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Date: October 15, 2018

To: Members of the Ethics Commission

From: Pat Ford, Senior Policy Analyst

Re: **AGENDA ITEM 4 – Public Financing Review Project – Findings and Recommendations**

Summary: This memorandum presents Staff's findings and recommendations stemming from its recent review of the City's public campaign financing program.

Action Requested: Staff requests that the Commission review the findings detailed in this memo and pursue the regulatory and legislative recommendations presented in Section II.

Overview

Section I of this memorandum describes the purposes for conducting the recent review of the City's public financing program (the "Program") and explains the methodology in carrying out the review. Section II provides the findings that Staff made at the conclusion of the review and recommends how the findings could best be addressed by the Commission at this time through specific regulatory and legislative actions. Section III summarizes several more major changes identified during the stakeholder outreach process that potentially could be made to the program at a later phase, however Staff does not recommend adopting these changes at this time.

As a general matter, the recommendations contained in this report reflect Program improvements that address the most pressing issues identified in the recent review that could be implemented relatively quickly to immediately improve the Program's efficacy, clarity, and workability. Through a tiered approach, more major changes to the nature of the Program – such as the requirements for eligibility and the kind of financing available to candidates – are recommended for examination at a later stage after the more immediate changes have been implemented and their effect is observed. This approach is designed to be responsive to addressing the most pressing issues that have recently been identified, and allow the Commission to have a clearer picture once those changes are implemented for analyzing more fundamental alterations to the Program. This approach also considers that a major legislative package to change foundational aspects of the Program would not be likely to go into effect soon. By contrast, these more targeted improvements could be passed and implemented more quickly, resulting in helpful improvements to the Program in a shorter timeframe.

I. Background – Purposes and Methodology of the Review

A. Purposes for Reviewing the City's Public Financing Program

At its June 2018 meeting, the Commission identified a review of the City's public financing program as its first policy priority. Since June, the Policy Division has been engaged in substantively reviewing the program, including outreach efforts to better understand how candidates, treasurers, and members of the public viewed the program's effectiveness, to better understand what participants' experiences with the Program have been, and to solicit input as to what changes might be made to further strengthen the program. The purpose of this research was to analyze how well the program is serving its intended purposes, which are: to limit spending in elections; decrease the amount of time candidates spend raising money; increase the opportunity for candidates to run for office; ensure the integrity of the electoral process; reduce the incumbent advantage; increase the competitiveness of elections; enhance the discussion of issues of public interest; assist voters in making informed decisions; and restore trust in government.

Many of these intended benefits are difficult to definitively measure. However, like partial public financing systems elsewhere, broad participation by eligible candidates is essential for the achievement of the Program's policy goals. Because the City's public financing system is a voluntary system, it is one that requires those candidates to assess its burdens with its benefits in deciding whether to participate. To encourage maximum participation by candidates who meet the eligibility requirements and, therefore, achievement of the policy goals for which the Program was established, any effective public financing system must regularly assess how those burdens and benefits are most effectively balanced.

Candidate participation is best served by a Program that minimizes regulatory burdens that do not, or do not any longer, provide a corresponding public benefit; that provides candidates with ample information and resources to comply with program requirements; that clearly explains the program requirements; and that is trusted by candidates to be rooted in systems that fairly and efficiently implement the program requirements. Insofar as the Program can perform strongly on these fundamental, practical measures and provide efficacy, clarity, and workability, it will likely better attract candidate participation and achieve the more general policy benefits that it was created to serve. Thus, for this review, Staff focused on: how well candidates are able to understand and comply with the program requirements; how clearly the code, regulations, and available resources establish the program requirements; and the extent to which the Program creates unnecessary burdens on candidates that could negatively affect their likelihood of participating in the Program.

B. Methodology of the Review

To gather information about the Program, Policy Staff solicited feedback from candidates and treasurers, performed analysis of available data about the Program, researched approaches taken in other jurisdictions with public financing programs, collaborated with other Staff members who administer or advise on the Program, reviewed the code, regulations, and informational materials related to the Program, and engaged with community stakeholders.

The purpose of directly engaging former candidates and treasurers was to elicit information that cannot be gathered by reviewing candidate filings. Two online questionnaires were designed and distributed, first for candidates and secondly for treasurers. The questionnaires sought to elicit information such as

how much time candidates and treasurers spent completing qualifying requests and how the qualification requirements affected candidates' decisions as to whether to participate in the Program.

Community stakeholders were also engaged by holding interested persons meetings on July 31st and August 1st. Turnout at both meetings was high, and extensive comments were provided by candidates, treasurers, members of community groups, and other interested members of the public. The discussions were focused on the qualification requirements for candidates, the funding that is available to candidates, and the spending limits that apply to program participants.

Staff in ethics commissions across the country were also consulted and the laws in other jurisdictions were researched to learn about how other agencies have approached public financing. This process especially helped shed light on the rules and processes for confirming the residency of contributors and for calculating and lifting spending limits. This cross-jurisdictional view provides perspective as to how the City's own public financing program might be improved.

The findings from these research initiatives that revealed areas for improvement are presented in the following section and are arranged by topic.

II. Findings and Recommendations

This section provides findings and recommendations for potential improvement of the Program that are designed to address the most pressing issues that surfaced during Staff's recent outreach and discussions. Each finding provides background on how Staff reached the finding and details how the finding could be addressed through regulatory or legislative actions.

At the end of this section, these recommended legislative and regulatory actions are enumerated in a single list to facilitate Commission discussion and potential motions.

A. Qualifying Requests and Matching Requests

To qualify for the Program and receive public campaign funds, candidates must demonstrate to the Commission that they meet all program requirements.¹ Candidates do so by filing a Qualifying Request ("QR"), referred to in the Campaign and Governmental Conduct Code (the "Code") as a *declaration*.² A candidate must provide supporting documentation with any QR that demonstrates that the candidate has received qualifying contributions totaling at least the minimum threshold amount required for qualification. The supporting documentation must indicate, pursuant to standards set forth in regulation, that the contributions were in fact received and that they were made by San Francisco residents.³ Auditors review all QRs, including the supporting documentation that candidates attach, and report to the Executive Director as to whether each QR should be approved or denied.

A similar process underlies the Matching Request ("MR"). Candidates who have already qualified for the program may subsequently file MRs to request additional funds under the program. As is the case with

¹ Campaign & Gov. Conduct Code § 1.142(b); *see Id.* at § 1.140 (stating program requirements).

² *Id.* at § 1.142(b).

³ Campaign Finance Reform Ordinance Regulation 1.142-3.

the QR, each MR must be accompanied by supporting documentation sufficient to demonstrate that the candidate has received valid matching contributions that warrant the distribution of City funds.

1. Findings

The Qualifying Request and Matching Request rules could be modified and clarified to create less burden on committees while still achieving an appropriate level of scrutiny for any claims for public funds. The fundamental policy underlying the QR and MR processes is that a reliable system must exist to ensure that public funds are only distributed in instances where a candidate has fulfilled all program requirements. Public campaign funds are financed by taxpayers, and the Commission is therefore obligated to scrupulously administer these funds in the public trust. The QR and MR processes are methods that provide a high degree of certainty that program requirements have been met before public campaign funds are distributed, and any system employed must serve this purpose first and foremost. On the other hand, because the Program is a voluntary system in which candidates opt to participate, it is important that the qualification process not impose unnecessary burden on candidates so as to not negatively affect participation in the Program.

To provide a basic picture of recent candidates' experiences with the QR process, Policy Staff conducted a review of the recent history of QR submissions and approval rates. This analysis provides a general idea of how many times candidates have submitted a QR before being qualified for public financing and provides some insights into difficulties candidates may find in passing the QR phase. The review looked at the seventeen candidates who qualified for public financing in the November 2016 and June 2018 elections.⁴ The average number of QRs filed by these candidates was 2.31. Of the seventeen candidates, three had their QR approved on the first attempt. Approximately half of the candidates were qualified on their second QR. This data reflects current QR reviews in which candidates present an initial list of contributions, auditors review those lists against existing criteria, reject certain of the contributions and provide specific reasons for the rejection, and the candidate is able to use the feedback to cure the contributions on a subsequent attempt. Two candidates filed four QRs before being qualified, the highest number in the sample.

This data indicates that some candidates have difficulty submitting a valid QR, with 29 percent of candidates having to file multiple refilings or resubmissions before qualifying. The low success rate on the first attempt (18 percent) indicates that the majority of these candidates were not able to assemble information necessary to qualify on their first attempt. To better understand why candidates and treasurers were having difficulty proving eligibility on their first QR, detailed feedback was solicited through a survey of candidates who have applied for public financing and from the treasurers who assisted them.⁵

⁴ All candidate filings are available on the Commission's website at <https://public.netfile.com/pub2/?aid=sfo>.

⁵ Staff distributed electronic surveys to candidates and treasurers using the email addresses that those individuals had provided to the Commission. The response rate for candidates was very low but was higher for treasurers. Nine treasurers completed the treasurer survey, seven of whom are professional treasurers. Jointly, the treasurers who completed the survey have assisted over 110 candidates for San Francisco mayor or supervisor, and roughly half of those candidates applied for public financing with the treasurer's help. The professional treasurers who completed the survey have assisted, on average, 6.8 candidates in applying for public financing. These figures indicate that the sample reflects significant experience with the Program. Conversely, there were respondents who

The candidates and treasurers who completed the public financing surveys communicated a variety of experiences with the Qualifying Request process. Some reported having little difficulty with the procedures that was not quickly addressed by Staff or by NetFile, the company that provides the Program's online application system. On the other hand, many respondents reported that applying for public financing was overly complicated. Multiple professional treasurers commented that, in their opinion, candidates require professional assistance to qualify for the Program and that this should change. These comments are reflective of the treasurers' impression that a high level of expertise is required in order to file a valid QR.⁶ Many treasurers also made general comments that the documentation requirements, especially those for proving that contributors are residents of the City, are too confusing. Some added that additional information and resources explaining the QR process might help to diminish the amount of time required to learn how to submit a valid QR.

Aside from candidates who qualified for the Program, the experiences of candidates who did not qualify for the Program but who expressed an interest in doing so were also assessed. Some of these candidates filed QRs but were never able to establish eligibility. Other candidates failed to timely file the Statement of Participation, which must be filed by the deadline for filing nomination papers. Because of this failure to file, the candidates were not eligible for the Program. Some of these candidates testified before or presented documents to the Commission, and some shared the opinion that the deadline for filing the Statement of Participation should not be the same as the deadline for the filing nomination papers. The reasoning was that some candidates enter the race in the final days or hours before the nomination period ends, and such candidates are not able to simultaneously comply with the deadline for the Statement of Participation. A later deadline would have given the candidates more time to file the Statement of Participation after they filed their nominating papers.

In light of these findings, Staff closely examined both the QR process and the codes and regulations underlying it to evaluate whether there are ways in which rules and processes could be modified to maintain appropriate rigor while alleviating any undue burden that candidates and treasurers have reported. Those recommendations follow below.

2. Recommendations

As described above, the Qualifying Request and Matching Request process exists to ensure that public funds are distributed to candidates if and only if they have fulfilled the program requirements. The primary requirements for contributions that must be checked by auditors during the QR and MR reviews are:

- that the contributions presented by the committee have in fact been received and not refunded,

had significantly less experience with the Program. Two treasurers who completed the survey had only one experience with filing a QR. This helps to balance the sample with individuals who lacked prior knowledge when they applied for public financing.

⁶ Some treasurers shared their estimates of what candidates must pay a professional treasurer to prepare and file a QR, which ranged from several thousand dollars to \$5,000, and, in one instance, was 4-5% of the candidate's total contributions raised or expenditures made. These billing estimates appear to reflect a significant level of time and energy that treasurers must devote to filing a QR, time and energy that not all candidates may be able to devote to the process.

- that the contributions were made by residents of the City,
- that the contributions were received within the time periods specified in the Code, and
- that the contributions are within the dollar limits specified in the Code.

This list is not exhaustive; qualification also requires a check for factors such as whether the candidate owes and penalties, fines, or filings to the City, is opposed by at least one candidate who has reached a certain threshold of financial activity, and has not contributed or loaned more than \$5,000 or his or her own money to his or her committee. However, the bulleted list represents the inquiries that must be made for each individual contribution that candidates present in their QRs and MRs.

Administratively, to help support a smooth and effective QR process, Staff will use the information gained from candidate and treasurer feedback to collaborate in two ways with the goal of improving the process by avoiding unnecessary confusion or burden on candidates while also promoting broad candidate participation. First, resources available to candidates, including the Supplemental Guide, will be reviewed and revised to better address what is required to submit a successful QR. This will help to ensure that candidates and treasurers are able to get answers to their questions about the qualification process. Second, to maintain a high level of rigor in the administration of public funds, Staff will collaborate to refine review methods wherever possible to ensure follow up requests are closely and consistently tailored to what is necessary to ensure a contribution meets program requirements under the law.

In addition to these administrative undertakings, the following regulatory and legislative changes are recommended for the Commission's adoption to improve the QR and MR review process and, therefore, the impact of the Program overall.

Amend the regulations to provide greater clarity as to what kind of documents are sufficient proof of residency.

Regulation 1.142-3(b) currently provides a list of the types of documents that may be used to prove the residency of a contributor. As set forth in the Regulation, those types of documents are:

- (1) the contributor uses a San Francisco address as the address on any bank account or any account with a financial institution, through the submission of copies of recent bank statements or personal checks listing the account holder's address;
- (2) the contributor uses a San Francisco address as a billing address, through the submission of copies of recent credit card or utility bills;
- (3) the contributor lives at a San Francisco address, through the submission of copies of a current deed or lease;
- (4) the contributor uses a San Francisco address as a mailing address, through the submission of copies of recent mail received by the contributor;
- (5) the contributor is currently registered to vote in San Francisco;

- (6) the contributor has represented to a government agency that he or she lives at a San Francisco address, through the submission of copies of a driver's license, passport, government-issued identification card, or tax returns; or
- (7) the contributor resides at a San Francisco address on a regular, ongoing basis, through the submission of any documents created or provided by a non-interested third-party that independently confirm that the contributor lives in San Francisco.⁷

Regulation 1.142-3(b) should be amended in the following ways:

- Clarify that the address shown on any document must be a residential address. Business addresses, for example, are not acceptable. Subparts (1), (2), and (4) in the preceding list fail to specify that the address shown in the documents must be a residential address where the contributor lives.
- Clarify that Subpart (1) includes Address Verification System (AVS) information showing the contributor's San Francisco residential address.
- Subpart (7) should be stricken from the regulation. This catchall category is vague and is the cause of confusion among committees. It is rarely used, and it therefore adds little or no value for committees while causing unnecessary confusion. Eliminating this vague category would make the list of acceptable documents a finite list of clearly identified options, making it clearer to committees what is acceptable.

Amend the regulations to state that Staff will not review the Qualifying Request of any candidate who has not timely submitted a Statement of Participation indicating that he or she will participate in the Program, even if it is before the deadline for filing the Statement of Participation.

As discussed, to be eligible to participate in the Program, candidates must timely file a Statement of Participation or Non-Participation indicating that they will participate in the Program. The Statement of Participation "must be filed by the candidate with the Ethics Commission no later than the deadline for filing nomination papers," which is the 147th day before the election unless extended pursuant to California law.⁸ As discussed, candidates must also file a QR, which can be filed no earlier than nine months before the election and no later than the 70th day before the election. In practice, almost all candidates who file a QR file a Statement of Participation first. However, because candidates may file a QR up to nine months in advance of the election, it is not technically against the Code to file a QR and to subsequently file a Statement of Participation. Staff have traditionally reviewed the QRs of candidates who have not filed a Statement of Participation as long as the 147th day before the election has not passed. This is because the candidate could still file the Statement of Participation on time. Staff would not approve such a QR (since the Statement of Participation requirement would not have been met), but Staff would at least review the substance of the request.

However, reviewing QRs in instances where the candidate has not filed a Statement of Participation can give the candidate the false impression that there are no outstanding requirements yet to fulfill. As a

⁷ Campaign Finance Reform Ordinance Regulation 1.142-3(b).

⁸ Campaign & Gov. Conduct Code § 1.142(a);

result, it would serve both the interests of the candidate and the most efficient use of limited Staff resources to only review QRs after the filing candidate has filed a Statement of Participation. Formalizing this policy in the form of a regulation would be the best way to clearly communicate the process to all candidates and help support transparency about the objective standards that apply in determining how and when candidate submissions are reviewed.

Clarify through regulation that a resubmission of a Qualifying Request cannot include new contributions that were not previously included in the Qualifying Request, but that refilings can include new contributions.

If a candidate's Qualifying Request fails to establish the candidate's eligibility for the Program, the Code provides ways for the candidate to cure the problems with the QR and try again to establish eligibility. If a candidate's QR is rejected and the candidate wishes to refile a QR before the main deadline for filing QRs (the 70th day before the election), the candidate may do so at any time prior to that deadline. This is called *refiling* a QR.⁹ When a candidate refiles a QR before the 70th day before the election the candidate can add new supporting documentation and can add new contributions that were not included in the prior QR. This is because, since the candidate is refiling before the deadline for filing QRs, the candidate is essentially filing a new document. The candidate is not limited in the number of refilings he may do before the 70th day before the election.

After the 70th day before the election has passed, there is a narrower right for candidates to cure problems in QRs and try again to establish eligibility. At that point, the candidate can no longer use the broad refiling process established in Code section 1.142(b). The candidate must rely on the narrower *resubmission* process in Code section 1.142(f).¹⁰ Resubmission allows the candidate to, within five days of being notified that a QR has been rejected, resubmit the QR with additional supporting documentation. Not only must the candidate resubmit the QR within five days of its being rejected, but the candidate must also complete the resubmission no later than the 60th day before the election.¹¹ The Executive Director must determine whether the resubmission establishes eligibility by the 55th day before the election.¹²

The Code indicates that candidates may not include a contribution in a resubmission if it was not included in the initial QR. This is because the Code establishes a narrower process for resubmissions after the 70th day before the deadline (as opposed to *refilings* that occur on or before that day). There is a shorter deadline for candidates to submit a resubmission. Additionally, Staff has a shorter time in which to complete the review of a resubmission (between five and fourteen days, depending on when the resubmission is received) than is the case with refilings (between fifteen and thirty days, depending on when the filing is received). Further, the Code's use of the term *resubmission* evidences a filing of the same document, but with certain amendments made, rather than a document that presents new

⁹ *Id.* at § 1.142(b). "The declaration and supporting material may be withdrawn and refiled, provided that the *refiling* is made no later than the 70th day before the election." [Emphasis added].

¹⁰ *Id.* at § 1.142(f). "Notwithstanding Section 1.142(b) of this Chapter, the candidate may, within five business days of the date of notification, resubmit the declaration and supporting material. If the candidate does not timely resubmit, the Executive Director's determination is final."

¹¹ Regulation 1.142-6(c).

¹² Campaign & Gov. Conduct Code § 1.142(e).

contributions that are being claimed as Qualifying Contributions. Given the technical nature of these similar processes established in the Code, the Commission should add to the existing regulations governing the QR process to better clarify the processes for refiling and resubmission.

Change the deadline for filing the Statement of Participation to three days after the deadline for filing nomination papers.

As discussed, candidates must file the Statement of Participation by the deadline for filing nomination papers in order to be eligible for the Program. However, candidates have criticized this deadline as being impracticable for candidates who enter the race immediately before the deadline for filing nomination papers.

To create a brief additional period for such candidates to declare their intention to participate in the Program, Policy recommends that the deadline be changed from the deadline to file nomination papers to *three days after* the deadline to file nomination papers. This change would require an amendment to Campaign and Governmental Conduct Code section 1.142(a).

B. Individual Expenditure Ceiling

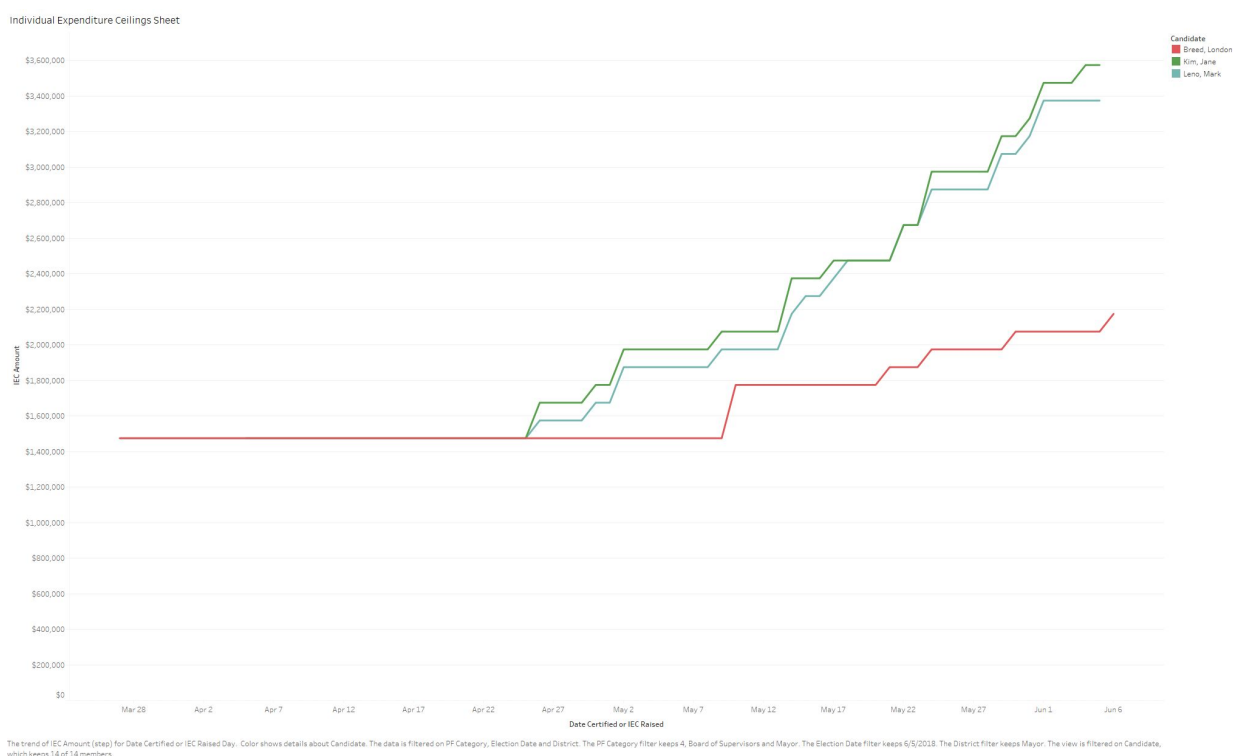
Each candidate who participates in the Program must abide by the Individual Expenditure Ceiling ("IEC"). The IEC is a dollar limit on a candidate's total expenditures. For supervisorial candidates, the IEC begins at \$250,000. For mayoral candidates, the IEC begins at \$1,475,000. The Executive Director must raise the IEC of any candidate if certain financial activity occurs in the race. This determination is made based on a formula that adds the Total Supportive Funds (the candidate's contributions, plus supportive third party spending) of the candidate's best funded opponent to the Total Opposition Spending (negative third party spending) against the candidate in question. If this figure exceeds the candidate's current IEC by at least \$10,000 (supervisorial candidates) or \$100,000 (mayoral candidates), then the candidate's IEC will be raised to the nearest whole increment of \$10,000 or \$100,000 (for supervisorial and mayoral candidates, respectively) beneath that figure. This process can be repeated without limit. In other words, there is no limit to how high the expenditure ceilings may be raised. As long as there is reported financial activity that triggers an IEC raise, Staff will continue to raise candidates' IECs.

Candidates are allowed to raise contributions that, if spent, would exceed their IECs. However candidates are not allowed to keep such excess funds in the committee's main bank account, known as the Campaign Trust Account. This rule is called the Trust Account Limit; a candidate can only keep money in her trust account that she is allowed to spend under her current IEC. A candidate must place all excess funds into a separate bank account, called the Campaign Contingency Account. There is no limit to how much a candidate may place in a contingency account, but she is prohibited from making any expenditures from the account. All committee expenditures must be made from the committee's trust account.

If the candidate has funds in her contingency account (funds that exceed the candidate's Trust Account Limit) and her IEC is raised, she must move funds from her contingency account into her trust account to bring the trust account balance up to the Trust Account Limit. In other words, raising the candidate's IEC creates space in the candidate's trust account by raising the Trust Account Limit (because the candidate is now allowed to spend more money). The trust account must be topped off up to the Trust Account Limit.

1. Findings

The current IEC system does a poor job of limiting candidate spending. This is evidenced by the high frequency and total number of IEC raises that occur in many elections. As a recent example, in the June 2018 mayoral election, there were only three publicly financed candidates, but there were thirty separate instances of a candidate's IEC being raised. London Breed's IEC was raised five times, to a final level of \$2,175,000 (147 percent of the initial IEC). Mark Leno's IEC was raised thirteen times, to a final level of \$3,375,000 (229 percent of the initial IEC). And, Jane Kim's IEC was raised twelve times to a final level of \$3,575,000 (242 percent of the initial IEC). Beginning on April 26th, the first day on which an IEC was raised in the election, and continuing until the June 6th election date, there was an IEC raise, on average, every 1.37 days. The following graph visually represents the candidates' IEC raises.



Further showing that the current model of perpetual IEC raising does not significantly limit candidate spending, candidates in the race were able to spend substantially all of their campaign funds, both privately raised contributions and public financing money, even though this considerably exceeded their initial IECs. According to the most recent available disclosures, which cover activity up to June 30, 2018, London Breed's expenditures totaled \$2,251,065. This is 99.1 percent of her total funds. Mark Leno's expenditures totaled \$1,918,661. This is 98.7 percent of his total funds. And, Jane Kim's expenditures totaled \$1,305,035. This is 99.7 percent of her total funds.¹³ All of these expenditure totals far outstrip

¹³ See SAN FRANCISCO ETHICS COMMISSION, Campaign Finance Data Dashboards – June 2, 2018 and November 6, 2018 Elections: Individual Expenditure Ceilings, available at <https://sfethics.org/ethics/2018/03/campaign-finance->

the initial IEC of \$1,475,000. And, the candidates were able to spend all of their funds, meaning that the IEC did not prevent them from spending any money that they held in reserve.

It is important to point out that these three candidates were in fact the financial frontrunners in the race. There was no fourth mayoral candidate whose activity caused Breed's, Leno's, and Kim's IECs to be raised. The current IEC raising formula counts independent expenditures, which can cause the IECs of two equally matched candidates to be raised. Also, the formula counts contributions that are in a candidate's trust fund but which have not been spent. This means that when a candidate's IEC is raised and, as a result, she transfers additional funds from her contingency account into her trust, the newly available funds may cause an opponent's IEC to be raised. Nonetheless, it is necessary to count such contributions if the formula is going to use candidate contributions for the purpose of calculating changes to the IECs.

The 2018 mayoral race was not unique in its high rate of IEC raises. Many other races have experienced significant IEC raising, and it is rare that a race with more than one publicly financed candidate does not experience multiple raises to IECs.¹⁴

Given that the current IEC mechanism is not achieving its intended purpose, the burden it imposes on participating candidates is not justified. Professional treasurers reported that their clients require assistance with monitoring and complying with the constantly-shifting IEC limits. The same is true for the limited Staff resources required to administer the current process: it requires significant Staff time to interpret financial disclosures in real time, conduct calculations using the IEC-raising formula, create running IEC totals for each candidate, and timely notify candidates of IEC raises.

2. Recommendations

Switch to an IEC mechanism whereby a candidate's IEC is permanently removed, rather than incrementally increased, when certain activity occurs.

Given that the current mechanism of incremental IEC raises does little to prevent well-funded candidates from spending all of their funds, it is no longer prudent to maintain the current system, which places a significant compliance burden on candidates and consumes limited Staff resources on a process that provides little if any current benefit. For added context, Staff are aware of no other jurisdiction that employs the City's incremental raising model for expenditure limits. All other jurisdictions appear to use a type of model in which the limit is permanently lifted once an opponent's financial activity reaches a certain level.¹⁵ Staff recommends that the Commission adopt this type of IEC mechanism. Pending further review and recommendations about more comprehensive Program

[dashboards-june-5-2018-and-november-6-2018-elections.html](#) (providing visual depictions of IEC raises in past and current races).

¹⁴ See *id.*

¹⁵ See, e.g., LOS ANGELES ETHICS COMMISSION, [City Candidate Guide – 2020 Regular Elections](#) at 36–37, available at <https://ethics.lacity.org/wp-content/uploads/2018/09/Candidate-Guide-20180917.pdf> (candidates are permanently released from the expenditure ceiling when a non-publicly financed candidate's spending exceed the amount of the expenditure ceiling or when independent expenditures for or against a candidate in the race exceed a certain threshold); SEATTLE DEMOCRACY VOUCHER PROGRAM, [Campaign Limits and Laws](#) at 6–7, available at <https://www.seattle.gov/democracymvouch/i-am-a-candidate/campaign-limits-and-laws> (candidates must petition to be released from the spending limit, but successful petitioners are permanently released).

reforms, initial IECs should, for the time being, be kept at their current levels. The current formula for ascertaining when activity justifies releasing a candidate from her initial IEC could be maintained or, as recommended in the following section, revised slightly. However, once the formula indicates that any change to a candidate's IEC is warranted, that candidate should be permanently released from the IEC.

It is important to note that the campaign finance landscape has changed since the current IEC mechanism was implemented. Legal decisions such as *Citizens United v. FEC* have been decided, and independent spending has replaced candidate spending as the main area of concern for those who advocate for decreased spending in local elections. With the current landscape in mind, it is less important to inhibit candidate spending than it is to empower candidate spending relative to independent expenditures. Indeed, it is one of the purposes of the Program to empower viable candidates to run competitive campaigns. In today's world, that means having the resources to overcome the oversized impact of independent expenditures. Switching to a "one-time permanent lift" model of IEC can bring the Program closer to serving this purpose.

Change the definition of *Total Supportive Funds* to count candidate expenditures, rather than contributions.

Currently, the formula for calculating whether a raise to a candidate's IEC is required takes into account the contributions that opponents have raised. A candidate's total amount of contributions, excluding funds that are in the candidate's contingency account, are counted toward that candidate's Total Supportive Funds. This means that if a candidate has an IEC of \$250,000 and has raised \$300,000, the \$50,000 that is held in the candidate's contingency account are not counted when evaluating that candidate's Total Supportive Funds. However, if that candidate's IEC gets raised to \$260,000, the candidate must then move \$10,000 from his contingency account to his trust account because the candidate's TAL has risen in parallel with the rise in his IEC. And, that means that the candidate's Total Supportive Funds has also risen by \$10,000 because there is now an additional \$10,000 of contributions that must be counted. This rise in Total Supportive Funds could be enough to require the IEC of another candidate to be raised.

An alternative approach recommended here is that the definition of Total Supportive Funds be changed to count a candidate's expenditures, rather than the candidate's contributions that are not in the candidate's contingency account. One reason for this change is to avoid the phenomenon described above, namely that transfers of cash from a contingency account to a trust account can cause another candidate's IEC to be raised. Although this feature of the program does make sense (because additional funds are effectively entering the race when they are moved to the trust account), it has been a cause of confusion and concern among candidates and treasurers. It would be better to wait until the candidate actually spends money before the funds are counted toward the candidate's Total Supportive Funds.

Additionally, using candidate expenditures to calculate Total Supportive Funds makes the calculation simpler and more comprehensible to candidates: Total Supportive Funds would be the sum of what the candidate has spent and what third parties have spent in support of the candidate. The candidate's contributions would be irrelevant to IEC calculations. The use of candidate spending, rather than

candidate contributions, for determining when spending limits should be lifted is common in other jurisdictions.¹⁶

The primary drawback of this approach is that a candidate could have a very large reserve of contributions, and yet opponents' IECs would not be raised because the candidate had not yet *spent* the money. This could enable the candidate to engage in large amounts of spending in the last days of an election, and the candidate's opponents may not be able to respond if they have already reached their IECs. Another potential drawback is that candidates would have an incentive to delay or manipulate the time at which they report expenditures, for fear that expenditures will cause an opponent's IEC to be raised.

Nonetheless, Staff finds that an expenditure-based method of calculating Total Supportive Funds would be more readily understood by committees, more in line with how Total Supportive Funds and Total Opposition Spending are calculated with regard to third party activity, and would avoid the issue of one candidate's IEC raise automatically causing another candidate to experience an IEC raise.

Eliminate the Trust Account Limit and the Campaign Contingency Account.

As described above, a candidate participating in the Program must make sure that her committee's trust account does not exceed the candidate's Trust Account Limit, which is pegged to the candidate's current IEC. Raises in the candidate's IEC require the candidate to move funds, if any, from the candidate's contingency account into her trust account. The presumed purpose of this requirement was to make sure that candidates are keeping track of how much money they are allowed to spend under their current IEC and are taking the affirmative step of segregating any excess funds to avoid inadvertent overspending.

In practice, the Trust Account Limit and the Contingency Account have no measurable value in preventing violations of the IEC. There is little reason to think that keeping some funds in a segregated account will make a candidate less likely to violate her IEC. For one, a candidate must deposit all contributions, at least initially, into her trust account. Within two days, she must transfer any portion that exceeds her Trust Account Limit into her contingency account. This means that excess funds are in fact comingled with trust account funds for some time, negating much of the value of maintaining segregated accounts. Additionally, the segregated accounts do not assist auditors in monitoring compliance with the IEC. Auditors must monitor a committee's expenditures to ensure that the committee is complying with the IEC and the Trust Account Limit, and monitoring expenditures is a separate process from monitoring the balance of the trust account. Auditors can just as easily monitor IEC compliance by simply keeping track of a candidate's total level of expenditures.

The Trust Account Limit creates another restriction that committees must comply with and which Staff must monitor for compliance, but it is a mechanism that does not appear to have a measurable counterbalancing value. Staff is aware of no other jurisdiction that requires candidates to maintain

¹⁶ See, e.g., LOS ANGELES ETHICS COMMISSION, City Candidate Guide – 2020 Regular Elections at 37, available at <https://ethics.lacity.org/wp-content/uploads/2018/09/Candidate-Guide-20180917.pdf>; SEATTLE DEMOCRACY VOUCHER PROGRAM, Campaign Limits and Laws at 6–7, available at <https://www.seattle.gov/democracymodel/i-am-a-candidate/campaign-limits-and-laws>.

segregated accounts in this way; elsewhere, candidates are allowed to keep all funds, including funds that exceed the spending limit, in their trust accounts.¹⁷

Policy recommends that the Trust Account Limit and the Contingency Account rule be eliminated.

D. Appeals

Section 1.142(g) of the Code grants candidates a limited right of appeal in situations where the Executive Director has made a final determination that the candidate's Qualifying Request fails to establish the candidate's eligibility for the Program.¹⁸ A final determination only occurs when a candidate has timely submitted a QR, Staff has reviewed the QR and found that it fails to meet the program requirements, and the candidate has not timely refiled or resubmitted the QR.¹⁹

1. Findings

The Code grants a candidate the right to appeal only final determinations. This would exclude instances where a candidate was ineligible for the Program but had not received a final determination on a QR. The prime example of this scenario is when a candidate submits a QR after the deadline. In such situations, Staff do not review the QR, and the Executive Director does not make a final determination. Thus, the candidate is ineligible but has not received a final determination. The Code would therefore not guarantee the candidate an appeal before the Commission. This outcome is in line with the purpose of a public financing appeal, which is to allow candidates the opportunity to convince the Commission that Staff's review of a QR was incorrect and that the candidate should in fact be certified based on the substance of the QR. Appeals based on Staff's refusal to accept late filings are not in line with the purpose and intent of the appeal mechanism.

Additionally, the Code fails to provide a standard of review for appeals. Section 1.142(g) states that candidates may appeal final determinations to the Commission, but it does not state what the candidate must prove in order for the appeal to succeed. Consequently, the Commission is left without a legal standard for evaluating appeals and is forced to resolve them based solely on general principles of equity.

2. Recommendations

Create a regulation to more clearly state the scope of the appeal right.

Although the Code already limits appeals to instances in which the candidate has received a final determination on a QR, this should be clarified through regulation. In recent history, requests for appeals have been received that do not pertain to a final determination on a QR. Some candidates have read the appeal right broadly and argued that they are entitled to an appeal before the Commission any

¹⁷ Staff in the agencies administering New York City's, Los Angeles', and Seattle's public financing program confirmed that candidates participating in those programs are not required to maintain a separate account for funds that exceed current spending limits.

¹⁸ Campaign & Gov. Conduct Code § 1.142(g) ("If the Executive Director declines to certify that a candidate is eligible to receive public financing under this Chapter, the candidate may appeal the Executive Director's final determination to the Ethics Commission. The candidate must deliver the written appeal to the Ethics Commission within five days of the date of notification of the Executive Director's determination").

¹⁹ *Id.* at § 1.142(c), (e)—(f).

time they fail to qualify for the Program for any reason. Creating a regulation to more clearly describe the scope of the appeal right would provide needed clarity to candidates. This could be done by explaining that a *determination* is the Executive Director's conclusion as to whether a timely filed Qualifying Request establishes the filer's eligibility for the program based on a substantive review of that request.

Create a standard of review for appeals.

A standard of review should be established through regulation that communicates to candidates what showing they must make in order for an appeal of a final determination to succeed; *i.e.* for any component of the Executive Director's final determination to be vacated. This would assist the candidate in preparing her appeal because she will have a standard around which to craft arguments and present evidence. Likewise, a standard of review would provide the Commission with an objective metric for determining when an appeal should succeed and a component of the final determination of the Executive Director should be vacated.

Staff proposes that the Commission adopt the standard that appellants "must demonstrate that Staff's review of the candidate's Qualifying Request and related supporting documentation was arbitrary and capricious in a way that materially and adversely affected the final determination on the candidate's Qualifying Request."

E. Ineligibility Based on Prior Violations

During prior discussions by the Commission regarding the public financing review, Commissioner Kopp expressed interest in a proposal that has been suggested by Supervisor Ahsha Safai that would bar candidates from receiving funds under the Program if they had been found, during a previous run for office, to have failed to account for a certain amount of expenditures. Presumably, the policy behind this proposal is to safeguard public funds by denying them to individuals who have previously demonstrated a lack of diligence regarding campaign finance accounting.

Several facets of the potential new rule remain unclear, and the Commission would need to resolve these before adopting it. First, what administrative process would be required to trigger the bar to public funds? Namely, would a finding in a final audit report suffice, or would a violation established through an enforcement proceeding be the trigger? Additionally, what specific finding would be required to trigger the permanent bar to public funds? Would it be the failure to provide the full level of documentation required in an audit (which includes invoices and receipts for the expenditure), or would the bar only be triggered by failure to provide any proof of the payment having been made (such as a check or credit card transaction)? Similarly, what is the appropriate monetary threshold to trigger the bar? This threshold could take the form of a flat dollar amount, a percentage of the candidate's total expenditures, or a combination of the two.²⁰

²⁰ For context, since 2011 there have been seven candidate audits that made material findings of a failure to account for expenditures (*i.e.* a failure to provide proof of payment and goods or service received). The median amount of unaccounted expenditures was \$12,813. The median percentage of total expenditures that were unaccounted for was just over 5%.

Separately, what should the term of the bar be? The Commission would need to determine whether it would be a lifetime bar, such that candidate can never participate in the Program again, or have a limited duration, such as five years from the date of the violation. Current law already contains a similar mechanism that affects eligibility for the Program, and this feature uses a five year period. Code section 1.140(a)(5) prevents a candidate's eligibility if there is a "finding by a court or by the Ethics Commission after a hearing on the merits, *within the prior five years*, that the candidate knowingly, willfully, or intentionally violated any Section of this Code or the campaign finance provisions of this California Political Reform Act."²¹ This rule would apply to unaccounted expenditures if the Commission found that the accounting failure was knowing, willful, or intentional. With this existing provision of the law in mind, the Commission should only adopt the proposal in question if it wishes to switch to a strict liability approach when the violation in question is inadequate documentation of expenditures and the Commission wishes to extend the bar beyond five years. Otherwise, the existing rule contained in Code section 1.140(1)(5) would be sufficient.

The Commission should also consider whether the bar should apply to all candidates who previously failed to provide adequate documentation of expenditures, or only to those who were publicly financed at the time of making the expenditures. Another consideration is whether the rule should bar any candidate who has ever provided inadequate documentation of expenditures, or only candidates who did so after the new rule goes into place. In other words, should a candidate who failed to provide documentation of expenditures in the year 2000 be ineligible for public financing in 2018? Or, should this rule only apply to candidates who provide inadequate documentation after 2018, when they knew that ineligibility for public financing would be a consequence of inadequate recordkeeping practices? Similarly, which races would be within the scope of the new rule? Would providing inadequate records of expenditures in a race for San Francisco City elective office be the only trigger for the bar, or would similar violations in state, federal, or other local races also trigger it?

At this time, Staff is not offering a recommendation as to whether this proposal should be adopted but instead encourages the Commission to consider the points described above in assessing whether the proposal should be moved forward at this time, postponed until a later time, or not taken up at all. As noted above, the scope of Staff's review and recommendations is focused on Program changes that address the most pressing issues that have surfaced to date as hurdles to candidates' participation.

F. Summary of All Regulatory and Legislative Recommendations

Below, each of the recommendations found in Parts A-D of this Section II are briefly summarized in an enumerated list. This is to allow the Commission to easily refer to each recommendation for purposes of discussion and potential motions.

If the Commission votes to undertake any of the following legislative or regulatory actions, Staff will then draft the appropriate regulations and/or ordinance language and bring such items to the Commission at a future meeting for final consideration.

²¹ *Id.* at § 1.140(a)(5) [emphasis added].

Regulatory Recommendations

1. Clarify that, for purposes of demonstrating the residency of a contributor, the address shown on any document must be a residential address.
2. Clarify that Address Verification System (AVS) information showing the contributor's San Francisco residential address is an acceptable method for demonstrating residency.
3. Remove Regulation 1.142-3(b)(7), a catchall category for forms of residency documentation.
4. Clarify that the Qualifying Request of any candidate who has not yet submitted a timely filed Statement of Participation indicating that he or she will participate in the Program will not be reviewed.
5. Clarify that a resubmission of a Qualifying Request cannot include new contributions that were not previously included in the Qualifying Request, but that refilings can include new contributions.
6. Clarify that appeals under Section 1.142(g) are only permitted in regard to a final determination on a timely filed Qualifying Request.
7. Create the following standard of review for appeals under Section 1.142(g): the appellant must demonstrate that Staff's review of the candidate's Qualifying Request and related supporting documentation was arbitrary and capricious in a way that materially and adversely affected the final determination on the candidate's Qualifying Request.

Legislative Recommendations

1. Change the deadline for filing the Statement of Participation to three days after the deadline for filing nomination papers.
2. Switch to an IEC mechanism whereby a candidate's IEC is permanently removed, rather than incrementally increased, when certain events occur.
3. Change the definition of *Total Supportive Funds* to count candidate expenditures, rather than contributions.
4. Eliminate the Trust Account Limit and the Campaign Contingency Account.

III. Potential Major Legislative Changes Identified by Stakeholders for Further Review

This section outlines potential legislative changes to the program that were suggested by stakeholders during recent outreach discussions on the Program. At this time, Staff does not take a position on these potential changes, but instead recommends that the Commission undertake the more immediately pressing regulatory and legislative changes contained in Section II. A subsequent Program review phase could be planned to report back to the Commission on the effectiveness of those changes, and it could assess more major changes to the program.

A. Change the Requirements for Qualification

Stakeholders suggested altering the qualification requirements for candidates in an attempt to better identify viable candidates who have a significant basis of support in the community. One reform might be to lower the aggregate contribution threshold that candidates must meet, but to reduce the maximum portion of a contribution that can be counted. For example, instead of requiring supervisorial candidates to demonstrate \$10,000 of qualifying contributions of up to \$100, the Program could require them to demonstrate \$5,000 of qualifying contributions of up to \$50. Another possible change would be to only allow supervisorial candidates to use qualifying contributions from residents of the district for which they are running to represent.

B. Change the Model of Financing that is Available

Stakeholders also advocated for altering the kind of financing that qualifying candidates receive under the Program. These suggestions ranged from merely providing a larger initial grant to qualifying candidates to reformatting the Program into a voucher-based model as seen in Seattle. Other concepts might be to match a smaller portion of each contribution but to institute a higher matching ratio. For example, instead of matching the full \$500 of a contribution at a 2:1 ratio, the Program could match only \$150 of a contribution at a 6:1 ratio. Some stakeholders recommended raising the total amount of funds that are available for each candidate.

C. Change the IEC Amounts and Make Release Optional

Lastly, stakeholders suggested that the IEC levels be changed. Specifically, most comments were that the initial IEC levels should be higher. Additionally, it would be possible to make release from the IEC optional or to require candidates to petition for release. If a candidate opted to be released from his or her IEC, the candidate could become ineligible to receive more funds under the Program. This is the model currently in use in Seattle.