CITY OF SAN DIEGO
ETHICS COMMISSION

Office of the Executive Director

M E M O R A N D U M

DATE: February 21, 2007

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

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Proposed Amendments to the Municipal Lobbying Ordinance
(San Diego Municipal Code sections 27.4001, et seq.)

A. Updates since October 25, 2006, Rules Committee Meeting

On October 25, 2006, the Ethics Commission made a presentation to the Rules Committee regarding its proposed amendments to the City's Lobbying Ordinance. At that time, the Rules Committee asked the Commission to consider the following issues, and to report back with its recommendations:

- Consider whether to narrow the scope of who is a "City Official" to require lobbyists to disclose only those contacts with high-level officials, not mid-level officials.

- Consider modifying the requirement that lobbyists disclose their campaign fundraising activities for the past four years on their registration forms, and in particular whether a shorter time period would be more appropriate.

- Consider adding a requirement that lobbyists disclose campaign services provided to current elected officials.

- Consider clarifying the language regarding campaign fundraising disclosures.

- Consider clarifying the language regarding reportable compensation.

- Consider clarifying and/or narrowing the definition of a "contact" with a City Official.

After considering the issues raised at the October 25, 2006, Rules Committee meeting, the Commission has amended its recommendations as follows:

- The definition of "City Official" has been narrowed in scope to include only twenty-nine high-level positions at the City and at City agencies (this list includes members of City boards and commissions, as well as the positions of City Manager, Assistant City Manager, and Deputy City Manager which are presently nonexistent under the "strong Mayor" form of government).

- The requirement to disclose campaign fundraising information on lobbyist registration forms has been changed from four years to two years. In addition, a "grandfather" provision has been added to exempt fundraising efforts that occurred prior to January 1, 2007. It is important to keep in mind that this disclosure is extremely limited and essentially requires the lobbyist to simply identify the name of the elected official who benefited from the fundraising efforts. There is no requirement to disclose specific dates or amounts raised.

- Also with regard to the disclosure of campaign fundraising activities, the phrase, "contributions the lobbyist knows or has reason to know were raised" has been deleted and replaced with the same language used in the definition of "fundraising activity." This language requires lobbyists to disclose contributions that are personally delivered to a candidate or to a candidate's committee, as well as contributions that the lobbyist identifies himself or herself to the candidate as having some responsibility for raising.

- There is a new requirement for the disclosure of a lobbyist's compensated campaign-related services. The applicable language is patterned after the provisions requiring the disclosure of campaign fundraising – lobbyists would be required to disclose very limited information for compensated campaign services provided to an elected City Official within the past two years on their registration forms, and disclose more detailed information on their quarterly disclosure reports for compensated campaign-related services provided to a candidate or a candidate-controlled committee during the reporting period.

- Language regarding reportable compensation has been revised to state that lobbyists must disclose the amount of compensation they receive for "lobbying activities," which includes direct communications with City Officials, as well as monitoring decisions, preparing testimony, conducting research, attending hearings, communicating with clients, and waiting to meet with City Officials.

- The definition of "contact" has been revised to clarify that it includes only those instances of direct communication with City Officials that are made for the purpose of influencing a municipal decision. Although the Rules Committee asked the Commission to consider whether it would be appropriate to limit "contacts" to certain locations or lengths of time, the Commission ultimately concluded that such an approach would create loopholes that would inevitably be used by lobbyists to avoid disclosure. For example, if a "contact" is defined as only those communications that take place in the office of a City Official, lobbyists could simply ensure that their contacts took place in another location. Similarly, if the ordinance includes a time limit for contacts, it would inevitably result in multiple, shorter meetings with lobbyists. [It is important to distinguish the definition of "contact" in the lobbying ordinance from a law or policy regulating ex-parte communications. As you will recall, such a law or policy was proposed by Carl DeMaio at the October 25, 2006, Rules Committee meeting. This issue has been placed on the Commission's legislative agenda for 2007 at the request of the Rules Committee.]

In addition, during the course of the Commission's deliberations over the past few months, several other issues were brought to the Commission's attention that resulted in the following changes to the draft ordinance:

- The definition of "client" has been updated to include members of a coalition or membership organization who pay $1,000 or more for a lobbyist's services. This will ensure that all relevant information regarding the financing of lobbying activities is disclosed to the public on the lobbyist registration forms. This change was made as a result of information obtained by the Commission during the course of recent enforcement activities. Essentially, there is a new trend in "grassroots" lobbying whereby a lobbyist retained and financed by an unpopular or unsympathetic client will recruit members of the public to join the cause, and then hide the identity of the original client by disclosing that the firm's client is a "coalition" of "concerned citizens."

- The provisions that address the disclosure of compensation have been amended to clarify that a lobbyist must report the compensation received from each client, but is not required to itemize the compensation received for each municipal decision he or she attempts to influence on the client's behalf.

- The definition of "expenditure lobbyist" (a lobbying entity that does not have any direct communications with City Officials, but makes expenditures for public relations, advertising, public outreach, etc., to influence a municipal decision) has been revised as follows: (1) the $5,000 threshold applies to any number of municipal decisions rather than to a single decision; (2) the corresponding time period for the threshold is a calendar quarter rather than ninety consecutive days; and (3) language has been added to clarify that an expenditure is considered made when a payment is made or when consideration is received.

- A new provision has been added that would require lobbyists to disclose compensated services they provide pursuant to a contract with the City. This provision is based on new information recently brought to the Commission's attention. In particular, in the past the City has retained lobbying firms, including some lobbying firms that are registered with the City to influence local municipal decisions, to assist with the City's lobbying efforts at the state and federal level. In addition, the City has hired individuals who previously lobbied the City. Because several other provisions recommended by the Commission would require the disclosure of activities that may serve to create a special relationship between a lobbyist and a City Official, the Commission believes that lobbyists should also disclose whether they have provided compensated services under a contract with the City. It should be noted that both Los Angeles and San Francisco require lobbyists to disclose contracts they have with their respective cities.

At this time, it is the Commission's view that the proposed amendments are in final form and are ready for consideration and approval by the Rules Committee. There are lobbyists who continue to object to the Commission's recommendations by asserting that the proposals are "too complicated," or that there has been "no legal analysis" of the recommended changes, or that the proposed amendments constitute "a solution in search of a problem." As discussed in greater detail below, the Commission does not believe there is any basis in fact for these claims. Instead, as demonstrated by the information set forth below, the proposed reforms will fix a series of problems that exist with the current ordinance, and will serve to prevent corruption and the appearance of corruption by creating far more transparency in the lobbying process. Moreover, as a result of the thorough legal analysis performed by the Commission's General Counsel throughout the past fifteen months, the Commission is confident that its proposals will withstand judicial scrutiny. The Commission does, of course, defer

to the City Attorney's Office to advise you on the legal issues associated with the Commission's proposals.

B. Foundation for Commission's Proposals

As the Commission explained at the October 25, 2006, Rules Committee meeting, each one of the Commission's proposals has been closely drawn to address an actual problem in terms of the effectiveness of the existing laws, or to address real and perceived corruption in the lobbying process. The following is an overview of the substantive proposed changes and the corresponding rationale:

New Definition of Lobbyist and Registration Threshold:

As explained at length in my memorandum to the Rules Committee dated October 19, 2006, the current definition of lobbyist and the registration threshold simply do not work. Investigations conducted by Commission staff reveal that there are people engaged in continuous and substantial lobbying of City Officials, yet they are not currently required to register because they do not meet the compensation threshold (currently $2,700 in a calendar quarter). For example, a lobbyist who works in-house for a company and earns $100,000 per year could meet with the staff in each of the eight Council offices once a week for twelve weeks, and still not meet the quarterly compensation threshold. The current law, therefore, allows a substantial amount of lobbying to take place without any disclosure to the public. In addition, the current system improperly equates earnings with influence, and requires an employee who earns $200,000 per year to register as a lobbyist much sooner than an employee of another company who earns $50,000 per year, even if they both engage in the same amount of lobbying activities. The Commission has also found that the current system is ineffective in terms of enforcement because it is very difficult to determine the precise amount of time someone spends on lobbying activities, which is essential in order to compute whether or not the individual reached the registration threshold.

In order to correct these problems, the Commission has proposed a $1 threshold for lobbying firms (contract lobbyists hired by third parties) and a contacts-based threshold for organization lobbyists (companies that employ lobbyists in-house). As discussed at great length in my previous memorandum, the Commission determined that the contacts-based threshold (10 contacts in 60 calendar days) is the best means of regulating significant attempts to influence decisions that may affect the revenue of a lobbyist's employer, without also inadvertently requiring average citizens to register as lobbyists for simply exercising their right to petition their elected officials on an issue that may affect their employers.

It is important to note that members of the public and regulated community who communicated with the Commission on the threshold issue overwhelmingly indicated their support for the proposed $1 threshold for lobbying firms, and the proposed contacts-based threshold for organization lobbyists. In other words, the Commission heard no objections to the proposed registration thresholds, with the exception of several lobbyists who recommended that the Commission go further in its definition of lobbyist by including people who are not compensated for their lobbying activities.

The Commission's proposals include a third category of lobbyist known as an "expenditure lobbyist." This is an entity or individual that attempts to indirectly influence municipal decisions by spending money on public relations, media relations, advertising, public outreach, etc. The Commission

concluded that it is important for these activities to be disclosed to the public if the related costs meet or exceed $5,000 within a calendar quarter. The Commission based this proposal on its experience with several enforcement matters that involved spending by special interests to generate public support for a particular issue. In those enforcement matters, the sources of the expenditures were never disclosed, and both the public and the City Officials involved in the municipal decisions failed to receive important information that would have been relevant to their assessment of the issues.

Disclosure of Campaign Contributions and Fundraising:

As discussed in greater detail below, there are many examples throughout this country in which lobbyists obtain, or appear to obtain, unique access to elected officials via campaign contributions and campaign fundraising. In addition, the Commissioners considered the personal experience of one of the Ethics Commissioners, who explained that he received special access (e.g., private telephone numbers and email addresses) for public officials after he engaged in campaign fundraising efforts to benefit these officials. In order to address the appearance of corruption that is created when lobbyists seemingly obtain unique access to elected officials, the Commission has included proposals that would require lobbyists to disclose their own campaign contributions, as well as their campaign fundraising activities.

It should be noted that, at one point during its deliberations, the Commission considered whether the appearance of corruption created by lobbyists engaging in campaign fundraising efforts to benefit the elected officials they may seek to influence was so great that a ban on fundraising by lobbyists was warranted. At that time, Jim Sutton (a lobbyist representing a group of clients) strenuously opposed the proposed ban, and promoted disclosure as a preferable alternative. In a letter dated July 13, 2006, Mr. Sutton asked the Ethics Commission to let "the sun shine on the fundraising activities of lobbyists," in lieu of a prohibition on fundraising by lobbyists. When the Commission ultimately decided to recommend disclosure of fundraising in lieu of an outright ban, Mr. Sutton clarified that his recommendation for transparency was only intended to cover those campaign contributions that a lobbyist personally delivers to a candidate. In the Commission's experience, this approach would easily enable lobbyists to circumvent disclosure rules by simply asking someone else to deliver the contributions on their behalf. In addition, this approach would ignore prevalent practices in campaign fundraising that involve the coding of contribution envelopes so that lobbyists receive credit for contributions sent directly by contributors to a candidate's campaign committee.

Both Los Angeles and San Francisco require lobbyists to disclose their fundraising activities. The Commission reviewed the laws in effect in these other cities and ultimately agreed with Mr. Sutton and others that the language used by these other jurisdictions could be improved upon to clarify the underlying intent. Accordingly, the Commission narrowly tailored the language in the relevant sections to require that lobbyists disclose (1) all contributions personally delivered by the lobbyist, and (2) all contributions for which the lobbyist "has identified himself or herself to a candidate or candidate's controlled committee as having some degree of responsibility for raising." In other words, if the lobbyist takes credit for providing a candidate with contributions, then the lobbyist should disclose the amount of those contributions on a quarterly disclosure report.

Some lobbyists have objected to this proposal and suggested that such a disclosure requirement should apply to all fundraisers and should be included in the City's campaign laws. Although the Commission may ultimately recommend such disclosure by candidate committees under the City's

campaign laws, it is the Commission's view that it is certainly appropriate to impose this requirement on paid lobbyists at this time because of the role that they play in influencing municipal decisions. The public has an undeniable interest in obtaining information regarding the different ways in which paid lobbyists obtain access and/or influence.

Disclosure of Campaign-Related Services:

During the course of its deliberations over the past fifteen months, the Commission was advised by a lobbyist that it is incorrect to assume that a special relationship exists between an elected official and his or her campaign consultants, and that it is often the case that elected officials are not fond of their respective campaign consultants for a variety of reasons. This information was contradicted by Councilmembers Madaffer and Frye at the Rules Committee meeting on October 25, 2006, at which time they suggested that the Commission consider a requirement that lobbyists disclose these prior relationships with elected officials.

The Commission staff subsequently conducted additional research and heard from various Council staffers that elected officials generally have a very good relationship with the campaign consultants who helped them gain elective office. By way of example, one Council staffer reported that Larry Remer had such a close relationship with former Councilmember Ralph Inzunza after he served as Councilmember Inzunza's campaign consultant that the Councilmember used a list of concerns prepared by Remer and printed on the letterhead of Remer's company (The Primacy Group) when the City Council was considering the creation of the Ethics Commission and the adoption of the Ethics Ordinance. Council staffers pointed out that it is typically only losing candidates who have complaints regarding the services provided by their consultants.

Disclosure of City Contracts:

As discussed above, the Commission received information over the past few months suggesting that lobbyists who have City contracts may develop special relationships with certain City Officials, and that such relationships should be disclosed if these lobbyists are also paid by private parties to influence the decisions made by City Officials. The rationale behind this recommendation is very similar to the rationale discussed above with respect to the disclosure of campaign-related services in that both disclosures would create a higher degree of transparency than currently exists.

Disclosure of City Officials Lobbied:

The Commission's rationale for this proposal is elementary: the most important piece of information the public needs regarding compensated efforts to influence the decisions of City Officials is the identity of the officials who were actually lobbied. Without this information, the public has no way of determining which officials may have been influenced by a lobbyist, and no way to rationally assess whether any acts of undue influence took place.

Several lobbyists recommended that lobbyists should be required to disclose the name of the department lobbied, but not the identity of the City Official. The Commissioners rejected this recommendation because they believe there is a very important distinction between meeting with an elected official and a Council staffer. The Commission also heard from several lobbyists that it would be too burdensome to identify every City Official present at a particular meeting. After further

consideration, the Commission modified its recommendations to require that lobbyists only disclose contacts with a select group of high level officials.

Some lobbyists also objected to disclosing the identity of City Officials they lobby, contending that that City Officials will avoid talking to them for fear of being "called out on a public report." The Commission staff has conferred with several City Officials on this issue, each of whom expressly deny that they would be concerned about being identified on a lobbyist disclosure report. They point out that they are frequently required to provide records and calendars in response to Public Records Act requests, and that their activities as government employees are continuously subject to public scrutiny. In fact, public access to the calendars of City Officials was the subject of an October 16, 2005, *Union Tribune* article (Attachment 6) that detailed the contacts various individuals had with City Officials over a specific period of time.

Gifts from Lobbyists:

The Commission has proposed a $10 per month limit on gifts from lobbyists to City Officials. This proposal stems from the Commission's belief that, in the view of the public, City Officials may be influenced in the performance of their official duties if they receive an expensive meal or a ticket to an event from a lobbyist. The recent conviction of a United States Congressman in connection with excessive gifts from a lobbyist has reinforced the public's belief that gifts from lobbyists to government officials are indications of undue influence.

It is relevant to note that, as reflected in the comparison chart, other jurisdictions throughout California have similar gift limits, or have imposed an outright ban on gifts from lobbyists. Rather than ban all gifts outright and potentially expose City Officials to an enforcement action for simply accepting a cup of coffee from a lobbyist, the Commission ultimately settled on the $10 limit to allow officials to accept gifts with a nominal value. It is also relevant to note that, throughout the course of the Commission's deliberations on the Lobbying Ordinance, the Commission did not hear any objections to this proposal (other than one that indicated the $10 limit should be slightly higher as the cost of a hamburger has increased over time).

C. Level of Complexity

As discussed above, some lobbyists have contended that the Commission's proposals are too complicated and burdensome, and are far more complex than comparable laws in other jurisdictions. The Commission has made every effort to propose reforms that are clear and concise, and that will not impose unnecessary burdens on the regulated community. In addition, the Commission has conducted a thorough review of the laws in other jurisdictions in California and made every effort to streamline and simplify the corresponding provisions whenever possible. The following are examples of laws in place in other jurisdictions which the Commission rejected or modified because they appear to be too complicated or burdensome:

- Both San Francisco and Los Angeles require lobbyists to itemize the contributions obtained through fundraising activities. In other words, lobbyists must identify the name of each contributor, the date of each contribution, the amount of each contribution, the name of the candidate who benefited, etc. Los Angeles also requires lobbyists to provide specific information regarding written political fundraising solicitations (whether or not the

solicitations actually resulted in contributions). The Commission opted to propose a much simpler, more straightforward approach that still ensures that the public has sufficient information about a lobbyist's fundraising activities. The Commission's proposal would require lobbyists to disclose the date and description of the fundraising effort, and the total amount raised. In other words, the Commission's proposal does not require lobbyists to itemize each contribution and identify the name of each contributor.

- Los Angeles requires lobbyists to fill out a separate disclosure page for all contributions made by lobbyists "at the behest" of City Officials to other candidates, which includes contributions made at the direction of the lobbyist, or in cooperation, consultation, or coordination with the lobbyist. Similarly, lobbyists in Los Angeles must disclose donations made "at the behest" of City Officials to charitable, religious, and non-profit organizations. The Commission received input from a lobbyist with experience in Los Angeles who explained that the "at the behest" language had caused a great deal of confusion because it arguably requires lobbyists to disclose campaign contributions and charitable donations, even if they were only discussed with City Officials in passing. Accordingly, the Commission decided against recommending a similar provision.

- San Francisco requires lobbyists to disclose gifts of tickets or admissions to political fundraisers or fundraising events sponsored by a 501(c)(3) organization. The Commission decided against recommending a similar provision in San Diego's lobbying laws because it appears somewhat inconsistent with San Diego's Ethics Ordinance (and the state's Political Reform Act), which expressly exempt these types of tickets from the gift regulations.

- The State of California requires individual lobbyists, as well as the lobbying firms/lobbyist employers who employ them, to prepare separate disclosure reports. In many instances, the lobbyist must disclose the exact same information as his/her employer (e.g. activity expenses and campaign contributions). The Commission viewed this system as unnecessarily duplicative and burdensome, and opted instead to recommend that lobbying firms and organization lobbyists file the disclosure reports, which will include information supplied by the individual lobbyists.

- The State of California requires people who retain lobbying firms to file disclosure reports in the same time and manner as employers who have lobbyists working for them in-house. In other words, the clients of lobbying firms must also file disclosure reports and provide specific information regarding their payments to lobbying firms and their campaign contributions. The Commission has not recommended that the City of San Diego adopt similar requirements. The information disclosed by the clients appears to be duplicative of the information disclosed by the lobbyists with the exception of the clients' campaign contributions, which are disclosed by the recipient campaign committees.

- The State of California does not exempt government entities from its lobbying regulations. If a similar provision were enacted in San Diego, employees of the County of San Diego, the Port District, the City of Chula Vista, the City of National City, etc., would be required to register as lobbyists and disclose their activities if they met with City of San Diego officials regarding a municipal decision. The Commissioners opted to maintain the current exemption

for government agencies because they believe the public is primarily interested in receiving information regarding efforts by private companies to influence government decisions.

Although several lobbyists have generally criticized the Commission's proposed reforms as too complicated, these lobbyists have not provided the Commission with any information regarding a specific provision that is allegedly problematic. Instead, the Commission heard from members of the public that the proposed reforms are clear and comprehensible. The Commission first learned that some lobbyists believe the proposals are too complicated at the October 25, 2006, Rules Committee meeting. In particular, one lobbyist expressed his belief that the proposals are "more complicated than any lobbying law in any other city in California." In his October 23, 2006, letter to Council President Peters, lobbyist Jim Sutton cites the following as the basis for his belief that the Commission's proposals are too complex:

- Mr. Sutton describes the registration thresholds proposed by the Commission as "inconsistent" because they treat contract lobbyists differently than employees who lobby on behalf of their employers.

  As demonstrated in the comparison chart prepared by the Commission (Attachment 4), other jurisdictions (e.g. Los Angeles, San Francisco, and the State of California) recognize the need to treat different types of lobbyists differently in terms of registration thresholds. Not only is San Diego not unique in terms of these "inconsistent" thresholds, but the Commission's current proposal is arguably far simpler than the current system or the alternatives. Instead of requiring lobbyists to register if they earn a specific amount of money in a certain time period or if they spend a certain amount of time lobbying in a certain period, the proposal would simply require all compensated contract lobbyists to register. There is no simpler way to impose a registration threshold. With respect to employees who lobby on behalf of their employers, they will need to register if they have ten lobbying contacts with high level City Officials in a sixty-day period. It is not a complex proposition to require lobbyists to count their number of lobbying contacts, and is clearly far less complicated than having them, or any enforcement agency, calculate the amount of compensation earned for lobbying activities.

- Mr. Sutton also references the fact that the Commission's proposals do not require homeowners associations and advocacy groups to register "simply because their members are not paid."

  The Commission considered the request by Mr. Sutton and other lobbyists to regulate uncompensated advocacy, but ultimately concluded that this type of regulation would have the unintended effect of also regulating average constituents seeking to contact their elected officials. In other words, it is the Commission's view that regulating uncompensated lobbying activities would inevitably result in an overly-complex ordinance and a highly confused regulated community. Moreover, as evidenced in the comparison chart, the vast majority of other jurisdictions in California do not regulate uncompensated lobbyists.

- As a purportedly "more straightforward alternative," Mr. Sutton recommends that the City of San Diego adopt the state's lobbying disclosure laws because these laws have been in effect for thirty years and because the state's Fair Political Practices Commission [FPPC] has a staff of technical advisors.

As some Councilmembers may recall, Mr. Sutton made a very similar recommendation when the City Council was considering the Commission's proposed changes to the City's campaign laws in 2003 and 2004. Then, as now, the adoption of state law would have the net effect of removing the proposals that are most objectionable to Mr. Sutton and his clients. In this case, the state does not require lobbyists to identify the names of the officials they have lobbied, nor does it require lobbyists to disclose campaign fundraising activities. As reflected in the comparison charts, the majority of the other provisions in state law are identical or substantially similar to those proposed by the Commission. Moreover, as discussed above, the Commission has not recommended several provisions that currently exist in state law because they believe that they are complicated, duplicative, and/or burdensome.

Finally, it is important to mention that the state's lobbying laws apply only to state lobbyists. It is highly unlikely that the FPPC would use its limited resources to provide advice to lobbyists whose local activities are not under its jurisdiction. In other words, "adopting" state law would not bring local lobbying activities under the purview of the FPPC. Instead, it would only impose on local lobbyists a set of laws expressly tailored for the unique structure of the state.

In order to highlight the relative simplicity and straightforward nature of the Commission's proposed reforms, the Commission staff has prepared draft Fact Sheets entitled "Am I a Lobbyist?" and "Exceptions to the Lobbying Ordinance" (Attachment 3).

D. Legal Analysis

The Commission's General Counsel, Cristie McGuire, has conducted a thorough and ongoing legal analysis of the proposed amendments to the City's lobbying laws, and is confident that they would survive any legal challenges. In addition to the customary legal research and analysis that is typically performed by the Commission's General Counsel when the Commission proposes legislative reforms, Ms. McGuire prepared a "primer" (Attachment 5) on the constitutional principles involved in developing lobbying regulations. The Commission used this primer as a guideline throughout its deliberations on the proposed Lobbying Ordinance.

This primer addresses a variety of Court cases that explain how different types of government regulation are subject to different types of legal scrutiny. Laws that incidentally burden a First Amendment right, such as registration, disclosure, and gift provisions, are not direct limitations on the right to petition the government, and are therefore subject to a relatively low level of judicial scrutiny. In order to enact such laws, a government entity need only demonstrate that there is a reasonable or rational basis for the law. As explained in Ms. McGuire's memo, this burden is met if it can be shown that the law was reasonably calculated to achieve its goal. On the other hand, laws that prohibit or restrict constitutionally-protected activities (such as a ban on campaign contributions by lobbyists) are subject to a higher judicial standard known as "strict scrutiny."

In the opinion of the Commission's General Counsel, the proposed reforms do not substantially interfere with the ability of a lobbyist to exercise his or her First Amendment rights. Because there is a rational basis for each one of the provisions, and because each provision has been crafted to achieve a specific goal, Ms. McGuire is confident that the proposals do not impermissibly infringe on

constitutionally protected activities. Similarly, because the proposals do not include outright prohibitions or restrictions on First Amendment activities, Ms. McGuire does not believe they would be subject to a "strict scrutiny" standard of judicial review. Accordingly, it is Ms. McGuire's opinion that the City is not required to demonstrate a "compelling governmental interest" by documenting the actual or apparent corruption that would be corrected by each of the proposals. (It is important to note that Ms. McGuire's memo addresses a specific case in which the California Supreme Court found that a limit on gifts from lobbyists was not subject to strict scrutiny because it was not a direct limitation on the right to petition for redress of grievances.)

In light of the extensive legal analysis performed by the Commission staff, it is difficult to understand any basis for an assertion that there has been "no legal analysis" of the Commission's proposals. Although the Commission will of course defer to the Office of the City Attorney to ultimately determine whether the proposed ordinance is "legal," the Commission is confident that the City has sufficiently demonstrated the need for the proposed reforms, and that the proposed amendments have been drafted in a manner that is reasonably calculated to achieve the Commission's articulated goals.

E. Empirical Evidence

Even though the City is not required to provide evidence of corruption or the appearance of corruption to justify the proposed amendments, such evidence certainly exists in abundance. The Commission was, therefore, surprised to hear a lobbyist at the February 2007 Commission meeting express his view that there is no empirical evidence to support the changes recommended by the Commission. During the ensuing Commission discussion, one of the Ethics Commissioners pointed out that a court reviewing the proposed changes might indeed distinguish between "empirical" evidence and "anecdotal" evidence. The Ethics Commission has, therefore, compiled a body of empirical evidence that supports the need for the reforms proposed by the Commission. The following are examples of this empirical evidence, but are by no means exhaustive:

- Three former City councilmembers were indicted following a federal corruption probe that identified Lance Malone as a lobbyist who had obtained special access to the councilmembers through campaign fundraising. The councilmembers received a total of $23,150 in "bundled" campaign contributions through Malone, and in the aggregate the former elected officials and their staffs had at total of 346 phone calls over two years with this lobbyist. Although appeals are still pending on this matter, the facts surrounding the indictments created an undeniable appearance of corruption between a lobbyist and City officials. (Attachment 12)

- In 2005, former U.S. Representative Duke Cunningham (whose district included parts of the City of San Diego) resigned from office and pled guilty to fraud and bribery charges stemming from his relationship with a lobbyist for a governmental contractor. (Attachment 13)

- *New York Times*, February 11, 2007 (Attachment 7). United States Senator Lindsey Graham was quoted as saying, "I don't see any problem with having events where private individuals who give you money can talk to you." The article also mentions an arrangement set up by Congressman Eric Cantor, who invited lobbyists to join him for a cup of coffee at the local Starbucks in exchange for a $2,500 contribution.

- *The Bankrollers: Lobbyists' Payments to the Lawmakers they Court, 1998 – 2006*, Public Citizen, May 2006 (Attachment 8). This report identifies the influence obtained by lobbyists through campaign contributions and campaign fundraising. The report details the access and influence of the top ten lobbyist-contributors on a federal level by identifying the elected officials who benefited from the contributions and documenting their subsequent actions (e.g. voting on specific matters, appropriations, earmarking, etc.) in support of the lobbyists' clients.

  One example cited in the report involves Stewart Van Scoyoc, a federally registered lobbyist. According to the data compiled in this report, the top ten recipients of Van Scoyoc's campaign contributions serve on the House or Senate Appropriations Committees. In turn, these elected officials have rewarded Van Scoyoc's clients in various forms. For example, the Senate Appropriations Committee earmarked nearly $150 million for the University of Alabama during the time that Senator Richard Shelby, a beneficiary of Van Scoyoc's campaign contributions, was Chair of the Committee (the University paid Van Scoyoc nearly $1.5 million in lobbying fees).

  Another example involving Van Scoyoc's fundraising and corresponding influence involves Reveal Imaging Technologies, a small Massachusetts start-up company that hired Van Scoyoc in June of 2003 and received a $2.4 million grant from the Transportation Security Administration [TSA] three months later. In October of 2003, Van Scoyoc hosted a fundraiser for Representative Harold Rogers, the Chair of the Appropriations Homeland Security Subcommittee. This fundraiser netted contributions from Reveal executives totaling $14,000. Over time, Rogers ultimately received $122,111 from Reveal executives and associates and by March of 2006, Reveal had received $28.1 million in orders from the TSA.

- *Measuring Corruption: Do Campaign Contributions and Lobbying Corrupt?* Gajan Retnasaba, Harvard Law School, 2005, Paper 737 (Attachment 9). This academic study examines the appearance of corruption with respect to underwriters of municipal bonds. As a result of the study, the author concludes that an appearance of corruption was created when politicians were able to reward underwriters who had benefited them (via campaign contributions) with lucrative underwriting contracts. The author further notes that when the Municipal Securities Rulemaking Board prohibited underwriters and their employees from conducting business in states where they had made campaign contributions in the past two years, the underwriters turned to lobbyists to make campaign contributions and obtain influence on their behalf.

- *Dallas Morning News*, July 7, 2005 (Attachment 10). This news story refers to court documents indicating that representatives of Westar Energy were told by their company's lobbyist, Richard Bornemann, that a $25,000 contribution to Representative Tom DeLay would give them access to DeLay, who was the U.S. House majority leader at the time. As a result of the contribution, two Westar executives attended a golf outing with DeLay.

- *Washington Post*, June 10, 2003 (Attachment 11). This story details the efforts of lobbyist Richard Bornemann on behalf of Westar Energy. In particular, Bornemann reportedly attended at least seven Washington fundraisers and brought checks from Westar executives. Bornemann subsequently set up a meeting between Congressman Joe Barton and Westar executives, shortly after which Congressman Barton offered an amendment to exempt Westar

from a federal energy regulation. The story also mentions emails from Westar executives discussing their belief that their $56,500 in campaign contributions should get Westar a "seat at the table" during the negotiations over the energy bill.

- *McConnell v. Federal Election Commission* 540 U.S. 93 (2003): In this landmark United States Supreme Court case, the Court considered a host of empirical evidence cited to justify the imposition of contribution limits on political parties, including the following:

  Declaration of lobbyist Robert Rozen, partner, Ernst & Young: "You are doing a favor for somebody by making a large donation and they appreciate it. Ordinarily, people feel inclined to reciprocate favors. Do a bigger favor for someone – that is write a larger check – and they feel even more compelled to reciprocate. In my experience, overt words are rarely exchanged about contributions, but people do have understandings." *McConnell,* 540 U.S. 93, 147 (2003).

  Declaration of former United States Senator Alan Simpson: "Too often, Members' first thought is not what is right or what they believe, but how it will affect fundraising. Who, after all, can seriously contend that a $100,000 donation does not alter the way one thinks about--and quite possibly votes on--an issue? . . . When you don't pay the piper that finances your campaigns, you will never get any more money from that piper. Since money is the mother's milk of politics, you never want to be in that situation." *McConnell,* 540 U.S. at 149.

  Declaration of former United States Senator Warren Rudman: "Special interests who give large amounts of soft money to political parties do in fact achieve their objectives. They do get special access. Sitting Senators and House Members have limited amounts of time, but they make time available in their schedules to meet with representatives of business and unions and wealthy individuals who gave large sums to their parties. These are not idle chit-chats about the philosophy of democracy. . . . Senators are pressed by their benefactors to introduce legislation, to amend legislation, to block legislation, and to vote on legislation in a certain way." *McConnell,* 540 U.S. at 151.

  Declaration of Gerald Greenwald, United Airlines: "Business and labor leaders believe, based on their experience, that disappointed Members, and their party colleagues, may shun or disfavor them because they have not contributed. Equally, these leaders fear that if they refuse to contribute (enough), competing interests who do contribute generously will have an advantage in gaining access to and influencing key Congressional leaders on matters of importance to the company or union. . . . Though a soft money check might be made out to a political party, labor and business leaders know that those checks open the doors of the offices of individual and important Members of Congress and the Administration. . . . Labor and business leaders believe--based on experience and with good reason--that such access gives them an opportunity to shape and affect governmental decisions and that their ability to do so derives from the fact that they have given large sums of money to the parties. *McConnell,* 540 U.S. at 125, n13.

  The *McConnell* court concluded that "it is not only plausible, but likely, that candidates would feel grateful for such donations and that donors would seek to exploit that gratitude." *McConnell,* 540 U.S. at 145.

> In addition, the *McConnell* court determined that actual evidence of corruption is not required to impose contribution limits and thereby restrict activities protected by the First Amendment: "More importantly, plaintiffs conceive of corruption too narrowly. Our cases have firmly established that Congress' legitimate interest extends beyond preventing simple cash-for-votes corruption to curbing 'undue influence on an officeholder's judgment, and the appearance of such influence.' Many of the 'deeply disturbing examples' of corruption cited by this Court in *Buckley,* 424 U. S., at 27, to justify FECA's contribution limits were not episodes of vote buying, but evidence that various corporate interests had given substantial donations to gain access to high-level government officials. Even if that access did not secure actual influence, it certainly gave the "appearance of such influence." *McConnell,* 540 U.S. at 150 (citations omitted).

Although some of the above-cited evidence pertains to large campaign contributions and does not specifically concern lobbying, the evidence is clearly applicable to campaign fundraising, which is an activity that is common to both lobbying and campaign finance. In addition, because the City of San Diego imposes limits on contributions to candidates, fundraising is one of the main avenues through which someone may demonstrate direct support for a candidate.

It should also be noted that the United States Supreme Court has held that in establishing the basis for the imposition of legislative reforms, it is entirely appropriate for the City of San Diego to consider evidence of corruption and the appearance of corruption that exists in other jurisdictions. "The First Amendment does not require a city, before enacting . . . an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Nixon v. Shrink Missouri Government PAC,* 528 U.S. 377, 394 (2000), citing *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 51-52 (1986).

F. Public Perception

During the course of the Commission's work on the lobbying laws over the past fifteen months, one lobbyist suggested that there is no evidence that the public is concerned about lobbying or that the public is in favor of the changes proposed by the Commission. This opinion was based on the fact that few members of the public attended the Commission meetings, which were more heavily attended by lobbyists. The Ethics Commission disagrees with this assessment and does not believe it is appropriate to equate low attendance with lack of interest. Research conducted by Commission staff indicates that the public is extremely concerned about corruption and the appearance of corruption when it comes to lobbyists and the access they have to elected officials, as evidenced by the following polls:

- <u>ABC News Poll (January 5 – 8, 2006):</u>

  Sixty-seven percent of those polled would ban lobbyists from making campaign contributions to Congress.

  Fifty-four percent of those polled would ban lobbyists from organizing campaign fundraisers for congressional candidates.

Ninety percent of those polled would ban lobbyists from giving Congress gifts, trips, or other things of value.

- Fox News / Opinion Dynamics Poll (January 10 – 11, 2006):

  Sixty-five percent of those polled believe that most elected officials in Washington make policy decisions or take actions as a direct result of money they receive from major campaign contributors.

- CBS / New York Times Poll (January 20 – 25, 2006):

  Seventy-seven percent of people polled think that recent reports of lobbyists bribing members of Congress is "the way things work" in Congress.

- Pew Research Center (February 1 – 5, 2006):

  Eighty-one percent of people polled think recent reports of lobbyists bribing members of Congress reflect behavior that is "common" in Congress.

- Pew Research Center (April 7 – 16, 2006):

  Forty-six percent of people polled are "very concerned" about the influence of lobbyists and special interests.

  Twenty-nine percent of people polled are "somewhat concerned" about the influence of lobbyists and special interests.

  Seventy-six percent of people polled are in favor of stricter limits on gifts from lobbyists.

The polling data is attached for your review (Attachment 14).

G. Conclusion

Throughout the past fifteen months of deliberations, the Commission has received extremely valuable input from lobbyists and members of the public regarding a variety of proposals under consideration. As reflected in letters to the Commission (Attachment15) and minutes of the Commission meetings (available at www.sandiego.gov/ethics), each recommendation was seriously considered and most were incorporated into the Commission's proposals. The input the Commission received was instrumental in terms of preparing a draft ordinance that is straightforward and comprehensible for the regulated community, and yet also addresses important public policy considerations.

As explained in detail above, the Commission does not believe that there is any legitimate basis to assert that the Commission's proposed reforms are "too complicated," or are a "solution in search of a problem." Instead, if adopted, these reforms will dramatically improve what is currently a largely ineffective ordinance. They will ensure that people who are compensated to influence municipal decisions are required to register as lobbyists, and they will further ensure that the Ethics Commission can effectively enforce the law when such individuals fail to register.

The proposed reforms will also require lobbyists to disclose more information than is presently required, which will in turn create more transparency and combat the appearance of corruption that surrounds lobbying and related activities. Although some lobbyists may object to the additional disclosure requirements, the Commission believes that this increased level of transparency will be critical to assuring the public that there is nothing secretive or sinister about the lobbying activities that take place in the City of San Diego every day. As registered lobbyist Michael McDade told the *Union-Tribune* in October of 2005: "People who are doing a legitimate job of presenting information to government officials should not have to worry about whether the public knows if they've talked to them."

For your convenience, we have provided "clean" and "strike-out" versions reflecting the proposed changes to the Lobbying Ordinance (Attachments 1 and 2). Note that we have added text boxes in the left margin of the "clean" version to identify the substantive changes made since the October 25, 2006, Rules Committee meeting. We look forward to discussing these proposed changes with you at the Rules Committee meeting on March 7, 2007. If you have any questions in the meantime, please contact me at your convenience.

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Stacey Fulhorst
Executive Director

Attachments

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