ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

Date: September 17, 2018

To: Members of the Ethics Commission

From: Pat Ford, Senior Policy Analyst

Re: **Agenda Item 6 – Discussion and Possible Action on Proposed Ethics Commission Opinion and Advice Regulations**

Summary: This memo presents a proposed set of regulations (Attachment 1) to clarify the procedures for providing opinions and advice to the regulated community.

Action Requested: That the Commission discuss the proposed regulations and consider approving them.

I. Background

The San Francisco City Charter provides that any person may request that the Ethics Commission provide a written opinion or informal advice regarding that person's duties under provisions of the Charter or the Municipal Code (the "Code") relating to campaign finance, conflicts of interest, lobbying or governmental ethics.[1] The purpose of allowing for such requests is to ensure that anyone whose activities are regulated by the Code has the opportunity to learn how the Code applies to his or her specific future conduct, and therefore to be empowered to conform their conduct to the requirements of the Code. This feature of the Commission's duties helps to ensure compliance with the Code and to promote transparency and fairness in both its administration and enforcement of the laws.

There are two separate modes through which the Commission or Staff can provide answers to questions about how the Code applies to the specific conduct of an individual: opinions and advice. The processes for requesting either an opinion or advice are substantially similar; a requestor must state the material facts, the questions presented, and whether he or she seeks an opinion from the Commission or advice from Staff. The differences between opinions and advice lie in (i) the process for issuance and (ii) the effect on the requestor.

A. Opinions

An opinion is a formal declaration by the Commission as to how provisions of the Charter or the Code apply to a specific person under a specific set of facts. Opinions can be adopted only by a majority vote of the Ethics Commission. If a person has been the subject of an opinion adopted by the Commission and conformed their conduct to what the opinion deemed to be

[1] CHARTER OF THE CITY AND COUNTY OF SAN FRANCISCO § C3.699-12(a)—(b).

lawful conduct, then, in any subsequent enforcement action, the Executive Director will not make a finding of probable cause that such conduct violates the Code. The person needs to have truthfully provided all materials facts when requesting the opinion.[2]

B. Advice

Informal advice, or simply *advice*, is analysis by Commission Staff as to how provisions of the Charter or the Code *likely* apply to a specific set of facts. The Commission does not participate in providing informal advice, and informal advice does not grant immunity from an enforcement proceeding to any person. If a person who requests and receives informal advice from Commission Staff conforms their conduct with the facts and recommendations stated therein, the informal advice may be relevant in a subsequent enforcement proceeding before the Commission as a mitigating circumstance.[3] The extent to which prior informal advice will serve as a mitigating circumstance will depend on factors including whether the requestor provided all the material facts when requesting advice.

II. Regulations

A. General Purpose

Staff recommends that the Commission review and discuss the regulations attached here as Attachment 1 and consider approving them so that they can promptly go into effect. These Regulations would provide important guidance to the regulated community and public about:

1. The process for requesting an opinion or advice;
2. What kinds of questions are proper for opinions and advice;
3. How Staff and, in the case of an opinion, the Commission must handle requests; and
4. The legal effects that opinions and advice have on the requestor.

The Regulations would further the purposes of the Code by facilitating clear opinion and advice procedures and, by extension, better compliance with the laws under the Commission's jurisdiction. This would be accomplished through a transparent and standardized process for issuing opinions and advice. Although there currently are standard practices and procedures used by Staff for handling requests for opinions and advice, the Regulations would formalize these procedures and make them more widely transparent to anyone considering requesting an opinion or advice. Having clear, standardized procedures would also promote the provision of consistent and timely opinions and advice. Each request would necessarily be subject to the same protocol, helping requestors to understand how their request will be handled and the likely timing for receiving a response.

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[2] *See Id.* at § C3.699-12(a); SAN FRANCISCO ETHICS COMMISSION, ENFORCEMENT REGULATIONS § 7(D)(8) (referring to opinions as "formal written advice" and stating that the Executive Director will not find probable cause for an enforcement action relating to conduct that has been deemed lawful in formal written advice issued to the respondent).

[3] *See Id.* at § C3.699-12(b).

Most fundamentally, the Regulations would promote greater understanding of the Code by clarifying how individuals seek guidance from the Commission and what legal effect that guidance has.

B. Stakeholder Engagement and Amendments to Regulations

Following the Commission's July meeting, at which Staff first presented a draft of the proposed regulations to the Commission for discussion purposes only, Policy has undertaken a program of stakeholder engagement to foster a constructive public discussion of the proposed regulations and to solicit proposals for amendments.

Policy facilitated interested persons meetings on July 31st and August 1st at which the public was invited to comment upon the proposed regulations that were presented at the July Commission meeting. Additionally, Policy engaged multiple stakeholders in phone conversations to provide for additional opportunity to hear detailed feedback and proposals about the draft regulations. Lastly, Policy has collected written comment from stakeholders pertaining to the proposed regulations. Those comments are attached to this memo as Attachment 2.

Policy heard many constructive comments during the program of stakeholder engagement. In response, Policy has adopted a small number of amendments that will improve the overall efficacy and transparency of the Commission's opinion and advice functions. These amendments, which are reflected in the version of the regulations attached here as Attachment 2, are:

- To clarify that when an authorized representative requests an opinion or advice on behalf of another person, the representative must provide the name of the person who has authorized the representative to make the request on his or her behalf;
- To clarify that when an authorized representative requests an opinion or advice on behalf of another person, the question must pertain to the duties under the law of the person who has authorized the representative to make the request on his or her behalf;
- To require that, after Staff have determined whether a request for an opinion or advice is a proper request, Staff must communicate that conclusion to the requestor within two days of the determination (the version presented in July required the conclusion to be communicated "as soon as practicable");
- To clarify that the Executive Director shall not find probable cause for pursuing an enforcement action with regard to conduct that was previously deemed lawful in an opinion requested by the respondent and adopted by the Commission (Whereas the version of the regulations presented in July only referred to this effect of an opinion in cases where both the District Attorney and City Attorney concur in the opinion [thereby conferring civil and criminal immunity to the requestor], the current draft clarifies that, regardless of concurrence by other offices, Commission opinions will confer immunity to the requestor from the Commission's administrative enforcement power.); and
- To clarify that if the Commission rescinds a previously adopted opinion, conduct that occurred after the opinion was adopted but before it was rescinded will still receive the benefit of the opinion.

Staff invites any questions or comments regarding the attached proposed regulations.

ATTACHMENT 1

San Francisco
Ethics Commission

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ETHICS COMMISSION

REGULATIONS FOR THE PROVISION OF OPINIONS AND ADVICE

Regulation 699-12-1: Definitions

For purposes of these Regulations, the following definitions shall apply:

A. "City" means the City and County of San Francisco.
B. "Commission" means the Ethics Commission, a body of five appointed members.
C. "Day" means any day other than a Saturday, Sunday, City holiday, or a day on which the Commission office is closed for business, unless otherwise specifically indicated. If a deadline falls on a weekend or City holiday, the deadline shall be extended to the next working day.
D. "Executive Director" means the Executive Director of the Commission or the Executive Director's designee.
E. "Good Cause" means providing adequate or substantial grounds or reason to take a certain action, or to fail to take an action prescribed by law.
F. "Requestor" means a person requesting an opinion or advice of the Ethics Commission or the requestor's authorized representative.
G. "Staff" means the employees of the Ethics Commission.

Regulation 699-12(a)-1: Requesting an Opinion

(A) A request for an opinion must be submitted to the Executive Director in writing, either hard copy or electronically, and must clearly state all of the following to be a complete and proper request:
  (i) That an opinion of the Commission is being requested.
  (ii) The name, title or position, and email address, mailing address, or telephone number of both the person or persons requesting the opinion and, when the requestor is an

authorized representative, the person or persons for whom the opinion is being requested.

(iii) If the requestor is an authorized representative, a specific statement that such authorization has been made.

(iv) All material facts, stated as clearly, concisely, and completely as possible.

(v) The question or questions based on the material facts.

(B) A request for an opinion is not a complete and proper request if it does any of the following:

(i) Does not pertain to the requestor's duties, or, when the requestor is an authorized representative, does not pertain to the duties of the person represented, under provisions of the Charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics.

(ii) Is not made in writing.

(iii) Does not clearly state that an opinion of the Commission is being requested.

(iv) Asks a general question of interpretation or policy.

(v) Depends on facts that are not provided by the requestor.

(vi) Asks about a hypothetical situation.

(vii) Asks about the duties or activities of someone other than the requestor who has not authorized such request.

(viii) Pertains to past duties or activities.

(ix) Omits factual information relevant to the duty or activity that is the subject of the request.

(x) Is substantially similar to a previously adopted opinion.

(xi) Is expressly addressed in the Charter, an ordinance, or Commission regulations.

(xii) Is outside the Commission's jurisdiction.

(C) The requestor may submit supporting materials, including memoranda, briefs, arguments, or other relevant material regarding the request for an opinion, provided that the supporting material is provided no later than twenty days prior to the meeting at which the Commission will consider the request.

(D) A requestor may withdraw a request for an opinion at any time prior to the Commission considering the proposed opinion. The withdrawal must be submitted in writing to the Executive Director.

Regulation 699-12(a)-2: Process for Reviewing Requests and Considering and Adopting Opinions.

(A) Only requests for an opinion that are complete and proper will be accepted for purposes of issuing an opinion. Upon receiving a request for an opinion, the Executive Director or his or her designee must determine whether the request constitutes a complete and proper request. The determination shall be transmitted to the requestor within two days after the determination is made. If the request does not constitute a complete and proper request, the Executive Director or Staff shall notify the requestor of the specific deficiencies in the request.

(B) Following the determination that an opinion request is complete and proper pursuant to Regulation 699-12(a)-1, the Commission shall consider the draft opinion in open session at its next regularly scheduled meeting so long as that meeting occurs no less than forty-five days after that determination. If good cause exists to extend the deadline for considering the opinion, the Executive Director will so notify the Commission.

(C) Upon receipt of a complete and proper request, the Executive Director or other Staff shall prepare a draft opinion that addresses the questions posed in the request. The Commission shall review the draft opinion and may adopt any recommendations of Staff. The Commission may adopt an opinion upon a majority vote of its members. If the Commission fails to adopt a draft opinion, the Commission must do one of the following:

(i) Deny the request for an opinion and state the reasons for the denial,

(ii) Request that the Executive Director amend the draft opinion in accordance with the direction of the Commission and schedule the revised opinion to be considered at the Commission's next regularly scheduled meeting.

(D) If the Commission adopts an opinion, the Executive Director shall, within three days of adoption, transmit the opinion to the City Attorney and District Attorney, provided that the Executive Director can extend this time for good cause.

(E) As set forth in the Charter, within ten days of receipt of the proposed opinion, the City Attorney and District Attorney shall advise the Commission whether they concur in the proposed opinion. If either the City Attorney or District Attorney does not concur with the proposed opinion, he or she shall inform the Commission in writing concerning the basis for disagreement.

Regulation 699-12(a)-3: Effect of Opinions

The Executive Director will not make a finding of probable cause if she or he is presented with clear and convincing evidence that, prior to the alleged violation, the respondent was the subject of an Opinion adopted by the Commission in which the conduct in question was deemed lawful and all facts pertinent to the opinion were truthfully disclosed by the respondent.

Regulation 699-12(a)-4: Rescinding Opinions.

An opinion may be rescinded by the Commission at a public meeting of the Commission by a majority vote of its members. The Commission must state for the public record the reasons for rescinding the opinion. However, if an opinion is rescinded, the opinion shall continue to have the effect stated in Regulation 699-12(a)-3 with regard to conduct that occurred after the opinion was adopted by the Commission and prior to the opinion being rescinded.

Regulation 699-12(b)-1: Requesting Informal Advice.

(A) A request for informal advice must clearly state all of the following in order to be a complete and proper request:
  (i) That informal advice is being requested.
  (ii) The name, title or position, and email address, mailing address, or telephone number of both the person or persons requesting advice and, when the requestor is an authorized representative, the person or persons for whom advice is being requested.
  (iii) If the requestor is an authorized representative, a specific statement that such authorization has been made.
  (iv) All material facts, stated as clearly, concisely, and completely as possible.
  (v) The question or questions based on the material facts.

(B) A request for informal advice is not a complete and proper request if it does any of the following:
  (i) Does not pertain to the requestor's duties, or, when the requestor is an authorized representative, does not pertain to the duties of the person represented, under provisions of the Charter or any ordinance relating to campaign finance, conflicts of interest, lobbying or governmental ethics.
  (ii) Asks a general question of interpretation or policy.
  (iii) Depends on facts that are not provided by the requestor.
  (iv) Asks about a hypothetical situation that does not pertain to the requestor's actual conduct or planned future conduct.
  (v) Asks about the duties or activities of someone other than the requestor who has not authorized such request.
  (vi) Pertains to past duties or activities.
  (vii) Omits factual information relevant to the duty or activity that is the subject of the request.
  (viii) Is substantially similar to a previously adopted opinion or published informal advice.
  (ix) Is expressly addressed in the Charter, an ordinance, or Commission regulations.
  (x) Is outside the Commission's jurisdiction.
  (xi) Is not made in writing, if the requestor desires the advice to be delivered in writing.

Regulation 699-12(b)-2: Reviewing Requests and Issuing Informal Advice.

(A) Only requests for informal advice that are complete and proper will be accepted for purposes of issuing informal advice. Upon receiving a request, Staff must determine whether it constitutes a complete and proper request for informal advice. Staff's determination shall be transmitted to a requestor within two days after the determination is made. If the request does not constitute a complete and proper request, Staff shall notify the requestor of the specific deficiencies in the request.

(B) Staff must provide the advice to the requestor no later than 30 days after a complete and proper request for informal advice is received. Staff may extend the response deadline if there is good cause for the delay.

Regulation 699-12(b)-3: Effect of Informal Advice

(A) If a person who is the subject of informal advice issued by Staff conforms their conduct with the facts and recommendations stated therein, the informal advice may be relevant in a subsequent enforcement proceeding before the Commission as a mitigating circumstance.

(B) Informal advice does not constitute a Commission opinion and is not a formal declaration of Commission policy.

ATTACHMENT 2

pillsbury

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August 31, 2018

Via Email

Ms. LeeAnn Pelham
Mr. Patrick Ford
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: **Proposed Advice and Opinions Regulations**

Dear Ms. Pelham & Mr. Ford:

Pursuant to your request for comments regarding the proposed advice and opinions regulations, please find my comments below. Please incorporate these comments into the public record.

Regulation 699-12(a)-1: Requesting an Opinion. To ensure that a request for an opinion by an authorized representative is considered a complete and proper request, (1) subparagraph (B)(i) should be revised as follows: "Does not pertain to the requestor's duties, or when the requestor is an authorized representative, does not pertain to the duties of the person represented, under provisions. . .", and (2) subparagraph (B)(vii) should be revised as follows: "Asks about the duties or activities of someone other than the requestor who has not authorized such request, or when the request has been authorized, asks about the duties or activities of someone other than the person who authorized the request."

Regulation 699-12(a)-2: Process for Reviewing Requests and Considering and Adopting Opinions. Subparagraph (A) provides that upon receiving a request for an opinion, the Executive Director or designee will determine whether the request constitutes a complete and proper request and transmit that determination to the requestor "as soon as practicable after the determination is made." Since such determinations will generally be made from a facial review of the written request, that process should not take an inordinate amount of time. Similar to the regulations

promulgated by the Fair Political Practices Commission ("FPPC"), the regulation should instead provide a specific timeframe for the notification to the requestor. For example, responding to such requests within seven days seems to be a reasonable timeframe for the completion of such facial reviews.

Regulation 699-12(a)-3: Effect of Opinions. The Executive Director will not make a finding of probable cause against a respondent who was the subject of an opinion adopted by the Commission in which both the District Attorney and City Attorney were in concurrence. A finding of no probable cause by the Executive Director should also apply even in the absence of a concurrence by the District Attorney and/or City Attorney.

If the respondent's actions are consistent with the actions addressed in the opinion, since the Commission has already concluded that the proposed actions of the respondent do not violate any laws, then the Executive Director should not thereafter make a finding of probable cause regarding those actions, whether or not there was concurrence in that opinion by the District Attorney and/or City Attorney.

Regulation 699-12(b)-1: Requesting Informal Advice. As currently drafted, this regulation will prevent any person, including an attorney, from seeking informal advice regarding hypothetical situations or general questions about the interpretation or policies regarding the City's political laws, unless the advice pertains to the requestor's duties. This will significantly and negatively impact attorneys who seek to understand these laws in order to properly advise clients regarding the same.

This position is contrary to Section 1.168(d) of the Campaign Finance Reform Act which specifically provides that "Any person may request advice from the Ethics Commission or City Attorney with respect to any provision of this Chapter."

This position is also contrary to a similar provision in the FPPC regulations. In Regulation 18329(c), informal assistance may be requested, in part, by (1) any person whose duties under the Act are in question, or by that person's authorized representative, or (2) **any person with a duty to advise other persons relating to their duties or actions under the Act**. The FPPC thus recognizes the value of providing informal advice to attorneys regarding various laws under its jurisdiction.

The Commission should adopt the approach used by the FPPC which includes three methods for providing opinions and advice: formal opinions, formal written advice, and informal assistance. Based on the foregoing, this regulation should be retitled "Requesting Formal Written Advice".

To ensure that a request for formal written advice by an authorized representative is considered a complete and proper request, (1) Subparagraph (B)(i) should be revised as follows: "Does not pertain to the requestor's duties, or when the requestor is an

authorized representative, does not pertain to the duties of the person represented, under provisions . . .", and (2) subparagraph (B)(v) should be revised as follows: "Asks about the duties or activities of someone other than the requestor who has not authorized such request, or when the request has been authorized, asks about the duties or activities of someone other than the person who authorized the request."

Regulation 699-12(b)-2: Reviewing Requests and Issuing Informal Advice. First, this section should be retitled "Reviewing Requests and Issuing Formal Written Advice."

Second, similar to Regulation 699-12(a)-2, a specific timeframe should be provided for the Executive Director to notify a requestor whether or not the request for formal written advice is complete and proper instead of "as soon as practicable after the determination is made." Again, seven days appears to be a reasonable timeframe for making this determination.

Regulation 699-12(b)-3: Effect of Informal Advice. This section should be retitled "Effect of Informal Written Advice."

Subparagraph (A) provides that if a person who is the subject of informal advice issued by Commission staff conforms their conduct with the facts and recommendations stated therein, the informal advice may be relevant in a subsequent enforcement proceeding before the Commission as a mitigating circumstance.

Such conformity should not be a mitigating circumstance but rather a complete defense in any enforcement proceeding initiated by the Commission against the person who received the advice, and evidence of good faith conduct in any other civil or criminal proceeding. See Government Code Section 83114(b).

Subparagraph (C) should be added to indicate that informal written advice may serve as guidance for others with similar facts and circumstances.

Regulation 699-12(c): Informal Assistance. Informal assistance should be added as a third option, including new sections on requesting informal assistance, reviewing requests and issuing informal assistance, and the effect of informal assistance. These regulations should include, in part, the following provisions:

1. Informal assistance may be requested by (a) a person whose duties under the law are in question, (b) anyone representing the person whose duties under the law are in question, or (c) an attorney, campaign treasurer, campaign consultant, or any other person who has a duty to advise other persons relating to their duties or actions under the law.

2. A request for informal assistance does not require the identification of specific parties by the requestor.

3. A request for informal assistance may include a request for an interpretation of a law, regulation, or policy.

4. A request for informal assistance may include how the law, a regulation or policy applies to a hypothetical situation. See attached written advice from the City Attorney which addressed several hypothetical scenarios involving contributions and expenditures.

5. Informal assistance may include oral or written assistance.

Thank you in advance for your consideration of the above recommendations.

Very truly yours,

Anita D. Stearns Mayo

Anita D. Stearns Mayo

Attachment

City and County of San Francisco: **Office of City Attorney**

Louise H. Renne,
City Attorney

August 4, 1992

Kathryn E. Donovan
Law Offices of Pillsbury, Madison & Sutro
455 Capitol Mall, Suite 335
Sacramento, California 95814

Dear Ms. Donovan:

You have asked how the San Francisco Municipal Election Contribution Control Ordinance (San Francisco Administrative Code Sections 15.501 et seq; "the Ordinance") applies to a number of hypothetical situations involving contributions to and expenditures by certain types of political committees. Our response follows.

INTRODUCTION

As amended by Proposition F, adopted by San Francisco voters on June 5, 1986, section 16.508 provides:

> No person other than a candidate shall make, and no campaign treasurer shall solicit or accept, any contribution which will cause the total amount contributed by such person with respect to a single election in support of or opposition to such candidates, including contributions to political action committees supporting or opposing such candidate, to exceed five hundred dollars ($500).

Accordingly, the Ordinance effects its limitation on contributions by regulating the solicitation, making and acceptance of the total contributions made by a person in support of or in opposition to a candidate for City office in connection with a specific election.

> Section 16.503 defines the term "contribution": Contribution shall be defined as set forth in Government Code of the State of California (commencing at Section 81000), provided, however, that "contribution" shall include loans of any kind or nature.

Accordingly, we must look to the Political Reform Act of 1974 (California Government Code Sections 81000) for the definition of contribution. Government Code Section 82015 provides in pertinent part:

> "Contribution" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not for political purposes. An expenditure made at the behest of a candidate, committee or elected officer is a contribution to the candidate, committee or elected officer unless full and adequate consideration is received for making the expenditure.

The Fair Political Practices Commission, the state agency charged with administering and enforcing the Act, has promulgated a regulation that provides additional guidance for determining whether a particular expenditure by a third person constitutes a contribution to a candidate. 2 Cal.Admin.Code Section 18215 provides in pertinent part:

> 18215. Contribution
>
> (a) A contribution is any monetary or nonmonetary payment made for political purposes for which full and adequate consideration is not made to the donor. A payment is made for political purposes if it is:
>
> * * *
>
> Received by or made at the behest of:
>
> (A) A candidate, . . .
> (B) A controlled committee;
> (C) An official committee of a political party, including a state central committee, county central committee, assembly district committee or any subcommittee of such committee; or
> (D) An organization formed or existing primarily for political purposes as defined in subsection (a)(1), including but not limited to a political action committee established by any membership organization, labor union or corporation.
>
> (b) "Made at the behest" means a payment made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the

request or suggestion of a candidate, controlled committee, official committee of a political party, or organization formed or existing primarily for political purposes.1/

With these definitions in mind, we will turn to the questions you have posed.

QUESTION 1

Your first question involves a group of persons who form a political committee ("the Committee") to support four identified candidates in a future election for the San Francisco Board of Supervisors where four or more candidates will appear on the ballot. You state that the Committee's primary activity will be to make independent expenditures to support the four candidates. Accordingly, for the purposes of this opinion letter, we will assume that the Committee is not a candidate-controlled committee. You ask how the Ordinance would limit funds received and spent by the Committee.

The first issue is whether, for the purposes of the Ordinance, contributions to the Committee would be deemed to be contributions in support of the candidates on whose behalf the Committee will be making independent expenditures. If so, a contribution to the Committee by a particular contributor would have to be aggregated with any other contributions made by that contributor in support of the candidate or candidates.2/

In a letter to Sherry C. Levit dated November 19, 1987, this office discussed application of the Ordinance to "independent expenditures" made on behalf of a candidate for San Francisco elective office. In that letter, we assumed for the purpose of our response that the person making the "independent expenditure" was an entity formed and operated for nonpolitical reasons and that it would not solicit funds to make expenditures to support a candidate or candidates. We then addressed the

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1/ The Act distinguishes contributions from "independent expenditures." The distinction turns on whether the expenditure is made at the behest of the candidate.

2/ We note that the Supreme Court has upheld limits on contributions to independent political committees that support candidates. California Medical Assn. v. F.E.C., 453 U.S. 182, 196-198 (1981); see Mott v. Federal Election Com'n, 494 F.Supp. 131 (D.D.C. 1980).

issue now posed by your question:

> If individuals form an "entity" that is independent of a candidate but which will solicit contributions and make "independent expenditures" in support of the candidacy of an individual, that entity becomes a committee formed for the purpose of soliciting contributions and making expenditures on behalf of a candidacy. Solicitation and acceptance of contributions by the committee would be subject to the contribution limit of the Ordinance. An "independent committee" risks violating the campaign contribution limits of the Ordinance if it solicits or accepts contributions from persons who have already made the maximum allowable contribution to a candidate. That is because the Ordinance limits the total amount a person may contribute in support of or in opposition to a candidacy without regard to the person or committee to which the contribution is made.

(Levit letter at p. 3.)

Accordingly, contributions made to the Committee by a contributor must be aggregated with any other contributions made by that contributor to the candidates or candidates supported by the Committee.3/ The aggregate amount of contributions made by office with respect to a single election may not exceed five hundred dollars ($500).

In your example, the Committee was formed to support four identified candidates for municipal office. This means that if a individual had not previously made a contribution in support of any of these four candidates, the Committee could solicit and the individual could contribute $500 in support of each of the four candidates, for a total of $2000.

Solicitation of contributions by independent committees raises special problems because the Ordinance limits to $500 the amount that may be contributed in support of a candidacy. Thus, a contributor must aggregate contributions made to more than one committee in support of a candidate to make sure he or she does not exceed the limits. Since the Ordinance also prohibits solicitations in excess of the $500 limit, the committee must take steps to ensure that it is not soliciting contributions from

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3/ This conclusion is supported by the unambiguous terms of the Ordinance. The Ordinance expressly regulates contributions to a committee supporting a candidate, as well as contributions directly to the candidate.

individuals who have already contributed in excess of the limit. When there is more than one committee soliciting contributions on behalf of an identified candidate, each committee is charged with knowledge that potential contributors may have already contributed to the candidate.

To forestall a claim that the solicitor knew or had reason to know that a contribution would exceed the Ordinance limits, the solicitor must check the currently available records to ascertain whether an individual has already made contributions. In addition, the committee soliciting the contributor must ask whether the contributor has already made contributions in support of the candidate. If subsequent campaign statements disclose that a particular contributor has made contributions to different committees supporting an identified candidate the aggregate amount of which exceeds $500, one or more of the committee or committees will be required to return to the contributor the amount contributed in excess of the limit, depending on when the contributions to the various committees were made. Committees who follow this course of action can avoid penalties for violation of the Ordinance.

In addition, the Committee must be able to demonstrate that the amount spent on behalf of a particular candidate supported by the Committee is no greater than the total amount that has been contributed to the Committee on behalf that candidate. In other words, if an individual contributes to the Committee $100 for each of the four candidates supported by the Committee, for a total of $400, the Committee must be able to demonstrate that the Committee has expended $100 of these funds on behalf of each of the candidates. See San Francisco Administrative Code §16.510.

The next question concerns the application of the Ordinance to Committee expenditures. The Ordinance does not purport to regulate <u>independent</u> expenditures; rather, it only regulates the solicitation and acceptance of contributions in support of or opposition to candidates. Accordingly, if a particular expenditure by the Committee does not constitute a contribution within the meaning of Government Code section 82015 and 2 C.C.R. 18215 (i.e., an expenditure made at the behest of the candidate), that expenditure by the Committee (as opposed to contributions to or made by the Committee) would not be subject to the contribution limits imposed by the Ordinance. Subject to the caveat in the preceding paragraph -- that the amount spent on behalf of a particular candidate supported by the Committee is no greater than the total amount that has been contributed to the Committee on behalf of that candidate -- the total amount of independent expenditures made by the Committee is not subject to the Ordinance's contribution limits.

QUESTION 2

Your next question involves a group of persons who form a political committee ("the Committee") to support four candidates and to oppose four candidates in a future election for the San Francisco Board of Supervisors. In your example, more than eight candidates will appear on the ballot. The Committee's primary activity will be to make independent expenditures to support or oppose the eight candidates. You ask how the ordinance limits funds received and spent by the Committee.

With respect to contributions made in support of the four candidates that the Committee supports, our answer to Question 1 also applies here. The additional question that must be answered here is how the Ordinance limits contributions made to the Committee for the purpose of opposing the candidacies of specific individuals and Committee expenditures made for that purpose.

Like contributions in support of a candidate, the Ordinance limits contributions to a Committee in opposition to a candidate to $500 per election. The problem that arises is that in some cases, a contribution to a committee against one candidate is in effect nothing but a contribution in support of another candidate. The clearest example is where only two candidates have qualified for a particular office. In that situation, a contribution against one candidate is, except in name, a contribution for the other: The purpose and effect of the contribution against one candidate is to support the election of the other. In that case, we would consider the contribution against one candidate to be a contribution in support of the second candidate. The two contributions would be aggregated to determine whether the $500 limit on contributions in support of a candidate had been violated.

In other cases, whether a contribution against one candidate is in effect a contribution in support of another candidate will be less clear; it will depend on the facts and circumstances of each case. Accordingly, we can provide no definitive advice on this issue. We do caution, however, that where a contributor makes a contribution in support of one candidate and against another candidate for the same office, the transactions will be closely scrutinized to determine whether the contribution against one person is in fact a contribution to the other candidate. The ultimate resolution of this issue will turn on the specific facts. You should contact this office for further guidance if you have questions about this issue in the context of an actual committee and election.

QUESTION 3

Your third question involves political activities by a group of persons who form a political committee ("the Committee") to promote a particular issue or viewpoint, in your example, vegetarianism. Your hypothetical Committee is registered with the California Secretary of State as a state general purpose committee that, under the Act, makes contributions or expenditures to support or oppose state candidates or measures or candidates or measures being voted on in more than one county. You note that its primary purposes would be to engage in the following types of activities:

1. Independent expenditures to support vegetarians and oppose carnivores who are candidates for the state legislature in districts in San Francisco.

2. Independent expenditures to support vegetarians and oppose carnivores who are candidates for city and county offices in San Francisco.

3. Independent expenditures to support pro-vegetarian ballot measures and to oppose local ballot measures favoring carnivores.

4. Expenditures for general advocacy of the committee's interests in supporting the vegetarian lifestyle, such as publications summarizing the voting records of incumbents, i.e., pro-vegetarian or anti-vegetarian.

With respect to this last paragraph, you state that such expenditures would be made independently of any candidate or candidate's committee, would not expressly advocate the election or defeat of any specific candidate and "would not otherwise unambiguously urge a particular result in an election."

You state that the Committee would have an ongoing existence and would solicit and accept contributions during both non-election and election years. The Committee would anticipate that at least one-third of its expenditures would be for purposes other than supporting or opposing candidates for office in San Francisco. You explain that the Committee would inform potential contributors that committee expenditures would be made at the discretion of the Committee, and that it could not be predicted what, if any, expenditures would be made in relation to any specific election. In other words, contributors would not know the ultimate purposes to which their contributions would be put.

You ask whether the Ordinance would limit contributions received by the Committee.

First, it is clear that the Ordinance would not regulate contributions that the Committee ultimately expends in support or opposition to ballot measures or candidates for the State Legislature. The Ordinance only regulates contributions in support of or opposition to candidates for City office.

Similarly, the Ordinance would not regulate contributions to the Committee that it ultimately expends for "general advocacy" where that advocacy does not constitute support or opposition to a candidate for municipal office. Accordingly, adopting the standard contained in the Act for distinguishing regulated independent expenditures from unregulated expenditures for general advocacy, we conclude that where an expenditure does not expressly advocate or oppose the election or defeat of a clearly identified candidate for municipal office, contributions received by the Committee and used by it for that expenditure would not be regulated by the Ordinance. Cal. Gov. Code §82031; see Buckley v. Valeo, 424 U.S. 1, 80 (1976); F.E.C. v. Furgtach, 807 F.2d 857 (9th Cir. 1987). The issue of whether an expenditure is for general advocacy rather than in support or opposition to a candidate for municipal office will closely scrutinized.

A much more difficult issue is presented with respect to contributions received by the Committee that ultimately are expended to support or oppose a candidate for municipal office. Unlike the committee in the first question, the general purpose committee in this example is not formed for the specific purpose of supporting certain identified candidates for municipal office, and, under the facts you have provided us, a contributor generally would not know whether his or her contribution ultimately would be used to support a candidate for City office. Even under these circumstances, however, large contributions that in turn were expended by the Committee on behalf of a candidate for City office could pose the same type of problems the prevention of which the Supreme Court has held justifies contribution limits. See California Medical Assn., supra, 453 U.S. at 197 (rejecting argument that limitation on contributions to multi-candidate committees did not "further the governmental interest in preventing the actual or apparent corruption of the political process.")

Additionally, there would be times when a contributor reasonably could expect that some share of the contribution he or she has made to the committee would be used to support a candidate for City office. For example, if during the course of a campaign for City office the Committee makes an expenditure in support of a particular candidate, persons making contributions

to the Committee after that date and before the election reasonably could conclude that some portion of the contribution to the Committee would be used for additional expenditures on behalf of the candidate in that election. If the Ordinance were construed as not applying to contributions to the Committee, the contribution limits imposed by the Ordinance could be circumvented. (See California Medical Association, 453 U.S. at 199 (limitation on contributions to multi-candidate committees was a proper method of ensuring effectiveness of limit on contributions directly to candidates.)

Even if the contributor did not know or have reason to know that a contribution could be expended in support of a candidate for City office, that is not the end of the issue. The Ordinance regulates the making and solicitation of a contribution. There are two steps to the transaction that could be subject to the Ordinance. First, under the facts of your letter, a contribution is solicited before the Committee has determined which if any City candidates the Committee will support. At that point, such a solicitation does not implicate the Ordinance. Second, if the Committee subsequently decides to support a specific candidate for City office, an expenditure in support of the candidate converts the previous contribution into one in support of the candidate subject to the limits imposed by the Ordinance.

In most cases, the original contributor will not know or have reason to know that his or her earlier contribution has been converted to a contribution subject to the Ordinance's limitation. Under those circumstances, the contributor will not be subject to penalties under the Ordinance if he or she makes subsequent contributions in support of the candidate supported by the Committee's expenditures.

The Committee making the expenditure, however, will be held to a higher standard. The Committee must ensure that funds used to make such expenditures consist entirely of funds from contributors which, when aggregated with other reported contributions made by those contributors in support of the candidate, would not exceed the Ordinance's $500 limit per contributor.

If the Ordinance had no application to contributions to the Committee, it is not difficult to conceive of situations where a candidate seeks municipal office with the reasonable expectation that, because of his position on some issue such as vegetarianism, he will be the beneficiary of large expenditures (comprised of large contributions) by the Committee. Under these circumstances, the government interest in regulating contributions to such committees is virtually as great as the public interest in limiting contributions made directly to the candidate.

The Board of Supervisors, in adopting the Ordinance, could not have intended to enact legislation that could be circumvented or undermined in these ways. Accordingly, we conclude that contributions made to a committee, including a general purpose committee, that are ultimately used to support or oppose an individual's candidacy for City office are subject to the Ordinance's $500 aggregate limit. Accordingly, when a committee expends funds in support of a candidate for City office, that expenditure must be allocated among the committee's contributors according to the proportion that each contributor's contribution bears to the total amount contributed to the committee.

We recognize that our conclusions pose significant accounting challenges to a committee contemplating making expenditures on behalf of a candidate for City office. We also are sensitive to the significant related problems this opinion may present to candidates who are the beneficiaries of such expenditures. Of course, these concerns could be addressed by legislative changes to the Ordinance. Until such changes are made, we believe that it is appropriate for a committee contemplating making expenditures on behalf of a City candidate (and candidates on whose behalf such committees make contributions) to propose accounting procedures that will ensure compliance with the Ordinance. We stand ready to review and provide advice regarding whether such proposals are adequate to guarantee compliance with the Ordinance.

Please feel free to contact this office if you have any further questions regarding this opinion.

Very truly yours,

LOUISE H. RENNE
City Attorney

BURK E. DELVENTHAL
Deputy City Attorney

RANDY RIDDLE
Deputy City Attorney

41241

From:	Ethics Commission, (ETH)
To:	Pelham, Leeann (ETH)
Cc:	Ford, Patrick (ETH); Thaikkendiyil, Gayathri (ETH)
Subject:	FW: Comments,t on proposed regulation on advice & opinions
Date:	Wednesday, September 12, 2018 12:22:30 PM

FYI.

From: Bruce Wolfe <brucewolfe.sf@gmail.com>
Sent: Tuesday, September 11, 2018 8:55 PM
To: Ethics Commission, (ETH) <ethics.commission@sfgov.org>
Subject: Comments,t on proposed regulation on advice & opinions

Dear Chair and Commissioners --

Speaking for myself as an individual and resident. A big concern of the People is when government takes action to create law but then, many times, refuses to explain exactly the intent of how it is meant to be implemented. Many times the response is that if the People are told then someone will figure out how to circumvent it or cheat. This should not be a concern of government as that is what amendments are for when problems arise. I urge all Commissioners and Ethics Department Staff to be as open and transparent as possible about what the intent and operation is for all that you enact and enforce. I enjoy greatly your workshops and find this is a perfect venue to expose and allow the People to engage with you all on such topics of law.

Bruce Wolfe, resident of SF