CITY OF SAN DIEGO
ETHICS COMMISSION

M E M O R A N D U M

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TO: Chair and Members of the San Diego Ethics Commission

FROM: Stacey Fulhorst, Executive Director
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SUBJECT: Proposed ECCO Amendments Relating to the Duplication of Candidates' Campaign Materials, Recordkeeping, Vendor Debt, and Electioneering

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INTRODUCTION

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." During the 2012 election cycle, as well as the recent Council District 4 and Mayoral special elections, various issues arose that indicate amendments to current campaign laws may be necessary in order to preserve their original purpose and intent. These issues include: (1) the duplication or re-publication of candidate materials by committees making "independent" expenditures; (2) the avoidance of disclosure of sponsors and major donors by committees disseminating campaign advertisements on credit; (3) an inadvertent disclosure loophole for political committees that disseminate issue ads; and (4) insufficiencies in the recordkeeping requirements that permit committees and their vendors to destroy records critical to Commission investigations.

DISCUSSION

PART 1. Duplication of Candidates' Campaign Materials

A. Existing Coordination Laws

As a result of the U.S. Supreme Court decision in the *Citizens United* case, as well as the U.S. District Court ruling in the *Thalheimer, et al. v. City of San Diego* litigation, committees that make independent expenditures to support or oppose City candidates are no longer subject to contribution limits or source prohibitions. The laws concerning what is, and what is not, an "independent" expenditure are currently found in state law and incorporated into ECCO by reference. According to these laws, when an expenditure is made "under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of" a candidate, it is not considered "independent" but is instead treated as a nonmonetary contribution to the candidate and subject to the City's contribution limits and ban on contributions from organizations (other than political parties). FPPC Regulation 18225.7(a). These laws expressly exempt situations in which the

committee making an independent expenditure has merely "obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents." FPPC Regulation 18225.7(d)(2).

Additionally, existing coordination laws provide that an expenditure is *presumed* to be "coordinated" rather than "independent" when the advertisement "replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate." FPPC Regulation 18225.7(c)(3)(B). The presumption may be rebutted, however, if the committee disseminating the advertisement demonstrates that it has not coordinated with the candidate. For example, a committee could successfully rebut the presumption by pointing out that the candidate's materials were available to all members of the public (e.g., on YouTube) and asserting that the candidate was not consulted or involved in the committee's decisions to reproduce some or all of the candidate's materials in an advertisement supporting the candidate.

Commission staff has noticed a recent increase in the number of committees that are duplicating and re-distributing candidates' campaign materials. Because the presumption of coordination in existing law is relatively easy to rebut, and because these committees are arguably subsidizing the dissemination of a candidate's political message, the Commission may wish to consider proposing amendments to ECCO that would expand the definition of "contribution" to include the republication and dissemination of candidate materials. (Note that the City is permitted to adopt laws that are more restrictive than those at the state.)

Based on research conducted by staff, the Federal Election Commission [FEC], the State of Florida, the City of Los Angeles, and the City of Long Beach, currently treat the reproduction of candidate materials as a nonmonetary contribution to the candidate, subject to contribution limitations and restrictions. (None of these statutes appears to have been subject to legal challenge.) The following excerpt from a recent FEC enforcement matter illustrates the rationale for the federal law:

> The facts of this case demonstrate why the republication of campaign materials is considered a contribution and the importance of enforcing this law. The ad cost only $14,000 to produce, but American Crossroads spent $440,000 broadcasting the ad containing Portman's footage. The campaign has unique access to its candidate to film the most favorable footage. One can easily see what a boon this could become to candidates if they need only incur the low cost of producing video and posting it to the internet, and then lEOPCs [independent expenditure-only political committees] could download the images and spend hundreds of thousands of dollars broadcasting them to a wider audience, magnifying the impact of the campaign's spending many times over.

Statement of Reasons (Weintraub, Bauerly, Walther), FEC Matter Under Review 6357 (Feb. 27, 2012).

B. Factors to Consider

During the course of staff's research concerning laws in place in other jurisdictions, staff noted a variety of factors that the Commission might want to consider with respect to the duplication of candidate materials:

- Laws in place in other jurisdictions generally apply to the substantial – not incidental – duplication of candidate materials. These laws do not, however, specify an amount or percentage of material that must be duplicated before an expenditure will be treated as a nonmonetary contribution to the candidate. In some cases, without a bright line, it could be difficult to determine whether the duplication at issue is "substantial." On the other hand, efforts to establish precise and definitive criteria for a duplication threshold would likely lead to complex and complicated laws. For example, to determine whether a specific percentage of duplication was achieved, the law would have to include guidelines for evaluating the particular characteristics of videos, photographs, images, illustrations, artwork, text, and audio. Additionally, guidelines would be needed to address the size, number and/or volume of duplicated content.

- Notable exceptions to existing duplication laws include use of a photograph provided by a candidate or use of a "brief quote of materials that demonstrate a candidate's position." Although these exceptions seem appropriate, they have also led to confusion. For example, if a committee uses three seconds of a candidate's video, does this qualify for the photograph exemption as the video is essentially a series of single photographs? And how "brief" must a quote be to fall within the exception?

- When adopting its duplication regulation, the FEC decided not to include an exception for materials available in the public domain because it determined that candidates would simply make all of their materials available on the Internet and the exemption would swallow the rule.

The following hypothetical scenarios illustrate just a few of the many permutations and quandaries that could arise in the regulation of duplicated candidate materials:

Hypothetical #1

Candidate Smith prints and distributes a two-sided mailer containing three photos of the candidate and five bullet points detailing the campaign's core message. The Voters for Freedom committee wants to support Candidate Smith in the upcoming election, and it considers duplicating the mailer with minor or major alterations using one of the following options (in each option, the candidate's "paid for by" disclosure would be replaced with the committee's own disclosure):

Option 1: Duplicate the candidate's mailer in its entirety.

Option 2: Replace the three photos of Candidate Smith with three different photos of the candidate downloaded from Candidate Smith's website.

Option 3: Keep Candidate Smith's original three photos, but shrink them to one-third their original size and add four new larger photographs depicting important City projects.

Option 4: Keep Candidate Smith's original three photos, but replace all of the bullet points with new text.

Option 5: Keep two of Candidate Smith's photos and two of Candidate Smith's bullet points, but rephrase the remaining three bullet points with new wording that conveys the same message.

Hypothetical #2

Candidate Jones creates a 30-second campaign video and uploads a high quality version of it to YouTube. The video depicts the candidate in a number of different places, shaking hands with constituents, knocking on neighborhood doors, and speaking to small groups of people. A voiceover explains Candidate Jones' qualifications for elective office. The Improve Our Neighborhoods committee wants to support Candidate Jones in the upcoming election and considers producing a 30-second television commercial using one of the following options (in each option, the committee's "paid for by" disclosure will replace the candidate's disclosure):

Option 1: Duplicate Candidate Jones' video in its entirety, including the voiceover.

Option 2: Duplicate Candidate Jones' video in its entirety, but replace the voiceover with original content.

Option 3: Use 15 seconds of the candidate's video footage and replace the voiceover with new content describing the candidate's qualifications with different wording that conveys the same message.

Option 4: Use 10 seconds of the candidate's video footage and 20 seconds of the candidate's voiceover.

These hypothetical scenarios illustrate the difficulty involved in establishing specific criteria for permissible and prohibited reproduction of candidate materials, and likely explain why other jurisdictions rely on a reasonable person standard for "substantial" reproduction.

PART 2. Record Retention

ECCO incorporates the relevant state law that imposes on candidates and committees a requirement that they maintain records relating to their contributions and expenditures for a period of four years. The business entities providing goods and services to candidates and committees, on the other hand, are not currently required to maintain comparable records for any

particular time. During the course of Commission investigations, efforts to obtain records from these vendors have been stymied by their destruction or deletion of records that contain important information. Accordingly, staff recommends that the Commission propose amending ECCO to require vendors to maintain specified records for a period of four years.

Additionally, staff recommends that the Commission consider expanding the current recordkeeping requirements for candidates and committees. In particular, staff recommends that candidates and committees be required to maintain correspondence, email, and text messages associated with their contributions and expenditures. Although most candidates and committees are already retaining these records, there is no actual requirement to do so, and some have deleted them immediately after an election resulting in the loss of important information in the event of a Commission investigation or audit.

PART 3. Vendor Debt

ECCO requires primarily formed recipient committees to identify the names of their top two donors of $10,000 or more on their campaign advertisements. SDMC §27.2975. In addition, state and local law require that a committee's sponsor be identified in the committee's name. FPPC Regulation 18419(b)(1). These provisions provide the public with important information regarding the source of funding for campaign advertisements. During the past election cycle, it became clear that several committees were circumventing these disclosure requirements by waiting to receive substantial monetary contributions until after their campaign advertisements were disseminated and, in most cases, until after the election. In other words, by arranging to make various types of independent expenditures on credit, these committees were able to withhold information concerning the identity of their major donors.

Under the current state of the law, a party does not make a "contribution" to a committee when verbally agreeing to pay the committee's advertising costs. Agreements to pay for something rise to the level of a "contribution" only when in writing, i.e., when they are in the form of an "enforceable promise to make a payment." Under state law, this includes a party promising "*in writing* to make a payment for specific goods or services, and the candidate or committee, based on the promise, expends specific funds or enters into an enforceable contract with a third party." FPPC Regulation 18216 (emphasis added). Accordingly, under the law, parties may enter into verbal agreements to cover the costs of disseminating campaign messages through mailers, canvassers, television advertising, phone banks, etc. without being identified on that advertisement as a committee sponsor or as a party providing major funding for the advertisement.

To address this concern, ECCO could be amended to provide that any agreement, including ones not in writing, constitutes an "enforceable promise to make a payment." However, this approach may not be desirable from an enforcement perspective as there would be no records to prove the existence of a strictly verbal agreement. ECCO could also be amended to limit the ability of primarily formed committees to disseminate campaign advertising on credit. Such an amendment would require a committee to pay its vendors in full for all costs associated with the production and dissemination of campaign advertising at the time it places an order for a campaign

advertisement. (According to current law, a committee must identify its major donors at the time an order is placed, not the time that an advertisement is disseminated.)

PART 4. Electioneering Communications

Various provisions in ECCO require that campaign advertisements contain a “paid for by” disclosure identifying the name of the committee paying for the advertisement. SDMC §§ 27.2970 to 27.2974. These provisions govern mailings, door hangers, yard signs, billboards, phone banks, etc., that advocate for or against a candidate. Such advertisements may be contrasted with “issue ads” that don’t expressly advocate for or against any person on the ballot, but can nevertheless make a meaningful impression in the months preceding an election. For example, an advertisement urging people to “tell Councilmember Johnson to stop being soft on crime” doesn’t tell anyone not to vote for Johnson, but it does portray the Councilmember in a manner that might harm his chances of prevailing in an upcoming election. ECCO addresses these types of issue advertisements in its “electioneering communications” provision, section 27.2980. Electioneering communications refer to clearly identified candidates within 90 days of an election, and require a “paid for by” disclosure on the communication and the filing of a disclosure form with the City Clerk.

Political committees typically make expenditures to expressly advocate for or against candidates or measures, and they are currently exempt from the electioneering communications rules because they are already required to file campaign statements disclosing all of their expenditures. This exemption leaves a gap, however, with regard to the “paid for by” disclosure on any issue advertisements disseminated by a political committee: a political committee making an expenditure for an advertisement that merely mentions a candidate is not subject to a “paid for by” disclosure under ECCO’s advertising laws (sections 27.2970 to 27.2974) because the advertisement is not expressly advocating for or against that candidate. In other words, a committee formed to support a City candidate may presently disseminate an issue ad without including a “paid for by” disclosure. In order to ensure that the public receives important information concerning the financing of all advertisements that mention City candidates in the months leading up to an election, staff recommends that the Commission consider amending ECCO to delete the existing exemption for political committees.

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