



Memorandum

TO: Mayor & City Council

FROM: Councilmember David Cohen
Councilmember Sergio Jimenez
Councilmember Pam Foley
Councilmember Domingo Candelas
Vice Mayor Rosemary Kamei

SUBJECT: SEE BELOW

DATE: December 12, 2023

Approved

Date: 12/07/2023

SUBJECT: Proposed Ordinance Regulating Foreign Influence in City Elections Prohibiting Foreign-Influenced Business Entities from Making Independent Expenditures, Campaign Contributions or Contributing to Independent Expenditure Committees.

RECOMMENDATION:

- 1) Accept staff recommendation A from the “Replacement Memorandum, 11/30/2023” with the following additional recommendations:
 - a) Ensure the policy does not impact US residents.
 - b) Close potential loopholes by covering subsidiaries of business entities owned or controlled by a Foreign Entity or a Foreign Influenced Business Entity.
 - c) Ensure businesses cannot use unusual investment or corporate ownership structures to avoid being covered by the ordinance.
 - d) Prohibit Foreign-Influenced Business Entities from using another Committee or Person as a pass-through to avoid the ordinance.
- 2) Reject alternative staff recommendation B from the “Replacement Memorandum, 11/30/2023”.

BACKGROUND

First, thank you to the staff for their extensive work on this ordinance which will go a long way towards the goal of strengthening our democracy in San Jose and curbing the influence of foreign financial interests in our elections. The original staff recommendation, recommendation A from the Replacement Memorandum dated 11/30/2023, is a strong ordinance that will ensure foreign financial interests do not play a role in the San Jose elections. However, it can be strengthened with the suggestions from Free Speech for People who lead and work on foreign-influenced election policy across the nation.

With these additional recommendations, the original ordinance will stand strong enough to ensure US residents owning local businesses are not impacted and address potential loopholes the alternative memo presents. By explicitly adding the phrase “outside the United States”, the ordinance protects US residents from being affected by this ordinance making the alternative memo’s exemption no longer necessary.

- a) Ensure the policy does not impact US residents (see amendment in **BOLD**)

12.06.112 Foreign Entity

- (b) Is an individual **outside the United States** who is not a citizen of the United States or a national of the United States, and who is not lawfully admitted for permanent residence.

According to comments from Free Speech for People, this amendment could make the ordinance more legally defensible. Foreign nationals inside the United States have some limited First Amendment rights while the U.S. Supreme Court has previously held in *Agency for International Development v. Alliance for Open Society Int’l, Inc.* that foreign nationals outside the United States have no First Amendment rights whatsoever.

- b) Close loopholes involving subsidiaries (see amendment in **BOLD**)

12.06.114 Foreign-Influenced Business Entity

- A. One percent (1%) or more of the total ownership interests of the Business Entity are held by a single Foreign **Owner**;
- B. Five percent (5%) or more of the total ownership interests of the Business Entity are held by two (2) or more Foreign **Owners** in aggregate; or
- C. A Foreign Owner directly or indirectly participates in the Business Entity’s decisions to engage in political activities in the United States.
- D. **The Business Entity is directly or indirectly controlled by a Business Entity meeting at least one of the conditions in subparagraphs A, B, or C.**

In many cases, foreign entities do not directly invest in U.S. corporations; rather, they create or buy a U.S.-based subsidiary and then use that as a vehicle for their U.S. investments. Using the term “Owner” rather than “Entity” would capture this phenomenon. Similarly, a foreign-influenced business entity could potentially avoid this ordinance by creating a subsidiary, which then engages in political spending. Adapting the ordinance to capture these scenarios will avoid such loopholes.

- c) Ensure unusual investment or corporate ownership structures cannot be used to avoid the ordinance (see amendment in **BOLD**)

12.06.114 Foreign-Influenced Business Entity

- A. One percent (1%) or more of the total ownership interests of the Business Entity are held, **owned, controlled, or otherwise directly or indirectly beneficially owned** by a single Foreign **Owner**;
- B. Five percent (5%) or more of the total ownership interests of the Business Entity are held **owned, controlled, or otherwise directly or indirectly beneficially owned** by two (2) or more Foreign **Owners** in aggregate; or

This more inclusive language eliminates possibilities for evasion through unusual investment or corporate ownership structures.

- d) Stopping the use of pass-throughs to avoid the ordinance. (see amendment in **BOLD**)

12.06.270 Prohibited Contributions – Foreign-Influenced Business Entities

- C. No Foreign-Influenced Business Entity shall make any Contribution to a Committee or Person that has conveyed, implicitly or explicitly, that Contributions to the Committee or Person may be directly or indirectly used in Elections for or against Candidates for City office.**
- D. The Business Entity shall also provide a copy of the statement of certification to any **Committee or Person** to which it contributes.

A common pattern in San Jose elections is for Foreign Influenced Business Entities (as well as other, non-prohibited businesses) to contribute to statewide committees, which then contribute the funds to local committees, which spend the money in San Jose. While San Jose cannot regulate all contributions to statewide committees, a committee that conveys that it will use some or all of its receipts for political spending in San Jose has a particular nexus to San Jose.

The signers of this memorandum have not had, and will not have, any private conversation with any other member of the City Council, or that member's staff, concerning any action discussed in the memorandum, and that each signer's staff members have not had, and have been instructed not to have, any such conversation with any other member of the City Council or that member's staff.