

**CITY OF SAN DIEGO  
ETHICS COMMISSION**

**Office of the Executive Director**

**MEMORANDUM**

**DATE:** May 20, 2013

**TO:** Council President and Members of the City Council

**FROM:** Stacey Fulhorst, Executive Director

**SUBJECT:** Recommendations Concerning Political Party Contribution Limits

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As a result of rulings by the United States District Court in the *Thalheimer v. City of San Diego* litigation, the City was required to amend its campaign laws to permit contributions from political parties to City candidates. Although the City initially adopted a limit of \$1,000 for contributions from political parties, the District Court struck down this limit in January of 2012. In its ruling, the Court stated that a new limit may be adopted only if the City demonstrates that it has seriously considered the balance between the following: “(1) the need to allow individuals to participate in the political process by contributing to political parties that help elect candidates with (2) the need to prevent the use of political parties to circumvent contribution limits that apply to individuals.” With respect to the City’s need to prevent circumvention of contribution limits, the Court upheld the City’s attribution rules which require political parties to use only donations from individuals in amounts of \$500<sup>1</sup> or less to fund their contributions to City candidates.

On March 16, 2012, the City Council Rules Committee asked the Ethics Commission to recommend a new limit for political party contributions as well as corresponding attribution rules. The Ethics Commission retained UCSD Professor Thad Kousser to prepare a report concerning the pros and cons of enacting a limit on political party contributions, the applicable constitutional tests, and comparisons with the limits in place in other jurisdictions to use as possible benchmarks. The Commission considered this report and Professor Kousser’s testimony at its meetings on April 12 and 20, 2012. Additionally, the Commission solicited and received extensive public input at these meetings. After conducting the balancing test described above, the Commission decided to recommend that the City limit political party contributions to \$3,000 per election for district candidates and \$12,000 per election for citywide candidates, with these limits serving as aggregate limits for all levels of a political party.

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<sup>1</sup> Subsequent to the Court’s ruling, individual contribution limits for citywide candidates (mayor and city attorney) were increased to \$1,000.

On May 9, 2012, the Rules Committee considered the Commission's recommendations concerning political party contributions and voted to forward them to the full City Council. On November 13, 2012, the City Council was scheduled to consider these issues as part of a larger package of proposed amendments; however, at the request of the City Attorney's Office, the proposed amendments associated with political party contributions were withdrawn to allow time for additional legal analysis.

In April of 2013, the City Attorney's Office retained UC Irvine Professor Richard Hasen to conduct a legal analysis of the Commission's proposals, and also retained UCSD Professor Thad Kousser to update his policy recommendations and benchmarks in light of new data from the 2012 election cycle. Both consultants prepared reports and provided testimony at the Rules and Economic Development Committee meeting on May 15, 2013, at which time the Committee voted to forward the revised limits recommended by Professor Kousser of \$10,000 per election for district candidates and \$20,000 per election for citywide candidates to the full City Council. On May 16, 2013, the Commission considered the reports prepared by Professors Hasen and Kousser and agreed to support the updated recommendations concerning contribution limits.

A summary of the information and documentation considered by the Ethics Commission throughout the course of its deliberations is as follows:

- a memorandum prepared by UCSD Professor Thad Kousser on April 12, 2012, and an updated memorandum prepared on May 1, 2013, outlining various policy considerations and benchmarks for development of new limits for political party contributions (Exhibits 1 and 11);
- a chart of contribution limits for individuals and political parties currently in place in the 15 largest U.S. cities (Exhibit 2);
- a PowerPoint presentation prepared by Barrett Tetlow, former Executive Director of the Republican Party of San Diego County, and presented at the Commission meeting on April 12, 2012 (Exhibit 3);
- a letter from Jess Durfee, Chair of the San Diego County Democratic Party, dated April 11, 2012 (Exhibit 4);
- information concerning the contributions made by political parties to City candidates in the 2010 election cycle and 2012 primary, as of March 17, 2012 (Exhibit 5);
- a memorandum dated April 18, 2012, from Christina Cameron, Ethics Commission General Counsel, addressing the legal issues relevant to consideration of a contribution limit for political parties (Exhibit 6);
- a letter from Charles H. Bell Jr., General Counsel to the California Republican Party, dated April 19, 2012 (Exhibit 7);

- a memorandum from Barrett Tetlow, Executive Director of the Republican Party of San Diego County, dated April 19, 2012 (Exhibit 8);
- comments from the Commission's Executive Director and General Counsel, as well as testimony provided by the following individuals at the Commission meetings on April 12 and 20, 2012: Barrett Tetlow, Executive Director of the Republican Party of San Diego County; April Boling, Treasurer for the Republican Party of San Diego County; William Moore, attorney for the San Diego County Democratic Party; Thad Kousser, Associate Professor of Political Science at UCSD; and Simon Mayeski, member of the board of California Common Cause, as reflected in the minutes from the April 12, 2012, and April 20, 2012, meetings of the Ethics Commission (Exhibits 9 and 10);
- a memorandum prepared by UC Irvine Professor Rick Hasen on May 1, 2013 (Exhibit 12);
- a memorandum from Francis Barraza, Executive Director of the Republican Party of San Diego County, presented to the Commission at its meeting on May 16, 2013 (Exhibit 13); and,
- testimony provided by the following individuals at the Commission meeting on May 16, 2013: Simon Mayeski, member of the board of California Common Cause, and Francis Barraza, Executive Director of the Republican Party of San Diego County.

The Commission's ultimate recommendations concerning political party contributions were based in large part on the following factors, which suggest the City's attribution rules are extremely difficult – if not impossible – to enforce, and that a very real potential exists for wealthy donors to circumvent the City's individual contribution limits by moving funds through political parties to City candidates:

- Charles Bell, General Counsel to the California Republican Party, argued that the City is legally precluded from imposing additional filing requirements on state general purpose recipient committees. (All state and local political parties are considered state general purpose recipient committees under California law.) In other words, he asserted that the City of San Diego may not require any political party to file a disclosure document attesting to the fact that it used conforming funds (i.e., donations from individuals in amounts of \$500 or less) to make contributions to City candidates. (See Exhibit 7 for additional details.)
- Although the Commission did not concede this point, it acknowledged that the state law referenced by Mr. Bell does call into question its ability to enforce the attribution rules upheld by a federal court in the *Thalheimer* case. The Commission considered the fact that any state or local political party could assert that attribution filing requirements are prohibited under state law during the course of a Commission investigation; as a result, the Commission decided to recommend repealing the attribution filing requirement (which the City Council did in November of 2012).

- The absence of an attribution filing requirement weighed heavily in the Commission's consideration of the balancing test required by the Court. Without this disclosure requirement, the public must essentially trust the political parties to use only contributions from individuals in amounts of \$500 or less to fund their contributions to City candidates (or \$1,000 or less for citywide candidates). In other words, this lack of transparency significantly increases the potential for circumvention of the City's contribution limits by special interests funneling large contributions through a political party to a City candidate.
- The Commission also considered information provided by Ms. Boling concerning political parties' complex financial situations created by federal campaign laws, and their corresponding inability to demonstrate that conforming funds were actually used to pay for contributions to City candidates. Specifically, federal campaign laws require political parties to maintain separate accounts for "hard" and "soft" money. Contributions from individuals in amounts up to \$10,000 are deposited into the hard money, or "federal" accounts; meanwhile, contributions not subject to hard money restrictions are deposited into the party's state (or "soft money") account. Federal law also requires that political parties pay for all their administrative and overhead costs from their federal accounts, and seek reimbursement of a specific percentage of these costs from their state (or "soft money") accounts. This law results in a substantial amount of funds being transferred back and forth between federal and state accounts on a regular basis. As a result, there is no way for the Commission or the public to determine that a political party had sufficient conforming funds on hand to make a particular contribution to a City candidate.
- For example, as of the date of the November 6, 2012, general election, the Republican Party had contributed \$800,000 to mayoral candidate Carl DeMaio and the Democratic Party had contributed \$237,500 to mayoral candidate Bob Filner. Neither the Commission nor the public has any way to determine if the Republican Party actually used contributions of \$500 or less from 1,600 or more individuals to fund its contributions to Carl DeMaio or if the Democratic Party actually used contributions of \$500 or less from 475 or more individuals. Moreover, according to the parties' attribution filings, the vast majority of funds used to make these contributions reportedly came from individuals in amounts of \$99 or less. Because such contributions are not itemized on federal or state disclosure reports, the public has no way to verify this information.
- Representatives of the Republican Party asserted that the Commission has the tools through its audit and enforcement activities to ensure that political parties comply with the attribution rules. This is simply not the case. Unless there is glaring evidence that a political party could not have had sufficient conforming funds on hand, the Commission does not have the authority to investigate a political party to determine if it complied with the attribution rules. It cannot initiate an investigation based solely on speculation. SDMC §26.0422(e)(4). Additionally, the Commission has no authority to audit political parties.

- Even if the Ethics Commission investigated a political party organization for compliance with attribution rules, or if the City Council gave the Commission the authority to audit a political party organization with regard to such rules, these efforts would require unfettered access to all of the organization's financial records, for both federal and state committees, including records unrelated to City of San Diego election campaigns. No political party organization has advised the Commission that such access would be provided. Even if it were, such efforts would also require additional staff resources.
- The Commission considered the associational rights of political parties, as reflected in their ability to meaningfully participate in local elections through direct contributions, member communications, and independent expenditures. The Commission took into account that federal campaign laws limit direct contributions from political parties to federal candidates to \$5,000, but allow substantially more money to be spent by parties in the form of coordinated expenditures (the specific amount varies per candidate based on a formula). In the City of San Diego, political parties are allowed to accept unlimited donations from any source for coordinated expenditures in the form of member communications. In the 2012 election cycle, the two political parties collectively spent more than \$1.7 million on member communications supporting and opposing the top two mayoral candidates. The Commission also took into account that political parties may now accept unlimited contributions from any source for the purpose of making unlimited independent expenditures to support City candidates. In summary, the Commission ultimately agreed with Professor Kousser's assessment that the parties have "two bullhorns to make their voices heard" and that "a reasonable limit on party-to-candidate contributions will not close off opportunities for parties to exercise their freedom of speech and associational rights." (Exhibit 1 at p. 5)
- William Moore, General Counsel to the San Diego County Democratic Party, testified that a political party contribution to a City candidate was important to signal its support in the early stages of a campaign, and that the act of signaling was more important than the actual amount of the contribution. He explained that political parties tend to use (unlimited) member communications to support candidates later in the election cycle.
- The local Democratic Party recommended a contribution limit for political parties between \$5,000 and \$10,000 (but ultimately concurred with Professor Kousser's recommended limits of \$10,000 and \$20,000); the local Republican Party recommended no limit (with tight attribution rules) or, alternatively, a limit between \$29,000 and either \$178,070 (Republican Party) or \$256,268 (Democratic Party). (See Exhibits 3, 4, 8, 9, and 10 for further details.) Some of the limits proposed by the Republican Party were based on a comparison to congressional elections; Professor Kousser pointed out that municipal elections are dissimilar from congressional elections in that the potential pool of contributors is much smaller because the potential sphere of influence as an elected official is limited to the City of San Diego (as opposed to the entire country).

- There are only a handful of court cases dealing with political party contribution limits. In general, these cases indicate that limits for political parties must be higher than individual limits. Although the courts have consistently indicated that they will defer to the discretion of legislative bodies to set a specific limit, they have also upheld political party contribution limits ranging from 5 times to 36 times the amount of individual contribution limits in the relevant jurisdictions. The recommended limits of \$10,000 (district) and \$20,000 (citywide) are 20 times the amount of the City's individual contribution limits.
- Professor Kousser calculated the average contribution limit for political parties in the top 15 U.S. cities. He also calculated contribution limits based on per-resident and per-voter comparisons, and he considered the higher expense of running a citywide campaign versus a district campaign. He ultimately recommended setting new limits at \$10,000 per election for district candidates and \$20,000 per election for citywide candidates, which he noted, would be the highest of the top 15 cities with the exception of Jacksonville (which has a \$50,000 limit for political parties). According to Professor Kousser, these limits are high enough to enable the political parties to play a large role in the City's elections, but low enough to ensure that the parties are not used as a conduit to circumvent individual contribution limits.
- Professor Hasen opined that a court is very likely to uphold the contribution limits recommended by Professor Kousser because: (1) such limits, combined with other means of participation such as unlimited member communications coordinated with City candidates, give ample opportunity for political parties to exercise their First Amendment rights; and (2) evidence suggests political parties may seek to pass on large contributions from a few wealth donors, raising the danger of circumvention noted by the District Court in the *Thalheimer* litigation.
- In his letter dated April 19, 2012, Mr. Bell pointed out that the state and county parties in California are considered separate entities under state law. Consequently, he asserted that the state party opposes any proposal to treat all levels of a political party as "affiliates" for purposes of contribution limits.
- According to Professor Hassen, the proposed aggregation of contributions from all levels of a political party is justified under the City's anti-circumvention interest, and is likely to survive judicial scrutiny. He notes that similar aggregation rules for political party contributions exist at the federal level, and that a number of states also impose aggregation rules, many of which are applicable to the cities within those states.

In summary, the Commission considered a wide variety of opinions and a host of empirical data in conducting the requisite balancing test between the associational rights of political parties and the City's interest in preventing circumvention of individual contribution limits. The Commission believes the recommended limits of \$10,000 (district) and \$20,000 (citywide) per election reflect an appropriate balancing of these interests, and further the purpose and intent of

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the City's campaign laws by avoiding the appearance of corruption created by large campaign contributions to City candidates.

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Stacey Fulhorst  
Executive Director

cc: Honorable Mayor  
Independent Budget Analyst  
Catherine Bradley, Deputy City Attorney

Attachments:

- Exhibit 1: Memo from Professor Thad Kousser dated April 12, 2012
- Exhibit 2: Chart of contribution limits in 15 largest cities
- Exhibit 3: Power Point presentation prepared by Barrett Tetlow dated April 11, 2012
- Exhibit 4: Letter from Jess Durfee dated April 11, 2012
- Exhibit 5: Information re: political party contributions made in 2010 and 2012 elections
- Exhibit 6: Memo from Christina Cameron dated April 18, 2012
- Exhibit 7: Letter from Charles H. Bell, Jr., dated April 19, 2012
- Exhibit 8: Memo from Barrett Tetlow dated April 19, 2012
- Exhibit 9: Minutes from Ethics Commission meeting of April 12, 2012
- Exhibit 10: Minutes from Ethics Commission meeting of April 20, 2012
- Exhibit 11: Memo from Professor Thad Kousser dated May 1, 2013
- Exhibit 12: Memo from Professor Richard Hasen dated May 1, 2013
- Exhibit 13: Memo from Francis Barraza dated May 16, 2013