THE CAMPAIGN LEGAL CENTER

215 E Street, NE · Washington, DC 20002
tel (202) 736-2200 · fax (202) 736-2222
www.campaignlegalcenter.org

Paul S. Ryan
Senior Counsel
pryan@campaignlegalcenter.org

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Submitted Electronically (Bobbi.Shearer@state.nm.us)

The Honorable Dianna Duran
Secretary of State
Attn: Ms. Bobbi Shearer
Elections Bureau
325 Don Gaspar
Santa Fe, NM 87501

Re: Comments on Notice of Proposed Rulemaking on Campaign Finance and Lobbyist Activities (Public Hearing Scheduled for January 8, 2014)

Dear Madam Secretary:

These comments are submitted by the Campaign Legal Center in regard to the notice of proposed rulemaking published last month pertaining to campaign finance regulation, lobbyist regulation and other matters within the purview of the Secretary of State.[1] The Campaign Legal Center offers comments below pertaining specifically to the proposed rules, amendments to rules, and Guidelines. Additionally, the Campaign Legal Center takes this opportunity to highlight two areas of campaign finance regulation that are of particular concern to the Campaign Legal Center, one of which is not explicitly addressed in the proposed rules or Guidelines (independent expenditure donor disclosure) and one of which would not adequately be regulated by the proposed rules or Guidelines (independence/coordination).

The U.S. Supreme Court's decision in *Citizens United v. Federal Election Commission (FEC)*, 558 U.S. 310 (2010), has had a dramatic impact on federal elections and elections in many states. In *Citizens United*, the Court struck down a federal law prohibiting corporations from making "independent" political expenditures, but by an 8-1 vote upheld related federal law disclosure requirements. Importantly, many courts around the nation have applied the reasoning of *Citizens United* in striking down contribution limits as applied to political committees making independent expenditures.

[1] Public notice of rulemaking available at http://www.sos.state.nm.us/uploads/FileLinks/f5a515bcc03e456bbe64d74c5334c4f2/Public_Notice_01_2014.pdf.

Several weeks ago, in *Republican Party of New Mexico v. King*, No. 12-2015 (10th Cir. Dec. 18, 2013), the U.S. Court of Appeals for the Tenth Circuit upheld a lower court decision enjoining the State of New Mexico from enforcing its limit on contributions to political committees that are to be used for independent expenditures. The injunction in *Republican Party of New Mexico* has given birth to so-called "super PACs" in New Mexico—*i.e.*, political committees that raise and spend unlimited funds to influence state elections. A reversal of the *Republican Party of New Mexico* injunction seems unlikely, so the Campaign Legal Center encourages the Secretary of State to prepare for the activities and regulatory consequences that will flow from it.

The Supreme Court's decision in *Citizens United*, and lower court decisions extending its rationale, rested on two fundamental assumptions: (1) that outside groups will be truly independent of candidates and parties and (2) that the funds raised and spent will be fully disclosed. Unfortunately, at the federal level and in many states, these assumptions have proven to be seriously flawed—true independence and transparency have not accompanied skyrocketing outside group spending.

These shortcomings in federal law and the laws of many states are detailed in an article I published last year: *Two Faulty Assumptions of Citizens United and How to Limit the Damage*, 44 U. Tol. L. Rev. 583 (2013). Below, the Campaign Legal Center comments on New Mexico campaign finance law with respect to these issues of (1) independence/coordination and (2) transparency, as well as other campaign finance policy issues not explicitly addressed in the pending rule and Guidelines amendments, and encourages the Secretary of State to proactively address these issues through rulemaking before New Mexico's elections are overwhelmed with political expenditures by groups closely associated with candidates and parties spending funds from undisclosed sources to aid the election of such candidates and parties. Failing to do so will likely severely undermine the integrity of the State's contribution limits and disclosure requirements—an outcome that is wholly avoidable.

Finally, as an overall matter, to the extent the Secretary of State elaborates upon and clarifies New Mexico's campaign finance and lobbyist statutes in this proceeding, the Campaign Legal Center encourages the Secretary of State to do so in the form of amendments/additions to the New Mexico Administrative Code, rather than simply doing so as part of the Guidelines published by the Secretary of State. As the New Mexico Commission of Public Records explains with respect to the New Mexico Administrative Code (NMAC), rules appearing in the Code are a "special category of law written by state agencies to support, clarify, or implement specific laws enacted by the legislature called statutes."[2] Although the Secretary of State is wise to publish its Guidelines to assist public understanding of the State's campaign finance lobbyist laws, the Campaign Legal Center believes the Guidelines should be augmented by more formal regulations in the NMAC.

1. Proposed Amendments to Rule 1.10.27 NMAC Related to the Voter Action Act

[2] New Mexico Commission of Public Records, *What Are State Rules*, available at http://www.nmcpr.state.nm.us/nmac/_explanation/whatare.htm.

The Secretary of State's Office is considering amendments to the rules implementing the Voter Action Act found at 1.10.27 NMAC.[3] The proposed amendments seemingly entail repealing nearly all of the substantive rules (*i.e.*, sections 1.10.27.9, 1.10.27.10, 1.10.27.11) and directing interested persons to consult the "Guidelines for the Voter Action Act" (as per section 1.10.27.8) for interpretation of the Voter Action Act. Given that the rules that the Secretary of State proposes deleting largely duplicate and/or incorporate by reference the governing statutes, repealing the rules is not unreasonable.

However, it is unclear to the Campaign Legal Center why the proposed amendments to Rule 1.10.27 would not likewise repeal section 1.10.27.7 ("Definitions") and, instead, would amend this section to incorporate definitions identical to those found in the Voter Action Act at 1-19A-2 NMSA. With the proposed amendments to Rule 1.10.27.7, the rule would seemingly repeat 1-19A-2 NMSA verbatim. Given that such a rule—an exact replica of the governing statute—would do nothing to improve the Secretary of State's effective administration of the Voter Action Act, nor the public's understanding of the Act, the Campaign Legal Center recommends that the Secretary of State consider deleting Rule 1.10.27.7, as it intends to do with the other substantive sections of Rule 1.10.27 NMAC. Retaining this section of the rules would do no harm, but deleting it would make the NMAC shorter and simpler while likewise doing no harm. The Campaign Legal Center is generally of the view that the purpose of regulations is to clarify and fill in gaps in the governing statute; a rule that merely repeats the statute does not advance these purposes.

In the event that the Secretary of State chooses to retain and amend Rule 1.10.27.7, the Campaign Legal Center recommends that the proposed definition of "Election Cycle" at section 1.10.27.7(E) be amended to include the word "cycle" after the phrase "general election" in the clause that reads "the general election begins on the day after the primary . . . ." Such an amendment would make this phrase parallel to the reference to "primary election cycle" in the preceding clause.

Finally, with respect to implementation of the Voter Action Act, the Campaign Legal Center wants to raise one issue worthy of further examination and possible rulemaking by the Secretary of State. Public campaign financing programs such as the one created by the Voter Action Act are generally intended to reduce the potential for actual or apparent corruption of public officeholders that can result from large private campaign contributions. To this end, in exchange for public funds, a candidate participating in New Mexico's public financing program must "limit total campaign expenditures and debts to the amount of money distributed to that candidate from the fund" and "not accept contributions or loans from any other source except the certified candidate's political party . . . ." 1-19A-7(C) NMSA.

In recent years, largely spurred by the U.S. Supreme Court's decision in *Citizens United,* so-called "independent expenditures" in elections campaigns have skyrocketed from coast-to-coast in both state and federal elections. Such independent expenditures can fatally undermine the purposes and effectiveness of public financing systems. *See, e.g.,* Maine Citizens For Clean

[3] Proposed amendments to Rule 1.10.27 NMAC available at http://www.sos.state.nm.us/uploads/FileLinks/f5a515bcc03e456bbe64d74c5334c4f2/1_10_27_NMAC_Voter_Action_Act_1.pdf.

Elections Money in Politics Project, *Report #11: The Shell Game: How Independent Expenditures Have Invaded Maine Since Citizens United* (2013).[4] One task facing regulators of campaign finance activities is establishing the extent to which candidates can interact with so-called "independent" spenders. For example, is it permissible for a candidate to solicit contributions for an independent expenditure group? When asked this question in the form of an advisory opinion request, the FEC ruled that federal candidates may solicit limited funds for independent expenditure groups and, further, "may attend, speak at, and be featured guests at fundraisers" for independent expenditure committees at which unlimited funds are raised, so long as the federal candidate does not personally solicit funds in excess of federal limits. *See* FEC, Ad. Op. 2011-12 at 1 (June 30, 2011) (Majority PAC).

Although independent spending has not yet played a significant role in publicly-financed New Mexico elections, the Campaign Legal Center respectfully urges the Secretary of State to recognize the likelihood that independent spending will increase in New Mexico's elections in the coming years[5]—and to consider the extent to which New Mexico's campaign finance statutes and regulations permit candidates to interact with groups making independent expenditures. The ability of a publicly-financed candidate to solicit large contributions for independent expenditure groups would severely undermine the integrity of Voter Action Act prohibition on such candidate's expenditure of large private contributions. Yet it remains unclear whether 1-19A-7(C) NMSA or any other statute or regulation prohibits such activity. The Campaign Legal Center encourages the Secretary of State to consider any and all regulatory options to avoid such an evisceration of the Voter Action Act including, as explained below, including broadening the regulation of activities deemed to constitute "coordination" between candidates and outside groups.

2. Proposed Adoption of Rule 1.10.13 NMAC Related to Campaign Finance

The Secretary of State's Office is considering adoption of a rule to implement the Campaign Practices Act and the Campaign Reporting Act.[6] Proposed Rule 1.10.13 would codify as a regulation at 1.10.13.7 NMAC, verbatim, the "definitions" statute found at 1-19-26 NMSA and would otherwise refer interested persons, via 1.10.7.8 NMAC, to the "Guidelines for Candidates and Campaign Committees" and the "Guidelines for Political Committees" for further interpretative guidance with respect to the Campaign Practices Act and the Campaign Reporting Act.

As noted above, the Campaign Legal Center holds the general view that regulations merely repeating statutes verbatim are of little value to the public and the regulated community.

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[4] Available at https://www.mainecleanelections.org/sites/default/files/web/MCCEReport11_TheShellGame_Letter.pdf.

[5] *See, e.g.*, Brennan Center et al., *The New Politics of Judicial Elections 2011-12: How New Waves of Special Interest Spending Raised the Stakes for Fair Courts* (2013), available at http://newpoliticsreport.org (detailing political spending in judicial elections in New Mexico and around the nation).

[6] Proposed Rule 1.10.13 NMAC available at http://www.sos.state.nm.us/uploads/FileLinks/f5a515bcc03e456bbe64d74c5334c4f2/1_10_13_NMAC__2__Campaign_Finance_1.pdf.

Consequently, the Campaign Legal Center recommends that the Secretary of State refrain from adopting 1.10.13.7 NMAC, which simply mirrors 1-19-26 NMSA.

However, the Campaign Legal Center encourages the Secretary of State to promulgate new rules that clarify the governing statutes in a number of different ways, and to amend the "Guidelines" to incorporate explanations of the new rules.

a. Disclosure

The definition of "political committee" at 1-19-26(L)(2) NMSA, upon which the State's campaign finance disclosure regime rests, includes "a single individual whose actions represent that the individual is a political committee[.]" The Secretary of State should clarify what type of "actions represent that [an] individual is a political committee."

Also, the Campaign Legal Center encourages the Secretary of State to clarify the circumstances under which a "political committee" must disclose the identity of a person from whom that committee has received funds—*i.e.*, when particular funds constitute a reportable "contribution" under state law. New Mexico law requires a political committee to report, with certain exceptions, the "name and address of the person or entity . . . from whom a contribution was received[,]" 1-19-31(A)(1) NMSA, as well as the "occupation or type of business of any person or entity making contributions of two hundred fifty dollars ($250) or more in the aggregate per election[,]"1-19-31(A)(2) NMSA. "Contribution," in turn, is defined to include anything of value "that is made or received for a political purpose[.]" 1-19-26(F) NMSA. And "political purpose" is defined to mean "influencing or attempting to influence an election or pre-primary convention, including a constitutional amendment or other question submitted to the voters[.]" 1-19-26(M) NMSA.

How does the Secretary of State determine whether a political committee has received funds for the purpose of influencing or attempting to influence an election—*i.e.*, received a reportable "contribution" under State law? The effectiveness of New Mexico's campaign finance disclosure laws hinges on this determination. For example, the FEC's guidance on this question with respect to federal elections—incorrect guidance in the Campaign Legal Center's view[7]—allowed more than $300 million to be spent on election ads in the 2012 campaign cycle, and more than $400 million total since the Supreme Court's 2010 decision in *Citizens United*, without the spenders being required to disclose the source of the funds spent. This undisclosed-source political spending, as well as the FEC guidance that has allowed it to occur, is detailed in my article *Two Faulty Assumptions of Citizens United and How To Limit the Damage*, 44 U. Tol. L. Rev. 583 (2013). The short explanation of how hundreds of millions of dollars of undisclosed-source political spending has occurred in recent federal elections is that the FEC has advised certain political spenders that they need only disclose their contributors if the contributors specifically designated their funds to pay for election ads. Not surprisingly, donors

[7] The Campaign Legal Center is co-counsel on a legal team representing U.S. Representative Christopher Van Hollen in *Van Hollen v. Federal Election Commission*, No. 11-cv-00766 (D.D.C.), No. 12-5118 (D.C. Cir.), an ongoing legal challenge to a Federal Election Commission regulation relating to federal donor disclosure requirements.

to these groups simply refrained from specifically designating their funds to be used for election ads. Voila! No donor disclosure required.

For decades the U.S. Supreme Court has recognize the vital importance of campaign finance disclosure to preventing corruption and informing the electorate. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976); *McConnell v. FEC*, 540 U.S. 93, 196-97 (2003); *Citizens United v. Fed. Election Comm'n*, 558 U.S. at 366-71. Most recently, in an 8-1 Supreme Court decision upholding a Washington State political disclosure law, Justice Scalia explained in a concurring opinion:

> Requiring people to stand up in public for their political acts fosters civic courage, without which democracy is doomed. For my part, I do not look forward to a society which, thanks to the Supreme Court, campaigns anonymously (*McIntyre*) and even exercises the direct democracy of initiative and referendum hidden from public scrutiny and protected from the accountability of criticism. This does not resemble the Home of the Brave.

Doe v. Reed, 130 S. Ct. 2811, 2837 (2010) (Scalia, J., concurring).

Just as undisclosed-source political spending has flooded federal elections, so too will it likely soon make its mark on New Mexico's elections. For this reason, the Campaign Legal Center respectfully urges the Secretary of State to take this rulemaking opportunity to ensure the effectiveness of the State's disclosure statutes through promulgation of appropriate rules requiring those paying for political activities to disclose the source(s) of their funding.

b. Coordination

As noted in the opening paragraphs of these comments, New Mexico is likely to soon see a dramatic increase in unlimited fundraising and spending by super PACs and other outside groups as a result of the *Republican Party of New Mexico* litigation. Again, as noted above, a key principal to the decisions in *Republican Party of New Mexico* and *Citizens United* is that truly independent expenditures do not pose a threat of corruption and, therefore, cannot constitutionally be limited. By contrast, expenditures coordinated with a candidate effectively serve as contributions to the candidate and can constitutionally be limited to prevent corruption or the appearance of corruption of candidates.

What distinguishes an independent expenditure from a coordinated expenditure (*i.e.*, in-kind contribution) under New Mexico law? The State statutory definition of "contribution" includes "in-kind contribution," *see* 1-19-26(F) NMSA, but as the Secretary of State notes in the Guidelines for Candidates and Campaign Committees, the "Campaign Reporting Act does not define in-kind contributions." The Guidelines further explain that the "Office of Secretary of State has looked to the Federal Election Commission Campaign Guide" for guidance regarding what constitutes an in-kind contribution. The Guidelines explain that "[a]n expenditure made by a person in cooperation or consultation with, or at the request of a candidate is also an in-kind contribution."

The Guidelines go on to include proposed new language in sections entitled "Expenditures Made By Other Entities that May Affect Candidates/Political Committees" that appear to be drawn from the FEC regulation at 11 C.F.R. § 109.21—which, despite its length and detail, still permits very close relationships between candidates and so-called independent spenders and, consequently, undermines contributions limits. The precise ways in which the FEC's regulations permit and accommodate very close relationships between candidates and so-called independent spenders—and how such close relationships give rise to corruption and the appearance of corruption—are detailed in my article *Two Faulty Assumptions of Citizens United and How To Limit the Damage*, 44 U. Tol. L. Rev. 583, 584-88 (2013).

For example, as noted above, the FEC has opined that a candidate can attend, speak and be a featured guest at a super PAC fundraising event without violating federal "coordination" rules. *See* FEC, Ad. Op. 2011-12 at 1 (June 30, 2011) (Majority PAC). The proposed Guidelines on coordination would seemingly likewise permit candidates to raise funds for purportedly-independent groups. The Secretary of State should consider adopting a regulatory presumption that the expenditure of any funds raised with the involvement of a candidate is a coordinated expenditure.

Also like the FEC's flawed coordination regulation, the "Content Prong" of the proposed Guidelines would seemingly permit outside groups to raise and spend unlimited funds for ads featuring candidates, with scripts written by candidates—ads fully coordinated with candidates in any meaningful sense of the word—so long as the ads ran more than 90 days before the candidate's election and stopped short of saying "vote for" or "vote against" (*i.e.*, did not contain "express advocacy"). Rather than employing an "express advocacy" standard more than 90 days before an election, the Secretary of State should consider employing a "promote, attack, support, oppose" (PASO) standard, like the one upheld as constitutionally permissible by the Supreme Court in *McConnell*, 540 U.S. at 170 n.64.[8]

Finally, like the FEC's regulation at 11 C.F.R. 109.21, the proposed Guidelines on coordination seemingly only apply to coordination of expenditures for "communications." How and to what extent does New Mexico law regulate the coordination of expenditures for campaign activity other than communications?

The Campaign Legal Center submits that FEC regulations do not require true independence of candidates from outside groups that raise and spend unlimited funds to support them and, therefore, do not comport with the *Citizens United* Court's belief that such expenditures would not give rise to corruption or the appearance of corruption. Rather than relying on flawed guidance from the FEC regarding the appropriate legal line distinguishing independent expenditures from coordinated expenditures, the Campaign Legal Center encourages the

[8] Also, while not particularly problematic from a substantive perspective, the Guidelines for Political Committees include on page 25 a section entitled "Certain Nonprofit Corporations May Make Independent Expenditures," which explains that the Supreme Court in *FEC v. Massachusetts Citizens for Life, Inc. (MCFL)*, 479 U.S. 238 (1986), held that certain nonprofit corporations possessing specified characteristics may make independent expenditures. The Supreme Court held more recently in *Citizens United* that all corporations may make independent expenditures, regardless of whether they possess the *MCFL* characteristics. Mentioning the *MCFL* exemption seems unnecessary post-*Citizens United*.

Secretary of State to promulgate rules that more effectively define "coordination" and maintain the integrity of the State's contribution limits. In the absence of such rules, New Mexico voters can expect to see the State's corruption-preventing candidate contribution limits eviscerated by candidate-specific super PACs, set up by family, friends, professional associates and former staff of the candidate, and involving the candidate directly in the super PAC's unlimited fundraising.

3. Proposed Adoption of Rule 1.10.14 NMAC Related to Lobbyist Requirements

The Secretary of State's Office is considering amendments to the rules implementing the Lobbyist Regulation Act.[9] Proposed Rule 1.10.14 would codify as a regulation at 1.10.14.7 NMAC, verbatim, the "definitions" statute found at 2-11-2 NMSA and would otherwise refer interested persons, via 1.10.14.8 NMAC, to the "Guidelines for Lobbyists and Lobbyist Employers" for further interpretative guidance with respect to the Lobbyist Regulation Act.

As noted above, the Campaign Legal Center holds the general view that regulations merely repeating statutes verbatim are of little value to the public and the regulated community. Consequently, the Campaign Legal Center recommends that the Secretary of State refrain from adopting 1.10.14.7 NMAC, which simply mirrors 2-11-2 NMSA.

4. Proposed Manuals

The Secretary of State is proposing amendments to four different manuals explaining areas of New Mexico law implemented by the Secretary of State:

- Guidelines for Candidates and Campaign Committees;[10]
- Guidelines for Political Committees;[11]
- Guidelines for the Voter Action Act;[12]
- Guidelines for Lobbyists and Lobbyists' Employers.[13]

With respect to all four of these manuals, the Campaign Legal Center recommends that the Secretary of State add a table of contents to the beginning of each manual and an index to the end of each manual. Inclusion of a table of contents and an index would significantly enhance the ease with which interested persons could locate explanations of specific aspects of the law.

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[9] Proposed Rule 1.10.14 NMAC available at http://www.sos.state.nm.us/uploads/FileLinks/f5a515bcc03e456bbe64d74c5334c4f2/1_10_14_NMAC_Lobbyist.pdf.

[10] Available at http://www.sos.state.nm.us/uploads/files/Guidelines%20of%20Candidates%20and%20Campaign%20Committees%2012-16-2013.pdf.

[11] Available at http://www.sos.state.nm.us/uploads/files/Guide%20for%20Political%20Committees-12-16-13.pdf.

[12] Available at http://www.sos.state.nm.us/uploads/files/Guide%20for%20Public%20Financing%20VAA%2012-2013.pdf.

[13] Available at http://www.sos.state.nm.us/uploads/files/Guide%20for%20Lobbyists%20and%20Lobbyist%20Employers%2012-16-13.pdf.

Furthermore, as noted above, to the extent that material in the Guidelines elaborates upon and clarifies the governing statutory provisions, the Campaign Legal Center encourages the Secretary of State to incorporate such material into the NMAC as formal rules. Doing so will provide the public and the regulated community with a single formal legal document to reference—rather than having to compare language in two or more campaign manuals.

5. Conclusion

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Paul S. Ryan

Paul S. Ryan
Senior Counsel
Campaign Legal Center