ELIAS LAW GROUP

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June 21, 2023

BY ELECTRONIC MAIL DELIVERY

Arizona Citizens Clean Elections Commission
1110 W. Washington St., Suite 250
Phoenix, AZ 85007

Re: Comment Regarding Draft Rules for Chapter 6.1 of Title 16, Arizona Revised Statutes – the Voters' Right to Know Act

Dear Commissioners:

We are election law practitioners who represent clients that plan to spend funds in connection with Arizona state elections in 2024. We are in receipt of an email from Mr. Thomas Collins, the Executive Director of the Arizona Clean Elections Commission (the ***"Commission"***) dated June 18, 2023, in advance of a June 22 meeting to discuss the draft rules (the ***"Draft Rules"***) implementing Chapter 6.1 of Title 16, Arizona Revised Statutes (the ***"Voters' Right to Know Act"*** or the ***"Act"***). We appreciate Mr. Collins noting that "you may have your own ideas you would like the Commission to consider" and to "[p]lease feel free to get in touch with us if you have any questions, concerns or comments." We have also reviewed the two new provisions of the Draft Rules circulated on June 18.

Our goals in this process are twofold: ensuring that the Draft Rules properly implement the Act and obtaining regulatory certainty for our clients. We understand that this process may be iterative and that the formal comment period will not open until after the June 22 meeting. By submitting comments now, we hope to focus the Commission's attention on two issues prior to the meeting.

First, to ask the Commission to clarify how sections 801(c) and 803 of the Draft Rules will work in practice when an entity (as opposed to an individual) transfers monies to a "covered person." We do not believe that any additional Draft Rule provisions are required to address this matter; we are instead requesting that the Commission confirm that our understanding of the Draft Rules – as applied to two hypothetical scenarios – is correct. We defer to the Commission as to the proper avenue for such confirmation, whether it be a written explanation and justification for the Draft Rules or a statement on the record at a Commission meeting. If our understanding of the Draft Rules is incorrect, however, then additional regulatory provisions may be required.

Second, to clarify the scope of the sixth and seventh types of "campaign media spending." We are agnostic as to whether the Commission addresses this issue via new regulatory provisions or an interpretive statement.

A. Clarifying how sections 801(c) and 803 of the Draft Rules work in practice.

Proposed section 801(c) of the Draft Rules reads as follows:

> In response to a request pursuant to A.R.S. § 16-972(D), a person must inform that covered person in writing, the identity of each other person that directly or indirectly contributed more than $2,500 in original monies being transferred and the amount of each other person's original monies being transferred ***up to the amount of money being transferred to the requesting person***.[1]

Proposed section 803(a) of the Draft Rules reads as follows:

> Before a covered person may use or transfer a donor's monies for campaign media spending, the donor must be notified in writing that the monies may be so used. The covered person must give the donor an opportunity to opt out of having the donation used or transferred for campaign media spending.[2]

The remaining subparts of section 803 specify how the written notice must be provided.

To ensure that the public understands how these two sections will work together, in practice, alongside the existing statutory provisions, we have set forth two hypothetical scenarios below that reflect how organizations transfer funds to influence Arizona state elections. We ask that the Commission clarify that the Donor and Covered Person's proposed course of action in Hypotheticals A and B comply with the statute and Draft Rules.

<u>Hypothetical A</u>

- Donor is a national organization that focuses on electing Democrats to statewide and legislative offices. Donor will effectuate its Arizona program by making monetary and in-kind contributions to Covered Person.

- Covered Person is a national organization that focuses on electing Democrats to statewide and legislative offices. Covered Person will effectuate its Arizona program by engaging in campaign media spending.

- Donor raises funds from individuals and organizations. To comply with applicable federal and state rules, Donor segregates its funds in different bank accounts based on money type (individual v. organizational), amount (some jurisdictions have contribution limits), and other factors (some donors place restrictions on their funds).

[1] *See* First Round Draft Notice of Proposed Rulemaking (June 18, 2023) at R2-20-801(C).
[2] *See id.* at R-20-803(A).

- While Donor would not use or transfer any funds provided by its donors restricted for use outside of Arizona elections, Donor has *not* sent section 803 compliant notices to *its* donors. (We do not read the Draft Rules to require Donor to do so.)

- On Friday, March 1, 2024, Donor contributes $500,000 to Covered Person. On Monday, March 4, 2024, Covered Person sends a section 803 compliant notice to Donor *and* a request for original monies notice prescribed by section 801(c) of the Draft Rules and A.R.S. § 16-972(D).

- During the current election cycle, Donor has received $2.5 million in contributions in total from both organizations and individuals. The donations from organizations are not original monies. Donor made the $500,000 contribution from a bank account that had received $1 million in contributions solely from individuals, all of which constituted original monies.

- In response to the request for original monies, Donor discloses that the individuals below contributed the following amounts since the beginning of the election cycle:

  Individual A -- $100,000
  Individuals B and C -- $50,000 each
  Individuals D, E, F, G, and H --$25,000 each
  Individual I, J, K, and L -- $10,000 each
  Individual M, N, O, P, Q, R, and S -- $5,000 each
  Unitemized -- $100,000 total from individuals who contributed $2,500 or less to Donor since beginning of election cycle.

- Donor responds to section 803 notice by opting-in to use of $500,000 for campaign media spending.

We interpret the aforementioned steps in Hypothetical A to be in compliance with proposed sections 801(c) and 803 of the Draft Rules. The statute and Draft Rules only require the opt-out notice to be sent from a covered person to a donor; that was done here. There is no requirement in the statute or Draft Rules that a donor must send opt-out notices to its own donors. Instead, the statute and Draft Rules merely require that a donor provide the "the identity of each other person that directly or indirectly contributed more than $2,500 in original monies being transferred and the amount of each other person's original monies being transferred up to the amount of money being transferred to the requesting person." That, too, was done here to the extent that the Commission would allow Donor to count the $100,000 in unitemized ($2,500 or less contributions) donations toward the $500,000 amount. (If it is instead required to provide the Covered Person with a list of donors who contributed $2,500 or less in original monies – even if those donors are not required to be disclosed on filings with the Commission – the Donor could comply in that way too.)

Hypothetical B

The same as Hypothetical A, except that Donor contributes $400,000 from the account consisting solely of contributions of original monies from individuals and $100,000 from a separate account consisting solely of contributions of non-original monies from nonprofit organizations. Neither the statute nor Draft Rules require that the disclosure of original monies be tied to the bank account from which the contribution of traceable monies is made. Therefore, Donor chose to source all $500,000 in original monies from the individual-only account, even though Donor contributed only $400,000 from that account and $100,000 from another account.

B. Clarifying the meaning of "campaign media spending."

The statute defines "campaign media spending" to mean "spending monies or accepting in-kind contributions to pay for" five types of "public communications" enumerated at § 16-971(2)(a)(i)-(v) *or* either of the following:

> (vi) "An activity or public communication that supports the election or defeat of candidates of an identified political party or the electoral prospects of an identified political party, including partisan voter registration, partisan get-out-the-vote activity or other partisan campaign activity."[3]
>
> (vii) "Research, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision."[4] The Draft Rules clarify that these activities "shall not be considered campaign media spending unless these activities are specifically conducted in preparation for or in conjunction with those other activities."[5]

We are asking the Commission to clarify the meaning of these latter two terms.

1. Clarifying the meaning of "activity" in Ariz. Stat. § 16-971(a)(vi).

The term "activity" is not defined anywhere in Title 16 and is used only once in the definition of "campaign media spending." The common definition of the term is so broad as to potentially include anything that a person does. This potential overbreadth creates confusion. For example, if a donor gives $50,000 to a statewide political party over the course of an election cycle, have they engaged in campaign media spending because they have done an "activity" that supports the electoral prospects of a candidate or political party? If so, the donor becomes a covered person with their own reporting obligations under the Act.[6] We do not think this is the intention of the Act. In this example, the political party is already obligated to report the identity of the donor to

[3] A.R.S. § 16-971(2)(a)(vi).
[4] *Id.* § 16-971(2)(a)(vii).
[5] First Round Draft Notice of Proposed Rulemaking (June 18, 2023) at R2-20-804.
[6] *See* A.R.S. §§ 16-971(7)(a), 16-973.

the state and saddling donors with a duplicative reporting obligation does not further the goals of the law.[7]

We are asking the Commission to clarify that the term "activity" only includes programs aimed externally at voters to support or oppose a political party, as opposed to monetary or in-kind contributions of goods or services made to a covered person *or* internal work performed by an organization. This interpretation is consistent with the language of the statute. While rules of statutory construction dictate that the term "activity" mean something distinct from "public communication," the statutory examples of such "activity" – partisan voter registration and partisan get-out-the-vote-activity – describe external programs aimed at voters that contain non-communicative program elements, such as collecting and submitting voter registration cards or transporting voters to the polls. We read the inclusion of the term "activity" to simply encompass these non-communicative elements that sometimes accompany programs aimed externally at voters. Likewise, the interpretive canon of *ejusdem generis* dictates that the term "other partisan campaign activity" is limited to activities of the same type as partisan voter registration and partisan get-out-the-vote activity – *e.g.*, external programs aimed at voters.[8]

It is also consistent with the statute's structure. The term "campaign media spending" includes a seventh type – discussed below – that is aimed squarely at *internal* activities. Unlike any of the other provisions, which stand on their own, the seventh provision stipulates that it these internal activities qualify as "campaign media spending" only if they are "conducted in preparation for or in conjunction with any of the [other six] activities."[9] If the sixth type of campaign media spending were also aimed at internal activities, it would likely contain the same requirement that it be conducted in preparation for or in conjunction with other types of campaign media spending. But it does not, further bolstering the interpretation hat the sixth type covers only activity aimed externally at voters.

2. <u>Clarifying that an organization does not engage in "campaign media spending" if it makes an in-kind contribution of research, design, production, polling, data analytics, mailing or social media list acquisition to a covered person.</u>

The term "campaign media spending" is defined to mean "spending monies *or accepting in-kind contributions* to pay for … [r]esearch, design, production, polling, data analytics, mailing or social media list acquisition or any other activity conducted in preparation for or in conjunction with any of the activities described in items (i) through (vi) of this subdivision."[10] It is notable that the term does *not* include *making* in-kind contributions for these goods or services. This reflects the clear distinction that the statute draws between donors and covered persons, and indicates a clear choice that the *recipient* of in-kind contributions bears the burden of filing reports. Therefore, we ask the Commission to clarify that an organization does not engage in

[7] *See id*. § 16-926.
[8] *See Wilderness World, Inc. v. Dep't of Revenue State of Arizona*, 182 Ariz. 196, 199 (1995) (describing the *ejusdem generis* interpretive canon as "where general words follow the enumeration of particular classes of persons or things, the general words should be construed as applicable only to persons or things of the same general nature or class of those enumerated."), *quoting White v. Moore*, 46 Ariz. 48, 53–54 (1935) *and* 59 C.J. Statutes § 581 (1932).
[9] *See* A.R.S. § 16-971(a)(2)(vi).
[10] *See id.*

"campaign media spending" if it makes an in-kind contribution of research, design, production, polling, data analytics, mailing or social media list acquisition to a covered person.

We appreciate the Commission's consideration of our request and are available to answer any questions.

Respectfully submitted,

Jon Berkon
Meredith Parnell
Elias Law Group LLP

Gmail

Thomas Collins <thomas.collins@azcleanelections.gov>

Re: Voters Right to Know Act - Prop 211 - Arizona - Complaint, Enforcement, Investigation, Transaction and Structuring Rules

lee@leemillerlaw.com <lee@leemillerlaw.com> Wed, Jul 26, 2023 at 3:27 PM
To: Thomas Collins <thomas.collins@azcleanelections.gov>

Couple of things re VRKA,

1. Is it assumed that a covered entity can use funds received from a donation required to be disclosed (+$5000 donation) even if they the underlying donor disclosure information hasn't yet been received from the donor? For example, my covered entity receives a $50K donation from a South Dakota trust via an online donation. I have no knowledge of who controls this trust and all I have to communicate with them is an email address. I send them an email saying they have 21 days to give me the opt out notice. 21 days go buy and its radio silence. Covered entity reports the $50k donation but then reports that the underlying donor information has "been requested." This is somewhat similar to what treasurers do when they don't have employer or occupation information on contribution reports. Is my covered entity free to start spending the $50k on political stuff?I don't see anything that puts the donation on hold in the absence of the donor information.

Is the assumption that an opponent will file a complaint, you'll send me the complaint and I'll provide you the info I have on the SD trust. The CCEC will send the SD trustee a subpoena asking for beneficiary or trustor information and then the CCEC and the trust will get into a fight over SD's laws protecting trustee's from disclosure?

2. Does R2-20-813 mean that if I inquire of the trustee of the SD trust where the trust got its money and the trustee sends me an email that says the money came from "investments" then my inquiry is complete and my covered entity is in compliance by reporting the $50K donation from Hillside Trust, Pierre, South Dakota.

> On Jul 24, 2023, at 4:21 PM, Thomas Collins <thomas.collins@azcleanelections.gov> wrote:
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> Colleagues:
>
> As you know, we have a meeting of the Commission currently scheduled for 7.27 at 9:30 a.m. Arizona time.
>
> The agenda will be posted online no later than Wednesday 7.26 at 9:30 a.m. Arizona time.
>
> The Commission will be meeting in person although virtual appearances are available.
>
> Attached you will find language we intend to present to the Commission to begin a public comment period. The attached documents include rules related to complaints, investigations, enforcement, transactions and structuring.
>
> Unless we hear more, this is the last chunk of rules we intend to bring to the Commission to commence a public comment period.
>
> We are only asking the Commission to formally begin a public comment period that will last no less than 60 days.
>
> And of course you may have your own ideas you would like the Commission to consider. Please feel free to get in touch with us if you have any questions, concerns or comments.
>
> Thank you,
> Tom
>
> --
> Thomas M. Collins
> Executive Director
> Arizona Citizens Clean Elections Commission

www.azcleanelections.gov
602-364-3477
--> 602-397-6362 <--
<Complaint, Investigation, Enforcement, Transactions and Structuring VRKA.pdf>

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August 7, 2023

Citizens Clean Election Commission
Attn: Thomas M. Collins, Executive Director
1110 West Washington Street, Suite 250
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ccec@azcleanelections.gov
VIA EMAIL ONLY

Re: Comments on Draft Rules R-20-803, R-20-805 and R-20-813

Dear Director Collins:

I respectfully submit the following comments in connection with the draft regulations R-20-803, R-20-805 and R-20-813, pursuant to the Commission's Notice of Proposed Rulemaking. Although I write solely on my own behalf, the comments are informed by my experience as an election law practitioner, to include ambiguities and uncertainties that some of my clients have encountered in seeking to understand and ensure compliance with the new regulatory obligations created by Proposition 211, A.R.S. §§ 16-971, *et seq*.

I. Draft R-20-803: Application to Political Action Committees

This regulation should be revised to reflect the impracticality of the "opt-out" provisions of A.R.S. § 16-972 as applied to "covered persons" that are also political action committees ("PACs"). The current Arizona campaign finance code, which Proposition 211 did not amend in any material respect, requires PACs to publicly report all receipts, to include itemized disclosures of all contributions in any amount by entities and out-of-state individuals and all contributions by Arizona residents in excess of $100 for the election cycle. *See* A.R.S. § 16-926(B)(1). More broadly, section 527 of the Internal Revenue Code—which is the predicate for most PACs' tax-exempt status—largely conditions such entities' exemption from federal income tax on the use of revenues for "exempt functions," *i.e.*, "influencing or attempting to influence the selection, nomination, election, or appointment" of individuals to public office." 26 U.S.C. § 527(e).

The upshot is that the opt-out provisions of Proposition 211 stand in considerable tension with regulatory and disclosure obligations imposed on many PACs by extrinsic sources of law. For example, assume an individual donates $6,000 to a "covered person" that is also a PAC; assume further that the recipient PAC notifies the donor of his opt-out rights in accordance with the proposed R-20-803, and that the donor exercises this prerogative. The PAC then must ensure that the funds are not used or transferred for reportable "campaign media spending." *See* A.R.S. § 16-972(C). If those funds are used for any other purpose that could constitute influencing an election, however, the PAC remains required by A.R.S. § 16-926(A)(1)(a) to publicly disclose that donor's identity. Alternatively, the PAC could in theory allocate the monies to wholly non-electoral purposes (thus rendering the funds a receipt other than a "contribution," within the meaning of A.R.S. § 16-901(11)), but the donation then may no longer be for an "exempt purpose," within the meaning

of the Internal Revenue Code. Application of the opt-out provisions to individuals who donate less than $5,000 per election cycle to a "covered person" PAC produces even more incongruous results. Proposition 211 generally leaves such donors' privacy intact irrespective of whether they exercise opt-out rights, but A.R.S. § 16-926(A)(1) nevertheless may necessitate their disclosure. Providing the opt-out notice envisaged by R-20-803 to such donors could easily induce confusion, if not an erroneous belief by the donor that his or her privacy will remain protected.

For these reasons, the Commission should consider amending the proposed R-20-803 by adding a subsection (F), as follows:

> ". . . F. Notwithstanding the foregoing, a covered person that is also a registered political action committee pursuant to A.R.S. § 16-905(C) may comply with this section and A.R.S. § 16-972 by including either in its written solicitations of funds or in a written receipt provided to a donor within ten (10) days of receiving the donor's monies a clear and conspicuous written notice that the political action committee is required by Arizona law to publicly report the name, address, and (if applicable) occupation and employer of all out-of-state contributors and all entity contributors, and of Arizona residents who contribute more than $100 per election cycle."[1]

II. Draft R-20-803: Advance Written Consent

A.R.S. § 16-972(C) permits covered persons to bypass the 21-day opt-out waiting period by instead obtaining the donor's advance written consent to the use or transfer of the donor's monies for campaign media spending. The regulation should likewise incorporate this alternative, which in many instances offers a logistically easier and more efficient method of compliance. Accordingly, the Commission should amend draft R-20-803 by adding subsection (G)—in addition to the subsection (F) proposed above—as follows:

> " . . .G. Notwithstanding the foregoing, a covered person may comply with this section and A.R.S. § 16-972 by obtaining, at the time monies are transferred to the covered person or thereafter, the donor's written consent to the use or transfer of such monies for campaign media spending. A consent provided pursuant to this subsection is sufficient if it includes an affirmative written manifestation by the donor (including but not limited to the marking of a check box on an electronic or paper remittance form) that the donor (i) authorizes the use or transfer of some or all of the donor's monies for campaign media spending and (ii) understands that the donor's identifying information may be reported to the appropriate governmental authority in this state for disclosure to the public."

III. Draft R-20-805: Disclaimer Exemption for Small Donors

Although A.R.S. § 16-973(G) preserves the privacy of original sources that donate $5,000 or less in monies or in-kind contributions per election cycle for campaign media spending, neither A.R.S. § 16-974(C) nor the draft R-20-805 directly incorporates this limitation, thereby creating an ambiguity, if not a direct conflict between these provisions.

[1] For similar reasons, the Commission should consider including political party committees within the ambit of this proposed revision as well.

The Commission accordingly should amend the draft R-20-805(B) to clarify: "Public communications by covered persons shall state the names of the top three donors who directly or indirectly made the three largest contributions of original monies in excess of $5,000 for the election cycle and who have not opted out . . . ."

IV. Draft R-20-813: Application to Attorneys or Other Fiduciaries

The final sentence of the draft R-20-813(D)—to wit, "Willful conduct includes advising a client to take an action or taking an action to violate A.R.S. § 16-975"—is improper. The Commission has no constitutional or statutory authority to prescribe obligations for fiduciaries acting in their capacity as such, particularly when the proposed regulation is incongruent with, or cumulative of, ethical directives or rules of conduct promulgated by a licensing authority or (in the case of attorneys) a separate branch of government.

With respect to attorneys, Arizona Rule of Professional Conduct 1.2(d) provides that "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." While the draft R-20-813(D) might be intended to codify a prohibition approximating this ethical limitation, its wording is not so confined.

The final sentence should be removed from the draft regulation entirely. While admittedly not having researched the question exhaustively, I am aware of no other instance in which an administrative agency has purported to devise an independent predicate for an attorney's or other fiduciary's liability when acting in that capacity. To do so apparently for the first time in a regulatory field that is suffused with both First Amendment imperatives and increasingly vindictive litigation tactics is, I respectfully suggest, inappropriate and misguided.

Attorneys are, of course, subject to the same civil and criminal laws that bind all other citizens, in addition to the Rules of Professional Conduct. But the final sentence of the draft R-20-813(D) risks chilling effective legal representation by engendering a potential (if not actual) discrepancy between an attorney's ethical duties to his or her client and the Commission's diktats. It also cultivates a perverse incentive for complainants to strategically engineer conflicts of interest and undermine confidential attorney-client relationships by joining a covered person's legal counsel as a co-respondent in Commission proceedings.

The Commission accordingly should excise the final sentence of the draft R-20-813(D) entirely. To the extent a comparable provision remains in the adopted regulation, it should be revised to incorporate verbatim the language of Arizona Rule of Professional Conduct 1.2(d).

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Thank you for your consideration of the foregoing comments.

Respectfully,

/s/ Thomas Basile
Thomas Basile

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August 21, 2023

Arizona Citizens Clean Elections Commission
1110 West Washington Street, Suite 250
Phoenix, Arizona 85007

(*via email*: ccec@azcleanelections.gov)

RE: Public Comment on Proposed Rules Implementing Prop. 211

Dear Commissioners:

This firm represents various political action committees, unions, and nonprofit corporations engaged in Arizona elections. We have been closely following the Commission's rulemaking process related to the Voters' Right to Know Act (the "Act"). We appreciate the opportunity to make public comment on proposed rules and ask the Commission for further clarification regarding certain portions of the Act.

Accordingly, please consider the following comments regarding the proposed rules introduced on June 22, and please further consider questions or points of clarification that we respectfully submit here, in the hopes that the Commission may choose to issue further rules or respond in writing to clarify the Act.

I. Donor Disclosure

Our primary concern about the Act and its proposed rules relates to the obligation that Covered Persons and their donors identify and disclose their contributors. Per our reading of the Act, there is ambiguity as to which contributions must be disclosed and how a Covered Person or a donor should appropriately identify those reportable contributions.

a. Scope of Donors' Duty to Identify Subcontributors (R2-20-801(C))

We turn first to non-Covered Persons (*e.g.*, donors) and their obligation to disclose contributions. Proposed Rule R2-20-801(C) is responsive to this topic:

> In response to a request pursuant to A.R.S. § 16-972(D), a person must inform that covered person in writing, the identity of each other person that directly or indirectly contributed more than $2,500 in original monies being transferred and the amount of each other person's original monies being transferred up to the amount of money being transferred to the requesting person.

We appreciate that this rule makes clear that a donor need only disclose those "original monies being transferred up to the amount of money being transferred to the requesting person." In other words, a donor who contributes $100,000 to a Covered Person must disclose the original sources of $100,000 of the donor's own funds (the "subcontributions"). But we respectfully request that the Commission add additional language to this rule to clarify that the donor may use any reasonable accounting system in determining *which* subcontributions to disclose, such that the donor's obligation is satisfied if it discloses non-opt-out donors who have made gifts totaling the amount equal to that transferred to the Covered Person. Given that money is fungible, donors should not be forced to attempt to identify and track the precise dollars the donor received and then transferred to the Covered Person.

A rule of this nature would appropriately balance the Act's interest in transparency and the burden on donors.[1] This is especially true because the Act places fewer burdens on donors compared to the burdens on Covered Persons themselves. As relevant, these requirements are principally that donors, who have not opted out of their funds being used for campaign media spending, provide records showing transfers of over $2,500 to covered persons and that such records be maintained for five years. *See* A.R.S. §16-972(D)–(E), -973(E). Because donors may not know that the recipient of their money will eventually qualify as a Covered Person (and therefore may not know until later that the Act applies to them at all), donors should not be expected to track each the original source of each precise dollar that is contributed to that eventual Covered Person.

Accordingly, adding language to R2-20-801(C) allowing for donors to use any reasonable accounting method to identify the source of the money "being transferred

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[1] Short of a rewritten rule on this issue, we would welcome written guidance from the Commission explaining that donors need not disclose the sources of *specific* dollars given to a Covered Person but may instead use any reasonable method to identify donors who have made gifts to the donor totaling an amount equal to that being transferred to the Covered Person.

up the amount of money being transferred to the requesting person" would clarify how donors are to identity the sources of the funds transferred.

b. Scope of Covered Persons' Duty to Disclose Contributors

Related to the disclosure of original monies, we respectfully request that the Commission clarify its intent regarding Covered Persons' obligation to identify "each donor of original monies who contributed, directly or indirectly, more than $5,000 of traceable monies or in-kind contributions for campaign media spending during the election cycle to the covered person and the date and amount of each of the donor's contributions." A.R.S. § 16-973(A)(6).

Based on our reading of the Act, it is ambiguous whether, on any given report, a Covered Person must disclose (1) *all* donors who have given the Covered Person more than $5,000 during the relevant election cycle or (2) only those donors who have given more than $5,000 *and* whose money was actually used in the Campaign Media Spending that triggers the Covered Person's report.

In the face of similarly ambiguous language related to non-Covered Person donors, the Commission helpfully explained in R2-20-801(C) that donors need only disclosure the sources of funds "up the amount of money being transferred." Similar language regarding Covered Persons would resolve ambiguity in the Act and promote compliance because Covered Persons will understand that the extent of their reporting obligations is limited to disclosure of those non-opt out donors whose contributions were used for Campaign Media Spending.

II. Disclaimers

Next, we request that the Commission clarify proposed Rule R2-20-805 regarding disclaimers on public communications. Would this rule, as written, require a Covered Person to list its top three donors (who have not opted out), regardless of whether those donors' funds were used to create the communication on which the disclaimer is to appear?

If that is the case, we respectfully urge the Commission to reconsider this proposed rule and rewrite it such that only the Covered Person's top three donors *whose funds were used to create the public communication* be included in the disclaimer. Donors may wish to be associated with certain but not all speech of a Covered Person. The Act should allow donors and Covered Persons to agree on specific uses of contributions, even if the donor has not opted out of their use for Campaign Media Spending.

It is not difficult to imagine a scenario in which a donor makes a contribution to fund certain work of a Covered Person, but by virtue of being one of the Covered Person's top three overall donors, the donor's name appears on messaging that is entirely unrelated to the goal which the donor hoped to further—perhaps without any forewarning. This scenario—made possible, in part, by proposed Rule R2-20-805—poses a nightmare for donors who wish to support Covered Persons on certain issues but not others. It will chill donor speech by forcing them to sign on to *all* communications of a Covered Person or *none*.[2]

III. Protected Identities

Proposed Rule R2-20-804 provides a clear mechanism for persons seeking to protect their identity from disclosure. But the public would benefit from guidance pertaining to what happens after any such exemption is approved. Currently, the draft rule provides that the Executive Director "shall issue a letter [granting the exemption] to the requestor within 5 days stating that their name shall not be disclosed." R2-20-804(C), (D). The requestor, as contemplated by the proposed rule, is the original source of traceable monies, not the Covered Person. The Covered Person, therefore, may have no indication that the identity of one of its donors should be withheld from the Covered Person's report.

It would be useful to include additional language that indicates that the original source who receives the exemption letter must send a copy to the Covered Person. Otherwise, Covered Persons may inadvertently violate the law by disclosing a person with a valid exception.

Covered Persons would also benefit from a rule regarding the effect that a protected-identity exemption has on the Covered Person's disclosure reports and disclaimers. The Act mandates that someone with an exemption "shall not be disclosed or included in a disclaimer." A.R.S. § 16-973(F). But neither the Act nor the proposed rules make clear whether other, non-identifying information about the exempted donation (*e.g.*, date, amount, etc.) must be included in the disclosure report.

Covered Persons would also benefit from an explanation of the disclaimer rules as applied when the identity of a Covered Person's top-three donor's identity must be

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[2] In light of this problem, we also urge the Commission to consider whether the Act would allow a donor to opt out of certain of a Covered Person's Campaign Media Spending activities but not others.

withheld. In that case, a disclaimer could reasonably state one of the three donor's names has been redacted, or the disclaimer could skip the exempted donor and instead identify the next top donor who has not been exempted.

We respectfully request further elaboration from the Commission on the precise steps that a Covered Person must take to craft compliant reports and disclaimers when a major donor is exempt from disclosure.

IV. Conclusion

We appreciate you considering our input during the Commission's public comment period and for allowing us to ask questions that may benefit from further clarification by the Commission. Please feel free to contact us and let us know if we may be of assistance as the Commission addresses these comments and requests.

Sincerely,

Roy Herrera

Roy Herrera

Cc: Tom Collins (Thomas.collins@azcleanelections.gov)

August 21, 2023

Submitted electronically to ccec@azcleanelections.gov.

Mark Kimble, Chairman
Arizona Citizens Clean Elections Commission
1802 W. Jackson St. #129
Phoenix, Arizona 85007

Re: Comments in Support of Proposed Rules R2-20-801 through R2-20-808, relating to the Voters' Right to Know Act (Proposition 211)

Dear Chairman Kimble and Members of the Commission,

Campaign Legal Center ("CLC") respectfully submits these written comments to the Arizona Citizens Clean Elections Commission ("Commission") in support of Proposed Rules R2-20-801 through R2-20-808 (collectively "Proposed Rules") implementing Arizona's recently enacted Voters' Right to Know Act.[1]

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every American's right to an accountable and transparent democratic system.

CLC commends the Commission's efforts to timely implement the Voters' Right to Know Act ("VRTKA" or "the Act") and commitment to developing thorough, clear, and functional regulations. Our comments and recommendations are intended to strengthen and clarify the draft rules and assist the Commission's work on this important issue.

DISCUSSION

I. Background

Before the passage of the Act, Arizona's prior campaign finance disclosure system was described as "one of the most pro-dark-money statutes imaginable."[2] Wealthy special interests used 501(c)(4) groups and other nonprofits as a conduit for millions of dollars, donating to organizations that

[1] *See* Ariz. Admin. Register, Vol. 29, Issue 28 at 1571-76, Notice of Proposed Exempt Rulemaking, Title 2. Administration, Chapter 20. Citizens Clean Elections Commission, Article 8, R2-20-801 through 808 (July 15, 2023), https://apps.azsos.gov/public_services/register/2023/28/contents.pdf.
[2] *See* Alexander J. Lindvall, Ending Dark Money in Arizona, 44 Seton Hall Legis. J. 61, 73 (2019).

either pay for independent spending directly or transfer the money to super PACs and other nonprofits for election spending in Arizona.[3]

The Voters' Right to Know Act was enacted by over 70% of Arizona voters in November 2022 to shine a light on the original sources of this flood of secret "dark money" campaign spending.[4] Like other disclosure laws, the Act does not limit expenditures for campaign speech or contributions to pay for such speech. Instead, the Act protects the First Amendment rights of voters, enhancing robust public debate and providing voters with information critical to choosing, and holding accountable, their elected leaders. As the Commission is aware, this was recently affirmed in a ruling by the Superior Court of Arizona, Maricopa County,[5] which granted the Commission and other defendants' motions to dismiss a facial challenge to the Act in June.[6]

II. The Proposed Rules and CLC's Recommendations

The Act is a critical policy achievement protecting voters' right to know who is spending big money to influence their vote. Laws requiring donor disclosure have always intended to educate the public about the true source of money trying to affect elections, and the Act ensures that disclosure in Arizona will be meaningful and not simply report the names of intermediaries or front groups who are masking the true identity of large donors. These proposed rules are an important next step in implementing the Act, fulfilling statutory obligations (as directed for top three donor disclaimers in A.R.S. § 16-974(C)), and providing necessary guidance and clarification to other sections.

In the following subsections, CLC suggests clarifications for four sections of the Commission's draft regulations, including provisions relating to opt-out notices, donor requests for exemptions from disclosure, top three donor disclaimers, and ex parte communications regarding pending complaints. We additionally suggest the Commission adopt regulations providing further guidance regarding how direct donors provide original source and intermediary information to covered persons under the Act. Finally, we have also included a brief subsection identifying some technical corrections.

A. § 803 - Opt-Out Notices

A key feature of the Act is each donor's right to opt-out their donations from use in campaign media spending; when a donor elects to opt-out within the 21-day statutory period, a covered person may not use those funds for campaign media spending, and the donor's identity is not subject to disclosure under the Act.[7] This process empowers donors to decide whether their money can be used by covered persons to influence elections. To avoid

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[3] *See* David R. Berman, Dark Money in Arizona: The Right to Know, Free Speech and Playing Whack-a-Mole, Morrison Inst. for Pub. Pol'y 3-4 (2014). *See* also Lindvall at 67-68; Dark Money Basics, OpenSecrets, https://www.opensecrets.org/dark-money/basics (last visited January 28, 2023).

[4] *See* ARIZ. SEC. OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2022 GENERAL ELECTION 12 (Dec. 5, 2022, 10:00:00 AM), https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf. *See also* Jane Mayer, *A rare win in the fight against dark money,* THE NEW YORKER (Nov. 16, 2022), https://www.newyorker.com/news/news-desk/a-rare-win-in-the-fight-against-dark-money.

[5] Minute Entry: Under Advisement Ruling, *Center for Arizona Policy, Inc. v. Arizona Secretary of State*, Sup. Ct. of the State of Arizona, Maricopa Cty., Case No. CV2022-016564 (Jun. 22, 2023) (*copy of ruling available at* https://campaignlegal.org/document/center-arizona-policy-inc-et-al-v-arizona-secretary-state-et-al-under-advisement-ruling).

[6] CLC's affiliated 501(c)(4) organization, CLC Action, represents Voters Right to Know, the political committee established to draft and support Proposition 211, in this litigation.

[7] *See* A.R.S. §§ 16-972(B) and (C), 16-973(A) and (E).

confusion for both donors and covered persons in the opt-out process, we recommend revisions to the below portions of § R2-20-803.

First, § R2-20-803(D) (providing covered persons with the ability to send donors additional opt-out notices) creates potential ambiguity surrounding the opt-out timeline when a covered person sends an additional opt-out notice or reminder within the statutory 21-day period.

The draft rule's language permits covered persons to send subsequent opt-out notices with new opt-out deadlines of no less than one day after receipt of the new notice. However, because the rule does not address how these new opt-out notices interact with the statutory opt-out period, it could create confusion among covered persons regarding whether a subsequent opt-out notice alters the required minimum 21-day opt-out period under A.R.S. § 16-972.

While nothing prevents a covered person from providing a donor with additional time to opt their contribution out of campaign media spending, we recommend revisions to clarify that any subsequent notices provided by a covered person cannot shorten the statutory 21-day opt-out period.

Furthermore, the final rule should specify that if a covered person does send a donor a subsequent opt-out notice, the covered person may not spend, transfer, or otherwise obligate those funds for campaign media spending purposes until any additional opt-out time provided in that notice has elapsed (or, of course, the donor affirmatively opts in).

Suggested language for subsection (D) is available below:

> "If a donor does not opt out after the initial 21-day notice period under A.R.S. § 16-972, a covered person may make subsequent written notices to a donor of their right to opt out and may set a time for response of no less than 1 day from the date the donor receives the notice. To be valid, the opt-out information must provide contact information to allow the recipient to contact the person who provided the opt-out information within the time identified in the subsequent request."

Second, § R2-20-803(E) creates ambiguity regarding how covered persons must address donor opt-out requests made after the 21-day period—and any subsequent opt-out period provided by the covered person—has passed. While a covered person may choose to honor a late opt-out request from a donor, the draft language presents logistical issues and appears to be in tension with the 21-day statutory deadline that a donor must abide by in order to opt out.

A.R.S. § 16-972(B) permits funds that have not been opted out within the 21-day period to be used or transferred for campaign media spending. Section R2-20-803(E) of the Proposed Rules currently requires a covered person to honor a donor's late opt-out request and treat it as a retroactive opt-out for that donor. However, this may be impossible if a covered person has already spent or obligated those funds for campaign media spending, as permitted by the statute. Moreover, this requirement potentially would result in covered persons being in a perpetual state of limbo: If any donor may opt out at any point after the initial notice, covered persons may be unable to spend donor funds on elections without being at risk of violating a late opt-out request.

We recommend the Commission eliminate the requirement that covered persons honor late opt-out requests and, accordingly, remove subsection (E) entirely. Covered persons could choose to honor a late opt-out request from a

donor if the funds have not already been spent or obligated, but they should not be required to do so. This deletion also dovetails with subsection (D), which (as clarified above) would allow covered persons to send additional opt-out notices with response periods after the initial 21-day statutory opt-out period has elapsed.

Third, we recommend revising the parallel language in § R2-20-803(B) and (D) regarding receipts provided to donors upon request.[8] This language permits donors to request a receipt, which may be issued prior to the end of the 21-day opt-out period (or any subsequent opt-out period provided under subsection (D)). Currently, the language requires a receipt to "confirm[] the donor's choice" as to whether funds have been opted out. Rather than requiring the receipt to confirm the status of the donated funds while the opt-out period is potentially still in effect, we suggest the following language:

> ". . . Upon request of the donor, the person responsible for providing the opt-out information must provide a receipt to the donor stating whether the funds had been opted-out at the time the receipt was issued. If the covered person regularly provides receipts for donations the receipt shall note whether the funds have been opted out . . ."

B. § 804 - Requests for exemptions

The Act provides original source donors with the ability to request an exemption from disclosure of their identity under the Act when their identity is otherwise protected from disclosure by a law or by a court order, or where a donor "demonstrates to the satisfaction of the commission that there is a reasonable probability that public knowledge of the original source's identity would subject the source or the source's family to a serious risk of physical harm." A.R.S. § 16-973(F).

The administration of this provision is particularly important to ensure both that donors who are truly at risk are protected and that the exemption process is not abused by those who merely would prefer anonymity. We suggest seven areas for revision or clarification below:

First, and most generally, this section appears to contemplate only situations where original sources request exemptions *after* a contribution is made to a covered person. We strongly recommend the Commission allow original sources to request an exemption from the Act prior to receiving a solicitation or making a contribution; a donor may intend to make contributions subject to disclosure under the Act and should be able, at that time, to submit a request prior to making such contribution.

Second, proposed § R2-20-804(A) provides that an original source who has not opted their funds out from campaign media spending must file a request for an exemption within fourteen days after the notice to opt out is given. However, the original source of funds may not receive an opt-out notice; if the original source contributes funds to an intermediary, which then passes the funds on to a covered person, it is possible that only the intermediary receives the opt-out notice. While an intermediary could choose to pass the opt-out notice back to the original source, there is no requirement that an intermediary do so. In this case, the Proposed Rule's timeline for an original source to apply for an exemption remains unclear.

We suggest that the regulations provide the same exemption request period for original sources who were not an immediate contributor to a covered person but may nonetheless be reported as the original source of funds in a

[8] This language is also paralleled in subsection (E); we recommend removing that paragraph entirely, but if it is retained or otherwise revised, the parallel language should also be updated.

report required under the Act. For example, where an original source contributed funds to multiple entities, who each passed along funds (thus functioning as intermediaries) to the covered person that totaled more than the $5,000 reporting threshold, the original source would not have received an opt-out notice – but would be identified in a report as a major contributor of funds in aggregate. That person may still qualify for, and should therefore be able to request, an exemption under A.R.S. § 16-973(F), and this situation should be contemplated in the final rule.

Third, proposed § R2-20-804(A) provides only a fourteen-day exemption request period after a donor receives the notice to opt out. This means that the exemption request period would elapse before the 21-day statutory opt-out period (or an extended opt-out period under § R2-20-803(D)) ends. We recommend modifying this subsection to reflect a twenty-one day exemption request period, in line with the statutory opt-out deadline.

Suggested language reflecting the above revisions to subsection (A) is as follows:

> "A. An original source who has not opted out of having their monies used for campaign media spending may file a request for an exemption with the Executive Director no later than 21 days after the notice to opt out is given. An original source may file a request for an exemption with the Executive Director prior to making a donation. In the event an original source did not receive a notice to opt out, the original source may file a request for exemption with the Executive Director no later than 21 days after discovering their monies may be or have been used for campaign media spending."

Fourth, proposed § R2-20-804(B), (C), and (D) currently describe the determination process for whether a requestor will be exempted from disclosure under the Act because of a court order (subsection (B)), statutory claim to confidentiality (subsection (C)), or reasonable probability of physical harm to the requestor or their family (subsection (D)). However, none currently provide for clear guidelines when the Commission determines the requestor is *not* entitled to the requested exemption. In such circumstances, the final rule should specify that the requestor's identity is subject to disclosure under the Act *but* should also provide a requestor who has already contributed money to a covered person with an additional amount of time (for example, five days) from the date of the decision denying the exemption to determine whether they wish to opt-out their contribution from campaign media spending.

We suggest the below language be added as a new subsection following subsection (D):

> "In the event the Commission decides that the request should not be granted, the Executive Director shall issue a letter to the requestor within five days stating the Commission's decision. The letter shall notify the requestor that they can opt out of having their monies used or transferred for campaign media spending by notifying the covered person in writing within five days of receipt of the letter, and that if the requestor does not opt out, their name shall be subject to disclosure."

Fifth, subsection (F) provides that "[n]o records related to a request shall be subject to a public records request or any other type of request. The records shall not be produced absent a court order compelling disclosure." This prohibition on sharing any records "related to" an exemption request is potentially overly broad and could capture even routine Commission agendas that mention a request but do not contain any identifying information regarding the requestor. We recommend narrowing this public records exemption to apply only to records that contain information that could lead to

the identification of a requestor, or by specifically listing the types of records subject to the exemption in subsection (F). Suggested language is as follows:

> "Records related to a request that contain information that may lead to the identification of a requestor shall not be subject to a public records request or any other type of request. Such records shall not be produced absent a court order compelling disclosure."

Furthermore, in the final rule, the Commission should consider making redacted versions of each final determination letter available to the public; the reasoning contained in such letters could be helpful to the public and to potential future applicants for exemptions to understand the process and reasoning behind the Commission's decision.

Sixth, we recommend modifying the language in (G) to clarify that records must be retained upon appeal of the Executive Director or Commission's determination:

> "All except the Executive Director's letter shall be destroyed within 30 days of the final disposition or determination and only after the conclusion of any subsequent court review, in the case of an appeal."

Lastly, § R2-20-804 does not provide for how the Commission will handle situations where a request for exemption is denied by the agency and later upheld by a court upon review. We suggest that a final version of the rules also provide guidelines for this situation. For example, when a request is denied by the Commission and then upheld by the court, the Commission should retain records until thirty days after the conclusion of the case, or until the period for an appeal has passed, whichever is longer.

C. § 805 – Disclaimers

Section R2-20-805 provides necessary guidance for A.R.S. § 16-974(C), which directs the Commission to establish a top three donor disclaimer requirement for public communications by covered persons. We commend the Commission in particular for including in proposed § R2-20-805(B) a clarification that top-three donor disclaimers only include donors of original monies who have not opted out pursuant to A.R.S. § 16-972. This interpretation of the Act is clearly consistent with its intent and other provisions.

As the Commission explores how to implement the top three donor disclaimers, we recommend additional language regarding how to calculate the top three donors and updated language applying the disclaimer requirement to different ad formats. These additional guidelines are particularly important for practical implementation; for example, if an ad runs over a longer period of time, the identity of the top three original source donors who did not opt out their funds might change. Without clear guidelines for these common situations, there may be questions or confusion for the regulated community.

Our recommended language is as follows:

> "B. Public communications by covered persons shall state in a clear and conspicuous manner the names of the top three donors who directly or indirectly made the three largest contributions of original monies who have not opted out pursuant to A.R.S. § 16-972 or a rule of the Commission during the election cycle to the covered person as calculated by the covered person at the time the advertisement was distributed for publication, display, delivery, or broadcast.
>
> > 1. For purposes of this subsection, contributions of traceable monies made in prior election cycles shall be considered to have been contributed in the current election cycle if the contributor's

aggregate contributions of original funds to the covered person constituted more than half of the covered person's traceable funds at the start of the election cycle;

2. If multiple contributors have contributed identical amounts such that there is no difference in contributed amounts between the third-highest contributor and the fourth-highest (or lower), the contributor who most recently contributed to the covered person shall be deemed a top three donor.

3. No contributor of traceable monies shall be deemed a top three donor if its aggregate contributions of original funds during the election cycle to the covered person are less than $5,000."

The recommended language below is designed to dovetail with the "clear and conspicuous" language in (B) and efficiently address how covered persons should include disclaimers in the broad range of ads and ad formats that fall under this requirement and would replace (C) and (D) from this section. The proposed standards leave potential ambiguity as to what would qualify as, for example, "clearly readable" or "clearly spoken." By creating a safe harbor where ads meet certain requirements, these regulations also provide the Commission with flexibility to better address potential violations of the Proposed Rule's disclaimer requirement.

C. For purposes of this § R2-20-805(B), a communication does not make a statement in a clear and conspicuous manner if it is difficult to read or hear or if the placement is easily overlooked.

D. Flexibility for certain internet or digital communications.—

1. Accommodation for technological impossibility. In the case of a public communication disseminated on the internet or by social media message, text message, or short message service where it is not technologically possible to provide all the information required by this section, the communication shall, in a clear and conspicuous manner—

a. state the full legal name of the covered person who paid for the communication; and

b. provide a means for the recipient of the communication to immediately and easily obtain the remainder of the information required under (B) with minimal effort and without receiving or viewing any additional material other than such required information.

E. Safe harbor for determining clear and conspicuous manner. A statement shall be considered to be made in a clear and conspicuous manner if the communication meets the following requirements:

1. Text or graphic communication.— In the case of a text or graphic communication, the statement shall be clearly readable and —

a. appear in letters at least as large as the majority of the text in the communication;

b. is contained in a printed box set apart from the other contents of the communication; and

c. is printed with a reasonable degree of color contrast between the background and the printed statement.

d. In the case of a sign or billboard, in addition to the requirements in clauses (a), (b), and (c), the disclosure shall be displayed at a height that is at least four percent of the vertical height of the sign or billboard.

2. Audio communications.— In the case of an audio communication, the statement is spoken in a clearly audible and intelligible manner at the beginning or end of the communications and lasts at least 4 seconds.

3. Video communications.— In the case of a video communication which also includes audio, the statement—

a. is included at either the beginning or the end of the communication; and

b. is made both in a written format that meets the requirements of clause (1) and appears for at least 4 seconds, and in an audible format that meets the requirements of clause (2).

4. Other communications.— In the case of any other type of communication, the statement is at least as clear and conspicuous as the statement specified in clauses (1), (2), or (3).

5. Brief video communications.— In the case of a video communication that is a qualified internet or digital communication shorter than 10 seconds, the audible portion of the statement may be omitted.

6. The disclosure requirements in (1), (2), and (3) apply to any broadcast, video, film, or audio format, whether distributed via airwaves, cable, the internet, or other delivery methods."

D. § 806 - Communication (ex parte)

We recommend the Commission consider re-titling proposed § R2-20-806 to "Ex Parte Communication" provide greater clarity regarding its purpose. In addition, we recommend a small revision to (B) to reflect that the ban on communications between the Executive Director (or any other commission staff or attorneys representing the Executive Director) and the Commissioners applies *only* to communications relating to a pending Complaint. In the absence of this revision, the proposed rule seems to suggest that the Commissioners cannot communicate with the Executive Director or other Commission staff at all if there is any complaint pending before the Commission.

"B. In the event of a Complaint, no Commissioner shall communicate with the Executive Director or any other commission staff or attorney who represents the Executive Director <u>regarding the Complaint</u> except in commission proceedings where the Respondent or Respondent's Counsel is present."

We additionally suggest that the Commission insert a new subsection (C) as follows, and re-number the current subsections (C) through (F) as (D) through (G).

"C. In the event that a Commissioner receives an ex parte communication as defined in subsections F and G of this rule, the Commissioner shall disclose receipt of such a communication on the public record in commission proceedings."

E. Proposed Additional Regulations

Any final regulations promulgated by the Commission on the Act should include guidance regarding the process for the direct donor to a covered person to provide original source information for the funds contributed if that donor is not the original source themselves.

A.R.S. § 16-972(D) requires any person who donates more than $5,000 in traceable monies in an election cycle to inform a covered person in writing of the identity of each other person who directly or indirectly contributed more than $2,500 of the donation in original monies and the amount of money contributed by those persons. A donor must convey this information within ten days after receiving a written request from the covered person, and must maintain these records for at least five years, available upon request to the Commission. Similar provisions govern in-kind contributions valued at more than $5,000. *See* A.R.S. § 16-972(E).

Language outlining this responsibility and the process for donors to report this information to a covered person – from a request by a covered person to the tracing, reporting, and record-keeping process for donors – should be addressed in the final regulations to reduce confusion for both donors and covered persons.

F. Minor Changes and Corrections

In addition to the more detailed and policy-oriented suggestions above, we identified a few minor changes and corrections the Commission may wish to consider. We suggest updating:

- § R2-20-801(C): ". . . a person must inform that covered person in writing <u>of</u> the identity of each other person that directly or indirectly contributed . . ."
- § R2-20-803(B)(3): "<u>Provide opt-out information in writing.</u> . . ." (The structure set forth in (B) and followed in (B)(1) and (2) is not followed in (B)(3) but can be resolved with this language).
- § R2-20-804(B): ". . . the Executive Director shall confirm the validity of the court order <u>with</u>in five days . . " provides greater flexibility to the Executive Director and parallels the construction in (C).

Conclusion

CLC thanks the Commission for its consideration of the foregoing comments and recommendations regarding this important rulemaking. As the Commission prepares to implement the Voters' Right to Know Act, CLC would be glad to provide further assistance or resources.

Respectfully submitted,

<u>s/ Elizabeth D. Shimek</u>
Elizabeth D. Shimek
Senior Legal Counsel

Philanthropy Roundtable

August 22, 2023

BY ELECTRONIC MAIL DELIVERY

Citizens Clean Elections Commission
Attn: Mr. Thomas M. Collins
1110 W. Washington Street
Suite 250
Phoenix, AZ 85007

Re: Comment on Proposed Rule Titled “Voter’s Right to Know Act, Proposition 211”

Dear Mr. Collins:

Philanthropy Roundtable files the following comments on the Citizens Clean Elections Commission’s proposed rule, Voter’s Right to Know Act, Proposition 211, which is a clear violation of the First Amendment. This proposed rule should be narrowly tailored to avoid any forced disclosure of donors to nonprofit organizations engaging in issue advocacy.

Arizona is home to almost 29,000 nonprofit organizations, with generous Arizonans giving more than $3.6 billion to charity each year. Philanthropy Roundtable supports the right of Arizonans to give and associate anonymously and believes donor privacy must be robustly protected.

The right of Arizonans to give freely and anonymously is protected by the First Amendment. Donors may choose to give anonymously for a variety of reasons including religious reasons, reasons of humility, to avoid solicitations, or in fear of reprisal and harassment. The decision by the U.S. Supreme Court in Americans for Prosperity Foundation (AFPF) v. Bonta has reaffirmed the robust protection of privacy rights under the U.S. Constitution. The decision in AFPF v. Bonta is a significant victory for privacy rights and underscores the fundamental importance of the right to freely associate without fear of government intrusion.

Regrettably, these rights are now under assault in Arizona after the passing of Proposition 211. Misleadingly titled the "Voters' Right to Know Act," Proposition 211 mandates that nonprofit organizations divulge the personal information of some of their donors, including names, addresses, employers, and contribution sums, to the government if these organizations participate in discussions about public matters. This directly undermines long-standing safeguards for donor confidentiality established by federal law and decisions of the U.S. Supreme Court. It enforces a new requirement on nonprofits that spend over $50,000 within a span of two years to address policy issues before an election, compelling them to publicly reveal any donor who has contributed more than $5,000 during the same two-year period.

Proposition 211 disregards fundamental safeguards for freedom of speech by establishing a so-called public entitlement to encroach upon an individual's personal matters. It coerces donors into a dilemma:

either stand by the causes and groups they endorse or expose their contributions and private details on a government registry. This outcome is poised to curtail open expression, intensify unwarranted intimidation, and foster a more contentious political dialogue. The landscape of philanthropy in Arizona stands as a testament to the remarkable generosity of its citizens, contributing billions to support the diverse array of nonprofit organizations that enrich the state's communities. The value of donor privacy is deeply rooted in the First Amendment and the AFPF v Bonta ruling reaffirms the significance of safeguarding privacy and maintaining the right to associate freely without undue government interference.

Proposition 211 threatens these foundational principles by demanding the exposure of donors' personal information, undermining their autonomy and potentially silencing their voices. This ill-conceived measure not only jeopardizes the vibrant philanthropic spirit of Arizona but also risks diminishing the open exchange of ideas and civic engagement. The preservation of donor privacy and the cherished ideals of free expression and association hang in the balance, calling for careful consideration and advocacy to uphold the essence of democracy itself.

On behalf of Philanthropy Roundtable, thank you for considering our cautionary comments in opposition to the implementation of the Voter's Right to Know Act, Proposition 211 without an explicit exemption for the legal, legitimate instances of nonprofit issue advocacy. If you have questions regarding our comments, please do not hesitate to contact me at emcguigan@philanthropyroundtable.org.

Sincerely,

Elizabeth McGuigan
Vice President, Policy & Government Affairs