MEMORANDUM OF LAW

DATE: January 24, 1996

TO: Charles G. Abdelnour, City Clerk

FROM: City Attorney

SUBJECT: May a Financial Institution Lawfully Issue a Credit Card to a Campaign Committee under the City's Election Campaign Control Ordinance?

QUESTION PRESENTED

Under The City of San Diego's Municipal Election Campaign Control Ordinance, may a financial institution lawfully issue a credit card to a campaign committee of a candidate for an elective City office?

SHORT ANSWER

Probably not, since by law the campaign committee may use the credit card only to make purchases for political purposes.

BACKGROUND

By memorandum dated December 5, 1995, you have asked the City Attorney for advice under the Municipal Election Campaign Control Ordinance ("Ordinance"), which is codified at San Diego Municipal Code ("SDMC") sections 27.2901 through 27.2975. The question arose because of a letter you received from Brian Maas, an attorney with Pillsbury Madison and Sutro, who represents a financial institution that would like to issue a credit card to a campaign committee of a candidate for an elective City office. You were informed that the financial institution wishes to issue the card to the campaign committee, not to the candidate him or herself. You were not informed, however, of the other terms and conditions of the card's issuance, for example, who will be authorized users of the card, upon whose credit history the issuance of the card will be based, the monetary limit to be placed on the card, or any other potentially relevant facts. The question arises in part because state law specifically allows credit cards to be issued to candidates' campaign committees,F

Under authority of Government Code sections 85201 (requirement to establish one campaign bank account) and 85202 (since repealed), the Fair Political Practices Commission ("FPPC") promulgated the following regulation:

The candidate may establish one or more

> credit card accounts or one or more charge accounts for the campaign bank account. Expenditures for payment of charges incurred on each credit card or charge account shall be made only from the campaign bank account. The credit card and charge accounts shall be used only for expenses associated with the candidate's election to the specific elective office designated in the statement of intention or expenses associated with holding that office.

2 Cal. Code Regs. ' 18524(c) whereas the City's Ordinance is silent on the question.

ANALYSIS

Under the Ordinance:

> It is unlawful for a person other than an individual to make a contribution to any candidate or committee, except to a committee that is organized solely for the purpose of supporting or opposing the qualification of a City measure for the ballot, or the adoption or defeat of a City measure, and the committee pursues no other purpose.

SDMC Section 27.2947(b).

In other words, the Ordinance prohibits organizations, including corporations and other forms of business entities, from making contributions to campaign committees of candidates running for elective City offices.

To be appreciated fully, this prohibition must be read in light of the purposes of the Ordinance, which in relevant part are "to prohibit contributions by organizations in order to develop a broader base of political efficacy within the community" and "to limit the use of loans and credit in the financing of municipal election campaigns . . . ." SDMC Section 27.2901. We read this language to require us to construe the prohibition against organizational contributions to limit the use of loans and credit and to limit the power of companies to influence elections.

Under the facts presented, the proposed card issuer is a financial institution. Without doubt, a financial institution is an organization that is prohibited from making contributions to candidates or their committees within the meaning of SDMC section 27.2947(b). The answer to the question presented hinges on whether issuance of a credit card constitutes a "contribution" within the meaning of the Ordinance.

I. Does issuance of a credit card constitute a contribution?

The term "contribution" is defined in relevant part in the Ordinance to include any payment, "or . . . any loan . . . unless it is clear from the surrounding circumstances that it is not made for political purposes." SDMC Section 27.2903(e)(1)(i) and (ii) (emphasis added). Thus, to respond to your inquiry, we must determine whether a credit card is either a loan or a payment.

A. Is issuance of a credit card a form of payment?

The term "payment" is defined broadly in the Ordinance to mean "any payment, reimbursement, distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or any other thing of value, whether tangible or intangible." SDMC Section 27.2903(l) (emphasis added).

The Song-Beverly Credit Card Act ("Act") regulates the issuance and use of credit cards, and the respective rights and liabilities of card issuers and cardholders in this state. Cal. Civ. Code Sections 1747-1747.7 (Deering 1994). The term "credit card" is defined in relevant part in the Act to mean any "card, plate, coupon book, or other single credit device existing for the purpose of being used from time to time upon presentation to obtain money, property, labor, or services on credit."F

This is very similar to the definition of the term "credit card" in the federal Consumer Credit Protection Act. 15 U.S.C. ' 1602(k). Whether the credit card is issued by a federal or state-chartered institution, or whether it is issued pursuant to state or federal law, however, does not change the analysis in this memorandum.

Cal. Civ. Code Section 1747.02(a).

When used, a credit card clearly fits within the Ordinance's definition of "payment." It permits the cardholder to obtain money or services from a third party vendor in exchange for the cardholder's agreement to reimburse the card issuer later. The payment is actually made by the card issuer to a third party, a vendor of goods or services, on behalf of the cardholder. It can also be considered an "advance" made by the issuer for the benefit of the holder. We think that issuance of a credit card and its use by the holder thus constitute a form of payment within this definition.

B. Is issuance of a credit card a form of loan?

Assuming for the sake of argument that issuance of a credit card is not a form of payment under the Ordinance, may it still be treated as a form of loan, and therefore a contribution? We think so. Under the Ordinance, a loan is a form of contribution, unless it is clear from the surrounding circumstances that the loan is not made for political purposes.

Although never labelled as such in the statutes governing credit

cards, a credit card may fairly be characterized as a loan, or a lending of credit.F

This is consistent with the FPPC's characterization of the issuance of credit cards to campaign committees. According to FPPC staff attorney Lee Ann Randolph, who spoke to me by telephone on December 20, 1995, the FPPC has issued oral, but not written, rulings that credit cards should be treated as loans under Government Code section 84216, which is part of the Political Reform Act. According to Ms. Randolph, credit cards are reportable as loans, but are not reportable as contributions, if the cards are received from a commercial lending institution in the ordinary course of business or if it is clear from the surrounding circumstances that they were not issued for political purposes.

As pointed out above, credit cards are a mechanism by which a person (consumer) may have a vendor of goods or services paid immediately by the card issuer in exchange for the consumer's agreement to reimburse the card issuer later.

Mr. Maas in his letter essentially concedes that issuance and use of a credit card is essentially a form of loan. The essential issue is whether issuance of a credit card to a campaign committee is a prohibited form of contribution under the Ordinance. This question requires determining whether a credit card is issued for political purposes when it is issued to a candidate's committee.

II. Is a credit card issued for political purposes when it is issued to a candidate's committee?

Whether a payment or loan is made for political purposes is essentially a fact question, which can be resolved only after consideration of the context and all of the surrounding facts.

This determination is in accord with a recent private advice letter issued by the FPPC pertaining to the reportability of payments made by an organization which sponsored a ballot measure. In Re Hollywood Park, Inc., Priv. Adv. Ltr. A-95-23 (Oct. 23, 1995). The FPPC ruled that Hollywood Park's payment to the City of the costs of a special election constituted reportable contributions to the political committee established to support the measure. In its letter to the FPPC, Hollywood Park apparently argued that there was no political purpose for the payment. However, the FPPC examined the surrounding facts and the context in which the payment was to be made and ruled to the contrary.

Absent all of the facts and the particular context in the present case, the City Attorney cannot make a definitive ruling as to whether mere issuance of a credit card by a financial institution, when it is issued to a candidate's campaign committee, is a prohibited contribution within the meaning of the Ordinance. Under the Ordinance, a loan is to be treated as a contribution unless it is clear that it was not made for political purposes. For the reasons set forth below, however, issuance

of a credit card to a candidate's campaign committee would likely be found by a court of law to be made only for political purposes and, therefore, would be prohibited under the City's Ordinance.

The term "political purpose" is defined in the Ordinance to mean in relevant part: "the purpose of influencing or attempting to influence the action of the voters for or against the nomination, election, defeat or recall of any candidate or holder of a City office . . . ." SDMC Section 27.2903(n). In the context of the present facts, we believe that it is the political purposes of the card user, not the card issuer, that is relevant to answer the questions presented. To find otherwise would fly in the face of the express purpose of the Ordinance and would totally defeat its effectiveness.

Mr. Maas argues that issuance of the card would not necessarily be a prohibited campaign "contribution" under the terms of the Ordinance if the card were not issued for political purposes. He argues further that, if a financial institution issues the card in the ordinary course of business, that is, issues the card without consideration of the candidate's political status and based on creditworthiness, then the credit card would not be a "contribution" prohibited by the Ordinance.

That argument has no merit because it ignores the fact that the card will be issued to a candidate's campaign committee, not to the candidate him or herself. Whether the campaign committee used the credit card to buy a desk or a campaign ad, the fact that a campaign committee made the purchase is strong evidence that the card was issued for political purposes. A campaign committee exists for the sole purpose of receiving contributions or making expenditures for political purposes. SDMC Section 27.2903(d) (definition of "committee"). Whether the bank was motivated to issue the card for political purposes is irrelevant.

In support of this finding that issuance of a credit card to a campaign committee would be unlawful under the City's Ordinance is the fact that there are only three major recognized exceptions to the Ordinance's prohibition against loans and extensions of credit. The first major exception is that an individual candidate may personally borrow unlimited amounts of money and contribute those moneys to his or her own campaign. The Ordinance expressly permits a candidate as an individual to "personally borrow any amount of money and contribute that money to the candidate's own campaign." SDMC Section 27.2942(b). A candidate could use a personal credit card to obtain a cash advance and turn around and contribute that money to his or her own campaign. But that is not what is proposed here.

The second major exception is vendor credit. SDMC Section 27.2945. Under this Municipal Code section, a vendor who directly sells goods or services to a candidate or a candidate's campaign committee may extend credit to the committee for a very limited duration.F

Specifically, SDMC section 27.2945 states in relevant part:

> A candidate or committee that accepts goods or services for political purposes on credit under section 27.2945(a), shall pay for those goods or services in full no later than ninety (90) calendar days after receipt of a bill or invoice and in no event later than ninety (90) calendar days after the last day of the month in which the goods were delivered or the services were rendered.

SDMC ' 27.2945(d)

Under the maxim expressio unius est exclusio alterius, if a law contains an express exception, it will be presumed that no other exception was intended. 58 Cal. Jur. 3d Statutes Section 115, citing Re De Neef, 42 Cal. 2d 691 (1941). Applying this rule to the present situation, the fact that only direct vendors are expressly authorized to extend credit to candidates or their committees, and the fact that credit card issuers are not mentioned, the City Council presumably intended to prohibit credit card transactions to cover any campaign debt. As the Ordinance is currently drafted, however, the legislative intent as pertains to the issuance or use of credit cards is not clear. The Ordinance could be amended easily to clarify the Council's intent.

The third major exception is the ability of ballot measure committees to accept contributions from organizations (SDMC Section 27.2947(d)) and to borrow any amount of money (SDMC Section 27.2942(c)). Unlike borrowing by a candidate's committee, borrowing by a ballot measure committee does not create the potential for an "indebted" elected official who may be influenced to take official action favorable to a lender in exchange for forgiveness or forbearance on collection of the debt.

That there are only these three specific exceptions to loans and extensions of credit reinforces our conclusion that a credit card issued to a candidate's committee would violate the Ordinance. If the City Council had intended to allow the use of credit cards, we believe a specific exception would have been adopted accordingly. One was not.

CONCLUSION

We believe that a financial institution's issuance of a credit card to a campaign committee for a candidate for an elective City office would violate the City's Municipal Election Campaign Control Ordinance. The proposal that led to the question presented was for a financial institution to issue the card to the campaign committee, not to the candidate. Since a campaign committee exists solely for political purposes, any credit card issued to it would necessarily be used for

political purposes. The motive of the credit card issuer would be irrelevant in making this determination. If the City Council wishes to authorize issuance of credit cards to candidate committees, then the City Attorney recommends amending the Ordinance.

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By
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Deputy City Attorney

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cc Mayor
City Councilmembers
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