

July 10, 2015

VIA EMAIL AND REGULAR MAIL

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@azcleelections.gov

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

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, Arizona Association of Realtors, Arizona Cattlemen's Association, Arizona Hospital and Healthcare Association, Arizona Chapter Associated General Contractors, Arizona Tax Research Association, Arizona Business Coalition and Valley Partnership, submits the 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,

A handwritten signature in black ink, appearing to read "Glenn Hamer", written in a cursive style.

Glenn Hamer

COMMENT REGARDING PROPOSED CHANGE TO R2-20-109

BY

ARIZONA CHAMBER OF COMMERCE AND INDUSTRY

GREATER PHOENIX CHAMBER OF COMMERCE

GREATER PHOENIX LEADERSHIP

ARIZONA SMALL BUSINESS ASSOCIATION

ARIZONA ASSOCIATION OF REALTORS

ARIZONA CATTLEMEN'S ASSOCIATION

ARIZONA HOSPITAL AND HEALTHCARE ASSOCIATION

ARIZONA CHAPTER ASSOCIATED GENERAL CONTRACTORS

ARIZONA TAX RESEARCH ASSOCIATION

ARIZONA BUSINESS COALITION

VALLEY PARTNERSHIP

Dear Commissioners:

The Arizona Chamber of Commerce and Industry, Greater Phoenix Chamber of Commerce, Greater Phoenix Leadership, Arizona Small Business Association, Arizona Association of Realtors, Arizona Cattlemen's Association, Arizona Hospital and Healthcare Association, Arizona Chapter Associated General Contractors, Arizona Tax Research Association, Arizona Business Coalition and Valley Partnership ("Arizona Business Community") submits this comment to express concern regarding the proposed change to R2-20-109(f)(12) by the Citizens Clean Election Commission ("Commission"). These organizations are nonpartisan, nonprofit organizations that advocate for the interests of the Arizona business community.

The Arizona Business Community strongly urges the Commission not to adopt the proposed regulation as drafted. At the outset, the Arizona Business Community is deeply concerned with the fact that the Commission has yet to publish the proposed regulation in a final draft form. The Commission may be exempt from typical rulemaking procedures under Arizona administrative law, but the fact that the Commission may present one version of this proposed rule for public comment and adopt a wholly different version later – without explanation or an opportunity for the general public to evaluate and comment on the final version – offends basic ideas about due process and fairness. Indeed, if the Commission intends to continue asserting jurisdiction over non-participating candidate committees (i.e., candidates that do not voluntarily

opt-in to the Commission's jurisdiction), it may be time reevaluate the Commission's exemption from standard rulemaking procedural law.

Although extremely confusing in its current form, the proposed rule appears to create a presumption that any group or organization formed "within six months immediately preceding the beginning of a legislative election cycle," or that is "formed or created during the election and knowingly makes expenditures or takes contributions of \$500 or more for any election in this state in a calendar year" is primarily organized for the purpose of influencing elections and therefore a political committee under Arizona law.¹ This proposed rule upsets settled understandings about the scope of the Commission's authority and is directly contrary to the statutory definition of "political committee."

The elected Arizona Secretary of State, and not the Commission, has primary statutory authority to regulate non-participating candidates and political committees.² The establishment of the Commission did not divest the Secretary of State of her position as Arizona's chief election officer. Indeed, although ignored in recent elections, the Commission's sole purpose is to regulate expenditures by *participating* candidates.³ The Arizona Business Community and its members, therefore, take issue with Commission's authority to promulgate this proposed rule, which is clearly beyond its statutory power to enforce.⁴ Simply, it is the business community's interest to have clear laws that are enforced by governmental agencies that have clear jurisdiction and are eventually accountable to elected officials and the general public.⁵ As the Commission was envisioned to only have jurisdiction over individuals who opted into its jurisdiction, such an unprecedented extension of an agency that is not beholden to the general public and elected officials is quite concerning to the interests of democracy. It is in the business community's interests to ensure such safeguards are in-place.

Moreover, the proposed rule would subject Arizona businesses and non-profit entities to duplicative and potentially conflicting regulations between the Commission and the Secretary of State. Efforts to enforce this rule will disrupt the business community's expectation that the Secretary of State is the sole regulator of political committees. There is the further potential that the two bodies could issue conflicting regulations regarding political speech. The resulting confusion will make it harder for businesses to predict how their Constitutionally protected political speech will be treated. This confusion may also have a chilling effect on the formation of groups and associations in Arizona.

¹ R2-20-109(f)(12)(a).

² A.R.S. § 16-916, 924(A).

³ A.R.S. § 16-940 *et seq.*

⁴ *Arizona State Bd. Of Regent ex rel. Arizona State University v. Arizona State Personnel Bd.*, 195 Ariz. 173, 175, 985 P.2d 1032, 1034 (1999) (Arizona agencies have no power beyond the scope of their enabling statutes).

⁵ For example, Sections 109(F)(6) and (8) of the proposed rule would subject entities to burdensome reporting requirements in addition to those reports already mandated by the Secretary of State. Arizona businesses have a right to know precisely when and how their lawful political activities may subject them to the added expense of filing reports with two state agencies.

Beyond jurisdictional issues, the proposed rule's vague draftsmanship makes it difficult for the business community to understand when and how entities will be presumptively subject to the Commission's authority. Specifically, the proposed rule turns on a problematic assumption that – notwithstanding an entity's good standing as a charity or social welfare organization under federal tax law – *any* organization is primarily political in nature simply based on the timing of its formation. But, nothing in the applicable statutes or regulations provides guidance on when “six months immediately preceding the beginning of a legislative election cycle” actually takes place. A.R.S. § 16-691(B)(1) defines “election cycle” as “the period between successive general elections for a particular office.” Therefore, it is wholly unclear when and how the Commission's proposed presumption is even operative. Arizona's business community should not have to retain counsel in order to calculate when and how such vague and overly burdensome regulations on Constitutionally protected political speech apply.

During the last election cycle, Arizona businesses and properly incorporated entities were forced to endure enough confusion with regard to the regulation of constitutionally protected political free speech by the state. Last fall, the U.S. District Court in *Galassini v. Town of Fountain Hills* invalidated the statutory definition of “political committee” because it was unconstitutionally vague and overbroad.⁶

In response, the Arizona Legislature acted quickly, passing H.B. 2649 to re-enact this foundational term of the election code with a clarified definition that tracks the recommendations of the *Galassini* opinion. Nothing in this new statute provides the Commission, or any other non-elected governmental agency, with the authority to enact a rule with such far-reaching presumptions concerning political activity as the one at issue here. Tying itself to the calendar, the presumption crushes the flexibility and analysis that H.B. 2649 provides. Even Mr. Collins believes that this public comment period will support a change from the using time of formation as a presumption to use as a factor in the analysis.⁷ In light of this statement, any substantial changes to the proposed rule should be re-publicized for general comment and should address what, if any, statutory authority the Commission relies upon for the proposed rule. Simply, the Commission is not able to insert itself as both the Arizona Legislature and the Arizona Secretary of State in not only creating laws, but then enforcing those same laws. The business community expects the government to respect the separation of powers and allow certainty from the laws that are duly voted on by the Arizona Legislature and signed by the Governor. In the proposed rule, the Commission is going too far.

We strongly recommend against the adoption of the proposed rule. Its shaky legal foundation and vagueness are almost certain to generate more litigation and keep Arizonans guessing as to when and how they may exercise their First Amendment right to speak out on political matters. This rule is bad for business, and worse for free speech.

We look forward to an opportunity to address these issues at the open meeting.

⁶ *Galassini v. Town of Fountain Hills*, No. CV-11-02097-PHX-JAT, 2014 WL 6883063, at *7 (D. Ariz. Dec. 5, 2014).

⁷ *CEC Rule Goes Forward, But With Willingness to Change*, YELLOW SHEET REPORT 1, May 14, 2015.