

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: August 20, 2008

TO: The Committee on Rules, Open Government and Intergovernmental Relations

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Election Campaign Control Ordinance [ECCO]
(San Diego Municipal Code sections 27.2901, et seq.)

On June 11, 2008, the Ethics Commission presented a series of proposed amendments to the City's campaign laws to the City Council Rules Committee. At that time, the Rules Committee approved the package of proposed amendments and forwarded them to the full City Council, with one exception: the proposal to increase contribution limits was forwarded to the full City Council for further discussion. Since that time, however, several additional issues have arisen concerning various provisions in ECCO and the Commission would like the Rules Committee to consider the following additional changes:

Additional Filing Requirement

In accordance with the filing schedule outlined in state law, local candidates must file several "pre-election statements" in the months leading up to a City election. Specifically, for this year's June 3rd election, candidates had to file a statement by March 24, covering the period ending March 17, and another statement by May 22, covering the period ending 17 days before the election. Their next campaign statements were not due until July 31, well after the election, and covered the period from the last statement through June 30. In other words, information regarding contributions received and expenditures made during the last 16 days before the election is not disclosed to the public until approximately two months after the election. State law includes a similar time table for filings required in advance of a November election.

The Commission has received suggestions that City candidates should be required to disclose all campaign activities within twenty-four hours. Twenty-four hour filings could be extremely burdensome for candidates and their treasurers. In the heat of a campaign, it can be difficult for candidates and treasurers to gather information regarding the contributions that have been

accepted by agents of the committee on a given day. To require them to do this every day would be especially onerous. Moreover, because ECCO requires candidates to obtain contributor information before depositing a contribution, and because a contribution must be disclosed as received even if it has not yet been deposited, a twenty-four hour filing requirement would likely necessitate frequent amendments of their campaign statements.

In light of the difficulties that would accompany twenty-four hour reporting, the Commission recommends adding one more pre-election filing in order to provide the public with additional information before election day. Put another way, requiring one additional campaign statement would strike the appropriate balance between a desire for extra transparency and the interest in minimizing the burdens placed on campaign committees.

Specifically, the Commission recommends amendments to ECCO that would require City candidates to file a third pre-election campaign statement on the Friday before a Tuesday election, covering the period through the Thursday before the election. It is relevant to note that the City of Los Angeles currently imposes a similar additional filing requirement on its City candidates, and the Los Angeles Ethics Commission staff reports that there do not appear to be any associated difficulties in terms of compliance.

Legal Defense Funds

During the 2007 state legislative season, the City of San Diego sponsored Assembly Bill 1441. This bill was ultimately approved and signed by the Governor in October of 2007. It amended state law to provide that local candidates may establish and maintain separate committees and bank accounts for legal defense fund purposes. Prior to the passage of this law, local candidates were required to maintain legal defense funds within an existing campaign committee, which effectively required them to co-mingle legal defense and campaign funds.

After the law was approved, the FPPC proposed a corresponding Regulation delineating the various rules associated with local legal defense funds. Because the initial proposed Regulation conflicted with the current legal defense fund rules in ECCO in several respects, the Commission staff worked with the FPPC staff on amendments to the proposed Regulation. These efforts were successful and on August 14, 2008, the FPPC approved the final Regulation (18530.45).

The FPPC Regulation requires our local legal defense fund laws to be at least as strict as the state's laws in three specific areas: the establishment of a legal defense committee, recordkeeping requirements, and reporting obligations. The proposed changes to ECCO meet these standards, and in fact closely follow the state's guidelines. In all other areas, the FPPC Regulation expressly permits the City to tailor its legal defense fund provisions in the manner it deems most appropriate, regardless of whether such laws are more or less restrictive than state law. Thus, the proposed amendments to the City's legal defense fund laws largely keep intact most of the framework that currently exists in ECCO. Many of the proposed changes simply

reflect the fact that legal defense funds no longer must be subsumed within an existing campaign committee. In other words, the proposed amendments recognize the ability of a candidate or elected official to create a new and distinct legal defense committee that can collect and spend contributions through its own separate and distinct legal defense checking account.

In addition to proposing amendments that reflect the ability to create separate legal defense committees, the Commission is proposing the following policy modifications associated with legal defense funds:

- The City's current legal defense fund provisions allow a contributor to give a candidate or officeholder up to \$250 per year per audit or legal proceeding, over and above what the contributor may give for campaign purposes. The Commission proposes to raise the legal defense contribution limit to \$1,000 per calendar year. In addition, the Commission proposes that the limit be tied to the same dollar amount that exists for campaign contributions (currently, there is no connection between the two limits). This would be accomplished by setting the limit so that it is always equal to the campaign contribution limit (which is indexed every two years in accordance with changes to the Consumer Price Index). In other words, whenever campaign contribution limits are increased through indexing, the contribution limit for legal defense funds would automatically be increased to the same amount.
- ECCO currently states that the creation of a legal defense fund is the only means by which a candidate or elected official may solicit and accept contributions to pay for the costs of responding to an audit or enforcement action. In other words, under current law, candidates and elected officials are not permitted to solicit or accept new campaign contributions for legal defense purposes without first establishing a "legal defense fund" to accept those contributions. (They are, however, permitted to use existing campaign funds for legal defense purposes in accordance with the guidelines in state law.) This provision prevents candidates and officials from collecting new contributions for their legal defense without first publicizing the fact that they are the subject of an Ethics Commission investigation (because they are required to provide a description of the action when they establish the legal defense fund). Thus, if a need for legal defense funds occurs in the midst of an election, it forces the candidate to decide between giving opponents potentially damaging information, or foregoing the ability to collect new legal defense fund contributions to pay legal expenses. There is arguably no harm to anyone but the candidates if they are allowed to solicit and use new campaign contributions to pay for legal bills, since they would essentially be using campaign funds that could be used for purposes of campaign advocacy on attorney's fees. Accordingly, the Commission recommends deleting the exclusivity provision.
- Both the current and proposed legal defense fund laws state that within six months of the conclusion of all audits and proceedings for which legal defense funds were collected, all

leftover funds must be disposed of and the City Clerk notified that the audits or proceedings have concluded. In the proposed amendment, the language refers to the termination of the legal defense committee, and is modeled on the new FPPC Regulation. That Regulation includes a provision permitting a local jurisdiction or the FPPC Executive Director to extend the termination date for good cause. In the event that a candidate or elected official has incurred substantial legal fees and needs additional time to retire the debt, an extension may be appropriate. (Note that any unpaid legal fees could be considered an unlawful gift to a candidate or elected official.) Accordingly, the Commission has proposed a corresponding provision in ECCO that would permit the Ethics Commission Executive Director to extend the termination date for good cause, and would also require the Executive Director to report to the Ethics Commission if he or she grants any such extensions.

Telephone Communications

The changes previously approved by the Rules Committee in June of 2008 include several amendments designed to bring the telephone communications provisions into conformance with recently-adopted state law. The Commission recently realized, however, that the new state law differs from ECCO in that state law regulates 500 or more advocacy calls “that are similar in nature,” whereas ECCO currently regulates 500 or more advocacy calls made in connection with an election, regardless of whether the content is similar. State law clearly intends to capture only those campaign efforts involving calls of 500 or more that use substantially the same script for the call (either live or recorded). The Commission is concerned that incorporating this new rule into ECCO will result in the Commission staff (in an advisory capacity) and the Commissioners (in an enforcement capacity) being forced to evaluate the nuances of different scripts to determine if a reasonable person would believe that they are “similar in nature.” The Commission believes that it would be more appropriate and effective to adopt a simpler bright-line law that will apply without the need for a case-by-case analysis. Accordingly, the Commission recommends amending the definition of “mass telephone communications” to incorporate ECCO’s current standard (500 or more calls made in connection with an election).

The Rules Committee previously approved changes that would expand the “mass telephone communications” definition to include more than just express advocacy calls, in order to require an identification disclosure on subtler “push poll” calls (note that disclosure may be made at the end of the call in order to avoid skewing the polling results). In order to clarify that the disclosure requirements would only apply to calls made for advocacy and polling purposes, and not to routine calls made to vendors, campaign staff, etc., the Commission recommends further amending the “mass telephone communications” definition to expressly state that it applies only to advocacy calls and polling calls.

For your convenience we have drafted the attached strike-out version reflecting proposed changes to the relevant portions of ECCO. We look forward to discussing these proposed

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changes with you at the Rules Committee meeting on September 3, 2008. If you have any questions, please contact me at your convenience.

Stacey Fulhorst
Executive Director

Enclosure

cc: Catherine Bradley, Chief Deputy City Attorney