

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

M E M O R A N D U M

DATE: September 12, 2008

TO: Council President and Members of the City Council

FROM: Guillermo Cabrera, Chair, San Diego Ethics Commission
Stacey Fulhorst, Executive Director, San Diego Ethics Commission

SUBJECT: Proposed Amendments to the Election Campaign Control Ordinance [ECCO] and Municipal Lobbying Ordinance (San Diego Municipal Code sections 27.2901, et seq. and 27.4002)

One of the responsibilities of the Ethics Commission, as set forth in SDMC section 26.0414(g), is to “undertake a review of the City’s existing governmental ethics laws, and to propose updates to those laws to the City Council for its approval.” In 2003 and 2004, the Commission completed an extensive review and overhaul of the City’s campaign laws. The proposed changes were adopted by the City Council and went into effect on January 5, 2005.

Since that time, the Commission has received input from City candidates and campaign professionals regarding various aspects of ECCO, including an ongoing concern that the City’s contribution limits are too low and should be increased. Accordingly, as part of its legislative calendars for 2007 and 2008, the Commission held a series of public workshops to address the issue of contribution limits and several related provisions. After extensive deliberation and consideration of various proposals, the Commission unanimously approved a package of proposed amendments that are discussed in detail below.

The Commission presented its proposed changes to the City Council Committee on Rules, Open Government and Intergovernmental Relations on June 11, 2008, at which time the Committee voted to approve and forward to the full City Council the Commission’s entire package of proposed amendments with one exception. The proposed amendment to increase campaign contribution limits was forwarded to the full City Council for further debate because the Committee was unable to reach a consensus regarding the specific amount to which limits should be increased.

PROPOSED AMENDMENTS

Contribution Limits (SDMC §§ 27.2935, 27.2936 & 27.2937):

Proposed changes: The Ethics Commission recommends increasing contribution limits to \$1,000 for both district and citywide candidates. The Commission also recommends maintaining the

current biennial indexing factor but modifying the indexing provision so that adjustments will be rounded to the nearest \$50 (currently adjustments are rounded to the nearest \$10).

Rationale: During the series of public workshops on ECCO, the Commission heard a great deal of testimony concerning the City's contribution limits. The main issue before the Commission was how best to balance the City's interest in reducing the potentially corrupting impact of giving money to a candidate against a candidate's ability to amass the resources necessary for effective campaign advocacy. Contribution limits that are too high can result in corruption or the appearance of corruption. On the other hand, contribution limits that are too low can harm the electoral process by preventing challengers from mounting effective campaigns against incumbent officeholders, and may not survive First Amendment scrutiny. Ultimately, the following factors led the Commission to conclude that the current limits are too low:

- The City's contribution limits were initially set at \$250 per election in 1973, when ECCO was first adopted by the City Council. In January of 2005, the contribution limit for candidates running in citywide races (Mayor and City Attorney) was increased to \$300, while the limit for candidates running in district races remained \$250. In addition, in January of 2005, a biennial indexing factor was incorporated into ECCO which resulted in adjustments to the contribution limits in March of 2007 to \$270 for district races and \$320 for citywide races.
- The costs associated with running for elective office (postage, printing, and media advertising) have increased substantially since 1973, and the contribution limits have not kept pace with increased costs. For example, the cost of postage in 1973 was \$.08, compared to \$0.42 today.
- If the original \$250 contribution limit were indexed for inflation in accordance with the Consumer Price Index, the limit in 2008 would be approximately \$1,200.
- Current contribution limits arguably prevent candidates from raising enough money to effectively communicate with voters. The current limits have an especially adverse impact on challengers because incumbents typically have an easier time raising money from a large group of individuals by virtue of their officeholder status.
- Current contribution limits, coupled with time limits on fundraising (12 months before an election and 180 days after an election), typically require candidates to spend a substantial amount of time fundraising, which comes at the expense of communicating with voters. For incumbents, the time spent raising funds takes away from time spent on official duties.
- State and local campaign laws include regulations designed to ensure transparency and provide the public with relevant information concerning contributions and expenditures in a timely manner. In order to ensure compliance with these regulations, candidates typically hope to retain experienced campaign professionals. Low limits on contributions, however, can result in insufficient funds to hire experienced professionals. Without experienced professionals, candidates reportedly find it more difficult to comply with ECCO.

- The City's current limits have the unintended consequence of encouraging City candidates to align themselves with various special interest groups and political parties because these groups have the means to support them financially via independent expenditures and member communications. Candidates maintain that they would prefer to raise their own campaign funds from individual supporters and control the advertising associated with their campaigns.

After the Commission determined that the current limits should be increased, it engaged in extensive discussions and deliberations before deciding to recommend a new limit of \$1,000 for both district and citywide races. The following factors contributed to this decision:

- Candidates for federal elective office are currently limited to \$2,300 per election, and candidates for the state legislature are limited to \$3,600 per election.
- Contribution limits for candidates for local elective office in the fifteen largest cities in the United States generally range from \$500 to \$5,000, with limits in Los Angeles of \$500 (district) / \$1,000 (citywide), and limits in San Francisco of \$500 (district & citywide).
- Because increasing contribution limits could have the effect of disenfranchising smaller contributors, the Commission considered the fact that a contributor making a \$50 contribution each month would still be able to contribute a total of \$900 in the 18 months leading up to a general election.
- Although indexing the original \$250 for inflation would result in a \$1,200 limit today, the Commission heard testimony indicating that the original \$250 limit was based in large part on a political compromise rather than a calculated study.
- Because candidates for citywide races generally have a larger pool of potential contributors, the Commission did not see a compelling need to recommend higher contribution limits for citywide candidates.

As discussed above, the Rules Committee generally agreed that the City's contributions should be increased, but decided to forward the proposal to the full City Council for additional discussion regarding the specific amount of the increase.

Additional Filing Requirement (SDMC § 27.2930):

Proposed changes: 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.

Rationale: 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. 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 it has not encountered any difficulties with compliance.

Restrictions on Time Periods of Contributions (SDMC § 27.2938):

Proposed changes: The Ethics Commission recommends adding an exemption to the 180-day post-election fundraising time limit for contributions from a candidate to his or her committee.

Rationale: ECCO currently prohibits City candidates from accepting contributions more than 180 days after a City election. When the Commission proposed this time limit in 2004, it expressed its interest in reducing the amount of time that an elected official engages in fundraising while contemporaneously conducting business as a City Official. The Commission noted that most post-election contributors are individuals who have business before the City, and the act of making a contribution long after a City election suggests an interest in obtaining special consideration from an elected official.

Since the time that this law took effect in January of 2005, the Commission staff has realized, through the course of its audit and enforcement activities, that the language of the statute prohibits the acceptance of all contributions more than 180 days after an election, including the personal funds that candidates may wish to deposit into their committees after the 180-day period expires. (ECCO requires candidates to deposit their personal funds into their committee bank accounts before spending their own money on their campaigns.) Accordingly, a candidate who has no leftover campaign funds arguably has no legal means to pay a campaign debt if he or she receives a new invoice or discovers an outstanding campaign debt more than 180-days after an election. Such a candidate also has no means of paying for recurring administrative expenses (e.g., treasurer and software fees associated with post-election filings) incurred more than 180

days after an election. Because the underlying intent of the prohibition was to prevent City candidates from accepting contributions from third parties long after a City election, the Commission recommends amending the current language to exempt a candidate's own contributions to his or her committee.

Professional Expense Funds (SDMC §§ 27.2965 through 27.2969):

Proposed changes: The Ethics Commission recommends a series of changes to the provisions in ECCO that address legal defense funds in order to recognize recent change in state law that permits local candidates to create separate committees and accounts for legal defense fund purposes. The amendments proposed by the Commission are also designed to ensure that the provisions of local law comply with the requirements set forth in the new state law and accompanying FPPC Regulation.

In accordance with direction from the Rules Committee, the term "legal defense fund" has been changed to "professional expense fund" wherever appropriate in ECCO. It should be noted, however, that recently adopted FPPC Regulation 18530.45 requires that the name of the committee listed on the Statement of Organization (which must be filed with the Secretary of State and the City Clerk) include the words "legal defense fund." Thus, although the proposed revisions to ECCO incorporate the terms "professional expense fund" and "professional expense committee," the revisions also reflect that the formal name of the committee must include the words "legal defense fund" in order to comply with state law.

In addition to the foregoing, the Commission is proposing the following policy modifications associated with professional expense funds: increase the annual contribution limits for these funds to mirror the per-election limit for City candidate elections, eliminate the provision that requires City candidates to create a new fund in order to raise money for legal defense fund purposes, and add a new provision permitting the granting of an extension to the six-month termination clause.

Rationale: 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 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 adopted corresponding Regulation 18530.45, which delineated various rules associated with local legal defense funds. This Regulation requires our local legal defense (or "professional expense") fund laws to be at least as strict as the state's laws in three specific areas: the establishment of the 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 provisions in the manner it deems most appropriate. Thus, the proposed amendments to the City's legal defense 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 “professional expense committee” that can collect and spend contributions through its own separate and distinct “professional expense” checking account.

In addition to the foregoing, the Commission has proposed several policy modifications that are based on the following:

- 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 “professional expense fund” 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 professional expense 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 (now referred to as “professional expense 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 professional expense 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 (SDMC § 27.2971):

Proposed changes: In order to conform to recent changes in state law, the Ethics Commission proposes amending this provision to require a “paid for by” disclosure in lieu of the current “on behalf of” disclosure when the call or caller is paid by a candidate or committee. In addition, the Commission proposes expanding the identification requirement from calls made for the purpose of expressly supporting or opposing a City candidate or measure, to also include calls made by candidates and committees for polling purposes.

Rationale: When ECCO was amended in 2004, a provision was added that required the inclusion of a “paid for by” disclosure in telephone communications directed to 500 or more individuals or households per election. This law was subsequently revised in late 2005 to require an “on behalf of” disclosure instead of the “paid for by” disclosure. The revision was prompted by concerns over the misleading appearance created when the “paid for by” disclosure was made by campaign volunteers.

In 2007, the State of California adopted new laws concerning identification requirements for telephone calls. This state law applies to all candidates and committees in California. It requires the inclusion of a “paid for by” disclosure when a candidate or committee pays for the call or pays another person to make the call on its behalf. Because it is not permissible for local campaign laws to be less restrictive than state law, it is necessary to amend ECCO to require a “paid for by” disclosure in situations in which the candidate or committee pays for the call (without using volunteers to make the call). The new state law also includes an “authorized by” disclosure requirement when a person has paid for a call at the behest of a candidate or committee. For purposes of consistency, the proposed amendments to ECCO also include this requirement.

The proposed amendments would maintain ECCO’s current requirement that volunteers make an “on behalf of” disclosure when a candidate or committee is paying for the resources used to make the calls. Although the new state law does not include any identification requirements for calls made by volunteers, the Commission believes that it is important for volunteers to identify the candidate or committee directing their efforts. In addition to satisfying the public’s interest in knowing who is paying for the resources used to make the call, a volunteer’s “on behalf of” disclosure will eliminate any ambiguity in the mind of the person receiving the call – under the state model a person receiving a campaign call from a volunteer will not be able to tell if the caller is truly a volunteer or is instead a paid caller failing to abide by the disclosure requirement. By requiring a volunteer to make an identifying disclosure when the resources used to make the

call are paid for by a candidate or committee, the proposed amendment to ECCO will provide the public with relevant information whenever these kinds of telephone calls are made.

Finally, the Commission staff has obtained advice from the Fair Political Practices Commission [FPPC] indicating that member communications are not exempt from the state's identification requirements for telephone calls. Accordingly, the amendments proposed by the Commission would delete the existing exemption for member communications by non-political parties.

In addition to the above proposed amendments that are necessary to harmonize local law with state law, the Commission also recommends revising ECCO to address "push polls" (a series of questions in a polling format that are designed to influence someone to vote for or against a particular candidate or measure). Because the current identification laws only apply to calls made expressly "for the purpose of supporting or opposing a City candidate or City measure," calls made for the purpose of conducting a true poll are not affected by the law. The Commission has learned, however, that some candidates and committees have attempted to avoid the identification requirement by claiming that their telephone communications were made for polling purposes, when in fact their polling questions suggest that the real purpose for the calls is to subtly advocate for or against City candidates.

In order to ensure that call recipients receive information regarding the caller, and in order to avoid situations that would require the Commission to evaluate the subtle nuances in particular poll questions to determine whether a reasonable person would conclude that the poll was a true poll or a push poll, the Commission recommends expanding the identification requirement to telephone communications made for polling purposes.

It is relevant to note that the identification requirement would only apply to calls made to 500 or more individual households by a City candidate or a political committee. If, for example, a newspaper or local television station wanted to pay for a true poll, it would not be subject to the above disclosure requirements; these entities are not political "committees." It is also relevant to note that the current and proposed laws do not specify the placement of the disclosure within the communication. In other words, a person conducting a true poll can make the required disclosure at the end of the call to avoid skewing the poll results.

Housekeeping Amendments (SDMC §§ 27.2903, 27.2911, 27.2916, 27.2917, 27.2924, 27.2925, 27.2930, 27.2939, 27.2945 & 27.2960):

The amendments proposed by the Ethics Commission include the following housekeeping changes and updates:

1. Proposed change: Modify the definition of "committee" to expressly include independent expenditure committees, and add a definition of independent expenditure committee.

Rationale: Clarifies that ECCO applies to non-recipient committees that make independent expenditures in support of or in opposition to a City candidate or measure.

2. Proposed change: Clarify that the duty to have a campaign treasurer, and the rules regarding authorization by the treasurer, apply only to candidates and “recipient” committees.

Rationale: Clarifies that a committee that does not receive contributions from others, but makes independent expenditures in support of a City candidate or measure, is not required to have a campaign treasurer.

3. Proposed change: Incorporate a reference to FPPC Regulation 18401, which sets forth a detailed list of the information that must be obtained by a committee before depositing contributions.

Rationale: Incorporating the relevant FPPC Regulation ensures that local laws concerning contributor information are consistent with state requirements.

4. Proposed change: Delete the current requirement that contributor information that has not been provided must be requested in writing within ten business days.

Rationale: The current requirement that missing contributor information must be requested in writing does not reflect the current practices of most candidates and committees (most request the information via telephone or email). Moreover, because local law requires candidates and committees to deposit contributions within thirty business days or return them within thirty-five business days, and because contributor information must be obtained before a contribution is deposited, the Commission does not believe there is a sufficient reason to impose a ten-day time limit on obtaining relevant contributor information.

5. Proposed change: Clarify that the lawful use of campaign funds is governed by the entire California Political Reform Act [PRA], as opposed to specific sections.

Rationale: Incorporating the PRA ensures that any and all updates to state law concerning the permissible uses of campaign funds will be automatically incorporated by reference into ECCO.

6. Proposed change: In the provision regarding acceptable uses of surplus funds, clarify that only “vendor” debts (as opposed to candidate loans) must be paid within 180 days.

Rationale: This change will harmonize the surplus funds regulations with the vendor debt laws, which regulate the payment of vendor debts as opposed to candidate loans.

7. Proposed change: Delete existing rules regarding recordkeeping and incorporate FPPC Regulation 18401 by reference.

Rationale: The recordkeeping requirements set forth in FPPC Regulation 18401 are more thorough, are updated on a fairly regular basis, and better reflect current campaign practices. In addition, by incorporating the state’s recordkeeping laws, local candidates and campaign professionals will be able to rely on one set of rules.

8. Proposed change: Eliminate a current provision indicating that a contribution is only deemed to be “accepted” for purposes of disclosure when a candidate or committee has obtained all of the requisite contributor information.

Rationale: Because ECCO requires candidates and committees to obtain contributor information before a contribution is deposited, campaign treasurers previously expressed concern that they might be required to disclose a contribution received at the end of a reporting period even though they had not yet obtained the contributor’s information, and that a campaign statement that did not include contributor information might result in an enforcement action by the Ethics Commission. As a result, ECCO currently states that contributions are not deemed to be “received” until the contributor information is obtained. This provision, however, is impermissibly less restrictive than state law, which states that a contribution is deemed to be “received” whenever the candidate or an agent of the candidate’s committee takes possession of the contribution. This necessary amendment to ECCO will require candidates and committees to report contributions received near the end of a reporting period, even if all contributor information has not yet been obtained. Once the information is obtained (within thirty business days as discussed above) the candidate or committee will be required to file an amended campaign statement reflecting the contributor information.

9. Proposed change: Incorporate FPPC Regulation 18531.2, which sets forth guidelines regarding the return of general election contributions and the apportionment of expenditures between the primary and general elections.

Rationale: When a candidate raises money for a general election, but does not participate in that election (i.e., withdraws from the race; wins outright in the primary; or does not make it to the run-off), that candidate is required to refund general election contributions to individual contributors on a pro rata basis, minus expenses associated with raising and administering general election contributions. The FPPC recently adopted a Regulation that provides guidance for state candidates with regard to refunding general election contributions and determining how primary and general election costs should be apportioned. This amendment will impose on local candidates the same refund and apportionment rules contained in the FPPC Regulation.

10. Proposed change: Amend the provision requiring contribution solicitations to include a reimbursement prohibition notice to clarify that a violation may only be cured if remedial action specified is taken before the date of the applicable election.

Rationale: ECCO requires candidates and committees to include on their campaign contribution solicitations a notice that reimbursements by organizations are prohibited. This provision contains a built-in cure for violations whereby the candidate or committee may distribute the notice to all solicited individuals and notify the Ethics Commission that remedial action has taken place. This built-in remedy only serves its intended purpose if it occurs before the applicable election.

11. Proposed change: Clarify that the laws regulating the extensions of vendor credit apply only to candidates and candidate-controlled committees.

Rationale: ECCO's requirement that campaign vendors be paid within 180 calendar days is intended to avoid situations where unpaid campaign debts essentially become in-kind contributions to a candidate. In addition, the 180-day limit is intended to discourage candidates from engaging in deficit spending in the hopes of collecting enough contributions after the election to retire their debts. (As discussed above, contributions made after an election create the appearance that the contributor is attempting to curry favor with the newly-elected official.) These public policy interests are not relevant to committees that are not controlled by a candidate.

Fundraising Disclosure by Lobbyists (SDMC § 27.4002):

Proposed changes: The Ethics Commission's proposals include an amendment to the Municipal Lobbying Ordinance that would increase the fundraising disclosure threshold for lobbyists from \$1,000 to \$4,000.

Rationale: As discussed above, the Commission has proposed increasing contribution limits to \$1,000 for both district and citywide candidates. The City's Municipal Lobbying Ordinance currently requires lobbying firms and organization lobbyists to disclose fundraising activities that result in the raising of \$1,000 or more for City candidates. This \$1,000 threshold was based on the City's current contribution limits of \$270 and \$320. If the City Council concurs with the recommendation to increase contribution limits to \$1,000, it would be appropriate to also considering raising the fundraising disclosure threshold so that it is not triggered by a single contribution. The Ethics Commission recommends increasing the threshold amount to \$4,000 to correspond with the approximately fourfold increased in the proposed contribution limits.

All the changes discussed above have been incorporated into the proposed clean and strikeout versions of the Ordinance that accompany this report, and which are attached hereto as separate documents. The proposed Ordinance, if approved by the City Council, would go into effect on January 1, 2009, and would be applicable only to elections occurring after that date. For example, candidates running for office in a 2010 election would be able to accept \$1,000 contributions (if this amount is approved by the Council), but candidates in the upcoming 2008 general election would not be able to accept additional contributions in 2009 from contributors who have already given them the maximum amount under the limits currently in effect.

We look forward to the City Council considering these proposed changes as soon as docketing of this issue is feasible. If you have any questions, please contact Stacey Fulhorst at your convenience.

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