

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

M E M O R A N D U M

DATE: May 30, 2008

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

FROM: Stacey Fulhorst, Executive Director

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 scheduled a series of public workshops beginning in October of 2007 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 at its meeting on May 8, 2008. The details of the proposed amendments, as well as several proposals considered but ultimately rejected by the Commission, are set forth below.

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 past eight months of ECCO workshops, 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, this time 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 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.

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. The Commission unanimously indicated its support for this proposal at its meeting on October 11, 2007. Commission staff, however, inadvertently failed to include this proposed change in the strike-out proposal approved by the Commission on May 8, 2008, and attached to this memorandum. Accordingly, we have prepared the attached “Option A” for consideration by the Rules Committee. If approved by the Rules Committee, this change will be incorporated into the proposed amendments submitted to the full City Council.

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.

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 calls made by candidates and committees that simply refer to a clearly identified candidate or measure.

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. 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 still require volunteers to 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 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 that refer to a clearly identified candidate or measure.

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 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 indicates 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 Committee 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 quadrupling the threshold amount to \$4,000 to correspond with the approximately fourfold increased in the proposed contribution limits.

For your convenience, "strike-out" versions reflecting the proposed changes to ECCO and the Lobbying Ordinance are attached, together with the Option A discussed above.

ISSUES CONSIDERED BUT NOT RECOMMENDED

In addition to the above proposals, the Ethics Commission considered several other policy issues, but ultimately decided not to recommend any ECCO amendments concerning these issues, as discussed below:

Contributions from Organizations (SDMC § 27.2950):

Proposed changes: During the course of its workshops on proposed increases to the City's contribution limits, the Commission heard testimony from individuals who suggested that the current ban on contributions from organizations to City candidates should be lifted. After careful consideration, the Commission ultimately decided not to recommend any changes to the current source restrictions.

Rationale: The Commission decided not to recommend lifting the ban on contributions from organizations for two reasons. First, the Commission believes that there is a public policy consideration in restricting contributions to City candidates to individual citizens rather than corporate or business interests. Second, the Commission considered the fact that eliminating the ban on contributions from organizations would necessitate the adoption of complex rules to ensure that contributions from the owners of an organization are aggregated with contributions from the organization, and that contributions from affiliated or subsidiary entities are also aggregated. Such complex rules would inevitably become a trap for the unwary and present additional compliance difficulties for candidates and their campaign staffs.

Disclosure of Fundraising Activities by City Candidates:

Proposed changes: The new lobbying laws that went into effect on January 1, 2008, require lobbying firms and organization lobbyists to disclose fundraising activities that benefit City candidates. During the course of the Commission's work on the proposed amendments to the lobbying laws, several lobbyists suggested that the burden for reporting fundraising activities should fall on the candidates, not the lobbyists, to ensure that the public is informed of all fundraising efforts conducted by a candidate's supporters. Accordingly, during its work on ECCO over the past eight months, the Commission considered whether to recommend the inclusion of fundraising disclosures into the City's campaign laws. For the reasons set forth below, the Commission decided against this recommendation.

Rationale: During the course of their deliberations, the Commissioners agreed that the disclosure of all fundraising activities by candidates would create a desirable level of transparency. They ultimately concluded, however, that a law requiring the disclosure of fundraising would be too complicated and cumbersome, as well as potentially unenforceable. Specifically, the Commission determined that it could be very difficult for candidates, in the heat of an election, to monitor the various individuals who fundraised on their behalf. In addition, the Commission questioned the efficacy of such a requirement if a candidate could simply elect not to keep track of fundraising efforts by one or more individuals. In other words, how would the Commission prove that a particular fundraising activity had not been disclosed?

The Commission also noted that the proposed fundraising disclosure in ECCO is different from the current fundraising disclosure in the lobbying laws in two important respects. First, the lobbying laws require lobbyists to disclose fundraising efforts if they personally deliver contributions or if they take credit with the candidate for the fundraising of contributions. In other words, because the lobbyist is the individual actually delivering or taking credit for the contributions, the lobbyist is in a position to know what needs to be disclosed. This situation is

contrasted with the proposed candidate disclosure where the candidate may not know if a particular individual has delivered or taken credit for a specific amount of contributions.

Second, the fundraising disclosure requirement for lobbyists is unique in that it is applied to individuals who receive compensation for their efforts to influence municipal decisions. When the individuals who raise money for City candidates subsequently contact the officeholders who benefited from their fundraising efforts and attempt to influence their official decisions, the appearance of improper influence is created. Therefore, the Commission concluded that the public has a unique interest in the fundraising activities of lobbyists, and that this interest is not comparable to the fundraising activities of other individuals.

We look forward to discussing the proposed changes outlined above at the Rules Committee meeting on June 11, 2008. If you have any questions, please contact me at your convenience.

Stacey Fulhorst
Executive Director

Attachments

cc: Catherine Bradley, Chief Deputy City Attorney
Kris Michel, Deputy Chief Community & Legislative Services

SAN DIEGO ETHICS COMMISSION REVIEW OF THE CITY'S Election Campaign Control Ordinance

OPTION A

§27.2938 Restrictions on Time Period of Contributions

- (a) It is unlawful for any *candidate* or *controlled committee* seeking elective *City* office to solicit or accept *contributions* prior to the twelve months preceding the primary *election* for the office sought.
- (b) It is unlawful for any *candidate* or *controlled committee* for *City* office to accept *contributions* more than 180 days after the withdrawal, defeat, or election to office. *Contributions* immediately following such a withdrawal, defeat, or election and up to 180 days after that date, may be accepted only by a *candidate* or *controlled committee* with outstanding debts or loans, and shall be used only to pay the outstanding debts or loans owed by the *candidate* or *controlled committee*.
- (c) *Contributions* pursuant to subsections (a) and (b) of this provision shall be considered *contributions* raised for the *election* in which the bills and debts were incurred and shall be subject to the *contribution* limits of that *election*.
- (d) The restrictions on accepting *contributions* imposed by this section do not apply to *contributions* made to a legal defense fund, as discussed in sections 27.2965-27.2969.
- (e) The restrictions on accepting *contributions* imposed by subsection (a) do not apply to *contributions* for recall *elections*, ~~or for elections occurring in 2006.~~
- (f) The restrictions on accepting *contributions* imposed by subsection (b) do not apply to *contributions* made by a *candidate* to his or her *controlled committee*.