

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: February 6, 2008
TO: Chair and Members of the San Diego Ethics Commission
FROM: Stacey Fulhorst, Executive Director
SUBJECT: Election Campaign Control Ordinance [ECCO]

Over the past several months, the Ethics Commission has been presented with an assortment of arguments on the subject of contribution limits, and whether or not they should be maintained, increased, or eliminated altogether. Some proposals would involve lifting contributions only in certain circumstances, while other suggestions involve raising limits for all purposes. In the interests of assisting the Commission with these issues, this memorandum identifies each proposal that has been suggested along with the policy questions that are still outstanding.

A. Increasing Contribution Limits

The Commission has heard the pros and cons of raising contribution limits, e.g., allowing an individual to make contributions supporting or opposing a candidate in amounts that are higher than the \$270 district limits and the \$320 citywide limits currently in effect. These limits were put into place as a means to curb corruption and the appearance of corruption. Under *Buckley v. Valeo*, 424 U.S.1 (1976), and the court cases that followed, the City of San Diego may impose contribution limits that survive constitutional scrutiny only when those limits are closely drawn to address a sufficiently important interest, i.e., reducing corruption and the appearance of corruption. For this reason, any recommendation by the Commission with regard to changing the contribution limits should be made in the context of using such limits as a tool to combat corruption in the City of San Diego.

If the Commission decides to recommend increasing contribution limits, a number of questions arise.

Questions:

1. How high should the limits be raised?
2. Should the limits be the same or different for district and citywide races?
3. Should the indexing factor stay the same (adjusted every two years per the CPI to the nearest \$10)?
4. Should limits go up when an opponent spends large amounts of personal wealth? (See section C below)
5. Should limits be increased until a candidate raises a particular amount of money, and then reduced? (See section D below)
6. If contribution limits are increased, should the Lobbying Ordinance's threshold for reporting "fundraising activities" be similarly increased?

B. Eliminating Contribution Limits

The Commission has heard from individuals who favor eliminating contribution limits altogether. As indicated above, the limits currently in effect were instituted as a means to curb corruption and the appearance of corruption. A recommendation to eliminate all contribution limits would, therefore, signify the Commission's belief that contribution limits do not serve their intended purpose or are otherwise an unnecessary tool in the fight against corruption in City elections.

Initial research conducted by the Commission staff indicated that both Chicago and Columbus impose "no limits" on at least some segment of their citizenry. The Commission staff conducted additional research regarding the specific laws in place in these cities and their impact in terms of public perception and the appearance of corruption.

1. Chicago

Chicago, in fact, does impose limits, but only on lobbyists and persons with business before the city. According to the Executive Director for the Chicago Board of Ethics, the city's contribution limits actually encompass a large group of people. Thus, the public perception in Chicago is that the city does have limits (\$1,500), but people with no business before the city are exempt from those limits. Having business before the city is broadly defined to include a wide variety of matters, including contracts, loans, grants, leases, and zoning. Contribution limits apply to developers and to any person seeking a city contract.

We also learned that there is no substantive public outcry in Chicago for lowering the contribution limits that do exist. Instead, we were advised that many of the elected officials have complained that the \$1,500 limits are too low. Another concern has to do with unions, which are not subject to contribution limits under Chicago law. Incumbents have complained that unions are contributing large sums of money to challengers. A proposal to subject unions to contribution limits, however, did not succeed. We were also advised that large contributions do not necessarily carry a negative stigma when the contributions are received and reported. Instead, the negative impact is more likely to occur when a large contributor is involved in some type of public scandal involving the city; it is then that the large contribution is perceived as having some type of corrupting influence.

Professor Brian Adams, who spoke at our December meeting, advised staff that the lack of limits for some individuals has had the effect of allowing incumbents in Chicago to outraise challengers. He related that Mayor Richard Daley raised over \$6 million in contributions in his 2003 re-election bid, while his three opponents raised less than \$50,000 combined. He added that Mayor Daley received 16 contributions of \$20,000 or greater (the highest was \$57,000). He also advised us that some non-incumbents did collect large contributions, but fewer than was the case with incumbents.

2. Columbus

Similar to Chicago, the acceptance of campaign contributions is partially limited in Columbus. Ohio state law extends its restrictions on campaign contributions from public contractors to municipalities. A government contract exceeding \$500 cannot be awarded to an individual or organization if specified persons (e.g., partner of partnership, 20% or greater shareholder of the corporation, spouse of individual, etc.) have made, within the previous two calendar years, one or more contributions in excess of \$1,000 to the holder of the public office having ultimate authority for the award of the contract.

Shortly before Democrats took over four statewide offices in early 2007, Republicans in Ohio passed a controversial campaign finance bill reportedly designed to stop “pay-to-play” politics in the state. Unions challenged the new law in court on constitutional and procedural grounds. In December 2007, a judge struck down the law based on a clerical error in the passage of the bill; the free speech issues were not addressed. An appeal may be filed. Although the law may not become effective, its provisions may be informative.

The bill extended to unions the government contractors’ restriction on campaign contributions. Contributions from unions were capped at \$2,000 per election to the elected official responsible for approving public contracts. This limit applied to any union or other political action committee affiliated with the contract recipient, for two years preceding the contract award.

Further, the \$2,000 limit was an aggregate limit that applied to all contributions from the union as well as individuals and organizations affiliated with the union. In addition to imposing contribution limits during the two years preceding a public contract award, the act imposed similar contribution limits from the time of the contract award until one year following the conclusion of the contract. According to the bill, violations would result in fines equal to three times the amount of the excess contribution and/or rescission of the contract.

If the Ethics Commission decides to recommend eliminating contribution limits, the following related questions should be addressed.

Questions:

1. If contributions limits are eliminated, will more frequent reporting be required? If so:
 - (a) How often? On certain dates? When accepting single contributions in excess of a particular dollar amount? When reaching a total dollar threshold?
 - (b) By what means (mail, email, fax, personal delivery)?
2. If contribution limits are eliminated for all contributors except those who have business with the City, how will candidates know which contributors have business with the City? Will it be enough for them to rely on the contributors' representations? What if someone decided to do business with the City after making a large contribution to a City candidate? Would contributors who made large contributions be prohibited from conducting business with the City for a specific period of time thereafter?
3. If contribution limits are eliminated, should the Lobbying Ordinance's threshold for reporting "fundraising activities" be increased?

C. Lifting Limits When Opponent Spends Substantial Personal Funds

At a past meeting, Commissioner Biddle suggested that the Commission consider recommending a temporary lifting of contribution limits for any candidate whose opponent spends a substantial amount of personal funds. In response, staff provided the Commission with a research memo addressing that suggestion. In that memo, we mentioned that this general concept has already been implemented for federal candidates (the so-called "Millionaires' Amendment"), and that its constitutionality was upheld in an August 9, 2007, ruling by a three judge panel of the U.S. District Court for the District of Columbia. *Davis v. FEC*, 501 F. Supp. 2d 22 (2007). On January 11, 2008, however, the U.S. Supreme Court agreed to review the lower court's decision. *Davis v. FEC*, 76 USLW 3095 (2008). Thus, at the moment, there are outstanding questions

concerning the constitutionality of such an amendment.¹ Accordingly, the Commission may wish to postpone any discussion of this issue until constitutional issues have been settled.

Notwithstanding the above, if the Commission is still interested in discussing this issue, there are a number of issues that would need to be resolved.

Questions:

1. What amount should trigger lifting the limits?
2. Should the limits be lifted altogether, or just increased (and by how much)?
3. How often, and in what manner, should the wealthy candidate be required to disclose his or her personal loans and/or contributions?
4. When and how should the Commission (or City Clerk) notify the wealthy candidate's opponents that contribution limits have been lifted?
5. Should limits be re-instituted after the non-wealthy candidate has raised an amount equal to the personal wealth loaned or contributed by his opponent? When and how should the non-wealthy candidate disclose reaching that amount?
6. What if the wealthy candidate makes a large loan or contribution to his or her campaign during the final days of a campaign, after the last pre-election disclosure?
7. What if the wealthy candidate incurs substantial debt during the months just prior to the election, but doesn't actually make a large loan or contribution to his or her campaign until after the election?
8. If contribution limits are increased, even temporarily, should the Lobbying Ordinance's threshold for reporting "fundraising activities" be increased as well?

Commissioner Biddle's suggestion also included the concept of lifting contribution limits for a candidate when an entity makes independent expenditures or member communications that "benefits" an opponent. Although this concept differs from a "Millionaires' Amendment" because it doesn't involve spending by another candidate, there are still some issues in common,

¹ Appellant Davis argued that the Millionaire's Amendment is unconstitutional because it creates an additional burden for him; is not justified by any accepted government interest; and cannot be justified as an anticorruption measure because it allows his opponents to raise larger campaign contributions, thereby increasing rather than decreasing the chances for corruption.

i.e., more frequent reporting by the entity spending the large sum, and the governmental interest in increasing rather than decreasing limits. Accordingly, the Commission may want to delay discussion of this issue until after the U.S. Supreme Court provides more guidance.

If the Commission still wishes to discuss the issue, the following questions may be relevant:

Questions:

1. Who would determine whether a candidate “benefited” from an independent expenditure or member communication? What criteria would be used?
2. What would be the triggering amount of the independent expenditure or member communication?
3. Would limits be lifted altogether or just increased (and by how much)?
4. Should limits be re-instituted after the candidate has raised an amount equal to the cost of the independent expenditure or member communication?
5. If it is determined that one candidate “benefited” from an independent expenditure or member communication, then should contribution limits be lifted for all the other candidates in the race? Would it make a difference if the candidate who “benefited” had coordinated with the party making the member communication?
6. What if the independent expenditure or member communication is a negative ad regarding one candidate? Would contribution limits be increased or lifted only for the candidate who is the subject of the negative ad?
7. When and how would independent expenditures and member communication have to be reported?
8. When and how would the Commission (or City Clerk) notify certain candidates that contribution limits had been lifted or eliminated, and then notify them that the limits were back in place?
9. What if an independent expenditure or member communication is made in the final days of a campaign?

D. Lifting Limits until a Threshold Amount of Contributions have been Raised

Another idea suggested at a past meeting involves increasing or eliminating contribution limits at the beginning of a campaign period, and imposing limits only after a candidate has collected a threshold amount of contributions.

As discussed above, any recommendation to eliminate or raise contribution limits, even if it is only for a limited period of time, would need to be accompanied by an explanation to support the Commission's view that limits do not serve their intended purpose in preventing the appearance of corruption.

If the Commission is interested in considering this proposal, the following questions would need to be addressed.

Questions:

1. What should the threshold amount be?
2. What limits, if any, should be imposed before the threshold amount has been reached?
3. What should the limits be once the threshold amount has been reached?
4. Should funds left over from a previous campaign count toward the new campaign's threshold amount? Should an incumbent candidate running for a second term be permitted to collect unlimited funds in his or her new committee, up to the threshold, and then carry over or transfer old committee funds to the new committee?
5. If contribution limits are increased in the manner described above, should the Lobbying Ordinance's threshold for reporting "fundraising activities" be increased as well?

E. Contributions from Organizations

Under the City's campaign finance laws, only individuals may make campaign contributions to support or oppose a City candidate. All business entities, including corporations, sole proprietorships, and partnerships, are prohibited from using their money to directly support or oppose City candidates. (These entities may, however, make unlimited independent expenditures to support or oppose City candidates.) As indicated in the questions below, if the Commission is interested in eliminating the ban on organizational contributions, it will have to grapple with an aggregation rule. If, for example, a business owner gives a \$320 contribution to a mayoral candidate, should that person's business also be allowed to give \$320 to the same candidate, or should an aggregate limit prevent any further contributions from any business owned by that

person? It is relevant to note that, in other jurisdictions where contributions from organizations are permitted, all contributions from the owners, officers, directors, and shareholders of the organization are aggregated for purposes of contribution limits.

Thus, if the Commission were to recommend lifting the ban on contributions from organizations, the following questions would be relevant:

Questions:

1. Should the ban be lifted for all business entities, or just sole proprietorships?
2. Should contributions from an organization and its owners, officers, directors, and shareholders be aggregated for purposes of contribution limits?
3. Should contributions from two different organizations that share the same owners, officers, directors and/or shareholders be aggregated for purposes of contribution limits?
3. Should the ban be lifted for lobbying firms and organization lobbyists?
4. Should the limits be the same as those for an individual, or different?

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