GENERAL NOTES:

Throughout the document the abbreviation CED (conducted energy device) has been replaced with the term ECD (electronic control device). Although ECD is preferable to CED, CED is acceptable as an acronym in light of the alternative put forward by some stakeholders, labeling ECDs as electronic control weapons (ECW). It is the POA's position to utilize either 1) ECD or, 2) CED in the general definition of the devices.

1) **POLICY (p. 1)**

(A) "Less-Lethal Alternatives" (p. 1) The only issue with this section is the overly-generic title. This section effective serves as operating statement for the overall policy, and the title should reflect something to that effect. The actual language used is open to negotiation, but could serve to address the concerns raised by some stakeholders that the policy lacks a mission statement of sorts.

(F) "Re-Evaluation" (p. 1): ***"When activating the ECD, the member should only use if for one standard cycle (five seconds), then stop, evaluate the effectiveness and determine if the subject can be restrained without additional use of force."***

The general language of this section is in line with other Taser/ECD Policies, but it seems to suggest that the officer should only utilize a single cycle of the ECD. Instead this section might read something like:

i. "*The initial use of the ECD shall be a standard five-second cycle, after which the officer will evaluate the need to apply a second five-second cycle, while offering the subject a reasonable opportunity to comply. Each subsequent five-second cycle requires a separate, articulable justification. Once the subject has been exposed to three standard cycles, the ECD shall be deemed ineffective and another use of force option will be considered, unless exigent circumstances exist."*

2) **DEFINITIONS (pp. 1-2)**

(B) "Active Resistance" (p.1)

COMMENT: Generally this section is acceptable, and even includes physical actions such as bracing and tensing, which may be indicative of active resistance, and thus implicate ECD deployment. Rather, the issue I have is that this section conflicts with another area of the policy that prohibits Taser deployment where the subject is running away from officers. Moreover, there is a good deal of confusion surrounding the terms "active resistance" v. "passive non-compliance" and "compliant" behavior. Right now, passive non-compliance doesn't seem fundamentally different from compliant, because both terms use the terms "offer[s] no…resistance." The only change in the language is the failure to respond to verbal commands with "passive non-compliance."

NOTE: From past experience, I read passive non-compliance as both 1) failing to respond to an officer's verbal commands, *and* 2) remaining fixed or stationary when an officer attempts to physically control the subject's movement (e.g. going limp in one's arms and legs, such that officers are required to physically pick the individual up in order to maneuver them). If an individual is locking arms, bracing against a physical object (e.g. a bench, lamp post, or another person) or tensing their limbs/attempting to pull away from an officer who has gone "hands-on" with that person, the situation is no longer in the realm of "passive non-compliance." The person is actively, physically trying to prevent the officer(s) from taking the subject into custody. Included in the list of actions constituting "active resistance," is running away. If "active resistance" is sufficient for ECD deployment, then by definition, an

officer should be permitted to deploy an ECD on an individual who (based on articulable facts) is attempting to run away from an officer.

(E) "Confetti Tags" (p. 2) – *"Tags that provide accountability for deployment of the ECD cartridge via the dispersal of minute coded tags specific to that cartridge."*

COMMENT: Taser's Anti-Felon Identification (AFID) tags are intended to promote Taser deployment tracking and identification. This identification method could, theoretically be used for accountability/transparency purposes. However, as described in more detail below, there is almost no reason to use these tags, given the other procedures in place for ECD cartridge identification and documentation. The tone of this section implies that officers need to be held accountable for their Taser deployments through the identification of AFID tags.

Instead this section could read something like: "Confetti-like identification tags which are ejected *each time an ECD cartridge is deployed. Because each AFID tag is printed with the corresponding Taser cartridge's serial number inscribed, a later determination can be made of which user deployed a particular cartridge."*

(G) "Deployment" (p. 2) – *"Removal of the ECD from the holster and pointing it at a subject."*

COMMENT: This language is confusing, because most other ECD policies define the act of drawing the ECD from its holster and pointing it at a subject as a "presentation." A few agencies have alternatively used the term "activation"/"activate." However this term is also not useful, because it still doesn't clarify whether "activate" refers to turning on the ECD unit or actually deploying the ECD probes by depressing the trigger on the unit. It is only appropriate to utilize the term "deployment" in the latter action.

(H) "Displaying the Arc" (p. 2) – *"A compliance function of the ECD. This method involves displaying the electrical current to a subject by first removing the cartridge and then depressing the trigger."*

COMMENT: Several parts of the section should be changed:

- First I would change this section to either "Spark Display" or "Arc Display" – Most other ECD policies and Taser/Axon itself utilize the term "Spark Display"

- Second, and more important, the statement "*a compliance function of the CED*" is both vague and unhelpful. An arc/spark display is a *non-contact* demonstration to a subject of the ECD's ability to emit an electrical discharge. No contact is made with the suspect, and a spark display is typically only utilized (for officer-safety purposes) where more than one officer is present, and the suspect is exhibiting active, though not necessarily aggressive resistance (i.e. no immediate threat of harm to officers or others). Although an spark display is intended to gain compliance, the compliance sought is voluntarily given by the subject. This language is vague enough to imply that an arc/spark display is synonymous with a drive/touch stun application.

(I) "Drive Stun" (p. 2) – *"Activating the ECD with the cartridge removed or discharged, and placing the electrodes upon the skin/clothing of the subject."*

COMMENT: This statement requires several changes as well:
- First, while "drive stun" is the official Taser/Axon nomenclature for the procedure, other Departments' ECD policies have utilized terms like "touch stun" which more

clearly explains that the taser is intentionally and directly applied to the skin/clothing of an individual (without a cartridge attached), with the intent of gaining compliance through a localized pain response.

Although "touch stun/drive stun" applications are generally discouraged, they are nonetheless extremely useful in certain circumstances, especially where an officer is seeking to "close the circuit" between deployed probes and a taser itself, in order to get sufficient neuro-muscular incapacitation (NMI) in the subject.

(L) "Probe Discharge" (p. 2) – *"When the trigger is depressed on the ECD, the probes are discharged from the cartridge which can penetrate a subject's clothing or skin, simultaneously discharging an electric current."*

COMMENT: The word "discharge" here is very fraught, because the nomenclature is likewise used for firearms, and implies that a taser probe **deployment** is comparable in severity to a firearm discharge. This, by implication, may subject taser probe deployments to review by the same oversight body which reviews OISs. I would strongly advocate for the use of the word "deployed," "expelled," or "ejected" with the corresponding changes made in other parts of the ECD policy to reflect this change in verbiage.

3) PROCEDURES (pp. 2 – 8)

(A) "Issuance and Carrying ECDs" (p. 2) –

COMMENT ON DPA PROPOSED CHANGES: There is no issue with the language placed in the May, 2017 Draft ECD Policy. However, it is important to at least offer a cursory rebuttal of the policy changes submitted by the DPA.

The DPA proposal states **"*Only officers assigned to the Tactical Company or the Specialist Team are authorized to carry Department-issued ECW's and cartridges after successfully completing the Department's Crisis Intervention Team (CIT) training and all other required Department-approved ECW training."***

There are several major issues with this proposal. First, restricting the number of officers who are permitted to carry the ECD to the Tactical Company and Specialty Team effectively negates the use of ECDs by SFPD, both for logistical and officer-safety reasons. Assuming that the Tactical Company conservatively handles two or three hostage barricades per month, and serves between ten and twenty search or arrest warrants per month, there is no plausible way that those officers could be expected to don their tactical gear and deploy, on a daily basis, to the number of potential calls that might fall within the ECD policy parameters, and do so in a timely and effective manner. If even ten applicable calls for service/ECD requests came out per day, that would equal five times the number of hostage/barricades that Tactical Company members deal with on a monthly basis. The logistics of deploying such a limited number of officers to handle every possible ECD deployment stretches the bounds of plausibility.

Moreover, if officers who arrive on scene and are confronted with an assaultive subject, are required to withdraw from the scene to await Tactical Company deployment for ECD use, day-to-day police operations would effectively grind to a halt. More importantly, this proposed policy change asks officers to risk the safety of citizens, suspects, and the officers themselves, with no tangible benefit. Most dynamic situations requiring the application of an ECD occur within seconds (or at the outer bounds, minutes). The average Tactical Company deployment is, at its

quickest 20-30 minutes in duration. Officers are not required to wait for Tactical Company assistance when they simply need to take an assaultive or actively resisting subject into custody, and under Ninth Circuit case law, officers are entitled to use other "intermediate force options" in order to effectuate the arrest. Forcing officers to either choose between those alternative force options or waiting an unsafe amount of time for the Tactical Company or Specialist Teams to arrive on-scene, actually increases the risk of a situation escalating into deadly force, which is what the ECD policy is meant to reduce or prevent.

(B) "Inspection" - (pp. 2-3) – *"Officers carrying the ECD shall perform an inspection of the ECD at the beginning of every shift, and*

(# 2) (p. 2) - "Ensure that the ECD is clearly and distinctly marked to differentiate it from the duty weapon and any other device."

COMMENT: This sentence states that officers carrying ECD's shall "ensure the CED/ECD *is clearly and distinctly marked to differentiate it from the duty weapon and any other device*." How exactly is an officer supposed to do this, especially since the ECD policy also clearly states that officers should in no way alter the taser from its factory settings? Are they supposed to paint the Taser or apply some other marking to distinguish it from a firearm? This doesn't make sense, and provides a clear avenue through which the department can implement discipline for 'non-compliance" with the policy.

- Inspection" - #3 (p. 3) – *"Whenever practical, officers should carry two or more cartridges on their person when carrying the ECD."*

COMMENT: Most, if not all taser models provide officers with the option of carrying two cartridges on the ECD unit itself, thus negating the need for an officer to carry the secondary cartridge "on their person."

- "Inspection" - #6 (p. 3) – *"Due to the flammable contents in some chemical agent containers, officers shall only carry Department-issued…(OC) which is non-flammable (water-based and will not ignite)."*

COMMENT: This directive seems a bit redundant, especially if this type of OC spray is more fully covered in the Department's "Use of Force" DGO, 5.01.

(DPA Proposed Section C – "Before Deployment")

COMMENT ON DPA RECOMMENDATION: The DPA has inserted the following language:

"Medical: Medical units shall be staged near the scene prior to ECW activation when possible. This precaution will greatly reduce the response time if a medical emergency occurs. A person's pre-existing condition and/or drug intoxication level are usually unknown to officers."

This language is both excessive and unnecessary in light of other provisions within the Draft ECD policy. First, suggesting that medical units pre-stage prior to an ECD deployment "when possible" presents a logistical nightmare. And how should the officers on-scene make this determination? Most ECD deployments occurs within seconds or minutes of the initial contact. Pre-staging of medical personnel usually only occurs in two situations: 1) during a hostage/barricade situation and 2) In situations where officers are dealing with a subject who is suffering from "excited delirium" (discussed further below).

However, in hostage/barricade situations, the Tactical Company is dispatched and takes control of the scene on arrival. Patrol officers are then prohibited from attempting to contact the subject directly, so it would be almost impossible for one of those officers to then deploy an ECD against the subject. In any case, most emergency response units/SWAT Teams have standard operating procedures that mandate EMS pre-staging, even when ECD deployment is not specifically contemplated, which renders this option moot.

Second, with respect to excited delirium encounters, medical literature shows a correlation between prolonged physical struggle and in-custody deaths. The longer officers have to struggle to get a subject into custody, the higher the chance that the subject will suffer serious bodily injury or death. In addition, the longer officers wait to take the subject into custody, the higher risk of a medical emergency. A 2011 article in the Journal of Emergency Medical Services, entitled "Excited Delirium Strikes Without Warning," states "Excited delirium is a life-threatening condition, referred to…as a "freight train to death." *This freight train can only be stopped by early recognition of the condition, a coordinated approach to physical restraint and the rapid administration of drugs and interventions* to treat the severe agitation and hyperthermia." As stated, it is preferable to have EMS personnel on scene if at all possible before an ECD deployment on someone experiencing excited delirium. However, an officer should have the discretion to determine if trying to get someone in custody is more beneficial while medical is en route, in light of the exponential risks that are present the longer a subject is allowed to remain agitated.

D. "Standard Cycle and Assessment" (p. 3)

i. FIRST PARAGRAPH (p. 3) – The first sentence states "when *activating the CED, the officer should only use it for on standard cycle (five-seconds)…*"

- **COMMENT**: This sentence is vague, because it does not define what "activation" means in this context. Does activation mean turning the side power switch to the "on" position? Does activation apply to probe deployments only, or to drive/touch stun applications as well? The second sentence likewise is too wordy; it should read something like "Each subsequent five-second cycle requires separate justification."

  - Finally, the third sentence is extremely concerning. The first half of the sentence reads "Officers shall use the minimum number of cycles necessary to place the person into custody." However this fact is already expressed in the previous sentence requiring separate, distinct justification for each five-second cycle of the ECD. If and officer depresses the ECD's trigger and applies three separate five-second cycles to a subject, but he is able to justify and articulate each cycle, then three cycles is the minimum number necessary to take the subject into custody.

- More importantly, the second half of the last sentence reads *"…in any event, unless lethal force is justified, [an officer] shall not employ more than three cycles or [?] a 15 total seconds of CED against a subject during a single incident*." This seems to suggest that any additional ECD cycles beyond three automatically turns the deployment into a deadly force situation, requiring the deployment of the homicide detail to the scene, even if the suspect is taken into custody, alive, is transported to the ER for observation, and is subsequently cleared and booked. Other Departments' policies place a caveat on the use of additional cycles of the ECD (beyond three), permitting their use, under limited circumstances, where "exigent circumstances" exist. This more reasonable policy

allows for circumstances where the suspect is a threat to officer or citizen safety, but a deadly force situation is not clearly present. Automatically turning a fourth ECD cycling into a deadly force situation is excessive in light of other extenuating circumstances.

COMMENTS ON DPA RECOMMENDATIONS: In the DPA's version of the ECD Policy, the language in the first sentence is changed to "*When activating the ECW, the officer **shall** use it for one standard cycle (five seconds)…then stop and evaluate the situation."*

This change is too restrictive, in light of the fact that officers are permitted to cycle the ECD more than once, so long as they can articulate their reason for doing do. The policy already provides a list of factors officers should consider before additional ECD cycles, so requiring the officer to physically stop and conduct an evaluation in every circumstance is both impractical and dangerous for the officers and others. Moreover, an officer is likely able to determine if the subject is going to comply or attempt to fight within a very short period of time, so mandating that the officer wait long enough for the subject to potentially re-engage in assaultive conduct is foolish.

ii. SECOND PARAGRAPH (p. 3)

COMMENT: This entire paragraph seems redundant in light of the previous statements, and seems more applicable in a "tactical considerations" or equivalent section, rather than the second paragraph of the initial taser deployment.

iii. THIRD PARAGRAPH (pp. 3-4)

COMMENT: This paragraph has far too much information. Principally,

1. **Consideration # 1 (p. 3):** ***"[an officer should consider] whether it is reasonable to believe that the need to control the individual outweighs the potentially increased risk posed by multiple applications."*** This is an *extremely* loaded sentence.

- First, who determines the reasonableness of the interaction? A Taser Committee? A third party bystander? The Chief? If the *Graham v. Connor* "objectively reasonable" test is supposed to stand for anything, it's that an officer's real-time decisions will only be measured against a reasonable officer of similar training and experience in a similar situation. A third party should not permitted to second-guess an officer's decision making by applying 20/20 hindsight. Courts will simply apply the *Graham v. Connor* three-prong test in determining the reasonableness of the officer's decisions at the time of the incident, utilizing the officer's training and experience, and the facts then known to him/her.

  Moreover, the question asks an officer to consider real world threats against a perceived, and astronomically low risk that an ECD deployment might cause both a ventricular fibrillation in the subject, and their subsequent death. If the officer reasonably perceives a threat to her safety or the safety of another officer or citizen, then a second cycle, or a third cycle, or even a fourth cycle may be completely justified in light of the low overall risk posed to the subject. Finally, officers would already be required to keep an AED device in their patrol vehicle, so in the

extremely unlikely event that a subject did suffer a ventricular fibrillation, the “potentially increased risk” of death is even further reduced.

2. **Consideration # 3 (p. 3): *“Whether the individual has the ability and has been given a reasonable opportunity to comply.”***

   Why would an officer need to consider whether he gave the subject a reasonable amount of time before applying subsequent cycles, when the ECD Policy, section III.C.1 expressly directs officers to do just that? An officer must, ***whenever practicable***, give a warning to the subject and/or other officers that the officer intends to deploy the ECD. Thus this section seems to imply that an officer ***must*** provide the subject with a reasonable amount of time no matter the circumstances. But there may be situations where an officer lacks sufficient time to provide a warning, or other safety considerations remove the ability to give the subject a verbal warning. Under this language, an officer may find himself in violation of the draft policy for failing to provide a verbal warning, even if s/he could clearly articulate their reasons for deployment.

E. “Deployment Methods” (p. 4)

iv. “Probe Deployment” (p. 4)

COMMENT: First, this section is confusing because it actually uses the proper term, “deployment” when discussing the act of pulling the ECD trigger, having the probes eject from ECD cartridge, and strike the subject. In other parts of the policy the Department uses the term “discharge” when discussing this action, which, as mentioned above – wrongly gives the impression that an ECD deployment is on par with the discharge of a firearm. Given the drastically different mechanism for deployment (i.e. compressed nitrogen v. gunpowder) an ECD should not be placed in the same use of force category as a firearm, and its use should not be alluded to in such a way as to imply similarities between the two force options.

- Instead the statement should read ”Probe mode occurs when the ECD is deployed and both probes make contact with a subject, with the goal of temporarily immobilizing him or her for the period in which the ECD is cycled. Proper probe mode application will result in the temporary immobilization of the subject and will provide the officer(s) with a “window of opportunity” in which they can take the subject safely into custody.”

v. “Drive Stun Deployment” (p. 4)

COMMENT: The second sentence of this description is contrary to the first sentence. The first sentence states that a drive stun application may be utilized as a “countermeasure to gain separation between members and the subject so that members can consider other force options.”

- The second sentence states “members shall not use the CED in drive stun mode *solely as a pain compliance technique.”* But pain compliance is one of two reasons for utilizing the ECD in drive stun mode. The other reason, “closing the circuit” in order to create “three points of contact” and thus induce neuro-muscular incapacitation (NMI), is also accompanied by localized pain compliance.

- Finally, the third sentence states that an officer "***shall wait a reasonable amount of time between applications"*** of the drive stun mode. But this practice is both impractical and actually subjects the officer to increased risk of physical harm. Drive stun applications require extremely close proximity to the subject, typically less than arm's length distance. Whether the officer is using the ECD in drive stun mode to gain pain compliance or to induce NMI, they are likely in a situation where there is a real risk of substantial bodily harm to the officer or others. Moreover, drive stun mode forces the officer to remain in immediate proximity to the subject, because drive stun mode requires constant pressure be applied to the subjects skin/clothing. Thus, if an officer is required to utilize drive stun mode, and has to take a subject into custody, while the subject is "under power," there may not be an opportunity to apply the ECD, stop, reassess and then reapply the ECD.

vi. "Displaying the arc or *Deploying the CED"* (p. 4)

COMMENT: First the title of this section is confusing because the "deployment" mentioned in this section is actually referring to the removal of the taser from the holster and pointing it, with the laser turned on, at a subject. The officer is not "deploying" the taser simply by removing it from the holster, and even when they point it at the subject, they are not "deploying" the taser, because they have not made contact with the subject yet, either through probe deployment or through drive/touch stun applications.

- Second, the last sentence is convoluted because, a spark display is itself a non-deployment. Why would an officer need to have an equivalent justification for a spark display as they would for the actual deployment of the ECD probes or application of the drive stun mode, when the point of the spark/arc display is to gain voluntary compliance? And in any case, the policy states that each five second cycle of the ECD should be justified by the officer. IF the officer can reasonably articulate their reason for a spark display against a non-compliant and/or aggressive subject, that fact alone shouldn't require the completion of a use of force form.

F. "Target Areas" (p. 4)

COMMENT: This section is extremely problematic, because it directly states that application of the ECD to the head, neck, chest or groin of the subject is prohibited "unless deadly force is justified." But nothing in Taser/Axon's manual states that application of the taser to the chest or groin, or for that matter, even the head or neck, creates a risk of death or substantial bodily harm in itself. Other departments' ECD policies have used much less inflammatory language, "unless exigent circumstances exist.". In fact, avoidance of the groin or the breasts, is not intended to prevent death or even substantial bodily injury, but merely to reduce the pain associated with these more sensitive areas of the body. A probe strike to the chest, neck, groin or even the head does not necessarily fall within "substantial bodily harm" because probe removal from these areas by trained medical personnel usually results in no lasting physical effects or wounds.

This statement is the equivalent of stating, "don't strike a subject in the armpit or the soles of the feet with ECD probes," because these are also areas of heightened sensitivity. Instead of this language, there should be something specifying that **"for frontal probe mode deployments, *reasonable efforts should be made to target the lower center body mass of the individual, and the officer should avoid intentionally targeting the head, neck, groin or chest. However it is recognized that the dynamics of the situation and officer safety considerations may not permit the***

officer to limit the application of the ECD probes to the precise target area. Whenever practical, deployment of the probes to the individual's back is preferred."

COMMENTS ON DPA RECOMMENDATIONS

The DPA inserted the following comments: "*Deploying the ECW across the chest area near the heart can induce cardiac capture (extra heart beats) which can lead to cardiac arrest. Avoid targeting the frontal chest area near the heart to reduce the risk of serious injury or death."*

This statement is both inaccurate and confusing. First, the studies which have discussed the increased risk of cardiac capture, have dealt with both probe placement either directly over the heart, or within inches of the heart. The average ECD deployment occurs within 7-15 feet, and Taser/Axon training states that, during "probe mode" the bottom taser probe will spread one foot for every five feet of travel. This means that an ECD deployment at 15 feet will have three feet of spread between probes. As such, the risk of both probes landing within inches of each other, and both probes being placed on or near the subject's heart, is extremely unlikely. Furthermore, we are discussing this topic based on a false supposition that ECD deployments are inherently and consistently a risk for substantial bodily harm or death, which medical literature does not support.

Finally, the proposed statement is phrased as an unequivocal directive: "*avoid* targeting the frontal chest area near the heart to reduce the risk of serious injury or death." If this proposal were accepted, then any probe placement over the chest area, even unintentionally, would constitute a violation of Department policy, thereby subjecting officers to discipline.

G. "Authorized Use of the CED" (p. 4)

COMMENT ON DPA RECOMMENDATION:

The DPA has placed language which, at first glance, seeks to mirror the three-prong test used under Graham v. Connor. However, the DPA three-factor test is deficient in several ways. First, prong #1 requires the subject to be armed with a weapon, but bars an officer from ever using it on a subject armed with a firearm, which should not be the case. Second, prongs # 2 and # 3 require the subject be harming the officer or another; but ECD use is also not prohibited when the subject is a threat to him or herself. Third, the proposed policy states that *"officers shall use the minimum amount of activations or cycles necessary to accomplish a lawful objective,"* but this statement is redundant in light of other restrictions on the overall number of ECD cycles. Finally, the proposal attempts to change the general use of force matrix available to officers by completely removing the "totality of the circumstances" language. DGO 5.01, Section III.B.2 states, after providing a lengthy list of factors officers should consider: *"Not all of the above factors may be present or relevant in a particular situation, <u>and there may be additional factors not listed</u>*"; this statement implies other factor may be relevant to the reasonableness of an officers' actions, but this ECD proposal removes that consideration. If a situation does not fall within one of the three prongs of the test provided by the DPA, then the officer is prohibited from deploying an ECD, and if they choose to proceed, they risk discipline.

GENERAL COMMENT: Intro paragraph is confusing because it states that officers should apply the "totality of the circumstances" test when determining the reasonableness of deploying the CED. However, one of the major factors that officers are required to consider when making this reasonableness determination is the "subject's level of resistance." The policy already states that officers should utilize "less-lethal" force

options to deal with subjects who are "actively resisting, assaultive or exhibiting any action likely to result in serious bodily injury or death of another person, themselves or the member." So if the level of force necessary to present and deploy the ECD is already provided, then why would an officer need to determine the level for resistance presented by the subject?

i. "An Officer may activate the ECD when a subject is:

1) *Armed with a weapon other than a firearm*, such as an edged weapon or blunt object, and the subject poses an i*mminent* threat to the safety of the public, him/herself or officers; or (p. 4)

COMMENT: This section is both overly restrictive and confusing. This policy imposes a blank prohibition on situations where a subject possesses a firearm. However, there may be circumstances – no matter how rare or extreme – where an officer should be able to utilize an ECD, so long as s/he has proper lethal coverage, and other extenuating factors dictate that the risk of close range exposure is not increased through such an action.

2) *Actively Resisting the officer* (p. 4)

COMMENT: This section is a bit unclear, because, the policy permits officers to tase in the case of active resistance, to include fleeing from an officer and situations in which the subject is "bracing" or "tensing." While I find this use reasonable in light of district and circuit court precedent from around the U.S., the Ninth Circuit has attempted to place significant constraints on officers' ability to deploy an ECD for active, though non-aggressive resistance. This is an area that will need to be discussed further.

3) No issue here (p. 4)

4) *Exhibiting actions likely to result in serious bodily injury or death to the public, him/herself or the officer.* (p. 4)

COMMENT: It's unclear how this option is separate from at least one or more of the three above-listed categories.

H. "Restrictions on ECD Use" – *Except where deadly force would be permitted, an officer shall not use an ECD."* (p.4-5)

COMMENT ON DPA RECOMMENDATIONS: The DPA has provided the following general position statement on ECD restrictions: *"ECWs have the potential to result in serious bodily injury or death, even when used in accordance with policy and training. Officers <u>shall</u> consider the <u>heightened risk</u> of serious bodily injury and death for the populations listed below and must be able to articulate the justification for exposing the person to <u>increased risk.</u>*"

First, the introductory statement is both overly broad, and unhelpful in tailoring an effective ECD policy. Every use of force option available to SFPD officers possesses an intrinsic risk of injury, hence the title "force option." Batons, even when used in accordance with policy and training, have the potential to result in bruising, broken bones, paralysis, or death. OC spray has the potential to result in skin irritation, blistering, blindness, severe respiratory distress, and in some cases death. Both of these force

options are considered intermediate on the force options spectrum, yet both options are utilized every day by officers, are approved by the Police Commission, the City, the Department, and the broader San Francisco community. Thus, this statement, while factually accurate, is hyperbolic

Second, the known risks associated with the various force options, including ECDs, are present among all populations, not merely those listed in the Draft ECD Policy. These considerations are also already incorporated in the use of force policy under DGO 5.01, and under the Draft ECD Policy put forward by the Department. Several of the populations listed by the DPA have been included and discussed in such a way that

***i. "if the subject is obviously pregnant."* (p. 4)**

COMMENT: This section raises several questions, including: What does "obviously pregnant" look like? Is it where the women is visibly showing? How far along in her pregnancy should a woman be before she is deemed "obviously pregnant? If a woman's stomach is minimally extended, should officers assume that the woman is pregnant? Should they not tase overweight woman, because her physical morphology may prevent an officer from making an "obvious" determination of whether she is pregnant or not?

Instead the policy should dictate that "officers should not tase a woman who is visibly showing, and who, through other factors, including the officer's physical observations reasonably appears to be pregnant, unless deadly force is the only alternative available to the officer(s)."

Remember, the concerns raised during an ECD deployment against a known pregnant woman are not based on any medical literature stating that the electrical signal would cause the mother or child lasting harm. Rather the issue is that with NMI, the mother may be unable to brace herself during a fall, and the blunt force trauma of landing on her stomach may increase the risk of inducing a miscarriage or premature delivery.

ii. "*if the subject is apparently over the age of 65."* (p. 4)

COMMENT: This section places unnecessary and/or undue burdens on officers in making a decision to deploy an ECD in an otherwise justifiable use of force. A person's physical presentation does not uniformly track with their calendar age, and thus people who are 65 or older may appear fit and healthy, while people who are not in good health, may be far younger than 65, but because of their appearance, body shape or musculature, appear older than they are. Instead the policy should read something akin to "if the subject visibly appears at the extremes of age (extremely elderly or extremely young (i.e. less than 13 years old) or those suffering from a clearly visible and/or easily identifiable physical disability."

iii. see ii. above (p. 5)

iv. see ii above (p. 5)

v. "*if the subject is physically in control of a vehicle in motion."* (p. 5)

***vi. "if the subject is in danger of falling from a significant height"* (p. 5)**

COMMENT: Define "significant height." Is it more than five feet above the ground? Is it significant because of the material on which the subject may fall?

It's unclear whether the policy contemplates injury or death simply because of the fall itself, or if it refers to the material on which the subject lands. In addition, this statement doesn't even discuss injury, so if a person is in danger of falling from a significant height, but doesn't fall after an ECD deployment, or falls, but doesn't suffer serious bodily injury, then the officer could still potentially face discipline.

Instead, the policy should read: **"when the subject is in a position where, because of his/her elevation, a fall could result in significant injury or death."**

vii. "if the officer has credible information that the subject suffers from a medical condition." **(p. 5)**

COMMENT: This category is soo broad that it effectively swallows the entire policy. The language on this section simply lists a "medical condition." as the basis for not deploying an ECD. What condition(s) are sufficient to implicate this policy? Heart attack is given as one example, but even that example is overly vague and unhelpful. How recently does the subject need to have suffered the heart attack to fall under this prohibition? Six months? One year? Five years? Ever? Moreover, what is the rationale for not utilizing the ECD simply because someone has had a heart attack in the past? Can the Department or any other stakeholder group provide any direct, causal link between ECD deployments and ventricular fibrillation? The answer is no. As a result, this policy prohibition, essentially utilizes non-existent science to justify not using the ECD on someone whom officers could have otherwise justifiably used the device on. This prohibition is especially concerning where the subject is not currently exhibiting any symptoms pre or post-deployment, but the officer still runs the risk of discipline because of the underlying medical condition. Moreover, if an officer responds to a scene, and the subject's friends or family merely state that the subject has a medical condition in order to prevent the officer from using otherwise appropriate force, then is the officer still subject to discipline if its later determined that the subject did not actually have that medical condition? .

Again, with regard to the massive scope of "medical conditions" which this prohibition may apply to, are the Department and/or stakeholders trying to incorporate mental conditions as well as physical ones? If so, what kind(s)? How severe? What happens if the officer interacts with a subject who is dealing with a medical condition which is completely manageable with routine medication, but the subject has chosen to voluntarily stop taking the meds? Does that factor alone prohibit the use of the ECD, even if the subject is violent and/or a threat to their own safety or the safety of officers/others? If the officer is already CIT trained before they are permitted to present and/or deploy the Taser, then shouldn't they be given the authority to make the determination if an ECD deployment is warranted under those circumstances?

Overall, this section needs to be completely removed, not simply amended, because of the risks involved in having it later be used as a justification for finding a policy violation are extremely high in light of the ambiguity expressed in the language here..

viii. "if the subject has recently been exposed to a flammable chemical agent or is otherwise in close proximity to any known combustible or flammable material, including alcohol-based OC spray. Department-issued OC spray is non-flammable." **(p. 5)**

COMMENT: This section is in line with other departments' ECD policies regarding flammable liquids/gases, but it is a bit over-inclusive when it states that the officer "shall not deploy the ECD if the subject…is otherwise in close proximity to *any known combustible or flammable material*." There are literally hundreds of flammable materials, but they are unlikely to be ignited through an ECD deployment (think plastic, or synthetic/polyester clothing). Instead the policy should read something like: "…if the officers knows or has reason to suspect that the subject has recently come into contact with a flammable liquid, or other combustible gas."

ix. *"More than three cycles or 15 total seconds of an ECD against a subject during a single incident."* (p. 5)

COMMENTS: First, this prohibition is clearly extreme. The statement that three full ECD cycles, or a total of fifteen seconds is only permitted where deadly force would otherwise be justified is in itself wrong, because, again, it presupposes that increased ECD cycles are directly/causally connected with ventricular fibrillation and/or death of individuals, which has not been proven through any medical literature. Thus, in situations where an officer is likely to suffer bodily harm, though not necessarily death, he or she would not be able to cycle the ECD for one second longer than the fifteen allowed without escalating the use of force into a deadly force situation. Which begs the question – does this increased time/cycling, therefore require a response from the DPA, IAD, DA's Office, Homicide Bureau?

- Second the provision is vague as to timing of the ECD cycles. In other words, this section prohibits "more than three cycles or 15 total seconds of an ECD…**during a single *incident***." What is the definition of an 'incident'? If an officer is involved in a fight, and applies two cycles of the ECD to a subject, but the subject is somehow able to tear off the ECD probes, and a foot pursuit occurs. If the officer subsequently deployment the ECD in probe mode, are these deployments considered two separate incidents, or a single one? In addition, is an officer allowed to tase one individual once and a second one, three times if needed during the same "incident" or is the total number of cycles limited to three?

- Other departments have chosen not to limit the ECD to three cycles based on the threat to the subject's health, but rather to look at the non-compliance as sign of ineffectiveness, and therefore the need to transition to a different use of force option, which is much more reasonable, and does not implicate a law enforcement response similar to an OIS for processing purposes.

I. "Prohibited Use" – Officers are prohibited from using the ECD: (p. 5)

1) No problem; (p. 5)

2) "*To intimidate by reckless display"* (p. 5)

COMMENT: This section is confusing and contradictory. The point of an ECD presentation *is* to intimidate, as evidenced by the nearly 80% success rate in gaining voluntary subject compliance simply through showing the ECD, and/or conducting a spark/arc display. Prohibiting the use of the ECD to intimidate is antithetical to the purpose of de-escalating an otherwise violent situation through a show of force and the avoidance of pain. Such a restriction would effectively bar the entire use of the spark display, because the person being asked to consider the "recklessness" is likely IA or potentially the subject him/herself, and

there is almost certainly an incentive to portray an officer who conducts a spark display as someone who "threatens and/or terrorizes their community through threats of force or violence" as has been stated by anti-ECD members of the Working Group. These individuals also argue that spark displays are antithetical to "community engagement" and cause a "lack of trust" in police.

- However, such displays are not permitted simply for fun, but must be done in an effort to avoid a probe deployment or drive stun, where the officer would be justified based on articulable factors.

3) "*If the subject is fleeing and does not pose an imminent threat of physical harm to the public or officers. Flight alone will never be the sole reason for applying an ECD on a subject.*" (p. 5)

COMMENT: This prohibition is actually contradictory to the ECD policy itself, and should therefore be amended or removed.

- Section I.A of the Policy states "*It is the policy of the SFPD to equip members with less-lethal alternatives, such as an ECD, to resolve encounters with subjects who are actively resisting, assaultive, or exhibiting any action likely to result in serious bodily injury or death of another person, themselves or the member.*" Section II.B defines "active resistance" as *"physically evasive movements to defeat an officer's attempt at control including bracing, tensing, running away…"*

Thus, according to sections I.A and II.B, officers are expressly permitted to deploy an ECD on someone simply for running away, because running away is considered actively resisting, and active resistance permits the use of the ECD. Moreover, standing Ninth Circuit case law states that even unannounced "headlong flight" in a high-crime area may constitute sufficient reasonable suspicion to justify seizure, and reasonable force may be utilized to effectuate that seizure if properly articulated.

4) "*On a subject who is compliant or who displays only passive non-compliance.*" (p. 5)

COMMENT: There is some serious confusion here, because passive non-compliance is defined under Section II.K as someone who "does not respond to verbal commands but also offer[s] [sic] no physical form of resistance." But active resistance includes bracing which is a form of resistance wherein the subject grabs and holds on to an external object (e.g. pole, bench, lamp, steering wheel while seated in a car, another individual, etc.) in order to avoid being moved; and tensing, which involves locking ones arms, legs, or body in general, to prevent movement, such as resisting a handcuffing maneuver or locking arms with another individual while sitting cross-legged on the ground. If bracing and tensing are actions which allow for the deployment of an ECD (in either drive stun or probe mode) then what does passive non-compliance look like, and how is an officer to know how to avoid the liability associated with deploying his ECD against someone who is "passively non-compliant" v. "actively resisting" by bracing or tensing?

5) "As a prod or escort device." (p. 5)

- No problem here.

6) "To rouse unconscious, impaired or intoxicated subjects; or (p. 5)

- No problem here.

7) "If the ECD is or has been submerged in water or other liquid." (p. 5)

- No problem here.

J. "Officer Requirements After Activations" – "As soon as feasible following an ECD [deployment], officers shall: (p. 5)

COMMENT: There should be clarification as to which ECD deployment (probe v. drive stun) requires medical call-outs, if not both. If both modes are implicated, that's fine, but there should be a clearer explanation here.

1) "Contact the Department of Emergency Management (DEM) and request emergency medical personnel to the scene of the ECD [deployment]" (p. 5)

- Need to define emergency medical personnel (is it fire? EMS/AMR etc.?)

2) "Notify a supervisor of all ECD [deployments], including unintentional [deployments] and drive stun [deployments]." (p. 5)

- Which supervisor needs to be notified? Front line supervisor (i.e. sergeant) or lieutenants, night captains, etc.?

3) "Collect confetti tags and book into evidence" (p. 5)

COMMENT: Why is this even necessary? The underlying rationale behind AFID confetti tags is to be able to identify a criminal who utilizes an ECD during the commission of a crime. If an officer is already being directed to collect the ECD probes and the cartridge(s) it/themselves, then why would they also need to collect AFID confetti tags as well? This policy doesn't even make sense in the context of multiple ECD cartridges being expended, or multiple officers deploying their ECDs in a single incident, because each officer is still required to collect the probes and/or cartridges for each deployment, and if the officer only utilizes drive stun mode, then no ECD cartridge – and therefore no AFID confetti tags – would need to be tagged and booked into evidence in any case.

4) – See #3 above. (p. 5)

K. "Duty to Render First Aid" – Officers shall render first aid when a subject is injured or claims to be injured by an officer's use of force unless first aid is declined, the scene is unsafe, or emergency medical personnel are available to render first aid." (pp. 5-6)

COMMENT: This section is both legally problematic and confusing:

First, is the Department mandating that an officer render first aid to any subject who suffers or claims an injury? This seems like it would open up the officer and the Department to some pretty significant liability, as a subject could easily claim that an injury was exacerbated by an officer who likely lacks sufficient medical training to render comprehensive first aid. In the case of an officer-involved shooting, there may be some moral imperative to render aid to a suspect, but even in that circumstance, there is also a strong

argument that, depending on the threat(s) known to the officer, and/or the number of suspects/subjects still outstanding the scene is sufficiently dynamic to obviate the requirement to render aid. In addition, exposing an officer to blood or other bodily fluids raises issues regarding workplace injuries/haz-mat exposure/worker's compensation, and unsafe working conditions.

Second, the policy does not describe what *kind* of first aid an officer is supposed to render. Bandages? Ice packs? in the case of a ventricular fibrillation, should the officer provide chest compressions, or simply apply the AED device? In light of medical literature that recommends only chest compressions in the case of a heart attack, is the Department mandating that officers provide mouth-to-mouth resuscitation as well? Because officers are only trained in introductory first-aid, and not pre-hospital trauma care, there is limited applicability here, other than the statistically improbable case of a V-Fib, where the officer would apply an AED and then monitor under qualified medical personnel can arrive on scene. Moreover, there is no affirmative duty to render aid under California Tort law, meaning that the Department cannot mandate an officer provide first aid other than the minimum amount they have been trained to undertake. Forcing an officer to expose him/herself to potentially contagious pathogens, to risk their own safety, and put them in a legally tenuous position, is not tenable.

- **"Only appropriate emergency medical personnel should remove ECD probes from a person's body. Officers shall treat used ECD probes as bio-hazard sharp objects, such as a used hypodermic needle, and shall use universal precautions when handling used ECD probes." (p. 6)**

  - (See K above) – Again, this section is confusing because it implies that officers who are ECD certified are not permitted to remove ECD probes, even though Taser Int'l/Axon specifically instructs officers how to remove used ECD probes in a safe and sanitary manner, absent probe placement in a physically sensitive location (e.g. face, neck, eyes, groin, etc.)

  In addition, if officers are prohibited from removing used ECD probes because of a medical risks involved, then why are they required to render aid when the same risks are presented in that circumstance? Assuming that the scene is not dynamic enough that used ECD probes can be removed in the first place, then there is no reason that SFFD or EMS couldn't be called out to render aid as well.

L. "Duty to Provide Medical Assessment" (p. 6)

First Sentence – "Officers shall arrange for a medical assessment and removal of ECD probes from a person's body by emergency medical personnel." (p. 6)

- This sentence is redundant in light of the last paragraph in Section (k) (see above).

- Second Sentence – "Members shall advise emergency medical personnel that a CED was used on the subject, and advise...if the subject loses consciousness, *appears to exhibit signs of a serious medical condition*, sustains a secondary injury (e.g. as the result of a fall), and/or is shocked in sensitive areas (e.g. face, eyes, neck, breast, and groin)." (p. 6)

- Again, this section needs some further explanation as to what constitutes a "serious medical condition."

QUESTIONS:
1) How is an officer supposed to determine if the subject is exhibiting signs of a serious medical condition?
2) What medical conditions fall within this category?
3) If the officer doesn't proactively question the person who was recently "tased," will they be subjected to discipline, even if the person appears fine?
4) If a subject is already "exhibiting signs of a serious medical condition(s)" then wouldn't emergency medical personnel (FIRE/EMS) already be notified, and wouldn't they be asking those questions of the subject as a component of their initial medical assessment?

- Third Sentence – "Members should give the approximate time of the ECD use on the subject to emergency medical personnel." (p. 6)

- This sentence is very confusing. First, what does "approximate time of the ECD use" mean? Is it referring to the overall deployment time (e.g. 10 seconds total deployment time, comprised of 2 full 5 second cycles), or is it referencing the length of time between the ECD deployment and when emergency medical personnel arrive (e.g. the subject was "tased" 5 minutes ago, etc.)?

Second, why is this information even required? Unless the subject is already experiencing physical symptoms related to a cardiac dysrhythmia, then of what use is this information? This statement implies that the duration of the ECD deployment has some medical effect, which – as we've discussed at length – is both medically disputed and statistically extremely unlikely.

M. "Duty to Provide Medical Evaluation" (p. 6)

- First Sentence - "All subjects who have been struck by ECD probes or who have been subjected to the electric discharge of the device, shall be transported by emergency medical personnel for evaluation at a local medical facility as soon as practical." (p. 6)

COMMENTS: This sentence seems too strongly worded. Any person who has been subjected to an ECD deployment should absolutely be assessed by on-scene FIRE/EMS, but there should not be a blanket directive to transport in all circumstances. Transporting all subjects simply because they've been shocked, without additional physiological indicators - as determined by the on-scene medical personnel - seems like overkill, because, assuming the subject is not being transported for further evaluation at a "local medical facility" they will likely be cleared on-scene and then transported to a booking facility, where they will again be put through a medical screening and evaluation process during intake. Moreover, the term "as soon as practical" rather than "as soon as possible" indicates that the person should be transported even if they're not exhibiting any symptoms,

- Instead the policy should read something akin to: "Any subjects who have been subjected to an ECD probe deployment or "drive stun" and are not-cleared by on-scene medical personnel, shall be transported for further evaluation at a local medical facility, as soon as practicable."

- Second Sentence – "If emergency medical personnel do not transport the subject, officers shall transport the subject to a local medical facility." (p. 6)

- This sentence raises soo many red flags liability-wise. If EMS declines transport, then they obviously do not feel that the subject is so physiologically impaired that they cannot

be transported to an appropriate booking facility for intake. As such, why would the Department then mandate that officers are *required* to transport someone for medical evaluation at a local medical facility when their medical condition is contra-indicative to a full medical work-up by an emergency physician? Moreover, if the subject truly is in some sort of medical distress, *why* would the Department want them to be transported to a medical facility in the back of a patrol vehicle, by a person who is clearly not – nor intended to be- a medical professional?

- There is no logical reason to have an officer transport a subject in this circumstance. Officers should request FIRE/EMS to the scene of the ECD deployment, and if the on-scene medical professionals determine that a transport is unnecessary - and therefore the subject is clear to be transported to a booking facility - then what place to police officers have medically overruling that determination? If the officer is transporting the subject to the booking facility and there is a medically emergent situation that arises during intake, then the correctional staff can notify medical professionals who can render appropriate aid. Medical transport is not within the purview of police officers' duties, nor should it be.

Finally, paragraph M.2 below, and Section N "Booking of Suspect" both support the argument that medical personnel should be the ones making medical diagnoses, and if those diagnoses do not require transport to a local medical facility, then police should not be doing it any way.

N. "Booking of Suspect" (p. 6)

- First Sentence – "Anyone who has been struck by ECD probes or who has been subjected to the electric discharge of the device shall not be detained at a District Station holding facility." (p. 6)

- I'm not sure what the rationale is behind prohibiting the use of District Station holding facilities, but if these facilities lack sufficient medical personnel on-site, then I can at least understand the point here.

- Second Sentence – See (M) above. (p. 6)

- Third Sentence – "Officers shall note the use of the ECD on the field arrest card on any subject who has been struck by ECD probes, or who has been subjected to the electric discharge of the device." (p. 6)

- Why is this necessary? For statistical purposes? If so, wouldn't this information be included in the narrative section of the arrest report anyway. If that's already the case, then I suppose that this is acceptable, so long as this information isn't utilized for disciplinary purposes.

O. "Documentation Requirements" (pp. 6-7)

- "Officers shall include the following information in the incident report or written statement:

3. Subject's known or suspected drug use, intoxication and other medical problems; (p. 6)

- Why is it necessary to describe the subject's known or suspected "other medical conditions?" See Section (M) above.

4. De-escalation techniques use by the officer(s); (p. 7)

- Again, why is this necessary? What is the rationale behind requiring officers to include the de-escalation techniques the officers utilized, other than for potential punitive purposes?

9. The distance at which the ECD was used; (p. 7)

- Why does this matter? What use does the Department have for this data, other than to determine if the officer has violated policy?

11. Description of where missed probes went; (p. 7)

- Why is this information pertinent? An attempted ECD deployment need not include the location of a missed ECD probe, unless the Department intends to use the data for discipline.

15. Identification of all officers activating ECDs; (p. 7)

- The term "activating" should be changed to "deploying"

P. "Supervisor Responsibilities" – "When an ECD has been activated, a supervisor shall follow the protocol outlined in DGO 5.01, Section VII, Section B.2. In addition, supervisors shall: (p. 7)

4) "Ensure that the ECD's memory records has been uploaded; (p. 7)

- When does the ECD memory need to be uploaded? By the end of the shift? Within 48 or 72 hours?

Q. "Off-Duty Considerations" (p. 7) – No issue here.

R. "Training" (pp. 7-8)

- First Sentence (p. 7) – No issue here.

- Second Paragraph, First Sentence (p. 7) - "Proficiency Training for officers who have been issued ECDs shall occur annually."

- How much training is the block of instruction? And will all training only occur annually, or will there be legal updates/training refreshers on a quarterly basis as well?

- Second Paragraph, Second Sentence (p. 7) – "A reassessment of an officer's knowledge or practical skills may be required at any time if deemed appropriate by the Department-approved ECD Instructors."

- How is this determination made? If an officer engages in annual re-certification, and fails his/her practical scenarios, are they provided with a second opportunity, or do they have to re-attend a separate remedial re-certification? This section needs clarification.

- Fifth Paragraph: (p. 8)

- "The Commanding Officer of the Training Division shall ensure that all training includes: (p. 8)

5. Target area consideration, to include techniques or options to reduce the unintentional application of probes near the head, neck, chest or groin." (p. 8)

- The word "application" and a few other words need to be changed. Instead it should read: "…to reduce the unintentional placement of ECD probes near the head, neck, eyes, or groin." This is, if I'm not mistaken, the only section in the entire policy that prohibits the placement of ECD probes on the chest of a subject, which is not outright barred by the ECD manufacturer(s), but merely advised against (in part because of the risk that the subject could accidentally pull out the probes while under power, or that they could potentially partially overcome the probe cycle to remove one or both probes.