State of Arizona
Citizens Clean Elections Commission

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Advisory Opinion 2024-02

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We are responding to your advisory opinion request on behalf of the Democratic Legislative Campaign Committee and the PAC for America's Future concerning the application of accounting methods to a particular donor's response to requests for information from covered persons under the Voter's Right Know Act (the "Act" or the "VRKA"), A.R.S. §§ 16-971 to 16-979, and whether donors who are not covered persons are required to provide opt out notices to their own donors under the Act.

Question Presented[1]

1) Are particular methods of recordkeeping by a donor 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?

2) Must donors who are not covered persons provide notice to their own donors of the opportunity to opt out of having their funds used for campaign media spending pursuant to A.R.S. § 16-972?

[1] These questions have been rephrased to reflect the substance of the questions presented by the AOR.

Commission Response

1) The Act provides that the Citizens Clean Elections Commission ("the Commission") may "[e]stablish the records persons must maintain to support their disclosures." A.R.S § 16-974(A)(7). The Commission promulgated Ariz. Admin. Code § R2-20-807(A), which provides that "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." The Commission has not adopted any particular accounting method or required a particular accounting method of persons subject to the Act. Generally, a method of maintaining records will be reasonable where it:

A) allows a reasonable person to confirm the accuracy of the transactions the person had engaged in,
B) requires a written record of transactions that is replicable by the appropriate personnel,
C) is determined prior to engaging in a set of transactions by the person responsible for the transactions, set forth in writing and distributed to appropriate agents and employees, and adhered to by the responsible person, their agents and employees,
D) includes appropriate records retention policies that are determined in advance of engaging in a set of transactions by the person responsible for the transactions, set forth in writing, distributed and adhered to by the appropriate agents and employees of the responsible person,
E) remains consistent with respect to transactions in Arizona over time,
F) does not create false reports or double count disclosures in any jurisdiction or otherwise invalidate the information,
G) is not adopted, used or attempted to be used to evade the reporting requirements of the Act or the Commission's rules promulgated pursuant to the Act.

2) The Act provides that "[b]efore the covered person may use or transfer a donor's monies for campaign media spending, the donor must be notified in writing that the monies may be so used and must be given an opportunity to opt out of having the donation used or transferred for campaign media spending." A.R.S. § 16-972(B). This language does not mandate that a donor who is not a covered person provide the opt out to their own donors before a covered person may use or transfer a donor's money for campaign media spending, nor does other language in the Act and Rules impose such a requirement.

Background

The facts presented in this advisory opinion are based on your letter received November 27, 2023 (Advisory Opinion Request or "AOR") and publicly available information.

The Democratic Legislative Campaign Committee (DLCC) and The PAC for America's Future (TPFAF) are "organized under section 527 of the Inernal Revenue Code." AOR at 1. As such, they are "political organizations" for tax purposes. *See* 26 U.S.C. § 527 (e)(1)("The term 'political organization' means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."). Such organizations are generally exempt from income taxes. *Id*. § 527(a).

These organizations have registered political committees in various states to comply with state laws. They maintain funds in a variety of different bank accounts in order to differentiate funds separated for legal and other reasons. The organizations plan to make contributions greater than $25,000 in legislative elections and intend to use funds from several of these separate accounts. Both organizations DLCC and TPFAF will have opted in to having their funds used for campaign media spending. AOR at 1.

The AOR sets out three "methods" for undertaking a response to a request for records by a covered person (more details on this process are outlined below). Specifically, the AOR includes the following:

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

Method #2: Disclose original monies from each account from which the contribution came, without regard to first-in or last-in order of receipt. Donor would disclose original monies totaling $50,000 from Account A, $30,000 from Account B, and $20,000 from account C, limited to original monies received during the current election cycle, but without regard to the order of receipt. To the extent that the original monies attributed to a source was $2,500 or less, the source would not be disclosed; such unitemized donations would be aggregated with the source being described as "unitemized." In addition, Donor would not "double count" any source of funds; once any original monies were disclosed as the source of a contribution in response to a § 16-972(D) request, they would *not* be disclosed as the source of any subsequent contribution in response to a § 16-972(D) request.

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

AOR at 2-3.

Legal analysis

Question 1

Voters passed the VRKA as Proposition 211 at the 2022 General Election and it was certified by Governor Doug Ducey in December 2022. The Act provides for reports by covered persons who spend large amounts of money on campaign media that disclose, among other information, "[t]he identity of 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).[2] Thus, covered persons are obligated to report information about the donor who actually earned the money as business income or who, as an individual, owned, earned or received the underlying funds.[3] In short, the original sources of funds are subject to reporting.

In order to facilitate this reporting, covered persons make written requests to those who have donated more than $5,000 in traceable monies (that is monies that have not been opted out of campaign media spending) for "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." A.R.S. § 16-972(D). The Commission adopted Ariz. Admin.

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[2] The initial reporting thresholds for covered persons are more than $50,000 for statewide elections and more than $25,000 for other elections. A.R.S. § 16-973(A).

[3] The Act defines original monies as "business income or an individual's personal monies," while traceable monies means "[m]onies that have been given, loaned or promised to be given to a covered person and for which no donor has opted out of their use or transfer for campaign media spending pursuant to section 16-972 [or] [m]onies used to pay for in-kind contributions to a covered person to enable campaign media spending." A.R.S. § 16-971(12), (18). The Act also defines personal monies as

> [A]ny of the following:
> (i) Any asset of an individual that, at the time the individual engaged in campaign media spending or transferred monies to another person for such spending, the individual had legal control over and rightful title to.
> (ii) Income received by an individual or the individual's spouse, including salary and other earned income from bona fide employment, dividends and proceeds from the individual's personal investments or bequests to the individual, including income from trusts established by bequests.
> (iii) A portion of assets that are jointly owned by the individual and the individual's spouse equal to the individual's share of the asset under the instrument of conveyance or ownership. If no specific share is indicated by an instrument of conveyance or ownership, the value is one-half the value of the property or asset.

A.R.S. § 16-971(14).

Code § R2-20-801(C) which provides that "[i]n 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." Additionally, "[i]f the original monies were previously transferred, the donor must disclose all such previous transfers of more than $2,500 and identify the intermediaries." A.R.S. § 16-972(D)

To ensure that information related to transactions subject to the Act are accurate, the Commission is authorized to "[e]stablish the records persons must maintain to support their disclosures." A.R.S. § 16-974(A)(7). The Commission adopted Ariz. Admin. Code § R2-20-807(A) to accomplish this objective. That section provides that "[a]ll 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." It also provides that a person subject to Act may keep these records in any commonly available media and that the Commission may take an adverse inference against the person if the person fails to keep reasonable records. Ariz. Admin. Code § R2-20-807(B)-(C).

In the AOR, the organizations note that Commission Staff recommended against adopting a rule for transfer records requiring the transferor to use "any reasonable accounting system" in determining which of donors should be disclosed. *See* Executive Director's August 22, 2023 Memorandum on proposed rules.[4] Staff made this recommendation because, in its view, the statute and the adopted rules make plain both what must be disclosed in response to a transfer record request and the recordkeeping requirements. The organizations now seek this opinion to assure them that three specific types of transfer records would accord with "Arizona law." AOR at 3.[5]

The goal of the Act is to ensure that voters learn the original source of funds used to influence their vote and fight against corruption. *See* Voter's Right to Know Act § 2 Purpose and Intent, https://apps.azsos.gov/election/BallotMeasures/2022/azsos_2022_publicity_pamphlet_standard_english_web_version.pdf at 227.

[4] The public comment to which the AOR refers used both the terms accounting system and accounting method without defining them. The AOR uses the term method.
[5] This Advisory Opinion only addresses the Act and Rules, not other Arizona legal requirements.

To that end, the statute and rule provide certain flexibility to those providing information to covered persons, while maintaining an objective standard to support the reliability of that information. This is consistent with how some supporters of the Act have interpreted the Act to the Commission. For example, in a presentation to the Commission, Campaign Legal Center Action's David Kolker explained:

> [I]f [the donor] got the money from somebody else and you didn't earn it yourself, then you're not the original source and you have to tell the covered person where that money came from and how it was passed along. So that if you're an interest group -- say you're an interest group that got a hundred thousand dollars from another interest group or from some rich person. You're not the original source, and when you pass money along to the covered person you need to reveal who the original source is.
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> [T]hat gives the donor a lot of flexibility, some may argue too much flexibility. And I would just point out that if that interest group is sitting on a hundred thousand dollars, if it wants to give away all[,] . . . a hundred thousand dollars to covered persons, like super PACs, it will eventually have to reveal the original source of all 100,000. But if it's only giving away a subset of that money, say, the first 25,000, it seems fair that they should get to choose, among the funds that they, have who is the most appropriately tagged as the original source of that money.

See Citizens Clean Elections Commission Minutes, December 15, 2022 at 20:11-20, 19:22-25, 21:1-8 (statement of David Kolker).

The rule the Commission adopted requires that those with obligations under the Act keep records reasonably. Naturally, objective factors bear on whether or not recordkeeping is reasonable. For example, a reasonable recordkeeping method for any going concern would include:

A) requiring a written record of transactions that is replicable by the appropriate personnel, including auditors and investigators;
B) requiring that the person providing information would do so in a writing to the covered person and that was distributed to appropriate agents and employees prior to the covered person engaging in a set of transactions, and the writing would be adhered to by the person to the covered persons, agents, and employees;
C) having appropriate records retention policies determined in writing by the person providing the transfer record and distributed to appropriate agents

and employees prior to engaging in a set of transactions, and adhered to by the person providing the information to the covered person, their agents and employees. (Transfer records must be kept for five years. A.R.S. § 16-972(D));

D) remaining consistent with respect to transactions in Arizona regardless of transferee throughout at least the election cycle and provide a business reason for changes in methods of identifying sources;

E) not creating false reports or double count disclosures in any jurisdiction or otherwise invalidate the information; and

F) not being adopted, used or attempted to be used to evade the reporting requirements of the Act or the Commission's rules promulgated pursuant to the Act.

Within these parameters, we do not believe the three methods identified in the AOR are unreasonable.[6] They are consistent with permitted practices recognized by the FEC as well as the terms of the Act and Rules. However, donors may not alternate between methods on an ad hoc basis; rather they must follow reasonable business and accounting practices for the duration of an election cycle and should exercise prudence in ensuring recordkeeping policies are developed, maintained and adhered to.

Question 2

Section 16-972(B) provides that "[b]efore the covered person may use or transfer a donor's monies for campaign media spending, the donor must be notified in writing that the monies may be so used and must be given an opportunity to opt out of having the donation used or transferred for campaign media spending." The section then identifies the contents of the notice and provides for Commission rulemaking. Although "[t]he notice . . . may be provided to the donor before or after 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." A.R.S. § 16-972(C). The Commission adopted Ariz. Admin. Code § R2-20-803 to facilitate donors receiving the notice required by the Act.

[6] We do not read the questions' reference that donors "would *not* be disclosed as the source of any subsequent contribution in response to a § 16-972(D) request" as meaning the organizations seek approval to provide information under other laws that would render their disclosures misleading or inconsistent.

The plain text of the Act does not impose on a donor who is not a covered person an obligation to provide the notice to those who may donate to that donor.

Conclusion

A Commission advisory opinion "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." Ariz. Admin. Code § R2-20-808(C)(3). A "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." *Id*. at (C)(4). Advisory opinions may be affected by later events, including changes in law.

Sincerely,

Mark S. Kimble
Chair