ETHICS COMMISSION
CITY AND COUNTY OF SAN FRANCISCO

Date: January 14, 2019

To: Members of the Ethics Commission

From: Pat Ford, Senior Policy Analyst

Re: **AGENDA ITEM 5 – Discussion and possible action on Phase I draft ordinances regarding the public financing program.**

Summary: This memorandum presents proposed draft of ordinance language to amend the City's public financing program. The draft is based on the Commission's initial determination at the October 19, 2018 meeting to pursue these recommendations stemming from its recent review of the program. This memorandum also responds to Commission's research questions posed at the November 16, 2018 meeting and provides additional data analysis conducted by Staff.

Action Requested: Staff requests that the Commission review the draft ordinance set forth as Attachment 1 and approve the ordinance.

I. Background

Under the Commission's current Policy Prioritization Plan, adopted at the Commission's regularly scheduled June 2018 meeting, a comprehensive review of the City's public campaign finance program (the "Program") is currently the Commission's top policy priority. The overall purpose of the review is to identify ways in which the Program's effectiveness and workability can be improved to support broad candidate participation in the program and program impact.

A. Phases of the Project

This policy review has been undertaken as a two-phase project to ensure first that several clearly identified workability issues can be improved with changes implemented most timely. In the second phase, a subsequent set of more complex issues for which further in-depth analysis is necessary to develop recommendations will be assessed and brought forward.

Phase I, the current phase of the review, has sought to identify features of the Program that are creating undue complexity, confusion, or requirements on participating candidates that do not yield a corresponding policy benefit. Changing these features of the Program is a way to recalibrate certain burdens for participants and to increase the Program's effectiveness in the near term. The features of the Program addressed in Phase I are those that candidates, Staff, and the Commission have observed to be problematic for candidates during the June and November elections in 2018.

Through formal appeals, public comment, questions, concerns and feedback communicated to Staff, there is a clear indication that candidates, treasurers, and members of the public are experiencing frustration with these aspects of the Program. Phase I has responded to these concerns by analyzing these Program features and recommending ways to improve them while still maintaining the current structure and parameters of the Program. Staff has pursued these recommendations in multiple forms:

(1) a set of regulations, which the Commission approved at its regularly scheduled November 2018 meeting;
(2) reexamining administrative aspects of the Program, which is ongoing as Staff prepares for the November 2019 election;
(3) improvements to the written resources that are available to Program participants, which is also ongoing; and
(4) the ordinance that is attached to this memorandum at **Attachment 1**.

Following the Commission's action on the proposed ordinance, and aligned with the Commission's ongoing interest in public campaign financing as its top policy priority, Staff plans to next engage in Phase II of the review project. Phase II will build on the key workability improvements advanced in Phase I and will broaden the scope of Program features reviewed. Phase II will analyze, among other things, the basic parameters of the Program, including the total amount of public funding that candidates can qualify to receive, the requirements for qualifying for the Program, the ratio at which private contributions are matched with public money, the initial spending limit that applies to participants, and whether any alternative model of public financing, such as democracy vouchers, is feasible and advisable at this time.

B. Recommended Ordinance Appears at Attachment 1

At its November 16, 2018 meeting, the Commission continued discussion of the ordinance attached here as Attachment 1 and posed several research questions to Staff.[1] The Commission was interested in learning more about the proposal to change the mechanism for adjusting candidate spending limits. Following this Background Section, Section II provides a brief explanation of each change contained in the proposed ordinance, provides data to assist the Commission in its consideration of those changes, and responds to the questions posed by the Commission at the November 2018 meeting.

Separately, at the November 2018 meeting, the Commission also had questions pertaining to a proposal to bar candidates from public financing participation if they had failed at some point in the past either to provide sufficient documentation of political expenditures or to timely meet filing requirements or pay late fines or penalties. (See **Attachment 2**). That proposal is not included in the proposed Ordinance. Section III of this memorandum provides further background on Staff's recommendation that the Commission take no action on this proposal.

[1] The Commission also approved a set of regulations at its November 16, 2018 meeting that clarify various aspects of the Program. Those regulations were transmitted to the Board of Supervisors on November 16th for a 60-day review period, as required by Charter § 15.102.

II. Staff Proposals

Attachment 1 represents the ordinance Staff proposes to address identified workability issues and make the Program more effective in the near term. These changes are briefly summarized below and are more fully discussed in the pages that follow.

A. **Modify the Spending Limit Adjustment Mechanism.** Switch to a spending limit adjustment mechanism whereby a publicly financed candidate is released from his or her spending limit when certain events occur. This is different from the current system, which incrementally adjusts spending limits upwards when certain events occur.

- The current system of incrementally raising the spending limit, or *Individual Expenditure Ceiling* (IEC), throughout the election has not discouraged candidate spending after the time at which the limit is first adjusted. Therefore, this feature of the Program only adds complexity and additional compliance burdens for candidates, which is not outweighed by a strong public policy benefit. The approach of releasing candidates from the spending limit in certain circumstances is used almost universally for partial public financing systems like San Francisco's.

B. **Modify how 'Total Supportive Funds' are Calculated.** Change the definition of *Total Supportive Funds* to count candidate expenditures, rather than contributions.

- Total Supportive Funds is a factor used to evaluate whether a publicly financed candidate should no longer be held to the initial spending limit. When doing this evaluation, using opponent spending rather than opponent fundraising will eliminate instances in which a change to one publicly-financed candidate's spending limit automatically triggers a change to another publicly-financed candidate's spending limit. Under the proposed ordinance, in addition to third party spending, only *spending* by a candidate would affect another candidate's spending limit.

- The proposed ordinance would also modify the periodic threshold reporting by candidates to be more closely tailored to expenditures, as this figure is what would matter for purposes of lifting spending limits.

C. **Eliminate the Trust Account Limit and the Campaign Contingency Account**.

- Requiring candidates to maintain a separate bank account to hold contributions that exceed the candidate's spending limit has not measurably reduced the likelihood that candidates will exceed the spending limit, nor does it enable compliance with the spending limit to be more closely monitored. It therefore creates an additional compliance burden on participating candidates that is not matched by a corresponding public policy benefit.

D. **Modify the Statement of Participation Filing Deadline.** Change the deadline for filing the Statement of Participation to three days after the deadline for filing nomination papers.

- This revised deadline would provide candidates who declare their candidacy late in the nomination period with adequate time to state their intention to participate in the Program.

A. **Modify the Spending Limit Adjustment Mechanism**

Amend spending limits to release a participating candidate from the spending limit when certain events occur, rather than incrementally adjust that candidate's spending limit upward.

Each candidate who participates in the Program must agree to limit his or her spending in order to receive public funds and must keep campaign expenditures below a limit established by statute until and unless certain other factors are present in their race.[2] This individual spending limit is an important feature of the Program and is designed to serve certain goals, such as acting as "an incentive to limit overall expenditures in campaigns, thereby reducing the pressure on candidates to raise large campaign war chests for defensive purposes beyond the amount necessary to communicate reasonably with voters" and increasing the extent to which candidates can engage voters on the issues.[3]

Under current law, a participating candidate's spending limit ("Individual Expenditure Ceiling" or "IEC") must be incrementally raised if three factors indicate that such a raise is warranted. The three factors are: the total contributions received by an opponent, the total level of independent spending in support of the opponent, and the total level of independent spending in opposition to the participating candidate.[4] This calculation is performed daily during an election as required expenditure notices are filed, and the IEC of a candidate can be increased a limitless number of times as a result.

Attachment 1 would change the Code to no longer incrementally raise spending limits. Instead, the Program would simply release a participating candidate from her individual spending limit when the three factors indicate that doing so is warranted.[5] In other words, if the expenditure activity of a participating candidate's best-funded opponent, when combined with third-party spending, reaches a certain level, the participating candidate would be released from her spending limit and would be free to spend any funds that the participating candidate had received. Until that time, the candidate would remain subject to the initial, fixed-amount spending limit that already applies under current law. The difference between current law and the proposed ordinance is that, at the time when a participating candidate's spending limit is first adjusted upward, the proposed ordinance would instead release that candidate from his or her spending limit rather than subject the candidate to an ongoing adjustable spending limit. The determination to release a participating candidate would continue to be made on a candidate-by-candidate basis; the law would not necessarily release all candidates in a given race from spending limits at the same time.

The reason for the proposed change is that the practice of incrementally increasing spending limits has not proven to be effective at limiting candidate spending. To be clear, the *initial* spending limit that applies at the beginning of a race ($250,000 for supervisorial candidates, and $1,475,000 for mayoral candidates) is still an important feature of the Program, and Staff's proposal would not affect it. By contrast, and as detailed empirically below, the progressively higher adjustable spending limits that

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[2] Campaign & Gov. Conduct Code § 1.140(b)–(c). The initial IEC is $250,000 for supervisorial candidates and $1,475,000 for mayoral candidates.

[3] *Id* at § 1.100(b)(3).

[4] *Id.* at § 1.143.

[5] Attachment 1, § 1.143 (draft).

apply to a participating candidate after that candidate has been released from the initial, fixed-amount spending limit have been of questionable value.

Staff's analysis of campaign finance data indicates that it is doubtful that these progressively increased spending limits have any considerable effect on candidate spending. Rather, from the time that a candidate's spending limit is first adjusted, the spending limit has demonstrated little if any effect on candidate spending. For this reason, the proposed ordinance recommends that this practice be discontinued, thereby eliminating an unduly complex and burdensome feature of the program for candidates without losing any significant policy benefit.

1. *The incremental adjustment of spending limits adds unnecessary complexity to the Program and unduly burdens participating candidates.*

Over the course of the June and November 2018 elections, the Commission heard widely from candidates, treasurers, and interested members of the public frustrated with some of the complexities of the Program. One aspect of the Program repeatedly cited is the incremental increases to candidate. For context, spending limits for individual candidates were raised forty-two times during the June 2018 election and one-hundred twenty-three times during the November 2018 election, for a total of one-hundred sixty-five separate spending limit adjustments during the year.

The Commission has received feedback from the public and candidates that it is too difficult to understand why and how spending limits are adjusted, and this likely can have a negative impact on candidate participation. Staff received a significant number of questions during the 2018 elections from candidates trying to understand how spending limits were being adjusted in their respective races. Many candidates have expressed the sentiment that it is impossible for the average candidate to participate in the Program without professional assistance, and IEC adjustments are clearly a factor in creating this perception. If adjustable spending limits are serving to dissuade potential participants, they are weakening the Program by suppressing participation.

By constantly adjusting spending limits throughout an election, the Program requires participating candidates to spend campaign resources to stay constantly apprised of their spending limit as it changes from day to day. This can detract, however, from the time and resources that could be spent instead engaging with voters, one of the core purposes of the Program. To the extent program requirements present undue complexity, the program can unintentionally be creating a more pronounced reliance on professional accountants and treasurers than may otherwise be necessary. If that happens, it can serve to diminish the effect that the public funds can have for participating candidates: instead of being spent on communications with voters about issues, for example, resources are directed instead toward increased compliance costs. In this vein, the more complex the Program is, the more it may unintentionally advantage well-resourced or incumbent candidates who may have the most access to professional help, more so than grassroots or first-time candidates who may find raising sufficient funds to be competitive more challenging. Program goals, to the contrary, seek to "[e]nsure that all individuals …have a fair opportunity to participate in elective and governmental processes;" "[r]educe the advantage of incumbents and thus encourage competition for elective office;" and allow all candidates

"to spend a smaller proportion of their time on fundraising and a greater proportion of their time dealing with issues of importance to their constituents' community."[6]

2. Continuing to hold candidates to incrementally increased spending limits after they have been released from the fixed initial spending limit confers little or no policy benefit.

The proposed ordinance recommends retaining the spending limits to which participating candidates agree to abide but to removing the provision of the Code that makes those limits adjustable, instead replacing it with a release mechanism. To reiterate, the proposed ordinance would not remove spending limits for participating candidates. Participating candidates should continue to be held to the *initial* spending limits unless and until the three metrics discussed above indicate that a candidate should no longer be held to such limit.

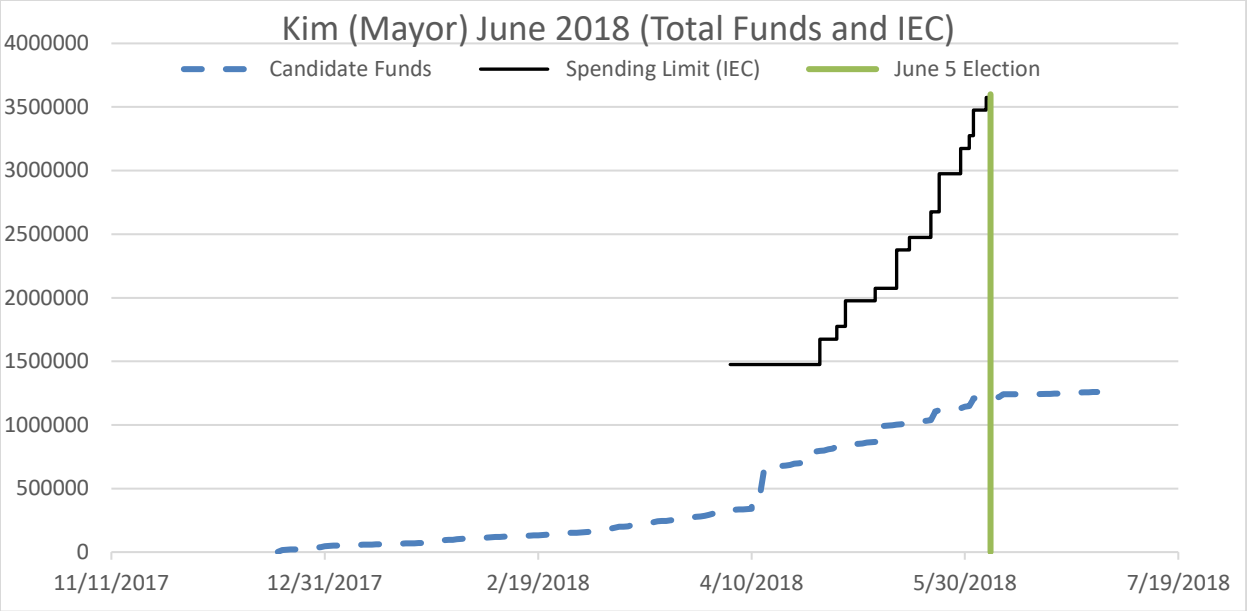
As discussed below, data from recent elections indicates that after the initial spending limit has been increased, the progressively higher limit ceases to have an appreciable effect on the candidate's spending. The primary bases for this conclusion are:

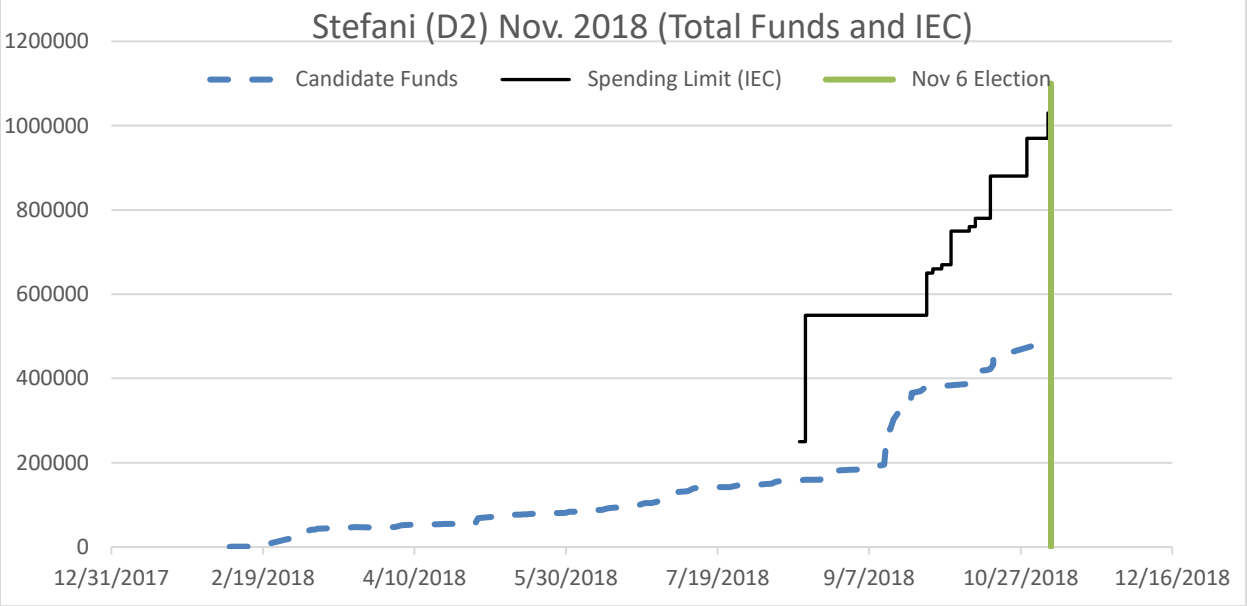
- For at least 79 percent of publicly financed candidates in 2018, the candidate's total amount of funds was less than the candidate's spending limit after the limit was increased; and
- For the remaining candidates, it does not appear that the increased spending limits affected their spending, even though their total funds at times exceeded their spending limits.

The charts below visually display financial data in a chronological manner, with the vertical line representing the date of the election. The dashed line indicates the candidate's total funds on each day, including both private contributions and public funds.[7] The solid line indicates the candidate's spending limit, or IEC. The stair-shaped increases in the IEC line show each time that the candidate's spending limit was incrementally adjusted based on opponent and third-party activity. Key conclusions about the data shown in the charts is provided after each set of charts.

[6] Campaign & Gov. Conduct Code § 1.100.

[7] A sudden increase in the line representing the candidate's funds usually indicates a point at which the candidate received a distribution of public funds under the Program.

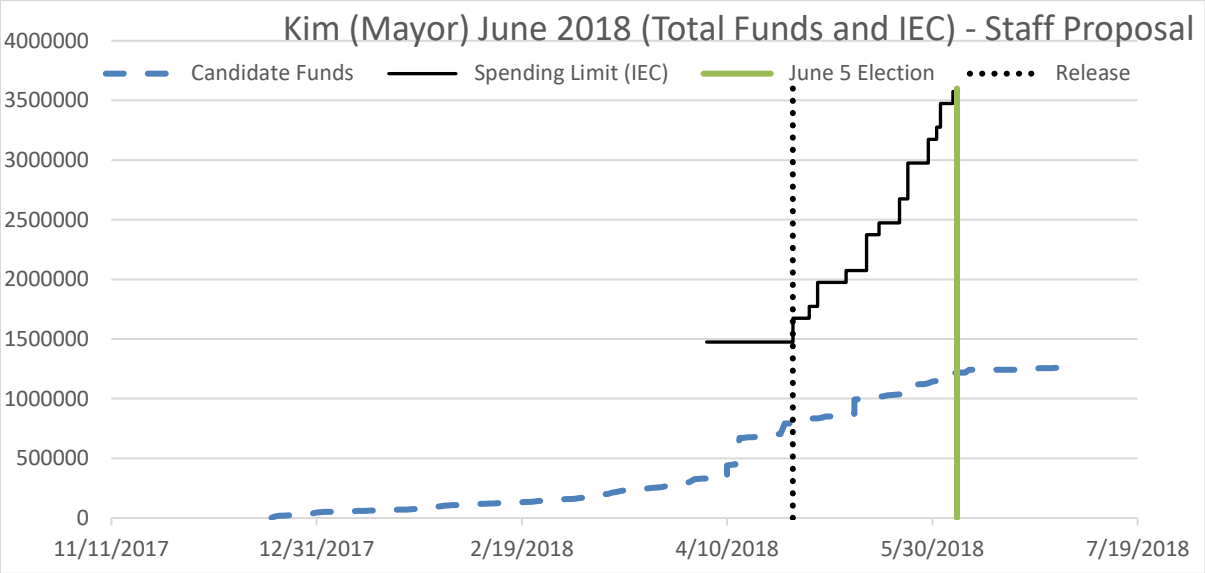


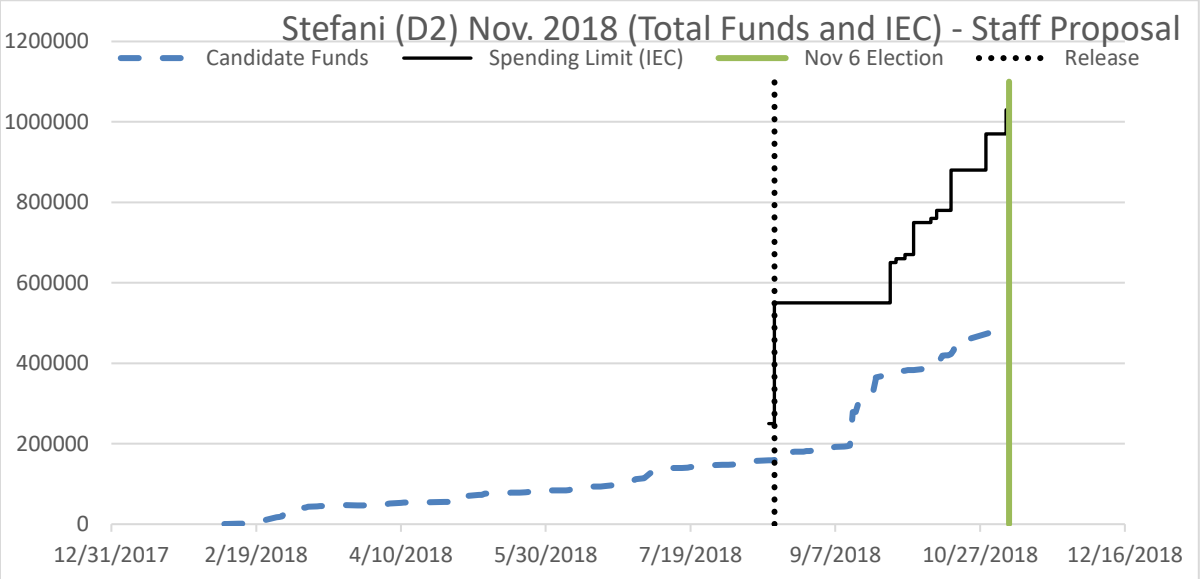


- For 57 percent of publicly financed candidates in 2018, the candidate's funds (which includes public financing received) never reached the level of the candidate's spending limit at any time during the election. At all times during the election, these candidates were allowed to spend 100 percent of their funds.

- There is no indication that the spending limit, after it was incrementally adjusted upward, continued to have any effect in lowering these candidates' expenditures. The adjusted spending limits for both candidates were consistently far higher than the candidates' funds.[8]

Under the proposed ordinance, the candidates would have been released from the spending limit at the time at which the first incremental increase occurred. This is shown in the following charts with a vertical dotted line.

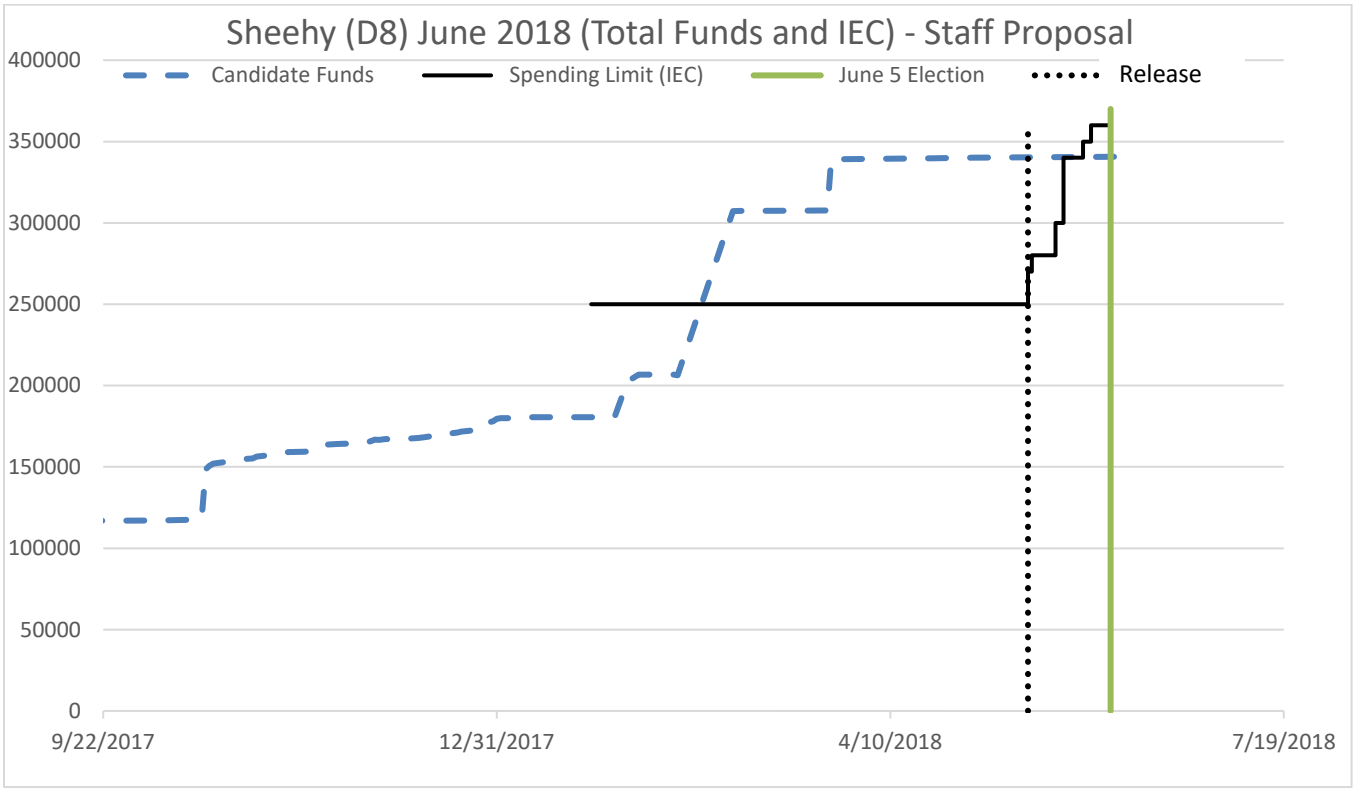




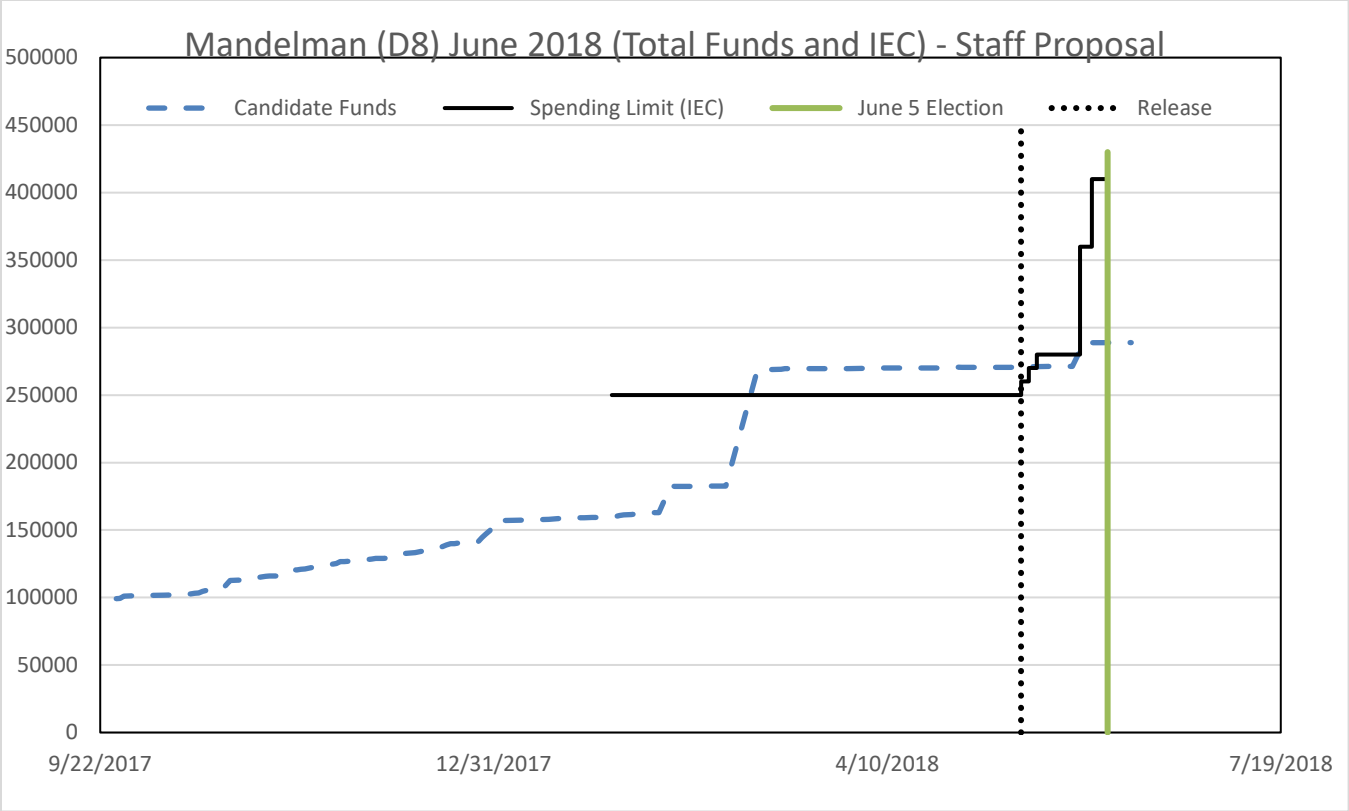
[8] By Election Day, Jane Kim's spending limit was 294 percent of her total funds, and Catherine Stefani's spending limit was 210 percent of her total funds. Kim's spending limit was raised twelve times; Stefani's was raised ten times.

- As discussed, Staff is recommending that the *initial* spending limits for publicly financed candidates be retained as they currently exist; supervisorial candidates would still begin with a spending limit of $250,000 and Mayoral candidates would begin with a spending limit of $1,475,000. Staff recommends only that the stair-shaped increases be discontinued and that a candidate be released from her spending limit instead, as previously detailed above.[9]

Based on the data, adjustable spending limits also appear to be ineffectual for candidates who, although possessing funds at one point that exceed the spending limit, never again possess funds sufficient to break the spending limit after the limit is incrementally increased. Simply releasing such candidates from the spending limit at that time would have substantially the same outcome. Examples of these candidates are shown in the following charts.



[9] For candidates who become publicly financed at a time when an opponent or third parties have already spend significant funds in the election, this release could happen soon after the candidate is qualified to received public funds. This is evident in the chart above for Catherine Stefani. However, the chart also indicates that Staff's approach would differ little in terms of the effect on the candidate's spending from the current approach; under either approach, the candidate would have been allowed to spend 100 percent of her funds at all times during the election. Current law and the proposed ordinance both allow this because candidates, such as these, who face more well-funded opponents need to be allowed to respond to opponents' activity. The difference is in how the candidate is let go from the initial IEC: by being released from it for good, or by having the limit ratcheted up many times over the course of the election.



- Both of the two candidates above received funds (private contributions and public funds) that exceeded their initial spending limits. However, spending limit increases quickly caused the candidates' spending limits to rise above their levels of funds, meaning that the candidates were then allowed to spend 100 percent of their funds.
- Under the proposed ordinance, the initial, flat spending-limit line would remain the same. When the candidates' funds exceeded that line, they would not have been allowed to spend the excess funds. However, when the three financial metrics regarding opponent and third party activity indicated that the candidate should no longer be held to that initial spending limit, Staff's approach would have released the candidates from the spending limit, instead of incrementally adjusting it upwards.
- The effect of releasing these candidates from their spending limit would have differed little from current law because both candidates' spending limits were rapidly increased to levels that exceeded their levels of funds, allowing them to spend all of their funds, if they chose to do so.

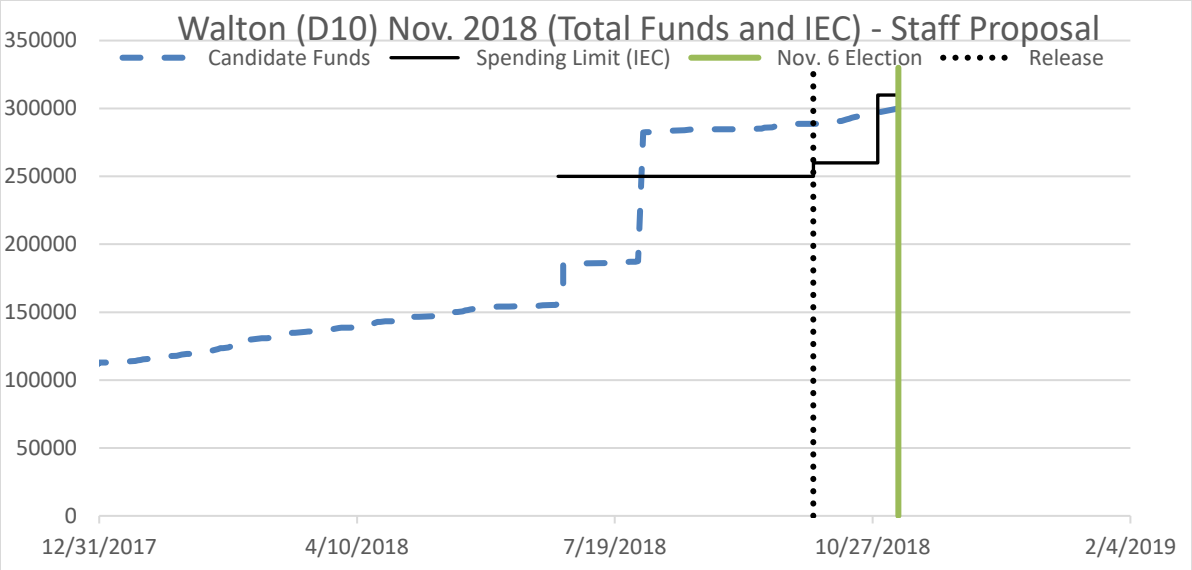
To summarize the data shown above, for roughly 80 percent of publicly financed candidates in 2018, had candidates been released from spending limits, rather than spending limits being incrementally adjusted, there would have been little or no difference in how the spending limits applied to the candidates. Once their spending limits began to be adjusted, these candidates were immediately, or

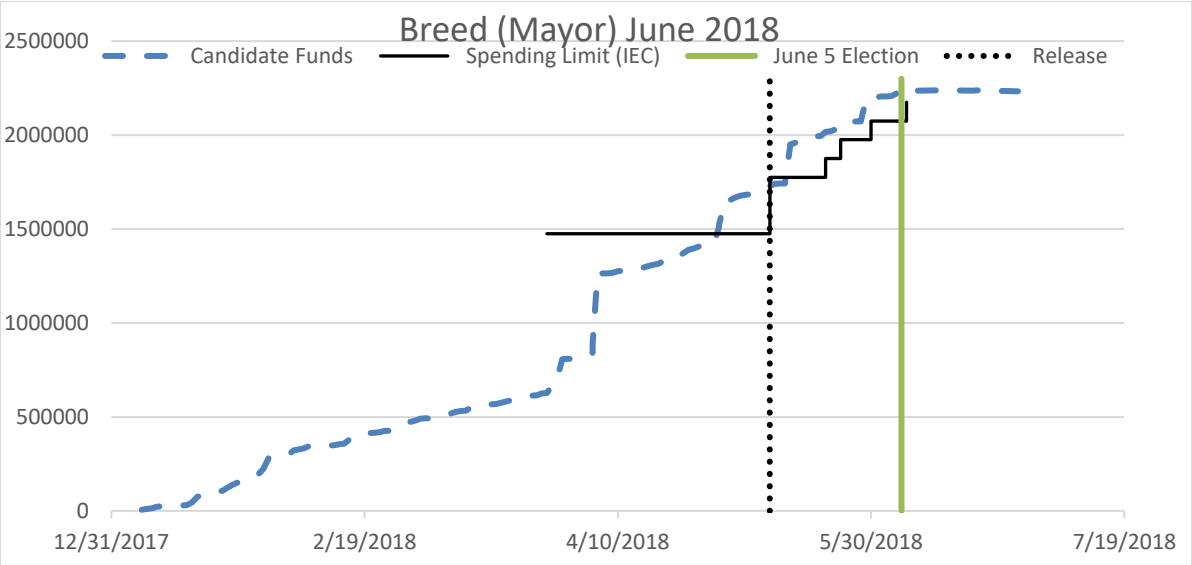
very soon, allowed to spend 100 percent of their funds.[10] Releasing candidates from the spending limit, rather than incrementally adjusting it upwards, achieves this same goal, which is an important part of the Program. But, the proposed ordinance would decrease the complexity and compliance burden that candidates must negotiate in order to understand and comply with spending limits. In that sense, this change is a way to improve the Program's effectiveness and workability while still maintaining the fundamental features of current spending limits.

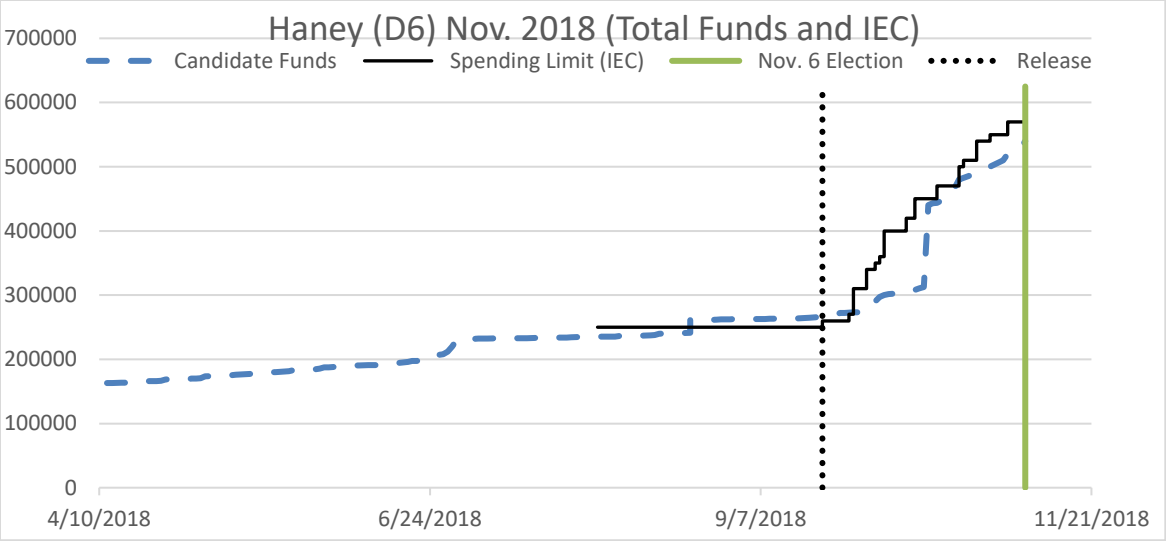
For a small group of publicly financed candidates in 2018, even after their spending limits began to be adjusted upwards, they were able to raise funds sufficient to exceed their spending limits. For the two or three publicly financed candidates in 2018 for whom this was the case,[11] the following charts visually demonstrate this.

[10] For candidate Sheehy, it took four incremental adjustments over the course of nine days to increase his spending limit to the level of his total funds. For candidate Mandelman, it took two adjustments over the course of two days. In reality, these candidates' spending limits should have been increased even more rapidly under the existing Program rules. Shortly before the election, Staff discovered that filings indicated that activity in the race was greater than previously accounted for. Staff corrected the miscalculations by further increasing spending limits for both candidates on May 29, 2018. This increase should have occurred earlier in the election, meaning that the candidates' spending limits would have surpassed their funds at an even earlier point.

[11] For Matt Haney, the third adjustment to his spending limit, which occurred one week after the first adjustment, pushed his spending limit above the level of his total funds. It is possible that, after this third adjustment, Haney's funds never again reached the level of his spending limit, meaning that he would have been able to spend 100 percent of his funds during the remainder of the election. The currently available threshold filings do not indicate that Haney's funds again reached the level of his spending limit. However, these filings do not include daily contribution levels, as does the Form 460. Once the Form 460 covering activity in late October 2018 are submitted this month, it will be possible to know whether Haney's funds reached the level of his spending limit at any point. For purposes of this report, Staff have categorized him in the second group, since it is *possible* that his funds exceeded his spending limit at some point after the limit was increased. However, this would have been the case for, at most, one or two days and by, at most, a few percentage points, assuming the accuracy of the candidate's threshold filings. This would have limited Haney's spending by a small amount and for a short time, if it happened at all.


Walton (D10) Nov. 2018 (Total Funds and IEC) - Staff Proposal
Candidate Funds
Spending Limit (IEC)
Nov. 6 Election
Release
350000
300000
250000
200000
150000
100000
50000
0
12/31/2017
4/10/2018
7/19/2018
10/27/2018
2/4/2019


Breed (Mayor) June 2018
Candidate Funds
Spending Limit (IEC)
June 5 Election
Release
2500000
2000000
1500000
1000000
500000
0
12/31/2017
2/19/2018
4/10/2018
5/30/2018
7/19/2018



- After the candidates' spending limits were adjusted upward, it appears that the spending limit in fact did little to suppress the candidates' spending. This is because:
    - the candidates in question, though still subject to the spending limit after it began to increase, were allowed to spend substantially all of their funds under the adjustable limits;
    - as a general matter, candidates do not typically spend 100 percent of their available funds at any given time, even when they are allowed to do so; and
    - the candidates did not slow down their fundraising efforts during the period in which their funds exceeded the spending limit. Each of these factors is explained below.

<u>At all times during the period when adjustable spending limits applied, Walton and Breed were allowed to spend substantially all of their available funds.</u>

Although Walton and Breed often possessed funds that surpassed the level of their adjusted spending limits, their funds did not greatly surpass the spending limit applicable at any given time. This means that at all times following the first spending limit adjustments (when Staff's proposal would release the candidates from the spending limit), the candidates were still allowed to spend substantially all of their funds. There was thus little value in continuing to hold the candidates to an increased spending limit, and it would have been effectively the same to release the candidates from the spending limit at the time of the first adjustment.

- During the time that Walton was subject to the increased spending limit, the limit always allowed him to spend 90 percent or more of his available funds. Additionally, it is clear that after

October 29th, Walton's spending limit had surpassed his available funds, and he was therefore allowed to spend 100 percent of his funds after that point.[12]

- At all times following the date of Breed's first spending limit adjustment, Breed was allowed to spend 89 percent or more of her available funds. Taking the average of all days during which Breed was subject to the adjusted spending limits, she was allowed to spend, on average, 94 percent of her available funds.

<u>As a general matter, candidates do not typically spend 100 percent of their available funds at any given time.</u>

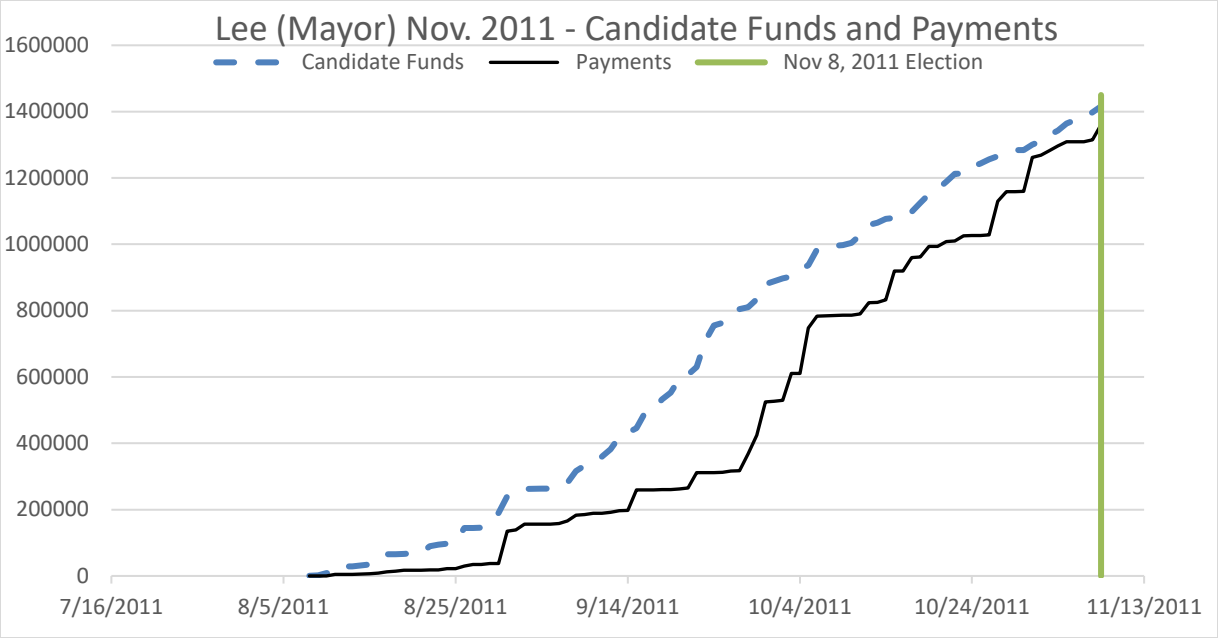
Typically, a candidate committee will not spend 100 percent of its available funds, even if the candidate is not held back by spending limits. Most candidate committees carry a balance of cash-on-hand to fund continued campaign operations, even in the final days of the election. [13] This is true both for candidates who are not subject to spending limits (i.e. candidates who do not participate in the Program) and for candidates who are subject to spending limits that far surpass their total funds and therefore do not limit their ability to spend available funds. These candidates serve as a useful comparison because their activity shows how candidates spend their money when not held back by spending limits.

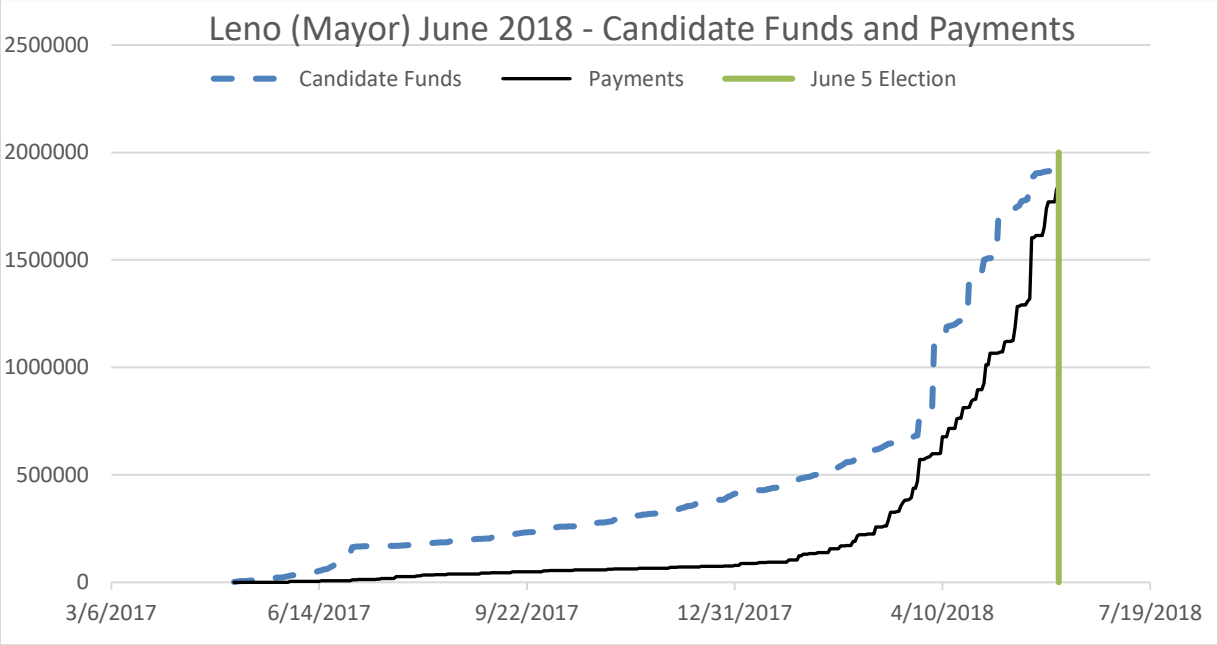
In the following charts, the dashed line represents the candidate's total funds received to date, and the solid line represents the candidate's total payments made to date. All of the following candidates were allowed to spend 100 percent of their funds at all times during the race.

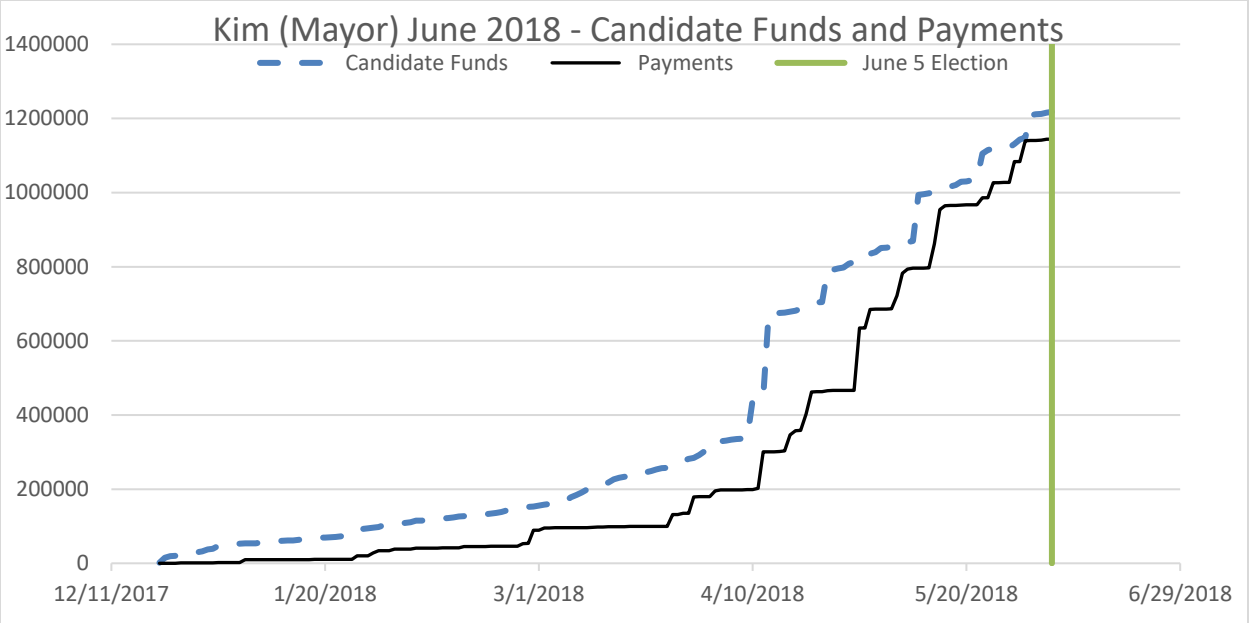
[12] Walton is not required to file the Form 460 covering activity after October 20, 2018 until January 31, 2019. Thus, it is not yet known what his precise daily level of funds were after that date. However, based on the candidate's threshold reports, his activity between October 20th and the election was likely similar to his activity between October 4th and October 20th, for which there is Form 460 data. At most, Walton could have increased his funds by only 3 percent (to a total of $309,999) without being required to file a threshold form informing Staff that he had raised additional funds.

[13] Candidates who are largely self-funded will inject additional cash into their committees using person funds, which are not subject to contribution limits and can therefore be added quickly and in large amounts. Such a candidate is more likely exhaust all committee funds before writing another check to his or her committee. This is not an option for non-self-funded candidates, since such candidates have to raise contributions in small increments from contributors. Additionally, public financed candidates are limited in how much money they may contribute to their own committees. Thus, candidates tend to carry a cash balance and to keep expenditures, including accrued expenses (unpaid bills), close to their level of funds received.

Separately, candidates can go into debt by accruing expenses (receiving goods or services for which they have not yet paid) and this amount can push the candidate's spending beyond the current level of their funds raised. However, the extent to which candidates go into debt is usually limited, as vendors must be willing to extend the candidate a line of credit.


Lee (Mayor) Nov. 2011 - Candidate Funds and Payments
Candidate Funds
Payments
Nov 8, 2011 Election
1600000
1400000
1200000
1000000
800000
600000
400000
200000
0
7/16/2011
8/5/2011
8/25/2011
9/14/2011
10/4/2011
10/24/2011
11/13/2011

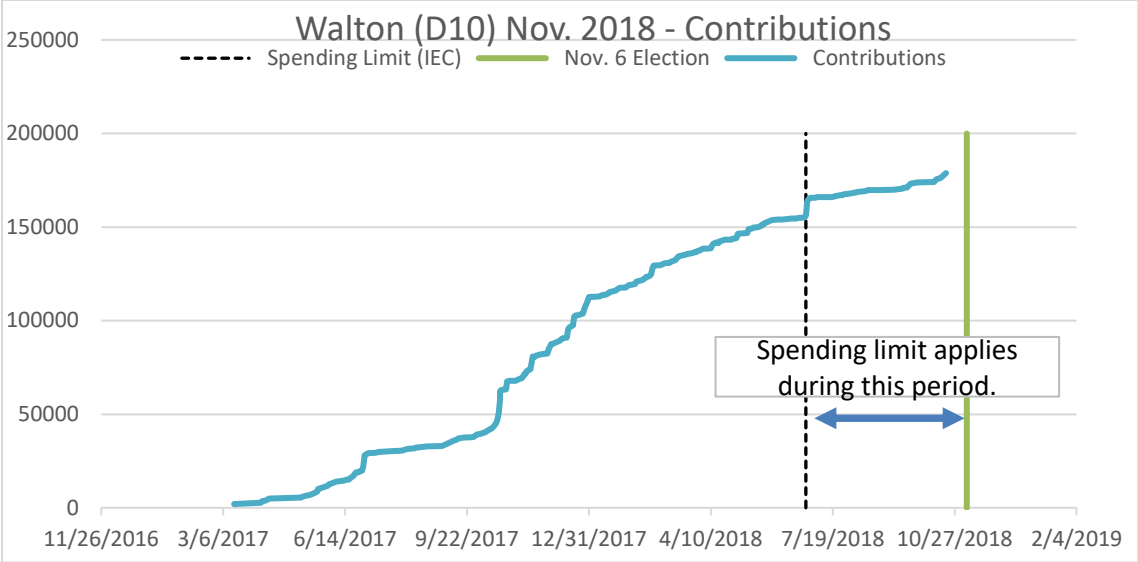

Leno (Mayor) June 2018 - Candidate Funds and Payments
Candidate Funds
Payments
June 5 Election
2500000
2000000
1500000
1000000
500000
0
3/6/2017
6/14/2017
9/22/2017
12/31/2017
4/10/2018
7/19/2018

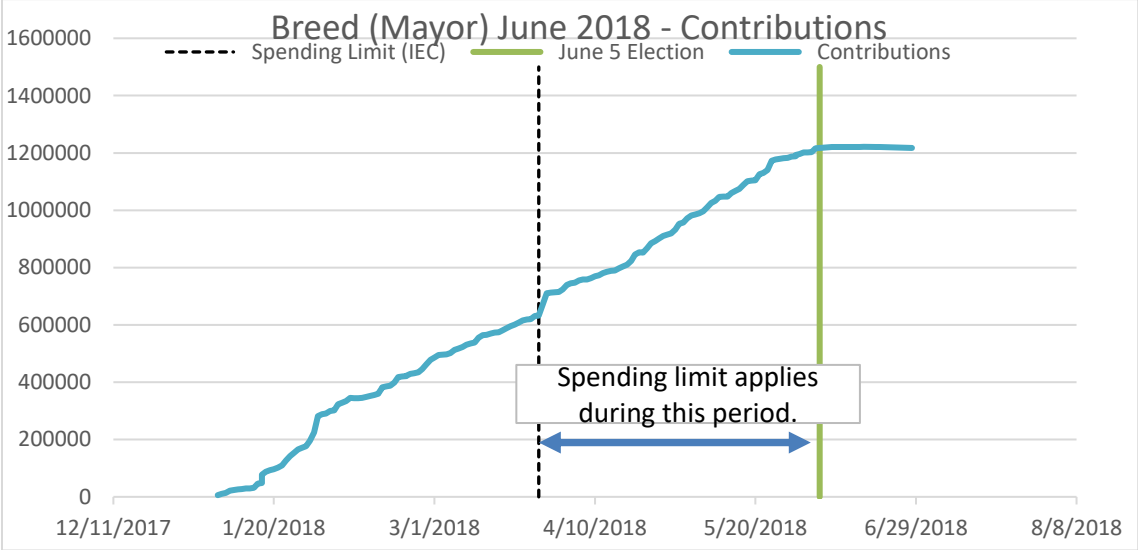


- Even with candidates that were not prevented by spending limits from spending 100 percent of their funds, the candidates tended not to spend all of their funds. Rather, the candidates tended to keep their outgoing payments below the level of their funds received to date.
- During the last month of their respective races the candidates spent most, but not all, of their funds available at the time. On the average day during the last month of the race, Ed Lee had spent 87 percent of his funds received to date, Mark Leno had spent 77 percent of his funds, and Jane Kim had spent 91 percent of her funds.
- The increased spending limits that applied to candidates in the 2018 elections likely did not reduce spending by candidates, even those who had funds in excess of their spending limits. Those candidates, just like the ones not held back by spending limits, would likely have retained a small reserve of cash and not spent 100 percent of their funds at any time. This means that limits preventing the candidates from spending the final five to ten percent of their funds likely did not significantly alter the candidates' behavior.

<u>Candidates do not appear to reduce their fundraising efforts because of spending limits.</u>

In 2018, candidates who already possessed funds in excess of their spending limits did not stop raising money. The following charts display the candidates' fundraising over time, with the solid vertical line representing the date of the election and the dotted vertical line indicating the time when each candidate qualified for public financing and first became subject to spending limits. The charts only include privately raised contributions and do not include public funds received under the Program.





- Walton's fundraising may have decreased slightly after he became subject to spending limits, but not dramatically. Breed's fundraising shows no decrease from the time that the spending limit first applied to her. Thus, the candidates most affected by spending limits in 2018 do not appear to have slowed down their fundraising activity after becoming subject to spending limits.
- Under the current Program, candidates appear to proceed with fundraising irrespective of applicable spending limits that may apply to them. There is thus little risk that candidates will engage in more fundraising under Staff's proposal.
- It is unlikely that, if the Program were to no longer hold a candidate to adjustable spending limits after she had been released from the initial spending limit, candidates would plan in advance to raise much more money than they would under the current rules. Under the proposed ordinance, a candidate would still be subject to the initial spending limit until she was released. If a candidate raised large sums of money, she would likely not be allowed to spend

that money until late in the election when she was released from the limit.[14] Because of this restraint and the uncertainty of when it would be removed, it is unlikely that a candidate who was capable of raising considerably more than the initial spending limit would choose to participate in the Program. Thus, the *initial* IEC alone is a sufficient deterrent to prevent well-funded candidates from using the Program to garner extra, unneeded funds; the subsequent, adjustable spending limits are not needed to provide this necessary deterrent.

In conclusion, the proposed ordinance, which would retain the fixed initial spending limit and eliminate adjustable spending limits, is based on a balancing of policy interests. Holding candidates to adjustable limits after they have been released from the initial spending limit may have some marginal effect on candidate activity. However, that effect is largely speculative and not easily identified in the data. By contrast, the negative impact that adjustable spending limits are having on candidates has already been observed. The complexity that they add to the Program serves to depress participation and cause Program funds to be wasted on compliance costs. The proposed ordinance would therefore discontinue the novel adjustable-limit approach and, instead, continue to rely on the initial, fixed spending limit as the primary restrictor of candidate spending.

B. **Modify how 'Total Supportive Funds' are Calculated**

Amend spending limits to factor in candidate spending, rather than candidate fundraising, for purposes of releasing another candidate from the spending limit.

Candidates who participate in the Program are subject to the spending limit. But, as discussed, candidates will not be held to the initial spending limit once opponent and third-party activity in their race reaches a certain level. Specifically, a participating candidate is no longer held to the initial spending limit if opponent fundraising, independent expenditures in support of that opponent, and independent expenditures opposing the candidate in question together add up to a sum greater than the candidate's spending limit. For purposes of this calculation, a candidate's own funds, plus independent expenditures made in support of that candidate, make up what is known as the candidate's "Total Supportive Funds."

Attachment 1 would change one of the three factors that is considered when determining when candidate is no longer he held to the initial spending limit. Instead of using an opponent's total *contributions received*, the proposed ordinance would instead take the opponent's total *expenditures made* into account.[15] This change is in response to concerns that were expressed by candidates and stakeholders during the 2018 that the current rules lead to undesirable consequences.

[14] For example, under Staff's proposal, London Breed would not have been released from her spending limit until May 15th, three weeks before the election. Any funds that were raised beyond the $1,475,000 spending limit could only be spent after this date.

[15] *Id.* at § 1.104 (draft). The definition of *Total Supportive Funds* (which would be renamed "Total Supportive Spending") would be changed by deleting "contributions received" and replacing it with "expenditures made or expenses incurred."

Specifically, the concern is that, by using opponent *fundraising* as a factor, the current rules can cause an automatic chain reaction with candidates' spending limits. This will occur when two candidates who are running in the same race are the financial frontrunners in that race, are both publicly financed, and have both received funds that exceed their spending limits.

Although the current rules count contributions as a factor for spending limit adjustments, the rules do not count contributions that exceed the candidate's current spending limit. For example, if a supervisorial candidate has raised $300,000 but is still subject to the initial $250,000 spending limit, only $250,000 of that candidate's contributions will be counted when determining her level of *total supportive funds.* The point of this limitation is to only count contributions as being part of the candidate's total supportive funds if the candidate is currently allowed to spend the funds. Only those funds are capable of having an impact on the race at that moment. Currently, funds a candidate may possess that exceed the candidate's spending limit are essentially "locked away" and cannot presently affect the race. But, when a candidate's spending limit is increased, the candidate is instantly allowed to spend some or all of those excess funds. Consequently, the formerly excess funds that no longer exceed the spending limit, must then be counted as part of that candidate's *total supportive funds* (since those funds were "freed up" and could be spent). This, in turn, has the potential of causing the other candidate's spending limit to be increased, since opponent contributions are one of the three factors.

The concern with this outcome is that the candidate whose spending limit was raised first did not engage in any additional fundraising or spending after her spending limit was increased. Nonetheless, her opponent's spending limit was also raised, merely because more of the candidate's funds *could* be spent under her newly increased spending limit. This was criticized as especially unfair when the independent expenditures that triggered the increase to the candidate's spending limit (and, by extension, the increase to the opponent's spending limit after more of the candidate's contributions are freed up) were carried out to benefit that opponent.

Any system for changing one candidate's spending limit based on the financial activity of an opponent must use an objective measure of the opponent's financial activity: the opponent's contributions, the opponent's expenditures, or both (whichever is higher). Currently, the Program uses opponent contributions (up to the level of the opponent's current spending limit) as that measure. The chain reaction described above would be eliminated if the Program instead used opponent expenditures. In that hypothetical, when a candidate's spending limit is increased (or the candidate is released from her spending limit) any excess funds that are thereby "freed up" are irrelevant. Only if the candidate chooses to *spend* those excess funds will they have any effect on the opponent's spending limit.

This change would prevent any automatic increases in one candidate's spending limit caused solely by an increase to another candidate's spending limit. For one, this will end a counterintuitive and arguably undesirable feature of the Program. This phenomenon has caused significant confusion and concern among participating candidates, likely consuming valuable candidate time and resources that could otherwise have been spent on voter outreach, a core Program goal. Additionally, it would grant the affected candidate control over whether and when the excess funds (that can be spent following a change in the candidate's spending limit) will affect the race. Instead of having those funds automatically counted, the candidate would have the ability to decide whether or not to spend the funds, which could potentially change an opponent's spending limit. The candidate may choose not to spend the funds at all in order to avoid the opponent being able to engage in more spending. This

outcome would reduce the overall amount of money spent in the race, one of the core purposes of the Program.

The proposed ordinance represents a better balancing of policy interests because it would secure the benefits discussed above without significant detriments. It is unlikely that a candidate could secure an unfair advantage by delaying spending until late in the election in an attempt to prevent an opponent from being released from the spending limit until a disadvantageous time. For one, candidates will still be subject to 24-hour threshold reporting of expenditures. This will continue to give Staff a timely running total of candidate spending, enabling Staff to release candidates from their spending limits within a short time of the triggering activity. This would make it difficult for a candidate to gain an advantage by delaying spending because, in short order, that spending would release the opponent from the spending limit and allow her to respond. Were a candidate to attempt to delay an opponent's ability to respond by significantly holding up spending by his own campaign, that candidate would be faced with risking his own campaign momentum and risk putting himself at a serious disadvantage by holding onto large amounts of campaign funds that otherwise could be used to communicate with voters and mount a competitive campaign.

Notably, Los Angeles City has used candidate expenditures rather than contributions as part of its formula for releasing publicly financed candidates from spending limits since the program was instituted in 1993. Colleagues there reported no instances of a candidate delaying expenditures for the purpose of preventing spending by a publicly financed opponent.

A Note Regarding Constitutionality

At the November 16th meeting, the Commission raised a question about whether amending the IEC mechanism to factor in candidate expenditures, rather than candidate contributions, could expose the City to a legal challenge. Staff does not believe that this proposal carries a significant risk of a valid legal challenge. Staff's analysis in support of this conclusion is contained in the *Note Regarding Constitutionality*, which is attached to this memorandum as **Attachment 3.**

C. **Eliminate the Campaign Contingency Account and the Trust Account Limit**

Candidates participating in the Program must keep their campaign expenditures below the individual spending limit unless and until those limits are affected by certain activities of third-parties or other candidates their race. Additionally, under current law, a participant may only keep funds in her committee's primary bank account that, if spent, would not exceed the candidate's spending limit. Any excess funds that the candidate possesses must be placed into a separate account. The separate bank account for holding excess contributions is the *Contingency Account* and the rule limiting the balance of the main account is referred to as the *Trust Account Limit.* If a candidate's spending limit is increased, the candidate must move a corresponding amount of funds from the Contingency Account into the main account, because the candidate may now spend these funds without violating the spending limit.

During the 2018 elections, Staff answered many questions from candidates trying to comply with the Trust Account Limit. Candidates expressed confusion about the details of the rule and frustration that it

created a potential pitfall for those who failed to understand the nuances of the rule. It is clear that this requirement has created an added compliance hurdle for participants but in a way that does not support the Program's goals.

The presumed purpose of this requirement was to encourage candidates to keep track of how much money they are allowed to spend under their current spending limit and to force candidates to take the affirmative step of segregating any excess funds to avoid inadvertent overspending. But in practice, the Trust Account Limit and the Contingency Account have not appeared to have any measurable value in preventing violations of the spending limit. There is little reason to think that keeping some funds in a segregated account will make a candidate less likely to exceed her spending limit. For one, a candidate must initially deposit all contributions into her committee's main account, also known as the *trust account*. Within two days, she must then 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.

Furthermore, requiring two separate accounts does not make a meaningful difference in monitoring compliance with spending limits. To monitor compliance with spending limits, auditors must monitor a committee's expenditures to ensure that expenditures are less than the candidate's limit. Monitoring compliance with the Trust Account Limit requires a separate process that involves first determining the candidate's current Trust Account Limit and then monitoring the balance of the committee's main account. The process for monitoring Trust Account Limits does not aid in reviewing spending limit compliance.

The Trust Account Limit thus creates another requirement that committees must comply with and that can result in violations, but it is a mechanism that does not appear to have an observable policy value. Staff is aware of no other jurisdiction that requires publicly financed candidates to maintain segregated accounts in this way; elsewhere, candidates are allowed to keep all funds, including funds that exceed the spending limit, in their trust accounts.[16] Staff recommends that this approach be adopted and that the Trust Account Limit and the Contingency Account rule be eliminated. This would remove an added complicating feature of the Program that fails to support the goals of the Program.

D. **Modify the Statement of Participation Filing Deadline**

To be eligible to participate in the Program, candidates must file the Statement of Participation by the deadline for filing nomination papers with the Department of Elections. The statement must be filed by the candidate with the Ethics Commission indicating whether he or she intends to participate in the public financing program and may not be amended after the deadline for filing nomination papers. During the 2018 elections, several candidates became ineligible by failing to timely file this form. Notably, the deadline has been criticized as being impracticable for candidates who decide to enter the race immediately before the deadline for filing nomination papers. The impact appears to be greatest on

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

candidates who declare their candidacy because of a sudden change in the race, such as an incumbent or other perceived front runner deciding not to run.

To create a brief additional period for candidates to declare their intention to participate in the Program, the proposed ordinance 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 will not undermine the purpose of the Statement of Participation, which is to finalize the set of candidates who may receive public financing at a determined time. It will give all candidates seeking election to a particular office the same knowledge about who the other candidates are in fact, and allow for each to make a fully informed decision about participating in the program. This additional flexibility would help ensure the Program is more accessible to all candidates and would likely support increased participation rates.

III. Proposal to Bar Certain Candidates from Receiving Public Financing

Attachment 2 is a draft ordinance that would bar a candidate from ever receiving public financing if the candidate had previously been found, through an audit by Commission Staff, to have failed to provide sufficient documentation for $10,000 or more of expenditures in a prior election. This rule would apply if the candidate had received money through the Program during the election in which the expenditures occurred.[17] This proposal was initially raised before the the Commission in 2018, and Commissioner Kopp requested that Staff include an analysis of this proposal as part of Phase I of the larger public financing review project.

Additionally, Attachment 2 would bar a candidate from receiving public financing if the candidate had ever failed to pay a late fine or penalty, or to file a form, owed to the City under the Campaign and Governmental Conduct Code (the "Code") or the Political Reform Act (PRA) within two years of the Commission notifying the candidate that the fine, penalty, or form was outstanding.[18] For example, if a candidate paid a late fine more than two years after being told by the Commission that the fine was outstanding, that person would be ineligible to participate in the Program.

Already under current law, candidates are ineligible for the Program if they have late fines, penalties, or forms outstanding.[19] However, a candidate can remedy the problem, and potentially become eligible for the Program, by paying the fine or penalty or filing the form. Attachment 2, however, would foreclose this option if more than two years had passed. Current law also excludes candidates from the Program who have, within the last five years, been found by the Commission or a court to have "knowingly, willfully, or intentionally violated any [s]ection of this Code or the campaign finance provisions" of the PRA.[20] Attachment 2 would broaden this rule to exclude any publicly financed candidate who had

[17] Attachment 2, § 1.140(a)(6) (draft).

[18] *Id.* at § 1.140(a)(3)–(4) (draft).

[19] Campaign & Gov. Conduct Code § 1.140(a)(3)–(4).

[20] *Id.* at § 1.140(a)(5).

previously failed to provide adequate documentation for expenditures, regardless of whether such violation was knowing, willful, or intentional.

For the reasons discussed below, Staff recommends that the Commission not approve Attachment 2.

1. *The type of conduct that would trigger the rule can already result in exclusion from the Program if the candidate's conduct is knowing, willful, or intentional.*

As drafted, Attachment 2 would bar a candidate from receiving public financing if the candidate fails to provide adequate documentation for $10,000 or more of expenditures in a prior election or fails to timely file forms or pay late fines or penalties. At its November 16th meeting, the Commission briefly discussed whether additional conduct should also trigger a bar to future public financing; specifically, whether the trigger should be broadened to also include other violations, for example those related to contribution recordkeeping, false endorsements, illegal coordination with other committees, advertisement disclaimers, Form 700 filings, illegal use of public resources, or accepting contributions from prohibited sources.

Insofar as any of the conduct listed above violates the Code or the Political Reform Act, any such violation by a candidate already will prevent the candidate from qualifying for the program for five years if the violation was found to be knowing, willful, or intentional.[21] This existing provision of the Code shows a clear intent to only exclude individuals from the Program if their prior violations of the Code or the Political Reform Act were committed with an identified, heightened degree of culpability. If a prior violation was not committed in this manner, the Code will still impose penalties pursuant to Code section 1.170. However, such violations will not result in ineligibility for the Program (unless the respondent fails to pay any late fine or penalty that is assessed, in which case the individual will be barred from the Program until the fine or penalty is paid).

The current balance that is struck by Code in only barring candidates from the Program in cases of knowing, willful, or intentional violations appears to be an appropriate one. Violations that are committed knowingly, willfully, or intentionally evidence a conscious disregard for the Code and/or the Political Reform Act. To promote accountability by candidates while also supporting the goal of broad candidate participation, these more egregious or intentional violations are those that warrant a candidate's automatic ineligibility for the Program. Lowering the rule's culpability requirement to a strict liability standard (especially if it were to apply to a broad list of violations) has the potential to unduly exclude candidates from the program whose violations did not exhibit heightened culpability and who have since complied with any penalties that were imposed on them.

2. *Although basing an exclusion from the Program on a violation established through an enforcement proceeding would be superior to basing it merely on an audit finding, this would not cure the problems with the proposal.*

As drafted, Attachment 2 would bar candidates from the Program based on an audit finding of failure to provide documentation of expenditures. The Commission has discussed whether a violation that has been established through an enforcement proceeding, rather than as a finding in a final audit report,

[21] Campaign & Gov. Conduct Code § 1.140(a)(5).

should be the trigger for the bar. As noted above, Staff recommends against adoption of Attachment 2. If, however, the Commission were to approve Attachment 2, a violation established through an enforcement proceeding would be a better triggering event. Following the release of audit reports, the candidates who are the subjects of the reports may provide documentation during an enforcement review. While that information should have been provided during the audit, it can nonetheless result in a determination that substantiates no violation occurred. If an audit finding alone were sufficient to trigger a bar to public financing, such candidates would become ineligible, regardless of whether they were subsequently able to demonstrate, during the course of enforcement review, that no violation had occurred. Even with this amendment, however, Staff believes that the proposal on balance is unwarranted and does not recommend Attachment 2 as a net improvement to the Program.

3. *Although the rules in Attachment 2 would not constitute a true double penalty or implicate retroactivity issues that would prevent the rules from being enacted, these issues are still important policy concerns.*

The approach embodied in Attachment 2 would not technically constitute a penalty because it only pertains to Program eligibility requirements and would not necessarily be imposed on all individuals who violate the Code (some may never apply for public financing and would therefore never be affected). Thus, it cannot be said to be a double penalty imposed on respondents in addition to the standard penalties that can be imposed on any violator of the Code under Code section 1.170. Likewise, since this proposal would be a tightening of eligibility requirements, as opposed to a true penalty, it would be permissible for the Commission to apply this new rule to conduct that occurred prior to the rule's enactment without implicating retroactivity problems.

However, the impact on affected candidates would nonetheless be significant, as public financing is an integral part of City elections for Mayor and Supervisor. Whether candidates should be excluded from the Program for conduct that was not knowing, willful, or intentional is a policy determination that will affect how accessible the Program is to future candidates. In the spirit of the current review project, which is to increase accessibility and boost participation while still maintaining a high level of administrative integrity in the Program, Staff advises against the bar proposed in Attachment 2.

4. *The proposed approach would uniquely limit access to the Program in a way that does not appear to be warranted in San Francisco and that has not been adopted in other public financing jurisdictions.*

Lastly, Staff are not aware of another jurisdiction that has implemented either of the rules contained in Attachment 2. Staff reviewed the laws governing the public financing programs in New York City, Los Angeles, Seattle, and Oakland and did not find such provisions. This indicates that other jurisdictions have not elected to enact the kind of limitation on public financing contained in Attachment 2 and that San Francisco would be an outlier for adopting this approach. Staff does not believe that events in San Francisco warrant this unique approach to limiting access to the Program.

The most similar provisions that Staff found are listed below. San Francisco already has analogous provisions in effect.

- The requirement in Los Angeles that "[t]he candidate or the candidate's controlled committee has filed all previously due campaign statements required by the Political Reform Act, the

Charter, this Code, or the Administrative Code."[22] San Francisco has such a requirement, found in Code section 1.140(a)(4).

- The requirement in New York that publicly financed candidates file any outstanding financial disclosures and pay any outstanding penalties owed to the Campaign Finance Board for any past violations.[23] Again, San Francisco already has such a requirement, set forth in Code section 1.140(a)(3)—(4).
- The requirement in Oakland that candidates file all pre-election statements that are owed at the time that funds are to be distributed under the public financing program.[24] Code section 1.140(a)(4) already imposes this same requirement in San Francisco.

IV. Recommendations

Staff recommends that the Commission approve Attachment 1.

Staff recommends that the Commission take no action on Attachment 2.

[22] Los Angeles Municipal Code § 49.7.23 (2017).

[23] New York City Administrative Code § 3-703(1)(m)–(n) (2018).

[24] Oakland Municipal Code § 3.13.080(g) (2018).

ATTACHMENT 1

FILE NO. ORDINANCE NO.

[Campaign and Governmental Conduct Code - Public Campaign Financing]

Ordinance amending the Campaign and Governmental Conduct Code to modify the operation of individual expenditure ceilings for publicly financed candidates for Board of Supervisors and Mayor.

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
Additions to Codes are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~*strikethrough italics Times New Roman font*~~.
Board amendment additions are in double-underlined Arial font.
Board amendment deletions are in ~~strikethrough Arial font~~.
Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. Chapter 1 of the Campaign and Governmental Conduct Code is hereby amended by revising Sections 1.104, 1.108, 1.140, 1.142, 1.143, and 1.152, to read as follows:

SEC. 1.104. DEFINITIONS.

Whenever in this Chapter 1 the following words or phrases are used, they shall mean:

* * * *

"Total Supportive ~~*Funds*~~ *Spending*" shall mean the sum of all ~~*contributions received*~~ *expenditures made or expenses incurred* by a candidate committee supporting a candidate for Mayor or the Board of Supervisors~~, other than any funds in the candidate's Campaign Contingency Account exceeding the candidate committee's Trust Account Limit~~, plus the expenditures made or expenses incurred by any person or persons for the purpose of making independent expenditures, electioneering communications, or member communications in support of that same candidate.

~~*"Trust Account Limit" shall mean the amount of funds in the Campaign Contribution Trust Account of a candidate committee supporting a candidate for Mayor or the Board of Supervisors whom the Ethics Commission has certified as eligible to receive public funds under this Chapter such that the expenditure of this amount would cause the candidate to reach, but not exceed, the candidate's Individual Expenditure Ceiling. The Trust Account Limit shall be reduced as the candidate spends money and shall be increased when his or her Individual Expenditure Ceiling increases.*~~

* * * *

SEC. 1.108. CANDIDATE COMMITTEE CAMPAIGN CONTRIBUTION TRUST ACCOUNTS ~~*AND CAMPAIGN CONTINGENCY ACCOUNTS*~~**.**

~~*(a) CANDIDATE COMMITTEE CAMPAIGN CONTRIBUTION TRUST ACCOUNTS.*~~

~~*(1)*~~ *(a)* Establishment of Account. Each treasurer for a candidate committee shall establish a Campaign Contribution Trust Account for the candidate committee at an office of a bank located in the City and County of San Francisco. All expenditures by the candidate committee for the City elective office sought shall be made from that account.

~~*(2)*~~ *(b)* Prohibition on Multiple Officeholder Accounts. All funds, services, or in-kind contributions received by a candidate committee for expenses incurred directly in connection with carrying out the candidate's usual and necessary duties of holding office shall be deposited, credited, or otherwise reported to the candidate committee's Campaign Contribution Trust Account. Such contributions shall be subject to the contribution limits in Section 1.114 of this Chapter *1*. An elected officeholder may not establish or control any other committees or accounts for the purpose of making officeholder expenses. Nothing in this Section *1.108* shall prohibit an officer from spending personal funds on official activities.

~~*(3) Account Limits. A candidate committee controlled by a candidate for Mayor or the Board of Supervisors whom the Ethics Commission has certified as eligible to receive public funds*~~

~~*under this Chapter shall not, at any time before the date of the election for which the candidate has been certified, have an amount of funds greater than the candidate committee's Trust Account Limit in its Campaign Contribution Trust Account, unless those contributions are immediately transferred into the candidate committee's Campaign Contingency Account.*~~

~~*(b) CAMPAIGN CONTINGENCY ACCOUNTS FOR CANDIDATE COMMITTEES FOR MAYOR AND THE BOARD OF SUPERVISORS.*~~

~~*(1) Notwithstanding any other section of this Code, including Subsection (a)(2), a candidate committee controlled by a candidate for Mayor or the Board of Supervisors whom the Ethics Commission has certified as eligible to receive public funds under this Chapter may maintain a Campaign Contingency Account separate from its Campaign Contribution Trust Account into which it may deposit money contributions in anticipation that the Ethics Commission will raise the candidate's Individual Expenditure Ceiling. All money contributions deposited into this account shall be reported as if it were deposited into the candidate committee's Campaign Contribution Trust Account.*~~

~~*(2) No candidate committee may deposit any funds into its Campaign Contingency Account if the amount of funds in the candidate committee's Campaign Contribution Trust Account is less than the candidate committee's Trust Account Limit.*~~

~~*(3) No expenditures shall be made from a Campaign Contingency Account established pursuant to this section. Funds may be transferred from the candidate committee's Campaign Contingency Account to the candidate committee's Campaign Contribution Trust Account, provided that the amount of funds in the Campaign Contribution Trust Account does not exceed the candidate committee's Trust Account Limit. All funds that qualify as matching contributions and are transferred from the Campaign Contingency Account to the Campaign Contribution Trust Account shall be eligible to be matched with public funds in accordance with the procedures set forth in this Chapter. Within ten days after the date of the election, the candidate committee shall turn over all funds in the Campaign Contingency Account to the Election Campaign Fund.*~~

SEC. 1.140. ELIGIBILITY TO RECEIVE PUBLIC FINANCING.

(a) REQUIREMENTS FOR ALL CANDIDATES. To be eligible to receive public financing of campaign expenses under this Chapter *1*, a candidate must:

(1) Have filed a statement indicating that ~~*he or she*~~ *the candidate* intends to participate in the public financing program under Section 1.142 of this Chapter.

(2) Agree to the following conditions:

(A) The candidate bears the burden of providing that each contribution the candidate relies upon to establish eligibility is a qualifying contribution;

(B) The candidate bears the burden of proving that expenditures made with public funds provided under this Chapter comply with Section 1.148 of this Chapter;

(C) The candidate will not make any payments to a contractor or vendor in return for the contractor or vendor making a campaign contribution to the candidate or make more than a total of 50 payments, other than the return of a contribution, to contractors or vendor*s* that have made contributions to the candidate;

(D) Notwithstanding Sections 1.114 and 1.116, the candidate shall not loan or donate, in total, more than $5,000 of his or her own money to the campaign;

(E) The candidate shall not accept any loans to his or her campaign with the exception of a candidate's loan to his or her own campaign as permitted by this Section *1.140*; and

(F) The candidate shall agree to participate in at least three debates with the candidate's opponents.

(3) Have paid any outstanding late fines or penalties, owed to the City by the candidate or any of the candidate's previous campaign committees, which were imposed for violations of this Code or the campaign finance provisions of the California Political Reform

Act (Government Code Sections 84100-85704), provided that the Ethics Commission had notified the candidate of such fines or penalties by the time of certification.

(4) Have filed any outstanding forms, owed to the City by the candidate or any of the candidate's previous campaign committees, which were required to be filed pursuant to this Code or the campaign finance provisions of the Political Reform Act (Government Code Sections 84100-85704), provided that the Ethics Commission had notified the candidate of such outstanding forms by the time of certification.

(5) Have no 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 (Government Code Sections 84100-85704). For purposes of this Section *1.140*, a plea of nolo contendere constitutes a finding by a court of a willful violation.

(b) ADDITIONAL REQUIREMENTS FOR CANDIDATES FOR THE BOARD OF SUPERVISORS. To be eligible to receive public financing of campaign expenses under this Chapter *1*, a candidate for the Board of Supervisors must:

(1) Be seeking election to the Board of Supervisors and be eligible to hold the office sought;

(2) Have a candidate committee that has received at least $10,000 in qualifying contributions from at least 100 contributors before the 70th day before the election; or, if the candidate is an incumbent member of the Board of Supervisors, have a candidate committee that has received at least $15,000 in qualifying contributions from at least 150 contributors before the 70th day before the election;

(3) Be opposed by another candidate who has either established eligibility to receive public financing, or whose candidate committee has received contributions or made expenditures which in the aggregate equal or exceed $10,000; and

(4) Agree that his or her candidate committee will not make qualified campaign expenditures that total more than the candidate's Individual Expenditure Ceiling of $250,000, ~~*or as adjusted*~~ *unless the Ethics Commission has lifted the candidate's Individual Expenditure Ceiling* under Section 1.143 of this Chapter.

(c) ADDITIONAL REQUIREMENTS FOR CANDIDATES FOR MAYOR. To be eligible to receive public financing of campaign expenses under this Chapter *1*, a candidate for Mayor must:

(1) Be seeking election to the office of Mayor and be eligible to hold the office sought;

(2) Have a candidate committee that has received at least $50,000 in qualifying contributions from at least 500 contributors by the 70th day before the election; or, if the candidate is the incumbent Mayor, have a candidate committee that has received at least $75,000 in qualifying contributions from at least 750 contributors by the 70th day before the election;

(3) Be opposed by another candidate who has either established eligibility to receive public financing, or whose candidate committee has received contributions or made expenditures that in the aggregate equal or exceed $50,000; and

(4) Agree that his or her candidate committee will not make qualified campaign expenditures that total more than the candidate's Individual Expenditure Ceiling of $1,475,000, ~~*or as adjusted*~~ *unless the Ethics Commission has lifted the candidate's Individual Expenditure Ceiling* under Section 1.143 of this Chapter.

(d) ADJUSTMENT OF EXPENDITURE LIMITS AND THRESHOLDS. The Ethics Commission is authorized to adjust:

(1) The figures in *S*ubsections (b)(4) and (c)(4) to reflect changes in the California Consumer Price Index, provided that such adjustments shall be rounded off to the

nearest $1,000 for candidates for the Board of Supervisors and the nearest $5,000 for candidates for Mayor;

(2) The figure in *Ss*ubsection (a)(2)(D) ~~*of this Section*~~ to reflect changes in the California Consumer Price Index, provided that such adjustments shall be rounded off to the nearest $1,000;

(3) The figures in *Ss*ubsections (b)(2) and (b)(3) ~~*of this Section*~~ to reflect changes in the California Consumer Price Index, provided that such adjustments shall be rounded off to the nearest $500;

(4) The figures in *Ss*ubsections (c)(2) and (c)(3) ~~*of this Section*~~ to reflect changes in the California Consumer Price Index, provided that such adjustments shall be rounded off to the nearest $5,000; and

(5) The maximum amount of a contribution that constitutes a qualifying contribution pursuant to Section 1.104 to reflect changes in the California Consumer Price Index, provided that such adjustments shall be rounded off to the nearest $10.

SEC. 1.142. PROCESS FOR ESTABLISHING ELIGIBILITY; CERTIFICATION BY THE ETHICS COMMISSION.

(a) STATEMENT OF PARTICIPATION OR NON-PARTICIPATION. Each candidate for the Board of Supervisors or Mayor must sign and file a Statement of Participation or Non-Participation in the public financing program. The statement must be filed by the candidate with the Ethics Commission no later than *the third day following* the deadline for filing nomination papers. On the statement, each candidate shall indicate whether ~~*he or she*~~ *the candidate* intends to participate in the public financing program. A statement of participation or non-participation may not be amended after the deadline for filing nomination papers.

If any deadline imposed by this subsection (a) falls on a Saturday, Sunday, or legal holiday, the deadline shall be the next business day.

(b) DECLARATION BY CANDIDATE. To become eligible to receive public financing of campaign expenses under this Chapter *1*, a candidate shall declare, under penalty of perjury, that the candidate satisfies the requirements specified in Section 1.140. Candidates shall be permitted to submit the declaration and any supporting material required by the Ethics Commission to the Ethics Commission no earlier than nine months before the date of the election, but no later than the 70th day before the election. Once the declaration and supporting material are submitted, they may not be amended. 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.

If any deadline imposed by this *Ss*ubsection *(b)* falls on a Saturday, Sunday, or legal holiday, the deadline shall be the next business day.

(c) DETERMINATION OF ELIGIBILITY. The Executive Director of the Ethics Commission shall review the candidate's declaration and supporting material to determine whether the candidate is eligible to receive public funds under this Chapter *1*. The Executive Director may audit the candidate's records, interview contributors, and take whatever steps the Executive Director deems necessary to determine eligibility. At the request of the Executive Director, the Controller shall assist in this review process.

(d) DETERMINATION OF OPPOSITION. To determine whether a candidate for the Board of Supervisors is opposed as required under Section 1.140(b)(3) of this Chapter *1* or a candidate for Mayor is opposed as required under Section 1.140(c)(3) of this Chapter, the Executive Director shall review the material filed pursuant to Section 1.152 of this Chapter, and may review any other material.

(e) CERTIFICATION. If the Executive Director determines that a candidate for Mayor or the Board of Supervisors has satisfied the requirements of Section 1.140, the Executive Director shall notify the candidate and certify to the Controller that the candidate is eligible to receive public financing under this Chapter *1*. The Executive Director shall not certify that a candidate is eligible to receive public financing if the candidate's declaration or supporting material is incomplete or otherwise inadequate to establish eligibility. ~~*Except as provided in subsection (h), the*~~ *The* Executive Director shall determine whether to certify a candidate no later than 30 days after the date the candidate submits his or her declaration and supporting material, provided that the Executive Director shall make all determinations regarding whether to certify a candidate no later than the 55th day before the election.

(f) RESUBMISSION. If the Executive Director declines to certify that a candidate is eligible to receive public financing under this Chapter *1*, the Executive Director shall notify the candidate. 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.

If, after viewing resubmitted material, the Executive Director declines to certify that a candidate is eligible to receive public financing under this Chapter, the Executive Director shall notify the candidate of this fact. Additional resubmissions may be permitted in the Executive Director's discretion. If the candidate fails to resubmit in the time specified by the Executive Director, or if no further resubmissions are permitted, the Executive Director's determination is final.

(g) APPEAL TO THE ETHICS COMMISSION. If the Executive Director declines to certify that a candidate is eligible to receive public financing under this Chapter *1*, 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.

SEC. 1.143. *~~ADJUSTING~~* *LIFTING* INDIVIDUAL EXPENDITURE CEILINGS.

This Section *1.143* shall apply only if the Ethics Commission has certified that at least one candidate for Mayor or the Board of Supervisors is eligible to receive public funds under this Chapter *1*.

(a) The Executive Director shall *~~adjust~~* *lift* the Individual Expenditure Ceiling, *~~of~~* *and the Individual Expenditure Ceiling shall no longer be binding on* a candidate for Mayor, *~~to an amount equal to~~* *if* the sum of the Total Opposition Spending against that candidate and the highest level of the Total Supportive *~~Funds~~* *Spending* of any other candidate for Mayor *~~if such amount~~* is greater than $1,475,000*~~, provided that the Executive Director may adjust a candidate's Individual Expenditure Ceilings only in increments of $100,000~~*.

(b) The Executive Director shall *~~adjust~~* *lift* the Individual Expenditure Ceiling, *~~of~~* *and the Individual Expenditure Ceiling shall no longer be binding on* a candidate for the Board of Supervisors, *~~to an amount equal to~~* *if* the sum of the Total Opposition Spending against that candidate and the highest level of the Total Supportive *~~Funds~~* *Spending* of any other candidate for the same office on the Board of Supervisors *~~if such amount~~* is greater than $250,000*~~, provided the Executive Director may adjust a candidate's Individual Expenditure Ceiling only in increments of $10,000~~*.

(c) The Executive Director shall promptly review statements filed pursuant to state and local law, including Government Code section 84204 and Sections 1.161, 1.162, and 1.163 of this Chapter *1*, to determine whether a communication supports or opposes one or more candidates.

Factors the Executive Director shall use to determine whether the communication supports or opposes one or more candidates include the following:

(1) whether the communication clearly identifies one or more candidates;

(2) the timing of the communication;

(3) the voters targeted by the communication;

(4) whether the communication identifies any candidate's position on a public policy issue and urges the reader or viewer to take action, including calling the candidate to support or oppose the candidate's position;

(5) whether the position of one or more candidates on a public policy issue has been raised as distinguishing these candidates from others in the campaign, either in the communication itself or in other public communications;

(6) whether the communication is part of an ongoing series of substantially similar advocacy communications by the organization on the same issue; and

(7) any other factors the Executive Director deems relevant.

(d) Within one business day of the date that the Executive Director makes a determination under ~~S~~subsection (c), either the candidate(s) identified in the communication or any candidate seeking the same City elective office as the candidate identified in the communication may object to the Executive Director's determination. The Executive Director shall respond to any objection within one business day of receiving the objection.

(e) Within one business day of the Executive Director's response, either the candidate(s) identified in the communication or any candidate seeking the same City elective office as the candidate identified in the communication may submit to the Executive Director a request that the Ethics Commission review the Executive Director's determination. Within one business day of receiving the request, the Executive Director shall notify each Commissioner of the candidate's request.

If within one business day of the Executive Director's notice, two or more members of the Commission inform the Executive Director that they would like to review the determination, the Executive Director shall schedule a meeting of the Commission on a date that occurs within one week of the Commissioners' requests. If three members of the Commission vote to overrule the Executive Director's determination, the Commission shall make a final determination based on the factors set forth above.

(f) If no candidate objects to the Executive Director's determination, if no candidate requests review by the Commission of the Executive Director's determination, if a request is made and two or more members of the Commission do not request to review the determination, or within one week of two members of the Commission requesting to review the Executive Director's determination, at least three members of the Commission do not vote to overrule the Executive Director's determination, the Executive Director's determination shall become final.

The Executive Director shall determine whether to ~~*adjust*~~ *lift* the Individual Expenditure Ceilings of each candidate for Mayor or the Board of Supervisors pursuant to either ~~*S*~~*s*ubsection (a) or (b) ~~*of this Section*~~ within one business day of a final determination.

SEC. 1.152. SUPPLEMENTAL REPORTING IN ELECTIONS FOR BOARD OF SUPERVISORS AND MAYOR.

(a) ELECTIONS FOR THE BOARD OF SUPERVISORS.

(1) In addition to the campaign disclosure requirements imposed by the California Political Reform Act and other provisions of this Chapter *1*, each candidate committee supporting a candidate for the Board of Supervisors shall file a statement with the Ethics Commission indicating when the committee has received contributions to be deposited

into its Campaign Contribution Trust Account or made expenditures that equal or exceed ~~$5,000~~ $10,000 within 24 hours of reaching or exceeding that amount.

(2) In addition to the supplemental report in ~~S~~subsection (a)(1) ~~of this Section~~, each candidate committee supporting a candidate for the Board of Supervisors shall file a statement with the Ethics Commission disclosing when the committee has ~~received contributions to be deposited into its Campaign Contribution Trust Account or~~ made expenditures that in the aggregate equal or exceed $100,000. The candidate committee shall file this report within 24 hours of reaching or exceeding the threshold. Thereafter, the candidate committee shall file an additional supplemental report within 24 hours of every time the candidate committee ~~receives additional contributions to be deposited into its Campaign Contribution Trust Account or~~ makes additional expenditures that in the aggregate equal or exceed $10,000.

(3) The Executive Director shall post the information disclosed on statements required by this subsection (a) on the website of the Ethics Commission within two business days of the statement's filing.

(b) ELECTIONS FOR MAYOR.

(1) In addition to the campaign disclosure requirements imposed by the California Political Reform Act and other provisions of this Chapter 1, each candidate committee supporting a candidate for Mayor shall file a statement with the Ethics Commission indicating when the candidate committee has received contributions to be deposited into its Campaign Contribution Trust Account or made expenditures that equal or exceed $50,000 within 24 hours of reaching or exceeding that amount.

(2) In addition to the supplemental report in ~~S~~subsection (b)(1) ~~of this Section~~, each candidate committee supporting a candidate for Mayor shall file a statement with the Ethics Commission disclosing when the candidate committee has ~~received contributions to be~~

~~*deposited into its Campaign Contribution Trust Account or*~~ made expenditures that in the aggregate ~~–~~equal or exceed $1,000,000. The candidate committee shall file this report within 24 hours of reaching or exceeding the threshold. Thereafter, the candidate committee shall file an additional supplemental report within 24 hours of every time the candidate committee ~~*receives additional contributions or*~~ makes additional expenditures that in the aggregate equal or exceed $50,000.

(3) The Executive Director shall post the information disclosed on statements required by this subsection *(b)* on the website of the Ethics Commission within two business days of the statement's filing.

(c) The supplemental statements required by *Ss*ubsections (a)(2) and (b)(2) are not required until the Ethics Commission has certified that at least one candidate is eligible to receive public funds under this Chapter *1*, provided that within two business days of the date that the Ethics Commission provides notice under this subsection that it has certified that a candidate is eligible to receive public funds under this Chapter, any report that previously would have been required under *subsections* (a)(2) and (b)(2) must be filed. Within two business days of certifying that at least one candidate is eligible to receive public financing under this Chapter, the Ethics Commission shall post a notice on its website, send out a press release, and send written notice by regular or electronic mail to all other candidates running for the same City elective office and to any other person who has requested such notice.

Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

Section 4. Severability. If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or unconstitutional without regard to whether any other portion of this ordinance or application thereof would be subsequently declared invalid or unconstitutional.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: _____
ANDREW SHEN
Deputy City Attorney

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ATTACHMENT 2

FILE NO. ORDINANCE NO.

[Campaign and Governmental Conduct Code - Eligibility for Public Financing]

Ordinance amending the Campaign and Governmental Conduct Code to modify eligibility requirements for candidates to receive public financing.

NOTE: **Unchanged Code text and uncodified text** are in plain Arial font.
Additions to Codes are in *single-underline italics Times New Roman font*.
Deletions to Codes are in ~~*strikethrough italics Times New Roman font*~~.
Board amendment additions are in double-underlined Arial font.
Board amendment deletions are in ~~strikethrough Arial font~~.
Asterisks (* * * *) indicate the omission of unchanged Code subsections or parts of tables.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The Campaign and Governmental Conduct Code is hereby amended by revising Section 1.140, to read as follows:

SEC. 1.140. ELIGIBILITY TO RECEIVE PUBLIC FINANCING.

(a) REQUIREMENTS FOR ALL CANDIDATES. To be eligible to receive public financing of campaign expenses under this Chapter, a candidate must:

(1) Have filed a statement indicating that he or she intends to participate in the public financing program under Section 1.142 of this Chapter.

(2) Agree to the following conditions:

(A) The candidate bears the burden of providing that each contribution the candidate relies upon to establish eligibility is a qualifying contribution;

(B) The candidate bears the burden of proving that expenditures made with public funds provided under this Chapter comply with Section 1.148 of this Chapter;

(C) The candidate will not make any payments to a contractor or vendor in return for the contractor or vendor making a campaign contribution to the candidate or

make more than a total of 50 payments, other than the return of a contribution, to contractors or vendor that have made contributions to the candidate;

(D) Notwithstanding Sections 1.114 and 1.116, the candidate shall not loan or donate, in total, more than $5,000 of his or her own money to the campaign;

(E) The candidate shall not accept any loans to his or her campaign with the exception of a candidate's loan to his or her own campaign as permitted by this Section; and

(F) The candidate shall agree to participate in at least three debates with the candidate's opponents.

(3) Have paid any outstanding late fines or penalties, owed to the City by the candidate or any of the candidate's previous campaign committees, which were imposed for violations of this Code or the campaign finance provisions of the California Political Reform Act (Government Code Sections 84100-85704), ~~*provided*~~ *within two years of the date* that the Ethics Commission had notified the candidate of such fines or penalties ~~*by the time of certification*~~.

(4) Have filed any outstanding forms, owed to the City by the candidate or any of the candidate's previous campaign committees, which were required to be filed pursuant to this Code or the campaign finance provisions of the Political Reform Act (Government Code Sections 84100-85704), ~~*provided*~~ *within two years of the date* that the Ethics Commission had notified the candidate of such outstanding forms ~~*by the time of certification*~~.

(5) Have no 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 (Government Code Sections 84100-85704). For purposes of this Section, a plea of nolo contendere constitutes a finding by a court of a willful violation.

(6) For a candidate that received public financing in connection with a previous campaign under this Chapter 1, have no Ethics Commission audit finding that the candidate's prior publicly financed campaign failed to maintain complete campaign records for expenditures, in violation of Sections 1.106 and 1.109, and Government Code Section 84104, where the amount of expenditures for which there was incomplete records totaled $10,000 or more.

* * * *

Section 2. Effective Date. This ordinance shall become effective 30 days after enactment. Enactment occurs when the Mayor signs the ordinance, the Mayor returns the ordinance unsigned or does not sign the ordinance within ten days of receiving it, or the Board of Supervisors overrides the Mayor's veto of the ordinance.

Section 3. Scope of Ordinance. In enacting this ordinance, the Board of Supervisors intends to amend only those words, phrases, paragraphs, subsections, sections, articles, numbers, punctuation marks, charts, diagrams, or any other constituent parts of the Municipal Code that are explicitly shown in this ordinance as additions, deletions, Board amendment additions, and Board amendment deletions in accordance with the "Note" that appears under the official title of the ordinance.

Section 4. Severability. If any section, subsection, sentence, clause, phrase, or word of this ordinance, or any application thereof to any person or circumstance, is held to be invalid or unconstitutional by a decision of a court of competent jurisdiction, such decision shall not affect the validity of the remaining portions or applications of the ordinance. The Board of Supervisors hereby declares that it would have passed this ordinance and each and every section, subsection, sentence, clause, phrase, and word not declared invalid or

unconstitutional without regard to whether any other portion of this ordinance or application thereof would be subsequently declared invalid or unconstitutional.

Section 5. Undertaking for the General Welfare. In enacting and implementing this ordinance, the City is assuming an undertaking only to promote the general welfare. It is not assuming, nor is it imposing on its officers and employees, an obligation for breach of which it is liable in money damages to any person who claims that such breach proximately caused injury.

APPROVED AS TO FORM:
DENNIS J. HERRERA, City Attorney

By: _____
ANDREW SHEN
Deputy City Attorney

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ATTACHMENT 3

A Note Regarding Constitutionality

At the November 16, 2018 meeting, the Commission raised a question about whether amending the IEC mechanism to factor in candidate expenditures, rather than candidate contributions, could expose the City to a legal challenge. Staff does not believe that this proposal carries a significant risk of a valid legal challenge. Staff reviewed several public financing programs across the country and confirmed that many such programs use opponent expenditures as a basis for releasing candidates from spending limits. Several notable examples are Los Angeles,[1] New York City,[2] Seattle,[3] Oakland,[4] and Minnesota.[5]

[1] Los Angeles Municipal Code § 49.7.25 (2017). "The applicable expenditure ceiling is no longer binding on a participating candidate in either of the following scenarios: (A.) ***A non-participating candidate in the same race makes or incurs campaign expenditures*** in excess of the expenditure ceiling; or (B.) ***Independent expenditure communications*** under Section 49.7.31(A)(1) in support of or opposition to any candidate in the same race ***exceed, in the aggregate, the following amounts***: (1.) $77,000 in a City Council election; (2.) $155,000 in a City Attorney or Controller election; (3.) $309,000 in a Mayoral election." *Id.* [formatting and emphasis added].

[2] New York City Administrative Code § 3-706(3)(b) (2018). "If any candidate in any covered election chooses not to file a certification as a participating or limited participating candidate pursuant to this chapter, and where the campaign finance board has determined that such ***candidate and his or her authorized committees have spent or contracted or have obligated to spend***, or received in loans or contributions, or both, an amount which, in the aggregate, exceeds three times the applicable expenditure limit for such office fixed by subdivision one of this section, then … such expenditure limit shall no longer apply to participating candidates and limited participating candidates in such election for such office …." *Id.* [formatting and emphasis added].

[3] Seattle Municipal Code § 2.04.630(f) (2015). "If a qualified candidate demonstrates to SEEC that he or she has an ***opponent (whether or not participating in the Program) whose campaign spending has exceeded the Campaign Spending Limit for the position sought*** as indicated above, where SEEC deems the excess material it shall allow such candidate to choose to be released from the Campaign Spending Limit …. SEEC shall also release a qualifying candidate from the Campaign Spending Limit to the extent that it is shown (on application of a Seattle candidate or citizen) that said qualified candidate faces ***independent expenditures*** … adverse to the candidate or in favor of an opponent and the sum of such independent expenditures plus said candidate's opponent's campaign spending materially exceeds the Campaign Spending Limit for that office." *Id.* [formatting and emphasis added].

[4] Oakland Municipal Code § 3.12.220 (2018). "If a candidate declines to accept expenditure ceilings and receives contributions or ***make [sic] qualified campaign expenditures equal to fifty (50) percent or more of the expenditure ceiling***, or if an ***independent expenditure committee in the aggregate spends*** more than fifteen thousand dollars ($15,000.00) on a District City Council or School Board election or seventy thousand dollars ($70,000.00) in a City Attorney, Auditor, Councilmember-at-Large or Mayoral election, the applicable expenditure ceiling shall no longer be binding on any candidate running for the same office …." *Id.* [formatting and emphasis added].

[5] Minnesota Statutes § 10A.25, subd. 10 (2018). "After the deadline for filing a spending limit agreement under section 10A.322, a candidate who has agreed to be bound by the expenditure limits imposed by this section as a condition of receiving a public subsidy for the candidate's campaign may choose to be released from the expenditure limits but remain eligible to receive a public subsidy if the candidate has an ***opponent who has*** not agreed to be bound by the limits and has received contributions or ***made or become obligated to make expenditures during that election cycle in excess of the following limits***: (1) up to the close of the reporting period before the primary election, receipts or expenditures equal to 20 percent of the election segment expenditure limit for that office as set forth in subdivision 2; or (2) after the close of the reporting period before the primary election, cumulative receipts or expenditures during that election cycle equal to 50 percent of the election cycle expenditure limit for that office as set forth in subdivision 2. *Id.* [formatting and emphasis added].

Additionally, Los Angeles, Seattle and Oakland also take third party expenditures into account for purposes of lifting spending limits, as San Francisco already does.[6]

Staff could only find one instance in which a public financing program was subjected to a legal challenge because it lifted spending limits in response to candidate (or third party) spending. This challenge was not successful, and the provision in question is still in effect. In 2013, prospective candidates filed suit against New York City's Campaign Finance Board, "challeng[ing] provisions of the New York City Administrative Code … which raise expenditure limits … for candidates participating in public financing when their opponents' spending and contribution receipts cross certain thresholds …."[7] In *Ognibene v. Parkes*, the U.S. District Court for the Southern District of New York upheld the use of opponent spending as a basis for lifting the spending limit of a publicly financed candidate, reasoning that:

> the Expenditure Relief provisions at issue here merely put publicly funded candidates in the same position as non-publicly funded candidates—they have the opportunity to spend competitively, provided that they can raise the funds with which to do so. This opportunity gives them no advantage over privately funded candidates, and certainly imposes no substantial burden on the privately funded candidates' decision to exercise their First Amendment rights.[8]

The court in *Parkes* distinguished New York's spending limit mechanism from the public financing law struck down by the U.S. Supreme Court in *Arizona Free Enterprise Club v. Bennett* in that "the Expenditure Limit Relief provisions do not put non-participating candidates to the choice of refraining from speech or causing their participating opponents to receive direct infusions of public money."[9] The court emphasized that, "[c]rucially, the amount of public funding a participating candidate may receive is not affected by an increase in the expenditure limit. Even where a participating candidate's expenditure limit is removed *entirely*, the participating candidate's public maximum funding limit remains set…."[10] Although this decision would not bind courts in San Francisco were the Program to be challenged, it indicates that a meaningful distinction has already been made between the IEC mechanism proposed by Staff and the public financing provisions that were struck down in *Arizona Free Enterprise* and related cases.

In light of federal court treatment of expenditure-based spending limit mechanisms, as well as the widespread adoption of this model in other jurisdictions, Staff still recommends that the Commission amend the IEC in the ways set forth in Attachment 1.

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[6] *See* Campaign & Gov. Conduct Code § 1.104 (definitions of "Total Supportive Funds" and "Total Opposition Spending"), 1.143(a)–(b).
[7] Ognibene v. Parkes, No. 08 Civ. 1335, 2013 U.S. Dist. LEXIS 49083, *1–2 (S.D.N.Y. April 4, 2013).
[8] *Id.* at *20.
[9] *Id.* at *21.
[10] *Id.* at *22.

Public comment received by the time this report was issued.

January 11, 2019

Re: *Opposition to proposal to eliminate – or "lift" – spending limits in publicly financed elections*

Dear Ethics Commissioners:

I am a long-time campaign finance reform advocate and have worked over the last two decades as a campaign manager on San Francisco Supervisorial and Mayoral campaigns involving public financing.

In advance of your January 18 meeting I want to concur with the Ethics Commission staff's assessment that the existing process to raise Independent Expenditure Ceilings in publicly financed candidate campaigns is flawed. However, I strongly oppose the staff proposal to eliminate - or "lift" - spending limits for candidates in publicly financed elections when another candidate exceeds the spending limit by any amount. In an effort to simplify the system, this proposal would instead have the detrimental effect of further increasing the flood of big money into politics and favoring big money-backed candidates over grassroots candidates. It would mean that, in every competitive candidate race, there would ultimately be no spending limits. All future candidates would then operate with the understanding that the sky's the limit.

Instead, I would like to offer an alternative proposal supported by a number of campaign reform advocates that would address the flaws in the current system without having the effect of abolishing spending limits altogether.

The alternative proposal would simply change two things:

First, increase the increment that the IECs are raised by. A suggestion would be to raise the IEC in Supervisorial races from $10,000 to $50,000 and in Mayoral races from $100,000 to $250,000, but those amounts could be lower.

Second, change the "trigger" for raising IECs to $1 over the spending limit, instead of the full amount of the IEC increase ($10,000 currently in Supervisor races, $100,000 currently in Mayoral races).

Changing both of these together, and they must be done together, would strengthen the ability of publicly financed candidates who abide by the spending limits to respond when they are attacked or outspent by Independent Expenditures or self-funded candidates. At the same time, it would significantly reduce the number of times in a campaign that the IEC would have to be increased, which would reduce the administrative burden on both candidates and Ethics staff.

I would encourage the Ethics Commission to not approve the staff proposal and to instead consider this alternative. Thank you for your time and consideration.

Sincerely,

Jon Golinger