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Ohio House Bill 737 Analysis

The public corruption scandal coming to light in Ohio is a stunning example of the problems with secret spending and the opportunities it creates for self-dealing. Speaker of the House Larry Householder engaged in an egregious pay-to-play scheme working with a power company to funnel millions of dollars into entities controlled by the Speaker to, among other things, elect legislators who would support the Speaker in exchange for the Speaker introducing and passing a billion-dollar bailout for that company. At the center of the scandal was Generation Now, a nonprofit organization that funneled money from the power company to a variety of other groups—including a political action committee—to engage in election spending to benefit candidates that would support Householder.

The "key" to the success of the scheme was hiding the power company as the source of the millions of dollars being given to Generation Now.[1] Even where Generation Now was disclosed as the contributor behind election spending, the lack of public disclosure of Generation Now's funding left voters in the dark about the true origin of the money it poured into Ohio elections. Faced with a monumental public corruption scandal, Ohioans across the political spectrum have called for reform of the state's campaign finance regime.

House Bill 737 is one proposed legislative response. Campaign Legal Center's analysis of the bill is that it makes minimal changes that, while perhaps covering some of the most glaring gaps in Ohio's campaign finance laws, leave significant room for wealthy special interests to hide their influence in Ohio's elections. HB 737 thus falls short of providing voters with the information they have called for and have a right to know. Meaningful transparency reform that will truly shine a light on sources of big spending in Ohio elections must have at least three features:

- *First*, all big spending in Ohio elections should be covered by disclosure requirements, regardless of the identity or classification of the spender. Current Ohio law focuses on classifying various entities into different

[1] WSYX ABC 6, *U.S. Attorney Update on the Arrest of Ohio House Speaker Larry Householder and Four Associates*, YouTube (July 21, 2020), https://www.youtube.com/watch?v=mYTY9GUnHMM&feature=youtu.be.

categories and setting disclosure requirements based on those categories. Any meaningful reform must ensure that *all* spenders above a set threshold are subject to disclosure, preventing the use of particular types of organizations to avoid disclosure.

- *Second*, the law should require the disclosure of the original sources of money for big spending in Ohio elections. Without tracing back spending to original sources, wealthy special interests can avoid disclosure through a never-ending shell game of pop-up organizations.

- *Third*, Ohio's transparency laws must be updated for the twenty-first century and require meaningful disclosure for digital campaign advertising.

I. HB 737 makes narrow changes to improve transparency but does not go far enough in addressing secret spending.

The proposed changes in HB 737 appear to more explicitly ensure that corporate and union spending on elections is subject to existing Ohio disclosure requirements. For example, the bill proposes that—like other covered entities—where corporations and unions spend $500 or more for certain political communications concerning candidate elections, those communications must include disclaimers identifying the corporation or union that paid for the communication.[2] Similarly, after spending $500 or more in support of or opposition to any candidate, corporations and unions would be required to file regular, periodic statements with the Ohio Elections Commission itemizing their expenditures.[3] Finally, when filing these statements, corporations and unions must identify the sources of their funds to the extent any one source's aggregate contribution exceeds $5,000 and does not come from typical business transactions.[4]

The import of these proposed changes largely depends on how two preexisting terms within Ohio's campaign finance laws have been interpreted and applied to various entities: "political contributing entity" and "continuing association."

A. Changes to "Political Contributing Entity" definition would help provide more transparency of corporate campaign spending.

A "political contributing entity," or PCE, is currently defined as "any entity, *including a corporation or labor organization*, that may lawfully make contributions and expenditures and that is not an individual or" other specified political committees, political funds, or a "continuing association."[5] The term "lawfully" is further defined as "not prohibited by any section of the [Ohio] Revised Code, or authorized by a final judgment of a court of competent jurisdiction."[6] PCEs, in turn, are currently already required to abide by existing disclaimer and reporting requirements, including filing

[2] HB 737 § 1 at 12–13 (proposed Ohio Rev. Code Ann. § 3517.105(B)(1)).
[3] *Id.* § 1 at 13–14 (proposed Ohio Rev. Code Ann. § 3517.105(B)(2)).
[4] *Id.* § 1 at 14 (proposed Ohio Rev. Code Ann. § 3517.105(B)(2)(d)).
[5] Ohio Rev. Code Ann. § 3517.01(C)(25) (emphasis added).
[6] *Id.*

periodic reports with the Ohio Elections Commission itemizing expenditures and contributions.[7]

Corporations would appear, under the letter of the law, to be covered as PCEs. But the current version of the Ohio Secretary of State's Ohio Campaign Finance Handbook states "[c]orporations may not currently be PCEs,"[8] and corporations do not appear to be treated as PCEs in Ohio.[9] Given that corporations are not currently considered to be PCEs, some change is urgently needed to ensure corporations must comply with Ohio's existing disclosure regime when they engage in political spending, and HB 737's explicit disclosure and disclaimer requirements for corporations would help eliminate this gap.

HB 737 additionally proposes to alter slightly the definition of PCE by defining it as "any entity … that may lawfully make contributions *or* expenditures."[10] This change may be to ensure that more entities, such as corporations and—as discussed below—unincorporated businesses, are covered as PCEs.

B. "Continuing Association" definition and other disclosure provisions will not provide sufficient transparency of campaign spending by nonprofit organizations.

A "continuing association" is defined as "an association, other than a campaign committee, political party, legislative campaign fund, political contributing entity, or labor organization, that is intended to be a permanent organization that has a primary purpose other than supporting or opposing specific candidates, political parties, or ballot issues, and that functions on a regular basis throughout the year."[11] Further, "continuing association" specifically "includes organizations that are determined to be not organized for profit under subsection 501 and that are described in subsection 501(c)(3), 501(c)(4), or 501(c)(6) of the Internal Revenue Code."[12] As noted above, a "continuing association" is also explicitly excluded from the definition of a PCE.[13] "Continuing associations" largely do not have specific disclosure obligations, other than where they appear to be covered by generally applicable requirements for independent expenditures made by any "other entity." [14]

HB 737 proposes no changes to the existing definition of "continuing association,"[15] creating a problematic lack of transparency for 501(c) organizations engaged in election spending. It is possible nonprofit organizations could fit both the definition of

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[7] *Id.* § 3517.105(B)(1), (2)(a); *see also id.* § 3517.10.
[8] Ohio Secretary of State, Ohio Campaign Finance Handbook, *Chapter 7: Political Contributing Entities* (revised March 2013), https://www.ohiosos.gov/globalassets/candidates/cfguide/chapters/chapter7.pdf.
[9] Labor organizations, on the other hand, are treated as PCEs. *See id.* (citing *United Auto Workers, Local Union 1112 v. Philomena*, 700 N.E.2d 936 (Ohio Ct. App. 1998)).
[10] HB 737 § 1 at 11 (proposed Ohio Rev. Code Ann. § 3517.01(C)(25)).
[11] Ohio Rev. Code Ann. § 3517.01(C)(4).
[12] *Id.*
[13] *Id.* § 3517.01(C)(25)
[14] Ohio Rev. Code Ann. § 3517.105(B)(2)(b)).
[15] HB 737 § 1 at 4.

either a PCE or a continuing association. In such cases, there is little doubt the nonprofit would opt to comply with the less transparent requirements for continuation associations. The outcome is even less clear for unincorporated nonprofit organizations. Such groups would not be covered under HB 737's proposed requirements for corporations, and may escape the obligations of a PCE as a continuing association.

But groups spending money to influence the outcome of Ohio elections cannot be allowed to avoid disclosure simply as a result of their organizational form. A better approach would be eliminating "continuing associations" as a category entirely for campaign finance purposes, as another pending bill—HB 739—proposes.[16] In doing so, that bill would eliminate any ambiguity as to whether a group would be a continuing association or PCE and would protect against evasion of disclosure obligations by particular types of organizations.

Finally, HB 737 amends the independent expenditure disclosure requirements to provide Ohioans more information about a corporation or labor organization's source of funding. It is not clear, however, how this provision would apply to nonprofit organizations. The bill exempts from disclosure funds that were "received in the ordinary course of business,"[17] creating ambiguity as to what funds received by nonprofit corporations are covered. While the clear intent of the provision—which also excludes funds received "in exchange for goods and services provided by" the corporation[18]—is to exclude legitimate business income received by for-profit businesses, nonprofit corporations, by their nature, are not selling products or providing services for a fee and, instead, rely on donations to operate. In other words, in their ordinary course of operation, at least, nonprofit corporations receive donations. Although those donations should not, and likely are not intended to, be excluded from disclosure requirements because they do not originate from any commercial "business" conducted by the nonprofit corporation, this language should be clarified to confirm that only income received from *commercial transactions* in the ordinary course of a company's business is excluded.

II. How to Strengthen HB 737's Proposals

As the recent scandal in Ohio demonstrated, wealthy special interests are adept at creating shell groups and passing money through a network of distinct entities either to avoid disclosure obligations altogether or to hide the true source of big money influencing elections. The narrow approach of HB 737 leaves Ohio voters at risk of remaining in the dark about who is funding political spending in their state. Any proposal to improve campaign finance disclosure requirements in Ohio, such as HB 737, should incorporate at the least the following three policies.

***First*, all big spenders in Ohio elections should be covered by disclosure requirements, regardless of the identity or classification of the spender.** As explained above, Ohio's campaign finance regime contains several differing

[16] HB 739 § 1 at 4 (proposed elimination of current Ohio Rev. Code Ann. 3517.01(C)(4)).
[17] HB 737 §1 at 14 (proposed Ohio Rev. Code Ann. § 3517.105(B)(2)(d)).
[18] *Id.*

classifications for political spending entities, and HB 737 largely retains that structure while adding specific obligations for corporations and labor organizations. The resulting framework in which entities may satisfy multiple definitions results in unnecessary vagueness while still leaving certain entities uncovered, particularly with respect to unincorporated nonprofits. Additionally, the consideration of limited liability companies (LLCs) or other unincorporated groups appears to be implicit at best. Under current regulations, LLCs—along with certain other unincorporated groups—are explicitly excluded from being covered as PCEs.[19] Because they are not corporations, LLCs inclusion in disclaimer and donor disclosure requirements would largely depend on falling under the expanded definition of PCE proposed by HB 737.[20]

A simpler approach, and one that would ensure broad coverage, would be to require disclaimers and donor disclosure for any person or entity making independent expenditures after a certain threshold of spending is reached. Ohio law already sets thresholds for reporting independent expenditures but differentiates between various entities for purposes of disclaimers and contributor reporting.[21] Streamlining and harmonizing the requirements for all independent expenditures regardless of the type of entity would also align with how electioneering communications are regulated.[22]

***Second*, the law should require the disclosure of the original sources of money for big spending in Ohio elections.** Where an entity that is currently not required to disclose its donors is spending directly, simply broadening the coverage of disclosure and disclaimer requirements will shed light on the sources of those expenditures. But without tracing back to original sources, wealthy special interests can continue to obscure themselves by setting up additional layers of organizations between themselves and the ultimate spending. For example, where an organization is acting as a conduit to pass along money from a wealthy funder to another entity that ultimately spends the money on election ads—the role that Generation Now appears to have played in Ohio's 2018 legislative elections—disclosure and disclaimer requirements that focus on the *spender's* contributors/donors allow the conduit organization to hide the sources of the money it passed along. Requiring spenders to trace back contributions/donations to original sources, however, prevents the proliferation of 501(c)(4)s, LLCs, or other entities from hiding the true source of political spending.

***Third*, Ohio's transparency laws must be updated for the twenty-first century and require meaningful disclosure of digital campaign advertising.** While Ohio's campaign finance laws generally vaguely reference "communications" without explicitly including or excluding digital communications,[23] Ohio's definition of "electioneering communication" is limited to "broadcast, cable, or satellite

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[19] Ohio Admin. Code 111:2-1-02(J) (2020).
[20] HB 739, while also retaining PCEs and similarly amending the definition to include "any entity … that *makes* contributions *or* expenditures," proposes to provide more clarity by explicitly including "partnership" and "unincorporated business organization or association" within the definition of PCE. HB 739 § 1 at 12-13.
[21] Ohio Rev. Code Ann. § 3517.105.
[22] *See id.* § 3517.1011.
[23] *Id.* §§ 3517.01(C)(17)(b), (23); 3517.105.

communication" and explicitly excludes "communications over the internet,"[24] similar to the federal definition.[25] As digital political advertising across the country is projected to reach nearly $2.8 billion this year,[26] it is imperative that campaign finance laws are updated to ensure parity between digital political communications and other media.

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Inclusion of these three policies within HB 737 or another bill would go a long way to improving transparency in Ohio elections. Other policies, including broadening protections against foreign interference to include foreign-controlled groups and strengthening coordination rules to ensure independent expenditures are truly independent, should also be considered as part of any comprehensive transparency legislation. CLC is happy to provide additional analysis and feedback on related or subsequent proposals, including on how to include these policies.

[24] *Id.* § 3517.1011(A)(7)(a), (b)(i).
[25] 52 U.S.C. § 30104(f)(3)(A)(i); 11 C.F.R. § 100.29(c)(1).
[26] Alexandra Burrell, *Political Ad Spending Will Approach $10 Billion in 2020, New Forecast Predicts*, Wall St. J. (June 4, 2019), https://www.wsj.com/articles/political-ad-spending-will-approach-10-billion-in-2020-new-forecast-predicts-11559642400.