

Campaign Finance Reform Ordinance Revision Project
Written Comments of Brent Ferguson
Counsel, Brennan Center for Justice at NYU School of Law
Submitted to the San Francisco Ethics Commission
August 14, 2017

Introduction

The Brennan Center has reviewed the Ethics Commission’s drafts of the Campaign Finance Reform Ordinance revision and accompanying documents intended to strengthen San Francisco’s campaign finance and ethics rules. We fully support the effort to protect the integrity of city government and ensure that city residents have access to meaningful information about campaign spending and the activities of their elected officials, and believe the proposals are a strong step in the right direction. To make them even stronger, we propose several amendments to the new provisions governing contributions by government contractors and disclosure, as explained below. We are available to discuss any of the comments and suggestions in more detail, and work with the Commission on subsequent drafts.

Contributions by Government Contractors

We have focused our review on the provisions that would amend the law regulating contributions and donations made by government contractors and prospective contractors. Our comments will focus on the original draft ordinance presented in March (the “March Draft”), the most recent draft (the “August Draft”) and the staff memorandum dated June 21, 2017 (the “Staff Memo”).

Most importantly, we applaud the Commission’s dedication to strengthening laws designed to curb harmful pay-to-play practices in city government. Courts and legislatures across the country have recognized the special threat of corruption that occurs when those who seek government contracts or other payments are allowed to donate to politicians who make decisions about those contracts.

We read the August Draft to make several significant changes to current law. Among other changes, it:

- (1) Narrows the current ban on contributions by contractors such that it only applies to recipients who are “individual[s] holding a City elective office” (by the omission of current C&GCC §§ 1.126(b)(1)(B)&(C));¹
- (2) Broadens the current ban on contractor giving such that it also includes “behested payments”² to elected officials (§ 1.126(b)(1)); and
- (3) Separately prohibits contributions and behested payments by any person with a financial interest in a land use matter being considered by certain city government bodies (§1.127(b)).

These amendments are narrower than those proposed in the March Draft, and likely reflect the concerns about the breadth of the March Draft expressed in the Staff Memo. We agree with Staff that some of the “public benefits” enumerated in the March Draft are outside the scope of the benefits often contemplated by common ethics and campaign finance laws, and may be difficult to define in some circumstances. For example, if a “public benefit” includes “tax savings resulting from a change in the law,” it would likely be quite difficult to define the proper class of beneficiaries, inform them, and keep track of the individuals and businesses restricted from contributing.

We also agree generally with the Staff’s admonition that legislatures and regulatory bodies should seek and discuss empirical evidence before restricting the ability to contribute, both to improve the efficacy of such restrictions and to ensure their constitutionality. Yet while empirical evidence is desirable, it does not necessarily need to come from within the jurisdiction considering a particular measure. As the U.S. Court of Appeals for the Second Circuit noted when reviewing New York City’s contractor contribution limit, “[t]here is no reason to require the legislature to experience the very problem it fears before taking appropriate prophylactic measures.”³ In fact, legislatures can and should consider evidence from other jurisdictions, social science, precedent, and common sense, as well as local experiences, to determine the best method by which to prevent corruption.⁴ The Brennan Center recently issued a report that categorizes and summarizes the most relevant research on corruption created by contributions (and other spending),⁵ and maintains an up-to-date online database with studies and evidence

¹ We recognize that § 1.126(e) of the August Draft requires individual contractors to attest to awareness “that contractors are prohibited from making contributions to candidates for elective office in the City.” Thus, if the omission of candidates and committees from the prohibition in § 1.126(b)(1) is unintentional, our comments on those sections are inapplicable.

² A behested payment is “a payment made for a legislative, governmental, or charitable purpose made at the behest of a City elective officer or candidate for City elective office.” § 1.126(a).

³ *Ognibene v. Parkes*, 671 F.3d 174, 188 (2d Cir. 2011).

⁴ *See, e.g., id.* at 189 (considering a report finding that government contractors were more likely to give large donations and more likely to give to incumbents, leading to “an appearance that larger contributions are made to secure ... whatever municipal benefit is at issue”); *Wagner v. FEC*, 793 F.3d 1, 16-20 (D.C. Cir. 2015) (reviewing state laws and weighing “the enormous increase in the government’s reliance on contractors,” which “necessarily poses an increased threat of both corruption and coercion,” in upholding federal prohibition on contractor contributions).

⁵ BRENT FERGUSON & CHISUN LEE, DEVELOPING EMPIRICAL EVIDENCE IN CAMPAIGN FINANCE CASES, BRENNAN CTR. FOR JUSTICE 2016, <https://www.brennancenter.org/publication/developing-empirical-evidence-campaign-finance-cases>.

from across the country.⁶ We encourage the Commission to review the database and report while the staff continues to develop a legislative record.

With those considerations in mind, we support the August Draft’s provisions targeting government contracts and those with a financial interest in the city’s land use decisions, though it may be permissible to include other classes of public beneficiaries listed in the March Draft. The final decision on which beneficiaries to include should be based on the considerations discussed in the previous paragraph, as well as the practical limitations of defining groups of affected beneficiaries and ensuring that the law can be fairly and thoroughly applied to them.

With these general comments in mind, we suggest the following specific changes and clarifications:

1) *Prevent those who have recently contributed from contracting with the government.*

Both the August Draft and the codified version of § 1.126 prohibit contributions from prospective contractors starting on the date that contract negotiations begin. Yet those who plan to seek government contracts may make contributions in advance of the commencement of contract negotiations. Thus, we recommend amending § 1.126 such that those who have made contributions in the last twelve months may not enter a contract or contract negotiations with the government. Other jurisdictions have adopted this method of regulation. For example, New Jersey uses an eighteen month limitation for contractors,⁷ and the Securities and Exchange Commission prevents investment advisors from providing paid services to government entities within two years after making a contribution.⁸

2) *Ensure that the government contractor prohibition in § 1.126 applies to candidates and committees controlled by candidates and officeholders.*

The current version of § 1.126(b) prohibits contributions to “individual[s] holding a City elective office,” but does not mention contributions to candidates.⁹ Any contribution ban or limit should apply to all candidates equally, whether they are incumbents or challengers¹⁰ — failing to include candidates could raise constitutional issues and lead to claims that incumbents are disadvantaged. And because challengers may win elections, it is important to ensure that they are not allowed to receive contributions from potentially corrupting donors.

⁶ *Money in Politics: Empirical Evidence Database*, BRENNAN CTR. FOR JUSTICE (2017), <https://www.brennancenter.org/analysis/money-politics-database>.

⁷ N.J. STAT. ANN. § 19:44A-20.14 (“The State . . . shall not enter into an agreement or otherwise contract to procure from any business entity services or any material, supplies or equipment, or to acquire, sell, or lease any land or building, where the value of the transaction exceeds \$17,500, if that business entity has solicited or made any contribution of money . . . within the eighteen months immediately preceding the commencement of negotiations for the contract or agreement.”). The law was upheld in *In re Earle Asphalt*, 950 A.2d 918 (2008), *aff’d*, 966 A.2d 460 (2009).

⁸ 17 C.F.R. § 275.206(4)–5(a)(1) (prohibiting provision of “investment advisory services for compensation to a government entity within two years after a contribution to an official of the government entity is made by the investment adviser”). A similar rule was upheld in *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995).

⁹ See note 1, *supra*.

¹⁰ See *Davis v. FEC*, 554 U.S. 724, 738 (2008) (“This Court has never upheld the constitutionality of a law that imposes different contribution limits for candidates competing against each other.”).

3) Clarify the scope of the “behested payments” prohibition in § 1.126 and § 1.127.

Under § 1.126(a), a behested payment is any payment made for a legislative, governmental, or charitable purpose at the behest of an elected official or candidate. Presumably, the definition intends to include payments made to charities, and possibly independent political groups, at the request or suggestion of a candidate or elected official. However, § 1.126(b)(1) only prohibits behested payments “to” an elected official. Thus, it is not completely clear whether the prohibition includes payments made at the request of that official directly to a charity or another group that is not controlled by that official.

While the language in § 1.127 is clearer because it prohibits all behested payments, rather than those made “to” an elected official, it may still be helpful to clarify that the ban applies to all payments made at the behest of an elected official, even if the official does not control the recipient entity.

Disclosure

We support the Commission’s effort to strengthen disclosure rules: the Staff Memo is correct to point out that since *Citizens United*, states and cities have seen election spenders use creative ways to avoid disclosing their true identities, and it is important to ensure that voters know the true source of the funds behind campaigns and advertisements.

Section 1.114.5(b) of the August Draft prohibits “assumed name contributions” and the Staff Memo suggests that the Commission adopt regulations to ensure it can find the “true source of a person’s donation.” We agree with both the prohibition and the suggestion for the Commission to adopt detailed rules. However, we suggest an alteration to the language of § 1.114.5(b) — the August Draft prevents donors from giving “in a name other than the name by which they are identified for legal purposes,” which may be interpreted only to prevent donors from misidentifying themselves. Some donations may come from legitimate, legally-formed groups whose names provide little information about their true sources of money. We recommend requiring donors to name the “original source” of all contributions, and defining “original source” as funds that are raised from sources such as salary or investment income, not from contributions or gifts. Under the “original source” requirement, any person or group making a contribution will need to report the underlying sources of their money if that money came from contributions by others.

We also strongly support the provisions in the August Draft that require elected officials to report certain contacts with (1) those who they have asked to make large donations to outside groups (§ 1.123(b)(7)), and (2) major bundlers (§ 1.125(b)(5)). Broadening disclosure requirements to cover interactions with donors can both help inform voters about elected officials’ priorities and deter behavior that would create the appearance of corruption,¹¹ such as an elected official repeatedly meeting with a donor to a supportive super PAC. The August Draft requires elected officials to report contacts that occur before the contribution is made; we recommend that the provisions be expanded such that elected officials would also need to report

¹¹ For a lengthier discussion of the utility of disclosure laws that focus on officeholder and candidate activity, see Brent Ferguson, *Congressional Disclosure of Time Spent Fundraising*, 23 CORNELL J.L. & PUB. POL’Y 1 (2013).

the same type of contacts if made within twelve months after the contribution. Thus, the rule would cover donors who give money before an election in the hope of favorable treatment afterwards.

Conclusion

Once again, we fully support the Commission's goal of reducing the influence of wealthy donors and providing more thorough information to city residents. We hope that these comments have been helpful and we are prepared to discuss in greater depth these and other changes the Commission may consider.