

TO: BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES
FROM: Vice-Chair Tom Pavel
SUBJECT: Proposal for 2025 SJMC Revision (#2)
DATE: Sep 12, 2024

Preface

As we discussed at our last meeting, this is a draft of a standalone memo to describe the concerns and potential proposals around officeholder-controlled ballot-measure committees. I expect us to discuss this at our next meeting, but please pass along any comments or suggestions on how to improve this proposal at any time.

Background

The San Jose Municipal Code (SJMC) imposes several campaign financing restrictions beyond the requirements of the California Political Reform Act (PRA). These restrictions largely target candidate campaigns for public offices and not ballot measure campaigns, under the rationale that opportunities for conflict of interest and the appearance of potential corruption mainly arise from funding individual candidates.

However, there is a potential loophole in this logic in the case of ballot-measure committees (BMCs) that are controlled by officeholders or candidates. A Mercury News investigative report in 2016 documented a number of cases at the state level where BMCs funded questionable expenses for officeholders and never actually supported any measures that made it onto a state ballot.¹ With City officeholders or prominent candidates soliciting BMC donations and controlling the spending of those BMCs, there could easily be similar dynamics around conflict of interest as can occur in committees to elect candidates.

¹ <https://www.mercurynews.com/2016/08/20/sacramentos-new-slush-funds-ballot-measure-committees/>

The SJMC previously addressed this by prohibiting officeholders from controlling BMCs entirely. However, this prohibition was ruled to violate the free speech rights of officeholders to advocate for ballot measures in the 2014 *Reed v FPPC* case.² Currently, the city has no restrictions on fundraising for BMCs, but it does require officeholders to disclose any fundraising solicitations they perform on behalf of BMCs or other candidates (SJMC 12.16.040).³

In addition, the SJMC prohibits *officeholder accounts* and associated fund-raising (SJMC 12.06.810).⁴ These accounts are permitted under state law, both as a place to hold leftover campaign funds until the next race and as a source of funding for legitimate public education and communication expenses while serving in office.⁵ Instead, San Jose forces candidates to close down their campaign accounts after the election (once loans and legal challenges are resolved), and the city provides budgets to pay for public communications and events for officeholders.

Proposal

Our board feels that there is still a potential for the appearance of conflict of interest whenever officeholders or candidates are associated with BMCs, and we have explored some ideas on how to address this proactively before a prominent controversy arises in a future election.

One idea is to institute time-limits on BMCs, similar to the 2-year cycles that are imposed on candidate committees. This should steer clear of any first-amendment concerns but it does present more practical problems. For example, many BMCs may be formed when a ballot measure is in the early phases and has not yet qualified for a particular election. We would need to allow for some limited avenue to roll-over a BMC to a subsequent election cycle if the ballot measure should get deferred. Of course, this needs to be limited in some substantial ways, or else an officeholder-controlled BMC could again risk becoming a slush fund.

Another approach might be to apply the 2-year time limits only to BMCs that are controlled by officeholders or candidates. This might risk the free-speech concerns by discriminating against officeholders, but it still fully allows them to raise and spend money, merely restricting that to a single election cycle. This would have the advantage of tailoring the time restriction to the specific case where conflict of interest is of the greatest concern.

² <https://www.sanjoseinside.com/wp-content/uploads/2014/03/Reed-v.-FPPC-tentative.pdf>

³

https://library.municode.com/ca/san_jose/codes/code_of_ordinances?nodeId=TIT12ETOPGOPR_CH12.16DIFUISSO_12.16.040REREW

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https://library.municode.com/ca/san_jose/codes/code_of_ordinances?nodeId=TIT12ETOPGOPR_CH12.06MUCAO_FAC_PT8OFAC_12.06.810OFACPR

⁵ The State defines officeholder accounts in PRA 85316(b). This is an account for fundraising for "governmental expenses" (see PRA 89512(a)) incurred while holding office, such as publishing newsletters, giving speeches, and travel. <https://fppc.ca.gov/content/dam/fppc/documents/advice-letters/1995-2015/2012/12-022.pdf>

A third approach might be to tighten up the definitions around officeholder accounts in the SJMC and use this to prohibit spending any BMC money on items that might benefit or promote an individual officeholder. This might be challenging to enforce and to specify in adequate detail, but perhaps we could leverage efforts in the state legislature to create similar prohibitions (such as SB1467).⁶

[Additional ideas?]

None of these ideas have been fully studied by the City Attorney's Office for practicality and legal robustness. We believe some guidance from the Rules Committee would be helpful before initiating such a study and settling on a specific measure to recommend.

⁶ http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1451-1500/sb_1467_bill_20160413_amended_sen_v98.pdf