

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: June 8, 2010
TO: Chair and Members of the San Diego Ethics Commission
FROM: Stephen Ross, Program Manager
SUBJECT: Election Campaign Control Ordinance and the *Thalheimer* Lawsuit

In December of 2009, plaintiffs Phil Thalheimer, et al., sued the City of San Diego seeking judicial declarations that a number of provisions of the City's Election Campaign Control Ordinance [ECCO] are unconstitutional. This case is still pending. On February 16, 2010, and May 18, 2010, in connection with this lawsuit, the United States District Court for the Southern District of California and the United States Court of Appeals for the Ninth Circuit, respectively, issued orders that have significant impacts on ECCO.

This memorandum addresses two issues arising from these rulings: (1) the extent to which the City may regulate contributions to political party committees participating in City of San Diego candidate elections; and (2) the extent to which the City may require additional disclosures on campaign advertisements funded by large donations in the context of City candidate elections.

A. Limits on Contributions to Political Party Committees

As you know, the district court's February 16, 2010, ruling significantly impacted ECCO by requiring the City to stop applying contribution limits or source prohibitions to committees that make only independent expenditures to support or oppose a City candidate. Thus, such committees may now accept contributions from individual and non-individual entities in unlimited amounts for purposes of making independent expenditures.

One of the provisions in ECCO that was impacted by the recent ruling is SDMC section 27.2936(b), which states: "It is unlawful for any general purpose recipient committee to use a contribution for the purpose of supporting or opposing a candidate unless the contribution is attributable to an individual in an amount that does not exceed \$500 per candidate per election." This provision applied to all general purpose recipient committees [GPRCs], including political party committees, participating in City candidate elections. Because all such committees were prohibited from making contributions directly to City candidates, they typically supported and opposed City candidates through the use of independent expenditures (and in some cases, member communications). Thus, SDMC section 27.2936(b) historically provided that GPRCs

making independent expenditures supporting or opposing a City candidate could only use contributions from individuals in amounts not exceeding \$500.

The district court's February 16, 2010, order states that the limitations in section 27.2936 do not apply to "committees making only independent expenditures." In other words, the plain language of the order establishes that the ruling does not apply to committees that engage in other types of political advocacy. This means that the City may continue to enforce the restrictions set forth in section 27.2936 on political party committees that make contributions to City candidates or make payments for coordinated member communications that support or oppose City candidates. This conclusion is relevant in the context of a separate ruling by the court holding that the City's ban on contributions from organizations to City candidates may not be applied to political party committees. In so doing, the district court opened up an entirely new avenue for political parties to participate in City candidate elections. In response to the court's directive, the Ethics Commission proposed, and the City Council adopted, a \$1,000 limit on contributions from political party committees to City candidates. This limit has not yet gone into effect.

In the meantime, Commission staff released a bulletin clarifying that section 27.2936 will apply to funds used to make political party contributions to City candidates. In other words, ECCO imposes a limit on contributions to a political party committee when such funds are used to make contributions to a City candidate. The bulletin explains that a "political party committee may not serve as a 'pass-through' for unlimited individual contributions or organizational contributions that would serve to effectively circumvent the limits and source prohibitions that are currently in place for contributions to candidates." (This bulletin was especially significant in light of the recent court ruling that is allowing political parties to make unlimited contributions to City candidates until next week when the \$1,000 limit goes into effect.)

Whether the source and amount restrictions in section 27.2936 should apply to political party committees if their political activities extend beyond independent expenditures requires an interpretation of ECCO that goes beyond the plain language of the code section. On one hand, the court's ruling permits committees making only independent expenditures to accept contributions without regard to source or limit, and thus without regard to section 27.2936. On the other hand, because section 27.2936 still applies to political party committees that make contributions or candidate-coordinated member communications (i.e., do more than "making only independent expenditures"), its plain language limits the contributions that such committees may use when making independent expenditures. Thus, the key issue for Commission discussion is whether section 27.2936's source and amount restrictions should apply to a political party committee making independent expenditures when that entity is not a "committee making only independent expenditures."

Although the court's order essentially permits the City to impose different standards for different political party committees depending on whether or not a particular committee made a contribution to a City candidate or coordinated a member communication with a City candidate,

staff recommends that the Commission consider a different interpretation of ECCO at this time in light of the issues discussed in detail below.

In considering whether to interpret ECCO in a manner that would essentially penalize a political party for making a contribution directly to a City candidate or for making payments for member communications coordinated with a City candidate, it is important to keep in mind the underlying public policy issues. Put another way, is the purpose and intent of ECCO furthered by an interpretation that subjects political party committees to contribution limits and source prohibitions only if they make contributions directly to City candidates or make payments for candidate-coordinated member communications? With respect to contribution limits, the courts have acknowledged that such limits will survive constitutional scrutiny only if they are closely drawn to achieve an important governmental interest, i.e., to prevent corruption and the appearance of corruption of City candidates and officeholders.

The following information may be relevant to your consideration of this issue:

- Past decisions by the U.S. Supreme Court have distinguished political committees that do more than make independent expenditures. In *California Medical Association v. FEC*, 453 U.S. 182 (1981), the Court upheld contribution limits to political committees that made contributions directly to candidates, and applied those limits even on funds received and used for purposes other than making contributions to candidates. Later, in *McConnell v. FEC*, *McConnell*, 540 U.S. 93 (2003), the Court upheld limits on contributions to political party committees, finding that the close relationship between such parties and the candidates of their choice could result in the party committees having undue influence over elected officials. In both of these cases, the Supreme Court indicated that such contribution limits served a legitimate purpose in preventing the committees from being used as conduits for the purpose of circumventing limits on contributions to candidates.
- In her recent ruling in the *Thalheimer* litigation, Judge Gonzalez echoed the opinions of the Supreme Court by indicating that the limit established for political party contributions to City candidates should not be so high as to permit political party committees to be used to circumvent the limit on contributions made directly to City candidates. In other words, she acknowledged that the Supreme Court had recognized the potential for corruption and the appearance of corruption if special interests are permitted to funnel unlimited sums through political parties and thereby render the City's contribution limits meaningless.
- Earlier this year, however, the Supreme Court in *Citizens United v. FEC*, 130 S.Ct. 876 (2010) made a sweeping statement that independent expenditures do not give rise to corruption or the appearance of corruption, calling into question what restrictions, if any, the City may impose in the area of independent expenditures. "The fact that speakers may have influence over or access to elected officials does not mean that these officials are corrupt." *Id.* at 910. "In fact, there is only scant evidence that independent expenditures even ingratiate. . . . Ingratiation and access, in any event, are not corruption." *Id.*

Because the *Citizens United* ruling applied to corporate independent expenditures, and did not address contributions to political party committees, it is not clear how the Court would view contributions made to such committees, which generally do more than make independent expenditures.

- There would likely be logistical difficulties in applying the \$500 contribution limit and the ban on contributions from organizations to political party committees that engage in multiple types of political advocacy. For example, would the restrictions apply as soon as a political party made a contribution directly to a City candidate? How long would the restrictions apply after making a contribution to a City candidate? The remainder of the calendar year? The rest of the election cycle? What if the political party made a contribution to a candidate in another city? Would that action trigger limits for contributions used to make independent expenditures to support a City of San Diego candidate? What if a political party made a direct contribution to one City of San Diego candidate in the primary election, and independent expenditures to support another City of San Diego candidate in the general election?
- For purposes of comparison, the State of California imposes a \$32,400 limit on the total amount of contributions that any person may give to a political party committee for purposes of making contributions to state candidates. There are no limits, however, for contributions that are used for purposes other than making contributions to state candidates (so long as such funds are placed in a separate “restricted use” bank account). Cal. Gov’t Code § 85303; FPPC Regulation 18534. Thus, a local imposition of source and amount limits on funds used by a political party committee to make independent expenditures would not follow the state model.

As indicated above, preventing the circumvention of valid contribution limits was a significant factor in the Supreme Court cases upholding limits on contributions to political committees that made contributions to candidates. Once the \$1,000 limit on political party committee contributions to City candidates goes into effect, the risks of such circumvention will be substantially reduced. Accordingly, at this time, staff does not recommend that the Commission apply the source and amount limits in SDMC section 27.2936 to a political party’s independent expenditures. The above-identified logistical issues, combined with *Citizen’s United’s* determinations regarding the non-corrupting effect of independent expenditures, make such an application problematic.

Note, however, that the *Thalheimer* plaintiffs have indicated that they will challenge the \$1,000 limit as being too low. Thus, if the Commission decides to interpret ECCO at this time in a manner that does not apply the restrictions of SDMC section 27.2936 to political party committees making independent expenditures in the context of the \$1,000 limit, it may wish to revisit the matter if a court ruling results in a significantly higher limit, one that is more likely to create an opportunity for the circumvention of contribution limits.

In considering the foregoing, the Commission may also wish to consider asking the City's outside counsel in the *Thalheimer* litigation to seek further clarification from the district court. You should also be aware that, in the view of outside counsel, the plaintiffs would likely seek an additional ruling from the court should the City decide to impose the restrictions set forth in SDMC section 27.2936 on political party committees making independent expenditures.

B. Additional Advertising Disclosures

Prior to the district court's February 16, 2010 ruling, committees making independent expenditures were subject to limits on the contributions they could accept from any one individual for use in City candidate elections. Under the court's ruling, GPRCs and Primarily Formed Recipient Committees [PFRC] may accept unlimited contributions from individuals and non-individual entities for the purpose of making independent expenditures in City candidate elections. Under these circumstances, staff has raised the issue of whether the City should expand its disclosure laws to identify the sources of large contributions used to fund such expenditures. In other words, in addition to disclosing the names of its donors on a campaign statement, should a committee also disclose the names of large donors on the campaign advertisement itself?

Primarily Formed Recipient Committees

A PFRC is a local committee formed to support or oppose a single City candidate or ballot measure or a group of City candidates or ballot measures appearing on the same ballot. In light of the court's recent ruling, these committees may now accept unlimited contributions from any source for the purpose of making independent expenditures supporting or opposing a City candidate.

Current provisions of ECCO provide for increased disclosures for large contributions made to support or oppose ballot measures. SDMC section 27.2975(a) requires ballot measure PFRCs to disclose on any campaign advertising the names of persons whose cumulative contributions are \$50,000 or more.¹ Section 27.2975 is derived from Government Code section 84506,² which contains a similar \$50,000 disclosure threshold for independent expenditures made to support ballot measures or candidates. Until now, ECCO had no need to incorporate the \$50,000 rule for candidate elections because of contribution limits; until the February 2010 court ruling, no person could make more than a \$500 contribution to a PFRC supporting or opposing a City candidate. (It is relevant to note that there have not been any PFRCs established to support or oppose City candidates in the past ten years; however, this may change in light of the recent court rulings.)

¹ If there are more than two donors of \$50,000 or more, only the top two names are disclosed. If there are more than two donors at the same highest amount, the two earliest ones to reach that amount are disclosed.

² Government Code 84506 currently requires any PFRC disseminating a "mass mailing advertisement" (i.e., items sent through the mail, but not including yard signs, door hangers, etc.) to identify the names of persons from whom the PFRC has received its two highest cumulative contributions of \$50,000.

Because PFRCs supporting or opposing City candidates are now permitted to accept unlimited contributions, the Commission may wish to consider extending the large donor disclosure rules to candidate elections. The extra disclosure would provide the public with immediate knowledge of the identities of the individuals or entities primarily responsible for funding an advertisement supporting or opposing a City candidate. In so doing, the Commission could consider the \$50,000 threshold that already exists in state law, or in the alternative, consider a lower threshold. It could, for example, require PFRCs to disclose on any campaign advertising the names of the top two contributors donating \$10,000 or more, or any other dollar amount up to \$50,000.³

Assuming a \$10,000 reporting threshold, if a PFRC created to support the candidacy of John Smith received \$12,000 from United Contractors of San Diego and \$10,000 from Henry Jones (and no larger contributions from other sources), the disclosure would read substantially as follows: “Paid for by the Committee to Support John Smith for City Council 2012, 100 Main Street, San Diego, CA 92101, with Major Funding by United Contractors of San Diego and Henry Jones.”⁴ If Jane Johnson then contributed \$15,000 to the committee, her name would replace Henry Jones’ name on subsequent advertisements.

In summary, the Commission may wish to give direction to staff on the following questions:

1. Should PFRCs that support or oppose a City candidate be required to identify on its campaign advertising the identity of its largest contributors?
2. If the answer to question 1 is yes, should the requirement be patterned after the language in section 27.2975 (top two contributors of \$50,000 or more), or should it instead use different disclosure criteria?

General Purpose Recipient Committees

Unlike PFRCs, which by law have relatively narrow purposes, the nature of GPRCs makes them resistant to supplemental disclosure laws. Because these “general purpose” entities collect dues, donations, and other types of funding for a variety of purposes, it can be difficult, if not impossible, to link a particular political advertisement to a particular source of funding. For example, Henry Jones may be the biggest donor to the United Contractors of San Diego, but the money he gives to that entity may be used for a County Supervisor race, a state ballot initiative, and a Chula Vista mayoral candidate. The fact that United Contractors of San Diego also spends \$10,000 on a mailer supporting a San Diego City candidate is little evidence of Henry Jones

³ Because of preemption issues, the City cannot impose a disclosure requirement on mass mailing advertisements that is less restrictive than the one that exists in state law.

⁴ Under FPPC Regulation 18402(c)(3), “[t]he name of a non-candidate controlled committee primarily formed to support or oppose one or more candidate, shall include the last name of each candidate whom the committee supports or opposes as listed on its statement of organization, the office sought and year of the election, and shall state whether the committee supports or opposes the candidate.”

intending to support that candidate, particularly if Henry Jones made his donation before the City candidate announced his or her candidacy. It is also possible that Henry Jones is opposed to the election of that City candidate. In other words, identifying a particular source of funding for a GPRC advertisement is virtually impossible given that any number of persons or entities may have given any amount of money to a GPRC for any number of purposes. Thus, requiring the disclosure "Paid for by the United Contractors of San Diego with Major Funding by Henry Jones" may not necessarily provide the public with a valid connection between a campaign advertisement and the true source of funding for that advertisement.

Moreover, this issue was the subject of litigation between the FPPC and the state's main two political parties in 2005, with the political parties arguing that disclosure of a GPRCs major donors can be misleading (for the same reasons identified in the paragraph above). To resolve the litigation, the FPPC issued a formal resolution declaring that the state's donor identification statutes would not be enforced against GPRCs. The FPPC also amended several donor identification regulations to limit their application to PFRCs.

For the reasons identified above, staff does not recommend amending ECCO to require additional donor identification disclosures on GPRCs.

As with other legislative amendments previously considered by the Commission, the issues set forth above may require discussion and deliberation over several months before the Commission is prepared to make a recommendation to the City Council. Additionally, the Commission might consider directing staff to obtain additional information or conduct additional research that it thinks would be helpful in with respect to considering these issues. Finally, it should be noted that staff anticipates bringing several additional policy issues to the Commission for its consideration in connection with the ongoing litigation.

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