



August 9, 2018

Submitted electronically to ethics.commission@sfgov.org

Chair Daina Chiu
San Francisco Ethics Commission
25 Van Ness Avenue, Suite 220
San Francisco, CA 94102

Re: Review of San Francisco's Public Financing Program

Dear Chair Chiu and Members of the Commission:

The Campaign Legal Center (“CLC”) submits these comments to the San Francisco Ethics Commission (“Commission”) regarding the substantive review of the city’s public financing program. The comments cover specific aspects of the public financing program discussed during public meetings held on July 31 and August 1, including the candidate qualification process, funding available for participating candidates, and the Individual Expenditure Ceiling. In our comments, we have included various recommendations and considerations that would help the Commission to advance objectives of the city’s public financing program.¹ Generally, implementation of our recommendations would require substantive amendments to the Campaign Finance Reform Ordinance.²

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening campaign finance, ethics, and lobbying laws across all levels of government. Since the organization’s founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court as well as numerous other federal and state court cases. Our work promotes every voter’s right

¹ See Proponent’s Argument in Favor of Proposition O (“The Ethics Commission proposes campaign finance reforms to encourage candidates to limit their spending, decrease the time candidates spend raising money, increase the opportunity for candidates to run for office, and ensure the integrity of the electoral process.”); see also S.F. Campaign & Governmental Conduct Code § 1.100(b) (“It is the purpose and intent of the People of the City and County of San Francisco in enacting this Chapter to . . . [e]nsure that all individuals and interest groups in our city have the opportunity to participate in elective and governmental processes . . . [h]elp restore public trust in governmental and electoral institutions”).

² By four-fifths vote of its members, the Ethics Commission may submit proposed amendments to the Campaign Finance Reform Ordinance for voter approval at the city’s next general election. S.F. Charter art. XV, § 15.102.

to participate in the democratic process and to know the true sources of money spent to influence elections.

We applaud the Commission’s decision to make the substantive review of San Francisco’s public financing system its top policy priority. The vast amounts of money being raised to fund elections has left many Americans feeling excluded from the democratic process. Campaign contributions increasingly come from a concentrated and limited pool of wealthy donors.³ Effective public financing programs can amplify the voices of all citizens—not just those who can afford to write large checks—and broaden political participation among the public at large. These programs require maintenance, however, to keep them up to date with the needs of campaigns. We fully support the Commission’s efforts to review the city’s program and maintain it as a viable funding option for San Francisco candidates.

I. Candidate Qualification Process

To receive public funding in San Francisco, candidates must satisfy qualification criteria specified in the Campaign Finance Reform Ordinance, including a two-part fundraising threshold.⁴ Further, candidates are only eligible for public financing if they face at least one opponent who has either established eligibility for public financing or received contributions or made expenditures above certain amounts.⁵ The fundraising threshold requires candidates to raise both a minimum *amount* and *number* of “qualifying contributions” between \$10 and \$100 from San Francisco residents.⁶ The requisite amount and number of qualifying contributions vary for mayoral and supervisorial candidates, as well as for incumbents and non-incumbents.

Non-incumbent mayoral candidates must collect at least \$50,000 in qualifying contributions from a minimum of 500 San Francisco residents, while an incumbent mayor must raise a minimum of \$75,000 from no fewer than 750 city residents.⁷ In elections for the Board of Supervisors, non-incumbent candidates must receive at least \$10,000 in qualifying contributions from a minimum of 100 city residents; incumbent members of the Board of Supervisors must raise a minimum of \$15,000 in qualifying contributions from at least 150 city residents.⁸ All candidates must demonstrate that they have met the fundraising threshold and other qualification

³ In 2016, half of all campaign contributions to federal candidates came from only 15,810 individuals. By comparison, in 2000, 73,926 individuals accounted for half of all contributions in federal elections. See NATHANIEL PERSILY, ROBERT F. BAUER, & BENJAMIN L. GINSBURG, BIPARTISAN POLICY CTR., CAMPAIGN FINANCE IN THE UNITED STATES: ASSESSING AN ERA OF FUNDAMENTAL CHANGE 22 (Jan. 2018), <https://bipartisanpolicy.org/wp-content/uploads/2018/01/BPC-Democracy-Campaign-Finance-in-the-United-States.pdf>.

⁴ S.F. Campaign & Governmental Conduct Code § 1.140.

⁵ *Id.* §§1.140(b)(3), (c)(3).

⁶ *Id.*; see also *id.* § 1.104 (“‘Qualifying contribution’ shall mean a contribution of not less than \$10 and not more than \$100 that is made by an individual who is a resident of San Francisco and that complies with all requirements of this Chapter.”).

⁷ *Id.* § 1.140(c)(2).

⁸ *Id.* § 1.140(b)(2).

criteria by submitting a Qualifying Request, along with supporting documentation, to the Ethics Commission no later than 70 days prior to the election.⁹

San Francisco’s fundraising requirements are comparable to qualification criteria for public financing in similarly-sized jurisdictions. For instance, Seattle’s Democracy Voucher Program requires mayoral candidates to collect “qualifying contributions” of at least \$10 from a minimum of 600 city residents; city council candidates, other than those seeking an at-large position, must receive qualifying contributions of at least \$10 from 150 Seattle residents.¹⁰ In Washington, D.C., the recently-enacted Fair Elections Program will require mayoral candidates to receive at least \$40,000 in “qualified small-dollar contributions” from a minimum of 1,000 city residents, and city council candidates for a ward seat will have to raise no less than \$5,000 in “qualified small-dollar contributions” from at least 150 city residents in order to receive certification for public funds.¹¹ Under D.C.’s new program, candidates must submit the required number and amount of “qualified small-dollar contributions” to the D.C. Board of Elections no later than 90 days before the date of the primary or general election, as applicable.¹²

There are several potential changes to the candidate qualification process in San Francisco that could advance the program’s objectives. First, the Commission should consider whether to require candidates for the Board of Supervisors to raise a certain number of their qualifying contributions from residents of the particular district that they seek to represent. Currently, a number of jurisdictions obligate city council candidates to collect qualifying contributions from residents of the relevant council district in order to gain eligibility for public funds.¹³ Seattle’s Democracy Voucher Program requires city council candidates seeking a district position to collect at least 75 of their 150 qualifying contributions from residents of that district.¹⁴ In New York City, city council candidate also must raise at least 75 qualifying contributions from within the relevant district as part of the qualification process for public funding.¹⁵

The intent behind a residency requirement for qualifying contributions is to encourage candidates to focus their time and effort on engaging prospective constituents during the formative stages of a campaign. At least one study has shown that residency requirements do, in fact, promote more involvement among publicly-financed candidates’ potential constituents. Analysis of public financing systems in New York City and Los Angeles found that residency requirements for qualifying contributions correlated with significant increases in both the percentage

⁹ *Id.* §§ 1.140(b)(2), (c)(2).

¹⁰ Seattle Mun. Code § 2.04.630(C) (as amended by 2018 Ordinance No. 125611).

¹¹ D.C. Law 22-94, § 332c(a)(1), 65 D.C. Reg. 2847 (May 25, 2018).

¹² *Id.* § 2(47B); D.C. Code §§ 1.1001.08(i)(1), (j)(1).

¹³ *See, e.g.*, Seattle Mun. Code § 2.04.630(C) (as amended by 2018 Ordinance No 125611); N.Y.C. Admin. Code § 3-703(2)(a); L.A. Mun. Code; Albuquerque, N.M., Charter art. XVI, § 5(B).

¹⁴ Seattle Mun. Code § 2.04.630(C) (as amended by 2018 Ordinance No 125611).

¹⁵ N.Y.C. Admin. Code § 3-703(2)(a)(iv).

of constituents who were “small donors” of \$250 or less as well as the percentage of constituents among all donors to city council candidates eligible for public funds.¹⁶

Another potential amendment to consider for San Francisco’s program is the elimination of the prerequisite that candidates face an electoral opponent, who in turn must have surpassed certain fundraising thresholds, in order to receive public funding.¹⁷ While limiting disbursement of public funds to candidates in a contested election helps to conserve program resources, there are countervailing reasons for allowing candidates running unopposed or facing an underfunded opponent to receive public funds.

Public financing regimes, especially matching funds programs like San Francisco’s, can promote political engagement even in the context of an uncontested election. These programs are structured to incentivize candidate outreach to voters irrespective of whether the election is contested. Moreover, the availability of public funds offers candidates an alternative to relying on large, private donations to fund their campaigns.

For these reasons, Washington, D.C.’s Fair Elections Program will permit candidates who qualify for public funds to receive matching funds even if they are running unopposed. Like San Francisco’s program, Washington, D.C.’s public financing ordinance will provide participating candidates in a *contested* election with both an initial payment and matching funds for certain contributions received from city residents.¹⁸ While the D.C. program will not furnish an initial payment to participating candidates in an *uncontested* election, it will continue to offer matching funds for any “qualified small-dollar contribution” raised by participating candidates running unopposed.¹⁹ This design helps to balance the District’s need to conserve resources with the program’s goal of promoting political engagement. The Commission should consider a similar option for San Francisco’s program in order to incentivize candidate outreach to small-dollar contributors.

II. Public Funding Available for Participating Candidates

San Francisco’s program offers partial public funding to candidates for mayor and the Board of Supervisors. The program can be described as a hybrid public financing system, providing both grants (“initial payments”) and matching fund payments to participating candidates. A candidate may not receive public funds through the program prior to 142 days before an election.²⁰

¹⁶ Michael J. Malbin & Michael Parrott, *Small Donor Empowerment Depends on the Details: Comparing Matching Fund Programs in New York and Los Angeles*, 15 FORUM 219, 234 (July 2017), <https://www.degruyter.com/downloadpdf/j/for.2017.15.issue-2/for-2017-0015/for-2017-0015.pdf>.

¹⁷ S.F. Campaign & Governmental Conduct Code §§ 1.142(b)(3), (c)(3).

¹⁸ D.C. Law 22-94, § 332d(b)(1).

¹⁹ *Id.*

²⁰ S.F. Campaign & Governmental Conduct Code § 1.144(b).

Once a candidate is certified for public funding by the Commission's Executive Director, the candidate will receive an initial payment from the Election Campaign Fund. The amount of the initial payment differs for mayoral candidates and supervisorial candidates.²¹ After certification, candidates are also able to collect matching payments, at tiered rates, for "matching contributions" up to \$500 made by city residents.²² A two-to-one match rate applies to matching contributions received up to certain thresholds, and a one-to-one rate is employed after a candidate has surpassed these thresholds.²³ Further, the program caps the total amount of public funding that a candidate can acquire through both the initial payment and matching funds payments, with different limits applicable to mayoral and supervisorial candidates.²⁴

To enhance public participation in the program, we recommend that the Commission consider an increase in the match rate for participating candidates in the city's program. A substantial body of research has shown that New York City's high rate of public-to-private dollar matching, currently at six-to-one, has substantially boosted local participation in municipal campaigns.²⁵

For example, analysis of New York City's program found that the city's implementation of multiple-matching public funds, in 2001, resulted in significant increases both in the number of individuals donors of \$250 or less and in the proportional significance of these donors to competitive city council candidates in the program.²⁶ These findings were consistent across challengers, incumbents, and open-seat candidates.²⁷ Another study of New York City's program found that the city's decision to increase its match rate from four-to-one to six-to-one further invigorated participation by "small donors" of \$250 or less.²⁸ Likewise, this study demonstrated that New York City's implementation of a six-to-one match rate, in 2013, resulted in

²¹ Mayoral candidates receive an initial payment of \$100,000, while candidates for the Board of Supervisor are eligible for a \$20,000 initial payment. *Id.* §§ 1.144 (c)(1), (d)(1).

²² *Id.* §§ 1.144 (c)(2)-(3), (d)(2)-(3).

²³ A candidate for mayor will receive a 2:1 public-to-private funds match for the first \$425,000 in matching contributions made to the campaign. Non-incumbent mayoral candidates are subsequently eligible for a 1:1 public-to-private funds match for the next \$25,000 of qualified contributions, and an incumbent mayor will receive a 1:1 match for the next \$12,500 raised. *Id.* § 1.144 (c)(2)-(3). In elections for the Board of Supervisors, certified candidates are eligible for a 2:1 public-to-private funds match for the first \$50,000 raised in matching contributions. Non-incumbents will then receive a 1:1 match for the next \$35,000 in matching contribution that they collect, and incumbents on the Board of Supervisors are eligible for a 1:1 match on the next \$32,500 in matching contributions. *Id.* § 1.144(d)(2)-(3).

²⁴ The maximum amount of public funds available to non-incumbent and incumbent candidates for mayor is \$975,000 and \$962,500, respectively. *Id.* § 1.144(c)(4). Non-incumbent and incumbent candidates for the Board of Supervisors can receive a total of \$155,000 and \$152,500, respectively, in public funds. *Id.* § 1.144(d)(4).

²⁵ N.Y.C. Admin. Code § 3-705(2)(a).

²⁶ Michael J. Malbin et al., *Small Donors, Big Democracy: New York City's Matching Funds as a Model for the Nation and States*, 11 ELECTION L.J. 3, 9-10 (2012), http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf.

²⁷ *Id.*

²⁸ Malbin & Parrott, *supra* note 16, at 232.

candidates raising a higher portion of their total campaign funds from small donors of \$250 or less.²⁹

Research also indicates that New York City's matching funds program has bolstered participation in local campaigns among a larger and more demographically diverse segment of the city's population. A statistical evaluation of donors to New York City campaigns found that 89% of the city's census-block groups had at least one resident who donated \$175 or less to a city candidate during the 2009 municipal elections.³⁰ By comparison, in 2010, only 30% of New York City's census-block groups contained at least one individual donor of \$175 or less to candidates for the New York State Assembly, who are not eligible for matching funds.³¹ This study also determined that census-block groups with at least one small donor of \$175 or less to a city candidate were statistically less affluent and more racially diverse than census-block groups with at least one "large donor," defined as an individual contributor of \$1,000 or more, signaling that the matching funds program has encouraged participation among politically underrepresented groups.³²

While political and fiscal dynamics vary among cities, the research findings from New York City substantiate that a high match rate for small contributions can augment local participation in campaigns. The Commission should assess whether the implementation of a higher match rate in San Francisco's program is a feasible method to improve political participation in the city.

III. Individual Expenditure Ceiling

San Francisco's public financing program imposes an "individual expenditure ceiling" ("IEC") on the total funds that a publicly-funded candidate may spend in a campaign.³³ The current IEC for mayoral candidates is \$1,475,000, and supervisorial candidates have an IEC of \$250,000.³⁴ The Commission will incrementally raise a publicly-financed candidate's IEC if an opponent's "total supportive funds,"³⁵ in combination with "total opposition spending"³⁶ against the publicly-financed candidate, significantly exceed the IEC.³⁷

²⁹ *Id.*

³⁰ ELISABETH GENN ET AL., BRENNAN CTR. FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS 10 (2012), https://www.brennancenter.org/sites/default/files/legacy/publications/DonorDiversityReport_WEB.PDF.

³¹ *Id.*

³² *Id.* at 14.

³³ S.F. Campaign & Governmental Conduct Code §§ 1.140(b)(4), (c)(4).

³⁴ *Id.*

³⁵ "'Total Supportive Funds' shall mean the sum of all contributions received by a candidate committee supporting a candidate for Mayor or the Board of Supervisors, other than any funds in the candidate's Campaign Contingency Account exceeding the candidate committee's Trust Account Limit, plus the expenditures made or expenses incurred by any person or persons for the purpose of making independent expenditures, electioneering communications or member communications in support of that same candidate." *Id.* § 1.104.

³⁶ "'Total Opposition Spending' shall mean the sum of any expenditures made or expenses incurred by any person or persons for the purpose of making independent expenditures, electioneering

As an initial matter, we note that San Francisco’s program is consistent with U.S. Supreme Court precedent on public financing “release” mechanisms. Specifically, the Court has held that release mechanisms may not give additional *public* funds, in excess of the initial spending limit, to a participating candidate in response to spending by a nonparticipating opponent or independent expenditures.³⁸ The Court has also held that campaign finance regimes may not raise contribution limits for a candidate to account for spending by an opponent.³⁹

In San Francisco’s program, the amount of matching funds available to a participating candidate is limited and not tied, in any way, to an opponent’s spending or independent expenditures.⁴⁰ The raising of a participating candidate’s IEC does *not* increase public funds available to the candidate and only permits the candidate to raise additional *private* contributions under the same limits applicable throughout the election cycle. Accordingly, San Francisco’s method of raising candidates’ IECs is distinguishable from provisions invalidated by the Court and does not present constitutional concerns under existing law.

Other jurisdictions with public financing impose limits on a participating candidate’s total campaign spending. Likewise, some jurisdictions permit a candidate’s release from their programs’ spending limits on the basis of an opponent’s funding and independent spending in the race. San Francisco’s incremental approach to lifting a candidate’s IEC is unusual, though, as other programs typically allow a publicly-financed candidate who is released from a spending limit to raise private contributions without regard to any supplementary cap on their total campaign funding.

For example, under Los Angeles’s matching funds system, a participating candidate will be released from the program’s spending limit if either (i) a nonparticipating

communications or member communications in opposition to a specific candidate for Mayor or the Board of Supervisors.” *Id.*

³⁷ *Id.* § 1.143. In mayoral races, the Executive Director must upwardly adjust a candidate’s IEC, in \$100,000 increments, when the sum of “total supportive funds” for another mayoral candidate and “total opposition spending” against the publicly-financed candidate surpasses \$1,475,000 by at least \$100,000. *Id.* § 1.143(a). The Executive Director must increase a supervisorial candidate’s IEC, in increments of \$10,000, when the “total supportive funds” of any other candidate in the race, coupled with “total opposition spending” against the publicly-financed candidate, exceed \$250,000 by at least \$10,000. *Id.* § 1.143(b).

³⁸ *Ariz. Free Enterprise Club’s Freedom Club PAC v. Bennett*, 564 U.S. 721 (2011). Arizona’s invalidated release provision gave additional public funds to a participating candidate if the total contributions received (in a general election) or expenditures made (in a primary) by a nonparticipating opponent, in combination with independent expenditures supporting a nonparticipant or opposing the participating candidate, exceeded the spending limit. Once additional public funds were triggered in an election, each private dollar received (general election) or spent (primary) by a nonparticipating candidate, and each dollar spent by an independent group supporting a nonparticipant or opposing a participating candidate, was matched with one dollar in public funds distributed to each participating candidate, up to a total of two times the initial spending limit for the election. *Id.* at 729-30.

³⁹ *Davis v. Fed. Election Comm’n*, 554 U.S. 724 (2008).

⁴⁰ S.F. Campaign & Governmental Conduct Code §§ 1.144(c)(4), (d)(4).

candidate makes expenditures above the limit, or (ii) independent expenditures supporting or opposing another candidate in the race exceed certain amounts.⁴¹ Once the ceiling is lifted, a publicly-financed candidate in Los Angeles may make expenditures without regard to limits for the remainder of the campaign.⁴² Similarly, Seattle's Democracy Voucher Program permits candidates to raise and spend private contributions in excess of the applicable spending limit when an opposing candidate's total contributions or expenditures, coupled with any independent expenditures for another candidate or against the publicly-financed candidate, surpass the spending limit.⁴³

San Francisco's incremental approach to raising the IEC seems intended to limit participating candidates' need to fundraise, while still affording them a means to respond to substantial campaign spending by opponents and third parties. Difficulties in administrating IEC adjustments, though, could outweigh the approach's utility. In 2016, the Commission adjusted IECs a total of 142 times, and 11 of the 12 publicly-financed supervisorial candidates had their IECs raised during the 2016 election cycle.⁴⁴ One supervisorial candidate's IEC was elevated to \$1.12 million, far in excess of the initial IEC of \$250,000.⁴⁵

According to the Commission, third-party spending was the primary driver of the numerous IEC adjustments in 2016.⁴⁶ Third-party spending in 2016 supervisorial races exceeded \$2.1 million, while the 12 publicly-financed candidates for the Board of Supervisors collectively spent around \$1.5 million.⁴⁷ The proliferation of third-party spending in San Francisco's 2016 elections was consistent with a general trend toward heightened independent spending in recent cycles.⁴⁸

The escalation of third-party spending in San Francisco is likely to continue in the future. In recognition of the growing levels of independent spending in city elections, the Commission should consider an alternative approach to adjusting candidates' IECs, including eliminating limits altogether in certain circumstances. This would not only simplify the Commission's administration of the IEC, but also provide greater certainty to publicly-financed candidates about anticipated levels of campaign funding available through the program. Adopting a method similar to Los Angeles, which releases publicly-financed candidates from spending limits if independent expenditures in the race exceed certain amounts, may offer a more straightforward process in light of the growing amounts of third-party spending.⁴⁹ As another possibility, the Commission should assess whether increasing the IEC in larger increments, particularly for supervisorial candidates, would simplify administration of the program. A third option would entail raising a candidate's IEC

⁴¹ L.A. Mun. Code §49.7.25.

⁴² *Id.*

⁴³ Seattle Mun. Code § 2.04.634 (as amended by 2018 Ordinance No 125611).

⁴⁴ SAN FRANCISCO ETHICS COMM'N, REPORT ON LIMITED PUBLIC FINANCING PROGRAM FOR THE NOVEMBER 2016 ELECTIONS 4 (March 22, 2017).

⁴⁵ *Id.* at 9.

⁴⁶ *Id.*

⁴⁷ *Id.* at 5, 7.

⁴⁸ *Id.* at 9.

⁴⁹ See L.A. Mun. Code § 49.7.25.

a limited number of times before releasing the candidate from spending limits altogether.

IV. Conclusion

CLC sincerely hopes the Commission will consider our policy recommendations during its review of the public financing program. We appreciate the opportunity to submit these comments, and would be happy to answer questions or provide additional information to assist the Commission's review process.

Respectfully submitted,

/s/

Catherine Hinckley Kelley
Director, Policy & State Programs

/s/

Austin Graham
Legal Counsel