

Memorandum

TO: BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES
FROM: Vice-Chair Tom Pavel
SUBJECT: Proposal for 2025 SJMC Revision (#2)
DATE: Oct 10, 2024

Preface

As we discussed at our last meeting, this is a revised draft of a standalone memo to describe the concerns and potential proposals around officeholder-controlled ballot-measure committees. I have expanded on the range of options for possible proposals. 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. This risk can compound if an officeholder-controlled BMC might remain active for up to the 8 years that a City officeholder could serve before terming out.

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 limit their campaign accounts to a single election cycle (including time to resolve legal challenges), and the city provides budgets to pay directly 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 should arise in a future election. Broadly speaking, there are three potential paths to address the issue.

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>

Disclosure

The first step to addressing conflicts of interest would be to require disclosure of the activity of BMCs. Although the SJMC does not impose any additional requirements on BMCs, the State PRA already requires quarterly or semi-annual filing of the sources of all contributions and some detail on all expenditures once a committee starts working towards qualifying a proposal for the ballot.⁶ Furthermore, any BMC controlled by an officeholder or candidate must file additional details on expenditures related to gifts, travel, or meals.⁷ We feel these existing disclosure rules should be adequate, since they are equivalent to those for any other candidate committee or independent expenditure committee. We could potentially explore imposing more frequent reporting for officeholder-controlled BMCs, but that doesn't seem a major factor in avoiding the appearance of conflicts.

Spending Restrictions

Another approach is to directly apply restrictions on certain types of spending by BMCs. For example, there was an effort in the state legislature (SB1467 in 2016)⁸ to restrict BMC advertisements from naming or promoting specific candidates or officeholders. Other efforts have sought to limit the proportion of BMC spending on travel and meals, but it might prove difficult to define a reasonable threshold that doesn't penalize legitimate early-stage BMCs. No such restrictions have successfully passed the legislature, and more investigation would certainly be required to form a workable proposal.

An alternate 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 it could potentially be a fruitful path that addresses the conflict of interest most directly.

Time Limits

Another way to reduce the potential for conflicts of interest would be to impose time-limits on BMCs, similar to those on candidate committees. This should steer clear of any first-amendment concerns, but it would present some 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 easily be rolled over for as long as the officeholder remains in office.

Alternately, the time limits could be applied 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, but it would require a legal analysis to assess whether it indeed steers clear of the *Reed v FPPC* precedent.

⁶ [https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual 3/Manual 3 Ch 1 What is a Ballot Measure Committee.pdf](https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual%203/Manual%203%20Ch%201%20What%20is%20a%20Ballot%20Measure%20Committee.pdf)

⁷ See PRA 18421.7 and 18421.8 as cited in [https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual 3/Manual 3 Ch 9 Committee Reports.pdf](https://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Manuals/Manual%203/Manual%203%20Ch%209%20Committee%20Reports.pdf) pp. 46-49

⁸ http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_1451-1500/sb_1467_bill_20160413_amended_sen_v98.pdf

[In researching this, I found a potential conflict between SJMC 12.06.290 and 12.06.200. The former limits all committees, including BMCs, to accepting contributions only within 210 days of the primary, while the latter expressly denies putting any restrictions on BMCs. We should certainly understand what the current state of SJMC regulation is regarding BMC time limits, and potentially we should recommend clarification of the language in the code.]

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 specific measures to recommend.