

NOTICE OF FINAL EXEMPT RULEMAKING
TITLE 2. ADMINISTRATION
CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION

PREAMBLE

<u>1. Articles, Parts, or Sections Affected (as applicable)</u>	<u>Rulemaking Action</u>
Article 8	New Article
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), and (C).

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

3. The effective date of te rule and the agency’s reason it selected the effective date:

R2-20-801 to 804. The agency selected August 24, 2023 in order to ensure that the

regulated community and the public were in a position to make informed decisions related to Arizona Revised Statutes Title 16, Chapter 6.1.

R2-20-805. The agency selected September 21, 2023 in order to allow additional comment between August and September and to ensure that the regulated community and the public were in a position to make informed decisions related to Arizona Revised Statutes Title 16, Chapter 6.1.

R2-20-806 to 808. The agency selected August 24, 2023 in order to ensure that the regulated community and the public were in a position to make informed decisions related to Arizona Revised Statutes Title 16, Chapter 6.1.

4. A list of all notices published in the *Register* as specified in R1-1-409(A) that pertain to the record of the exempt rulemaking:

Notice of Proposed Exempt Rulemaking, 29 A.A.R. 1571, July 21, 2023.

5. 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

E-mail: ccec@azcleaselections.gov

Web site: www.azcleaselections.gov

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 An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:

The Voter's Right to Know Act, Chapter 6.1 of Title 16, Arizona Revised Statutes was passed by voters and certified on December 5, 2022. The Act provides for the disclosure of certain information related to the funding of political campaigns and disclaimers on campaign public communications. It also granted enforcement, rulemaking, and other powers to the Citizens Clean Elections Commission, a nonpartisan state commission. These proposed rules are part of the implementation of the Act.

R2-20-801: Establishes that 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 this rule applies in specific circumstances, such as kind of media.

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.

7. 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:

No studies were conducted relevant to these rules.

8. 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:

The rulemaking does not diminish a previous grant of a authority of a political subdivision of this state.

9. The summary of the economic, small business and consumer impact, if applicable:

Not applicable.

10. A description of any changes between the proposed rulemaking, including any supplemental proposed rulemaking, and the final rulemaking package (if applicable):

The Commission approved several changes at public meetings August 26, 2023 and September 21, 2023. Materials provided to the Commission, including all changes adopted, meeting minutes, and recordings of the public meetings are available by contacting the Commission. For clarity, this section notes where no changes were made.

These changes are not substantial.

R2-20-801: Section R2-20-801(B) includes a reference to a definition in A.R.S. § 16-971(2)(a)(vii). The Notice of Proposed Exempt Rulemaking included a manifest typographical error misciting the provision. The error is manifestly typographical for two reasons. First, the Proposed rule referred to a subsection that does not exist at this time in Title 16, Chapter 6.1. Second, the rule directly includes the terminology from the correct section. Consequently, a reasonable person would have sufficient textual evidence to surmise the error was typographical.

In R2-20-801(C), the word “of” was added to correct a typographical error in this sentence:

In response to a request pursuant to A.R.S. §16-972(D), a person must inform that covered person in writing, 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 up to the amount of money being transferred to the requesting person.

R2-20-802: No changes were made to this section.

R2-20-803: The Commission added the word “period” to correct an unintended possible interpretation of the proposed rule and to ensure the rule is unambiguous. Specifically, the Commission added the word period to R2-20-803(D): “If a donor does not opt out after the initial notice period, 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.” The Commission also added the word period to R2-20-803(E): “A donor may request to opt out at any time after the initial notice period 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.”

R2-20-804: The Commission added language to R2-20-804(A) that restates the premise of the provision, which provides procedures for a donor to request an exemption from disclosure. Consequently, the section now reads:

An original source who has reason to believe their identity will or could be subject to disclosure under Chapter 6.1 of Title 16 may file a request for exemption pursuant to A.R.S. § 16-973(F) at any time. 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. In the event an original source did not receive a notice to opt out, the person 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.

In R2-20-804(B)-(D), the Commission added language clarifying that the “identity” of a donor should not be disclosed if requirements of the statute are met, rather than just the name of the donor. In those same sections, the Commission directed that in the event the requirements for the exemption are not met, the Executive Director shall issue a letter to the person who requested the exemption stating that the person’s identity may be disclosed. In R2-20-804(G), the Commission added language clarifying how records related to an exemption shall be maintained and released. Specifically, the rule now reads: “All records except the Executive Director’s letter shall be destroyed ~~within~~ 30 days after ~~of~~ the determination, unless timely review of the Commission’s action is sought. The Executive Director’s letter shall not be made public except by a court order.”

R20-805: In section R2-20-805(B), the Commission added language to better reflect the statute’s underlying disclosure requirements. The section now reads: “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 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. In the event a donor otherwise subject to disclosure pursuant to this section is protected under A.R.S. § 16-973(F) the disclaimer shall omit that donor’s identity.”

R2-20-806: The Commission clarified that restrictions on communications between the Commission and the Executive Director after the filing of a complaint alleging violations

of Title 16, Chapter 6.1 or Commission rules under that Chapter relate to the Complaint. The Commission also added language requiring a Commissioner to report an ex parte communication to the Commission. Specifically, R2-20-806(G) states: In the event that a Commissioner receives an ex parte communication as defined in this rule, the Commissioner shall disclose receipt of such a communication in a public meeting of the Commission.

R2-20-807: No changes were made to this section.

R2-20-808: No changes were made to this section.

11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments, if applicable:

R2-20-801: Comment 1 from Herrera Arellano LLP (HA). HA focuses on this proposed language in R2-20-801(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.

HA believes that this language needs an additional provision specifying that a donor may use "any reasonable accounting system" to determine its compliance with this section. Such a provision would, in HA's view, prevent donors from being "forced to identify and track the precise dollars the donors received" and lower the burden on donors in making those identifications.

Staff respectfully disagrees. The rules require record keeping to track transactions. A.A.C. R2-20-207. That requirement, along with the statutory bar on structuring transactions illegally, provide flexibility to donors but require them to act reasonably. Imposing a

specific kind of accounting method requires additional regulation and will potentially mire the Commission and donors deeply in accounting questions rather than compliance with the Act. In short, this additional regulation would unnecessarily burden donors and raise potential compliance and enforcement costs.

Comment 2 from HA. Based on R2-20-801(C), HA argues for a rule change that would address what it sees as an ambiguity in the law. Specifically, HA asserts that there is an ambiguity in A.R.S. § 16-973 that limits disclosure to just those donors who have both given money and had that money used for campaign media spending. The firm requests a rule that limits the disclosure to dollars actually used.

Staff respectfully disagrees. The comment does not explain the statutory basis for the claimed ambiguity.

R2-20-803: Chapter 6.1 of Title 1, or Proposition 211, requires that donors be given an opportunity to opt out of having their donations used for campaign media purposes. This rule provides details on how a covered person could comply with that requirement.

Comment 1 from Statecraft, a Phoenix-based law firm. Statecraft first comments that it believes that there could be confusion among donors to PACs who receive an opt out notice regarding Proposition 211 and chose not to have their donation used for campaign media spending only to have their identity nevertheless revealed on regular campaign finance reports, or, in Statecraft's view, create complications for the PAC under the Internal Revenue Code.

Statecraft proposes an alternative way for PACs to comply with A.R.S. § 16-972 relating to opting out.

Staff has not identified a basis in Proposition 211 to support Statecraft's proposed solution.

Although nothing prevents a PAC or political party from providing additional information on how a donor's money may be used or identity may be disclosed, staff's reading of the comment is to create an alternative mechanism for compliance outside of the terms of the statute. Consequently, staff does not recommend acting on Statecraft's comment.

Comment 2 from Statecraft. Statecraft notes that Proposition 211 states that "the notice required by this section may be provided to the donor before . . . the covered person receives a donor's monies, but the donor's monies may not be used or transferred for campaign media spending until at least twenty-one days after the notice is provided or until the donor provides written consent pursuant to this section, whichever is earlier." Statecraft requests that this language be incorporated into the rules.

Staff interprets the comment and draft language provided by Statecraft as being redundant of what the statute already allows. As such staff respectfully concludes this change is unnecessary.

Campaign Legal Center (CLC). CLC submitted three comments regarding proposed R2-20-803.

CLC Comment 1. This comment states that the proposed rule creates an ambiguity because it can be read to allow a subsequent opt out opportunity to a donor before the 21-day period mandated by statute expires by the omission of the word "period."

Staff agrees that there may be unintended ambiguity by omitting the word "period" from the first sentence of R2-20-803(D). This is not a substantial change.

CLC Comment 2. CLC's second comment expresses concern about proposed R2-20-803(E). The comment states that the proposed rule requires a covered person to act on an effort by a donor to opt out after the initial notice period retroactively. The comment states

that this may be impossible to comply with if the donor's money has already been spent. The comment asserts that the covered person's may not be able to manage their affairs if they are mandated to address constant efforts to opt out. CLC recommends removing the subsection.

Staff is not certain why the renewed opt out request would have to be honored or could be honored retroactively. Nothing in Proposition 211 prevents a donor from later requesting to opt out. Furthermore, this rule provides some certainty to donors that their rights under the statute will be treated appropriately. Moreover, other comments indicate concern that donors may have with being disclosed based on actions of the covered person. Staff recommended a change to clarify that the subsequent request must come after the initial notice period, as intended.

CLC Comment 3. CLC's third comment relates to receipts provided to donors by covered persons. CLC argues that the receipt should be more explicit and memorialize "whether funds have been opted-out at the time the receipt was issued."

The dictionary definition of receipt is a "writing acknowledging the receiving of goods or money." <https://www.merriam-webster.com/dictionary/receipt> (August 22, 2023). Consequently, a receipt should by its terms acknowledge the amount of money donated and, in addition, the donor's choice as to opting out. Respectfully, staff does not believe this change is necessary.

R2-20-804: Proposition 211 provides that a donor may request an exemption from disclosure under certain circumstances including where the Commission concludes 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."

CLC submitted seven comments on this provision.

CLC Comment 1. CLC believes that the proposed rule in general does not apply until an original source after a contribution has been made to the covered person.

Staff did not intend this interpretation. Proposed R2-20-804(A) was intended to set a deadline for an original source. The deadline is 14 days after an opt out notice is given. If no opt out notice has been given, the deadline is not triggered. The language contains no limitation on the timing of the request. Nevertheless, as discussed below, staff recommends some clarifying but non-substantial changes to ameliorate this potential misconception.

CLC Comment 2. CLC states that because an original source may not actually receive an opt out notice and, as a result, the timeline would be unclear.

Staff explained to the Commission that because the opt out notice does not trigger the request, but rather triggers the deadline, the timeline is clear. Nevertheless, as explained in Section 10 of this preamble, staff recommended and the Commission adopted, clarifying but non-substantial changes to ameliorate this potential misconception.

CLC Comment 3. The CLC states that the proposed rule's 14-day timeline to seek an exemption after a notice is given is too short and the timeline to seek an exemption should be entirety of the opt out period.

Commission Staff believes the reason for the 14-day period is that, in the event an original source desires to make a request they must make it before the 21-day opt out period expires if they are to have the exemption ruled upon prior to the expiration of the opt out period. This is an effort to minimize the impact of on the covered person's ability to use funds, and enable the original source to make an informed choice about the use of their funds and the possible reporting obligations stemming from that use. Staff respectfully does not

recommend this change.

CLC Comment 4. CLC suggests an additional subsection that requires a letter to the original source detailing that they may opt out of having their money used for campaign media spending and providing five days to opt out.

Staff believes that this additional time to opt out is unnecessary to mandate and inserts the Commission further in the donor-covered person relationship. However, as specified in Section 10 of the preamble, staff recommended clarifying language that indicates a letter will issue regarding either the grant or denial of a request and the Commission agreed. Specifying a written conclusion to the proceeding does not substantively change the rule.

CLC Comment 5. CLC suggests the Commission narrow the proposed limit on public records requests, suggesting that even an agenda could be eliminated from a public records request. CLC suggests language that limits the language to information that could lead to the identity of the original source or specifically listing the records that will not be released. Staff respectfully disagrees with the comment. Established legal principles, including the public records statutes in Arizona, the Arizona open meetings law, and due process itself would make the application of an exemption such as this to something like an agenda contrary to law. The goal of the statute is to preserve confidentiality. Staff is not in a position to determine what information may lead to the identification of an original source who is entitled to an exemption. Given that the statute outlines those situations will arise in situations where the stakes are demonstrably high, staff respectfully does not recommend acting on this comment at this time.

CLC Comments 6 and 7. CLC expresses concern that the rules requiring the destruction of requests for an exemption 30 days after a determination by the Commission authorizes

that destruction regardless of pending legal action. It also expresses concern that the rules do not address specifically how records will be retained if there are subsequent proceedings.

From a staff perspective, an executive director would be barred by other legal principles and rules from destroying records with further proceedings pending. That said, staff recommends some non-substantial modifications to bring these background principles into the text.

HA submitted two comments on this proposed rule.

HA Comment 1. Covered persons are not included in the process of determining whether an original source is entitled to an exemption. HA requests that an original source be required to send a copy of the determination to the covered person.

As CLC notes, the original source requesting an exemption may not know who the covered person is. The reverse is also true. Placing this burden on the requestor does not appear to be a solution to the problem HA observes. Moreover, it would intrude on the privacy of the original source who just requested protection. Staff believes the better course is to allow original sources and covered persons to work out their communications among themselves.

R2-20-805: Statecraft comments that the statute provides that donors who give less than \$5,000 are not disclosed on reports under the VRKA. Statecraft notes that the rule should be clarified to ensure that a person who is otherwise not disclosable should not face disclosure in a disclaimer. Staff agrees that this is the intent of both the statute and the proposed rule and recommends the express inclusion of that threshold in the rule text.

Consequently, Section 805(B) would read: 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 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.

HA suggests two changes to this proposed rule. First, they suggest that the Commission, by rule, limit disclosure of donors on a disclaimer to only those whose funds were actually used for the communication in question. The statute doesn't provide for such a limitation nor does the pre-existing disclaimer statute A.R.S. § 16-925. Consequently, staff does not recommend this change.

The firm also recommends a change to account for the protection of identities. While the statute provides that under certain circumstances an otherwise disclosable donor is not subject to disclosure, the proposed rule does not directly address the consequence of that occurrence. In short, what goes on a disclaimer if the donor is not to be revealed. Like Statecraft's comment this suggestion squares with the terms of the statute and clarifies the terms of the rule. Additionally, while the statute requires that "at a minimum" the top three donors be identified on the disclaimer, staff sees no reason to have a fourth donor revealed merely because a third donor is protected.

Based on staff's recommendation, the combined language from the Statecraft and HA comments would read:

"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 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. In the event a donor otherwise subject to disclosure pursuant to this section is protected under A.R.S. § 16-973(F) the disclaimer shall omit that donor's identity.”

CLC also made comments related to this proposed rule. The first suggestion CLC makes is to create a look back in the disclaimer such that a prior donor whose donation from a prior election cycle account for more than 50 percent of the covered person's funds. While there may be an argument the term “at a minimum” as used in A.R.S. § 16-974 would permit the Commission to tack on an additional requirement, the better reading of the statute is that at a minimum refers to the number of donors, not the time frame of the donation. The statute specifically states that donors in the current election cycle are to be identified. Staff does not recommend this change.

The next suggestion is that the commission add additional clarification as to what to if there is a tie among the top three donors. Staff doesn't think this level of detail is necessary. In the event that this occurs, staff may recommend revisiting this aspect of CLC's comment, but in the meantime, Staff recommends presuming a covered person will make a reasonable determination of how to disclose the top three donors. The next comment, CLC suggests, consistent with Statecraft that Commission clarify that donors under \$5,000 are not to be disclosed in a disclaimer. Staff agrees.

The remainder of CLC's comments and suggested language focus on creating more specific parameters for covered person's in ensuring disclaimers are available and accessible. While Staff is conscious of the public's interest here, we are not aware of abuses

of the reasonableness standard set forth in A.R.S. § 16-925 and reflected in this proposed rule. Consequently, staff does not recommend this change.

R2-20-806: CLC Comment. CLC requests that the title of the rule change to reflect it is principally about ex parte communications. It suggests clarifying language around when the Commission and staff can communicate in the event of a complaint. Finally, CLC suggests a subsection making clear the steps that a commissioner should take in the event of an ex parte communication. Staff agreed these clarifying, non-substantial changes are warranted.

Other comments: The organization Philanthropy Roundtable submitted a comment generally disagreeing with Proposition 211 and stating that the group opposes implementation without an explicit exemption for the legal, legitimate instances of nonprofit issue advocacy. Staff at this time believes that the definitions of campaign media spending, which cabin reporting obligation to a discreet set of actions related to political campaigns, provide sufficient protection to issue advocacy absent an additional rule.

12. Any other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. When applicable, matters shall include but not be limited to:

No other matters have been prescribed.

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:

Not applicable.

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:

Federal law is not applicable to the subject of the rule.

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:

No such analysis was submitted.

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

Not applicable.

14. Whether the rule was previously made, amended, repealed or renumbered as an emergency rule. If so, the agency shall state where the text changed between the emergency and the exempt rulemaking packages:

These rules were not made as emergency rules.

15. The full text of the rules follows:

TITLE 2. ADMINISTRATION
CHAPTER 20. CITIZENS CLEAN ELECTIONS COMMISSION
ARTICLE 8. VOTER'S RIGHT TO KNOW ACT RULES

Section

R2-20-801. Definitions and Rules of Construction

R2-20-802. Time

R2-20-803. Opt-out Notices

R2-20-804. Request for Exemptions

R2-20-805. Disclaimers

R2-20-806. Ex Parte Communications

R2-20-807. Recordkeeping

R2-20-808. Advisory Opinions

ARTICLE 8. VOTER'S RIGHT TO KNOW ACT RULES

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. § 16-971(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, 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 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 period, 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 period 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 reason to believe their identity will or could be subject to disclosure under Chapter 6.1 of Title 16 may file a request for exemption pursuant to A.R.S. § 16-973(F) at any time. 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. In the event an original source did not receive a notice to opt out, the person 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.
- 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 identity shall not be disclosed. In the event that the order is not confirmed, the Executive Director shall issue a letter to the requestor stating their identity may 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 identity shall not be disclosed. If the Commission does not vote that the statute applies by roll call vote in favor of the request, the Executive Director shall issue a letter to the requestor within 5 days stating that their identity may 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 identity shall not be disclosed. If the Commission does not approve the request by a roll call vote the Executive Director shall issue a letter to the requestor within 5 days stating that their identity may 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 after of the determination, unless timely review of the Commission's action is sought. The Executive Director's letter shall not be made public except by a court order.

R2-20-806. Ex Parte Communications

- 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 regarding the Complaint 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 by 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.
- G. In the event that a Commissioner receives an ex parte communication as defined in this rule, the Commissioner shall disclose receipt of such a communication in a public meeting of the Commission.

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 on 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 in Chapter 6.1 of Title 16.

D. A request for reconsideration may be made by:

1. 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; or
2. Any person who states a good faith basis for vacating or reversing a prior opinion subject to other rules in this section.

E. Any request for reconsideration shall meet all of the requirements otherwise required of an initial request.