



September 25, 2023

Submitted electronically to ccec@azcleaselections.gov.

Mark Kimble, Chairman
Arizona Citizens Clean Elections Commission
1802 W. Jackson St. #129
Phoenix, Arizona 85007

Re: Comments in Support of Proposed Rules R2-20-809 through R2-20-813, relating to the Voters' Right to Know Act (Proposition 211)

Dear Chairman Kimble and Members of the Commission,

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Arizona Citizens Clean Elections Commission (“Commission”) in support of Proposed Rules R2-20-809 through R2-20-813 (collectively “Proposed Rules”) implementing Arizona’s recently enacted Voters’ Right to Know Act.¹

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy through law at all 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 proceedings. Our work promotes every American’s right to an accountable and transparent democratic system.²

CLC thanks the Commission for its consideration of our comments on the prior round of proposed rules seeking to implement other portions of the Voters’ Right to Know Act (“VRTKA” or “the Act”)³ and for its ongoing commitment to developing thorough, clear, and functional regulations. Our brief comments and recommendations are intended to strengthen and clarify the Proposed Rules and assist the Commission’s work on this important issue.

¹ See Ariz. Admin. Reg., Vol. 29, Issue 35 at 1969-73, Notice of Proposed Exempt Rulemaking, Title 2. Administration, Chapter 20. Citizens Clean Elections Commission, Article 8, R2-20-809 through 813 (Sept. 1, 2023), https://apps.azsos.gov/public_services/register/2023/35/contents.pdf.

² CLC’s affiliated 501(c)(4) organization, CLC Action, represents Voters’ Right to Know, the political committee established to draft and support Proposition 211, in ongoing litigation relating to the Act.

³ *CLC Comments on Arizona Rulemaking Regarding the Voters’ Right to Know Act (Prop 211)*, Campaign Legal Ctr. (August 22, 2023), <https://campaignlegal.org/document/clc-comments-arizona-rulemaking-regarding-voters-right-know-act-prop-211>.

DISCUSSION

I. Background

Before the passage of the Act, Arizona’s prior campaign finance disclosure system was described as “one of the most pro-dark-money statutes imaginable.”⁴ Wealthy special interests used 501(c)(4) groups and other nonprofits to conceal the true sources of millions of dollars of election spending, whether by using those entities to for independent spending directly or as a conduit to transfer the money to super PACs and other organizations for election spending in Arizona.⁵ The Voters’ Right to Know Act was enacted by over 70% of Arizona voters in November 2022 to shine a light on the original sources of this flood of secret “dark money” campaign spending.⁶

In June 2023, the Commission promulgated the first round of Proposed Rules to implement the Act, resulting in the adoption of the first set of rules on August 24, 2023.⁷ This second round of Proposed Rules, focusing primarily on complaint, investigation, and enforcement procedures, are an important next step in implementing the Act, providing necessary guidance and clarification for the public and persons involved in or contributing to campaign media spending.

II. The Proposed Rules and CLC’s Recommendations

In the following subsections, CLC suggests clarifications for three sections of the Commission’s Proposed Rules, including provisions relating to verified complaints and responses, investigation, and enforcement. We have also included a brief subsection identifying minor technical corrections and suggested language regarding the recordkeeping obligations of intermediary donors, as discussed in our prior comments.⁸

A. § 809 – Complaint Procedures

The citizen complaint process is a key feature of the Act, providing any Arizona voter with the ability to help ensure enforcement of original source disclosure requirements under the Act. This process allows “[a]ny qualified voter in [Arizona]” to file a verified complaint with the Commission alleging that a person has failed to comply with the Act. A.R.S. § 16-977(A). This provision empowers Arizona voters to help protect their right to know who is spending to influence their ballots. To avoid confusion and ensure that the

⁴ See Alexander J. Lindvall, *Ending Dark Money in Arizona*, 44 Seton Hall Legis. J. 61, 73 (2019).

⁵ See DAVID R. BERMAN, MORRISON INST. FOR PUB. POL’Y, DARK MONEY IN ARIZONA: THE RIGHT TO KNOW, FREE SPEECH AND PLAYING WHACK-A-MOLE 3-4 (2014). See also Lindvall at 67-68; *Dark Money Basics*, OpenSecrets, <https://www.opensecrets.org/dark-money/basics> (last visited January 28, 2023).

⁶ See ARIZ. SEC. OF STATE, STATE OF ARIZONA OFFICIAL CANVASS: 2022 GENERAL ELECTION 12 (Dec. 5, 2022, 10:00:00 AM), https://azsos.gov/sites/default/files/2022Dec05_General_Election_Canvass_Web.pdf. See also Jane Mayer, *A rare win in the fight against dark money*, THE NEW YORKER (Nov. 16, 2022), <https://www.newyorker.com/news/news-desk/a-rare-win-in-the-fight-against-dark-money>.

⁷ See *Text of Rules Adopted, Proposed Rules related to the Voter’s Right to Know Act, Proposition 211*, Ariz. Citizens Clean Elec. Comm’n (Aug. 24, 2023), available at <https://storageccec.blob.core.usgovcloudapi.net/public/docs/916-Text-of-Rules-Adopted-8-24.pdf>.

⁸ CLC Comments, *supra* note 3.

regulatory language adheres to the statute, we recommend revising the below portions of § R2-20-809.

Proposed Rule § R2-20-809(A), outlining the citizen complaint process, permits a broader category of persons to file complaints than is provided in the statute. A.R.S. § 16-977(A) provides “[a]ny qualified voter in [Arizona]” with the right to file a verified complaint. However, under the proposed rule, subsection (A)(1) allows for “any person” to submit a complaint to the director. This change is inconsistent with the statutory language and drastically expands who may submit a verified complaint.

The Commission has already adopted many rules from the first round of rulemaking for the Act, including § R2-20-801; this rule sets the definitions for the regulatory chapter, using the statutory definitions provided in A.R.S. § 16-971.⁹ Under A.R.S. § 16-971, “person” is defined as “both a natural person and an entity such as a corporation, limited liability company, labor organization, partnership or association, regardless of legal form.” Thus, the proposed language of § R2-20-809(A)(1) substantially broadens and conflicts with the Act and appears to permit both natural persons and entities to file complaints, regardless of whether they are qualified Arizona voters.

Should the Commission wish to consider complaints that are not submitted by a qualified Arizona voter, the proposed rule already authorizes the Executive Director to file a complaint under subsection (H) “if a person believes a violation of [the Act or its associated regulations] has occurred.” This subsection permits the Executive Director to consider complaints from persons other than qualified Arizona voters but requires the official complaint to be filed by the Executive Director directly. This ensures compliance with the Act but permits the Commission to consider issues raised by persons or entities who fall outside of the Act’s citizen complaint process for enforcement.

Considering the above, we strongly recommend that the Commission revise § R2-20-809(A)(1) to reflect the statutory language, which limits the verified citizen complaint process to qualified Arizona voters.

B. § 810 - Response Procedures

Proposed rule § R2-20-810 provides the procedures for Commission staff and Respondents to respond to a complaint under § R2-20-809, laying out critical timelines and details so both the Commission and persons who have had complaints filed against them can understand the timeline, rights, and responsibilities afforded under the Act. To ensure all parties have a clear understanding of the response process, we recommend the following revisions to the proposed rule:

First, while many parts of the response procedures timeline in § R2-20-810 are clearly outlined, there is one significant absence: a floor or minimum number of days the Commission staff may provide to a Respondent to reply. When Commission staff send a copy of the complaint and a description of the process and procedures to the Respondent, the proposed rule states that Commission staff must give Respondents “a deadline of not more than 30 days after the date of the written communication [sharing the complaint and

⁹ See *Text of Rules Adopted*, *supra* note 7.

procedures].”¹⁰ However, there is no minimum or base period in the proposed rule that a Respondent may rely on to prepare a reply.

We recommend the Commission consider setting a reasonable minimum period for a Respondent to reply, in addition to the thirty-day maximum already included in the proposed rule. We suggest ten or fourteen days as a reasonable potential minimum period; however, the Commission and its staff will have the best understanding of what might be reasonable in Arizona. By providing a minimum period, potential Respondents will have assurance that they will have *at least* that period to respond to any complaint that might be made against them and that they will not be subject to very short response periods.

Second, we recommend the Commission consider beginning the response timeline on the date the communication is received by the Respondent, rather than on the date of the written communication from the Commission. This ensures that Respondents do not lose time to respond due to mail delays or other issues in the transmission of the complaint to the Respondent.

Third, § R2-20-801(A)(3) provides the Executive Director with the ability to grant Respondents extensions for a complaint response, at the Executive Director’s discretion. We recommend two minor additions to this language: first, we recommend the rule state “Extensions *may* be granted on request at the discretion of the Executive Director,” rather than the imperative “shall,” to better reflect the discretion granted to the Executive Director.

Furthermore, we suggest that extensions “shall only be granted with good cause shown” to ensure that requests are sufficiently detailed as to the Respondent’s actual need for an extension and to inform the Executive Director’s decision-making process.

C. § 811 - Investigation and Enforcement Procedures

Proposed rule § R2-20-811 outlines the process by which the Executive Director and Commission staff investigate complaints, report investigation results, and begin enforcement actions. To ensure clarity and protect the Commission in the event of a civil enforcement suit, we suggest the following revisions:

Subsection (D) directs the Executive Director to prepare a report regarding an alleged violation of the Act or its related rules upon completion of an investigation if the Executive Director believes the allegations were substantiated. However, the rule does not state what the Executive Director should do if the recommendation is that a violation did not occur. While Subsection (F) does permit the Executive Director to dismiss a complaint at any time, it would be prudent to include a parallel procedure under (D) for dismissals where the Commission has completed a full investigation of a complaint and the Executive Director believes the allegations were not substantiated. This record would be particularly important for the defense of the Commission if the Complainant were to file a citizen enforcement suit under A.R.S. § 16-977(C), which allows for a Complainant to bring a civil action to compel the Commission to enforce the Act if the complaint is dismissed at any point.

¹⁰ See § R2-20-810(A)(1)-(3).

We suggest the Commission consider creating additional language for subsections (D) or (F) or a new subsection outlining a procedure for when complaints are dismissed after a full investigation because the Executive Director believes the allegations were not substantiated. Depending on the Commission's preference, the report could be issued by the Executive Director alone as a reflection of the dismissal power under (F) or submitted to the Commissioners as a recommendation for their final determination under an expedited version the enforcement hearing process under § R2-20-812. An example of such language is as follows:

“If, upon completion of an investigation, the Executive Director does not find sufficient facts to substantiate the allegations in the complaint, the Executive Director shall dismiss the complaint and issue a written report to the respondent stating that after completion of an investigation, the Executive Director did not find sufficient facts substantiating the allegations in the complaint to pursue the matter.”

D. Additional Language Regarding Donor Records

In CLC's comments on the prior round of rulemaking for the Act, we recommended the Commission promulgate regulations or guidance regarding the process for the direct donor to a covered person to provide original source information for the funds contributed, if that donor is not the original source.¹¹ This language may fall within § R2-20-813 following subsection (A), or it may be better addressed in an additional section specific to donor recordkeeping.

We suggest the following language:

[B.] A person who has contributed more than \$5,000 in an election cycle to the covered person who does not already maintain records regarding the original source of monies eligible to become traceable monies must determine the identity of each other person that directly or indirectly contributed to the original monies being transferred and the amount of monies contributed or transferred by each person after receiving a written request from a covered person pursuant to A.R.S. § 16-972(D).

1. The donor shall make a clear and conspicuous request in writing to any upstream donors or intermediaries for the identity of the original source of the monies for the purpose of donor records.

2. Donor records shall be maintained in writing. Donors may utilize any reasonable accounting method to track all monies received and disbursed. To the extent that a donor owns or controls monies eligible to be traceable funds beyond the amount contributed to the intermediary or covered person, the donor may determine which monies are specifically contributed to the intermediary or covered person. Specific monies may not be disbursed more than once.

3. The ten-day period provided for a donor to respond to a covered person's request for original source information under A.R.S. § 16-972(D) shall not be interpreted or used to extend the covered

¹¹ CLC Comments, *supra* note 3.

person's statutory deadline for disclosure reports under A.R.S. § 16-973(A).

4. In-kind contributions. A person making an in-kind contribution to a covered person for the purposes of campaign media spending must provide information regarding the original source of monies at the time the contribution is made pursuant to A.R.S. § 16-972(E).

5. A covered person must aggregate donations from the same original source that reach the covered person through different sources.

[C.] A person who is not a covered person may provide the notice prescribed by A.R.S. § 16-872(B) to another person who has given that person monies before transferring monies or making an in-kind donation to a covered person. Nothing in this rule shall be interpreted to override restrictions donors place on donations or prevent a recipient from honoring those restrictions.

E. Minor Changes and Corrections

In addition to the suggestions above, we have identified a few minor changes and corrections the Commission may wish to consider. We suggest revising the following provisions:

- § R2-20-811, subsection (A) cites “A.R.S. § 16-979(D),” but that section does not include a subsection (D). It appears subsection (A) intends to reference A.R.S. § 16-979(C).
- § R2-20-809(A)(3)(b) requires verified complaints to “clearly identify each person, including any individual, entity, committee, organization or group, that is alleged to have committed a violation” under the Act or its associated regulations. At the time a qualified Arizona voter submits a verified complaint, it is possible that there are persons involved in a violation who are unknown to the Complainant and would only be revealed in the course of an investigation. As a result, we suggest the Commission consider revising the language to require complaints to “clearly identify any person,” rather than “each person.”

Conclusion

CLC thanks the Commission for its consideration of the foregoing comments and recommendations regarding this important rulemaking. As the Commission prepares to implement the Voters' Right to Know Act, CLC would be glad to provide further assistance or resources.

Respectfully submitted,

s/ Elizabeth D. Shimek
Elizabeth D. Shimek
Senior Legal Counsel