-CITY OF SAN DIEGO
ETHICS COMMISSION

Office of the Executive Director

MEMORANDUM

DATE: September 9, 2009

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

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Municipal Lobbying Ordinance (SDMC §§ 27.4001, et seq.)
Docketed for Rules Committee Consideration on September 16, 2009

In August of 2007, the City Council approved an overhaul of the City's lobbying laws. These new laws took effect on January 1, 2008. Since that time, Commission staff has heard many questions and concerns from the firms and organizations subject to the Ordinance, and has also had an opportunity to identify areas in the Ordinance that could be clarified, simplified, or otherwise improved. Accordingly, the Commission recommended various amendments that were approved by the Rules Committee on October 8, 2008. Because of scheduling difficulties, however, the amendments never came before the full City Council. Because there are four new City Council members and a new composition of the Rules Committee, it is appropriate to recommence the review process.

In conjunction with the amendments previously approved by the Rules Committee, the Commission is proposing additional changes designed to clarify certain aspects of the Ordinance and to provide more guidance to Organization Lobbyists in connection with transitioning from one year's registration to the next. The proposed amendments are summarized below.

A. "Lobbying" versus "Lobbying Activities"
SDMC §§ 27.4002; 27.4009(a)(6); 27.4017(a)(2)(D); 27.4017(b)(2)

The Lobbying Ordinance defines "lobbying activities" to include a broad range of activities related to lobbying, including monitoring decisions, gathering facts, and conducting research. In other words, in addition to actual lobbying, "lobbying activities" includes a variety of related activities that do not require actual contact with a City Official. The term "lobbying activities" existed in the prior Lobbying Ordinance for purposes of determining whether someone met the compensation threshold, and was incorporated into the current Ordinance initially as a means of capturing the lobbying-related activities for which a Lobbying Firm is paid.

The term "lobbying activities" has a wider application in the current Lobbying Ordinance, and has caused some confusion with both Lobbying Firms and Organization Lobbyists. These entities have to disclose two sets of individuals: those who lobby and those who are indirectly

involved in lobbying efforts. In addition, it has created some ambiguity for the public. For example, a firm may identify a person who engaged only in "lobbying activities" on the Quarterly Disclosure Report, while leaving blank the spaces for the names of City Officials lobbied; in such circumstances it may appear to the public that City Officials were lobbied but left off of the form.

In order to clarify the original intent of the disclosure laws, the Commission recommends replacing the term "lobbying activities" with "lobbying" in the applicable sections of the Ordinance. Accordingly, firms and organizations would list on their Quarterly Disclosure Reports only the names of individuals who actually lobby, not the names of individuals who merely monitor decisions or conduct research in connection with prospective lobbying. Additionally, this amendment would require firms and organizations to disclose on their quarterly reports the municipal decisions on which they actually lobbied during the quarter, but not the decisions for which their activities were limited to monitoring or researching. The term "lobbying activities" would remain in the Ordinance solely as a means for Lobbying Firms to calculate the compensation they received for their lobbying and related efforts in a quarter in which they actually lobbied City Officials.

B. "Lobbying Activities" & Lower Level Employees
SDMC § 27.4002

As explained above, the term "lobbying activities" originated in the prior Lobbying Ordinance, which encompassed lobbying communications with all City employees, not just the high-level officials identified in the current Lobbying Ordinance. Under the current Ordinance, a communication with a lower level City employee is not "lobbying" even if made for the purpose of influencing a municipal decision. Such communications do, however, fit within the scope of what is a "lobbying activity." In other words, when a Lobbying Firm is seeking to influence a municipal decision and contacts a lower level City employee as part of that effort, it is appropriate to include that activity within the scope of "lobbying activities" for purposes of calculating the compensation the firm is receiving for its efforts. The Commission therefore recommends amending the definition of "lobbying activities" to expressly include communications with all City employees.

C. Definition of "Lobbyist"
SDMC § 27.4002

Because of the expansive nature of "lobbying activities," the term "lobbyist" as currently defined (one who engages in lobbying activities) is arguably broad enough to include individuals who are paid to assist on lobbying efforts (e.g., secretaries, assistants), but never have an actual lobbying contact. Neither the Commission nor the City Council ever intended the Lobbying Ordinance to require that such individuals be listed as "lobbyists" on a Registration Form or Quarterly Disclosure Report. Accordingly, the Commission recommends revising the definition of "lobbyist" to clarify that it applies to individuals who "lobby" rather than those who may otherwise be involved in "lobbying activities."

In addition, under the current Lobbying Ordinance, an entity is permitted to disclose the names of any prospective lobbyists in order to avoid having to amend its Registration Form repeatedly

throughout the year as individuals start lobbying (and become actual "lobbyists"). The current Ordinance is somewhat ambiguous, however, with regard to when a Lobbying Firm or Organization Lobbyist must disclose fundraising activities, campaign contributions, etc. for an individual who was named prospectively but has not yet had a lobbying contact. Thus, to simplify the Ordinance, the Commission recommends amending the definition of "lobbyist" to expressly include anyone who has been designated by a Lobbying Firm or Organization Lobbyist on its Registration Form as being expected or authorized to lobby. Under this amendment, a Lobbying Firm or Organization Lobbyist can either (a) designate an individual as being authorized to lobby and simultaneously disclose that individual's fundraising activities, etc., or (b) decide not to designate an individual as being authorized to lobby, and in that instance not make any disclosures about that person unless and until he or she is so authorized.

D. Uncompensated Officers

SDMC §§ 27.4002; 27.4009(b)(6) – (8); 27.4017(b)(4) – (8)

Under the Lobbying Ordinance, uncompensated officers of an Organization Lobbyist are generally exempt from disclosing fundraising activities, campaign contributions, campaign contracts, and City contracts. For example, an Organization Lobbyist is not required to disclose the fundraising activities of the volunteer members of its board of directors. The organization is, however, required to disclose the fundraising activities of its lobbyists. A "lobbyist" is defined to include any person who lobbies on behalf of an Organization Lobbyist, and thus the term encompasses uncompensated officers who lobby. Under the Lobbying Ordinance, when a person is both an "uncompensated officer" and a "lobbyist," the organization must disclose the person's lobbying as well as his or her fundraising activities, campaign contributions, etc. (Note that the lobbying contacts of uncompensated officers do not count towards the registration threshold.) Some organizations have been confused by board members being exempt in their capacity as "uncompensated officers," but being subject to different rules in their capacity as "lobbyists."

It is fairly common for the chairperson of an organization's board to participate in lobbying activities. Therefore, in the interests of clarifying the law and simplifying reporting requirements, the Commission recommends amending the definition of "lobbyist" to include an organization's chairperson who lobbies, but excluding all other volunteer officers. This will significantly reduce the amount of work required of organizations governed by a board of directors, particularly those with twenty or thirty board members. Instead of having to determine whether all twenty or thirty board members had a contact with a City Official (and if so, made contributions, engaged in fundraising, etc.), the organization will only have to ask the chairperson about his or her activities. The Commission also recommends adding language in other sections of the Ordinance to clarify the disclosure requirements for a chairperson who lobbies on behalf of the organization.

In addition, because some organizations have a "board president" rather than a "chairperson," the Commission recommends that the term "chairperson" apply to the person who holds the highest position of authority on an organization's board of directors, even if that person has a title other than "chairperson." Finally, the Commission recommends that the definition of "chairperson" include persons acting in a temporary capacity, e.g., "acting Chairperson."

E. Contact Needed Before Registration
SDMC § 27.4009(a)(6)

Although the Commission has advised Lobbying Firms that they are only required to identify on their Registration Forms the names of clients for whom the firms have had at least one lobbying contact, the Commission recommends adding language to clarify this distinction.

F. Amending Organization Lobbyist's Registration Form
SDMC § 27.4009(b)(5)

The Lobbying Ordinance requires an Organization Lobbyist to disclose on its Registration Form the municipal decisions it sought to influence during the 60 days prior to its filing date. It also requires an Organization Lobbyist to amend its Registration Form within ten days of any changes in the information on the form. The purpose of the ten day amendment is to ensure that the public receives timely information regarding any new municipal decisions the Organization Lobbyist is attempting to influence. However, the requirement was inadvertently drafted to include only previous decisions the Organization Lobbyist sought to influence. Thus, if an Organization Lobbyist starts lobbying on a municipal decision not identified on its Registration Form, there is presently no requirement that the Registration Form be amended to reflect that fact. The public may not know that an Organization Lobbyist is lobbying on a particular decision until seeing its quarterly report, which may not be filed until months later. The Commission, therefore, recommends an amendment clarifying that Organization Lobbyists must disclose the decisions it is seeking to influence, as well as those it sought to influence during the 60 calendar days preceding its registration. This amendment will also ensure that the rules concerning amendments apply equally to organization lobbyists and lobbying firms (firms are currently required to amend their registration forms within ten days if they add a new client or a new municipal decision).

G. Registration Renewal
SDMC §§ 27.4007(f); 27.4009(b)(4),(5)

The Lobbying Ordinance currently provides little guidance to Organization Lobbyists with respect to renewing their registrations. In particular, when counting lobbying contacts made over the past 60 days for purposes of reaching the registration threshold, it is not clear whether an Organization Lobbyist should count contacts that were made the previous year when such contacts were (or will be) reported on the Quarterly Disclosure Report for the fourth quarter of the previous year. Put another way, it is not clear whether an organization is required to re-register in January even if it has finished all of its lobbying efforts the previous November or December, and has not lobbied in January.

In order to clarify the criteria for registration renewal, the Commission recommends that contacts made in the prior calendar year count toward the "10 contacts in 60 days" threshold only if the organization is continuing to lobby in the current calendar year. Thus, an organization with no lobbying contacts in the current year will not be required to register solely on the basis that it had lobbying contacts in November or December of the previous year. In addition, the Commission recommends that the contents of the registration form be consistent with the criteria for registration renewal. In other words, if an organization meets the threshold for renewal, it should disclose information regarding the lobbying contacts that were counted for renewal purposes.

H. No Lobbying During Reporting Period
SDMC § 27.4017(a)(2)(E)

Some Lobbying Firms have quarters during which they have no lobbying contacts, and may even engage in no "lobbying activities." Although the Commission staff has advised firms that they need not report anything for clients for whom they have engaged in no lobbying activity in the quarter, some firms are hesitant to report nothing for fear that it will appear to the public that they are failing to report information for their registered clients. As a result, the Commission recommends amending the Ordinance to require that a Lobbying Firm affirmatively state on the Quarterly Disclosure Report that it engaged in no lobbying for the client during the quarter.

I. Fundraising Activities – Aggregate Threshold
SDMC § 27.4017(a)(6), (b)(6)

The Lobbying Ordinance requires Lobbying Firms and Organization Lobbyists to disclose individuals who engaged in "fundraising activities" during the reporting period. A person engages in "fundraising activities" when he or she takes credit for raising $2,000 or more for a candidate. A person must be identified on a disclosure statement if he or she raised $2,000 in connection with one fundraising effort, or if he or she raised an aggregate of $2,000 through multiple efforts. The Lobbying Ordinance's disclosure language uses the phrase "for each instance of fundraising activity," which could be interpreted to mean that disclosure is only required when a single effort reaches the $2,000 threshold, i.e., that disclosure is not required when a person has multiple, smaller fundraising efforts that collectively meet the reporting threshold. Accordingly, the Commission recommends changes to clarify that all fundraising efforts by an individual that collectively total $2,000 or more must be disclosed.

J. Contributions – Aggregate Threshold
SDMC § 27.4017(a)(4) and (5), (b)(4) and (5)

The Commission recommends a similar amendment to the provision that requires Lobbying Firms and Organization Lobbyists to disclose campaign contributions made by owners, officers, and lobbyists of $100 or more. Specifically, the Commission proposes language to clarify that disclosure is required of all contributions made during the reporting period that collectively total $100 or more, not just individual contributions of $100 or more.

K. Contributions for Legal Defense Purposes
SDMC § 27.4002

For purposes of disclosure on a Quarterly Disclosure Report, the proposed amendments will make "contribution" a defined term, and expressly state that the term includes payments made to a candidate's professional expense committee (i.e., legal defense fund committee).

L. Contingency Fee Lobbying
SDMC § 27.4017(a)(2)(A)

Although the current laws require Lobbying Firms to include information regarding clients for whom they are working pursuant to a contingency fee arrangement, there is no specific requirement that firms provide information relating to their contingency-related compensation.

Accordingly, when a firm reports "zero" compensation for a client, the public has no way of knowing if the lobbying for that client was *pro bono* or was instead performed in anticipation of a contingency payment. As a result, the Commission recommends requiring that firms indicate (i.e., check a box on the form) when they have engaged in contingency lobbying.

In addition, the Commission recommends that Lobbying Firms include in their reportable compensation any fees they became entitled to receive during the reporting period for contingency lobbying performed in a previous quarter. This will ensure that the public receives more accurate information about the total compensation a firm has earned for its lobbying efforts.

M. Contingency Fee Campaign Services
SDMC § 27.4017(a)(7), (b)(7)

The Lobbying Ordinance requires that Lobbying Firms and Organization Lobbyists disclose the names of owners, officers, and lobbyists who "provided compensated campaign-related services to a candidate or candidate-controlled committee." The Commission recommends updating the Ordinance to clarify that compensation includes a contingency agreement such as a "win bonus" that will be awarded in the event that a candidate wins an election.

N. Removal of Two-Year Look-Back Provision
SDMC § 27.4009(a)(3) – (5), (b)(3) – (5)

The Commission recommends deleting all instances of language excluding pre-2007 fundraising activities, contributions, campaign-related services, and contract services in light of the fact that all such activities now pre-date the two year look-back provisions in the Ordinance.

For your convenience we have drafted the attached strike-out version reflecting proposed changes to the relevant portions of the Lobbying Ordinance. We look forward to discussing these proposed changes with you at the Rules Committee meeting on September 16, 2009. If you have any questions, please contact me at your convenience.

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Stacey Fulhorst
Executive Director

Enclosure

cc: Catherine Bradley, Chief Deputy City Attorney