August 13, 2015

VIA EMAIL
Chairman Thomas J. Koester,
Commissioner Timothy J Reckart (outgoing),
Commissioner Mitchell C. Laird,
Commissioner Steve M. Titla,
Commissioner Damien R. Meyer,
Commissioner Mark S. Kimble (incoming)

Citizens Clean Elections Commission
1616 West Adams, Suite 110
Phoenix, Arizona 85007
comments@azcleanelections.gov

Re: Opposition to Proposed Amendments to Regulation R2-20-109(F) Version 2

Dear Commissioners Koester, Reckart, Laird, Titla, Meyer and Kimble:

On-behalf of the Arizona Chamber of Commerce and Industry, Greater Phoenix Chamber of Commerce, Greater Phoenix Leadership, Arizona Small Business Association, The Realtors® of Arizona Political Action Committee, Arizona Cattlemen's Association, Arizona Hospital and Healthcare Association, Arizona Chapter Associated General Contractors, Arizona Tax Research Association, Arizona Business Coalition and Valley Partnership, Greater Flagstaff Chamber, Tucson Chamber of Commerce, Mesa Chamber of Commerce, Tempe Chamber of Commerce, Chandler Chamber of Commerce, Yuma County Chamber of Commerce, Buckeye Chamber of Commerce, Prescott Valley Chamber of Commerce, Green Valley Sahuarita Chamber of Commerce and Greater Oro Valley Chamber of Commerce we submit the attached comment to express concern regarding the proposed change to R2-20-109(f)(12).

Due to the significant impact the proposed rule will have on the Arizona business community, we strongly encourage the Citizens Clean Elections Commission not to finalize the proposed rule and to provide our organizations an opportunity to provide comment on any revised proposed rule.

If you have any questions, please do not hesitate to contact me. We greatly appreciate your attention in this matter.

Sincerely,

Glenn Hamer

COMMENT REGARDING PROPOSED CHANGE TO R2-20-109 VERSION 2

BY

ARIZONA CHAMBER OF COMMERCE AND INDUSTRY

GREATER PHOENIX CHAMBER OF COMMERCE

GREATER PHOENIX LEADERSHIP

ARIZONA SMALL BUSINESS ASSOCIATION

THE REALTORS® OF ARIZONA POLITICAL ACTION COMMITTEE

ARIZONA CATTLEMEN'S ASSOCIATION

ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION

ARIZONA CHAPTER ASSOCIATED GENERAL CONTRACTORS

ARIZONA TAX RESEARCH ASSOCIATION

ARIZONA BUSINESS COALITION

VALLEY PARTNERSHIP

GREATER FLAGSTAFF CHAMBER OF COMMERCE

TUCSON CHAMBER OF COMMERCE

MESA CHAMBER OF COMMERCE

TEMPE CHAMBER OF COMMERCE

CHANDLER CHAMBER OF COMMERCE

YUMA COUNTY CHAMBER OF COMMERCE

BUCKEYE CHAMBER OF COMMERCE

PRESCOTT VALLEY CHAMBER OF COMMERCE

GREEN VALLEY SAHUARITA CHAMBER OF COMMERCE

GREATER ORO VALLEY CHAMBER OF COMMERCE

Dear Commissioners:

We write you again to express our concern with the proposed change to Title 2, Chapter 20 of the Arizona Administrative Code. As with Version 1 of the proposed change to R2-20-109(f), the above organizations ("Arizona Business Community") respectfully submit that Version 2 of the proposal is an ill-advised and unlawful expansion of the Commission's authority over free speech in Arizona.

At the outset, we are deeply troubled by the irregularity and lack of transparency in the process by which the Commission developed this rule. We wrote before how the Commission's failure to circulate a "final" proposed rule in the first instance undercut the legitimacy of any rule the Commission ultimately may adopt. The Commission again demonstrated its disregard for public scrutiny when, at the end of the 60-day comment period, it substituted Version 1 of the proposed rule for an altogether different Version 2 that incorporated the substance of a public comment by former Commissioner Louis Hoffman. The substance of Version 2 was not even discussed during the past hearing.

It is disturbing that the Commission plans to adopt a draft rule wholesale that it did not even write, and even more that Arizona's citizens were not given another full public comment period to vet the rule and engage in meaningful dialog. It is also disturbing that a small cadre of current and past Commissioners is apparently taking this opportunity to pursue a personal agenda at the expense of the Legislature and the Secretary of State with a very obvious political slant. At the very least, the Commission should have discussed Version 2 in the open meeting and circulated a new final proposed rule for another full comment period. If laws must be enacted to regulate political speech in Arizona, they should be the product of open debate by representatives of the people—not back-room deals by unelected, appointed officials.

This rule appears less concerned with commonsense election regulation and more so with expanding the Commission's power, even if the result is a constitutional crisis and protracted litigation at taxpayers' expense. The Arizona Republic Editorial Board said it best: "There's only room for one campaign overseer in this state."[1] We maintain the position from our previous comment that the proposed amendment to R2-20-109(f)(3) that would expand the Commission's authority over all political speakers in Arizona – rather than just those affiliated with participating candidates – is both beyond the Commission's authority and a dangerous usurpation of the Secretary of State's constitutional and statutory duties.[2] We support and applaud State Election Director Eric Spencer's meticulous analysis of the flaws in the Commission's legal reasoning on this point. If this citation to authority and this re-visitation to the recent history and

[1] *Clean Elections Butts in Where It Doesn't Belong*, The Arizona Republic, June 14, 2015, *available at* http://www.azcentral.com/story/opinion/editorial/2015/06/15/clean-elections-butts-belong/71158244.

[2] Clean Elections Executive Director Tom Collins recently defended the Commission's push for co-extensive regulatory power with the Secretary of State, saying the regulatory overlap is manageable while the Commission, the Secretary of State, and Attorney General maintain a cooperative working relationship. *See* Tom Collins, *Clean Elections Isn't Making a Power Grab*, The Arizona Republic, August 5, 2015, *available at* http://www.azcentral.com/story/opinion/op-ed/2015/08/05/clean-elections-arizona/31174469. Respectfully, Mr. Collins misses the point. Political speakers in Arizona should not have to live in fear for the day the Commission and other state officials choose not to cooperate and provide conflicting directives.

well-understood purpose of the Clean Elections Act does not dissuade the Commission to elevate its office to co-equal the Secretary of State, Litigation ultimately will ensue.

Nobody in Arizona will benefit if the Commission and Secretary of State are forced to litigate who has ultimate authority over privately financed electoral contests. Once again, Arizona taxpayers and businesses will be forced to finance both sides of a lawsuit in which few have a personal stake, and the only certainty at the end of the day is that Arizona will have fewer resources with which to provide essential services and create opportunities for all Arizonans. Moreover, even for Arizona citizens and businesses who choose to engage in political speech, this duplicative regulation and the legal uncertainty of intra-governmental litigation will almost certainly chill political participation. The 2016 election already promises to be a thrilling political contest – with many competitive races and ballot measures – and Arizonans should not have to consult an attorney to understand the state of election law and who enforces it.

Even if the Commission had jurisdiction to enforce Chapter 6 of the election code, the proposed rule would provide the Commission with power well beyond the letter of the law to designate groups as political committees. It is a basic principle of administrative law that agencies have no power beyond the scope of their enabling legislation.[3] Just this past session, the Legislature passed – and the Governor enacted – new criteria for whether a group may be designated a political committee. The revised statute defines political committee in pertinent part as follows:

> An association or combination of persons that meets both of the following requirements:
>
> (i) Is organized, conducted or combined for the primary purpose of influencing the result of any election in this state or in any county, city, town or other political subdivision in this state, including a judicial retention election.
>
> (ii) Knowingly receives contributions or makes expenditures of more than five hundred dollars in connection with any election during a calendar year, including a judicial retention election.[4]

The proposed rule, however, collapses this two-part test into a singular inquiry:

> Alternatively, the Commission shall consider a Group a "political committee," provided that it meets the requirement of A.R.S. § 16-901(20)(f)(ii), if the Group is "conducted" for the primary purpose of influencing the results of any Listed Election. **In determining whether a Group is "conducted" for the primary purpose of influencing the results of any Listed Election, the Commission shall presume that a Group has been "conducted" for such primary purpose if (1) it has made expenditures as defined in A.R.S. § 16-901(8) during a**

[3] *E.g., Arizona State Bd. of Regents ex rel. Arizona State University v. Arizona State Personnel Bd.*, 195 Ariz. 173, 175, 985 P.2d 1032, 1034 (1999) (en banc) (gathering cases)
[4] A.R.S. § 16-901(20)(f).

> **calendar year of $500 or more, or (2) it has taken contributions as defined in A.R.S. § 16-901(5) during a calendar year of $500 or more**.[5]

Essentially, while the Legislature provided that a political committee is a group that (1) is organized for the purpose of influencing elections and (2) participates in elections, the Commission would simply presume any group that participates in elections by spending or accepting $500 in contributions to be spent on public policy efforts is organized primarily to influence elections. The proposed rule would rewrite the law, rather than enforce it.

We are hesitant to offer policy alternatives by which the Commission may designate groups as political committees because – like the Commission – we are not the Arizona State Legislature.[6] We believe in the commonsense principle that, if an agency wishes to change the law, it should urge such change through the legislative process rather than administrative fiat. While we cannot stress enough our objection to the Commission's extra-jurisdictional rulemaking, we provide the following revisions to the proposed rule.

Assuming the Commission had legal authority to designate groups as political committees, the better course would be to delete the proposed provision, and insert the following language as applicable to election contests that directly involve and are direct toward participating candidates:

> Alternatively, for purposes of Groups directly supporting or opposing participating candidates only, the Commission shall consider a Group a "political committee," provided that it meets the requirement of A.R.S. § 16-901(20)(f)(ii), if the Group is "conducted" for the primary purpose of influencing the results of any Listed Election. In determining whether a Group is "conducted" for the primary purpose of influencing the results of any Listed Election, the Commission shall consider all relevant facts and circumstances, including whether the Group devotes the majority of its resources to activities designed to influence Listed Election. If the relevant Group is an entity organized under Section 501(c) of the federal internal revenue code, the Commission shall presume the Group is not conducted for influencing the primary purpose of influencing the results of any Listed Election. The Commission may rebut this presumption with clear and convincing evidence.

Amending the proposal in this fashion would give due regard to the highly persuasive body of federal law on whether an entity is organized for the purpose of influencing elections, and prevent the Commission from second-guessing the IRS on whether entities organized under

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[5] Proposed R2-20-109(f)(12)(b) (Version 2).

[6] We note here our frustration with Executive Director Collins' suggestion that the Chamber has no place in this discussion because it has never previously involved itself in Commission proceedings. The Chamber, and its constituent businesses and organizations, have every right to comment on this rule and its effect on their First Amendment rights. Mr. Collins' comment simply demonstrates the Commission's political aim in proposing this rule, efforts to keep guidelines having statewide implications narrowed to a few likeminded current and former Commissioners, and its disregard for those with whom it disagrees on political matters. This is exactly why such legislative activity should be left where it belongs – with the duly elected Legislature.

Section 501(c) of the tax code are properly designated tax-exempt organizations.[7] Indeed, federally designated tax-exempt organizations must already demonstrate their primary purposes annually to federal regulators. These entities should not be forced to spend their limited resources to make the same showing to state regulator, and non-incorporated groups should not be held to any different standard. In sum, if the Commission purports to determine a group's primary purpose, it should look to existing law rather than a presumption that contradicts the plan language of the state election code and federal tax code.

Finally, in the event Version 2 is ever enforced, we strongly object to the provision in Subsection (e), which provides "[a] person appearing before the Commission may rebut a presumption established by [this proposed rule] by clear and convincing evidence." By this provision, the Commission would not only presume that groups engaged in almost any political speech are political committees, but also shift the burden of proof to the unfortunate group in question to prove by the most demanding legal standard in civil jurisprudence to prove it is *not* a political committee. Not only is this guilty-until-proven-innocent approach to administrative regulation wholly foreign to our system of due process—it also has absolutely no support in state election statutes pertaining to political committees or the government's inherent burden to prove legal compliance violations. Not even the Secretary of State has authority to issue such binding determinations that a group is an unregistered political committee, and there is no reason to believe the Commission could do so even if it did possess co-equal authority to the Secretary of State. We admonish the Commission to amend this section to provide that any presumption that a group is a political committee may be overcome by a preponderance of the evidence.

Furthermore, the final rule should harmonize the roles state law enforcement officials. There is no doubt that the Commission some has jurisdiction over participating candidate elections. But if the Commission determines that a violation of Article 1 took place, it should issue a formal complaint to the Secretary of State, who can in in turn refer the matter to the Arizona Attorney General for further proceedings. This would prevent the Commission from unilaterally inserting itself into enforcement of Article 1 and ensure harmony between the various governmental agencies and stakeholders who all desire fair and predictable enforcement of the election code.

The Arizona Business Community believes that the proposed rule will harm the interests of Arizona businesses and taxpayers, and chill political speech on the eve of a pivotal election in American history. We strongly urge the Commission not to adopt the proposed rule, or at minimum adopt the proposed rule with the amendments outlined in this comment.

Although Version 2 should not be adopted in any form, to the extent the Commission decides to revise Version 2 to include any additional changes – including proposals by us, we strongly encourage the Commission to again post any version of a draft rule for review and

[7] Indeed, 501(c) entities must already undergo substantial scrutiny of their activities by the IRS on an annual basis in order to prove they are appropriately organized for charitable purposes. *See, e.g.*, 26 C.F.R. § 501(c)(4)-(a)(2)(ii) (discussing the extent to which certain charitable organizations may engage in legislative advocacy); Rev. Rul. 2007-41, 2007-1 C.B. 1421 (2007) (surveying illustrative fact patterns to demonstrate the line between social advocacy and election intervention). We doubt very much the Commission could improve upon the IRS's well-established purpose-driven inquiry.

comment by the various stakeholders before formally adopting any provision. This is a minimum requirement of due process and is required by principals of administrative law.

If it is the Commission's goal to address the issue of "dark money" in Arizona politics, then let us have an open discussion with the public to define this often-divisive term, and work together to find new ways to build confidence in the integrity of elections. This rule simply puts the cart before the horse and, in doing so, will only divide us further. We are happy to expand on these points and discuss possible alternative measures to this proposed rule at the open meeting.