

**CITY OF SAN DIEGO
ETHICS COMMISSION**

Office of the Executive Director

MEMORANDUM

DATE: August 29, 2014

TO: Honorable Council President Pro Tem Sherri Lightner, Chair, and Members of the Economic Development and Intergovernmental Relations Committee

FROM: Stacey Fulhorst, Executive Director

SUBJECT: Recommended Changes to Election Campaign Control Ordinance [ECCO] Docketed for Committee Consideration on September 22, 2014

One of the responsibilities of the Ethics Commission, as set forth in SDMC section 26.0414(g), is to “undertake a review of the City’s existing governmental ethics laws, and to propose updates to those laws to the City Council for its approval.” During the 2012 election cycle, as well as the Council District 4 and Mayoral special elections, the Commission noticed two new campaign strategies employed by committees formed to support and oppose City candidates that suggest amendments are necessary in order to combat the appearance of corruption and ensure transparency with respect to the funding of campaign advertisements: (1) the duplication or republication of candidate materials in connection with “independent” expenditures; and (2) the dissemination of campaign advertisements on credit resulting in the avoidance of laws that require the disclosure of major donors. After extensive discussion and deliberation concerning various methods of addressing these situations, the Commission ultimately decided to recommend the amendments discussed below.

Duplication of Candidate Materials

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

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

In recent election cycles, the City has experienced a trend that is occurring in campaigns nationwide in which candidates make their campaign materials available on their campaign websites for committees to duplicate and re-distribute as “independent” expenditures. For example, is not uncommon for City candidates to produce campaign videos and post them (in high-definition format) on their websites or on YouTube, which enables “independent” committees to download them and pay the considerable costs of broadcasting them as television commercials. In such instances, it is next to impossible to prove that actual coordination between the candidate and the committee took place. Moreover, because this practice is becoming increasingly widespread, actual coordination is no longer necessary for a committee to assume a candidate’s advertising costs; a candidate’s consultant knows that placing the candidate’s campaign materials on the Internet will make them available to “independent” committees (supported by unlimited contributions) that will pay the costs of disseminating the materials to prospective voters. Similarly, a committee’s consultant knows to check the candidate’s website and YouTube for candidate-produced materials that can be replicated and re-distributed by the committee as a means of financially supporting the candidate.

The Commission has received several complaints from individuals asserting that these duplication efforts are effectively circumventing the City’s contribution limits, which serve to prevent the appearance of corruption that results when wealthy special interests are permitted to make substantial contributions to potential officeholders. Although such donors are limited in the amount of money they may give directly to City candidates, they are not limited in the amount they may give to an “independent” committee that uses those funds to duplicate and disseminate campaign material created and developed by the candidate. In essence, the current state of the law allows wealthy donors to indirectly make unlimited contributions to City candidates by giving their funds to “independent” committees that effectively pay the candidate’s advertising expenses.

In order to prevent circumvention of the City’s contribution limits, the Commission has prepared amendments that would treat the duplication of candidate materials as an in-kind contribution to the candidate, subject to contribution limits and source prohibitions. The amendments proposed

by the Commission are modeled on existing federal law (11 CFR 109.23), and include the following exemptions:

- written words, phrases, or sentences contained in a candidate's campaign materials;
- statements made by a candidate during a speech, debate, or other public forum;
- duplication of three or fewer photographs of the candidate;
- an advertisement that clearly advocates the defeat of the candidate; and
- member communications.

In drafting the proposed amendments, the Commission received input from Paul Ryan, Senior Counsel with the Campaign Legal Center and a nationally-recognized expert on campaign finance laws. Mr. Ryan has prepared the attached memo in which he opines that the proposed duplication regulations are lawful in light of relevant court rulings and would therefore survive any legal challenges.

With respect to the exemption for written words, phrases, or sentences used in a candidate's campaign materials, the Commission decided to recommend this exemption for practical as well as public policy reasons. For example, consider a candidate's use of such routine campaign phrases as "balance the City's budget" and "improve neighborhood safety." A committee using the same phrases in its campaign literature may reasonably claim that it crafted such phrases on its own without reviewing or duplicating the candidate's materials. Moreover, there is seemingly no compelling public interest in forcing a committee to rearrange the words used by a candidate or to paraphrase the candidate's sentiments in order to say essentially the same thing.

As far as the exemption for three or fewer candidate photographs, it's important to point out that this duplication limit applies only to those photographs produced by the candidate. An unlimited number of photographs produced by the independent committee (or anyone else independent of the candidate) may be used without triggering an in-kind contribution.

Because the goal of the proposed amendments is to prohibit practices that circumvent contribution limits, it is appropriate to include an exemption for advertisements that clearly advocate for the defeat of the candidate whose materials are duplicated. In other words, a communication that opposes a candidate cannot be considered an in-kind contribution to the candidate whose materials are duplicated, and therefore should be exempt from the duplication regulations.

Vendor Credit Limitations

ECCO requires independent committees formed to support or oppose City candidates or measures to disclose the names of their top two donors of \$10,000 or more, as well as their sponsors (which include donors who contribute 80% or more of total contributions) on their

campaign advertisements. SDMC §§ 27.2930, 27.2975. These disclosure laws provide the public with important information regarding the major funders behind campaign advertisements. During the past election cycle, it became apparent that several committees were avoiding these disclosure requirements by waiting to receive substantial monetary contributions until after their campaign advertisements were disseminated and, in most cases, until after the election. In other words, by arranging to make various types of independent expenditures on credit, these committees were able to withhold information concerning the identity of their major donors.

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

To ensure that important information about the financing of committees formed to support or oppose City candidates and measures is provided to the public, the Commission recommends amending ECCO to limit the ability of these committees to pay for campaign advertising on credit. In particular, the proposed amendments would require a committee to pay its vendors in full for all costs associated with the production and dissemination of campaign advertising at the time it places an order for a campaign advertisement if the committee’s bank account balance is insufficient to cover the advertising costs. It is important to note that the Commission’s proposed amendments would apply only to those situations in which the identity of the committee’s major donors or sponsors could be concealed by the extension of vendor credit. In other words, if a committee has two major donors who have each contributed \$100,000, the vendor debt restrictions would generally not impact the committee’s ability to purchase door hangers on credit that cost \$15,000.

Additional Proposed Amendments

The package of amendments proposed by the Commission includes the following additional changes that are less substantial in nature:

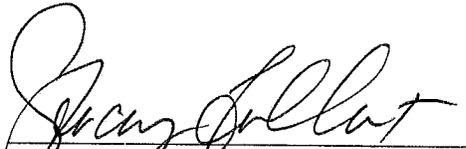
- In response to requests from several professional campaign treasurers based outside the City of San Diego, the Commission recommends expanding the current law that requires City committees to establish campaign accounts at banks that provide services in the City of San Diego to permit the use of banks that provide services in the state of California.

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- In order to correct a previous drafting oversight, the amendments proposed by the Commission include an exemption to the telephone communication disclosure laws for member communications (other than those made by a political party).
- The Commission recommends closing an inadvertent loophole in the law that governs electioneering communications (i.e., communications that mention a City candidate within 90 days of an election but do not expressly advocate for the election or defeat of the candidate). In particular, the Commission has proposed changes that will ensure that political committees are required to include a "paid for by" disclosure on electioneering communications. In addition, the changes recommended by the Commission will clarify that the electioneering communication laws do not apply to materials printed in quantities of 200 or less or telephone calls made to less than 500 individuals or households.

Both clean and strike-out versions of the proposed amendments are attached for your review.

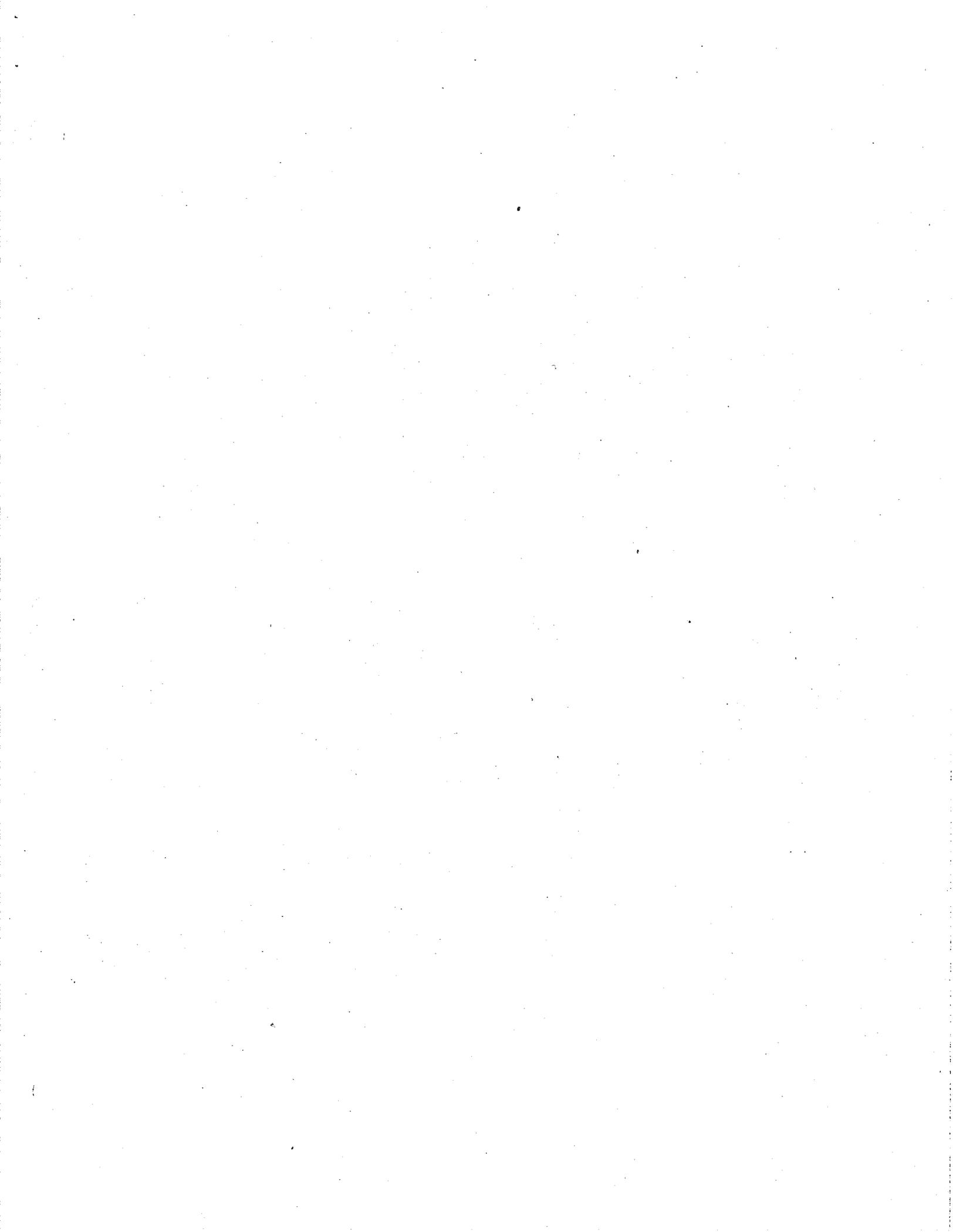


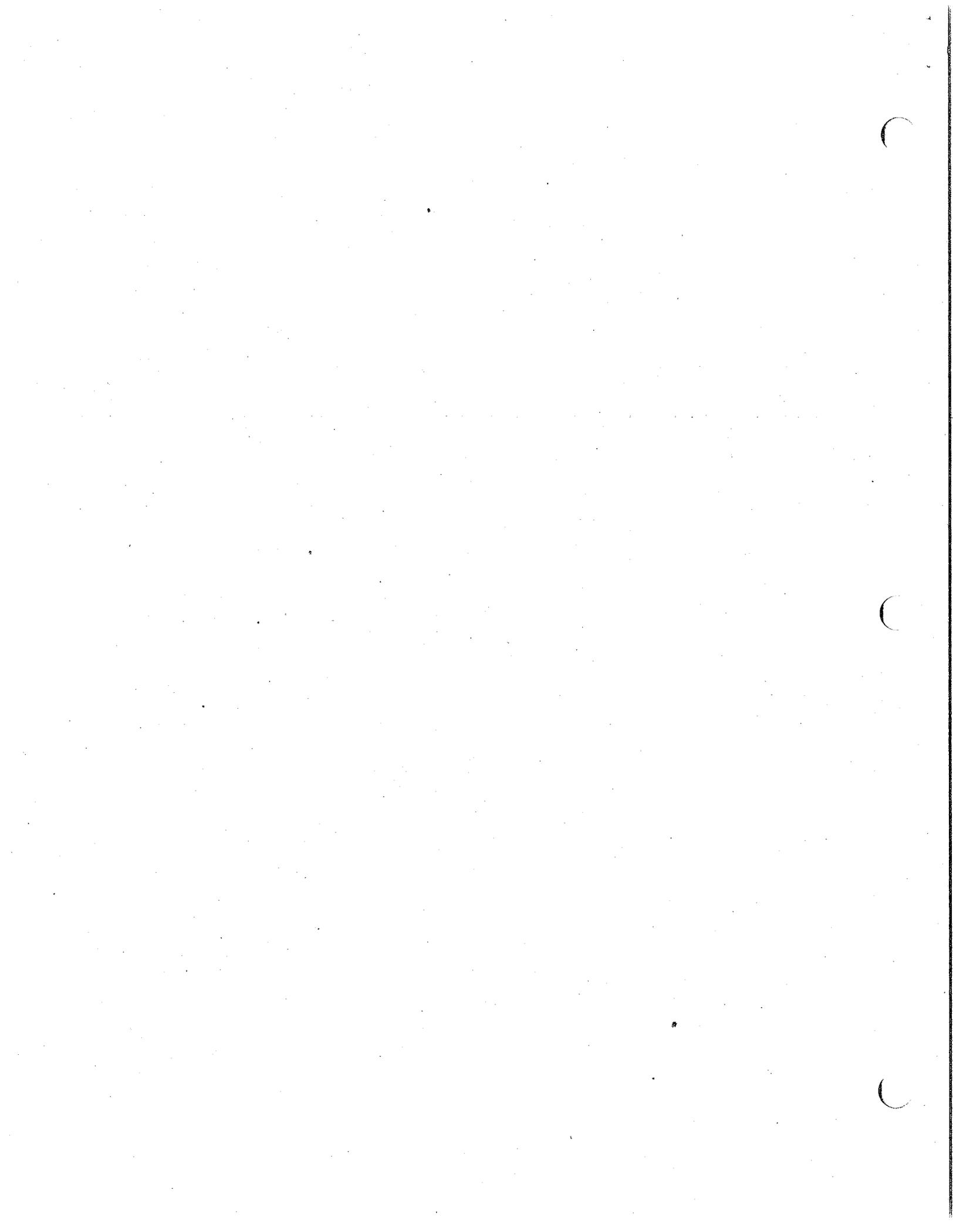
Stacey Fulhorst
Executive Director

Attachments

cc: Honorable Mayor
Independent Budget Analyst
Catherine Bradley, Deputy City Attorney









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August 28, 2014

By Electronic Mail (SFulhorst@sandiego.gov)

TO: Stacey Fulhorst, Executive Director
City of San Diego Ethics Commission
FROM: Paul S. Ryan, Senior Counsel
Megan P. McAllen, Associate Counsel
The Campaign Legal Center
RE: Proposed Election Campaign Control Ordinance Amendments Relating to the
Duplication of Candidates' Campaign Materials

In response to the 2012 election cycle, the San Diego Ethics Commission (“the Commission”) proposed various amendments to the City’s Election Campaign Control Ordinance (“ECCO”) in an effort to preserve the original intent and purpose of the law. Among other recommendations principally related to existing ECCO provisions,¹ the amendments include a new provision that would effectively expand the definition of “contribution” to include any payment by a committee to distribute an advertisement that duplicates or republishes a candidate’s campaign materials. The following memorandum addresses the relevant legal and practical considerations that should guide the City’s analysis as it considers whether to adopt this proposed amendment regarding duplication of candidate campaign materials. For the reasons set forth below, we conclude that the proposed law is constitutionally sound, and urge its adoption.

DISCUSSION

1. Duplication of a Candidate’s Campaign Materials

A. Current law and proposed ECCO § 29.2947

Proposed ECCO section 29.2947, which effectively expands the City’s definition of “contribution” to cover payments made for the duplication, reproduction or republication of candidate campaign materials, is a form of “coordination” regulation intended to complement existing standards governing the determination of an expenditure’s “independence.” Under current law, if an expenditure is “made at the behest of” a candidate or committee, or “made under the control or at the direction of, in cooperation, consultation, coordination, or concert

¹ The Commission’s other recommendations include a new provision targeting committees that avoid disclosure of their sponsors and major donors by disseminating campaign advertisements on credit, *see* proposed ECCO § 27.2959, as well as minor changes to ECCO §§ 27.2966, 27.2971(f), and 27.2980.

with, at the request or suggestion of, or with the express, prior consent of' the candidate or committee, it is treated as a nonmonetary contribution to the candidate subject to the City's contribution limits and its restriction on contributions from non-party organizations. FPPC Regulation § 18225.7 (incorporated by reference in ECCO). In addition, an expenditure is *presumed* to be "made at the behest of" a candidate or committee if it is "a communication relat[ed] to a clearly identified candidate or ballot measure" and the communication "replicates, reproduces, republishes or disseminates, in whole or in substantial part, a communication designed, produced, paid for or distributed by the candidate or committee." *Id.*

§ 18225.7(c)(3)(B). However, that presumption is easily rebutted: the state law includes an express exemption when, *inter alia*, the person making the expenditure has "merely" "obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents." *Id.* § 18225.7(d)(2). The Commission has noted a recent increase in the number of purportedly "independent" committees duplicating candidate materials—a practice that directly undermines San Diego's candidate contribution limits—but the activity is difficult to regulate as "coordination" under current law.

Under the Commission's proposed "duplication" ordinance, "[a]ny committee that makes a payment for distributing or disseminating an advertisement that duplicates, reproduces, or republishes a candidate's campaign materials, in whole or in part, has made a contribution to the candidate for purposes of the [City's] contribution limits and source prohibitions," although the candidate has not necessarily "accepted" or "received" a contribution. ECCO § 27.2947(a)–(b) (Proposed July 11, 2014). The proposed ordinance would include any "advertisement that uses materials created, prepared, or obtained by the candidate or the candidate's controlled committee for campaign purposes . . . regardless of whether such materials were accessible to members of the public on the Internet or through other means not requiring coordination with the candidate or the candidate's controlled committee," but would not include limited words or phrases, statements made during candidate speeches or public events, adversarial advertisements, or member communications. The proposed ordinance makes clear that, so long as the duplication of campaign materials was not done at the behest of the candidate, the ordinance would not impose any liability on a candidate whose campaign materials were duplicated, nor impose any additional filing requirements on such candidates.

B. Analysis

Without such an ordinance regulating duplication of campaign materials, a committee can effectively subsidize a candidate's campaign and evade the City's candidate contribution limits by disseminating the candidate's campaign materials under the guise of "independent" speech. ECCO's contribution limits and prohibitions no longer apply to funds raised by committees making independent expenditures to support or oppose City candidates, so the size of that subsidy is potentially unlimited. *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011). Defining the boundary between independence and coordination is thus a crucial means of preventing circumvention of the contribution limits.

Proposed ECCO § 29.2947 is modeled on a similar federal law provision involving the republication of candidate campaign material, 11 C.F.R. § 109.23, which provides that financing the "dissemination, distribution, or republication, in whole or in part," of any campaign materials

prepared by a candidate or an agent of the candidate “shall be considered a contribution for the purposes of contribution limitations and reporting responsibilities of the person making the expenditure.” Like San Diego’s proposed law, the FEC regulation treats an expenditure for the republication of campaign materials as an in-kind contribution irrespective of whether the expenditure is also a “coordinated communication”—i.e., meets one of the specified “conduct” prongs of the FEC’s “coordinated communication” regulation.² Therefore, under both the federal provision and proposed ECCO § 29.2947, only the person or group financing the republication of candidate materials—but not the candidate herself—is liable for the in-kind contribution. *See* 11 C.F.R. § 109.23(a) (providing that “[t]he candidate who prepared the campaign material does not receive or accept an in-kind contribution, and is not required to report an expenditure,” unless the expenditure is also coordinated within the meaning of 11 C.F.R. § 109.21 (coordinated communications) or 11 C.F.R. § 109.37 (party coordinated communications)); ECCO § 29.2947(b) (“[N]othing in this section imposes any liability on a candidate whose campaign materials were duplicated, reproduced, or republished.”).

The federal regulation sets forth five exceptions to the general rule treating the financing of republication of campaign materials as a contribution by the republisher—(1) republication by the candidate who prepared the material, (2) republication of material by an opponent of the candidate who prepared the material, (3) press exemption, (4) brief quote of material by a person expressing her own views, and (5) republication by a party committee as a coordinated expenditure. 11 C.F.R. § 109.23(b). Similarly, the provisions of proposed ECCO § 29.2947 do not apply to the following:

- (1) any written words, phrases, or sentences contained in a candidate’s campaign materials;
- (2) any statements made by a candidate while delivering a speech or speaking at a debate, forum, or similar public event in an advertisement that does not use an audio or video recording made by the candidate or the candidate’s controlled committee;
- (3) the duplication of three or fewer photographs of the candidate;
- (4) an advertisement that clearly advocates the defeat of the candidate;
- (5) member communications; or,
- (6) instances in which a payment was “made at the behest” of a candidate, as that term is defined in [FPPC § 18225.7]. Such a payment is a contribution regardless of whether any campaign materials were duplicated, reproduced, or republished.

ECCO § 29.2947(d). These exceptions roughly track the federal law,³ and reflect a considered approach that balances the City’s interest in preventing the abuse and circumvention of its campaign finance laws with the regulated community’s need for clear guidance.

² “Coordination” only occurs under federal law when an expenditure for a specific communication meets *both* prongs of the “coordinated communication” regulation: (1) the ad contains specified content *and* (2) the candidate suggests or requests the ad; is materially involved in the spender’s decisions regarding the content of the ad, the intended audience, or the media outlet used; or otherwise meets one of the rule’s narrow “conduct” standards. *See* 11 C.F.R. § 109.21(c) (content standards) and 109.21(d) (conduct standards). The “conduct” standards are also met by use of a “common vendor” absent a firewall, or involvement of a person or contractor who had been employed by the candidate in the previous 120 days, absent a firewall. *See* 11 C.F.R. § 109.21(d)(1)–(5); 109.21(h). To establish “coordination” with respect to republished campaign materials, the republication is itself sufficient to satisfy the regulation’s “content” standards. 11 C.F.R. § 109.21(c)(2). The “conduct” standards, however, include exceptions for material obtained from the public domain. *Id.* § 109.21(d)(2).

³ Although proposed section 29.2947(d) does not contain an explicit press exemption, one is incorporated into the definition of “expenditure.” *See* ECCO § 27.2903.

C. Proposed ECCO § 29.2947 is constitutional.

There are no constitutional barriers to subjecting payments for duplication of candidate campaign materials to the City's candidate contribution limits as proposed, because notwithstanding the Supreme Court's pronouncement in *Citizens United v. FEC* that independent expenditures cannot be constitutionally limited because they "do not give rise to corruption or the appearance of corruption," 558 U.S. 310, 357 (2010), *non-independent*—i.e., coordinated—expenditures are not so immunized. While no court has directly considered the federal regulation that provided the model for San Diego's proposed law, 11 C.F.R. § 109.23, the Supreme Court has maintained a broad view of coordination in general, and has spoken expansively about the degree of independence that is necessary to prevent outside spending from "undermin[ing] contribution limits." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 464 (2001) ("*Colorado IP*"). Only "totally independent," "wholly independent," and "truly independent" expenditures qualify.

Since the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" to influence an election made independently of candidates. The *Buckley* Court upheld as constitutionally permissible candidate contribution limits, *id.* at 29, but struck down limits on individual independent expenditures, *id.* at 51. The Court recognized, however, that to be effective any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the [campaign finance laws] through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47. The *Buckley* Court further explained that there was a difference between expenditures "made *totally* independently of the candidate and his campaign," *id.* at 47 (emphasis added), and "coordinated expenditures," and construed the contribution limits to include not only contributions made directly to a candidate, but also "all expenditures placed in cooperation with or with the consent of a candidate" or his campaign committee. *Id.* at 46–47 n.53; *see also id.* at 78.

Unlike contributions, the *Buckley* Court explained, *totally* independent expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id.* at 47. The Court explained further that the absence of coordination "undermines the value of the expenditure to the candidate" and "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id.* By contrast, a committee's duplication and republication of a candidate's campaign materials is undoubtedly of great assistance to the candidate's campaign and runs no risk of being counterproductive. If the candidate did not view the materials as valuable to her campaign, she would not have produced them in the first instance. For this reason, a committee's payments to duplicate and distribute campaign materials pose precisely the same threat of corruption as a contributions given directly to a candidate—and such contributions may be limited under *Buckley*.

The Court echoed *Buckley*'s broad language regarding coordination in later decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996)

(“*Colorado I*”), the Court held that a radio advertisement aired by the Republican Party attacking the Democratic Party’s presumptive nominee to the U.S. Senate would not be treated as coordinated because the ad was developed “*independently* and not pursuant to any general or particular understanding with a candidate” *Id.* at 614. Then, in *Colorado II*, the Court—again in the context of party spending—noted that independent expenditures are only those “without any candidate’s approval (or *wink or nod*)” 533 U.S. at 442, 447 (emphasis added). Shortly thereafter, the Court again noted that the relevant “dividing line” was “between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that *truly* are independent.” *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (emphasis added).

In the course of striking down spending limits, the *Buckley* Court specifically considered the possibility that the federal contribution limits could be evaded by “the simple expedient of paying directly for media advertisements or for other portions of the candidate’s campaign activities” using “independent” expenditures. 424 U.S. at 46. The Court explained that there was no such risk, because such direct payments were to be treated as contributions subject to the limits and prohibitions of the Act. The Court later repeated this straightforward conclusion—that paying a campaign’s media bills is “virtually indistinguishable” from making a contribution—in *Colorado I*. 518 U.S. at 624. Similarly, paying to reproduce and disseminate a candidate’s own campaign materials amounts to “paying directly for [a candidate’s] media advertisements.” Such payments can be constitutionally regulated as nonmonetary contributions because, as the district court explained in *FEC v. Christian Coalition*, “[a] mere expenditure to increase the volume of the candidate’s speech by funding additional purchases of campaign materials . . . does not raise the same type of First Amendment concerns” as other forms of coordination rules. 52 F. Supp. 2d 45, 85 n.45 (D.D.C. 1999) (distinguishing the federal republication provisions from the standard for conduct constituting coordination, and narrowing the latter as overbroad).

The Commission’s proposed amendment does not exclude from regulation the duplication of materials already available in the public domain. ECCO § 2947(c) (“The provisions of this section apply to a committee’s advertisement that uses [candidate campaign materials] . . . regardless of whether such materials were accessible to members of the public on the Internet or through other means not requiring coordination with the candidate or the candidate’s controlled committee.”) (emphasis added). Excluding such material would remove from the provision’s coverage the very concern that motivated its drafting in the first place: candidates developing material and posting it online with the plain expectation that it will be picked up and disseminated by a deep-pocketed independent committee.⁴ As the history of the federal republication provision further demonstrates, a public domain exception would neuter the law. In a 2002 FEC rulemaking proceeding, a commenter proposed an exception from the coordination/republication rule “to cover republication and distribution of original campaign material that already exists in the public domain, such as presentations made by candidates, biographies, positions on issues or voting records.” *Coordinated and Independent Expenditures*, Final Rules & Explanation & Justification, 68 Fed. Reg. 421, 442–43 (Jan. 3, 2003). The FEC,

⁴ This practice has been on the rise nationwide. See, e.g., Sean Sullivan, *McConnell-aligned group launches seven-figure ad campaign with his footage*, Wash. Post, Mar. 18, 2014, http://www.washingtonpost.com/blogs/post-politics/wp/2014/03/18/mcconnell-aligned-group-launches-seven-figure-ad-campaign-with-his-footage/?wprss=rss_politics.

however, “decline[d] to promulgate a ‘public domain’ exception because such an exception could ‘swallow the rule,’ given that *virtually all campaign material that could be republished could be considered to be ‘in the public domain.’*” *Id.* (emphasis added).

Moreover, a public domain exception is not constitutionally required. In *McConnell*, the plaintiffs argued that any definition of coordination that did not “hinge on the presence of an agreement” failed to provide the “‘precise guidance’ that the First Amendment demands.” 540 U.S. at 221. But the Supreme Court concluded otherwise: in particular, the Court was “not persuaded that the presence of an agreement marks the dividing line between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that truly are independent.” *Id.* In short, “the rationale for affording special protection to wholly independent expenditures”—i.e., that their independence “alleviates the danger that they will be given as a *quid pro quo* for improper commitments from the candidate” and may even make them “counterproductive” to the candidate’s campaign—does not extend to something as obviously beneficial as outright duplication of the candidate’s campaign materials. *Id.* Instead, when a supposedly “independent” committee pays to reproduce and disseminate all or part of something specifically prepared by a candidate—even if acquired from a publicly available source—it will plainly be “as useful to the candidate as cash.” *Id.* Such a scenario, unlike “truly” or “wholly” independent spending, poses a clear risk of corruption and the appearance of corruption.

CONCLUSION

For all of the above-stated reasons, the Campaign Legal Center concludes that the proposed “duplication” ECCO ordinance amendment is constitutionally sound and respectfully urges the City to adopt the amendment.

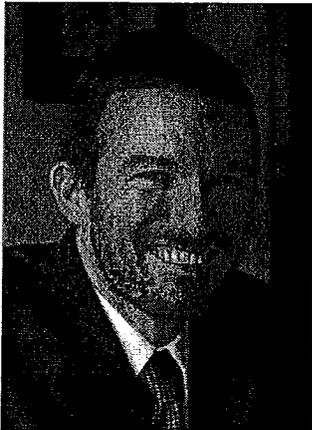
We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Paul S. Ryan

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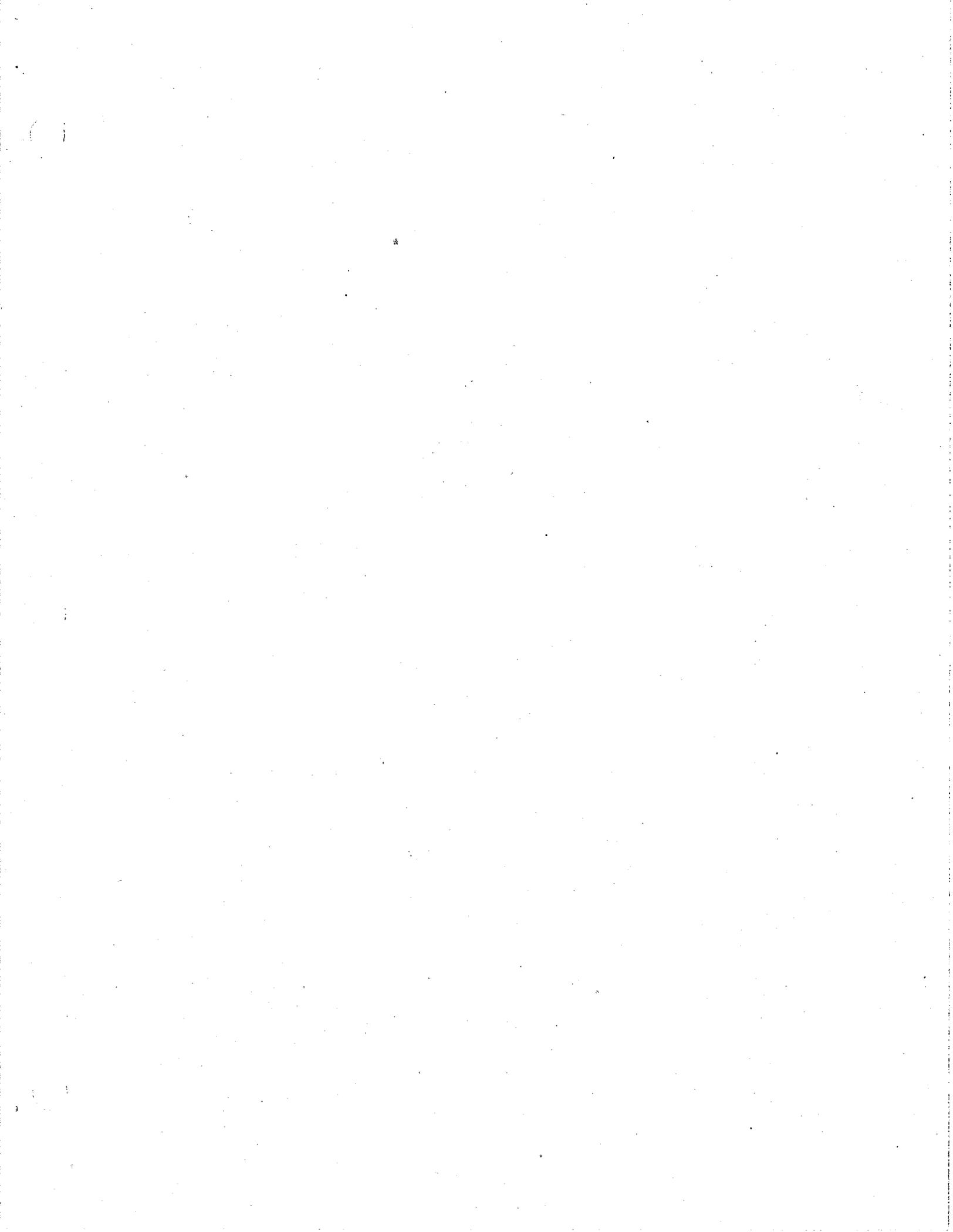


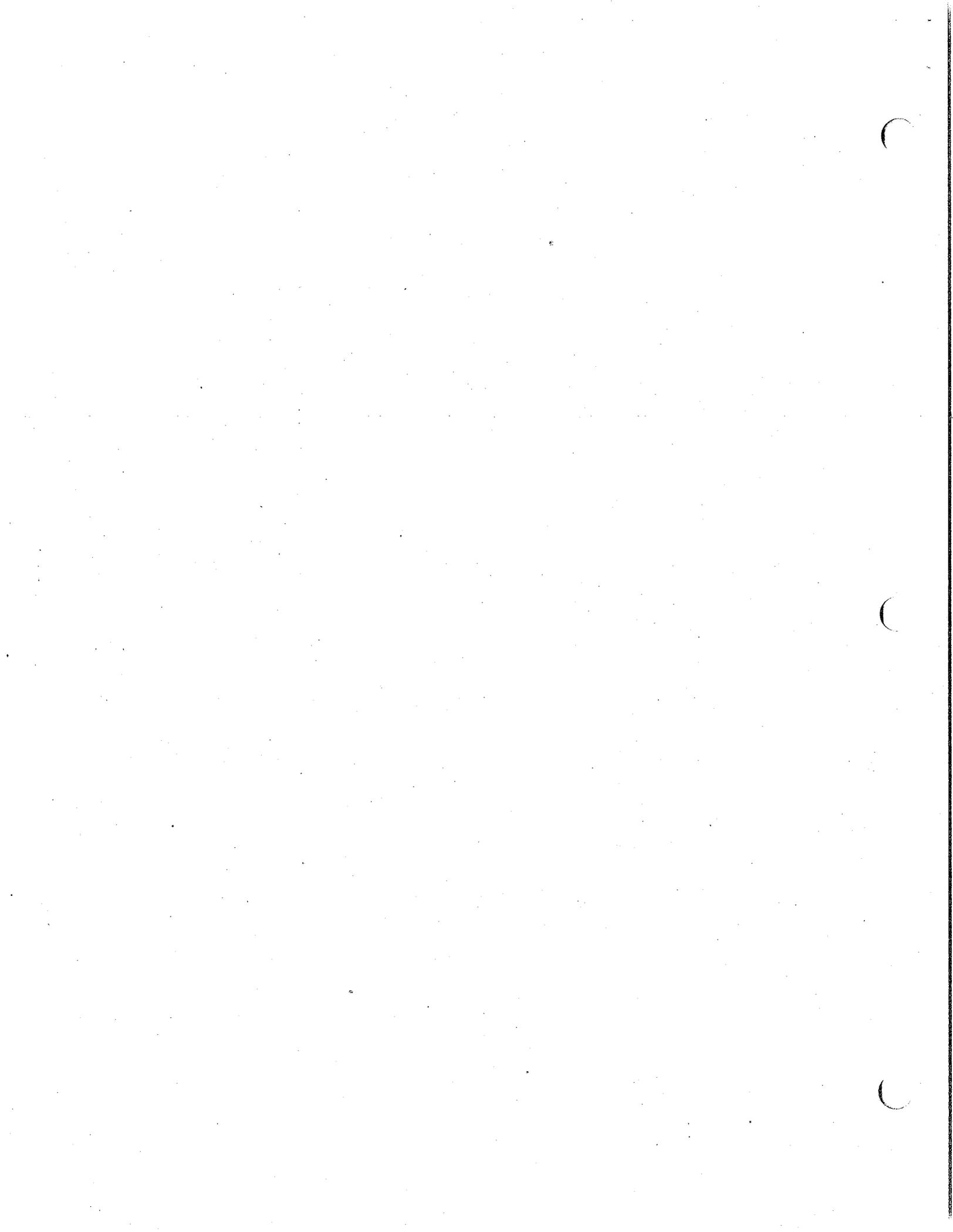
Paul S. Ryan joined the Campaign Legal Center in October 2004. He has specialized in campaign finance, ethics, and election law for more than a decade and is former Political Reform Project Director at the Center for Governmental Studies (1999-2004) in Los Angeles. Mr. Ryan litigates campaign finance issues before federal and state courts throughout the United States and has published extensively on the subject of election law in journals including the *Stanford Law and Policy Review* and the *Harvard Journal on Legislation*.

Mr. Ryan has testified as an expert on election law before Congress, regularly represents the Campaign Legal Center before the Federal Election Commission and has testified before state and municipal legislative bodies and ethics agencies around the nation. He has appeared as a campaign finance law expert on news programs of CNN, NBC, C-SPAN, NPR and other media outlets, and is quoted regularly by *The New York Times*, *Los Angeles Times*, *The Washington Post*, *Roll Call* and other news publications.

Mr. Ryan is a graduate of the University of California, Los Angeles School of Law's Program in Public Interest Law and Policy (2001) and the University of Montana (1998), and is admitted to practice law in the District of Columbia, the State of California, the Supreme Court of the United States, the U.S. Fourth Circuit Court of Appeals and the U.S. Ninth Circuit Court of Appeals.







SAN DIEGO ETHICS COMMISSION REVIEW OF THE CITY'S
Election Campaign Control Ordinance

PROPOSED AMENDMENTS

(Clean Version)

July 11, 2014

Chapter 2: Government
Article 7: Elections, Campaign Finance and Lobbying
Division 29: Election Campaign Control Ordinance

§27.2916 Campaign Contribution Checking Account

- (a) Every *controlled committee* that accepts *contributions* and every *primarily formed recipient committee* shall establish one campaign checking account at a bank or other financial institution with an office or branch in the state of California.
- (b) – (c) [No change in text.]

§27.2947 Duplication of a Candidate's Campaign Materials

- (a) Any *committee* that makes a *payment* for distributing or disseminating an advertisement that duplicates, reproduces, or republishes a *candidate's* campaign materials, in whole or in part, has made a *contribution* to the *candidate* for purposes of the *contribution* limits and source prohibitions set forth in sections 27.2934, 27.2935, 27.2950, and 27.2951.
- (b) The “making” of a *contribution* to a *candidate* under subsection (a) does not mean that the *candidate* has “accepted” or “received” a *contribution* for purposes of *contribution* limits or source prohibitions. Accordingly, nothing in this section imposes any liability on a *candidate* whose campaign materials were duplicated, reproduced, or republished.
- (c) The provisions of this section apply to a *committee's* advertisement that uses materials created, prepared, or obtained by the *candidate* or the *candidate's controlled committee* for campaign purposes, including, but not limited to, mailers; flyers; pamphlets; door hangers; walking cards; posters; yard signs; billboards; banners and large signs; business cards; campaign buttons; bumper stickers; newspaper, magazine, television, radio, and Internet advertisements; photographs; audio recordings; and videos, regardless of whether such materials were accessible to members of the public on the Internet or through other means not requiring coordination with the *candidate* or the *candidate's controlled committee*.

- (d) The provisions of this section do not apply to:
- (1) any written words, phrases, or sentences contained in a *candidate's* campaign materials;
 - (2) any statements made by a *candidate* while delivering a speech or speaking at a debate, forum, or similar public event and contained in an advertisement that does not use an audio or video recording made by the *candidate* or the *candidate's controlled committee*;
 - (3) the duplication of three or fewer photographs of the *candidate*;
 - (4) an advertisement that clearly advocates the defeat of the *candidate*;
 - (5) *member communications*; or,
 - (6) instances in which a *payment* was "made at the behest" of a *candidate*, as that term is defined in title 2, section 18225.7 of the California Code of Regulations. Such a *payment* is a *contribution* regardless of whether any campaign materials were duplicated, reproduced, or republished.
- (e) Nothing in this section imposes on any *candidate* or *committee* any filing obligations in addition to those set forth in California Government Code sections 81000 *et seq.* and title 2 of the California Code of Regulations.

§27.2959 Extensions of Vendor Credit – Primarily Formed Recipient Committees

- (a) *Vendors* may extend credit to *primarily formed recipient committees* in the ordinary course of business in the same manner they extend it to *persons* for other than *political purposes*, except as set forth in subsection (b).
- (b) A *primarily formed recipient committee* may not accept credit from a *vendor*, but shall instead pay the *vendor* in full from existing funds at the time of placing the order, if all three of the following conditions are met:
- (1) the *vendor* is providing goods or services relating to designing, creating, printing, mailing, posting, broadcasting, or disseminating a campaign advertisement;
 - (2) the balance in the *committee's* bank account, including funds received but not yet available, is insufficient to cover in full the *committee's* advertising debt liability; and,
 - (3) the identity of the *committee's sponsors* or top two donors of \$10,000 or more would change if any *person* made a *contribution* to the *committee* in an amount equal to the *committee's* advertising debt liability.
- (c) For purposes of this section:
- (1) "a campaign advertisement" means any tangible or intangible campaign content that requires a "paid for by" or similar funding disclosure under

sections 27.2970, 27.2971, 27.2972, or 27.2974, and any television or radio advertisement that requires a “paid for by” or similar funding disclosure pursuant to state or federal campaign law;

- (2) “a *contribution to the committee*” refers to a potential *contribution* by any *person* who would be contributing to the *committee* for the first time as well as by any *person* who has already contributed to the *committee*;
- (3) “advertising debt liability” means the full costs of the campaign advertisement being considered by the *committee* plus the remaining balance owed for all other campaign advertisements purchased by the *committee* on credit; and,
- (4) the costs of a campaign advertisement do not include costs owed solely to a *vendor* who is paid at regular intervals for providing consulting services to the *committee* over and above those associated with campaign advertisements.

§27.2966 Establishment of a Professional Expense Committee and Checking Account; Recordkeeping

- (a) A *City Official or candidate* who raises professional expense funds shall deposit the funds in, and expend the funds from, a professional expense checking account that is separate from any other bank account held by the *City Official or candidate*. The checking account shall be established at a bank or other financial institution with an office or branch in the state of California.
- (b) – (d) [No change in text.]

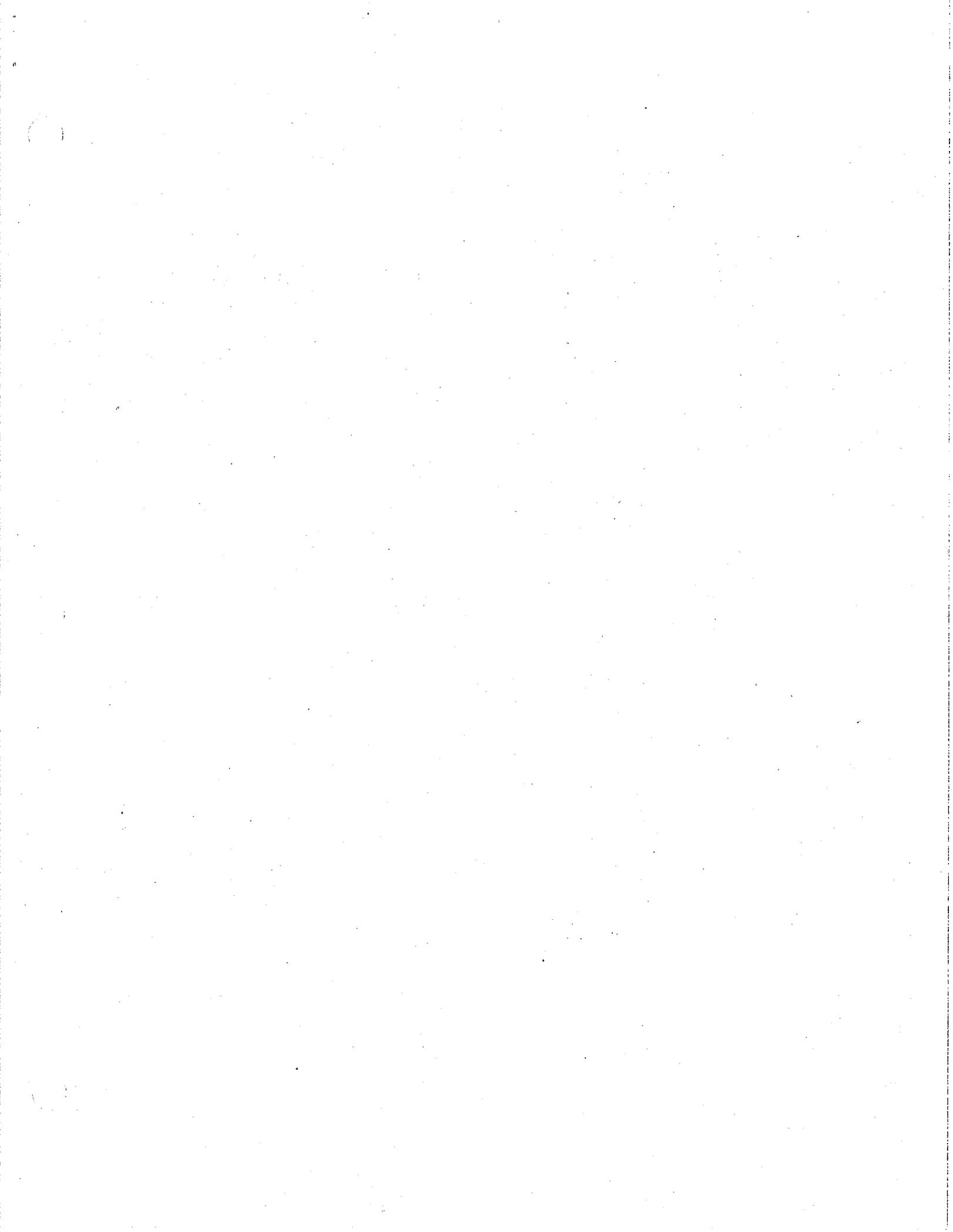
§27.2971 Telephone Communications

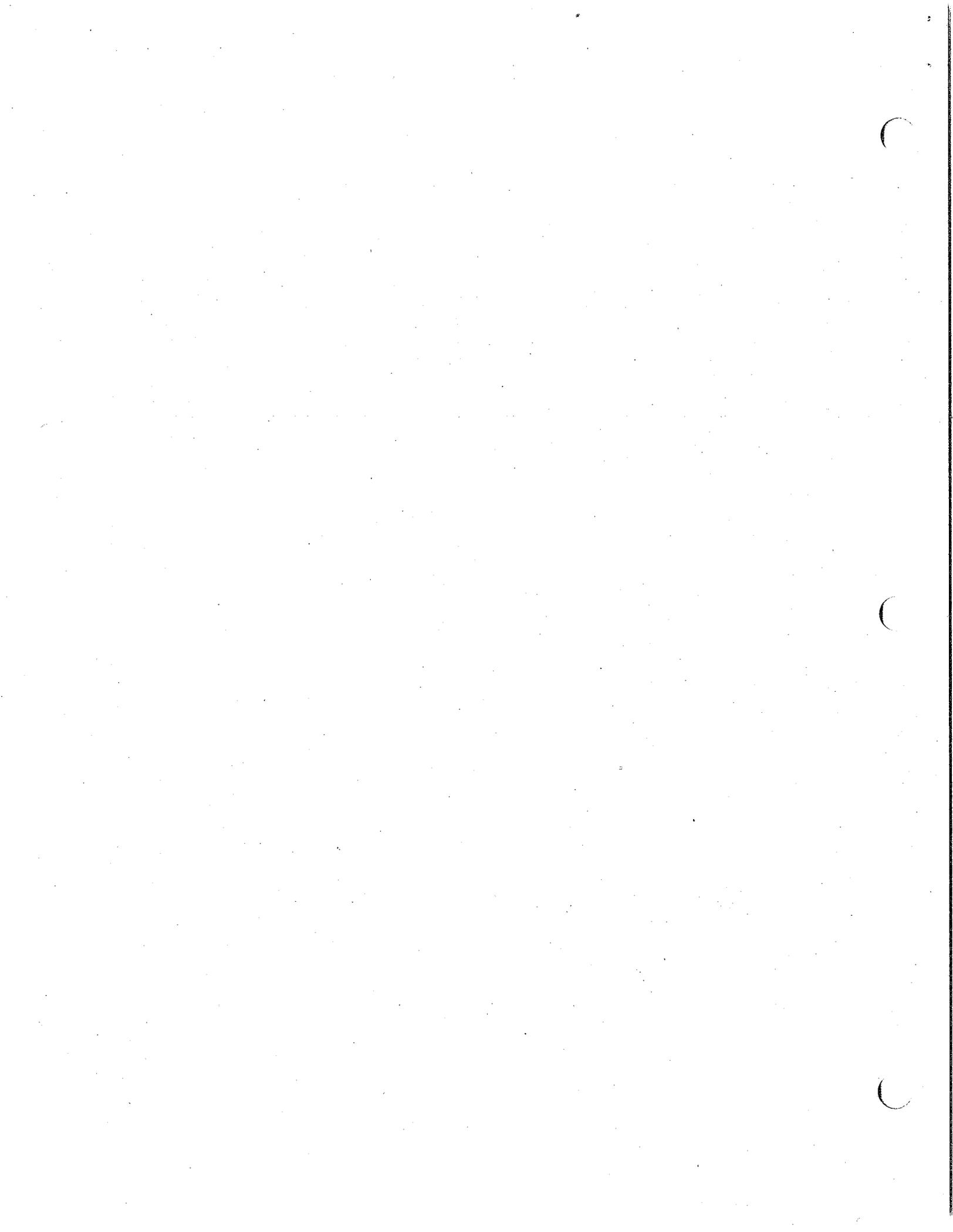
- (a) – (e) [No change in text.]
- (f) The disclosure requirements set forth in this section shall not apply to a *candidate* personally engaging in a live telephone communication or to a *member communication* by an organization that is not a political party.

§27.2980 Disclosure of Electioneering Communications

- (a) – (e) [No change in text.]
- (f) The communications subject to the provisions of this section do not include:
 - (1) news stories and editorials by broadcast outlets or regularly published newspapers, periodicals, or magazines of general circulation;
 - (2) *member communications*, except those made by a political party;

- (3) communications made in the form of a slate mailer;
 - (4) communications paid for by a governmental entity;
 - (5) communications that occur during a *candidate* debate or forum;
 - (6) communications made solely to promote a *candidate* debate or forum made by or on behalf of the *person* sponsoring the debate or forum, provided that such communications do not otherwise discuss the positions or experience of a *candidate*; ~~or~~
 - (7) communications in which a *candidate*'s name is required by law to appear and the *candidate* is not singled out in the manner of display;
 - (8) printed materials in quantities of 200 or less distributed within a single calendar month; or,
 - (9) live or recorded telephone calls made to less than 500 individuals or households.
- (g) [No change in text.]
- (h) The obligation to file an "Electioneering Communication Disclosure Report" under subsection (c) shall not apply to any entity that is a *committee*.





SAN DIEGO ETHICS COMMISSION REVIEW OF THE CITY'S
Election Campaign Control Ordinance

PROPOSED AMENDMENTS

(Strikeout Version)

July 11, 2014

Chapter 2: Government
Article 7: Elections, Campaign Finance and Lobbying
Division 29: Election Campaign Control Ordinance

§27.2916 Campaign Contribution Checking Account

- (a) Every *controlled committee* that accepts *contributions* and every *primarily formed recipient committee* shall establish one campaign checking account at an office of a bank or other financial institution ~~providing checking account services located in the City of San Diego~~ with an office or branch in the state of California.
- (b) – (c) [No change in text.]

§27.2947 Duplication of a Candidate's Campaign Materials

- (a) Any committee that makes a payment for distributing or disseminating an advertisement that duplicates, reproduces, or republishes a candidate's campaign materials, in whole or in part, has made a contribution to the candidate for purposes of the contribution limits and source prohibitions set forth in sections 27.2934, 27.2935, 27.2950, and 27.2951.
- (b) The "making" of a contribution to a candidate under subsection (a) does not mean that the candidate has "accepted" or "received" a contribution for purposes of contribution limits or source prohibitions. Accordingly, nothing in this section imposes any liability on a candidate whose campaign materials were duplicated, reproduced, or republished.
- (c) The provisions of this section apply to a committee's advertisement that uses materials created, prepared, or obtained by the candidate or the candidate's controlled committee for campaign purposes, including, but not limited to, mailers; flyers; pamphlets; door hangers; walking cards; posters; yard signs; billboards; banners and large signs; business cards; campaign buttons; bumper stickers; newspaper, magazine, television, radio, and Internet advertisements; photographs; audio recordings; and videos, regardless of whether such materials were accessible to members of the public on the Internet or through other means not requiring coordination with the candidate or the candidate's controlled committee.

- (d) The provisions of this section do not apply to:
- (1) any written words, phrases, or sentences contained in a *candidate's* campaign materials;
 - (2) any statements made by a *candidate* while delivering a speech or speaking at a debate, forum, or similar public event and contained in an advertisement that does not use an audio or video recording made by the *candidate* or the *candidate's controlled committee*;
 - (3) the duplication of three or fewer photographs of the *candidate*;
 - (4) an advertisement that clearly advocates the defeat of the *candidate*;
 - (5) *member communications*; or,
 - (6) instances in which a *payment* was "made at the behest" of a *candidate*, as that term is defined in title 2, section 18225.7 of the California Code of Regulations. Such a *payment* is a *contribution* regardless of whether any campaign materials were duplicated, reproduced, or republished.
- (e) Nothing in this section imposes on any *candidate* or *committee* any filing obligations in addition to those set forth in California Government Code sections 81000 *et seq.* and title 2 of the California Code of Regulations.

§27.2959 Extensions of Vendor Credit – Primarily Formed Recipient Committees

- (a) *Vendors* may extend credit to *primarily formed recipient committees* in the ordinary course of business in the same manner they extend it to *persons* for other than *political purposes*, except as set forth in subsection (b).
- (b) A *primarily formed recipient committee* may not accept credit from a *vendor*, but shall instead pay the *vendor* in full from existing funds at the time of placing the order, if all three of the following conditions are met:
- (1) the *vendor* is providing goods or services relating to designing, creating, printing, mailing, posting, broadcasting, or disseminating a campaign advertisement;
 - (2) the balance in the *committee's* bank account, including funds received but not yet available, is insufficient to cover in full the *committee's* advertising debt liability; and,
 - (3) the identity of the *committee's* sponsors or top two donors of \$10,000 or more would change if any *person* made a *contribution* to the *committee* in an amount equal to the *committee's* advertising debt liability.
- (c) For purposes of this section:
- (1) "a campaign advertisement" means any tangible or intangible campaign content that requires a "paid for by" or similar funding disclosure under

sections 27.2970, 27.2971, 27.2972, or 27.2974, and any television or radio advertisement that requires a “paid for by” or similar funding disclosure pursuant to state or federal campaign law;

- (2) “a contribution to the committee” refers to a potential contribution by any person who would be contributing to the committee for the first time as well as by any person who has already contributed to the committee;
- (3) “advertising debt liability” means the full costs of the campaign advertisement being considered by the committee plus the remaining balance owed for all other campaign advertisements purchased by the committee on credit; and,
- (4) the costs of a campaign advertisement do not include costs owed solely to a vendor who is paid at regular intervals for providing consulting services to the committee over and above those associated with campaign advertisements.

§27.2966 Establishment of a Professional Expense Committee and Checking Account; Recordkeeping

- (a) A *City Official or candidate* who raises professional expense funds shall deposit the funds in, and expend the funds from, a professional expense checking account that is separate from any other bank account held by the *City Official or candidate*. The checking account shall be established at ~~an office of~~ a bank or other financial institution ~~providing checking account services located in the City of San Diego~~ with an office or branch in the state of California.
- (b) – (d) [No change in text.]

§27.2971 Telephone Communications

- (a) – (e) [No change in text.]
- (f) The disclosure requirements set forth in this section shall not apply to a *candidate* personally engaging in a live telephone communication or to a member communication by an organization that is not a political party.

§27.2980 Disclosure of Electioneering Communications

- (a) – (e) [No change in text.]
- (f) The communications subject to the provisions of this section do not include:
 - (1) news stories and editorials by broadcast outlets or regularly published newspapers, periodicals, or magazines of general circulation;

- (2) ~~communications that are considered expenditures or independent expenditures under this Division;~~
 - (3)(2) *member communications*, except those made by a political party;
 - (4)(3) communications made in the form of a slate mailer;
 - (5)(4) communications paid for by a governmental entity;
 - (6)(5) communications that occur during a *candidate* debate or forum;
 - (7)(6) communications made solely to promote a *candidate* debate or forum made by or on behalf of the *person* sponsoring the debate or forum, provided that such communications do not otherwise discuss the positions or experience of a *candidate*; ~~or~~
 - (8)(7) communications in which a *candidate*'s name is required by law to appear and the *candidate* is not singled out in the manner of display;
 - (8) printed materials in quantities of 200 or less distributed within a single calendar month; or,
 - (9) live or recorded telephone calls made to less than 500 individuals or households.
- (g) [No change in text.]
- (h) The obligation to file an "Electioneering Communication Disclosure Report" under subsection (c) shall not apply to any entity that is a committee whose primary filing officer is not the *City Clerk*.