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Citizens Clean Elections Commission

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MEMORANDUM

To: Commissioners

From: Commission Staff

Date: September 9, 2016

Subject: Highlights of Proposed Rule Changes

Proposed Action:

Staff proposes to open the rule process on the changes identified in the attached exhibits. It is important to stress that this is only the opening of the process. Action on adoption of any amendments will follow. By beginning this process Thursday, September 15, the amendments would be eligible for adoption as soon as the November meeting, with an additional month available if necessary, to meet our January 1 projected implementation date.

Except where necessary references to SB 1516 include HB2297, a companion bill. We have highlighted what we think are the most crucial changes. Rule changes are limited to Article 1, 4, and 7. Additionally, we recommend you review the enforcement procedures.

Highlights of Rules:

R2-20-101

- Removes part of the definition of unopposed.

R2-20-105

- Reverts to statutory levels for qualifying contributions. Testimony this summer and the experience of candidates over the past two election cycles indicate candidates are struggling to meet the thresholds set by rule. Corporation Commission candidates are qualifying later, for example, or in one case in 2014 not at all. The legislature in session law indicated a desire to have the qualifying contribution increase expressly for the 2014 cycle. Fiftieth Legislature, Second Regular Session, Chapter 257, Section 20, available at http://www.azleg.gov/FormatDocument.asp?inDoc=/legtext/50leg/2r/laws/0257.htm&Session_ID=107. Given the purpose of the law is to allow participation to fighting corruption, revisiting this policy is appropriate and the time frame the legislature contemplated has past.

R2-20-109

- Maintains Internal Revenue Service/Corporation Commission delegation for certain entities that might otherwise be political committees. Adopted at August meeting, 3-2. Moved to R2-20-109(F)(11) for clarity and to account for statutory differences between SB1516 and earlier measures.
- Removes exemption process for 16-941(D), -958 reports. These exemptions were created to avoid potentially duplicative reports when the legislature later added ARS 16-914.02, which applies to corporations, labor unions and LLCs. That statute has been repealed, effective Nov. 5. The Clean Elections Reports, which voters put in place long before the 16-914.02 reports, will be the only time-sensitive report on spending in state elections that we are aware of post-SB1516. R2-20-109

R2-20-110

- SB 1516 is ambiguous regarding post-general election reports. Specifically, Without a post a post general election for nonparticipating candidates, their last report for a particular election cycle would not be filed until two or four years after that election was completed. Participating candidates must show that they have properly spent and refunded as appropriate clean funding. This requires a post general report for those candidates in compliance with A.R.S. §§ 16-953(B) and -956(A)(7). This proposal adds such a report.
- Moved references on joint expenditures under use of funds to incorporate them with the joint expenditure reporting requirements to align and simplify the rules. (This is the change in Article 7 noted above).

R2-20-111

- Reflects that the reductions required by ARS 16-941 will be enforced on permitted contribution limits SB1516. (see legal note below)
- Reflects that the limit adjustment will be \$100 (see legal note below)

R2-20-112

- Political Party Exception—the current rule, based on a now repealed statute, is replaced with a new rule that adopts the new statute for party support of nominee, which do not constitute contributions pursuant to SB 1516. R2-20-112

Article 2. R2-20-201 – R2-20-228

- Maintains existing enforcement procedures. Although some may argue that SB 1516 affects the Commission's authority to enforce the act, whatever limits it imposes are not related to Article 2 of Chapter 6 or the penalties imposed by that Article. The extent that the measure conflicts with the Clean Elections Act directly, it raises a voter protection act issue. These provisions will not be put out for public comment because there is no change. However, this information is important for your consideration.

R2-20-402.02

- Staff proposes to subject all statewide participating candidates to audit. Audits are performed by outside auditing firm. We have changed audit policies from time to time to account for various changes. There are fewer statewide participating candidates, however, the current means many will not be audited at all because they subject to the

limitations of the random draw. The clean funding for these races is a considerable amount of money and warrants this additional scrutiny.

Most Article 1 Rules – R2-20-101 – R2-20-115

- Updates and in some cases corrects various cross-references affected by SB1516

Legal framework

The staff recommendation again attempts to adopt avoid conflict where possible with the SB1516 language. However, the fact remains that there are numerous voter protection act as well as equal protection and other issues raised by the measure. Attempts to directly limit commission enforcement are plain VPA violations.

However, other issues exist. By way of illustration, SB 1516 expressly states that the cross references contained in the act failed to be updated consistent with the VPA. However, some people will nevertheless argue that where SB1516 changed the underlying cross-referenced statute, the change is effective notwithstanding the VPA, and despite a recent AG opinion rejecting that construction of cross references. Ariz. Att’y Gen. Op. I16-01 at 4 (“The Arizona and United States Supreme Court have recognized the principle of statutes adopting and incorporating other authorities by reference.”), available at <https://www.azag.gov/sgo-opinions/state-fire-marshal%E2%80%99s-adoption-national-fire-protection-association-code>

The cross-references alone raise legal questions. For example, what is the factor that should be used to adjust campaign finance limits? Inflation, as the unamended Clean Elections Act states, or \$100 as SB1516’s companion HB2297 calls for. (The rule proposal seeks to address cross-reference issues on permitted campaign contributions and their limits by applying ARS 16-941(B) to the new statutory sections.)

Additionally, the exemptions from the definitions of contribution and expenditure have been vastly expanded. For example, a corporation or union can now directly contribute to a political party for certain activities, A.R.S. 16-911(B)(5), and parties can in turn make coordinated expenditures on behalf of candidates that are not contributions at all. Thus, although the party cannot directly write a check to a candidate with corporate-generated funds, A.R.S. 16-915(B), the services of the party are not contributions at all. Similarly, all legal costs may be paid by any entity, including corporations and unions, regardless of their purpose and these donations will be both unlimited and undisclosed. A.R.S. 16-911(B)(6)(c). Individuals, for example, may make donations of food, property usage and invitations that are not limited or reported. A.R.S. 16-911(B). Other provisions allow expansion of the internal communication by entities to groups nominally related to the entity in coordination with candidates free from limit or disclosure, A.R.S. 16-911((B)(10) and expands the facilities that can be made available by individuals and corporations and unions to candidates free from limit or disclosure, A.R.S. 16-911 (B)(11). These issues and issues like them could raise cross-reference problems as they tend to allow for greater donations and less disclosure which could be seen as contrary to the anti-corruption purposes of the Clean Elections Act. These issues are in addition to the U.S. and State constitutional issues noted in staff’s May 2016 memo to the Commission.

During the session, the Commission advised the legislature of the risks of creating two parallel systems. Now, we recommend using the new limits statutes and adjustments for discussion purposes and so indicating by rule. But the legal conflict is open and apparent. We therefore recommend the Commission continue to note its legal concerns in proposals circulated for public comment.

Therefore, we recommend the Commission include in its notices the following language:

The legality of provisions of SB1516 and HB2297, and their companion measure HB2296 (all enacted in the 2016 legislative session) remain open to question. In the interest of consistency, the Commission proposes to adopt rules consistent with those changes where possible. The Commission's rulemakings are exempt from Title 41, Ch. 6, Article 3, pursuant to A.R.S. § 16-956.