



2001 North Main Street, Suite 500 Walnut Creek, California 94596  
Telephone: (925) 953-1620 Fax: (925) 953-1625

**MEMORANDUM**

**DATE:** July 8, 2016  
**TO:** Matthew Duffy  
Superintendent  
West Contra Costa Unified School District  
**FROM:** Harold M. Freiman  
**RE:** Campaign Contribution and Expenditure Limits  
**CLIENT/MATTER:**  
1550-01

At its meeting of June 13, 2016, the Governance Committee discussed a draft Board resolution that would impose campaign finance limits for Board elections. In discussing the draft policy and applicable legal considerations, the Committee sought input on the three primary considerations recommended by legal counsel for developing a defensible policy: (1) what problems the Board seeks to address with such a policy; (2) what solutions the Board proposes to address those problems; and (3) how those policies can most narrowly be focused so as to limit Constitutional challenges based on First Amendment rights of free speech and assembly.

Attached, please find a revised draft resolution containing potential changes proposed by our office to take into consideration the three points above. Our changes are shown in redlining, and a clean copy is also attached. We emphasize that these are only possible revisions. Ultimately, the Board will have to give careful consideration to the policy in order to ensure that it is both meeting the District's objectives and is prepared in a fashion most likely to survive the strict scrutiny that would be applied by a reviewing court, as discussed in our memorandum of June 10, 2016.

Each of the three considerations described above is addressed below with explanation of certain of the proposed revisions to the policy.

**1. What Problems Does the Board Seek to Address?**

As discussed at the June 13, 2016, Governance Committee meeting, a defensible campaign contribution policy should be based on a clearly articulated, important public interest or interests. It is the responsibility of the Board to identify what those interests are. The statement of interests contained in the draft policy discussed on June 13 contained a fairly limited number of objectives when compared to policies that have been adopted by other local agencies in California. In this revised draft, we attempted to incorporate many of the issues identified by other local agencies as

well as emphasizing some mentioned by Trustee Cuevas at the last meeting. The issues that we added or further emphasized include:

- Fundraising diverts public officials from their public duties.
- The appearance of corruption.
- Unfair advantage to incumbents.
- Greater access by contributors to public officials than other members of the public.
- The appearance of undue influence.
- The financial strength of certain individuals or organizations contributes to undue influence.
- Increasing campaign costs cause candidates to raise more from special interest groups.
- Public impression that smaller contributors have less of a role in political campaigns.

## **2. What Are The Proposed Solutions?**

The proposed solutions contained in the initial draft were left largely intact, except as addressed below. The primary solution is the implementation of the campaign contribution limit, currently stated as \$1,000.

## **3. Can The Proposed Solutions be Narrowed?**

The attached revisions proposes a number of ways in which the scope of the campaign finance reform measures are limited. Some of the key considerations are noted below.

### *Amount of Limit*

We did not propose a change to the \$1,000 limit. As previously discussed, it is critical that this limit reflect an amount that is not so low that it unduly restricts the ability of persons running for office to run a campaign, particularly against incumbents. Further consideration should be given to the basis for selecting this particular figure. As noted in our prior memorandum, the \$1,000 federal limits that were upheld in the *Buckley* case in 1976 would be \$4,200 when inflated to today's value. That \$4,200 figure is also in place for state offices in California under the Political Reform Act. On the other hand, San Francisco's limit is \$500 times the number of offices to be voted for, and Oakland's limit ranges from \$100 to \$500 depending on whether the candidate has voluntarily agreed to expenditure limits.

The initial draft of the resolution did not include an inflationary increase to the \$1,000 figure. As noted in our prior memorandum, including an inflationary increase is a factor favorably looked on by a reviewing court, as including increases is one way of helping to avoid the amount of the limit becoming so low over time that it limits the ability of challengers to defeat incumbents, among other considerations. If the Board wanted to add an inflationary increase, we can do so, but the District will then also have to stay on top of calculating, announcing and adhering to the new limits each year.

While we retained the contribution limit, we eliminated any reference to expenditure limits. As previously discussed, mandatory expenditure limits have been found by the United States

Supreme Court to be unconstitutional. The policy could include discussion of voluntary limits if so desired.

#### *Removal of Prohibition on Contributions by Organizations*

The revision removes the provision in the draft resolution which prohibited organizations from donating directly to candidates or candidate controlled committees. Federal law expressly prohibits corporations from directly contributing to candidates for federal office, and the Supreme Court confirmed the constitutionality of this prohibition. (52 U.S.C. § 30118; *Citizens United v. FEC* (2010) 558 U.S. 310.) The Supreme Court in *Citizens United* also found it to be unconstitutional to limit corporate contributions to independent committees or for corporations otherwise to buy advertising supporting or opposing candidates.

California law does not contain a similar outright prohibition on campaign contributions by corporations; instead, corporations are subject to the same \$4,200 monetary contribution limit as individuals. (Gov. Code §§ 82407, 8530.) As far as we are aware, an outright prohibition on corporate contributions directly to candidates has not been tested in California, although our understanding is that 22 states do prohibit corporations from contributing directly to political campaigns. After *Citizens United*, it may not be possible to prohibit organizational contributions to committees not controlled by candidates, though that again has not been fully tested in state court.

The most conservative approach is for the District to model its resolution on California law and impose the same contribution limitations on individuals and corporations alike, and not to bar contributions by organizations. If the District chooses to include an outright prohibition on corporation or organization contributions in its resolution, there is a possibility this could be challenged. If the preference is nevertheless to bar any contributions by organizations, we can propose additional revisions to include that requirement. However, our recommendation is that any such prohibition, at most, apply to direct contributions to candidates and their controlled committees, and not to independent committees or direct expenditures by outside parties, such as through paying for advertising.

#### **Assembly Bill No. 2523**

At the June 13 Committee meeting, a member of the public mentioned a pending bill on campaign finance reform. That bill, AB 2523 (Mullin), would establish mandatory campaign contribution limitations for local elections along the lines of those limitations already in place for state offices. The bill passed the state Assembly on June 2, 2016, and was referred to the Senate Committee on Elections & Constitutional Amendments on June 9, 2016. The bill passed the Senate Committee on June 21, 2016. It has been re-referred to the Appropriations committee and a hearing is scheduled for August 1, 2016.

Currently, California's Political Reform Act does not extend to local school districts. AB 2523 expressly applies to school districts, meaning that for the first time, there will be a formal vehicle for enforcement of campaign contribution limits for California school districts. The default for all local agencies statewide would become the Political Reform Act limit of \$4,200 per election. If enacted, the bill's provisions will go into effect on January 1, 2018.

As currently written, the bill would allow a local elected body to choose a limit and other conditions that differ from those set out in the Political Reform Act, as long as these limitations do not prevent compliance with the Act. Thus, if the Board were to act on campaign finance reform, its resolution would likely be effective even if the bill passes. If the Board does not take any action and AB 2523 does go into effect, the District will be required to follow the campaign contribution limits and related conditions applicable to state offices under the Political Reform Act starting in 2018.