

TO: BOARD OF FAIR CAMPAIGN AND POLITICAL PRACTICES
FROM: Board Member Tom Pavel
SUBJECT: Open Issues from SJMC Revision Proposals
DATE: June 8, 2023

History

In Sep 2022 the board heard a complaint regarding Common Good Silicon Valley. This prompted an ad-hoc subcommittee to examine the campaign finance rules around committees controlled by officeholders or sponsored by 501(c)(4) nonprofits and whether those rules should be tightened up in advance of future problems and complaints. The challenge, of course, is that free speech issues raised by Citizens United and other legal precedents restrict what can be done in the San Jose Municipal Code (SJMC). As a result, several of these issues were left open as they needed further brainstorming and examination of possible approaches for practicality and legal feasibility. The subcommittee has now concluded and the open issues are being returned back to the board at large.

(1) Disclosure for Independent Committees

The structure that Common Good Silicon Valley evolved into by the time of its third amended filing represents a potential loophole to any future tightening of rules around officeholder-controlled committees. Namely, this became an independent expenditure committee (PAC) that is sponsored by a 501(c)(4) nonprofit organization. In such structures, it could be difficult to establish to what extent the officeholder (Mayor Liccardo in this case) “controlled” the nonprofit and hence the PAC. This is essentially the classic structure of “dark money” political contributions that has become common following Citizens United. Although it would be unconstitutional to prohibit such PACs, they still pose dangers to campaign finance integrity like those addressed in SJMC 12.06. Hence, it might be worth considering whether additional disclosure requirements on all independent committees would serve the public interest.

Although contribution limits to independent committees would be unconstitutional, it should be feasible to require additional disclosures. Currently, the Form 410 filings require listing the *treasurer*, *assistant-treasurer*, and *principal officers* of the committee. It is unclear, however, if this set of officers would include all persons with a “significant influence over spending decisions” of the committee. If feasible, extending that disclosure requirement to list all persons or organizations with a vote or with “significant influence” in spending decisions would certainly help to improve the anonymity problem. Presumably,

this would apply only to independent PACs supporting/opposing City elected officials, but it could perhaps be extended to those supporting/opposing City ballot measures later.

There is a reasonable question about whether the “significant influence” standard is sufficiently clear-cut to legislate here. It seems likely to be a good standard, though, since there must already be case-law precedent around it for defining and distinguishing independent committees. It may also be worth exploring whether a tighter standard could be used. For example, perhaps any communications with candidates, officeholders, or lobbyists could be required to be reported. It could also be useful to look for any disclosure precedents used successfully in other municipal jurisdictions. For example, the City of Santa Clara has lowered its threshold for reporting of independent expenditure committees from \$50,000 to \$100 in order to cover more of these PACs (but it does not require any additional disclosure of who controls the PACs).

In any event, what set of measures are most effective and practical needs significant further legal research before we can recommend specific municipal code changes to address this issue. However, the recent example suggests this type of PAC will become more prominent in City campaigns and it would be best to address additional disclosure requirements before future complaints arise about such PACs.

(2) Concerns about loopholes via ballot measure committees

Another item to consider is the role of officeholder-controlled ballot measure committees. Currently, the SJMC leaves ballot-measure campaigns unregulated because there is not a direct threat of the appearance of quid-pro-quo corruption. However, when an officeholder controls the ballot-measure committee, these concerns can well reappear. We found a Mercury News article from 2016, describing potential abuses in ballot-measure committees across the state serving effectively as “slush funds” for officeholders. Because ballot-measure committees can be established prior to qualifying any particular measure for a specific election and there are currently no time limits on these committees, officeholders could potentially use them to solicit, collect, and park donations while they are serving in office. These funds can be used for a range of expenses and could potentially present the appearance of conflicts of interest around favors owed to large donors.

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

Due to free-speech concerns, it would be difficult to limit the dollar value of donations to ballot-measure committees, but we could potentially impose time limits on such committees. Just as the SJMC requires candidates to raise and spend funds within a 2-year window around a specific election, we could limit ballot-measure committees to a 2-year window (or perhaps allow for a limited roll-over to a new ballot-measure committee if there is a case for postponing the measure to a future election). It might also be possible to restrict officeholders from controlling ballot-measure committees entirely, but this is likely more questionable. Again, further legal research is required.

(3) Disclosure requirements for Op-Eds

Although unrelated to officeholder accounts and the CGSV case, there was another issue potentially in need of further exploration. 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.