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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: February 2, 2009

RE: Proposed Amendments To The Oakland Campaign Reform Act From The Commission's Lobbyist Registration And Campaign Finance Committee

Attached is a revised "redline" demonstrating the Committee's proposed changes to the Oakland Campaign Reform Act ("OCRA"). The redline incorporates those modifications made by the Committee during the past year in its review of the ordinance. The redline has been annotated to provide the Commission with explanations and/or rationales for the proposed changes. ***Attachment 1.***

Commission staff would like to call the Commission's attention to three provisions contained in the redline:

1) Proposed Section 3.12.070 ("Limitation On Contributions To Persons Making Independent Expenditures")

Proposed Section 3.12.070 revises and consolidates existing provisions in Sections 3.12.505(C)-(F) and 3.12.060(C)-(F). Those existing sections regulate contributions to committees that make independent expenditures supporting or opposing local candidates. The Committee has discussed revising those existing sections to assist in their future interpretation and administration.

Currently, Sections 3.12.050(C)-(F) and 3.12.060(C)-(F) are subject to a stipulated stay order issued by a federal district court that precludes their application and enforcement pending the outcome of litigation in the matter of OAKPAC et al v. City of Oakland, Public Ethics Commission. The lawsuit is challenging the constitutionality of these subsections. Since it is possible that the lawsuit may still be pending when and if the Commission requests the City Council to consider

adoption of proposed Section 3.12.070, Commission staff recommends that the Committee consider adding a new subparagraph 3.12.070(F) to read as follows:

(F) Section 3.12.070 shall not become effective until 1) a final decision, resolution or settlement is reached in the case of OAKPAC, Oakland Metropolitan Chamber Of Commerce et al v. City Of Oakland, The City Of Oakland Public Ethics Commission; U.S. District Court, Northern District Of California; Case. No. C06-6366 and 2) the City Council specifies by resolution a date on which Section 3.12.070 shall become effective.

2) Proposed Section 3.12.180 ("Legal Expense Fund")

Proposed Section 3.12.180(E) would impose restrictions on what can be done with any balance remaining in a so-called "legal expense fund" after the conclusion of legal proceedings. Current OCRA provisions permit local officeholders and candidates to establish a legal expense fund to defray costs associated with defending actions challenging their conduct in a campaign, election or in the performance of officeholder duties.

Proposed Section 3.12.180(E) currently provides:

~~3.12.170~~3.12.180 Legal Expense Funds

A. An elected city officeholder or candidate for city office may receive contributions for a separate legal expense fund, for deposit into a separate account, to be used solely to defray attorney's fees and other legal costs incurred in the candidate's or officeholder's legal defense to any civil, criminal, or administrative action or actions arising directly out of the conduct of the campaign or election process, or the performance of the candidate's or officeholder's governmental activities and duties. Contributions to the legal expense fund must be earmarked by the contributor for contribution to the fund at the time the contribution is made. All funds contributed to an officeholder or candidate for legal expense fund must be deposited into the officeholder's appropriate campaign bank account prior to being deposited into the legal expense fund. The legal expense fund may be in the form of a certificate of deposit, interest-bearing savings account, money market account, or similar account, which shall be established only for the legal expense fund.

B. ~~Contributions received by or made to the~~No person shall make to any elected City officeholder or candidate for City office, and no elected City officeholder or candidate for City office shall accept from any person, a contribution or contributions to a legal expense fund ~~shall not be subject to the contribution limitations of Article III of this Act.~~totaling more than the amount permitted in Section 3.12.050(B), as adjusted, during any calendar year.

C. Expenditures made from the legal expense fund shall not be subject to the voluntary expenditure ceilings of Article IV of this Act.

D. Prior to the receipt of any contributions to a legal expense fund, the officeholder or candidate shall file with the Office of the City Clerk a form entitled "Statement Of Proceedings" that identifies the specific civil, criminal or administrative proceedings for which the legal expense fund is established. Information on the form shall include the case or administrative proceeding number, the case name or title of proceedings, and the venue or location of the proceedings.

E. No legal expense fund balance remaining after any court case or proceeding in connection with which the funds were raised may be transferred to any other person, fund or committee. Within six months after final conclusion of the lawsuit or proceeding and the payment of all debts incurred in connection with that lawsuit or proceeding, any surplus in the legal expense fund must be returned to the donors on a pro rata basis or given to the City of Oakland general fund.

In October, 2008, the FPPC implemented a new administrative regulation that directly addresses the creation and use of legal expense funds by local jurisdictions. Administrative Regulation 18530.45 provides:

1. Candidates or officers must create and deposit legal defense funds deposit in a separate bank account and create a controlled committee for each account. The statement of organization shall for the new committee shall describe the specific legal dispute(s) for which the account is established.

2. The candidate or officer must keep and maintain all records in connection with the legal defense fund. Any random state audit of campaign records shall include an audit of the legal defense funds.

3. The candidate or officer must file campaign statements for the legal defense at the same time and manner as any other candidate committee.

4. Local jurisdictions may impose different requirements, including a contribution limit, on a legal defense fund or legal defense committee as long as the local requirements are at least as strict as the state law pertaining to the establishment of the committee, recordkeeping and reporting.

5. Candidates may only raise legal defense funds "reasonably calculated to pay, and may only be expended for, attorney's fees and other related legal costs." The regulation defines what constitutes "attorney's fees" and "legal costs" and places further limitations on when a candidate or officer can begin raising legal defense funds.

6. If the total remaining funds exceed $5,000, the entire sum shall be returned to the donors on a pro rata basis. Remaining funds totaling less than $5,000 may be disposed in a manner similar to "surplus campaign funds" as provided under the Political Reform Act.

The new administrative regulation directly affects existing Section 3.12.170 and proposed Section 3.12.180. Commission staff will return at a subsequent meeting with language harmonizing the new state administrative requirements with the Committee's proposed changes.

3) Proposed Section 3.12.230 ("Expenditure Ceilings Lifted")

The Committee is proposing slight modifications to existing law that lifts the voluntary expenditure ceiling in situations where a committee making independent expenditures expends more than specified amounts in a given campaign. The Committee's current proposal reads as follows:

~~3.12.220~~3.12.230 Expenditure Ceilings Lifted

A. If a candidate declines to accept expenditure ceilings and receives contributions or makes qualified campaign expenditures equal to fifty (50) percent or more of the expenditure ceiling, or if ~~an~~a committee makes independent ~~expenditure committee in the aggregate spends~~expenditures of more than ~~fifteen~~twenty thousand dollars ~~($15,000.00) on~~($20,000.00) in a District City Council or School Board election or ~~seventy~~ninety thousand dollars ~~($70,000.00)~~($90,000.00) 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, and any candidate running for the same office who accepted expenditure ceilings shall be permitted to continue receiving contributions at the amounts set for such candidates in Sections ~~3.12.050C and 3.12.060C of this Act. The independent expenditure committee amounts of fifteen thousand dollars~~3.12.050(B) and 3.12.060(B) of this Act. The amounts of twenty thousand dollars ($20,000.00) and ninety thousand ~~($15,000.00) and seventy thousand dollars ($70,000.00)~~dollars ($90,000.00) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts resulting from an increase in the CPI as provided by Section ~~3.12.180~~3.12.210 of this chapter.

One of the potential "loopholes" in the existing and proposed version of Section 3.12.230 is a situation in which two or more committees support or oppose a candidate but no one committee reaches the $20,000/$90,000 independent expenditure threshold necessary to lift the expenditure ceiling. While admittedly a weak remedy to the perplexing problem of independent expenditures, the expenditure ceilings should arguably be lifted when independent expenditures ***in***

the aggregate (as well as by an individual committee) reach the threshold level in a particular campaign. A modified proposed Section 3.12.230 could read as follows:

~~3.12.220~~3.12.230 Expenditure Ceilings Lifted

*A. If a candidate declines to accept expenditure ceilings and receives contributions or makes qualified campaign expenditures equal to fifty (50) percent or more of the expenditure ceiling, or if ~~an~~**one or more** committees make independent ~~expenditure committee in the aggregate spends~~expenditures **in the aggregate** of more than ~~fifteen~~twenty thousand dollars ~~($15,000.00) on~~($20,000.00) in a District City Council or School Board election or ~~seventy~~ninety thousand dollars ~~($70,000.00)~~($90,000.00) 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, and any candidate running for the same office who accepted expenditure ceilings shall be permitted to continue receiving contributions at the amounts set for such candidates in Sections ~~3.12.050C and 3.12.060C of this Act. The independent expenditure committee amounts of fifteen thousand dollars~~3.12.050(B) and 3.12.060(B) of this Act. The amounts of twenty thousand dollars ($20,000.00) and ninety thousand ~~($15,000.00) and seventy thousand dollars ($70,000.00)~~dollars ($90,000.00) respectively, shall be increased in proportion to any increase of the voluntary expenditure ceiling amounts resulting from an increase in the CPI as provided by Section ~~3.12.180~~3.12.210 of this chapter.*

Tonight Commission staff will provide an overview of the Committee's wide-ranging recommendations. The Office of the City Attorney strongly recommends the Commission to establish a complete and thorough factual record addressing the need and public interests involved for the proposed amendments. To that end, Commission staff recommends that the Commission direct staff to agendize the proposed amendments for public input and discussion at each successive Commission meeting until all the proposed changes are fully and thoroughly considered.

Finally, Commission staff would like to publicly thank Commissioners Ashburn, Stanley and Love for their diligent work on this project during the past year.

Respectfully submitted,

Daniel D. Purnell
Executive Director