

1 [Campaign and Governmental Conduct Code - Expanding Scope of Whistleblower Protection
Ordinance]

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3 **Ordinance amending the Campaign and Governmental Conduct Code to broaden the**
4 **scope of whistleblower complaints, provide retaliation protections for City contractors,**
5 **increase the remedies available for whistleblowers who have suffered retaliation, and**
6 **establish greater confidentiality protections for whistleblowers' identities.**

7 NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
8 **Additions to Codes** are in *single-underline italics Times New Roman font*.
9 **Deletions to Codes** are in *strikethrough italics Times New Roman font*.
10 **Board amendment additions** are in double-underlined Arial font.
11 **Board amendment deletions** are in ~~strikethrough Arial font~~.
12 **Asterisks (* * * *)** indicate the omission of unchanged Code
13 subsections or parts of tables.

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12 Be it ordained by the People of the City and County of San Francisco:

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14 Section 1. The Campaign and Governmental Conduct Code is hereby amended by
15 adding and revising Sections 4.100, 4.105, 4.107, 4.115, 4.117, and 4.120, to read as follows:

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SEC. 4.100. FINDINGS.

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18 The City and County of San Francisco has a paramount interest in protecting the
19 integrity of its government institutions. To further this interest, individuals should be
20 encouraged to report ~~to the City's Ethics Commission, Controller, District Attorney, City Attorney~~
21 ~~and the complainant's department~~ possible violations of laws, regulations, and rules governing
22 the conduct of City officers and employees, City contractors, and employees of City contractors.

22

23 This Chapter sets forth the requirements for the City's Whistleblower Program and protects
24 all City officers and employees, City contractors, and employees of City contractors from
25 retaliation for reporting filing a complaint with, or providing information to, the Ethics Commission,
~~Controller, District Attorney, City Attorney or complainant's department about~~ improper government

1 activity by City officers and employees or unlawful activity by City contractors and their employees
2 in connection with a City contract.

3 This Chapter ensures that complaints that do not allege a violation of law over which
4 the Ethics Commission or Controller has jurisdiction are directed to the appropriate agency for
5 investigation and possible disciplinary or enforcement action.

6 Finally, this Chapter implements Charter Appendix Section F1.107. Section F1.107
7 directs the Controller, as City Services Auditor, to administer a whistleblower program and
8 investigate reports of complaints concerning the misuse of City funds, improper activities by
9 City officers and employees, deficiencies in the quality and delivery of government services,
10 and wasteful and inefficient City government practices.

11 **SEC. 4.105. COMPLAINTS OF IMPROPER GOVERNMENT ACTIVITY;**
12 **INVESTIGATION PROCEDURES; REFERRAL TO OTHER AGENCIES.**

13 (a) COMPLAINTS. Any person may file a complaint with the Ethics Commission,
14 Controller, District Attorney or City Attorney, or ~~a written complaint with~~ the complainant's
15 department alleging that a City officer or employee has engaged in improper government
16 activity, or that a City contractor or employee of a City contractor has engaged in unlawful activity in
17 connection with a City contract. ~~by: violating local campaign finance, lobbying, conflicts of interest or~~
18 ~~governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City~~
19 ~~resources; creating a specified and substantial danger to public health or safety by failing to perform~~
20 ~~duties required by the officer or employee's City position; or abusing his or her City position to~~
21 ~~advance a private interest.~~

22 (b) ETHICS COMMISSION COMPLAINT PROCEDURES. The Ethics Commission
23 shall investigate complaints filed under this Section that allege violations of local campaign
24 finance lobbying, conflicts of interest and governmental ethics laws pursuant to the
25 procedures specified in Charter Section C3.699-13 and the regulations adopted thereunder.

1 Nothing in this subsection shall preclude the Ethics Commission from referring any matter to
2 any other City department, commission, board, officer or employee or to other government
3 agencies for investigation and possible disciplinary or enforcement action. The Ethics
4 Commission may require that any City department, commission, board, officer or employee
5 report to the Ethics Commission on the referred matter.

6 (c) REFERRAL. The Ethics Commission shall refer complaints that do not allege a
7 violation of law, regulation or rule that is within the Ethics Commission's jurisdiction to the
8 appropriate agency for investigation and possible disciplinary or enforcement action. The
9 Commission may conduct preliminary investigations into such complaints to determine
10 whether the complaint contains sufficient information to warrant referral. The Ethics
11 Commission may require ~~that~~ any City department, ~~commission, board, officer or employee to~~
12 provide a written report regarding the department's investigation and any action that the department
13 has taken in response to the Ethics Commission's referral within a time-frame that the Ethics
14 Commission shall specify. ~~report to the Ethics Commission on the referred matter.~~

15 **SEC. 4.107. COMPLAINTS BY CITIZENS AND EMPLOYEES; WHISTLEBLOWER**
16 **PROGRAM.**

17 (a) WHISTLEBLOWER PROGRAM. The Controller shall administer and publicize a
18 whistleblower and citizen complaint program for citizens and employees to report the misuse
19 of City funds, improper activities by City officers and employees, deficiencies in the quality
20 and delivery of government services, and wasteful and inefficient City government practices.
21 Subject to subsection (b), ~~the~~ Controller shall investigate and otherwise attempt to resolve
22 complaints reported to the Whistleblower Program. The Controller shall administer a hotline
23 telephone number and website and publicize the hotline and website through press releases,
24 public advertising, and communications to City employees.

1 (b) REFERRAL OF CERTAIN COMPLAINTS. The Controller shall refer the following
2 complaints as set forth in this Section:

3 ~~(i)~~ (1) Those which another City agency is required by federal, state, or local law
4 to adjudicate: To that agency;

5 ~~(ii)~~ (2) Those which may be resolved through a grievance mechanism
6 established by collective bargaining agreement or contract: To the official or agency
7 designated in the agreement or contract;

8 ~~(iii)~~ (3) Those which involve allegations of conduct which may constitute a
9 violation of criminal law: To the District Attorney or other appropriate law enforcement
10 agency;

11 ~~(iv)~~ (4) Those which are subject to an existing, ongoing investigation by the
12 District Attorney, City Attorney, or Ethics Commission, where the applicable official or
13 Commission states in writing that investigation by the Controller would substantially impede or
14 delay his, her or its own investigation of the matter: To the investigating office; and

15 ~~(v)~~ (5) Those which allege conduct that may constitute a violation of local
16 campaign finance, lobbying, conflict of interest or governmental ethics laws, regulations or rules:
17 ~~to~~ the Ethics Commission and the City Attorney.

18 Where the conduct that is the subject of the complaint may violate criminal law
19 and any civil or administrative law, statute, ordinance or regulation, the Controller may take
20 action on the noncriminal aspects of the matter under this Section even if a referral has been
21 made to another agency under this Section.

22 If a complaint is referred under this Section, the Controller shall inform the
23 complainant of the appropriate procedure for the resolution of the complaint.

24 (c) TRACKING AND INVESTIGATION. The Controller shall receive, track, and
25 investigate complaints made or referred to the Whistleblower Program. The investigation may

1 include all steps that the Controller deems appropriate, including the review of the complaint
2 and any documentary or other evidence provided with it, the gathering of any other relevant
3 documents from any City department or other source, and interviews of the complainant and
4 other persons with relevant information.

5 (d) INFORMATION PROVIDED UNDER PENALTY OF PERJURY. In those instances
6 in which the Controller deems it appropriate, the Controller may require that persons making
7 complaints or providing information swear to the truth of their statements by taking an oath
8 administered by the Controller, or an agent of the Controller, or through written declarations
9 made under penalty of perjury under the laws of the State of California.

10 (e) REFERRAL AND RECOMMENDATION BY CONTROLLER. The Controller may
11 refer the complaint to a City department for investigation, either before conducting an initial
12 investigation or after doing so, and may recommend that a City department take specific
13 action based on the Controller's initial investigation. Within 60 days of receiving a complaint
14 for investigation or a recommendation by the Controller for specific action, or such other time
15 as the Controller shall specify, the City department shall report to the Controller in writing the
16 results of the department's investigation and any action that the department has taken in
17 response to a recommendation by the Controller that the department take specific action.

18 (f) REPORT BY DEPARTMENT AND FURTHER ACTION BY CONTROLLER. If the
19 Controller has recommended that a City department take disciplinary or other corrective
20 action that the department has declined to take, the department shall report to the Controller
21 its reasons for failing to do so within the timeframe that the Controller specifies for reporting
22 on its investigation of the complaint. If the Controller determines that the department's
23 reasons are inadequate and that further investigation may be appropriate, the Controller may
24 refer the matter to the Mayor, City Attorney or District Attorney or to any officer or agency that
25 has jurisdiction over the matter.

1 (g) RESPONSIBILITY OF DEPARTMENTS. The department head shall be
2 responsible for compliance by his or her department with these duties. If department staff fail
3 to comply with the duties to investigate complaints referred by the Controller and to make the
4 reports required by this Section, the Controller shall notify the department head. If the
5 department head fails to take action to obtain the department's compliance with these duties,
6 the Controller may refer the matter to the Mayor, City Attorney or District Attorney or to any
7 officer or agency that has jurisdiction over the matter.

8 **SEC. 4.110. DEFINITIONS.**

9 For purposes of this Chapter, the following words and phrases shall have the following
10 meanings:

11 ~~(a) The term~~ "City" or "City agency" shall means the City and County of San Francisco,
12 its departments, commissions, task forces, committees, and boards.

13 ~~(b) The term~~ "eComplainant's department" includes the complainant's supervisor, the
14 executive director or highest ranking officer in the complainant's department, and the board or
15 commission overseeing the complainant's department.

16 "Deficiencies in the quality and delivery of government services" shall mean the failure to
17 perform a service, when performance is required under any law, regulation or policy, or under a City
18 contract or grant.

19 "Improper government activity" shall mean violations of any federal, state or local law,
20 regulation or rule including but not limited to laws, regulations or rules governing campaign finance,
21 conflicts of interest or governmental ethics laws; or actions which create a danger to public health or
22 safety by the failure of City officers or employees to perform duties required by their positions.

23 "Improper government activity" does not include personnel actions.

24 "Misuse of City funds" shall mean any use of City funds for purposes outside of those directed
25 by the City, or local, state and federal law.

1 ~~(e)~~ The term "Preliminary investigation" shall be limited to, but need not include: review
2 of the complaint and any documentary evidence provided with the complaint; interview of the
3 complainant; interview of the respondent, counsel to respondent and any witnesses who
4 voluntarily agree to be interviewed for this purpose; review of any relevant public documents
5 and documents provided voluntarily to the Commission.

6 "Supervisor" or "supervisory employee" shall mean any individual having the authority, on
7 behalf of the City, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or
8 discipline other employees, or the responsibility to direct them, to adjust their grievances or to
9 effectively recommend such action, if, in connection with the foregoing, the exercise of that authority is
10 not merely routine or clerical, but requires the use of independent judgment.

11 "Unlawful activity" shall mean violations of any federal, state or local law, regulation or rule
12 including but not limited to those laws, regulations or rules governing campaign finance, conflicts of
13 interest or governmental ethics laws; or actions which create a danger to public health or safety by the
14 failure of City officers or employees to perform duties imposed by a City contract.

15 "Wasteful and inefficient City government practices" shall mean the expenditure of City funds
16 that could be eliminated without harming public health or safety, or reducing the quality of government
17 services.

18 **SEC. 4.115. PROTECTION OF WHISTLEBLOWERS - CITY EMPLOYEES.**

19 (a) RETALIATION PROHIBITED. No City officer or employee may terminate, demote,
20 suspend or take other similar adverse employment action against any City officer or employee
21 because the officer or employee has in good faith:

22 ~~(i)~~ (1) filed a complaint with any supervisory employee within a City agency alleging
23 that a City officer or employee engaged in improper government activity, misused City funds, caused
24 deficiencies in the quality or delivery of government services or engaged in wasteful and inefficient
25 government practices; the Ethics Commission, Controller, District Attorney or City Attorney, or a

1 ~~written complaint with the complainant's department, alleging that a City officer or employee engaged~~
2 ~~in improper government activity by: violating local campaign finance, lobbying, conflicts of interest or~~
3 ~~governmental ethics laws, regulations or rules; violating the California Penal Code by misusing City~~
4 ~~resources; creating a specified and substantial danger to public health or safety by failing to perform~~
5 ~~duties required by the officer or employee's City position; or abusing his or her City position to~~
6 ~~advance a private interest,~~

7 (ii) (2) filed a complaint with any supervisory employee within a City agency alleging
8 that a City contractor, or employee of a City contractor, engaged in unlawful activity, misused City
9 funds, caused deficiencies in the quality and delivery of government services or engaged in wasteful
10 and inefficient government practices; the Controller's Whistleblower Program, or

11 (iii) (3) provided any information in connection with or otherwise cooperated with
12 any investigation conducted under this Chapter.

13 (b) COMPLAINTS OF RETALIATION FOR HAVING FILED A COMPLAINT
14 ALLEGING IMPROPER GOVERNMENT ACTIVITY.

15 (i) (1) **Administrative Complaints.** Any city officer or employee, or former city
16 officer or employee, who believes he or she has been the subject of retaliation in violation of
17 § subsection (a) of this Section 4.115 may file a complaint with the Ethics Commission. The
18 complaint must be filed no later than two years after the date of the alleged retaliation.

19 The Ethics Commission shall investigate complaints of violations of § subsection
20 (a) of this Section 4.115 pursuant to the procedures specified in ~~San Francisco~~ Charter Section
21 C3.699-13 and the regulations adopted thereunder. The Ethics Commission may decline to
22 investigate complaints alleging violations of § subsection (a) if it determines that the same or
23 similar allegations are pending with or have been finally resolved by another administrative or
24 judicial body. Nothing in this § subsection shall preclude the Ethics Commission from referring
25 any matter to any other City department, commission, board, officer or employee, or to other

1 government agencies for investigation and possible disciplinary or enforcement action. The
2 Ethics Commission may refer matters to the Department of Human Resources with a
3 recommendation. The Ethics Commission may require ~~that~~ any City department, ~~commission,~~
4 ~~board, officer or employee~~ to provide a written report regarding the department's investigation and
5 any action that the department has taken in response to the Ethics Commission's referral within a time-
6 frame that the Ethics Commission shall specify. ~~report to the Ethics Commission on the referred matter.~~

7 (ii) (2) **Civil Complaints.** Any City officer or employee who believes he or she
8 has been the subject of retaliation in violation of ~~§~~subsection (a) of this Section 4.115 may
9 bring a civil action against the City officer or employee who committed the violation. Such
10 action must be filed no later than two years after the date of the retaliation.

11 (iii) (3) **Burden of Establishing Retaliation.** In order to establish ~~that~~
12 retaliation occurred under this Section 4.115, a complainant in a civil action must demonstrate,
13 or the Ethics Commission in an administrative proceeding must determine, by a preponderance of
14 the evidence, that the complainant's engagement in activity protected under ~~§~~subsection (a)
15 was a substantial motivating factor for the adverse employment action. The ~~employer~~
16 respondent may rebut this claim if it demonstrates by a preponderance of the evidence that it
17 would have taken the same employment action irrespective of the complainant's participation
18 in protected activity.

19 (4) **Duty to Report Complaints to the Ethics Commission.** Supervisory employees who
20 receive a complaint of retaliation under this Chapter must keep the complaint confidential and
21 immediately report the complaint to the Ethics Commission. Supervisory employees who fail to report
22 complaints of retaliation are subject to the penalties and remedies set forth in subsection (c)(2) of
23 Section 4.115.

24 (c) **PENALTIES AND REMEDIES.**

1 (i) (1) Charter Administrative Penalties. Any City officer or employee who
2 violates § subsection (a) of this Section 4.115 may be subject to administrative penalties
3 pursuant to Charter Section C3.699-13.

4 (ii) (2) Discipline by Appointing Authority. Any City officer or employee who
5 violates § subsection (a) or (b)(4) of this Section 4.115 shall be subject to disciplinary action up
6 to and including dismissal by his or her appointing authority. If no disciplinary action is taken
7 by the appointing authority, the Ethics Commission may refer the matter to the Civil Service
8 Commission for action pursuant to Charter Section A8.341.

9 (iii) (3) Civil Penalties. Any City officer or employee who violates § subsection
10 (a) of this Section 4.115 may be personally liable in a civil action authorized under Subsection
11 (b)(ii) subsection (b)(2) of this Section for a civil penalty not to exceed ~~\$5,000~~ \$10,000. The
12 Ethics Commission may adjust annually by regulation the penalties imposed by this subsection (c)(3) to
13 reflect the change in the California Consumer Price Index for that year, provided that such adjustments
14 shall be rounded off to the nearest \$100.

15 (d) RESERVATION OF AUTHORITY.

16 (i) (1) Civil Service Commission. Nothing in this Section 4.115 shall interfere
17 with the powers granted to the Civil Service Commission by the San Francisco Charter.

18 (ii) (2) Appointing Authority. Nothing in this Section 4.115 shall interfere with
19 the power of an appointing officer, manager, or supervisor to take action with respect to any
20 City officer or employee, provided that the appointing officer, manager, or supervisor
21 reasonably believes that such action is justified on facts separate and apart from the fact that
22 the officer or employee took any of the actions listed in subsections 4.115(a)(1)-(3). filed a complaint
23 with, or cooperated with, an Ethics Commission investigation of such complaint; or filed a complaint
24 with or provided information to the Controller, District Attorney, City Attorney or the complainant's
25 department.

1 (e) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare,
2 and each City department shall post a notice of whistleblower protections. The notice shall be
3 posted in a location that is conspicuous and accessible to all employees.

4 (f) WHISTLEBLOWER PROTECTION AWARENESS TRAINING.

5 (1) The Controller, in collaboration with the Ethics Commission, shall prepare, and all
6 City departments shall distribute, materials to publicize and promote whistleblower protections as part
7 of each department's new hire training programs.

8 (2) The Ethics Commission, Controller, and Department of Human Resources shall
9 collaborate to ensure that whistleblower protection information and training is developed and
10 implemented by January 1, 2018.

11 **SEC. 4.117. PROTECTION OF WHISTLEBLOWERS - CITY CONTRACTORS.**

12 (a) RETALIATION PROHIBITED. No City officer or employee may take steps to terminate a
13 contract with a City contractor; refuse to use a City contractor for contracted services; request that a
14 City contractor terminate, demote, or suspend one of its employees; or take other similar adverse
15 action against any City contractor or employee of a City contractor because the contractor or the
16 contractor's employee:

17 (1) filed a complaint with any supervisory employee within a City agency alleging that a
18 City officer or employee engaged in improper government activity, misused City funds, caused
19 deficiencies in the quality and delivery of government services or engaged in wasteful and inefficient
20 government practices;

21 (2) filed a complaint with any supervisory employee within a City agency alleging that
22 another City contractor, or employee of another City contractor, engaged in unlawful activity, misused
23 City funds, caused deficiencies in the quality and delivery of government services or engaged in
24 wasteful and inefficient government practices; or

1 (3) provided any information in connection with or otherwise cooperated with any
2 investigation conducted under this Chapter.

3 (b) COMPLAINTS OF RETALIATION FOR HAVING FILED A COMPLAINT ALLEGING
4 IMPROPER GOVERNMENT ACTIVITY OR UNLAWFUL ACTIVITY.

5 (1) **Administrative Complaints.** Any City contractor or employee of a City contractor,
6 who believes it, he, or she has been the subject of retaliation in violation of subsection (a) of this
7 Section 4.117 may file a complaint with the Ethics Commission. The complaint must be filed no later
8 than two years after the date of the alleged retaliation.

9 The Ethics Commission shall investigate complaints of violations of subsection (a) of
10 this Section 4.117 pursuant to the procedures specified in Charter Section C3.699-13 and the
11 regulations adopted thereunder. The Ethics Commission may decline to investigate complaints
12 alleging violations of subsection (a) if it determines that the same or similar allegations are pending
13 with or have been finally resolved by another administrative or judicial body. Nothing in this
14 subsection shall preclude the Ethics Commission from referring any matter to any other City
15 department, commission, board, officer, or employee, or to other government agencies for investigation
16 and possible disciplinary or enforcement action. The Ethics Commission may refer matters to the
17 Department of Human Resources with a recommendation. The Ethics Commission may require any
18 City department to provide a written report regarding the department's investigation and any action
19 that the department has taken in response to the Ethics Commission's referral, within a time-frame that
20 the Ethics Commission shall specify.

21 (2) **Burden of Establishing Retaliation.** In order to establish that retaliation occurred
22 under this Section 4.117, the Ethics Commission in an administrative proceeding must determine, by a
23 preponderance of the evidence, that the complainant's engagement in activity protected under
24 subsection (a) was a substantial motivating factor for the adverse action. The respondent may rebut
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1 this claim if it demonstrates by a preponderance of the evidence that it would have taken the same
2 adverse action irrespective of the complainant's participation in protected activity.

3 (c) PENALTIES AND REMEDIES.

4 (1) Administrative Penalties. Any City officer or employee who violates subsection (a)
5 of this Section 4.117 may be subject to administrative penalties pursuant to Charter Section C3.699-13.

6 (2) Redress for Retaliatory Adverse Action. Following an administrative hearing and
7 after making a finding that an adverse action has been taken for purposes of retaliation, the Ethics
8 Commission may, subject to the Charter's budgetary and contracting provisions, order the cancellation
9 of retaliatory adverse action taken against a City contractor or employee of a City contractor.

10 (d) NOTICE OF WHISTLEBLOWER PROTECTIONS. The Controller shall prepare, and each
11 City department, shall post a notice of the whistleblower protections established by this Section 2.117.
12 City contractors shall distribute the notice of protections to all of their employees.

13 **SEC. 4.120. CONFIDENTIALITY.**

14 (a) WHISTLEBLOWER IDENTITY. Any individual who files a complaint under Section
15 4.105 of this Chapter may elect to have his or her identity kept confidential as provided by
16 Charter Section C3.699-13(a). Such election must be made at the time the complaint is filed.

17 (b) COMPLAINTS AND INVESTIGATIONS. The Ethics Commission shall treat as
18 confidential complaints ~~made~~ received under Sections 4.105, 4.115, and 4.117 of this Chapter,
19 and related information, including but not limited to materials gathered and prepared in the
20 course of investigation of such complaints, and deliberations regarding such complaints, as
21 provided by Charter Section C3.699-13(a).

22 (c) PENALTIES FOR DISCLOSURE OF WHISTLEBLOWER IDENTITY. Except as provided
23 in subsection (d), any City officer or employee who discloses the identity of any complainant with the
24 knowledge that the complainant elected to keep his or her identity confidential may be subject to the
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1 administrative proceedings and penalties set forth in Charter Section C3.699-13, in addition to
2 disciplinary action up to and including dismissal by his or her appointing authority.

3 ~~(e)~~ (d) EXCEPTIONS.

4 ~~(i)~~ (1) Conduct of Investigations. Nothing in this Section shall preclude the
5 Ethics Commission from disclosing the identity of an individual or other information to the
6 extent necessary to conduct its investigation.

7 ~~(ii)~~ (2) Referrals. Nothing in this Section shall preclude the Ethics Commission
8 from referring any matter to any other City department, commission, board, officer or
9 employee, or to other government agencies for investigation and possible disciplinary or
10 enforcement action.

11
12 Section 2. Effective Date. This ordinance shall become effective 30 days after
13 enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the
14 ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board
15 of Supervisors overrides the Mayor's veto of the ordinance.

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1 Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors
2 intends to amend only those words, phrases, paragraphs, subsections, sections, articles,
3 numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal
4 Code that are explicitly shown in this ordinance as additions, deletions, Board amendment
5 additions, and Board amendment deletions in accordance with the “Note” that appears under
6 the official title of the ordinance.

7

8 APPROVED AS TO FORM:
9 DENNIS J. HERRERA, City Attorney

10 By: _____
11 ANDREW SHEN
12 Deputy City Attorney

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