CLC
ADVANCING DEMOCRACY THROUGH LAW

August 14, 2019

Submitted electronically to Dylan.Lange@state.nm.us

The Honorable Maggie Toulouse Oliver
Secretary of State
325 Don Gaspar, Suite 300
Santa Fe, New Mexico 87501

Dear Secretary Toulouse Oliver,

The Campaign Legal Center ("CLC") respectfully submits these written comments regarding the proposed rulemaking to amend New Mexico's campaign finance rule, N.M. Code R. § 1.10.13.[1] CLC staff attorney Austin Graham will be present at the Secretary's rulemaking hearing on August 16 to answer questions and provide additional information about the comments.

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening American democracy across all levels of government. Since the organization's founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other court cases and regulatory proceedings. Our work promotes every citizen's right to participate in the democratic process and to know the true origin of funds spent to influence elections.

CLC supports the Secretary's initiation of this rulemaking to implement the provisions of S.B. 3,[2] and the Secretary's continued leadership on political transparency issues will enable the people of New Mexico to know who is trying to influence elections in their state. The recommendations in our comments are intended to help ensure the Secretary's final rule provides effective disclosure of independent expenditures and prevents the circumvention of contribution limits in New Mexico's Campaign Reporting Act ("CRA"). The comments are organized according to the sections of the proposed rule to which they relate.

[1] Vol. XXX, Issue 13 N.M. Reg. 355 (July 16, 2019).
[2] 2019 N.M. Laws ch. 262.

I. § 1.10.13.7. "Definitions"

A. Defining "Paid Online Advertising" to Ensure Disclosure of Digital Advertisements

In § 1.10.13.7(A), the proposed rule defines "advertisement" to include a communication referring to a candidate or ballot question that is distributed by "electronic media," including "paid online advertising." As amended by S.B. 3, the CRA similarly defines "advertisement" to include communications through "electronic media."[3]

The amount spent on online campaign advertising has grown considerably at both the federal and state levels in recent years. According to research firm Borrell Associates, total expenditures for online advertising in federal, state, and local elections exceeded $1 billion both in 2018 and during the 2016 election cycle.[4] The estimated $1.8 billion spent for online advertising in last year's midterms alone represents a 2,400% increase over the total spending for online ads in the 2014 midterm elections.[5] The surge in online campaign advertising is likely to continue in future elections, as campaigns, political committees, and outside groups increasingly rely on digital media to target prospective voters.

Considering the growing prominence of online advertising in U.S. elections, the Secretary should clarify the meaning of "paid online advertising" to make clear the types of "electronic media" advertisements regulated in New Mexico campaigns, and to ensure online political ads are disclosed in accordance with state law. For guidance in defining "paid online advertising," we suggest the Secretary look to the definition of "qualified internet or digital communication" in H.R. 1, the federal election-reform legislation passed by the House of Representatives earlier this year.[6] Generally, H.R. 1 defines "qualified internet or digital communication" as a communication "placed or promoted for a fee on an online platform," which is separately defined, in part, as "any public-facing website, web application, or digital application, including a social network, ad network, or search engine."[7]

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[3] *See* N.M. Stat. Ann. § 1-19-26(A) (defining "advertisement" to include "a communication referring to a candidate or ballot question that is published, disseminated, distributed or displayed to the public by print, broadcast, satellite, cable or electronic media, including recorded phone messages, or by printed materials, including mailers, handbills, signs and billboards").

[4] *See* Rob Lever, *Despite Restrictions, Digital Spending Hits Record in US Midterms*, AFP (Nov. 13, 2018), https://www.yahoo.com/news/despite-restrictions-digital-spending-hits-record-us-midterms020115626.html; Kate Kaye, *Data-Driven Targeting Creates Huge 2016 Political Ad Shift: Broadcast TV Down 20%, Cable and Digital Way Up*, ADAGE (Jan. 3, 2017), https://adage.com/article/media/2016-political-broadcast-tv-spend-20-cable-52/307346.

[5] Rob Lever, *Despite Restrictions, Digital Spending Hits Record in US Midterms*, AFP (Nov. 13, 2018), https://www.yahoo.com/news/despite-restrictions-digital-spending-hits-record-us-midterms020115626.html.

[6] For the People Act of 2019, H.R. 1, 116th Cong. § 4206 (2019)

[7] *Id.* §§ 4206, 4208.

Along similar lines, the definition of "advertisement" in the final rule could include a subsection setting forth the meaning of "paid online advertising," such as:

"For purposes of this rule, 'paid online advertising' means any communication placed or promoted for a fee on any public-facing website, web application, or digital application, including a social network, ad network, or search engine."

B. Including Coordination with Legislative Caucus Committees in the Definition of "Coordinated Expenditure"

Under § 1.10.13.7(H) of the proposed rule, the definition of "coordinated expenditure," in relevant part, covers an expenditure made "at the request or suggestion of, or in cooperation, consultation, or concert with, a candidate, an agent of the candidate, the candidate's campaign committee or a political party." S.B. 3 also added a definition of "coordinated expenditure" to the CRA, encompassing expenditures made "at the request or suggestion of, or in cooperation, consultation or concert with, a candidate, campaign committee or political party or any agent or representative of a candidate, campaign committee or political party."[8]

While the rulemaking proposal's "coordinated expenditure" definition would apply to coordinated spending with a candidate's campaign or a political party, it does not expressly include expenditures made in coordination with a legislative caucus committee. Since legislative caucus committees, like candidates and political parties, are subject to contribution limits under the CRA,[9] the Secretary should extend the rule's definition of "coordinated expenditure" to cover coordination with legislative caucus committee. Otherwise, the CRA's contribution limits for legislative caucus committees could be susceptible to evasion, as donors who had made maximum contributions to legislative caucus committees could then engage in unlimited coordinated activity with the committees to further support them.

Importantly, the addition of legislative caucus committees within the rule's definition of "coordinated expenditure" would comport with the CRA's comprehensive application to expenditures made in coordination with any "agent or representative" of a political party.[10] By definition, a legislative caucus committee is "a political committee established by *the members of a political party* in a chamber of the legislature."[11] Because the CRA requires a political party's members to establish and administer legislative caucus committees, these committees and the legislators controlling them are effectively "agents" and "representatives" of New Mexico's political parties. Accordingly, the final rule should treat legislative caucus

[8] N.M. Stat. Ann. § 1-19-26(I).
[9] *Id.* § 1-19-34.7(C).
[10] *Id.* § 1-19-26(I).
[11] *Id.* § 1-19-26(O) (emphasis added). *See also* 2019 N.M. Laws ch. 262, § 15 (establishing "[t]he speaker and minority floor leader of the house of representatives and the majority floor leader and minority floor leader of the senate" as "the designated leaders of the legislative caucus committees for the members of their political party," and requiring "[f]unds belonging to a legislative caucus committee [to] be managed by the designated leader or the leader's designee.").

committees as representatives of political parties, and expressly regulate coordination involving legislative caucus committees to preserve the effectiveness of the CRA's contribution limits.

II. § 1.10.13.11. "Reporting of Independent Expenditures"

Specifying When Contributions Are Earmarked or Solicited to Fund Independent Expenditures

In § 1.10.13.11(C), the proposed rule would require any person making independent expenditures above certain amounts to file a report disclosing the name and address of each source of contributions received in excess of $200 "that were earmarked or made in response to a solicitation to fund independent expenditures." The CRA, as amended by S.B. 3, includes an analogous requirement to disclose sources of contributions above $200 "earmarked or made in response to a solicitation to fund independent expenditures" on independent expenditure reports.[12] S.B. 3 also amended the CRA to expressly forbid a person from making contributions or expenditures "with an intent to conceal . . . the true source of funds used to make independent expenditures."[13] However, neither the proposed rule nor the CRA explains when a person has "earmarked" a contribution or given it "in response to a solicitation" to pay for independent expenditures.

In the absence of regulatory guidelines describing when contributions are earmarked or solicited for independent expenditures, the CRA's new disclosure requirements are unlikely to be fully effective. Independent expenditure reporting laws that restrict disclosure to donors who have memorialized their intent to pay for independent expenditures are notoriously ineffectual.[14] In practice, donors rarely provide written documentation indicating the purpose of contributions made to organizations that are not registered political committees, especially since these entities, in addition to making independent expenditures, may engage in other activities unrelated to elections. Consequently, limiting donor reporting only to the most obvious instances of earmarking can preclude meaningful disclosure of the sources of money used to make independent expenditures.

To ensure that the sources of funds used for independent expenditures are disclosed as required by state law, and to help enforce the CRA's restriction on contributions or expenditures being made with an intent to conceal "the true source of funds used to make independent expenditures," the final rule should explain when a contribution is earmarked or solicited to pay for independent expenditures. In delineating this requirement, the rule should take into account contextual factors to help the CRA's new independent expenditure disclosure regime bring greater transparency to New Mexico elections.

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[12] N.M. Stat. Ann. § 1-19-27.3(C).
[13] *Id.* § 1-19-34.3(B).
[14] *See, e.g.*, Press Release, Public Citizen, Public Citizen Urges FEC to Close its Donor Disclosure Loophole (Mar. 4, 2019), https://www.citizen.org/news/public-citizen-urges-fec-to-close-its-donor-disclosure-loophole/.

For guidance in developing a standard for when contributions are earmarked or solicited for independent expenditures, we recommend the Secretary look to "covered transfer" reporting laws. The most well-known covered transfer legislation is the federal DISCLOSE Act, which was approved by the House of Representatives this year as part of H.R. 1.[15] Originally formulated in response to the surge of dark money spending after *Citizens United v. FEC*, the DISCLOSE Act would require corporations, labor unions, and nonprofit groups to disclose certain transfers made to other organizations if the transfers were initially designated or solicited for making campaign-related disbursements, including independent expenditures or electioneering communications.[16]

By extending reporting requirements beyond contributions given for the express purpose of paying for independent expenditures, covered transfer reporting presents a more comprehensive approach to disclosure that takes into account the broader context in which money was contributed, helping to ensure the public knows the real sources responsible for independent expenditures. In a similar manner, New Mexico's rule should make clear when a contribution is "earmarked or made in response to a solicitation" to fund independent expenditures.

For example, the final rule could include the following as a new subsection within § 1.10.13.11:

"For purposes of 1.10.13.11(C) NMAC, a contribution is earmarked or made in response to a solicitation to fund independent expenditures if the person making the contribution:
(1) Designates, requests, or suggests that the amounts be used for independent expenditures. A person 'designates, requests, or suggests' that amounts be used for independent expenditures if, at any time, there is an agreement, suggestion, designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, that all or any part of the transfer or payment be used to fund independent expenditures;
(2) Provided the amounts in response to a solicitation or other request, whether direct or indirect, express or implied, oral or written, for a transfer or payment to fund independent expenditures; or
(3) Knew or had reason to know from the surrounding circumstances that the amounts would be used to fund independent expenditures."

[15] For the People Act of 2019, H.R. 1, 116th Cong. § 4111 (2019). Likewise, both Rhode Island and Austin, Texas have enacted covered transfer laws modeled on the DISCLOSE Act. *See* R.I. Gen. Laws Ann. § 17-25.3-1; Austin, Tex., City Code § 2-2-34.
[16] *See* Lisa Rosenberg, *What You Should Know About the DISCLOSE Act Part 1: What is the Disclose Act*, SUNLIGHT FOUND. (July 12, 2012), https://sunlightfoundation.com/2012/07/12/what-you-should-know-about-the-disclose-act-part-1-what-is-the-disclose-act/.

III. § 1.10.13.24. "Earmarking"

Preventing Circumvention of Contribution Limits

The CRA, as amended by S.B 3, now allows for political parties and legislative caucus committees to accept contributions in amounts up to five times greater than the contribution limits for candidates and other political committees.[17] Likewise, New Mexico law now permits political parties and legislative caucus committees to provide unlimited in-kind contributions to candidates during the general election campaign,[18] while candidates' campaign committees, in turn, can make unlimited contributions to political parties and to legislative caucus committees of their parties.[19]

S.B. 3's amendments to the CRA open new channels for political parties and legislative caucus committees to deliver substantial resources to candidates. These channels also present new challenges to the enforcement of state law's contribution limits, as political parties and legislative caucus committees could become vehicles for donors, especially those who have already provided contributions up to the statutory limits to specific candidates, to provide additional financial support to candidates in excess of the CRA's contribution limits. Therefore, as part of the final rule, we recommend that the Secretary include measures to help safeguard against the use of political parties and legislative caucus committees as conduits for making excessive contributions to candidates.

To address circumvention concerns, the rule should make clear that an intermediary who forwards an earmarked contribution must provide to the recipient of the funds, in writing, all the information about the original source of the contribution necessary for recordkeeping and reporting purposes under state law. New Mexico's rule currently specifies that contributions "earmarked or otherwise directed through another person" are considered contributions "from the person who originally made the contribution."[20] However, there is no additional guidance in the rule describing how recipients of earmarked contributions must collect and report information about the original sources of those contributions.

For example, the Federal Election Commission's ("FEC") regulations include a requirement for an intermediary forwarding earmarked contributions to provide the recipient of the earmarked money with a "transmittal report," which must contain the name and address of the original contributor, along with information about the amount and date of the contribution.[21] Similarly, a number of state election agencies have promulgated special reporting procedures for earmarked

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[17] N.M. Stat. Ann. § 1-19-34.7(C).
[18] *Id.* § 1-19-34.7(J).
[19] *Id.* § 1-19-34.7(K).
[20] N.M. Code Regs. § 1.10.13.24(C).
[21] *See* 11 C.F.R. § 110.6(c). *See also* Fed. Election Comm'n, *How to Report Earmarked Contributions*, https://www.fec.gov/help-candidates-and-committees/filing-ssf-reports/earmarked-contributions/ (last visited Aug. 13, 2019).

contributions.[22] Including an analogous requirement in New Mexico's final rule would serve to ensure that earmarked contributions are properly documented and disclosed, thus aiding in the enforcement of the CRA's contributions limits.[23]

As another anti-circumvention measure, the final rule should specify when an earmarked contribution is attributable both to the original contributor and to the intermediary who forwarded the earmarked funds. Using their enhanced fundraising capabilities, political parties and legislative caucus committees may try to direct donors to provide them contributions for the purpose of supporting particular candidates through either monetary or in-kind contributions. When a political party or legislative caucus committee instructs a donor to contribute for the purpose of supporting a specific candidate, the contribution should count toward both the donor's and the party or committee intermediary's respective contribution limits for that candidate.

At the federal level, the FEC's regulations stipulate that if an intermediary forwarding an earmarked contribution has exercised "any direction or control over the choice of the recipient candidate," the contribution is considered made by—and counts toward the contribution limits for—both the original donor *and* the intermediary.[24] Election administrators in some states and localities also have prescribed regulations describing when an earmarked contribution is attributable to both its original source and an intermediary.[25] In the final rule, we suggest the Secretary add a similar requirement for attributing an earmarked contribution to an intermediary, in addition to the original contributor, in situations where the intermediary has participated in the decision to steer resources to a specific candidate.

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[22] *See, e.g.*, 2 Cal. Code Regs. § 18432.5; Mont. Admin. R. 44.11.404; Wash. Admin. Code §§ 390-16-240, 390-16-033. For example, Washington State's Public Disclosure Commission requires an intermediary who transfers earmarked contributions to submit a special report to both the beneficiary of the earmarked funds and the Commission. Wash. Admin. Code §§ 390-16-240, 390-16-033; *see also* Wash. Pub. Disclosure Comm'n, *Earmarked Contributions*, https://www.pdc.wa.gov/learn/publications/candidate-instructions/contributions/earmarked-contributions (last visited Aug. 12, 2019).

[23] *See* N.M. Stat. Ann. § 1-19-34.7(D) ("All contributions made by a person to a candidate, either directly or indirectly, including contributions that are in any way earmarked or otherwise directed through another person to a candidate, shall be treated as contributions from the person to that candidate.").

[24] 11 C.F.R. § 110.6(d)(2) ("If a conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the earmarked contribution shall be considered a contribution by both the original contributor and the conduit or intermediary. If the conduit or intermediary exercises any direction or control over the choice of the recipient candidate, the report filed by the conduit or intermediary and the report filed by the recipient candidate or authorized committee shall indicate that the earmarked contribution is made by both the original contributor and the conduit or intermediary, and that the entire amount of the contribution is attributed to each.").

[25] *See* Wash. Admin. Code § 390-16-240(3); N.Y.C. Campaign Fin. Bd. R. 1-04(j).

IV. § 1.10.13.31 "Disclaimer Notices on Advertisements"

Including Disclaimer Requirements in the Final Rule

The proposed rule would remove the existing section of the rule, § 1.10.13.31, governing disclaimer notices on political advertisements. It is unclear, however, why the proposed rule would eliminate the section, considering S.B. 3 included disclaimer requirements that largely follow § 1.10.13.31.[26] CLC recommends the Secretary include requirements for political advertising disclaimers in the final rule so that New Mexico's voters are properly informed about the sponsors of advertisements concerning state candidates and ballot questions.

Conclusion

CLC applauds Secretary Toulouse Oliver's continued efforts to improve political transparency and accountability in New Mexico, and we appreciate the Secretary's consideration of our comments on this important rulemaking. CLC staff attorney Austin Graham will be attending the public hearing on August 16 to provide testimony and to answer any questions about the recommendations in these comments.

Respectfully submitted,

/s/
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/s/
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[26] N.M. Stat. Ann. § 1-19-26.4.