



REPORT TO LAW & LEGISLATION COMMITTEE City of Sacramento

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915 I Street, Sacramento, CA 95814-2671

STAFF REPORT
January 20, 2009

**Honorable Members of the
Law and Legislation Committee**

**Title: Proposed Changes to the City's Campaign Reform Codes To Repeal
the Limits on Contributions to Independent Expenditure Committees**

Location/Council District: Citywide

Recommendation: Staff recommends that the Law and Legislation Committee approve repealing provisions of the City's Campaign Contribution Limits Code related to contributions to independent expenditure committees and direct staff to prepare and bring to the full City Council an ordinance to repeal subsection D of Section 2.13.050 of Chapter 2.13.

Contact: Rich Archibald, Assistant City Attorney; Patti Bisharat, Director of Governmental Affairs

Presenters: Patti Bisharat, Director of Governmental Affairs

Department: City Attorney's Office/City Manager's Office

Description/Analysis

Issue:

The legality of at least one provision of the City's Contribution Limits Code, the provision that establishes limits for contributions made to independent expenditure committees, has been called into question in a series of court decisions involving ordinances of other California jurisdictions (including the cities of Oakland, San Jose and San Francisco). The independent expenditure committee contribution limits in these cities were held to be unconstitutional restrictions on expenditures. The City's contribution limits were patterned after the limits established in San Francisco.

The validity of the San Francisco limits, as well as the limits of the other jurisdictions referenced above, are currently on appeal to the Ninth Circuit Court of Appeals.¹ Pending the decision on these appeals, it would be appropriate for the City to repeal or suspend enforcement of its independent expenditure committee contribution limits, and one additional related section (establishing certain accounting requirements for those making independent expenditures). The repealed provisions could be readopted or the suspension lifted, should the Ninth Circuit determine that the independent expenditure committee contribution limits are valid and lawful.

Policy Considerations:

Repealing the limits on contributions to independent expenditure committees would be a temporary action pending the outcome of a decision by the Ninth Circuit Court. This action would reduce the potential of legal challenges against the City.

Environmental Considerations: None.

Sustainability Considerations: None.

Committee/Commission Action: None.

Rationale for Recommendation:

No action at this time could result in legal challenges against the City.

Financial Considerations: None.

Emerging Small Business Development (ESBD): None.

Respectfully submitted by: 

Patti Bisharat
Director of Governmental Affairs

¹ The Ninth Circuit recently remanded the San Jose case for further proceedings at the administrative level. Enforcement proceedings were initiated at the administrative level in the San Jose matter, and it is the policy of the courts to abstain from deciding such cases prior to their completion at the administrative level.

Recommendation Approved:

for Patti Bushart

Ray Kerridge
City Manager

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BACKGROUND

The contribution limits code, chapter 2.13 of title 2 of the City Code, includes limits on contributions that persons may make to independent expenditure committees that make contributions to candidates for city elective office, or that make contributions for or against a candidate for City elective office. Subsection D of Section 2.13.050 of the City Code provides:

- D. Contributions to Committees. No person shall make to any committee which contributes to any candidate for city elective office or makes expenditures for or against any candidate for city elective office, and no such committee shall accept from any person a contribution or contributions totaling more than nine hundred dollars (\$900.00) in a calendar year; and no large political committee shall make to any committee which contributes to any candidate for city elective office or makes expenditures for or against any candidate for city elective office, and no such committee shall accept from any large political committee a contribution or contributions totaling more than three thousand five hundred dollars (\$3,500.00) in a calendar year. The provisions of this subsection shall not apply to contributions to candidates and candidate-controlled committees, which shall be subject to the limits set forth in subsections A and B of this section.

Section 2.13.050, adopted in 2000 (Ord. No. 2000-048), was patterned substantially after a similar provision in the campaign code for the City and County of San Francisco. That provision was successfully challenged in the federal district court for the northern District of California, in a decision issued in late 2007. The court found that the limits on contributions to independent expenditure committees served as both contribution limits as well as expenditure limits; that for expenditure limits to be upheld, there had to be a showing of a compelling reason, or compelling governmental interest, for their enactment, and also a showing of no less restrictive alternative; that the ordinance was not supported by a compelling governmental interest and was not the least restrictive alternative. See Comm. On Jobs Advocacy Fund v. Herrera, 2007 U.S. District Court LEXIS 73736 (N.D. Cal. 2007). The case is currently pending before the Ninth Circuit.

Several other jurisdictions have had similar limits on contributions to independent political expenditure committees struck down on constitutional grounds. These include the California cities of Irvine, [Lincoln Club v. City of Irvine, 292 F.3d 934 (9th Cir. 2002)]; Oakland [Oakpac v. City of Oakland, 2006 U.S. Dist Ct. LEXIS 96900 (2006)]; and San Jose [San Jose Silicon Valley Chamber of Commerce Political Action Comm. v. City of San Jose, 2006 U.S.

Dist Ct. LEXIS 94338 (Sept. 2006), vacated and remanded by 2008 U.S. App. LEXIS 21767] (Oct. 2008) (reversed on *Younger* abstention grounds, and not on substantive grounds).² In the Oakland decision, the court also called into question the contribution limits for independent expenditure committees as an impermissible content-based restriction.

The issue of contribution limits for contributions to independent expenditure committees has arisen in other jurisdictions, and they have been held invalid in a number of decisions. See e.g., N.C. Right to Life, Inc. v. Leake, 525 F.3d 274 (4th Cir. 2008); Arkansas Right to Life State PAC v. Butler, 29 F. Supp. 2d 540 (W.D. Ark. 1998).

It is not clear when the Ninth Circuit will address the issue of the constitutionality of the independent expenditure committee contribution limits at issue in the case involving San Francisco (as well as the other cities). Pending a decision on this issue, it would be appropriate for the City of Sacramento to suspend or repeal its independent expenditure committee contribution limits.

The City's limits were called into question by attorneys representing independent expenditure committees interested in making independent expenditures in the most recent mayoral race, and the attorneys cited the adverse decisions in the San Jose and other cases. This issue was raised during the final weeks of the mayoral race, and it is the understanding of the City Attorney's Office that the inquiries were made to the City Clerk by attorneys representing two independent expenditure committees, one supporting former Mayor Fargo, and one supporting current Mayor Johnson. Based on consultation with and advice from this office, the Clerk advised the attorneys that the City would not be enforcing its contribution limits during the last few weeks of the mayoral race. The full Council was apprised of this advice at the same time as, or prior to, the advice was conveyed to the Clerk and thereafter to the committee representatives. If the City had not taken this step, the provision would likely have been challenged in court, and a successful challenge would have resulted in significant attorneys' fees awarded to the challengers.

Pending a decision on this issue, it would be appropriate for the City of Sacramento to suspend or repeal its independent expenditure committee contribution limits. Should the Ninth Circuit decide in favor of the constitutionality of these contribution limits, the suspension could be lifted or the provision reenacted. Given that the campaigns for the 2010 elections are likely to commence in the near future, it would be appropriate to address the issue of these contribution limits now.

In addition to the provision establishing the contribution limits for independent expenditure committees, there are related provisions calling for

² See footnote 1 above.

separate bank accounts and accounting of contributions to independent expenditure committees that should also be suspended or repealed if the decision is to suspend or repeal the contribution limits. These include the exception provisions set forth in Section 2.13.050D.

2.13.050 Contribution limitations.

A. Council Members. Contributions to candidates for the office of city council member shall be subject to the following limitations in addition to the limitations established by Article 3 of Chapter 5 of the Political Reform Act (Government Code Sections 85301—85307):

1. Contributions by Persons. No person shall make, and no candidate for the office of city council member, or a controlled committee of such candidate, or person acting by or on behalf of such candidate or such candidate's controlled committee shall accept any contribution which would cause the total amount contributed by that person to the candidate, or to the candidate's controlled committee, to exceed nine hundred dollars (\$900.00) in any of the following periods: a primary election period; a general election period; or a special election period; provided that, to the extent the Political Reform Act establishes a lower limit for special elections, the lower limit shall apply.

2. Contributions by Large Political Committees. No large political committee shall make, and no candidate for the office of city council member, or a controlled committee of such controlled committee, or person acting by or on behalf of such candidate or such candidate's controlled committee shall accept, any contribution which would cause the total amount contributed by that large political committee to the candidate, or to the candidate's controlled committee, to exceed three thousand five hundred dollars (\$3,500.00) in any of the following periods: a primary election period; a general election period; or a special election period; provided that, to the extent the Political Reform Act establishes a lower limit for special elections, the lower limit shall apply.

B. Mayor. Contributions to candidates for the office of mayor shall be subject to the following limitations in addition to the limitations established by Article 3 of Chapter 5 of the Political Reform Act (Government Code Sections 85300—85307):

1. Contributions by Persons. No person shall make, and no candidate for the office of mayor, or a controlled committee of such candidate, or person acting by or on behalf of such candidate or such candidate's controlled committee, shall accept into the candidate's campaign contribution account, any contribution which would cause the total amount contributed by that person to the candidate, or to the candidate's controlled committee to exceed one thousand one hundred fifty dollars (\$1,150.00) in any of the following periods: a primary election period; a general election period; or a special election period; provided that, to the extent the Political Reform Act establishes a lower limit for special elections, the lower limit shall apply.

2. Contributions by Large Political Committees. No large political committee shall make, and no candidate for the office of mayor, or a controlled committee of the candidate or such candidate's controlled committee, or person acting by or on behalf of

such candidate or such candidate's controlled committee shall accept, any contribution which would cause the total amount contributed by that large political committee to the candidate, or to the candidate's controlled committee, to exceed five thousand eight hundred fifty dollars (\$5,850.00) in any of the following periods: a primary election period; a general election period; or a special election period; provided that, to the extent the Political Reform Act establishes a lower limit for special elections, the lower limit shall apply.

C. Contributions by a Candidate to the Candidate's Campaign. Nothing in subsections A and B of this section is intended to limit the amount that a candidate may contribute to his or her own campaign from his or her personal funds.

~~D.—Contributions to Committees. No person shall make to any committee which contributes to any candidate for city elective office or makes expenditures for or against any candidate for city elective office, and no such committee shall accept from any person a contribution or contributions totaling more than nine hundred dollars (\$900.00) in a calendar year; and no large political committee shall make to any committee which contributes to any candidate for city elective office or makes expenditures for or against any candidate for city elective office, and no such committee shall accept from any large political committee a contribution or contributions totaling more than three thousand five hundred dollars (\$3,500.00) in a calendar year. The provisions of this subsection shall not apply to contributions to candidates and candidate-controlled committees, which shall be subject to the limits set forth in subsections A and B of this section.~~

~~Exception. A committee may solicit and accept contributions in excess of the limits established by subsection 1 above if the committee makes expenditures for any lawful purpose other than supporting or opposing candidates for city elective office, provided that:~~

~~1. Funds received from contributions in excess of the limits set forth in subsection 1 above are used only for lawful purposes other than supporting or opposing candidates for city elective office or making contributions to candidates for city elective office; and~~

~~2. The committee shall establish a separate bank account to be used for making expenditures to support or oppose candidates for city elective office or for making contributions to candidates for city elective office. All expenditures to support or oppose candidates for city elective office and all contributions made by the committee to candidates for city elective office must be made with funds from this account. A committee may not deposit into this account any contributions that were solicited or accepted in excess of the limitations established by subsection 1 above.~~

E. Making and Acceptance of Contributions, Timing of Contributions and Contributions to Officeholders in Off-Election Years.

1. Making and Acceptance of Contributions. For purposes of this chapter, a contribution shall have been considered to have been “made” and “accepted” as follows:

a. Monetary Contributions.

i. Making of Monetary Contributions. For purposes of the contribution limitations of this chapter, a monetary contribution is made on the date the contribution is mailed, delivered, or otherwise transmitted to the candidate or a controlled committee. The date of the check or other negotiable instrument by which the contribution is made may be presumed by the candidate or controlled committee to be the date on which the contribution was mailed, delivered or otherwise transmitted, unless it is known to the candidate to be later than the date the contribution is mailed, delivered or otherwise transmitted, in which case the earlier date shall be considered the date on which the contribution is made.

ii. Acceptance of Monetary Contributions. For purposes of the contribution limits of this chapter, a monetary contribution shall be deemed “accepted” on the date that it is made; provided that a monetary contribution shall not be considered accepted for purposes of this chapter if it is not cashed, negotiated or deposited, and, in addition, is returned to the donor within fourteen (14) days of receipt.

b. Nonmonetary Contributions.

i. Making of Nonmonetary Contributions. A nonmonetary contribution is made by the contributor on the earlier of the following dates: (A) the date that funds are expended by the contributor for goods or services if the specific expenditure is made at the request of the candidate or controlled committee; (B) the date that the candidate or controlled committee or agent of the candidate or controlled committee obtains possession or control of the goods or services; or (C) the date that the candidate or controlled committee otherwise receives the benefit of the expenditure.

ii. Acceptance of Nonmonetary Contributions. A nonmonetary contribution is deemed accepted on the date that it is made by the contributor; provided that a nonmonetary contribution shall be deemed not to have been accepted for purposes of this chapter if it is returned within fourteen (14) days of having been made by returning to the contributor any of the following: (A) the nonmonetary contribution; (B) its monetary equivalent; or (C) the monetary amount by which the value of the nonmonetary contribution exceeds the contribution limits of this chapter.

2. Timing of Contributions. For purposes of this chapter, a contribution shall be deemed to be a contribution during a general election period only if it is made by the contributor on or after the first day of the month immediately following the month in which the primary election is held.

3. Contributions Made in Off-Election Years.

a. Contributions made to candidates for city elective office during an off-election year shall be attributed to, and shall be considered to have been made during, the primary election period, general election period or special election period for purposes of the contribution limits established by subsections A and B of this section.

i. Contributions to Officeholders in Off-election Years. Contributions to an incumbent mayor or an incumbent member of the city council made in an off-election year shall be considered contributions for the election in which the incumbent acquired his or her office, unless the contributions are accepted and deposited into a new campaign contribution account for a future election to the same or different office.

ii. Contributions to Nonincumbent Candidates in Off-election Years. Contributions made during an off-election year to a nonincumbent candidate for a future city elective office for which a primary or special election will be held shall be considered contributions made during the primary or special election period unless the contributions are accepted and deposited into a campaign contribution account established for a prior election or an election for a different office. (Ord. 2007-098 § 2; Ord. 2007-015 §§ 1—3; Ord. 2005-072 § 2; Ord. 2003-010 § 1; Ord. 2000-048 § 1 (part))