ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

October 24, 2006

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Dear Mr. Heneghan:

The Ethics Commission received your letters of October 2 and 10, 2006, in which you requested advice regarding several recent amendments to the Campaign Finance Reform Ordinance (San Francisco Campaign and Governmental Conduct Code § 1.100 et seq. or "CFRO").

The Ethics Commission provides two kinds of advice: written formal opinions and informal advice. S.F. Charter Section C3.699-12. Written formal opinions are available to individuals who request advice about their responsibilities under local laws. Formal opinions provide the requester immunity from subsequent enforcement action if the material facts are as stated in the request for advice, and if the District Attorney and City Attorney concur in the advice. *See id.* Informal advice does not provide similar protection. *See id.*

Because you seek general advice for your clients regarding the recently enacted amendments, the Commission is treating your inquiry as a request for informal advice. Your questions and the Commission's responses are set forth below.

Questions and Advice

A. Application of corporate contribution ban to PACs which receive corporate and non-corporate contributions.

As you noted in your letter, corporations may no longer use their general treasury funds to contribute to San Francisco candidates. (CFRO § 1.114(b).) This change, which became effective on July 23, 2006, prohibits any corporation organized pursuant to state or federal law, or the laws of a foreign country, from making a contribution to a candidate for City elective office. However, such corporations may establish, administer, and solicit contributions to a separate segregated fund to be utilized for political purposes by the corporation, provided that the separate segregated fund complies with the requirements of federal law, including sections 432(e) and 441b of Title 2 of the United States Code and any amendments thereto.

In your October 2, 2006 letter, you asked the following questions:

1. May PACs[1] which have received contributions from both individuals and corporations still contribute to San Francisco candidates, as long as they only finance these contributions with contributions (of $500 or less) received from non-corporate sources? (In your October 10, 2006 letter, you asked a similar question, namely, that we confirm advice that "a committee which has received contributions from individuals and corporations may make contributions to San Francisco candidates, so long as the committee can demonstrate that it has funded the committee's contributions to San Francisco candidates using funds received from individuals.")
2. May a PAC use the allocation rules set out in SFEC Regulation 1.114(c) in order to determine whether it has sufficient funds from non-corporate sources to finance its contributions to San Francisco candidates?
3. May business entities set up as "limited liability companies" still contribute to San Francisco candidates? Partnerships with one or more corporate partners?

With respect to your first question, section 1.114(b) was enacted "to follow the purpose and intent of a similar federal law, including: (1) preventing corruption or the appearance of corruption by precluding corporations from converting earnings amassed under the state conferred benefits of the corporate structure into war chests that can be used to incur political debt from elected officials; (2) protecting the individuals who have paid money into a corporation for purposes other than the support of candidates from having that money used to support political candidates to whom they may be opposed; and (3) preventing circumvention of existing, valid contribution limits." *See* Legislative Digest to File 060033.

Because PACs or committees are not conferred the same benefits that accrue to corporations, but instead raise funds based on their respective stated purposes, they do not trigger the same concerns that contributions from corporations trigger. Thus, there is no general prohibition, other than the $500 contribution limit, on the ability of PACs and committees to contribute to candidates for City elective office. Nonetheless, permitting a PAC or committee that receives contributions from corporations to make contributions to candidates may enable corporations to do indirectly what they are prohibited from doing directly. Thus, Commission staff interprets section 1.114(b) to permit PACs and committees to contribute to candidates for City elective office, so long as the PAC or committee can demonstrate that the source of funds for the contributions stems from monies received from individuals and entities that are not corporations.

Regarding question two, staff will be reviewing Ethics Regulation 1.114(c)-1 to determine whether it should be made applicable to donations received by contributors that may be subject to the ban in section 1.114(b), or whether there may be better alternate methods to ensure that corporate funds are not being used to make contributions to candidates. We welcome your comments on this issue, which we will be presenting to the Commission in the near future.

[1] For the purposes of this advice letter, we are defining "PACs" to be general purpose recipient committees under state and local law.

Regarding question three, because of the legislative history of section 1.114(b), we look at federal law to answer your question. Accordingly, whether business entities set up as limited liability companies are subject to the corporation contribution ban under section 1.114(b) depends upon how the LLC is treated by the Internal Revenue Service. A contribution by an LLC that elects to be treated as a partnership by the IRS, or that does not elect treatment as either a partnership or corporation, will be considered a contribution from a partnership. An LLC that elects to be treated as a corporation by the IRS, or an LLC with publicly traded shares, will be considered a corporation for the purposes of the ban. *See* C.F.R. § 110.1(g). A partnership with one or more corporate partners may continue to contribute to a candidate for City elective office if the contributions come exclusively from non-corporate sources. *See* C.F.R. § 110.1(e).

B. Disclosing dates of expenditures.

You asked several questions about section 1.112(a)(3), which requires that all electronic statements filed under section 1.112 include the date that an expenditure is incurred, provided that the Commission's forms accommodate the reporting of such dates. Specifically, you asked whether the term "incurred" means that committees must disclose the date on which they become legally obligated to pay the expense, or the date that they receive an invoice from a vendor, or the date that they receive the benefit of the goods or services. You also wrote, "Or is this new law intended to simply capture the date which the committee actually makes a contribution or independent expenditure, or actually sends a check to a vendor?" The Commission will adopt regulations to implement section 1.112(a)(3). It is likely that the term "incurred" will track the state's definition of when an expenditure is made, which is the earlier of payment for or receipt of goods and services. *See* Gov't Code § 82025.

You also asked whether the new law changes the current reporting requirement in any way other than requiring dates on Schedules E and F on the Form 460. As you point out, committees currently "must disclose all expenses incurred during a reporting period, even if they are not paid during the reporting period, on Schedule F of Form 460; they then disclose the actual payment during the period it is made, on Schedule E. If a committee pays the invoice during the same period in which it receives the invoice or otherwise obtains the benefit of the goods or services, however, then it only disclosures that the expenditure was made on Schedule E and does <u>not</u> accrue it on Schedule F" (emphasis original). Staff does not anticipate that this practice will change.

Finally, you inquired where committees should put expenditure dates on reporting forms and whether the Commission will be working with the campaign reporting software vendors to figure out how they will add this new disclosure requirement to their systems. You asked how the Commission will notify committees that the forms now "accommodate the reporting of such dates." And you asked if committees will be required to include this information on the pre-election reports due on October 26, 2006. Staff will examine various ways in which to implement this new requirement and anticipates that it will be working with campaign software vendors in this process. Staff will also provide sufficient notice to committees about the new requirement prior to its implementation. Because the Commission has not yet adopted forms to accommodate the reporting of expenditure dates, the information will not be required on the pre-election reports due on October 26, 2006.

C. Pre-election reports for San Francisco Major Donors.

You asked if under section 1.135, as amended, a major donor or PAC must file pre-election reports if it is "active only" in San Francisco. You also state that "the prior version of the law was triggered only when the major donor or PAC made a $500 contribution or independent expenditure for a San Francisco candidate, whereas the new law omits this qualifier and seems on its face to be triggered when a major donor or PAC makes a contribution or independent expenditure to any candidate or committee in any jurisdiction" (emphasis original). You asked us to confirm that the reporting requirement applies only to major donors or PACs which are active only in San Francisco and which spend $500 or more on contributions or independent expenditures for San Francisco candidates.

Section 1.135 requires, in addition to the campaign disclosure reports required by the Political Reform Act and other provisions of the CFRO, "all San Francisco general purpose committees" to "file preelection statements before any election held in the City and County of San Francisco at which a candidate for City elective office or City measure is on the ballot, if the committee makes contributions or expenditures totaling five hundred dollars ($500) or more during the period covered by the preelection statement." Because the CFRO incorporates the definition of "general purpose committee" that appears in the Political Reform Act, Government Code section 82027.5, section 1.135 is applicable to both major donor and independent expenditure committees. *See* C&GC Code § 1.106; Gov't Code § 82013; Moll Advice Letter, CA FPPC Adv. A-97-080.

By its own terms, section 1.135 applies to "San Francisco general purpose committees," which has been interpreted to mean committees "active only" in San Francisco. *See* Moll Advice Letter. Whether a general purpose committee is "active only" in San Francisco depends on its activities – while a committee that conducts more than de minimis activity outside San Francisco is not considered "active only" in San Francisco, whether a given activity is de minimis will necessarily depend on the overall activity and history of the committee. *See id.*

As you note, section 1.135 no longer contains language that the $500 contributions or expenditures be made "to support or oppose a candidate for City elective office." Thus, any San Francisco general purpose committee that makes contributions or expenditures of $500 or more must file pre-election statements on the prescribed dates.

D. 180-day vendor rule.

You note that new section 1.118 requires all candidates to pay all debts within 180 days. You asked if the new law applies only to new debt incurred after the effective date of the ordinance, which was October 14, 2006; or if the new law applies to debts incurred before the effective date of the ordinance, and if the latter, whether committees have 180 days from October 14 to pay off such debts or are in non-compliance on the effective date of the new law.

Under section 1.118(a), a candidate who accepts goods or services on credit must pay for such accrued expenses in full no later than 180 calendar days after receipt of a bill or invoice and in

no event later than 180 calendar days after the last calendar day of the month in which the goods were delivered or the services were rendered, unless it is clear from the circumstances that the failure to pay is reasonably based on a good faith dispute. Under subsection (b), this requirement does not apply to debt owed to a financial institution for an outstanding credit card balance. Under subsection (c), each and every calendar day any accrued expense remains partially or wholly unpaid after the time periods set forth in subsection (a) constitutes a separate violation.

Because this provision changes the way that debt is treated for candidates, staff believes that existing committees that had incurred debt prior to the effective date of the amendments should be given a sufficient period of time to pay off their debts. Therefore, staff will recommend to the Ethics Commission that all committees that incurred debt before October 14, 2006 will have at least 180 days from that date to pay off such debt. Staff anticipates that the Commission will consider regulations related to section 1.118, and would welcome comments as to how best to implement this section so that it is both fair and serves the purpose for which it was designed, which is to prevent the extension of credit for extended periods of time such that they become in essence contributions to the candidate. Until the Commission adopts regulations, staff does not plan on enforcing the new law on debt that was incurred by committees prior to October 14, 2006.

E. Advertisement disclaimers

You note that section 1.162.5 requires campaign advertisements to include a "paid for by" disclaimer in 14-point type. You asked if we could confirm that the new disclaimer requirement does not apply to "mailings (unless they are paid for by a candidate committee (section 1.161(a)), pre-recorded telephone messages, telephone banks or flyers."

As you correctly point out, section 1.161 requires a "paid for by" disclosure on mass mailings paid for by a candidate for City elective office. Other sections of the CFRO require disclosure statements on certain types of campaign communications. For example, any recorded telephone messages, independent expenditures for mass mailings and electioneering communications are all required to have a "paid for by" disclosure. *See* CFRO §§ 1.161.5, 1.162, and 1.163. Section 1.162.5 was enacted to extend the "paid for by" disclosure to other types of campaign materials, such as door hangers, billboards and print and broadcast advertisements that are paid for by both candidates and non-candidates. Section 1.162.5(b) defines a campaign advertisement as "(1) programming received by a television or radio; (2) a communication placed in a newspaper, periodical or magazine of general circulation; (3) posters, door hangers, and yard signs produced in quantities of 200 or more; or (4) a billboard." Thus, it is clear that section 1.162.5 does not cover mailings, pre-recorded telephone messages or telephone banks, each of which is covered by a separate section in CFRO.

Whether section 1.162.5 covers flyers depends upon what you mean by "flyer." In a conversation with staff, your colleague indicated that "flyer" means an 8 1/2 x 11 piece of paper on which information is printed, which is handed out to people on the street or left on tables at political events for attendees to pick up. Your colleague also stated that if the flyer is left on a doorstep, it would be considered a door hanger and subject to section 1.162.5. Based on this

explanation, a flyer that is a sheet of printed paper that is handed out to members of the public or left on tables at political events would not be subject to section 1.162.5.

F. Donations to charities.

You also inquired about section 1.122(b)(1), which prohibits candidates from using their campaign funds to make a donation to a charitable organization. You asked whether, because the term "charity" normally refers to a certain type of nonprofit organizations set up under section 501(c)(3) of the Internal Revenue Code, may candidates still make donations to other types of nonprofits such as those set up under sections 501(c)(4) or (c)(6), or to religious, scientific, literary, educational or 501(c)(3) organizations other than charities, as long as the donations are reasonably related to a legislative, governmental or political purpose.

Section 1.104(b) of the CFRO defines "charitable organization" as an entity exempt from taxation pursuant to Title 26, Section 501 of the United States Code. Accordingly, by its terms, the prohibition applies to all 501 tax-exempt organizations, whether established under section 501(c)(3), (c)(4) or (c)(6). It follows that under section 1.122(b)(i), contributions in a candidate's campaign account may not be donated to any such organization.

I hope you find this information helpful. If you have questions, please do not hesitate to contact me.

Sincerely,

John St. Croix
Executive Director

By: Mabel Ng
Deputy Executive Director

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