



ETHICS COMMISSION

CITY AND COUNTY OF SAN FRANCISCO

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TO: Derek Evans, Clerk, Rules Committee
Board of Supervisors

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COMMISSIONER

FROM: LeeAnn Pelham, Executive Director, Ethics Commission

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COMMISSIONER

SUBJECT: **Ordinance Introduced by Supervisor Cohen to Establish Certain Disclosure Requirements for Trustee Elections (FILE NO. 17073)**

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COMMISSIONER

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The Ethics Commission (the “Commission”) has received a proposed ordinance introduced by Supervisor Cohen, that was referred to the Commission for informational purposes under the 30-day rule. The Ordinance would create disclosure rules for certain communications made to benefit candidates in elections for the San Francisco City and County Employees’ Retirement System, the Retiree Health Care Trust Fund, and the Health Service Board (collectively, “Trustee Elections”).

We are submitting these Staff comments because the ordinance would create express regulatory duties for the Commission as the agency mandated to regulate campaign finance and disclosure for campaigns for City elective office. Specifically, the ordinance would require certain filings to be made with the Commission and would designate the Commission as the department responsible for enforcing provisions enacted by the ordinance.

The Commission supports the goal of providing the public with greater transparency about how communications in elections are financed. To strengthen achievement of the proposal’s stated goals, however, we believe that certain changes to the current language of the Ordinance would be beneficial. Most importantly, as discussed more fully below, we would urge that the provisions of the ordinance be incorporated into the City’s Campaign and Government Conduct Code, a body of law administered and enforced by the Commission, rather than the Administrative Code. Alternatively, if the Ordinance continues as introduced as an amendment to the Administrative Code, we recommend that certain revisions be made to clarify and strengthen the Ordinance and to provide greater clarity about the Ethics Commission’s regulatory oversight role.

Background

On June 13, 2017, Supervisor Malia Cohen introduced File No. 170738 (the “Ordinance”), an ordinance that proposes to amend the San Francisco Administrative Code to require disclosure of candidate and third-party spending in Trustee Elections, that is, in elections for the San Francisco City and County Employees’ Retirement System (“SFERS”), the Retiree Health Care Trust Fund, and the Health Service System Board. The item has been referred for

comment to City departments, including the Ethics Commission, and to the Board’s Rules Committee for hearing.

Disclosure Requirements as Proposed in the Ordinance

As introduced, the Ordinance would require candidates running in Trustee Elections to make certain disclosures whenever they spend \$500 or more to distribute communications to voters eligible to vote in a Trustee Election. *Communications* include “any printed mailing, flyer, door-hanger, pamphlet, brochure, card, sign, or billboard.” The required disclosures would include:

- the amount of funds spent on the communication;
- the source of the funds spent on the communication;
- the vendor used to create and distribute the communication; and
- a copy of the communication.

These same disclosure requirements would also apply to any third party that spends \$500 or more to distribute communications to voters eligible to vote in a Trustee Election.

Any candidate or third party required to make such disclosures would initially be required to do so within 72 hours of distributing the communication in question. Fourteen days before ballots in the relevant Trustee Election may be marked, the deadline would shift to 24-hours after distribution. All disclosures must be made to the Commission.

Discussion

Purpose of Ordinance

Though Trustee Elections are distinguishable from the other electoral races for which the Commission currently administers and enforces campaign disclosure requirements, we understand that there exists a strong interest in greater public disclosure in these races. Unlike elections for citywide or district-based offices of City elective officers, voting in Trustee Elections is open only to the members of the particular system overseen by the trustees. However, these elections can have an impact on the City at large because of the effect that trustee decisions can have on City finances. SFERS currently manages total assets valued at over \$21 billion,¹ and pension liabilities that cannot be covered by the trust fund could become a financial liability for all San Francisco taxpayers. Thus, requiring disclosure for funds spent in Trustee Elections would further the policy goal of promoting electoral transparency in a way that benefits all residents of the City, not solely those individuals who are eligible to vote in Trustee Elections.

The California Legislature acted in 2010 to similarly require campaign disclosures in elections for the California Public Employee Retirement System (“CalPERS”) and the California State Teacher Retirement System (“CalSTRS”).² The Legislature was concerned that a lack of transparency in CalPERS and CalSTRS

¹ SAN FRANCISCO EMPLOYEE’S RETIREMENT SYSTEM, ANNUAL REPORT: FOR FISCAL YEAR ENDED JUNE 30, 2016, at 10 (*available at* http://mysfers.org/wp-content/uploads/SFERS_AnnualReport_FY16_web.pdf).

² See Cal. Gov’t Code § 82023 (including candidates for CalPERS Board of Administration and CalSTRS Teacher Retirement Board in the definition of *elective office* under the PRA); see also Senate Bill No. 1007, Legislative Counsel’s Digest, *available at* http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB1007.

elections, paired with the enormous size of assets under management by both entities, created a danger of undue influence by campaign donors over elected trustees.³ To address this concern, the Legislature expanded the definitions of “elective office” and “elective state office” contained in the Political Reform Act to encompass CalPERS and CalSTRS board members.⁴ In doing so, the Legislature subjected CalPERS and CalSTRS elections to the Political Reform Act’s campaign disclosure requirements and, therefore, to the decision-making accountability those requirements are designed to promote.

The potential for undue influence in San Francisco Trustee Elections is not unlike the risk highlighted by the California Legislature regarding CalPERS and CalSTRS elections. As such, enacting local campaign disclosure requirements for Trustee Elections, as a general matter, could similarly help address that potential here in the City and County of San Francisco.

Issues for Consideration

The Current Draft Disclosure Requirement Assumes Specific Communications Will be Traced to Specific Funding Sources. As drafted, the Ordinance requires candidates and third parties who spend \$500 or more on a campaign communication to disclose “the source of the ... funds spent on creating and distributing the communication(s).” This requirement essentially requires filers to disclose the origin of the particular funds used to make a communication. For example, if a candidate in a Trustee Election spend \$1,000 to print and distribute a flyer promoting her candidacy, she would be required to disclose the source of that \$1,000. This manner of disclosure requires a filer to establish a nexus between a particular expenditure and the particular incoming contribution that enabled her to make that expenditure.

The term *source* is ambiguous in these code sections and could be variously interpreted to mean the true source of the funds, the person who actually contributed the funds to the candidate or third party, or even a candidate’s committee. It is also unclear how contributions to a candidate or third party will be tied to a specific communication for purposes of disclosure; the Ordinance, as currently drafted, does not specify whether “first-in-first-out” or any other accounting principles should be used to determine the source of funds used to finance a particular communication.

Currently, unless there is specific indicia of a contribution earmarked for a specific purpose, neither City nor state law requires disclosure of funding tied to a making a *particular* expenditure. The disclosure system that is currently in place for committees spending money in San Francisco elections generally tracks incoming contributions and outgoing expenditures as two separate variables. Committees must report all of the contributions that they receive, including the contributor’s name, address, employer and occupation, and the date and amount of the contribution. Contributions are reported on the Fair Political Practices Commission (“FPPC”) Forms 460, 496, and 497. Committees must also report how they spend money, including the date, amount, and a description of the expenditure. Expenditures are reported on FPPC Forms 460 and 496.

Creating this nexus-style disclosure requirement would carry logistical impediments that could create unintended consequences for complying with this provision in practice. Contributions are deposited into

³ SENATE RULES COMMITTEE, FLOOR ANALYSIS: SENATE BILL 1007 (June 24, 2010), at 3–4 (*available at file:///C:/Users/patrick.ford/Downloads/200920100SB1007_Senate%20Floor%20Analyses-.pdf*).

⁴ See Senate Bill No. 1007, *infra note 2*.

the committee's account, documented, and disclosed as needed. Similarly, expenses are drawn from the account, documented, and disclosed as needed. A new requirement that requires filers to tie specific funds received to specific expenditures made would require development of accounting methods not required even for larger, ongoing political committees. Such a nexus requirement would also face ineffective enforcement until and unless such new accounting methods were adopted, and campaign reporting systems could be adjusted to the accommodate the new information.

The Commission, for example, currently receives campaign disclosures in the form of State-required statements (Form 460), contribution reports (Form 497), and expenditure reports (Form 497). The Commission receives these forms electronically through its online campaign disclosure filing system. There is no feature in any of the existing required FPPC forms, however, that allows for reporting of a nexus between specific contributions and expenditures. For such a new requirement to be electronically reportable, the Commission would have to pursue the design and implementation of an online data collection method tailored to that specific requirement. Such a project would likely cost \$65,000 to implement and \$15,000 to maintain, and would not be completed for roughly two to three years due to the backlog of technology projects that also require revision of filing technologies to ensure they capture existing disclosure requirements. Additionally, since it is unclear how committees would tie contributions to expenditures, there is no clear method for the Commission to identify inaccuracies in the committees' reports and to therefore effectively enforce the provision.

An Alternative Approach Could Rely on a Fuller, Existing CFRO Disclosure Framework. As written, the Ordinance would enact campaign finance disclosures for Trustee Elections by amending the Administrative Code. Alternatively, by creating for Trustee Elections a disclosure system that more closely resembles the disclosure framework already in place in San Francisco elections, the Ordinance could instead require candidates and third parties to fully disclose the contributions they receive and the expenditures they make. This could be accomplished by amending Article I, Chapter 1 of the Campaign and Government Conduct Code, also known as the Campaign Finance Reform Ordinance ("CFRO"). The Ordinance could revise the definition of "City elective office" in CFRO so that it also covers Trustee Elections. This would require parties making expenditures in Trustee Elections to comply with the existing disclosure requirements found in CFRO.⁵ By adopting the Ordinance as an amendment to CFRO, the Board of Supervisors could incorporate an existing body of campaign finance regulation, which includes definition of terms, filing procedures, enforcement mechanisms, and clarification of disclosure rules.

The primary benefit to incorporating the Ordinance into CFRO is the promotion of clear, robust, and consistent disclosure and greater transparency for the public and regulated persons. CFRO is an existing, cohesive set of campaign finance rules, and it is supported by regulations promulgated by the Ethics Commission. Many persons engaged in campaign activities in the City are familiar with CFRO and the Commission's existing mandate to provide compliance guidance and public disclosure about campaign fundraising and expenditures in both candidate and issue campaigns.

We note a similar approach was taken by the state Legislature in 2010 to promote improved disclosure and public oversight of elections for the California Public Employees' Retirement System ("CalPERS")

⁵ See San Francisco Campaign & Gov't Conduct Code § 1.112. CFRO requires candidates for City elective office, as well as committees primarily formed to support or opposed a candidate for City elective office, to comply with the reporting requirements found in the Political Reform Act.

Board of Administration through amendment of Title 9 of the California Government Code (the Political Reform Act, or “PRA”).⁶ By doing so, the Legislature utilized the existing body of procedures and regulations created by the Fair Political Practices Commission.⁷

Another key benefit to structuring the Ordinance as an amendment to CFRO is ensuring that the disclosure process for Trustee Elections is as full, efficient, timely, and cost-effective as possible to implement. The Commission currently uses an e-filing system to receive the public disclosures required of all candidates under CFRO. This system promotes strong compliance and reduces the cost of administering disclosure processes that are paper-based. Likewise, contribution disclosures in Trustee Elections made through an e-filing system would similarly support compliance, with lower costs, and promote effective public disclosure because it would maintain uniformity with disclosure procedures applicable to other city- and county-wide elective offices.

Staff estimates that implementation of new stand-alone features for Trustee Elections in an e-filing system would cost \$65,000 and require approximately \$15,000 per year to maintain. Full implementation would likely require roughly six months to one year. If, however, the new disclosures were incorporated into CFRO, candidates in Trustee Elections would use the same existing disclosure system, process, and formats as other CFRO filers. There would be no additional cost required to use the existing e-filing system to receive disclosures from candidates in Trustee Elections, and integrating Trustee candidate disclosures into the existing e-filing system would not require the length of time necessary to implement a separate system.

In sum, we believe this approach would be most beneficial because it would integrate the newly regulated elections into the existing body of City campaign finance regulations. By building uniformity in the law, this approach would help encourage public access to and understanding of a more complete range of information about Trustee Election campaigns. It would also clarify and improve compliance guidance available to filers subject to the new law. This approach would also promote the ability of the government to enforce the new transparency provisions.

If the Board of Supervisors does not wish to subject Trustee Elections to the fuller breadth of campaign contribution and expenditure reporting that exists for other political committees regulated by CFRO, however, it would be possible to specify which provisions of CFRO apply to Trustee Elections and which ones do not.

If the Proposed Disclosure Requirements Remain within the Administrative Code, Revisions for Greater Clarity and Effectiveness Are Necessary. In its current form, the Ordinance’s disclosure requirements for candidates in Trustee Elections may result in greater vagueness than intended, which would compromise the intended creation of a meaningful and effective contribution disclosure regime.

⁶ See Cal. Gov’t Code § 82023 (including candidates for CalPERS Board of Administration and CalSTRS Teacher Retirement Board in the definition of *elective office* under the PRA); see also Senate Bill No. 1007, Legislative Counsel’s Digest, available at http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=200920100SB1007.

⁷ See [Political Reform Act – Important Notice](https://www.calpers.ca.gov/docs/political-reform-act-memo.pdf), California Public Employees’ Retirement System (available at <https://www.calpers.ca.gov/docs/political-reform-act-memo.pdf>) (summarizing Fair Political Practices Commission rules that apply to CalPERS elections).

If the Board seeks to enact the new Trustee Elections disclosures as amendments to the City's Administrative Code, therefore, we would urge that references to the sections of CFRO that create reporting requirements be added. Not only would this bring the disclosures required in Trustee Elections in line with existing disclosure rules, but it would also ensure that relevant future changes to CFRO would automatically carry over to the rules applicable to Trustee Elections.

A provision expressly granting the Commission the authority to enact regulations to implement these provisions of the Administrative Code should also be added.

In addition, the Ordinance currently includes a *mens rea* component requiring reckless or negligent conduct in order for the Commission to enforce a penalty. This provision should be amended so that violations can be based in strict liability, as is the case with other provisions of campaign laws enforced by the Ethics Commission.

Lastly, we would recommend the following provisions of the current draft Ordinance be addressed as noted below:

Section 16.553-2(a)

- The words “nomination, a statement at disclosure category one (1) with the” should not be stricken from the Code. This appears to be a drafting error, as it disrupts the syntax of the provision.

Sections 16.553-2(b)(1), 16.553-3(a)

- The Ordinance imposes a reporting requirement when a candidate or third party “spends \$500 or more on communications.” However, it is unclear whether the \$500 threshold refers to the cost of an individual communication or to the total, cumulative amount that the candidate or third party has spent on communications in that election. A threshold that is based on the cost of an individual communication is superior because it would exclude communications with a *de minimis* cost.
- The Ordinance does not require filers to report the date on which the communication was distributed. This detail is essential in order for the Commission to assess whether the filer complied with the 72- and 24-hour filing deadlines.

Section 16.553-3(c)

- The Ordinance requires candidates and third parties spending \$500 or more on communications to file a copy of the communication as part of the mandated disclosures. However, member communications are exempt from this particular requirement. There is no clear purpose for exempting member communications from any reporting requirement. As such, this exception should be removed.

Section 16.557-1

- The Ordinance attempts to exempt the disclosure of voter information from California Elections Code Section 2194. It is unclear whether a City ordinance may exempt City actions from state law. This section may need to be removed.

Section 16.566(c)

- The Commission’s authority to impose penalties under the Ordinance is currently established as “an administrative proceeding ... for an amount up to \$5,000 for each violation.” To ensure consistency in the Commission’s enforcement powers and available remedies, these should be defined only by reference to the Commission’s general enforcement authority conferred by Section C3.699-13 of the San Francisco Charter.

Thank you for the opportunity to provide feedback and recommendations on the proposed Ordinance. We look forward to working with Supervisor Cohen and other Members of the Board going forward to assist in their efforts to enact the clearest, strongest, and most workable and enforceable disclosure provisions for the City’s Trustee Elections.

If you have any questions or would like any information in the interim, please feel free to contact me or Senior Policy Analyst Kyle Kundert at (415) 252-3100.