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BY ELECTRONIC MAIL DELIVERY

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

Re: Advisory Opinion Request

Dear Commissioners:

Pursuant to Rule R2-20-808 adopted by the Arizona Citizens Clean Elections Commission ("***Commission***"), we seek an advisory opinion on behalf of the Democratic Legislative Campaign Committee and The PAC for America's Future (each individually, a "***Donor***" and collectively, "***Donors***").

I. Factual Background

Donors are organized under section 527 of the Internal Revenue Code. As national organizations focused on electing candidates to legislative office, Donors have registered political committees in multiple states in accordance with state campaign finance rules. To comply with applicable federal and state rules, Donors segregate 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).

Each Donor intends to make one or more monetary contributions in excess of $25,000 to a covered person to fund campaign media spending to influence the election of a state legislative candidate during the 2024 election cycle. Each Donor plans to make the contributions from more than one of their bank accounts; for ease of reference in this opinion, we will refer to these as Accounts A, B, and C. Donors will not make these contributions with funds restricted for use outside of Arizona elections. Donors will opt in to having their contributions used for campaign media spending in response to the notice required by A.R.S. § 16-972(B).

Donors seek guidance regarding which original monies they must disclose to a covered person in response to a § 16-972(D) request and, assuming the Donors do not themselves qualify as covered persons, seek confirmation that they are not required to send § 16-972(B) opt-out notices to their own contributors.

II. Discussion/Questions Presented

1. Do one or more of the following methods of disclosing original monies satisfy Donors' obligations under Arizona law?

Donors have reviewed the rules promulgated by the Commission, comments submitted in response to the proposed rules, and the Commission staff memorandum in response to the comments. One comment, submitted by a law firm, asked the Commission to specify that "any reasonable accounting system" may be used by a donor to determine its compliance with R20-20-801(C). The Commission staff rejected this request, concluding that "this additional regulation would unnecessarily burden donors and raise potential compliance and enforcement costs." The Commission staff noted that the requirement for donors to maintain a "record keeping system to track transactions" and "the statutory bar on structuring transactions illegally provide flexibility to donors but require them to act reasonably."

Donors now wish to confirm that one or more of their proposed methods of disclosing original monies complies with this standard. As stated above, each Donor plans to make the contributions from more than one of their bank accounts. To make the analysis easier, for each Donor we are asking the Commission to opine on a proposed $100,000 contribution that would come from three different bank accounts: $50,000 from Account A, $30,000 from Account B, and $20,000 from Account C. There are three potential ways that Donors could reply to an A.R.S. § 16-972(D) request seeking disclosure of the original monies comprising the contribution.

Donors believe that all three methods comply with Arizona law and are asking the Commission to confirm that it agrees. If the Commission believes that one or more methods complies and one or more methods does not comply, Donors ask that the Commission specify which method(s) comply and which method(s) do not.

- *Method #1:* Disclose original monies using a first-in-first-out (FIFO) or last-in-first-out (LIFO) accounting methodology for each account from which the contribution came. Donor would disclose the first-in or last-in original monies totaling $50,000 from Account A, $30,000 from Account B, and $20,000 from account C. To the extent that the original monies attributed to a source was $2,500 or less, the source would not be disclosed; such unitemized donations would be aggregated with the source being described as "unitemized." In addition, Donor would not "double count" any source of funds; once any original monies were disclosed as the source of a contribution in response to a § 16-972(D) request, they would *not* be disclosed as the source of any subsequent contribution in response to a § 16-972(D) request.

- *Method #2:* Disclose original monies from each account from which the contribution came, without regard to first-in or last-in order of receipt. Donor would disclose original monies totaling $50,000 from Account A, $30,000 from Account B, and $20,000 from account C, limited to original monies received during the current election cycle, but without regard to the order of receipt. To the extent that the original monies attributed to a source was $2,500 or less, the source would not be disclosed; such unitemized donations would be aggregated with the source being described as "unitemized." In addition, Donor

would not "double count" any source of funds; once any original monies were disclosed as the source of a contribution in response to a § 16-972(D) request, they would *not* be disclosed as the source of any subsequent contribution in response to a § 16-972(D) request.

- *Method #3:* Disclose original monies from any of the three accounts, without regard to how much was contributed from each account (again, limited to original monies received this election cycle). For example, Donor could disclose $100,000 in original monies from Account A; or Donor could disclose $50,000 in original monies from Account B and $50,000 in original monies from Account C; or Donor could disclose $75,000 in original monies from Account A, $15,000 in original monies from Account B, and $10,000 in original monies from Account C. To the extent that the original monies attributed to a source was $2,500 or less, the source would not be disclosed; such unitemized donations would be aggregated with the source being described as "unitemized." In addition, Donor would not "double count" any source of funds; once any original monies were disclosed as the source of a contribution in response to a § 16-972(D) request, they would *not* be disclosed as the source of any subsequent contribution in response to a § 16-972(D) request.

Proposed answer: Yes. All three reporting methods are reasonable methods for disclosing original monies and therefore comply with the statute.

A.R.S. § 16-972(D) reads as follows:

> Any person that donates to a covered person more than $5,000 in traceable monies in an election cycle must inform that covered person in writing, within ten days after receiving a written request from the covered person, of 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***. If the original monies were previously transferred, the donor must disclose all such previous transfers of more than $2,500 and identify the intermediaries. The donor must maintain these records for at least five years and provide the records on request to the commission.[1]

Rule R2-20-801(C) 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***.[2]

Rule R2-20-803(A) reads as follows:

> Before a covered person may use or transfer a donor's monies for campaign media

[1] A.R.S. § 16-972(D) (emphasis added).
[2] Ariz. Admin. Code R2-20-801(C) (emphasis added).

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.[3]

First, R2-20-801(C) expressly provides that A.R.S. § 16-972(D) requires disclosure only "up to the amount of money being transferred to the requesting person."[4] Therefore, if Donor contributes $100,000 to a covered person, Donor is only required to account for $100,000 in incoming donations in its response to a § 16-972(D) request.

Second, in recommending adoption of the proposed rules, the Commission staff advised that "the statutory bar on structuring transactions illegally provide[s] flexibility to donors but require[s] them to act reasonably."[5] The proposed disclosure methods are objectively reasonable. They disclose original monies provided to Donor in an aggregate amount equaling the contribution to the covered person, they only disclose original monies provided to Donor in the current election cycle, and they avoid any double counting. In fact, each of Donors' proposed compliance methods would comply with a similar Minnesota statute that prescribes a methodology by which donors to independent expenditure committees may comply with the requirement to disclose underlying contributors:[6]

> (c) To determine the amount of membership dues or fees, or donations made by a person to an association and attributable to the association's contribution to the independent expenditure or ballot question political committee or fund, the donor association must:
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> (1) apply a pro rata calculation to all unrestricted dues, fees, and contributions received by the donor association in the calendar year; or
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> (2) as provided in paragraph (d), identify the specific individuals or associations whose dues, fees, or contributions are included in the contribution to the independent expenditure political committee or fund.
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> (d) Dues, fees, or contributions from an individual or association must be identified in a contribution to an independent expenditure political committee or fund under paragraph (c), clause (2), if:
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> (1) the individual or association has specifically authorized the donor association to use the individual's or association's dues, fees, or contributions for this purpose; or
>
> ***(2) the individual's or association's dues, fees, or contributions to the donor association are unrestricted and the donor association designates them as the source of the subject contribution to the independent expenditure political committee or fund.***
>
> (e) After a portion of the general treasury money received by an association from a person has been designated as the source of a contribution to an independent expenditure or ballot

[3] *Id*. R2-20-803(A).
[4] *Id.* R2-20-801(C).
[5] *See* Memorandum from Thomas Collins to Arizona Citizens Clean Election Commissioners regarding Voter's Right to Know Act Rules (Aug. 22, 2023) at 2.
[6] Minn. Stat. Ann. § 10A.27, subd. 15(c)-(e) (emphasis added).

> question political committee or fund, that portion of the association's general treasury money received from that person may not be designated as the source of any other contribution to an independent expenditure or ballot question political committee or fund.

Echoing the statute, the Minnesota disclosure form notes that "[a] contribution may be attributed to specific donors if the donor has specifically authorized the association to use that donor's dues or donations for independent expenditure purposes or, absent specific authorization, the association designates specific donors' dues or donations as the source of the contribution to the independent expenditure political committee or fund" and expressly permits donor organizations to include unitemized amounts in accounting for the total amount contributed.[7] The fact that each of Donors' proposed methods would comply with another state's analogous disclosure regime evinces the reasonableness of each method.[8]

For these reasons, we ask the Commission to confirm that each proposed method complies with A.R.S. § 16-972(D) and Rules R2-20-801(C) and R2-20-803(A).

2. <u>If Donors do not engage in campaign media spending themselves, are they required to send opt-out notices to their own contributors?</u>

Proposed answer: No. The statute and rules merely require the opt-out notice to be sent from a covered person to the *covered person's donors*. There is no requirement that a donor send opt-out notices to its own donors.

A.R.S. § 16-972(B) reads as follows:

> Before the 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 and must be given an opportunity to opt out of having the donation used or transferred for campaign media spending.[9]

Rule R2-20-803(A) reads as follows:

> Before a covered person may use or transfer a donor's monies for campaign media

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[7] Minnesota Campaign Finance Board, *2022 Disclosure Statement for Corporations and other Unregistered Associations Contributing to Independent Expenditure Committees and Funds*, https://cfrlite.cfb.mn.gov/pdf/forms/cf_reports/2022_IEPCF_Underlying_Disclosure.pdf.

[8] The LIFO/FIFO method is also expressly contemplated in guidance issued by the Federal Election Commission and the Michigan Secretary of State. In advisory opinions, the Federal Election Commission has opined that "the Commission has identified certain accounting methods as reasonable. In Advisory Opinion 2006-6 (Busby), the Commission identified the method described in 11 CFR 110.3(c)(4), which is known as the 'first in, first out' method, as a reasonable accounting method. In Advisory Opinion 2004-45 (Salazar), the Commission determined that the 'last in, first out' accounting method was reasonable." FEC Adv. Op. 2006-38 (Casey), https://www.fec.gov/files/legal/aos/2006-38/2006-38.pdf. Likewise, the Michigan Secretary of State has opined that "[e]xpenditures to Michigan candidates, PACS, Political Party Committees or Ballot Question Committees may be made directly from the committee's out-of-state account and reported through the LIFO accounting method or any other reasonable accounting method." Mich. Bureau of Elections, *Appendix K: Out of State Groups*, https://mertsplus.com/mertsuserguide/index.php?n=MANUALS.AppendixK.

[9] A.R.S. § 16-972(B).

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.***[10]

The other subsections of Rule R2-20-803 detail the contents, format, and timing of the opt-out notices. Neither the statute nor rule require any person other than the covered person to send opt-out notices to donors. Rule R2-20-813(B) permits but does not require a person who is not a covered person to provide the opt-out notice to another person who has contributed original monies before transferring the monies to a covered person.[11]

Requiring donors to send opt-out notices to their own donors would be unworkable in practice. Under such a regulatory scheme, each nested donor that transferred traceable monies would be required to send opt-out notices to their donors, some of which might face the same obligation. This "Russian nesting doll" situation would lead to covered persons having to wait far longer than 21 days prior to engaging in constitutionally protected speech. The Commission should confirm that A.R.S. § 16-972 and R2-20-803 do not require donors to covered persons to send opt-out notices to their own underlying contributors.

Very truly yours,

Jonathan S. Berkon
G. Meredith Parnell
Counsel to The PAC for America's Future and Democratic Legislative Campaign Committee

[10] Ariz. Admin. Code R2-20-803(A) (emphasis added).

[11] *Id*. Rule R2-20-813(B) ("A person who is not a covered person *may* provide the notice prescribed by A.R.S. § 16-972(B) to another person who has given that person monies before transferring monies or making an in-kind donation to a covered person.") (emphasis added).