakland, its elected officials, officers, employees, boards and commissions with regard to compliance with city regulations and policies intended to assure fairness, openness, honesty and integrity to City government including, Oakland's Campaign Finance Reform Ordinance, conflict of interest code, code of ethics and any ordinance intended to supplement the Brown Act, and to make recommendations to the City Council on matters relating thereto."

2. <u>Specific Commission Duties Under City Charter Section 202(b) and O.M.C. Chapter 2.24</u>

Pursuant to City Charter Section 202(b), Section 2.24.020 of the Oakland Municipal Code specifically authorizes the Commission to perform the following duties:

a) to "oversee compliance" with OCRA, the City of Oakland Code of Ethics (exists only for the City Council), conflict of interest regulations, Lobbyist Registration Ordinance and the Sunshine Ordinance.

b) to "review all policies and programs which relate to elections and campaigns in Oakland" and to report back to the City Council on the impact of such policies and programs.

c) to "make recommendations to the City Council" regarding OCRA, Code of Ethics, conflict of interest code, the Lobbyist Registration and Sunshine Ordinances, and the imposition of fees and penalties for administering and enforcing local ordinances, and to report every other year to the City Council regarding the effectiveness of local ethics laws.

d) to "issue oral advice and formal written opinions in consultation with the City Attorney when necessary."

e) to develop forms, information and training programs.

O.M.C. Section 2.24.030 also authorizes the Commission to 1) conduct investigations, audits and public hearings, 2) issue subpoenas for persons and things, and 3) impose penalties and fines as provided by ordinance.

O.M.C. Section 2.24.070 authorizes the Commission to adopt "rules, regulations and procedures" for the conduct of its business. Such rules, regulations and procedures become effective 60 days after adoption unless vetoed by a 2/3 vote of the City Council.

3. <u>Specific Commission Authority Under Various "Policy" Ordinances</u>

Consistent with City Charter Section 202(b)(5) -- "the City shall by ordinance prescribe the function, duties, powers, jurisdiction...of the Commission" -- the City Council has adopted a number of policy ordinances which set forth Commission authority over particular subjects and persons. The policy ordinances which the City Council has authorized the Commission to administer and enforce are: The Oakland Campaign Reform Act (OCRA), the Oakland Sunshine Ordinance, The Limited Campaign Financing Act, the Lobbyist Registration Act, and the False Endorsement In Campaign Literature Act. Each ordinance specifically authorizes the Commission to exercise specific investigative, administrative and enforcement duties.

4. <u>Commission Authority To Adjust City Council Salaries Under Charter Section 202(c)</u>

City Charter §202(c) specifically authorizes the Commission to establish and adjust City Council salaries: "Beginning with Fiscal Year 2003-2004, the Public Ethics Commission shall annually adjust the salary for the office of Councilmember by the increase in the consumer price index over the preceding year. The Commission may adjust salaries beyond the increase in the consumer price index up to a total of five percent. Any portion of an increase in compensation for the office of Councilmember that would result in an overall increase for that year in excess of five percent must be approved by the voters."

- **Recommendation: The Commission should have the authority to place proposed local ethics laws directly before the voters upon a super-majority vote of the Commission.**

Among the powers the Task Force reviewed from other jurisdictions was the ability to place local ethics laws directly before the voters for approval.

Some members of the Task Force noted the difficulty in obtaining City Council approval for Commission recommendations. Members noted that the San Francisco Ethics Commission has had this authority since 1993 and has used it successfully to place a public campaign financing measure before the voters after the Board of Supervisors first rejected it.

Members considered several potential limitations and conditions on the proposed recommendation: 1) Any Commission decision to place a proposed measure before the voters require a super-majority vote [e.g., a 5/7 vote or higher]; 2) The City Council first be provided with an opportunity to adopt the proposed measure or place the proposed measure on the ballot; 3) Permit the Ethics Commission or its chairperson to draft and/or sign the formal ballot argument notwithstanding the current limitation on Commissioner campaign activities contained in O.M.C. Section 2.24.050; and 4) Any such delegation of authority to the Commission should specify the subject areas encompassed by the term "local ethics laws."

- **Recommendation: The Commission should have the authority to provide immunity or a defense from a Commission enforcement action for those persons who rely upon a previous Commission opinion or written staff advice.**

  Members of the Task Force reviewed provisions in other jurisdictions that permit other ethics commissions to provide immunity and/or a defense to persons who rely upon commission or staff advice. Members considered arguments that authorizing the Commission to provide immunity or a defense against Commission enforcement would encourage people with questions about their duties under local ethics laws to seek advice before taking action.

  A consensus emerged to recommend that the Commission be authorized to provide immunity or a defense against Commission enforcement actions pursuant to administrative procedures adopted by the Commission.

- **Recommendation: The Commission's should address issues of Commission jurisdiction and remedies within its implementing ordinance and specific policy ordinances.**

Task Force members noted that Charter Section 202(a) extends Commission authority over "the City of Oakland, its elected officials, officers, employees, boards and commissions." Members discussed whether this language was clear and certain enough to confer the Commission's authority over such entities as the School Board, Port of Oakland, local joint powers authorities (JPA's), and non-profit corporations. The Task Force also noted that Charter Section 202(b)(5) provides that the City shall prescribe the Commission's functions, duties, powers and jurisdiction "by ordinance."

Task Force members also noted comments from current and former Commissioners that the Commission occasionally lacks the authority to respond to complaints filed with the Commission. Commission staff advised Task Force members of past complaints in which the Commission was unable to enforce local Sunshine laws over such entities as the Oakland School Board, JPA's and some local non-profit corporations. Complaints alleging that contractors made impermissible contributions to City Council candidates while negotiating with the Port of Oakland have been dismissed because OCRA's prohibition extends only to contracts requiring approval by the City, Redevelopment Agency and School District, but not the Port. The Task Force also noted comments that the Commission often lacks an effective remedy for determined violations, particularly under the Sunshine Ordinance.

Rather than attempting to address broad issues of jurisdiction within the City Charter, the Task Force recommends that the Commission first inventory its existing policy ordinances to determine whether each ordinance extends the Commission's jurisdiction to those persons whose activities arguably should be regulated. The Task Force also recommends that the Commission determine whether the remedies provided in every policy ordinance are sufficient to respond effectively to a proven violation. Where deficiencies exist within the policy ordinances, the Commission should seek their amendment. Several Task Force members also commented that the Commission should not hesitate to use its status as a Charter-created commission to advise, educate and, when necessary, criticize persons or agencies for apparent violations even if legal jurisdiction and/or remedies are unavailable.

- **Recommendation: Retain the Commission's authority to set City Council salaries.**

  Members of the Task Force noted that the Commission is the only one of its kind to have the authority to adjust City Council salaries.

Some members expressed a belief that adjusting City Council salaries was not compatible with the Commission's other duties.

Task Force members concluded that the Commission should retain this duty in light of the recently approved Measure X, in which Oakland voters ratified the Commission's role in this area. Over the long term, several members contended that a separate "City Compensation Board" be established to adjust the salaries of all elected officials.

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E. Oversee compliance with any ordinance intended to supplement the Brown Act or Public Records Act.

F. Review all policies and programs which relate to elections and

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campaigns in Oakland, and report to the City Council regarding the

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impact of such policies and programs on City of Oakland elections and campaigns.

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amendments to the City of Oakland Code of Ethics, Campaign Reform Ordinance, Conflict of Interest Code, any ordinance intended to supplement the Brown Act or Public Records Act, and lobbyist registration requirements should the City

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Council adopt lobbyist registration legislation, and submit a formal report

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all local regulations and local ordinances related to campaign financing, conflict of interest, lobbying, the Brown Act, the Public Records Act, and public

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which shall be reviewed by the Commission ad adjusted as appropriate, in odd-numbered years. In 1997, the Commission shall first establish a base salary for the Office of Councilmember at a level which shall be the same or greater than that

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which is currently received. Thereafter, the Commission shall fix City Councilmember compensation at a level not to exceed ten percent (10%) above the base salary as adjusted.

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I. Each year, and within the time period for submission of such information for the timely completion of the City's annual budget, provide the City Council

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J. Make recommendations to the City Council regarding the imposition of fees to administer and enforce local ordinances and local regulations related to campaign financing, conflict of interest, registration of lobbyists, supplementation of the Brown Act and Public Records Act and public ethics.

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K. Make recommendations to the City Council regarding the adoption of additional penalty provisions for violation of local ordinances and local

regulations related to campaign financing, conflict of interest, registration of lobbyists, and public ethics.

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with respect to a person's duties pursuant to applicable campaign financing, conflict of interest, lobbying, and public

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campaign financing, conflict of interest, lobbying, and public ethics.

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N. Develop campaign financing, conflict of interest, lobbying, Brown Act, Public Records Act and public ethics informational and training programs, including but not limited to:

1) Seminars, when appropriate, to familiarize newly elected and appointed officers and employees, candidates for elective office and their campaign treasurers, lobbyists, and government officials, with city, state and federal laws related to campaign financing, conflicts of interest, the Public Records Act, the Brown Act, lobbying, and public ethics.

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2) Preparation and distribution of manuals to include summaries of ethics laws and reporting requirements applicable to city officers, members of boards and commissions, and city employees, methods of bookkeeping and records retention, instructions for completing required forms, questions and answers regarding common problems and situations, and information regarding sources of assistance in resolving questions. The manual shall be updated when necessary to reflect changes in applicable city, state and federal laws related to campaign financing, conflicts of interest, lobbying, and public ethics.