



# ETHICS COMMISSION CITY AND COUNTY OF SAN FRANCISCO

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EXECUTIVE DIRECTOR

Date: May 18, 2014  
To: Members, Ethics Commission  
From: John St. Croix, Executive Director  
By: Jesse Mainardi, Deputy Executive Director  
Re: Commission Response to *McCutcheon v. Federal Election Commission*

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## Introduction

This memorandum briefly discusses recommended Commission actions with respect to Campaign and Governmental Conduct Code section 1.114(a)(2) ("Section 1.114(a)(2)"), the aggregate limit on contributions to City candidates in a given election, in light of the United States Supreme Court's opinion in *McCutcheon v. Federal Election Commission*, No. 12-536.

In short, staff recommends that the Commission resolve to suspend enforcement of Section 1.114(a)(2), and that it direct staff to prepare an ordinance repealing that section, either alone or as part of a package of amendments to the City's Campaign Finance Reform Ordinance ("CFRO").

## Legal Background

In *McCutcheon*, the Court struck down as unconstitutional a federal law limiting how much an individual could contribute to federal candidates, parties and PACs in a two-year election cycle. The Court found that this federal aggregate limit violated the First Amendment because it did not serve to prevent *quid pro quo* corruption and because it unnecessarily abridged contributors' associational freedoms.

Section 1.114(a)(2) similarly imposes an aggregate limit on contributions to City candidates in a given City election.<sup>1</sup> Although the federal and City aggregate limits are not identical, staff believes that there are no constitutionally significant differences between the two limits, and that Section 1.114(a)(2) is therefore not likely to withstand constitutional challenge.

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<sup>1</sup> Section 1.114(a)(2) provides that "[n]o person shall make any contribution which will cause the total amount contributed by such person to all candidate committees in an election to exceed \$500 multiplied by the number of city elective offices to be voted on at that election."

## Options and Decision Points

Given that the *McCutcheon* case indicates that Section 1.114(a)(2) is constitutionally suspect, staff recommends that the Commission do the following:

1. Adopt a resolution of non-enforcement. Staff recommends that the Commission adopt a resolution stating that the aggregate limit in Section 1.114(a)(2) will not be enforced against contributors in City elections. A draft resolution to this effect is attached as Exhibit A. If the Commission adopts this (or a substantially similar) resolution, staff will publicize the resolution, update the Commission's educational materials, and advise that contributors to City candidates are not subject to the aggregate limit in Section 1.114(a)(2).

In this regard, it is worth noting that other jurisdictions with their own aggregate contribution limits, including the City of Los Angeles and the states of Maryland, Massachusetts and Wisconsin have already publicly announced that they will suspend enforcement of those limits in response to *McCutcheon*.

**Decision Point 1:** Shall the Commission adopt the attached resolution stating that the aggregate contribution limit in Section 1.114(a)(2) will not be enforced?

2. Propose a repeal of Section 1.114(a)(2). Staff also recommends that it prepare for consideration by the Commission and the Board of Supervisors ("Board") an ordinance repealing Section 1.114(a)(2).<sup>2</sup> The repeal may be proposed either alone or as part of a package of amendments to CFRO. A simple repeal of Section 1.114(a)(2) could of course be accomplished more expeditiously, and the Commission could consider such a repeal as early as at its next meeting.

However, waiting for staff to produce a package of amendments would allow the Commission to propose other improvements and changes to CFRO without having to return to the Board at a later date. Moreover, a statement of non-enforcement of Section 1.114(a)(2) should alleviate any constitutional concerns regarding the aggregate limit pending approval of the new ordinance.

In addition to repealing Section 1.114(a)(2), a package of amendments might include, among other things, provisions that:

- Consolidate and clarify the City's disclaimer and reporting requirements for campaign communications by City candidates and by third parties, and institute more frequent reporting requirements for certain communications.
- Extend the City's disclaimer requirements to certain electronic communications and otherwise harmonize these requirements to a greater degree with state law.

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<sup>2</sup> Amendments to CFRO must be approved by a four-fifths vote of the Ethics Commission and a two-thirds vote of the Board. (CFRO § 1.103.)

- Allow a candidate receiving public financing to designate a certain percentage of his or her campaign expenditures as compliance costs that would not count towards the individual expenditure ceiling.
- Repeal the \$500 annual contribution limit to PACs that support or oppose candidates, which a court has permanently enjoined the City from enforcing.

Staff anticipates that the process of drafting a package of proposed amendments, including the solicitation of public input through interested persons meetings, will require approximately six to nine months. Staff would aim to make such amendments effective in advance of the November 2015 Mayoral election.

**Decision Point 2:** Shall the Commission direct the staff to draft an ordinance repealing solely Section 1.114(a)(2), or shall it direct the staff to include such a provision in a planned future package of CFRO amendments?

### **Conclusion**

Staff has proposed the actions it believes are called for by the *McCutcheon* opinion, namely a resolution suspending enforcement of Section 1.114(a)(2), and an ordinance repealing that section.

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## RESOLUTION

WHEREAS the United States Supreme Court, in a 5-4 vote, decided *McCutcheon v. Federal Election Commission*, 572 U.S. \_\_\_\_, No. 12-536 (S. Ct. Apr. 2, 2014) on April 2, 2014, striking down section 441a(a)(3) of Title 2 of the United States Code; and

WHEREAS section 1.114(a)(2) of the San Francisco Campaign Finance Reform Ordinance (“CFRO”), Article I, Chapter 1 of the Campaign & Governmental Conduct Code, is similar to the provision at issue in the *McCutcheon* case in that it imposes an aggregate contribution limit how much a person may contribute to multiple candidates in a single City election; and

WHEREAS in light of the legal precedent and reasoning set forth in the *McCutcheon* case, CFRO section 1.114(a)(2) should not be enforced at this time; and

THEREFORE, BE IT RESOLVED by the San Francisco Ethics Commission that, as of the date of this resolution, it will do the following:

- Suspend enforcement of CFRO section 1.114(a)(2)
- Advise that contributors and committees are not subject to an aggregate limit on total contributions in a single election

I certify that this resolution was adopted by the San Francisco Ethics Commission on May 28, 2014.

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John St. Croix, Executive Director  
San Francisco Ethics Commission

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