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)