



To: Members of the Seattle Ethics and Elections Commission
From: Alan Durning and Margaret Morales, Sightline Institute
Memo Re: Honest Elections Seattle's Spending Limit Relief Provision
Date: June 21, 2016

Spending limit relief provisions are common features of campaign public funding programs. These provisions increase or eliminate program spending limits for participating candidates when they are faced with significant oppositional spending. Definitions of opposing spending vary, but typically include a measure of non-participating candidate's spending, and sometimes independent expenditures, either in opposition to participating candidates and/or in support of their rivals.

These provisions have been the subject of recent court scrutiny. Famously, the US Supreme Court struck down Arizona's relief provision in 2011 (*Arizona Free Enterprise Club v Bennett*), which called into question a number of similar provisions in other public funding programs across the country. The authors of Seattle's spending limit relief provision (*Section 2.04.630 (f)* of Seattle Municipal Code) crafted the policy with this history in mind, intending it to hold up under legal scrutiny. Nevertheless, this remains a gray area of the law, and the provision leaves a number of questions for the Seattle Ethics and Elections Commission to determine through rulemaking.

In crafting this memo, we have benefited from the counsel of legal advisors with expertise in campaign finance and constitutional law at the Brennan Center for Justice at New York University, the Campaign Legal Center in Washington, DC, and Pacifica Law Group in Seattle. We have also heard from experts at the National Institute on Money in State Politics and a former director of the Council on Governmental Ethics Laws.

We have written this memo as a review of some of the best practices in spending limit relief provisions from several jurisdictions across the United States. We have identified key features of the provisions in each of the five main jurisdictions we review and compared them with Seattle's new law. In general, these provisions answer the following six questions:

- 1) What are the requirements for activating the provision?
- 2) What happens when these requirements are met?
- 3) How will the governing body define and calculate relevant spending by opposing candidates and/or independent expenditures (IEs)?
- 4) If IEs are considered, what factors will the governing body use to determine whether an IE communication supports or opposes a candidate?

- 5) Is there a process by which candidates can dispute a decision of the governing body?
- 6) Who holds the burden of proof for determining when the requirements of the provision have been met?

Summary Table: Spending Limit Relief Provisions in Six Public Funding Jurisdictions

| | Year | Type of Public Funding Program | Relief Provision | Requirements for activation of provision | IEs considered? |
|--------------------------------------|------|------------------------------------|---|---|-----------------|
| Seattle | 2015 | Voucher | Participating candidate can ask Seattle Ethics and Elections Commission (SEEC) to be released from campaign spending limit. | Activated when non-participating candidate's spending, plus IE spending in opposition to participating candidate or in support of non-participating candidate, materially exceeds Program spending limit. | Yes |
| Arizona <i>(repealed in 2011)</i> | 1998 | Full funding | <i>Candidates received matching public funds up to opponents' spending and/or opposing IE spending.</i> | <i>Activated when non-participating, opposing candidate spending, plus opposing IE spending, plus IE spending in support of non-participating candidates exceeded election spending limit.</i> | Yes |
| Los Angeles, CA | 1990 | Matching; >2-for-1 | Participating candidate's expenditure ceiling lifted | Activated when: 1) A participating candidate spends >100% of the applicable expenditure ceiling; OR 2) IE communication expenditures reach a certain threshold (determined by office) in support of or opposition to any candidate in the race. | Yes |
| Minnesota | 1974 | Partial grant; contributor refunds | Participating candidate can choose to be released from expenditure limit. | Activated when: 1) Opposing, non-participating candidates spend 20% of expenditure limit | No |

| | | | | | |
|----------------------|------|---------------------------|---|---|-----|
| | | | | pre-primary; OR 2) Opposing, non-participating candidates spend 50% of spending limit post-primary. | |
| New York City | 1988 | Matching; >2-for-1 | Participating candidate's expenditure limit increased or lifted, depending on scale of opposing candidate's spending. | Expenditure limit is 1) increased when opposing, non-participating candidates spend half of expenditure limit; 2) lifted when opposing, non-participating candidates spend three times expenditure limit. | No |
| San Francisco | 2000 | Matching; 2-for-1 or less | Participating candidate's individual expenditure ceiling incrementally raised. | Activated when Total Opposition Spending against a candidate, plus Total Supportive Funds of any other candidate in the race, exceed the Program expenditure limit. | Yes |

In this memo we begin with a review of Seattle's new spending limit relief provision, which leaves a number of questions unanswered. Next, we compare Seattle's provisions with those in five other jurisdictions. We encourage the Commission to pay special attention to New York and San Francisco's regulations. These regulations offer some of the most detailed policies regarding two areas that will require rulemaking in Seattle. These areas are: criteria for determining the intent of an IE communication and dispute procedures.

Seattle

Seattle's relief provision, codified in Section 2.04.630 (f) of Seattle Municipal Code, includes the following features:

- **Requirements for Activation:** Seattle's relief provision takes effect when non-participating candidate's spending, plus IE spending in opposition to the participating candidate or in support of his or her opponent, materially exceeds the Program Spending Limit. What shall constitute "material" excess is not defined.
- **Provision:** Participating candidate's Campaign Spending Limit and contribution limits lifted (see section on discrepancy below).
- **Definition of Spending:** Not clearly defined.
- **Determination of Intent of IE Spending:** Not clearly defined.

- **Dispute Process:** Not defined.
- **Burden of Proof:** A Program candidate or citizen must demonstrate to SEEC that an opponent's or IE's spending exceeds Program limits.

Important Questions Seattle's Relief Provision Leaves Unanswered

The text does not answer the following questions:

- 1) What will the threshold be for "material" excess spending necessary to activate the provision?
- 2) How will opposing, non-participating candidate spending be defined and tracked?
- 3) What process will the Commission use to determine whether IE communication was intended in support of, or in opposition to, a candidate?
- 4) What will the process be for qualified candidates to demonstrate to SEEC that the requirements of the provision have been met? What will constitute sufficient proof of excess spending?
- 5) What will the timeline be for action on the spending limit relief provision?
- 6) Will there be a dispute process for individuals who do not agree with SEEC's findings regarding opposing, non-participating candidate spending, or intent of IE communication?
- 7) Given limits on both spending and total contributions, how will participating candidates effectively take advantage of relief on a short timeline?

We address each of these questions below, including indicating where other jurisdictions' policies offer models that may be useful to the Commission.

Defining Material Excess Spending

We believe it is important that the Commission set a clear definition of "material" excess spending. In several provisions we reviewed from other jurisdictions (including those from Los Angeles and San Francisco), the spending relief provision is activated when opposing spending exceeds program spending limits by any amount. This has the benefit of releasing participating candidates from spending limits as early as possible. In keeping with this philosophy, we suggest the Commission define "material excess" as very close to the Program Spending Limit.

The drafters of Honest Elections Seattle specifically wrote "material," presumably to allow campaigns a small margin for understandable error. Campaigns, especially grassroots campaigns, sometimes include a variety of people making spending decisions and, in the chaos of a hot contest, someone might turn in a receipt for coffee for volunteers or a late Kinko's receipt that the treasurer had not previously been aware of, pushing spending above the limit.

On the other hand, a generous definition of "material" would effectively raise the spending limit. We suggest the Commission specify a low dollar amount, such as \$200 or \$500, or a percentage, such as 0.1 percent (\$150 for a district council race or \$800 for a mayor's race) as a guideline.

Definition of Opposition Spending and Establishing a Decision Dispute Process

The Initiative is not clear regarding how opposing candidate or IE spending will be defined. We suggest total expenditures be defined as the total spending reported on a candidate's C-4 form, and as defined on page 17 of the 2015 SEEC Candidate Guide [here: <http://www.seattle.gov/ethics/elpub/CandGde150416.pdf>]. This definition of expenditure includes not only spending to date, but also obligations to pay in the future for contracted services.

Determining when IE spending is made in opposition to a participating candidate, or in support of an opposing candidate, will be a slightly more complicated process. Because IEs might deploy a variety of deceptive tactics—such as running a *faux* support campaign by running ads that cite attributes the IE's managers know well will repel Seattle voters (“Vote for Candidate Y! She supports children's right to buy guns and narcotics!”)—we believe this determination should be left to the discretion of the SEEC but with a clear protocol by which such decisions can be disputed. San Francisco's city code outlines seven criteria which the SF Ethics Commission will use to determine the intent of an IE communication. See page 13 of this memo for a list and discussion of these criteria. New York City and San Francisco have both outlined detailed dispute protocols which may serve as models for Seattle in developing a similar process.

Burden of Proof

One important way in which Seattle's provision differs from most others we reviewed is that it places the burden of proof squarely on the shoulders of participating candidates. In other words, the provision charges participating candidates with demonstrating to SEEC that they face opposition spending that materially exceeds Program Spending Limits. Though other jurisdictions (such as New York City) provide a petition process by which a candidate or other citizen could dispute a decision of the Commission, candidates themselves are not typically charged with bringing the relief provision to the attention of the governing body.

The Commission will need to determine a clear and accessible process by which participating candidates can easily monitor opponents' and third party spending and notify the Commission when it exceeds Campaign Spending Limits. We suggest the Commission set up systems that help to reduce the monitoring burden on participating candidates by making it easy for them to track both opponent spending and relevant third party spending. Los Angeles' relief provision regulations, reviewed below, place some of the notification burden on non-participating candidates and may offer one model that could reduce some of this monitoring burden.

A reasonable and effective timeline

In order for this provision to be useful to participating candidates, we believe the Commission must respond to requests for release in a timely manner. In many other jurisdictions, including Los Angeles, Minnesota, and San Francisco, candidates can be released from spending limits within 24 hours of the

requirements of the spending relief provision being met. We suggest that the SEEC adopt a similarly short response timeline, and commit to reviewing and acting on any request for spending limit release within 24 hours of receiving that request. To this end, the Commission might need to authorize the Executive Director to act on its behalf or authorize a subcommittee to act on the Commission's full authority or otherwise design a rapid-response method of decision making.

Seattle's definition of Campaign Spending Limit and the Question of Escrow Accounts

The Initiative's definition of Campaign Spending Limit differs significantly from the definitions presented in most other public funding programs. A Campaign Spending Limit, defined in SMC Section 2.04.630 (d), is defined as

“(i) money spent to date (equal to prior expenditures, plus debts and obligations), and the value of any in kind donations reported, plus (ii) cash on hand and (iii) the value of unredeemed Vouchers on hand which the candidate shall have allocated to the primary or general election)”

Because this definition includes unspent cash on hand plus unredeemed Vouchers, it in essence limits campaign fundraising to the Program Spending Limit. Most other public funding programs we reviewed limit candidate spending, but not fundraising, allowing participating candidates to raise funds beyond program spending limits, thus allowing candidates to prepare for a late term release from program spending limits. Seattle's somewhat unique definition of Spending Limit to include fundraising precludes this type of preparation and raises some questions about how participating candidates will effectively utilize this provision given short campaign timelines. We believe the SEEC may need to address this issue to ensure candidates' confidence in the Program and their ability to realistically utilize this provision.

Because a large portion of campaign and independent spending occurs in the final weeks leading up to an election, we envision that the relief provision will most often be triggered in the final weeks before an election. In this case, a participating candidate would be hard pressed to raise significant funds to combat opposition spending in such a short time.

One solution to the problem of Seattle's limit on fundraising may be escrow accounts. In order to not violate the program's Campaign Spending Limit, additional fundraising could take place prior to the activation of the spending relief provision via an escrow, or separate account, which the participating candidate could only access in the event of the relief provision coming online.

The Commission could by rule design such a system. It would do well to guard against such escrow accounts being so helpful or easy to access that all candidates fill them as a matter of course then conspire with a friendly IE to help tap them. This question clearly requires careful reflection from the Commission.

Rhode Island's Model

The only other public funding program we found which similarly regulates participating candidates' fundraising to program contribution limits is Rhode Island (see Title 17-25-20 2(i) of the State's General Laws: <http://webserver.rilin.state.ri.us/Statutes/TITLE17/17-25/17-25-20.HTM>). The Rhode Island Board of Elections has made efforts to ensure the spending limit relief provision will be useful to participating candidates. The program requires all candidates for offices covered by the state's public funding program who face challengers in a primary or general election, whether they have elected to receive public funds or not, to file a form title MPF-2. The form requires candidates to report not only spending and contributions to date, but also "expected contributions" and "anticipated expenditures," which include those not yet contracted for. The stated purpose of the form is,

"to prevent a candidate who is being challenged in a primary or in an election from deferring either contributions or expenditures until a point in time when it will be difficult or impossible for his or her opponent or opponents to raise and expend before the primary or election, as the case may be, an additional sum of money as permitted by law"

(Page 13, 2014 Campaign Finance Manual for the Public Financing of Campaigns, here:

http://www.elections.state.ri.us/publications/Campaign_Finance/2014_mpf_manual_v2.pdf),

Though Rhode Island's form MPF-2 may provide participating candidates with some additional warning regarding opponent spending, it represents only a partial solution to the problem of effective fundraising on a short timeline. We encourage the SEEC to look more closely at Rhode Island's protocol related to the spending relief provision to see whether it may provide a transferable model to the Seattle context, and to explore other possible policies for protecting this important portion of the program.

Three clarifications regarding the details of Seattle's provision

Total Voucher fundraising limits: The Initiative states that when the SEEC chooses to allow a candidate to be released from Program Campaign Spending Limits and contribution limits,

"SEEC shall allow such candidate to redeem his or her Democracy Vouchers received theretofore or thereafter up to the amount of the Campaign Spending Limit only, then allow such candidate to engage in campaign fundraising without regard to any Program requirements."

(SMC 2.04.630 (f))

We see three ways in which this text could be interpreted related to Voucher fundraising and urge the Commission to make clear its interpretation. Here are the scenarios:

If a candidate has received a combination of Democracy Vouchers and direct donations prior to the activation of the spending limit relief provision, could that candidate, newly released from the Spending Limit, either

- a) Continue raising a mix of both Vouchers and direct contributions up to the Campaign Spending Limit. Once this limit is reached, the candidate cannot raise further Vouchers but can continue raising other contributions. Under this scenario, a candidate's Voucher fundraising post activation of the spending relief provision would depend heavily on the mix of Voucher and other contributions they receive after activation of the provision.

OR

- b) Continue raising Vouchers up to a total value equal to the remaining difference between the candidate's fundraising prior to the date on which the spending limit relief provision took effect and the Program Campaign Spending Limit. After this Voucher value is reached, the candidate could continue raising other contributions, but not Vouchers, beyond the Program Spending Limit. This would ensure candidates could raise a very specific number of additional Vouchers after the spending limit relief provision took effect.

OR

- c) Continue raising Vouchers until the total value of Vouchers raised (both before and after activation of the spending limit relief provision) is equivalent to the Program Campaign Spending Limit. Any direct donations received (either before or after the activation of the relief provision) would not be considered as part of the Spending Limit threshold for Vouchers.

We believe that scenario (a) is the most reasonable interpretation of the Initiative text. We also believe that this interpretation will likely provide the most protection against legal challenge given the Arizona precedent.

New contribution limits: The Initiative does not make clear what the new contribution limits will be for participating candidates who are released from Program contribution limits via the relief provision. We suggest that participating candidates should be released from Program contribution limits to use the contribution limits that apply to all candidates for city office, as outlined in Section 5 of the Initiative, SMC 2.04.370).

Consistency in Program requirement relief: The text of the Initiative also contains a small discrepancy regarding what program requirements a participating candidate can be released from when faced with "materially significant" adverse spending. In Section 2.04.630 (f) the Initiative states that when a participating candidate has an opponent whose campaign spending has exceeded the program's Campaign Spending Limit, the participating candidate can be released from *both* the Campaign Spending

Limit and campaign contribution limits. In contrast, in a case where a participating candidate is released from Program requirements due to an opponent's spending plus independent expenditures, the Initiative states that participating candidates can be released from Program Spending Limits, but makes no mention of release from Program campaign contribution limits. We suggest that this should be consistent across both cases and that participating candidates should be released from both Campaign Spending Limits and contribution limits any time the relief provision comes into effect.

Arizona

The United States Supreme Court ruled Arizona's spending limit relief provision unconstitutional in 2011, in its decision *Arizona Free Enterprise Club v Bennett* (Supreme Court decision here: [\[\[https://www.law.cornell.edu/supct/html/10-238.ZS.html\]\]](https://www.law.cornell.edu/supct/html/10-238.ZS.html)). We include a brief summary of the former policy here in order to provide the Commission with some context about the history of relief provisions.

Arizona's provision gave participating candidates additional public funds up to the total expenditures of their opposing, non-participating candidates plus third party independent expenditures made in support of non-participating candidates and/or in opposition to the participating candidate (the full text of the now defunct Arizona relief provision is accessible here:

[\[\[http://law.justia.com/codes/arizona/2010/title16/16-952.html\]\]](http://law.justia.com/codes/arizona/2010/title16/16-952.html)).

- **Requirements for Activation:** The provision was enacted when the sum of opposing, non-participating candidates' expenditures, plus opposing IE spending, plus IE spending in favor of a non-participating candidate exceeded the election spending limits.
- **Provision:** Participating candidates received additional public funds to match the sum of the expenditures described above.
- **Definition of Spending:** Opposition spending includes spending by non-participating, opposing candidates, plus IEs against the participating candidate, plus IEs in favor of non-participating, opposing candidates.
- **Determination of Intent of IE Spending:** Not clear in the Arizona Revised Statutes.
- **Burden of Proof:** Monitoring of total spending fell to the Citizens Clean Elections Commission.

The Court's main difficulty with this provision rested on its treatment of Independent Expenditures. As the Court wrote in its decision, providing participating candidates with direct public funds to combat non-coordinated IEs puts participating candidates at a significant advantage over non-participating candidates, who have no control over IE spending either in their favor or in opposition to their participating opponents. Further, the Court stated, the provision could effectively silence IEs by requiring them to choose between prompting the matching funds, changing their message, or refraining from communicating.

What could this offer Seattle?

Seattle's relief provision differs significantly from Arizona's former provision in that candidates are simply released from spending limits, and not granted additional money to level the playing field. Nevertheless, the treatment of Independent Expenditures in the Commission's rulemaking is an area that will require considerable attention and care.

Los Angeles, California

Los Angeles' public financing regulations are detailed in the Los Angeles Municipal Code Section 49.7; specifics regarding the city's spending limit relief provision are in subsection 25, both printed here: [\[\[http://ethics.lacity.org/PDF/publications/candguides/pub_CityCandGuide2015.pdf\]\]](http://ethics.lacity.org/PDF/publications/candguides/pub_CityCandGuide2015.pdf).

The regulations include the following features:

- **Requirements for Activation:** Non-participating candidate spending exceeds expenditure ceiling or IE spending reaches a specific threshold.
- **Provision:** Participating candidate's Expenditure Ceiling lifted.
- **Definition of Spending:** Only loosely defined as non-participating candidate campaign expenditures or third party spending threshold.
- **Determination of Intent of IE Spending:** Not defined.
- **Burden of Proof:** Non-participating candidates must notify the Ethics Commission when they make expenditures exceeding the participating candidate's Expenditure Ceiling.

What could this offer Seattle?:

Determination of Intent of IE Communication:

The 2015 City Candidate Guide includes minimal guidelines regarding how the Commission will determine the intent of an IE communication with respect to the relief provision. Page 43 reads,

“An independent expenditure communication is a communication that expressly advocates the election or defeat of a clearly identified candidate or, taken as whole and in context, unambiguously urges a particular result in an election but is not authorized, distributed, paid for, or behested by the affected candidate or committee. LAMC § 49.7.2(J).”

(Available here:

[\[\[http://ethics.lacity.org/PDF/publications/candguides/pub_CityCandGuide2015.pdf\]\]](http://ethics.lacity.org/PDF/publications/candguides/pub_CityCandGuide2015.pdf))

Burden of Proof

According to the 2015 City Candidate Guide, non-participating candidates must notify the Ethics Commission when they make expenditures that exceed 100 percent of the Program Expenditure Ceiling.

The Ethics Commission then notifies all participating candidates in the same race that their Expenditure Ceiling has been lifted (page 43).

New York City

New York City's spending limit relief provision is included in the New York City Administrative Code, Section 3-706 (3), available here:

[[[http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/newyorkcityadministrativecode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:newyork_ny](http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/newyorkcityadministrativecode?f=templates$fn=default.htm$3.0$vid=amlegal:newyork_ny)]].

The New York City Campaign Finance Board (CFB) has made further regulations on the processes for determining when provision requirements are met. These regulations are written in Rule 7-03, here: [[<http://www.nycffb.info/law/rules/rule-7-03-review-contributions-and-expenditures>]].

- **Requirements for Activation:** The CFB activates the provision when non-participating, opposing candidates spend either half, or three times as much, as the applicable expenditure limit.
- **Provision:** Participating candidate's expenditure limit increased or lifted.
- **Definition of Spending:** Non-participating, opposing candidate's authorized committee expenditures and contributions only.
- **Determination of Intent of IE Spending:** Independent expenditures not considered.
- **Burden of Proof:** Generally the Campaign Finance Board monitors spending. Any individual may submit a petition to the CFB requesting a review of CFB findings if they feel accounting is inaccurate

Following the Arizona decision in 2011, one portion of New York City's relief provision was repealed. This policy increased the matching ratio for participating candidates facing well-funded opposition. Full text for this defunct part of the provision was in sub-section 3 (a) (ii) (iii) and (b) (ii) (iii) and can be accessed here:

[[[http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/newyorkcityadministrativecode?f=templates\\$fn=default.htm\\$3.0\\$vid=amlegal:newyork_ny](http://library.amlegal.com/nxt/gateway.dll/New%20York/admin/newyorkcityadministrativecode?f=templates$fn=default.htm$3.0$vid=amlegal:newyork_ny)]].

What could this offer Seattle?:

Burden of Proof Model and Protocol for Petitioning the Board for Reconsideration

New York City's Campaign Finance Board Rule 7-03 includes a detailed protocol by which individuals can petition the Board to reconsider determinations of spending (e.g. purpose of IE communication) relevant to the spending limit relief provision. The full text of the protocol can be accessed here:

[[<http://www.nycffb.info/law/rules/rule-7-03-review-contributions-and-expenditures>]]. The Seattle Ethics and Elections Commission will likely need to develop a similar protocol for Seattle candidates.

San Francisco, California

San Francisco's public financing regulations come from San Francisco's Campaign and Governmental Conduct Code, Article 1; the spending relief provision in particular is detailed in Section 1.143, here: [\[\[http://library.amlegal.com/nxt/gateway.dll/California/campaign/article/election/campaigns?f=template&fn=default.htm&3.0&vid=amlegal:sanfrancisco_ca&anc=JD_Art.ICh.1\]\]](http://library.amlegal.com/nxt/gateway.dll/California/campaign/article/election/campaigns?f=template&fn=default.htm&3.0&vid=amlegal:sanfrancisco_ca&anc=JD_Art.ICh.1).

The regulations are also explained in the Supplemental Candidate Guides, available here: [\[\[http://www.sfethics.org/ethics/2009/05/candidates-and-officeholders.html\]\]](http://www.sfethics.org/ethics/2009/05/candidates-and-officeholders.html).

San Francisco has some of the most detailed regulations regarding its spending limit relief provision. The city has clear guidelines for three areas which likely require rulemaking in Seattle's context. First, San Francisco was the only jurisdiction we found which laid out clear guidelines regarding how the Commission will determine the intent of an IE communication. SEEC may wish to adopt a similar set of guidelines on this topic. San Francisco also offers the only clear definition of spending, both in opposition to participating candidates, and in support of non-participating candidates. Finally, similar to New York City, San Francisco's regulations offer another dispute protocol by which candidates can petition the Commission to reconsider a relief provision decision.

The regulations include the following features:

- **Requirements for Activation:** The provision is enacted when the sum of a non-participating candidate's total spending, plus any spending by Independent Expenditure against a participating candidate, plus IE spending supporting an opposing candidate, exceed a participating candidate's Individual Expenditure Ceiling.
- **Provision:** Participating candidate's Individual Expenditure Ceiling is incrementally increased to equal sum of Supportive and Opposition Spending of non-participating candidates in the same race.
- **Definition of Spending:** San Francisco's Ethics Commission has also made some of the clearest definitions of Supportive and Opposition Spending to determine when the requirements of the provision have been met. See the relevant text below.
- **Burden of Proof:** Monitoring responsibilities falls to the Executive Director of the Ethics Commission; candidates may object to the decision and request the Commission review.

What could this offer Seattle?:

In the analysis below we've included significant text from the city's code and additional Ethics Commission Regulations as they relate to specific lingering policy questions on Seattle's spending limit relief provision.

Definition of Spending

San Francisco's regulations clearly define how the Ethics Commission will define and calculate Opposition Spending by IEs and Supportive Funds spent by non-participating opposing candidates. The full regulations are available here: [<http://www.sfethics.org/ethics/2011/06/-regulations-to-campaign-finance-reform-ordinance-san-francisco-campaign-and-governmental-conduct-co.html>] and are printed below.

Regulation 1.104-4: Determination of Total Opposition Spending.

(a) To determine the total opposition spending against a candidate who has been certified eligible to receive public funding, the Executive Director shall add any amounts reported on Third Party Spending Forms that the Executive Director and/or Ethics Commission has determined, pursuant to section 1.143, are intended to oppose the candidate. The Executive Director may also consider, in his or her discretion, any other relevant information available to the Ethics Commission that reflect additional, unreported third-party spending.

(b) Total opposition spending does not include spending by a candidate to support himself or herself or to oppose his or her opponents in the same election.

Regulation 1.104-5: Determination of Total Supportive Funds.

(a) To determine the total supportive funds of a candidate for the Board of Supervisors or Mayor, the Executive Director shall use the aggregate amount of contributions that the candidate reports on Forms SFEC-152(a)-1 and SFEC-152(a)-2. The Executive Director shall then add to this any amounts that reported on Third Party Spending Forms that the Executive Director and/or the Ethics Commission has determined, under section 1.143, are intended to support the candidate. The Executive Director may also consider, in his or her discretion, any other relevant information available to the Ethics Commission that reflect additional, unreported third-party spending.

(b) Spending intended to oppose one candidate does not constitute supportive spending for the candidate's opponents

Determination of Intent of IE communication:

As mentioned, San Francisco's provision includes detailed protocol by which the Ethics Commission will determine whether an IE communication is made in support of, or opposition to, a candidate. The city's Campaign Finance Code outlines seven criteria for determination and give the Ethics Commission's Executive Director final discretion over the decision.

SEC. 1.143. ADJUSTING INDIVIDUAL EXPENDITURE CEILINGS (continued)

(c) The Executive Director shall promptly review statements filed pursuant to state and local law, including Government Code section 84204 and Sections [1.161](#), [1.162](#), and [1.163](#) of this Chapter, to determine whether a communication supports or opposes one or more candidates.

Factors the Executive Director shall use to determine whether the communication supports or opposes one or more candidates include the following:

- (1) whether the communication clearly identifies one or more candidates;*
- (2) the timing of the communication;*
- (3) the voters targeted by the communication;*

(4) *whether the communication identifies any candidate's position on a public policy issue and urges the reader or viewer to take action, including calling the candidate to support or oppose the candidate's position;*

(5) *whether the position of one or more candidates on a public policy issue has been raised as distinguishing these candidates from others in the campaign, either in the communication itself or in other public communications;*

(6) *whether the communication is part of an ongoing series of substantially similar advocacy communications by the organization on the same issue; and*

(7) *any other factors the Executive Director deems relevant.*

Process for Disputing Commission's Decision:

San Francisco's regulations also include a detailed process by which candidates can dispute the Commission's decision regarding the intent of an IE communication. Important in this dispute protocol is the very quick decision deadlines by which the Ethics Commission and Executive Director must respond to disputes. These clearly defined and accelerated deadlines are important to making such a provision function on a short election timeline.

SEC. 1.143. ADJUSTING INDIVIDUAL EXPENDITURE CEILINGS (continued)

(d) *Within one business day of the date that the Executive Director makes a determination under Subsection (c), either the candidate(s) identified in the communication or any candidate seeking the same City elective office as the candidate identified in the communication may object to the Executive Director's determination. The Executive Director shall respond to any objection within one business day of receiving the objection.*

(e) *Within one business day of the Executive Director's response, either the candidate(s) identified in the communication or any candidate seeking the same City elective office as the candidate identified in the communication may submit to the Executive Director a request that the Ethics Commission review the Executive Director's determination. Within one business day of receiving the request, the Executive Director shall notify each Commissioner of the candidate's request.*

If within one business day of the Executive Director's notice, two or more members of the Commission inform the Executive Director that they would like to review the determination, the Executive Director shall schedule a meeting of the Commission on a date that occurs within one week of the Commissioners' requests. If three members of the Commission vote to overrule the Executive Director's determination, the Commission shall make a final determination based on the factors set forth above.

(f) *If no candidate objects to the Executive Director's determination, if no candidate requests review by the Commission of the Executive Director's determination, if a request is made and two or more members of the Commission do not request to review the determination, or within one week of two members of the Commission requesting to review the Executive Director's determination, at least three members of the Commission do not vote to overrule the Executive Director's determination, the Executive Director's determination shall become final.*

The Executive Director shall determine whether to adjust the Individual Expenditure Ceilings of each candidate for Mayor or the Board of Supervisors pursuant to either Subsection (a) or (b) of this Section within one business day of a final determination.

(Added by Ord. 234-09, File. No. 090989, App. 11/20/2009; amended by Ord. [64-12](#), File No. 111082, App. 4/20/2012, Eff. 5/20/2012; Ord. [102-15](#), File No. 150294, App. 6/25/2015, Eff. 7/25/2015)

We believe the Commission will need to make rules in answer to the five questions we laid out at the beginning of this memo that are unanswered in Seattle's provision. We hope this review of other jurisdictions, with attention to what policy models they might offer to the Seattle context, provides a starting place for the Commission to embark on its rulemaking.

Sincerely,

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Margaret Morales, Senior Research Associate
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Appendix A: Minnesota

Minnesota's spending limit relief provision is written in the state statutes, Chapter 10A.25, Subdivision 10, available here: [[<https://www.revisor.mn.gov/statutes/?id=10A.25>]].

- **Requirements for Activation:** Opposing, non-participating candidates spend 20 percent of primary spending limit, or 50 percent of general spending limit.
- **Provision:** Participating candidate can choose to be released from expenditure limit.
- **Definition of Spending:** Expenditures from all opposing, non-participating candidate's campaign committees.
- **Determination of Intent of IE Spending:** N/A
- **Burden of Proof:** Not defined.

Minnesota's policy differs significantly from Seattle's and we did not see any immediate areas where Seattle could learn from Minnesota's regulations. We are including the text of the regulation here as supplementary material.

Provision: Text from 2015 Minnesota Statutes

Section 10A.25 SPENDING LIMITS.

Subd. 10. Effect of opponent's conduct.

(a) After the deadline for filing a spending limit agreement under section 10A.322, a candidate who has agreed to be bound by the expenditure limits imposed by this section as a condition of receiving a public subsidy for the candidate's campaign may choose to be released from the expenditure limits but remain eligible to receive a public subsidy if the candidate has an opponent who has not agreed to be bound by the limits and has received contributions or made or become obligated to make expenditures during that election cycle in excess of the following limits:

(1) up to the close of the reporting period before the primary election, receipts or expenditures equal to 20 percent of the election segment expenditure limit for that office as set forth in subdivision 2; or

(2) after the close of the reporting period before the primary election, cumulative receipts or expenditures during that election cycle equal to 50 percent of the election cycle expenditure limit for that office as set forth in subdivision 2.

Before the primary election, a candidate's "opponents" are only those who will appear on the ballot of the same party in the primary election.

(b) A candidate who has not agreed to be bound by expenditure limits, or the candidate's principal campaign committee, must file written notice with the board and provide written notice to any opponent of the candidate for the same office within 24 hours of exceeding the limits in paragraph (a). The notice must state only that the candidate or candidate's principal campaign committee has received contributions or made or become obligated to make campaign expenditures in excess of the limits in paragraph (a).

(c) Upon receipt of the notice, a candidate who had agreed to be bound by the limits may file with the board a notice that the candidate chooses to be no longer bound by the expenditure limits. A notice of a candidate's choice not to be bound by the expenditure limits that is based on the conduct of an opponent in the state primary election may not be filed more than one day after the State Canvassing Board has declared the results of the state primary.

(d) A candidate who has agreed to be bound by the expenditure limits imposed by this section and whose opponent in the general election has chosen, as provided in paragraph (c), not to be bound by the expenditure limits because of the conduct of an opponent in the primary election is no longer bound by the limits but remains eligible to receive a public subsidy.