

TO: BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES
FROM: Board Member Tom Pavel
SUBJECT: 2025 SJMC Revision Proposals
DATE: Nov 9, 2023

The purpose of this memo is to track an evolving set of ideas for San Jose Municipal Code (SJMC) rule changes that came out of discussions in the past several board meetings. In essence, these topics are the start of our 2025 cycle of recommended changes to the Municipal Code. Many of the items still require further refinement and therefore it makes sense to start working on them as early as possible. Since the issues are not yet settled, they seem to need more detailed descriptions than would be available in the previous spreadsheet format. Once we decide on the details of proposed SJMC changes for each item, we can go back to a shorthand description suitable for tracking in the spreadsheet. This memo reflects my recollection of these issues and is meant just as a starting point for future discussions. Any updates or additions are welcome and will be incorporated into future revisions. Prior descriptions are marked in grey so as to highlight the changes from previous memos.

(1) Additional Disclosure for Independent Committees

[This item was referred to the CAO for input at the Aug 2023 board meeting. One related example from the City of Santa Clara was discussed in the Oct board meeting.]

The concern here is that independent expenditure committees (PACs) sponsored by 501(c)4 non-profits can be quite opaque as to who is funding and who is running these PACs (in particular, whether City candidates or officeholders are heavily involved). We discussed the legal constraints on our ability to limit spending by these PACs or to force disclosure of the donors to the non-profit. Hence, we settled on the idea of legislating disclosure of "decision-makers" of the PAC. How exactly to frame this best is an open question for which we asked for legal advice from the City Attorney's Office (CAO). We could ask for disclosure of all officers in the PAC, all board members, everyone who votes on spending decisions, or anyone with "significant influence" on spending (or perhaps there are further options we haven't yet considered). Our guidance to the CAO is that we wanted the broadest measure that was legally defensible and practical. We also heard from the City Clerk's Office that it is feasible to create new campaign disclosure forms as needed to support these sorts of new disclosures, should this change be approved by the City Council in the future.

A recent news story (links below) illustrated another example of how important the disclosure of affiliations between candidates and PACs funded by nonprofits can be. In this case, an FPPC complaint alleged that a 501(c)3 paid for Facebook ads without filing campaign spending disclosures. My understanding is that a formal independent-expenditure committee was never established (which is one part of the complaint). However, the ads were advocating on issues that aligned with the Santa Clara mayor, but the relationship between the mayor and the nonprofit remains unclear in the news reports (and is another element of the complaint). Hopefully, any disclosure rules we might propose would clarify such a relationship in similar circumstances in the future.

<https://sanjosespotlight.com/santa-clara-mayor-accused-of-ties-to-dark-money-group/>

<https://www.mercurynews.com/2023/09/18/santa-clara-councilmembers-file-ethics-complaint-against-group-they-say-has-ties-to-mayor-lisa-gillmor/>

(2) Concerns about Candidate-Controlled Ballot Measure Committees

[We agreed to table this item until the other 3 topics make further progress. As a matter of priorities, we felt this topic had a less urgent need for resources and time.]

This item arose from a 2016 investigative report in the Mercury News (link below), regarding potential abuse of ballot-measure committees by statewide officeholders. There have not been reports of such issues at the City level, but the analogy is straight-forward. The concern is that because the SJMC does not limit contributions or put any time restrictions on ballot-measure committees, a City candidate or officeholder could potentially solicit contributions to a ballot-measure committee that could be used as a “slush fund” to benefit the officeholder/candidate in ways that pose conflicts of interest. The idea here is that perhaps we could legislate some limits on ballot-measure committees to get ahead of this before an actual conflict arises. The main proposal we discussed was to require time limits on ballot-measure committees, such as limiting them to a 2-year election cycle, perhaps with some limited ability to roll over to another cycle if the ballot measure were delayed. A fair question was raised in discussion of whether this should only apply to ballot-measure committees associated with (or controlled by) candidates or officeholders, and we did not have a clear consensus on that question. There was also some concern as to whether this danger was too speculative and therefore whether legislative changes in this area were justified. We agreed to keep discussing the topic in future board meetings.

<https://www.mercurynews.com/2016/08/20/sacramentos-new-slush-funds-ballot-measure-committees/>

For some additional context on the potential conflicts that could arise and some ideas on how to define instances of officeholder affiliation for independent committees, I found this report from the NYU Brennan Center a useful resource (even though it mainly describes federal campaigns).

<https://www.brennancenter.org/our-work/research-reports/elected-officials-secret-cash>

(3) Disclosure Requirements for Op-Eds

[This item was referred to the CAO for draft language at the Feb 2023 special board meeting.]

This topic arose from discussion around the Barco complaint in Dec 2022. The SJMC requires a well-defined set of disclosures on any advertising for campaigns, but there are no current specifications for unpaid publications by campaigns. In a traditional newspaper, an unpaid op-ed written by a candidate or other campaign spokesperson would contain an attribution letting the public know the column came from an active campaign. However, similar publications on the Internet do not always follow the same norms and this could produce some potential confusion. In particular, there seems to be a public interest in distinguishing official campaign statements from ones that could be seen as impartial third-party endorsements. Hence, the Board recommended studying the feasibility of an addition to the SJMC that would require disclosure/attribution of publications like op-eds, blogs, or social media posts if they come from a candidate or another representative from the candidate's campaign organization. The City Attorney's office may require additional input or consultation as this topic is further investigated.

(4) Disclosures for Telephone Solicitations

[The CAO agreed to check whether SMS text messages fell under the current 12.06.10 rules on advertising. If not, we felt that disclosures for SMS campaigns were the key area for focus in our next discussion of this topic.]

The SJMC has a set of required disclosures for campaign-related advertisements, including those made by independent PACs. However, there seem not to be any required disclosures for telephone solicitations. These calls can involve fairly long and elaborate scripts and there would seem to be value to the public in requiring a disclosure early on in the script of what organization is sponsoring the call. However, our discussion identified that there can be a broad range of structures for such campaign-related calls. The callers could be a professional call center hired by a campaign or an independent PAC, but they could also be volunteers using a call database organized by a campaign/PAC. The callers could even be unaffiliated citizens calling their own personal set of contacts. Hence, the question of how to require disclosures without infringing on free-speech rights might become tricky. Perhaps we could limit the requirement to paid telemarketing programs, in order to make the tightest analogy to the existing advertising disclosure rules. In any event, we wanted to come back and discuss this further after we all had some time to study the issues.

Our discussion in the Oct board meeting highlighted that most campaigns are now primarily using text messages (SMS) and that voice-call solicitations are likely on the decline in the coming years. Given that text messages bear many similarities to emails, it seems possible that our existing rules on advertising disclosures might already apply to text message campaigns. If not, this seems to be the most impactful area for us to focus our attention. If SMS messages are indeed already covered, then we agreed to revisit the area of voice calls and see if we could form a recommendation for disclosures.