

NOTICE OF PROPOSED RULEMAKING

TITLE 2. ADMINISTRATION

CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION

PREAMBLE

1. Article, Part, or Section Affected (as applicable) Rulemaking Action

R2-20-801	New Section
R2-20-802	New Section
R2-20-803	New Section
R2-20-804	New Section
R2-20-805	New Section
R2-20-806	New Section
R2-20-807	New Section
R2-20-808	New Section

2. Citations to the agency's statutory rulemaking authority to include the authorizing statute (general) and the implementing statute (specific):

Authorizing statute: A.R.S. § 16-974(A)(1).

Implementing statutes: A.R.S. §§ 16-972(B), 16-973(F), 16-974(A)(5), (A)(7), (A)(8), (C).

Statute or session law authorizing the exemption: A.R.S. § 16-974(C).

3. Citations to all related notices published in the Register as specified in R1-1-409(A) that pertain to the record of the proposed rule:

Notice of Rulemaking Docket Opening: (volume #) A.A.R. (page #)

4. The agency's contact person who can answer questions about the rulemaking:

Name: Thomas M. Collins

Address: 1110 W. Washington Street, Suite 250, Phoenix, AZ 85007.

Telephone: (602) 364-3477

Fax: Not applicable

E-mail: ccec@azcleelections.gov

Web site: www.azcleelections.gov

5. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:

R2-20-801 – R2-20-801 – Establishes the definitions in A.R.S. § 16-971 shall apply to this article. Rules of construction will also be located in this section and this rulemaking proposes two: one relates to the definition

of campaign media spending, the other relates to information provided to a covered person upon that person's request for donor information. This rule is necessary to ensure consistency in the application of terms.

R2-20-802 – Establishes consistent rules for this article for when actions specified are to be completed. Time rules are necessary to provide predictability to those who have to take actions under the rules and the public.

R2-20-803 – Provides rules for the form of opt-out notices required by A.R.S. § 16-972(F) as well records related to those decisions that may be provided to donors. These notices advise a person that their donation may be used for campaign media spending and allow them to opt out within a certain time. This proposed rule also addresses procedures if a covered person makes an additional notice to a person regarding opting out or when a person chooses to opt out at a later time.

R2-20-804 – Section 16-973 provides that certain original sources may have their identities protected by legal mechanisms such as court orders, statutes, and an application to the commission. This rule is necessary to provide the procedures for establishing that an original source should or should not be protected, including how the Commission may address a matter in executive session and how records relating to these procedures should be treated.

R2-20-805 – Section 16-974 directs the Commission to establish disclaimer requirements for public communications of covered persons. These communications are things like broadcast advertising, newspaper advertising, and internet advertising. The disclaimer states who paid for the and whether it was approved by a candidate or not. The rule provides details about how who paid for should be determined.

R2-20-806 – This rule provides details on how communication to and from the Commission should be handled, including defining ex parte communications and prohibiting them. It also sets forth the authority of the Executive Director to communicate regarding a complaint and how a respondent should advise the Commission that the respondent is represented by counsel. The rule is necessary to provide confidence to the public and others with business before the Commission that their matters will be handled fairly and provides predictability about how the Commission or its employees will interact with people with business before the Commission.

R2-20-807 – Section 16-974 provides the Commission with authority to make rules related to recordkeeping. This rule does that. It is necessary because proper record keeping is crucial to ensuring compliance with the law.

R2-20-808 – This rule provides a process for advisory opinions. Advisory opinions are a crucial part of the compliance and enforcement process because they allow a person to seek the Commission's opinion about an action before that person takes it, thus facilitating compliance and avoiding enforcement. The rule also provides the time frame and information required to process requests for advisory opinions.

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6. A reference to any study relevant to the rule that the agency reviewed and proposes either to rely on or not to rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:

Not applicable.

7. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:

Not applicable.

8. The preliminary summary of the economic, small business, and consumer impact:

Not applicable.

9. The agency’s contact person who can answer questions about the economic, small business and consumer impact statement:

Name: Thomas M. Collins

Address: 1110 W. Washington Street, Suite 250, Phoenix, AZ 85007.

Telephone: (602) 364-3477

Fax: Not applicable

E-mail: ccec@azcleaselections.gov

Web site: www.azcleaselections.gov

10. The time, place, and nature of the proceedings to make, amend, repeal, or renumber the rule, or if no proceeding is scheduled, where, when, and how persons may request an oral proceeding on the proposed rule:

The Commission will consider final approval of these rules at a public meeting no earlier than 60 days after its May 18, 2023 meeting.

11. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any

specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:

- a. **Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:** The Commission does not have statutory authority to issue permits.
- b. **Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**
- c. **Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**

12. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:

Not applicable.

13. The full text of the rules follows:

R2-20-801 Definitions and rules of construction

A. The definitions in A.R.S. § 16-971 shall apply to these rules.

B. For purposes A.R.S. § 16-971(2)(a)(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 other activities described in A.R.S. § 16-972(2)(a) shall not be considered campaign media spending unless these activities are specifically conducted in preparation for or in conjunction with those other activities.

C. 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.

R2-20-802 Time

The following rules apply in computing any time period specified in these rules:

A. The day of the event or act shall be excluded.

B. If the deadline is five days or fewer, then Saturdays, Sundays, and legal holidays shall be excluded.

C. If the last day of the period is a Saturday, Sunday, or legal holiday, the last day is excluded, and the period runs until the next day that is not a Saturday, Sunday, or legal holiday.

D. The next day is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

R-20-803 Opt-out notices

A. 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.

B. The notice must:

1. Inform donors that their monies may be used for campaign media spending and that information about donors may have to be reported to the appropriate government authority in this state for disclosure to the public.
2. Inform donors that they can opt out of having their monies used or transferred for campaign media spending by notifying the covered person in writing within twenty-one days after receiving the notice that the donor prefers to opt-out of having their monies used or transferred for campaign media spending and that a receipt confirming their choice shall be provided upon request.
3. Opt-out information shall be provided in writing. If provided with other written information the opt-out information must be provided in a format at least the same size type as any other information provided in writing along with the notice. The information must be either the first sentence in a paragraph or itself constitute a paragraph. If the opt-out information is provided

without additional writing it must be clearly readable. 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 21 days. Upon request of the donor, the person responsible for providing the opt-out information must provide a receipt to the donor confirming the donor's choice. If the covered person regularly provides receipts for donations the receipt shall confirm the donor's choice. Nothing in this rule precludes providing a donor a receipt without waiting for a request.

- C. Any person responsible for providing the opt-out information must keep a record of when the information was provided and maintain all related records including the written notice for five years.
- D. If a donor does not opt out after the initial notice, 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. Upon request by the donor, the person responsible for providing the opt-out information must provide a receipt to the donor confirming the donor's choice. If the covered person regularly provides receipts for donations the receipt shall confirm the donor's choice.
- E. A donor may request to opt out at any time after the initial notice and the covered person must confirm the opt out to the donor in writing no later than 5 days after the request and subsequently that donor shall be treated as having opted out by the covered person. Upon request of the donor, the person responsible for providing the opt-out information must provide a receipt to the donor confirming the donor's choice. If the covered person regularly provides receipts for donations the receipt shall confirm the donor's choice.

R2-20- 804 Request for exemptions

- 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 14 days after the notice to opt out is given.
- B. In the event the request provides documentation of a court order requiring confidentiality, the Executive Director shall confirm the validity of the court order in five days. If the order is confirmed, the Executive Director shall issue a letter to the requestor stating that their name shall not be disclosed.
- C. In the event that the person making the request claims a statute provides for such confidentiality, the request shall include a citation to the statute and argument why the statute applies to require confidentiality. The Executive Director may make a recommendation to the Commission. The Executive Director shall place the item on an agenda no later than the next regular Commission meeting. The person and their counsel may appear. In order to protect the interests of the original source pending a determination, the Commission may vote to go into executive session to protect confidential information and if warranted for other reasons authorized by the Open Meeting Law. For purposes of this rule, the person and their counsel shall be deemed individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities if the Commission votes to go into executive session pursuant to A.R.S. § 38-431.03(A)(2). No vote may be taken in the executive session. If the Commission decides that the statute applies by a roll call vote in public session in favor of the request, the Executive Director shall issue a letter to the requestor within 5 days stating that their name shall not be disclosed.
- D. In the event the person making the request claims that there is a reasonable probability that they or their family will experience threats of physical harm, the request shall provide such evidence. The request may also include argument in favor of the request. The Executive Director may make a recommendation to the Commission. The Executive Director shall place the item on an agenda no later than the next regular commission meeting. The person and their legal representative may appear. In order to protect the interests of the original source pending a determination, the Commission may vote to go into executive session to protect confidential information and if warranted for other reasons authorized by the Open Meeting Law. For purposes of this rule, the person and their counsel shall be deemed individuals whose presence is reasonably necessary in order for the public body to carry out its executive session responsibilities if the Commission votes to go into executive session pursuant to A.R.S. § 38-431.03(A)(2). No vote may be taken in the executive session. If the Commission decides that the request should be granted by a roll call in public session in favor of the request, the Executive Director shall issue a letter to the requestor within 5 days stating that their name shall not be disclosed.
- E. The agenda shall not identify the requestor.
- F. No 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.
- G. All records except the Executive Director's letter shall be destroyed within 30 days of the determination.

The Executive Director's letter shall not be made public except by a court order.

R2-20- 805 Disclaimers

- A. A covered person shall include the words "paid for by" on every public communication followed by the full legal name of the covered person making the public communication. The public communication shall also state whether it is: 1) authorized by any candidate or their agents and any candidate's name who individually or through their agents participated in the authorization; or 2) that the public communication is not authorized by any candidate or their agents acting on the candidate's behalf.
- B. 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 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.
- C. If it is not technologically possible for a public communication disseminated on the internet or by social media message, text message or short message service to provide all the information required by this section, the public communication must provide a means for viewers to obtain, immediately and easily, the required information without having to receive extraneous information. The public communication must always state the full legal name of the covered person.
- D. If the public communication is:
 - 1. Broadcast on radio, the disclosure shall be clearly spoken at the beginning or end of the advertisement.
 - 2. Delivered by hand or by mail, the disclosure shall be clearly readable.
 - 3. Delivered electronically, the disclosure shall be clearly readable.
 - 4. Displayed on a sign or billboard, the disclosure shall be displayed at a height that is at least four percent of the vertical height of the sign or billboard.
 - 5. Broadcast on television, in a video or film, both of the following requirements apply:
 - (a) The disclosure shall be both written and spoken at the beginning or end of the advertisement, except that if the written disclosure statement is displayed for the greater of at least one-sixth of the broadcast duration or four seconds, a spoken disclosure statement is not required.
 - (b) The written disclosure statement shall be printed in letters that are displayed in a height that is at least four percent of the vertical picture height, except that if the advertisement is paid for by a political action committee, the written disclosure statement shall be displayed in a height that is at least ten percent of the vertical picture height.
 - (c) These disclosure requirements apply to any broadcast, video, or film format, whether distributed via airwaves, cable, the internet, or other delivery methods.

R2-20-806 Communication

- A. No individual shall communicate with any Commissioner ex parte as defined in subsections E and F of this rule. No Commissioner shall communicate with any individual ex parte as defined in subsections E and F of this rule.
- 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 except in commission proceedings where the Respondent or Respondent's Counsel is present.
- C. The Executive Director may communicate with a Respondent, a Respondent's counsel, a Complainant or Complainant's Counsel or any other person with information regarding a Complaint.
- D. If a Respondent wishes to be represented by counsel with regard to any matter pending before the Commission, Respondent or Respondent's Counsel shall so advise the Commission by sending a writing to the Commission including the following:
 - 1. The name, address, and telephone number of the counsel.
 - 2. A statement authorizing such counsel to receive any and all notifications, service of process, and other communications from the Commission, its staff and attorneys on behalf of Respondent.Upon receipt, the Commission shall have no contact with Respondent except through the designated counsel unless authorized Respondent.
- E. Ex parte communication means any written or oral communication by any person outside the agency to any Commissioner or any member of a Commissioner's staff which imparts information or argument regarding prospective Commission action or potential action concerning:
 - 1. Any proceeding involving a request for an exemption.
 - 2. Any enforcement proceeding.
 - 3. Any pending litigation matter, or

4. Any pending rulemaking, or
5. Any pending advisory opinion request.

F. Ex parte communications do not include the following communications:

1. Statements by any person publicly made in a public forum; or
2. Statements or inquiries by any person limited to the procedural status of an open proceeding, rulemaking, advisory opinion request, or a litigation matter.

R2-20-807 Recordkeeping

- A. All records required to be retained by Chapter 6.1 of Title 16 shall be kept in such order that a reasonable person could confirm the accuracy of transactions, transfer records, reports, opt out notices, and other information by review of the documents and other information.
- B. Records may be kept in any media a person subject to Chapter 6.1 of Title 16 chooses, provided that the media is commonly available and not proprietary.
- C. Failure to maintain records in a reasonable manner may give rise to factual presumption against the person in an enforcement proceeding or other action under Chapter 6.1 of Title 16.

R2-20- 808 Advisory Opinions

A. Requests for advisory opinions

1. Any person may request in writing an advisory opinion concerning the Chapter 6.1, of Title 16 or any regulation prescribed by the Commission pursuant to that chapter. An authorized agent of the requesting person may submit the advisory opinion request, but the agent shall disclose the identity of his or her principal.
2. The written advisory opinion request shall set forth a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests.
3. Advisory opinion requests shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made.
4. The Executive Director shall review all requests for advisory opinions submitted. If the Executive Director determines that a request for an advisory opinion is incomplete or otherwise not qualified, they shall, within 10 days of receipt of such request, notify the requesting person and specify the deficiencies in the request.
5. Advisory opinion requests must be sent to the Clean Elections Commission by email or as directed by the Commission staff. Procedures for advisory opinion requests shall be available on the Commission website.

B. Availability and Comments on Requests.

1. Advisory opinion requests which qualify under this section shall be made public at the Commission promptly upon their receipt.
2. A copy of the original request and any supplements thereto, shall be available for public inspection and may be obtained via a written request to the Executive Director.
3. Any interested person may submit written comments concerning advisory opinion requests made public at the Commission.
4. The written comments shall be submitted within 10 days following the date the request is made public at the Commission. Additional time for submission of written comments may be granted upon written request for an extension by the person who wishes to submit comments or may be granted by the Executive Director without an extension request. Comments Advisory opinion requests must be sent to the Clean Elections Commission by email or as directed by the Commission staff.

C. Issuance and Reliance on Advisory Opinions

1. Within 60 calendar days after receiving a qualifying advisory opinion request, the Commission shall issue to the requesting person a written advisory opinion or shall issue a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of a majority of members present at a meeting of the Commission.
2. The 60 calendar day period is reduced to 20 calendar days for a qualified advisory opinion request provided the request:
 - a. Is submitted by a person within the 60 calendar days preceding the date of any election to which Chapter 6.1 of Title 16 applies;
 - b. Identifies the election by date and jurisdiction.
 - c. Presents a specific transaction or activity related to the election that may invoke the 20

day period if the connection is explained in the request.

3. An advisory opinion rendered by the Commission may be relied upon by any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.
 4. Any person who relies upon an advisory opinion and who acts in good faith in accordance with that advisory opinion shall not, as a result of any such act, be subject to any sanction provided Chapter 6.1 of Title 16.
- D. Reconsideration of Advisory Opinions.
1. A request for reconsideration may be made by the person who made the request within 15 days of the opinion's approval but no later than 5 days before the Commission's next regular meeting.
 2. A request for reconsideration may be made by any person who states a good faith basis for vacating or reversing a prior opinion subject to other rules in this section. Any reconsideration shall meet all of the requirements otherwise required of an initial request.