CLC
ADVANCING DEMOCRACY THROUGH LAW

July 19, 2023

Submitted electronically to SoS.Rulemaking@coloradosos.gov

The Honorable Jena Griswold
Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Dear Secretary Griswold,

Campaign Legal Center (CLC) respectfully submits these comments in response to the Notice of Proposed Rulemaking (Proposed Rule) for rules concerning campaign and political finance.[1]

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other federal and state court cases. Our work promotes every American's right to an accountable and transparent democratic system.

CLC supports the Secretary's rulemaking to clarify transparency requirements for political spending in Colorado. To strengthen the Proposed Rule, CLC recommends adopting more comprehensive guidance for identifying donations earmarked for political spending to ensure the law accomplishes the goal of providing Colorado voters with more information about who is spending big money to influence their vote.

Since the Supreme Court's 2010 decision in *Citizens United v. FEC*, outside spending in elections has skyrocketed, increasing from $205 million in 2010 to $2.9 billion in 2020.[2] Outside spending in Colorado has followed the same trend.[3] Some outside spenders use methods designed to evade disclosure laws, allowing wealthy special interests to hide the true source of money used to influence elections.[4] As big outside spending

[1] Notice of Proposed Rulemaking, Rules Concerning Campaign and Political Finance, 8 C.C.R. 1505-6, Colo. Reg. Vol. 46, No. 12 (June 25, 2023).
[2] OpenSecrets, *Outside Spending*, https://www.opensecrets.org/outside-spending/ (accessed July 19, 2023).
[3] FollowTheMoney.org Chart of Independent Spending in Colorado, 2006-2022, https://www.followthemoney.org/show-me?dt=2&is-s=CO&f-fc=2,3#[{1|gro=is-s,is-y (accessed July 19, 2023).
[4] *See, e.g.*, Bryan Dewan, *What is Dark Money?*, CAMPAIGN LEGAL CTR. (MAY 9, 2022), https://campaignlegal.org/update/what-dark-money; *see also* Anna Massoglia, *Record contributions from dark money groups and shell companies flooded 2022 midterm elections*, OPENSECRETS (June

increasingly impacts elections, campaign finance laws must provide real transparency by ensuring voters know which wealthy special interests are spending big money to influence their votes.

As explained below, our comments highlight the lack of disclosure flowing from the current implementation of Colorado's transparency requirements, which would likely continue under the Proposed Rule's approach, and propose changes that would better accomplish the Secretary's goals of making the state's campaign finance transparency laws a national model and providing Coloradans with more information about "who's spending millions and millions of dollars to influence their votes."[5]

I. Current implementation of Colorado's disclosure requirements provides little additional information to voters about the true sources of big money spent on Colorado elections.

Under Colorado law, a "covered organization" making annual transfers of $10,000 or more "earmarked" for the purpose of the recipient or a subsequent transferee to make independent expenditures or electioneering communications must provide the recipient with an affirmation containing certain information about the covered organization and its transfers.[6] If the covered organization is a nonprofit entity, its affirmation must also include the name of any person who transferred $5,000 or more to the organization in the previous 12 months that was earmarked for the purpose of making independent expenditures or electioneering communications.[7] Each recipient of $10,000 or more in earmarked funds from a covered organization must submit the organization's affirmation to election officials when filing reports of independent expenditures or electioneering communications.[8]

Colorado also recently updated its disclosure requirements to increase transparency for spending in support of or opposition to ballot issues and ballot questions. Colorado law specifies that an organization has a "major purpose" of supporting or opposing a ballot measure—and would thus be subject to committee registration and reporting requirements—if it acts "as an issue committee's funding intermediary by making contributions to an issue committee from funds earmarked for the issue committee."[9] Groups that make expenditures on ballot measures in excess of $5,000 in a calendar year, but do not otherwise qualify as an issue committee, must also file disclosure reports in connection with their ballot measure spending.[10]

These requirements make clear that the identification of earmarked contributions plays a linchpin role in the efficacy of Colorado's electoral disclosure laws. Accordingly,

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23, 2023), https://www.opensecrets.org/news/2023/06/record-contributions-dark-money-groups-shell-companies-flooded-midterm-elections-2022/.

[5] *See* Sam Brasch, *Colorado Dems Have A Plan To Shine A Light on Dark Money. Could It Work?*, CPR NEWS (June 20, 2019), https://www.cpr.org/2019/06/20/colorado-dems-have-aplan-to-shine-a-light-on-dark-money-could-it-work/.

[6] Colo. Rev. Stat. § 1-45-107.5(14)(a) and (b).

[7] Colo. Rev. Stat. § 1-45-107.5(14)(d)(IV)(A).

[8] Colo. Rev. Stat. § 1-45-107.5(14)(c).

[9] Colo. Rev. Stat. § 1-45-103(12)(b)(II)(E).

[10] Colo. Rev. Stat. § 1-45-108(1)(a)(VI).

effective implementation must account for all of the ways in which donors effectively designate their contributions for political spending, as disclosure requirements that narrowly require transparency only of, for example, donors who have explicitly specified that a particular donation pay for particular campaign expenditures are notoriously ineffectual.[11] Unfortunately, recent reporting illustrates the current implementation of Colorado's disclosure laws evinces a narrow understanding of earmarking and, as a result, limited information for Colorado voters.

The multi-level disclosure requirements for covered organizations described above were enacted in the wake of record spending in Colorado elections in 2018,[12] which was declared the "costliest year ever in Colorado politics."[13] A substantial share of campaign spending that year was funded by nonprofits and corporate entities that did not have to disclose their sources of funding under state law—sometimes called "dark money."[14] But despite enacting new disclosure laws in response to this secret spending by wealthy special interests, Colorado elections remain awash in secret electoral spending, depriving voters of information about who is spending millions to influence their vote.[15] In one example, a 501(c)(4) "social welfare" nonprofit spent millions of dollars in Colorado elections in 2020 without disclosing its donors.[16] Subsequent federal tax filings showed the nonprofit also transferred many more millions to a web of other groups active in state and local candidate and ballot measure elections, again without disclosing its donors.[17]

A recent analysis of secret spending in Colorado concluded that the requirement for disclosing earmarked contributions "hasn't been effective" thus far.[18] Instead, "[n]onprofits have managed to sidestep the rule by saying that large donations they received weren't designated as political donations."[19] Indeed, based on a search of Colorado's TRACER database, it appears only *ten* affirmations by covered organizations have been filed since

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[11] For example, one estimate found that FEC rules requiring disclosure only for contributions earmarked "for the purpose of furthering" specific independent expenditures allowed up to $769 million in undisclosed spending into federal elections between 2010-2018. *CLC Analysis: FEC Rule Kept As Much As $769 Million in Political Spending in the Dark*, CAMPAIGN LEGAL CTR. (Nov. 12, 2018), https://campaignlegal.org/document/clc-analysis-fec-rule-kept-much-769-million-political-spending-dark.

[12] Sandra Fish, *Nonprofit cash being spent in Colorado campaigns still impossible to trace despite 2019 law*, COLO. SUN (Jul. 10, 2020), https://coloradosun.com/2020/07/10/colorado-campaign-finance-dark-money/.

[13] Sandra Fish, *It's official: 2018 is the costliest year ever in Colorado politics*, COLO. SUN (Oct. 31, 2018), https://coloradosun.com/2018/10/31/colorad-election-2018-spending-record/.

[14] Sandra Fish, *Here's how much the oil and gas industry spent on the 2018 election in Colorado*, COLO. SUN (Dec. 12, 2018), https://coloradosun.com/2018/12/12/oil-gas-money-2018-election-colorado/.

[15] *Supra*, note 12.

[16] Jesse Paul, *Influential conservative dark-money group doesn't have to reveal donors, face campaign finance sanctions, Denver judge rules*, COLO. SUN (Apr. 21, 2023), https://coloradosun.com/2023/04/21/unite-for-colorado-campaign-finance-case-resolution/.

[17] Jesse Paul and Sandra Fish, *Conservative dark-money group bankrolled almost every major Republican effort in Colorado last year, tax docs show*, COLO. SUN (Dec. 12, 2021), https://coloradosun.com/2021/12/22/unite-for-colorado-conservative-dark-money/.

[18] Sandra Fish, *Dark-money political nonprofits were big spenders — for Democrats and Republicans — in Colorado's 2022 elections*, COLO. SUN (Dec. 29, 2022), https://coloradosun.com/2022/12/29/dark-money-in-2022-colorado-elections.

[19] *Id.*

the law took effect, none of which appear to identify any donors to those covered organizations.[20]

The Proposed Rule, though, does not address these shortcomings. Currently, the Proposed Rule provides that "[a] contribution will be considered earmarked if it includes or is accompanied by a direction or instruction which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a candidate, committee, or ballot measure."[21] This definition provides minimal further clarification to the statutory definition,[22] and further appears to require an explicit, concurrent demand that a contribution be used for political spending to be considered "earmarked." In practice, donors rarely explicitly memorialize the purpose of donations made to multipurpose organizations, even where donors and the recipients have a shared understanding of the purpose of the donation, and the current lack of disclosure in Colorado from covered organizations reiterates this reality.

In short, because the disclosure framework in Colorado law focuses on donations and transfers earmarked for specific political spending, the enhanced transparency laws enacted since 2018 will improve transparency only if the Secretary promulgates an effective regulatory interpretation of "earmarked." Otherwise, outside spenders will continue to evade disclosure with impunity, leaving Colorado voters in the dark.

II. The final rule should account for additional ways that donations are functionally designated for political spending.

Because Colorado's transparency framework for political spending focuses on donations and transfers earmarked for political spending, the final rule must provide comprehensive guidance for earmarked funds that accounts for all of the ways in which donations are functionally designated for political spending. The Fair Campaign Practices Act generically defines "earmark" to include a "designation, instruction, or encumbrance that directs" the recipient to use or transfer the funds for the purpose of making independent expenditures, electioneering communications, or contributions or expenditures to influence a ballot measure,[23] and this rule provides an opportunity for the Secretary to clarify actions that are properly considered earmarking.

CLC recommends the Secretary look to "covered transfer" laws, like the federal DISCLOSE Act, to develop guidance on earmarking in the final rule. Unlike many reporting laws, which only require the ultimate spenders of funds to disclose their immediate donors, covered transfer laws introduce reporting requirements for intermediary organizations moving money that is designated or solicited for campaign-related spending. The DISCLOSE Act was developed initially in response to the surge of secret spending in federal elections after *Citizens United* and was included in the For the People Act of 2021.[24]

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[20] Colorado Secretary of State, TRACER, Affirmations filed by Covered Organizations during the period from August 2, 2019 to July 19, 2023 (last visited July 19, 2023), https://tracer.sos.colorado.gov/CampaignFinance/Reports/ReportParameters.aspx?Form=RPT-CF-CONT-011&Public=A1Z2Y7B3-7901-567W-C1PU-8V5EU9ERSI10.

[21] Proposed R. 10.20.1.

[22] Colo. Rev. Stat. § 1-45-103(7.5).

[23] *Id*.

[24] For the People Act of 2021, H.R. 1, 117th Cong. § 4111 (2021).

Under the DISCLOSE Act, corporations, labor unions, and nonprofit organizations would be required to disclose any transfer in excess of $10,000 made to another organization if the transfer was: (i) designated for campaign-related disbursements, including independent expenditures or electioneering communications; (ii) provided in response to a solicitation to fund campaign-related disbursements; (iii) made following discussions with the recipient about making campaign-related disbursements; or (iv) given to a recipient whom the transferring organization knew or should have known would use the transfer to pay for campaign-related disbursements.[25]

Indeed, similar legislation has been enacted at the state and local level in Rhode Island and Austin, Texas.[26] These laws present a more comprehensive approach to transparency in the post-*Citizens United* campaign finance environment, including by accounting for the many ways in which wealthy special interests functionally designate that their donations be used for political spending.

Although we recognize that not all aspects of "covered transfer" laws are suitable for the final rule's clarification of Colorado's statutory definition of "earmark," we recommend the Secretary adopt two aspects of these laws. First, the final rule should clarify that funds are earmarked for political spending even when the instruction or designation is not made expressly or concurrently. Donors and spenders come to agreements or understandings through informal means that effectively designate money for political spending without being written down or made at the same time as the funds are transferred; the rule should explicitly encompass those informal or implicit designations as earmarking. Second, the final rule should explicitly provide that donating in response to a request for funds to pay for political spending is a form of earmarking. When spenders make solicitations for funds to support political spending and donors provide funds in response to that solicitation, both the donor and the spender clearly understand those funds to be designated for political spending, and such transactions should be subject to disclosure under the rule.

CLC has prepared the following draft language incorporating our recommendations for the Secretary to consider in promulgating the final rule:

Recommended text for the final rule

Proposed text for 10.20.1

10.20.1 "Earmark" means a designation, instruction, or encumbrance that directs the transmission and use by the recipient of all or part of a contribution, donation, or transfer to a third party for the purpose of making one or more independent expenditures, electioneering communications, or contributions or expenditures to support or oppose a ballot measure, including the transfer of such contribution, donation, or transfer by the recipient for use by another person for such purposes. A contribution, donation, or transfer is considered earmarked if:

(a) There is, at any time, an agreement, suggestion, designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, for the contribution, donation, or transfer to be used to make independent expenditures, electioneering communications, contributions or expenditures to support or oppose

[25] DISCLOSE Act of 2023, H.R. 1118, 118th Cong. (2023).
[26] R.I. Gen. Laws Ann. § 17-25.3-1; Austin, Tex., City Code § 2-2-34.

a ballot measure, or a transfer to another person to make independent expenditures, electioneering communications, or contributions or expenditures to support or oppose a ballot measure; or

(b) The contribution, donation or transfer was made in response to a solicitation or other request for a transfer or payment for the making of independent expenditures, electioneering communications, contributions or expenditures to support or oppose a ballot measure, or a transfer to another person to make independent expenditures, electioneering communications, or contributions or expenditures to support or oppose a ballot measure.

Conclusion

Thank you for your consideration of CLC's comments and recommendations for this important rulemaking. We would be happy to answer questions or provide additional information to assist the Secretary in promulgating the final rule.

Respectfully submitted,

/s/ Aaron McKean
Aaron McKean
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