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| **From:** | Board of Supervisors, (BOS) |
| **To:** | BOS-Supervisors; BOS Legislation, (BOS); Somera, Alisa (BOS) |
| **Subject:** | FW: Friends proposal for April 3 meeting |
| **Date:** | Tuesday, April 03, 2018 8:04:18 AM |
| **Attachments:** | FoEApril3mtg.docx |

**From:** LARRY BUSH [mailto:sfwtrail@mac.com]
**Sent:** Monday, April 02, 2018 3:12 PM
**To:** Pelham, Leeann (ETH) <leeann.pelham@sfgov.org>; Kundert, Kyle (ETH) <kyle.kundert@sfgov.org>; Ford, Patrick (ETH) <patrick.ford@sfgov.org>
**Subject:** Friends proposal for April 3 meeting

Ethics leadership:

Friends of Ethics respectfully request your consideration of proposals we support as improving the Anti-Corruption and Accountability Ordinance.

They include:

- Prohibiting contractors from bundling contributions for the election or benefit of officials who decide on their contracts. San Francisco law already bans contributions from contractors, but overlooked the equally significance of undue influence through bundling contributions and benefits. This should be corrected.

- Prohibit "behested payments" requested by City Hall officials from

  a) those with pending decisions at City Hall. This was the core violation in the Ed Jew prosecution that would have been legal if Supervisor Jew had actually delivered the funds to the groups he promised rather than keeping them.

  b) to benefit any entity that hires or make an officer any relative, staff member, or appointee of the official. This is commonplace in many jurisdictions and seen in such funding as Inaugural Committee celebrations.

  c) charitable behest payments must go to a 501c3 providing direct services to low-income resident. Only a tiny fraction of behest payments go to service charities.

  This cannot be allowed to be a backdoor to influence peddling by designating advocacy groups as "charitable."

Behest payments exist almost nowhere except in California, and rely on a tie of mutual obligation between city officials, donors and recipients. This is not politically healthy or wise.

- Prohibit fundraising by city commissioners and appointees for officials who appoint them or for those they back. A city commission appointment should not be a reward for fundraising nor should it require supporting candidates. Currently we have a pending criminal trial that initially included fundraising by a city commissioner. San Francisco already recognizes the unique public duties of commissioners by prohibiting them from being paid to lobby other city commissions and departments. Fundraising for candidates is a close kin to contract advocacy using one's commission position.

- Include a Private Right of Action similar to state law, federal law and that exist in other California jurisdictions that allows a citizen to share in the penalties that are awarded after a court action. To respond to concerns that this could be an open door to nuisance suits, this provision would only apply when a violation could result in penalties of $50,000 or more, thus ensuring it is not used for such minor violations as type size, rare occasions of failure to identify a donor's employer, filings that exceed deadlines by a short time.

Friends of Ethics was actively involved in contacting national and state experts on campaign laws and on ethics matters. The Brennan Center, the Campaign Legal Center, Common Cause, Maplight, individuals like Bob Stern, a principal author of the state Political Reform Act, and Ann Ravel, former chair of the Federal Election Commission and past chair of the Fair Political Practices Commission all reviewed aspects of these proposals. We also relied on the analysis of Harvey Rose, the Board's Budget and Policy Analyst, and three San Francisco Civil Grand Jury investigations into our city's Ethics operation and laws.

We note that Bob Stern specifically recommended that the phrase "Independent Expenditure Committee" not be used but rather describe campaign-related committees as either "candidate-controlled committee" or "Non-candidate controlled committee."

We accepted their suggestions on how to improve San Francisco's policies and practices.

These proposals were raised at the Ethics Commission during its extensive considerations of this reform, and while they found some favor, they did not muster the four votes needed to add them to the current proposal.

We believe they will better serve the public. We also contracted with

Public Policy Polling to assess San Francisco registered voter views of suggestions. PPP considers the responses to be “very strong” and range from two-to-one to three-to-one margins in all cases.

For the proposal being offered by Supervisor Peskin, the margin was better than seven-to-one in favor.

We are attaching the poll for your benefit.

Friends of Ethics consists of those who served as Ethics Commissioners, former Civil Grand Jury members, good government advocates and community activists.

Thank you for considering these proposals at the Tuesday joint Board-Ethics meeting.

Sincerely,

Larry Bush for Friends of Ethics

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| **From:** | Board of Supervisors, (BOS) |
| **To:** | BOS-Supervisors; BOS-Legislative Aides; Calvillo, Angela (BOS); Somera, Alisa (BOS); BOS Legislation, (BOS) |
| **Subject:** | FW: Public comment for EC/BoS meeting tomorrow |
| **Date:** | Monday, April 02, 2018 5:08:04 PM |
| **Attachments:** | Peskin Legislation (00338614xAEB03).pdf |

**From:** Tom Willis [mailto:tw@rjp.com]
**Sent:** Monday, April 02, 2018 3:36 PM
**To:** Board of Supervisors, (BOS) <board.of.supervisors@sfgov.org>; Kundert, Kyle (ETH) <kyle.kundert@sfgov.org>; Pelham, Leeann (ETH) <leeann.pelham@sfgov.org>
**Cc:** GIVNER, JON (CAT) <Jon.Givner@sfcityatty.org>; SHEN, ANDREW (CAT) <Andrew.Shen@sfcityatty.org>
**Subject:** Public comment for EC/BoS meeting tomorrow

Please see attached our firm's written testimony with respect to tomorrow's joint Ethics Commission/Board of Supervisors meeting. Please place this in the public record for the meeting and we also request that you please forward it to the Ethics Commissioners and Board of Supervisors. Thank you very much, Tom Willis

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**MEMORANDUM**

**To:** Interested Parties

**From:** Remcho, Johansen & Purcell, LLP

**Date:** March 29, 2018

**Re:** Proposed San Francisco legislation imposing de facto contribution limits on ballot measure and independent expenditure committees

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San Francisco Supervisor Aaron Peskin has proposed legislation that would require donors who give $10,000 or more to a local ballot measure, independent expenditure or general purpose committee to disclose, within 24 hours of making the contribution, all of their financial interests of $10,000 or more in businesses located in or doing business in San Francisco, as well as those of their immediate family members.

For each investment, the donor must disclose the name of the business entity, a general description of the business, the nature of the investment, the date on which the investment was acquired, and the fair market value of the investment. Donors must also identify and describe any entity doing business in the City for which the donor is an employee, officer, director, partner, or trustee.

A donor failing to file the disclosure report in an accurate and timely manner would be subject to late fees of $50 per day, as well as administrative penalties of $5,000 per violation or three times the amount not properly disclosed, whichever is greater. The law would apply retroactively, meaning that any donor who has already given $10,000 or more to a local committee in 2018 would have to disclose their financial interests within 24 hours of the law going into effect or face fines and penalties.

The proposed legislation would be unconstitutional for two readily apparent reasons.

First, the legislation essentially seeks to impose a limit on contributions that is unlawful under basic First Amendment principles that the United States Supreme Court has applied consistently

for more than 40 years. Contributions to ballot measure and independent expenditure committees cannot be subject to limits. The reason is that the only governmental interest that can justify limits on political activity is preventing corruption or the appearance of corruption, and the Court has held there is no anti-corruption interest in limiting contributions to, or spending by, ballot measure and independent expenditure committees. *Buckley v. Valeo*, 424 U.S. 1, 47 (1976) (The "absence of prearrangement and coordination of an expenditure with the candidate or his agent [. . .] alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate."); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 298 (1981) (striking down contribution limits on ballot measure committees); *Citizens United v. Fed. Elections Comm'n*, 558 U.S. 310 (2010) (striking down prohibition on unions and corporations making independent expenditures); *see also SpeechNow.org v. Fed. Elections Comm'n*, 599 F.3d 686, 696 (D.C. Cir. 2010) (striking down contribution limits on independent expenditure committees); *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2010) (same with respect to general purpose PACs).

Although Supervisor Peskin's proposal does not explicitly impose a contribution limit of $10,000 on local committees, it has the same effect. In imposing severe burdens on any person wishing to make a contribution of $10,000 or more to those committees, the law virtually guarantees few if any persons will make contributions over $9,999. A person contemplating such a contribution could not contribute unless she was willing and able to do all of the following: (1) identify and describe all of her investments in businesses of $10,000 or more; (2) accurately value all of those investments, even if the value cannot be readily determined; (3) determine the date the investment was acquired; (4) identify any other business for which the donor is an employee, director, officer, trustee, or partner; (5) determine if those entities are located or do business in San Francisco; (6) repeat steps 1-5 for all investments held by immediate family members; (7) do all of that in 24 hours; and (8) be willing to make this private information public. This would be extremely burdensome for an individual who owns stock through retirement or brokerage accounts or who holds investments in private companies, and it would prove virtually impossible for businesses. How could an individual with a diversified investment portfolio, or a company with diversified sales and investments, identify, within 24 hours, every interest of $10,000 or more in entities doing business in San Francisco? "Doing business" in San Francisco, after all, includes any company whose products end up being sold in the City, from paper towels, meat, and medicine to tires, software, and roofing shingles.

In addition, the rules and forms that already exist for public officials to disclose their financial interests, which will undoubtedly be used as a model for donor disclosures, are complex and long, consisting of a 19-page form with instructions and an 16-page reference manual. While public officials usually have three months to complete this process, and often employ lawyers or other expert consultants to assist, donors would have merely 24 hours to do so. This would be especially problematic for donors who are asked for contributions in the last few weeks of the election cycle, when time is of the essence.

Together, these burdens are so severe they have the effect of imposing a de facto, and unlawful, contribution limit of $10,000 or more on local committees. No reasonable person would choose to incur the proposal's onerous and invasive reporting requirements or subject themselves to the real possibility of late fines or penalties. In similar situations, where a statutory scheme does not directly limit permissible political speech but does so indirectly by imposing "a special and potentially significant burden" on those who would exercise that right, the Supreme Court has found those laws unconstitutional. *See Davis v. Fed. Elections Comm'n*, 554 U.S. 724, 739-40 (2008) (in striking down higher contribution limits for candidates who were not self-funded, the court acknowledged that while the provision does not impose an outright cap on a candidate's use of personal funds, "it imposes an unprecedented penalty on any candidate who robustly exercises that First Amendment right") (citation omitted); *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011) (same with respect to a public matching fund scheme). In those cases, as with this proposal, the "resulting drag on First Amendment rights is not constitutional simply because it attaches as a consequence of a statutorily imposed choice." *Davis*, 554 U.S. at 739. Put differently, in forcing a donor who wishes to make a contribution of $10,000 or more to choose between the First Amendment right to make such a contribution and being subject to discriminatory and unprecedented burdens in exercising that right, the proposed legislation violates the First Amendment. *Id.*

This was clearly Supervisor Peskin's intent: to freeze, through onerous regulatory disincentives, large contributions to local committees. In introducing his proposal, Supervisor Peskin forthrightly acknowledged that "[i]f I could ban these sorts of donations, I would,"[1] and in his cover letter

[1] Joe Eskenazi, Political Disclosure Bill Unsubtly Takes Aim at Ron Conway, Mission Local (Feb. 13, 2018, 2:35 p.m.), https://missionlocal.org/2018/02/political-disclosure-bill-unsubtly-takes-aim-at-ron-conway/.

proposing the legislation, he focused on what he viewed to be the corrosive effects of large dollar contributions. But as the Supreme Court has explained, the interests with which Supervisor Peskin is really concerned — reducing the amount of money in politics and restricting "the political participation of some in order to enhance the relative influence of others" — are not legitimate objectives on which political speech may be restricted, but instead "impermissibly inject the Government 'into the debate over who should govern.' And those who govern should be the last people to help decide *who* should govern." *McCutcheon v. Fed. Elections Comm'n*, 134 S. Ct. 1434, 1441-42 (2014) (quotation, citations omitted). With this legislation, Supervisor Peskin has, in effect, attempted to achieve indirectly what he cannot achieve directly.

Second, even if it did not act as an impermissible contribution limit, the legislation nonetheless would be unconstitutional because it would not meet the constitutional requirements for disclosure laws operating in the area of core political speech. Such laws are subject to an "exacting scrutiny" standard of review, which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Citizens United*, 558 U.S. at 366-67. Still, the specific standard of review applied to a campaign disclosure law is less important than an assessment of the "fit between the stated governmental objective and the means selected to achieve that objective." *McCutcheon*, 134 S. Ct. at 1445; *see also Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 874-75 (8th Cir. 2012). In this regard, "if a law that restricts political speech does not avoid unnecessary abridgement of First Amendment rights, [. . .] it cannot survive "rigorous" review." *McCutcheon*, 134 S. Ct. at 1446 (citation, quotation omitted).

To begin with, courts have struck down disclosure laws that are so cumbersome that they chill political participation. *See, e.g., Minnesota Citizens Concerned for Life, Inc.*, 692 F.3d 864; *Iowa Right To Life Committee, Inc. v. Tooker*, 717 F.3d 576 (8th Cir. 2013). For the reasons discussed above, the proposed legislation is certain to severely chill otherwise lawful contributions of $10,000 or more to local committees, and for this reason alone cannot survive exacting scrutiny.

Moreover, the proposal is unconstitutional because it would neither advance a sufficiently important governmental interest nor be sufficiently tailored to any such interest. While courts have recognized that disclosure laws may be justified based on a governmental interest in providing the electorate with information about "the sources of election-related spending" (*Citizens United*, 558 U.S. at 367), that justification only supports the disclosure of basic information about a contributor, such as

name, address, and occupation and employer. *See*, *e.g.*, *id.* at 366-67; *Yamada v. Snipes*, 786 F.3d 1182 (9th Cir. 2015). We are not aware of any court that has construed the informational interest so broadly as to justify compelled disclosure of a donor's personal financial information (or those of her immediate family), particularly when the donor has a countervailing fundamental right to privacy that extends to one's personal financial information, as is the case here. *See* Cal. Const. art. I, § 1; *Valley Bank of Nevada v. Superior Court*, 15 Cal. 3d 652, 656 (1975); *see also City of Carmel-By-The-Sea v. Young*, 2 Cal. 3d 259, 268, 272 (1970).

The only interest advanced by Supervisor Peskin to justify his proposal (other than to ban large contributions outright) provides no support for finding the law constitutional. Supervisor Peskin contends that the electorate has a right to know "*why* major donors to independent expenditure committees are making those contributions" and that "a window into their investments in businesses that seek to extract private value from City Hall will provide part of that picture." To be clear, that is not a legitimate governmental interest on which to impose burdensome reporting requirements. But even if it were, there is no connection — much less a substantial relationship — between that goal and the proposed disclosures. The proposal is based on the faulty premise that an individual who owns a stock in any amount is making a decision to give to a campaign based on that holding. Moreover, unless that person controls the actions of the company, which only a few insiders can do, there is no connection between a company's actions to obtain City approval on a matter and a person's private investment in that company. Yet, the proposal requires disclosure of a person's private holdings regardless of whether the person has any control over the company, let alone any awareness of its dealings with the City, if any. Indeed, disclosure is also not limited to investments in businesses that have had or may have matters before the City. Rather, donors must list all businesses in which they have an interest that conduct business in the City, whether or not they have had or will have any matters before the City. In short, the timing and scope of disclosures is not tied in any way to City legislative or administrative action relating to a corporate interest, which, after all, is the purported reason for the proposal.

The overbreadth of the proposal does not end there. Public officials must submit financial disclosures because they make or influence government decisions and the state has a compelling interest in preventing financial conflicts of interest from influencing that process. *See County of Nevada v. MacMillan*, 11 Cal. 3d 662, 671 (1974). None of those concerns, however, exist with respect to private campaign donors who do not themselves make government decisions. Yet in contrast to the 24 hours given to donors under this proposal, public officials are usually given three months to complete

their disclosure reports, file them only once a year, and report only interests they held in the prior 12 months. Cal. Gov't Code §§ 87200 *et seq.* Thus, the proposal would impose a much more onerous reporting scheme on private citizens than applies to the governmental officials who are actually charged with making the decisions about which Supervisor Peskin purports to be concerned.

In sum, Supervisor Peskin's proposal would constitute a profoundly burdensome abridgement of First Amendment rights whose sole purpose is to chill otherwise lawful contributions. It would be irresponsible for the Board of Supervisors and Ethics Commission to knowingly enact a law that so blatantly violates the First Amendment rights of persons who care enough about this City to participate in its election processes.

(00337026-3)