CITY AND COUNTY OF SAN FRANCISCO

OFFICE OF THE CITY ATTORNEY

DENNIS J. HERRERA
City Attorney

DIRECT DIAL: (415) 554-4748
E-MAIL: tara.collins@sfgov.org

September 17, 2012

The Honorable Katherine Feinstein
Presiding Judge
San Francisco Superior Court
400 McAllister Street, Department 206
San Francisco, CA 94012

Re: Response Civil Grand Jury Report

Dear Judge Feinstein:

In accordance with Penal Code Sections 933 and 933.05, the City Attorney's Office submits the following response to the Civil Grand Jury Report entitled, "Surcharges and Healthy San Francisco: Healthy for Whom?", issued in June 2012. The Civil Grand Jury Report asked the City Attorney's Office to respond to Findings No. 5, 6, 7 and 12, and Recommendations No. 1, 3 and 4 of the Report, set forth below.

Finding No. 5: San Francisco businesses that collected surcharges prior to January 1, 2012 have no obligation to report surcharge receipts to the City nor reconcile the surcharges with health care expenses.

Response to Finding No. 5: Partially disagree. Although the Health Care Security Ordinance ("HCSO") did not require employers to reconcile health care surcharges and health care expenditures with respect to surcharges collected prior to January 1, 2012, the Office of Labor Standards Enforcement ("OLSE") did require employers to report the amount of health care surcharges they collected on their 2011 Annual Reporting Forms, in addition to their health care expenditures.

Finding No. 6: Due to the varied wording in describing surcharges on consumers' bills, and the wording of the ordinance, the auditing of surcharges will be difficult.

Response to Finding No. 6: Because the auditing of surcharges imposed on customers falls within the jurisdiction of the OLSE, the City Attorney defers to the OLSE's response to this finding.

Finding No. 7: Consumer fraud is committed if the consumer's receipt states that a surcharge is being assessed for a stated purposes and is not being used for that purpose.

Response to Finding No. 7: Agree. A business commits consumer fraud if it assesses a surcharge for a stated purpose with the knowledge that it will use the money for a different purpose.

Finding No. 12: HRAs may not be an allowable option in meeting the federal requirements under the Affordable Care Act.

Response to Finding No. 12: The City Attorney agrees that HRAs may not be an allowable option under the Affordable Care Act, but this question will likely be answered definitively by forthcoming regulations from the Secretary of Health and Human Services.

Recommendation No. 1: Disallow employers subject to the Office of Labor Standards Enforcement regulations from adding surcharges on customers' bill to pay for the HCSO employer mandates and mandated paid sick days.

Response to Recommendation No. 1: This is a question for San Francisco's policymakers, specifically, the Mayor and the Board of Supervisors. Should the policymakers wish to consider this recommendation, the City Attorney will provide them with the appropriate legal advice.

Recommendation No. 3: The District Attorney open an investigation to review the Jury's survey findings for possible consumer fraud.

Response to Recommendation No. 3: Because this recommendation is directed at the District Attorney, the City Attorney defers to the District Attorney's response.

Recommendation No. 4: Disallow the use of the employer HRA option.

Response to Recommendation No. 4: This is a question for San Francisco's policymakers, specifically, the Mayor and the Board of Supervisors. Should the policymakers wish to consider this recommendation, the City Attorney will provide them with the appropriate legal advice.

Sincerely,

DENNIS J. HERRERA
City Attorney