CLC
ADVANCING DEMOCRACY THROUGH LAW

July 22, 2019

Submitted electronically to sos.rulemaking@sos.state.co.us

The Honorable Jena Griswold
Secretary of State
1700 Broadway, Suite 200
Denver, CO 80290

Dear Secretary Griswold,

The Campaign Legal Center ("CLC") respectfully submits these written comments regarding the proposed rulemaking for campaign and political finance.[1] CLC staff attorney Austin Graham will also be present at the Secretary's rulemaking hearing on July 24 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 origin of funds spent to influence elections.

Our comments concern the disclosure requirements of H.B. 1318, the Clean Campaign Act of 2019. Colorado's new disclosure law presents a framework to address one of the most significant problems in campaign finance regulation today: dark money and, in particular, the deliberate funneling of political contributions through multiple entities to keep the underlying sources of the funds hidden from the public. CLC is doubtful, however, that the new law will effectuate greater transparency in Colorado's elections unless judiciously implemented by regulations.

As enacted, several of H.B. 1318's provisions require regulatory interpretation to ensure the effectiveness of the new disclosure regime for covered organizations. Chiefly, the law's limited application to transfers "earmarked" by a covered organization or its donors for independent expenditures or electioneering communications, and its allowance for a covered organization's donors to opt out of

[1] Notice of Proposed Rulemaking, Rules Concerning Campaign & Political Finance, 8 C.C.R. 1505-6, Colo. Reg. Vol. 42, No. 12 (June 25, 2019).

public disclosure with an unverified claim of harm or harassment could seriously undermine the statute's new requirements in the absence of thorough rules.

We believe the proposed rules provide insufficient guidance on the disclosure requirements added by the bill. Only two provisions of the proposed rules refer to H.B. 1318's amendments to § 1-45-107.5(14), C.R.S., and neither reference meaningfully addresses covered organization disclosure. Accordingly, we urge the Secretary to use this rulemaking to clarify disclosure requirements for covered organizations and to truly effectuate Colorado's new law. In doing so, the Secretary would help to deliver meaningful political transparency to the people of Colorado.

I. The Final Rules Should Clarify the Meaning of "Earmarked" Transfers to Ensure Adequate Disclosure by Covered Organizations

H.B. 1318 introduced new disclosure requirements for any "covered organization" making annual transfers of $10,000 or more "earmarked" for purposes of the recipient, or a subsequent transferee, making independent expenditures or electioneering communications.[2] Upon making $10,000 or more in "earmarked" transfers, a covered organization must provide each recipient of transferred funds with a written affirmation listing certain information about the organization and its transfers;[3] if it is a nonprofit entity, a covered organization generally must also include in the affirmation the name of any "person" who transferred $5,000 or more to the organization in the previous 12 months if the transfer was "earmarked" for the purpose of making an independent expenditure or electioneering communication.[4] Each recipient of $10,000 or more in "earmarked" transfers from a covered organization must submit the organization's affirmation to election officials when filing reports of independent expenditures or electioneering communications.[5]

While H.B. 1318 amended the statutory definition of "earmark" to include donations designated for making electioneering communications, the legislation did not otherwise describe when covered organizations and their donors have "earmarked" transfers for purposes of making independent expenditures or electioneering communications. Likewise, the proposed rules do not clarify the meaning of "earmarked" transfers for purposes of disclosure under amended § 1-45-107.5, C.R.S. Indeed, only one provision in the proposed rules, the definition of "transfer" in section 1.23, relates to the statute's new disclosure mandates.

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[2] Clean Campaign Act of 2019, 2019 Colo. Sess. Laws 3040, 3042-44 (to be codified at Colo. Rev. Stat. § 1-45-107.5(14)). As defined in H.B. 1318, "covered organization" means "a corporation, including an entity organized under section 501(c) or 527 of the Internal Revenue Code, a labor organization, or an independent expenditure committee. It does not include a small donor committee, political party committee, or candidate committee."

[3] *Id.*

[4] *Id.*

[5] *Id.* The recipient also must maintain a copy of the covered organization's written affirmation for at least one year after the end of the election cycle in which the affirmation was received. *Id.*

The absence of regulatory guidelines implementing the earmarking conditions in § 1-45-107.5(14), C.R.S., would significantly undercut the new law's efficacy. Reporting requirements that limit disclosure to donors who have evidenced a specific intent to pay for campaign-related expenditures are notoriously ineffectual. In practice, donors rarely memorialize the "purpose" of donations made to multipurpose organizations that are not registered political committees, and there is often no evidence available to demonstrate donors' intentions in contributing to non-committee entities, which, in addition to making expenditures in campaigns, may engage in a range of activities unrelated to elections. Consequently, limiting financial reporting to formally earmarked funds can preclude meaningful public disclosure of the sources of campaign-related spending.

At the national level, the Federal Election Commission ("FEC") has narrowly construed federal law's reporting obligations for non-committee organizations that make independent expenditures and electioneering communications, requiring these groups only to disclose donors who provided contributions earmarked "*for the purpose of furthering*" specific independent expenditures or electioneering communications.[6] Under the FEC's regulations, non-committee organizations do not have to identify any donors—regardless of the size of their contributions—absent evidence of their intent to pay for a particular advertisement.[7] This standard has proved comically easy for sophisticated donors to evade. Coupled with the Supreme Court's decision in *Citizens United v. FEC* striking down restrictions on corporate independent expenditures,[8] the earmarking prerequisites within the FEC's reporting rules have facilitated an exponential increase in "dark money" in federal campaigns. According to one estimate, non-committee groups that do not disclose their donors spent at least $769 million on independent expenditures in federal elections between 2010 and 2018.[9]

Dark money has also become a problem in Colorado. Over $200 million was spent in Colorado's 2018 election, a record amount.[10] A considerable share of the campaign spending last year was funded by nonprofits and corporate entities that did not have to disclose their sources of funding under state law.[11] For instance, the

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[6] 11 C.F.R. §§ 109.10(e)(1)(vi), 104.20(c)(9) (emphasis added).
[7] *See id.* In August 2018, a federal district court invalidated the FEC's regulatory framework for donor disclosure by non-committee groups that make independent expenditures, holding the FEC's rule "impermissibly narrows the mandated disclosure . . . which requires the identification of such donors . . . even when the donor has not expressly directed that the funds be used in the precise manner reported." *CREW v. FEC*, 316 F. Supp. 3d 349, 423 (D.D.C. 2018), *appeal docketed*, (D.C. Cir. Aug 30, 2018) (No. 18-5261).
[8] 558 U.S. 310 (2010).
[9] *CLC Analysis: FEC Rule Kept As Much As $769 Million in Political Spending in the Dark*, CAMPAIGN LEGAL CTR. (Nov. 12, 2018), https://campaignlegal.org/document/clc-analysis-fec-rule-kept-much-769-million-political-spending-dark.
[10] Sandra Fish, *It's official: 2018 is the costliest year ever in Colorado politics*, COLO. SUN (Oct. 31, 2018), https://coloradosun.com/2018/10/31/colorad-election-2018-spending-record/.
[11] Sandra Fish, *Here's how much the oil and gas industry spent on the 2018 election in Colorado*, COLO. SUN (Dec. 12, 2018), https://coloradosun.com/2018/12/12/oil-gas-money-2018-election-colorado/ ("The top 10 corporate and nonprofit donors on Colorado's elections this

Sixteen Thirty Fund, a 501(c)(4) organization based in Washington, D.C., gave over $10.5 million to left-leaning independent expenditure PACs and issue committees active in Colorado's 2018 election, while two conservative nonprofits, the Colorado Economic Leadership Fund and the Workforce Fairness Institute, collectively donated millions to various political committees aligned with state Republicans and the oil-and-gas industry;[12] none of these groups had to report donors under the FCPA. At the local level, dark money played a prominent role in Denver's municipal election earlier this year, as independent spending by nonprofits and other "outside" groups surpassed $1 million.[13]

According to its proponents, H.B. 1318 will help to address the problem of money being funneled into Colorado elections through non-committee organizations that do not otherwise disclose their sources of funding.[14] But because the disclosure framework added by H.B. 1318 is confined to transfers "earmarked" for independent expenditures or electioneering communications, the new disclosure requirements will improve transparency only if the Secretary promulgates an effective regulatory interpretation of "earmarked." Otherwise, § 1-45-107.5(14), C.R.S., will be readily susceptible to evasion.

Defining "Earmarked" for Purposes of § 1-45-107.5(14), C.R.S.

To ensure H.B. 1318 brings about more disclosure in Colorado, the final rules should include a comprehensive definition of "earmarked" for purposes of transfers covered under § 1-45-107.5(14), C.R.S., the scope of which is dependent on the meaning of "earmarked." Moreover, because Colorado's new disclosure regime entails multi-level reporting, a thorough definition of "earmarked" in the rules would help Colorado voters to trace money spent in state elections to the original sources of the funds, even when those sources are several steps removed from the making of independent expenditures or electioneering communications.[15]

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year combined to spend $51.6 million in all, which represented 36 percent of the total money spent by issue committees and super PACs at the state level").

[12] *Id.*; Sandra Fish, *Dark money and disclosure gaps are priorities for new state election chief, Democrats,* COLO. SUN (Dec. 31, 2018), https://coloradosun.com/2018/12/31/jena-griswold-dark-money-campaign-finance-colorado/.

[13] Andrew Kenney, *Outside groups spent more than $1 million to influence Denver's election, and it took a lot of work to figure that out*, DENVER POST (June 17, 2019), https://www.denverpost.com/2019/06/17/denver-elections-dark-money-spending/.

[14] *See* Sam Brasch, *Colorado Dems Have A Plan To Shine A Light on Dark Money. Could It Work?*, CPR NEWS (June 20, 2019), https://www.cpr.org/2019/06/20/colorado-dems-have-a-plan-to-shine-a-light-on-dark-money-could-it-work/.

[15] Although the FCPA defines "earmark," the statute's definition is not specific to transfers made by covered organization. *See* Colo. Rev. Stat. § 1-45-103(7.5). As amended by H.B. 1318, the FCPA's definition of "earmark" encompasses "a designation, instruction, or encumbrance that directs the transmission and use by the recipient of all or part of a donation to a third party for the purpose of making one or more independent expenditures or electioneering communications in excess of one thousand dollars." Clean Campaign Act of 2019, 2019 Colo. Sess. Laws 3040, 3040.

CLC recommends the Secretary look to "covered transfer" laws for guidance in developing a definition of "earmarked" for the final rules. Unlike many reporting laws, which only require the ultimate spenders of funds to disclose their donors, covered transfer laws introduce reporting requirements for intermediary organizations moving money that is designated or solicited for campaign-related spending. The most well-known covered transfer legislation is the federal DISCLOSE Act.[16] Formulated in response to the surge of dark money spending after *Citizens United*, the DISCLOSE Act generally would require corporations, labor unions, and nonprofit groups to disclose any transfer in excess of $10,000 made to another organization if the transfer was: (i) designated for campaign-related disbursements, including independent expenditures or electioneering communications; (ii) provided in response to a solicitation to fund campaign-related disbursements; (iii) made following discussions with the recipient about making campaign-related disbursements; or (iv) given to a recipient whom the transferring organization knew or should have known would use the transfer to pay for campaign-related disbursements.[17]

This year, the House of Representatives passed a version of the DISCLOSE Act as part of H.R. 1.[18] Moreover, both Rhode Island and Austin, Texas have passed

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[16] DISCLOSE is an acronym for "Democracy Is Strengthened by Casting Light on Spending in Elections." 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/.

[17] *Id.*; *see also* Lisa Rosenberg, *What You Should Know About the DISCLOSE Act Part 2: How does the DISCLOSE Act Shine a Light on Super PACs and Dark Money?*, SUNLIGHT FOUND. (July 13, 2012), https://sunlightfoundation.com/2012/07/13/what-you-should-know-about-the-disclose-act-part-2-how-does-the-disclose-act-shine-a-light-on-super-pacs-and-dark-money/.

[18] For the People Act of 2019, H.R. 1, 116th Cong. § 4111 (2019) ("COVERED TRANSFER DEFINED.—(1) IN GENERAL.—In this section, the term 'covered transfer' means any transfer or payment of funds by a covered organization to another person if the covered organization—(A) designates, requests, or suggests that the amounts be used for—(i) campaign-related disbursements (other than covered transfers); or(ii) making a transfer to another person for the purpose of making or paying for such campaign-related disbursements; (B) made such transfer or payment in response to a solicitation or other request for a donation or payment for—(i) the making of or paying for campaign-related disbursements (other than covered transfers); or (ii) making a transfer to another person for the purpose of making or paying for such campaign-related disbursements; (C) engaged in discussions with the recipient of the transfer or payment regarding—(i) the making of or paying for campaign-related disbursements (other than covered transfers); or (ii) donating or transferring any amount of such transfer or payment to another person for the purpose of making or paying for such campaign-related disbursements; (D) made campaign-related disbursements (other than a covered transfer) in an aggregate amount of $50,000 or more during the 2-year period ending on the date of the transfer or payment, or knew or had reason to know that the person receiving the transfer or payment made such disbursements in such an aggregate amount during that 2-year period; or (E) knew or had reason to know that the person receiving the transfer or payment would make campaign-related disbursements in an aggregate amount of $50,000 or more during the 2-year period beginning on the date of the transfer or payment.").

covered transfer laws modeled on the DISCLOSE Act.[19] Because they extend reporting requirements beyond contributions given for the express purpose of paying for independent expenditures or electioneering communications, these laws present a more comprehensive approach to disclosure that takes into account the context in which money was contributed, helping to ensure the public knows the real sources responsible for transfers given—directly or indirectly—to influence elections. In the final rules, the Secretary should consider incorporating elements of covered transfer reporting into a new definition of "earmarked" specific to the requirements of § 1-45-107.5(14), C.R.S.

Suggested Text for the Final Rules

"For purposes of § 1-45-107.5(14), C.R.S., a covered organization or donor to a covered organization has 'earmarked' a contribution, donation, or transfer for the purpose of making an independent expenditure or electioneering communication if the covered organization or donor:

(a) Designates, instructs, or directs that the contribution, donation, or transfer be used for independent expenditures or electioneering communications or making a transfer to another person for the purpose of making independent expenditures or electioneering communications. A person 'designates, instructs, or directs' that amounts be used for independent expenditures or electioneering communications 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 contribution, donation, or transfer be used for independent expenditures or electioneering communications; or

(b) Made the contribution, donation, or transfer in response to a solicitation or other request for a transfer or payment for the making of independent expenditures or electioneering communications or making a transfer to another person for the purpose of making independent expenditures or electioneering communications.

II. The Final Rules Should Describe the Opt-Out Process for Donors Claiming They Face a "Reasonable Probability" of Harm or Harassment from Disclosure

Pursuant to H.B. 1318's amendments to § 1-45-107.5, C.R.S., upon reaching the $10,000 threshold in "earmarked" transfers, a covered organization must provide a written affirmation to each recipient of its transfers that lists specific information about the organization.[20] If a covered organization is a nonprofit, its affirmation statement generally must include identification of any person who made transfers of $5,000 or more to the organization in the preceding 12 months that were

[19] R.I. Gen. Laws Ann. § 17-25.3-1; Austin, Tex., City Code § 2-2-34.
[20] Clean Campaign Act of 2019, 2019 Colo. Sess. Laws 3040, 3042-44 (to be codified at Colo. Rev. Stat. § 1-45-107.5(14)).

"earmarked" for the purpose of making an independent expenditure or electioneering communication.[21]

However, a covered organization must redact from its written affirmation the name of any "natural person" donor who asserts that public disclosure would "lead to a reasonable probability of harm, threats, harassment, or reprisals to the person or to individuals affiliated with that person."[22] To opt out of disclosure, a donor must provide the covered organization with a written statement, made under oath on a form prescribed by the Secretary, that the person believes there is a "reasonable probability" he or she will be subject to harm, threats, harassment, or reprisals if publicly identified.[23] Covered organizations must retain opt-out forms received from donors for at least a year, and must provide the forms to the Secretary in response to a request related to an investigation of a potential campaign finance violation.[24]

Colorado law's donor opt-out provision is loosely based on a narrow exemption established by the U.S. Supreme Court more than forty years ago. In *Buckley v. Valeo*, the U.S. Supreme Court established that, in limited circumstances, as-applied relief from disclosure was available for a minor party that could demonstrate "a reasonable probability that the compelled disclosure of [its] contributors' names will subject them to threats, harassment, or reprisals from either Government officials or private parties."[25] *Buckley*'s recognition of the availability of as-applied exemptions was grounded in principles from the Court's prior holding in *NAACP v. Alabama*, which blocked the State of Alabama's pernicious attempts to force the NAACP to publicly identify its local members during the Jim Crow era.[26]

Not long after *Buckley*, the Court held that the Socialist Workers Party ("SWP") had presented sufficient evidence of threats, harm, and reprisals to warrant an as-applied exemption from Ohio's Campaign Expense Reporting Law.[27] In *Brown v. Socialist Workers '74 Campaign Committee*, the record contained "substantial evidence of past and present hostility from private persons and government officials against the SWP," including instances of workplace hostility, threats and hate mail, police harassment, and even a "massive" FBI surveillance operation centered on the party.[28] In light of the extensive record of governmental and private hostility against the SWP and its members, the Court concluded the "balance of interests" favored exempting the party from Ohio's disclosure law.

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[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] 424 U.S. 1, 74 (1976).
[26] *Id.* at 69-72. The connection between *Buckley*'s as-applied exemption and *NAACP v. Alabama* underscores the level of potential harm necessary to justify an exemption from campaign finance disclosure, i.e., "where the threat to the exercise of First Amendment rights is so serious and the state interest furthered by disclosure so insubstantial that the [disclosure] requirements cannot be constitutionally applied." *Id.* at 71.
[27] *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87 (1982).
[28] *Id.* at 98-102.

Despite numerous opportunities to do so, the Supreme Court has not granted an as-applied disclosure exemption since *Brown*.[29] Accordingly, *Buckley* and *Brown* continue to guide courts in deciding whether particular organizations should be exempt from disclosure. Under the standard developed in those cases, as-applied exemptions are available only to minor parties or organizations that can proffer substantial evidence showing a "reasonable probability" of threats, harassment, or reprisals to their supporters if compelled to disclose them.

Along with courts, the FEC may grant exemptions from federal law's disclosure requirements through its advisory opinion process.[30] When assessing requests for exemptions, the FEC considers two distinct questions: (i) whether a group is a "minor" party or organization;[31] and (ii) whether the past and present evidence of harassment, threats, or reprisals against the group and its supporters outweighs the governmental interests in favor of disclosure.[32] Under this analysis, the FEC has granted only one organization an exception from federal law's disclosure requirements. Between 1990 and 2012, the FEC issued a series of advisory opinions extending the partial exemption from certain federal reporting requirements that the SWP had originally received from the Supreme Court.[33] In each case, the FEC was presented with specific evidence that the SWP and its members continued to be subject to documented threats, harassment, and reprisals.[34] The FEC, like the Supreme Court, has not accepted other organizations' requests for exemptions, however, appropriately limiting as-applied relief to situations in which it was constitutionally necessary.

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[29] *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 367-71 (2010).
[30] 11 C.F.R. § 112.1; *see also* FEC Advisory Op. 1990-13 at 2.
[31] For the initial question of whether a group constitutes a "minor" party or organization, the FEC examines both the organization's "electoral success" and its financial viability. Generally, only a party or organization whose favored candidates have achieved few, if any, electoral wins, and that has raised a relatively negligible amount of money from a small number of contributors will be considered "minor." FEC Advisory Op. 2012-38 at 8.
[32] FEC Advisory Op. 2012-38 at 8. If a group does qualify as a "minor" party or organization, the FEC then examines the history of harassment, threats, or reprisals directed at the organization by government officials and private sources, as well as contemporary evidence of continued hostility against the group from government and private sources. Lastly, the FEC balances those two complementary factors against the government's interests in public disclosure of an organization's contributions and expenditures. *Id.*
[33] FEC Advisory Op. 1990-13; FEC Advisory Op. 1996-46; FEC Advisory Op. 2003-02; FEC Advisory Op. 2009-01; FEC Advisory Op. 2012-38. In 2017, however, a majority of the FEC failed to agree whether the SWP continued to qualify for a partial reporting exemption. Letter from Adav Noti, Associate General Counsel, FEC, to Michael Krinsky & Lindsey Frank (Apr. 20, 2017), https://www.fec.gov/files/legal/aos/2016-23/2016-23.pdf. After reviewing the SWP's latest request for an exemption, some members of the FEC believed "the probability of adverse action against the SWP is significantly lower than it was at any previous time the Commission has considered this issue, and the public interest in disclosure of SWP's financing is greater." Draft A, FEC Advisory Op. 2016-23 at 17-18 (Jan. 5, 2017), https://www.fec.gov/files/legal/aos/2016-23/201623.pdf.
[34] *See* FEC Advisory Op. 2012-38 at 3-4 (describing different types of evidence submitted to FEC by SWP's supporters).

Consistent with the Supreme Court's and the FEC's limited application of the exemption, the Secretary should promulgate rules to ensure the opt-out provision in § 1-45-107.5(14), C.R.S., is employed only by donors facing threats comparable to those experienced by the Socialist Workers Party for many years. Specifically, to standardize usage of state law's opt-out provision, the final rules should describe: (i) the requirements for donors to request that covered organizations redact their names from written affirmations; (ii) how covered organizations, in turn, should process donors' opt-out requests; and (iii) the Secretary's process for deciding whether donors have met the requirements for opting out of disclosure, pursuant to § 1-45-107.5(14)(d)(IV)(C), C.R.S.

a. Describing the Process for Donors to Submit Opt-Out Requests

In the final rules, we recommend the Secretary promulgate regulatory requirements for donors to request that covered organizations redact their names from written affirmations. State law, as amended by H.B. 1318, does not delineate the formal process for donors to opt out of disclosure, other than by stipulating that donors must affirm, under oath, "there is a reasonable probability that they will be subject to harm, threats, harassment, or reprisal if disclosed."[35]

Accordingly, the rules should specify a method for donors to submit opt-out requests to covered organizations. In addition, the rules should require donors to submit a "sworn statement," as part of the opt-out request, that describes their reasons for avoiding disclosure. Along with the sworn statement, a donor should include any documentation or materials that substantiate the opt-out request, such as evidence of harassment, employment repercussions, violence, or serious threats directed toward the donor or other similarly situated individuals. In its assessments of the SWP's requests for exemptions, for example, the FEC considered a broad range of exhibits submitted by the SWP, each of which included at least one sworn statement from an SWP supporter and various supporting materials, such as police reports, court records, news accounts, correspondence, and other materials.[36] In Colorado, the final rules similarly could require donors to submit comparable evidence, if available, with their opt-out requests.

Importantly, a requirement for donors to provide a sworn statement, along with supporting evidence, would aid investigations of potential violations of the new disclosure law. By establishing a written record of a donor's stated justification for opting out of disclosure, the Secretary could more easily assess whether the donor's reason for eschewing disclosure was legitimate. Relatedly, a sworn statement would help to prevent evasion of state law by individuals trying to avoid public identification without legal justification.

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[35] Clean Campaign Act of 2019, 2019 Colo. Sess. Laws 3040, 3044 (to be codified at Colo. Rev. Stat. § 1-45-107.5(14)(d)(IV)(C)).
[36] *See* FEC Advisory Op. 2012-38 at 3-4; FEC Advisory Op. 2003-02 at 6.

b. Describing the Process for Covered Organizations to Redact Donors' Names

The final rules should detail the requirements for covered organizations to process donors' opt-out requests, as state law does not make clear how the organizations should remove donors' names from their written affirmations. Thus, establishing regulatory parameters for this process would assist covered organizations in complying with state law and promote standardization in covered organizations' management of opt-out requests. In describing the intake process for such requests, the rules should clarify how covered organizations should deal with incomplete or inaccurate opt-out forms, and specify at what point covered organizations may no longer accept donors' requests for name redaction.

Along with procedural clarifications, the final rules should make clear that only "natural persons" may lawfully request redaction of their names under state law's opt-out clause.[37] Further, the regulatory guidelines should stress that state law only permits the redaction of a donor's *name* from a written affirmation, as H.B. 1318 did not authorize the removal of other information about a donor's transfers to a covered organization.[38] Even if individual donors' names are absent from a written affirmation, information about the amounts and dates of those donors' transfers can provide the public with a better understanding of a covered organization's funding, and also facilitate enforcement of the law.

c. Describing the Process for the Secretary to Determine Whether Donors Satisfy Requirements for Opt-Out

In accordance with § 1-45-107.5(14)(d)(IV)(C), C.R.S., the final rules should explain how the Secretary will make "a final decision finding that the individual whose name was redacted does not meet the requirements of this subsection."[39] The statute states only that donors must affirm their belief there is "a reasonable probability" they will be subject to harm, threats, harassment, or reprisals if disclosed. This leaves to the Secretary's regulatory discretion how to determine if there is a "reasonable probability" of harm, and the level and types of evidence that will establish such a probability of harm from public disclosure.

Because state law does not specify how donors can satisfy the evidentiary requirements for name redaction, it is important that some criteria exist for the Secretary to assess the validity of donors' opt-out claims to assure the "reasonable probability" exception is granted where appropriate and not abused by individuals who simply have personal preferences for anonymity. To establish standards for deciding whether a donor has satisfied the requirements for opt-out under § 1-45-107.5(14)(d)(IV)(C), C.R.S., the Secretary should review the FEC's advisory opinions concerning the SWP's requests for as-applied exemption from federal reporting

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[37] *See* 2019 Colo. Sess. Laws at 3043-44 ("A covered organization is not required to include a *natural person's* name if disclosure of that person would lead to a reasonable probability of harm, threats, harassment, or reprisals to the person or to individuals affiliated with that person.") (emphasis added).
[38] *Id.*
[39] *Id.*

requirements.[40] The series of FEC advisory opinions describes the amount and kinds of evidence that SWP supporters offered in support of the party's exemption requests.[41] The Secretary should review the FEC's advisory opinions for guidance in developing comparable evidentiary requirements for donors who forgo disclosure under Colorado law.

In conclusion, if donors opt out of disclosure on the basis of unverified concerns about public disclosure, the transparency objectives of H.B. 1318 will be undermined. Accordingly, regulatory guidelines, like those described above, are essential to safeguard against exploitation of state law's opt-out provision.

III. The Final Rules Should Ensure That the Public Can Readily Access Disclaimer Statements on Digital Campaign Advertising

H.B. 1318 expanded Colorado's disclaimer requirements to cover communications "placed on a website, streaming media service, or online forum for a fee."[42] The new law authorizes the Secretary to specify, by rule, size and placement requirements for disclaimer statements to be included on online communications.[43]

The proposed rules require that "[i]f the size, format, or display requirements of an electronic or online communication make it impracticable to include a disclaimer statement on the communication, the disclaimer statement must be available by means of a direct link from the communication to the web page or application screen containing the statement." The proposal further states that "information provided in the direct link must be clearly and conspicuously displayed, and be immediately apparent on the screen." Under the proposed rules, it is "impracticable" to include a disclaimer on an online or electronic communication "if the text of the required disclaimer statement would constitute 20 percent or more of the total communication."

a. Requiring Digital Ads to Link Directly to Disclaimer Statements Without Recipients Navigating Through Additional Material

The inclusion of an alternative option for presenting disclaimers on certain digital campaign advertisements enables the flexibility necessary to accommodate new formats of online advertising, for which size, format, or display limitations make provision of a normal disclaimer impossible. It is important, however, that the recipients of these digital ads not be subject to a barrage of superfluous and distracting information when they try to access disclaimers through direct links. For

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[40] *See* FEC Advisory Op. 1990-13; FEC Advisory Op. 1996-46; FEC Advisory Op. 2003-02; FEC Advisory Op. 2009-01; FEC Advisory Op. 2012-38.

[41] For example, in 2012, the SWP produced a total of 57 evidentiary exhibits, falling into five general categories: (i) potential supporters' apprehension over being publicly identified as an SWP supporter; (ii) firings and alleged workplace intimidation; (iii) alleged hostility from private parties; (iv) alleged hostility from local law enforcement; and (v) other alleged governmental information gathering and sharing. FEC Advisory Op. 2012-38 at 3-4.

[42] 2019 Colo. Sess. Laws at 3047.

[43] *Id.*

example, users who select a direct link should *not* be taken to the advertiser's home page, where they would likely have to scroll through additional campaign material to locate the disclaimer information at the bottom of the page.

Therefore, the final rules should require that, upon following a direct link to view a disclaimer, recipients of a digital ad on which a full disclaimer is "impracticable" are directed to the complete disclaimer statement *without receiving or viewing any additional material* other than the statement.[44] In tandem with the proposed rules' requirement that disclaimers "be immediately apparent on the screen," this addition to the rules would assure that digital advertisements, regardless of form, supplied voters with the important information required by law.

b. Focusing "Impracticability" Exception on Technological Impossibility

Given the growing use of online advertising in election campaigns,[45] it is imperative that, to the extent possible, disclaimers on digital ads provide the same information as advertisements in more traditional media. As the prevalence of digital campaign advertisements has increased in recent years, many online platforms have adjusted their advertising formats to accommodate political ad disclaimers. In fact, Facebook,[46] Google,[47] and Twitter[48] currently *require* that election-related advertising include "Paid for by" statements with the name of the ad sponsors. Accordingly, disclaimer statements now can be easily placed on political ads disseminated on major platforms as technological innovations have made it possible to include full disclaimers on most digital communications.

The Secretary's final rules should reflect this reality. Instead of specifying that disclaimers are "impracticable" if the text would "constitute 20 percent or more of the total communication," the final rules should focus on whether there are genuine technological constraints prohibiting the placement of a disclaimer on a particular advertisement. This alternative approach is used in H.R. 1, the

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[44] For example, H.R. 1 would require any modified disclaimer statement placed on a "qualified internet or digital communication" to "provide a means for the recipient of the communication to obtain . . .the information required under this section with minimal effort and without receiving or viewing any additional material other than such required information."). H.R. 1, 116th Cong., § 4207 (2019-2020). *See also* ATTACHMENT 1.

[45] According to research firm Borrell Associates, digital ad spending in federal, state, and local U.S. elections exceeded $1 billion both in 2018 and in the 2016 election cycle. *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.

[46] Ads About Social Issues, Elections or Politics, FACEBOOK, https://www.facebook.com/business/help/198009284345835 (last visited June 14, 2019).

[47] List of Ad Policies, GOOGLE, https://support.google.com/adspolicy/answer/6014595?hl=en (last visited June 14, 2019).

[48] Political Content in the United States, TWITTER, https://business.twitter.com/en/help/ads-policies/restricted-content-policies/political-content/US-political-content.html (last visited June 14, 2019).

comprehensive federal election-reform bill, which only allows for modified disclaimers to be included on digital ads when including a full disclaimer is otherwise "not possible."[49] Similarly, California law permits small online ads to include, in lieu of full disclaimers, links to webpages with disclaimer statements only if including a full disclaimer "would severely interfere with the [sponsor's] ability to convey the intended message due to the nature of the technology used to make the communication."[50] In the final rules, the Secretary should similarly limit the "impracticability" exception to digital advertisements on which full disclaimers are not possible due to serious technological constraints.

Conclusion

At the Secretary's rulemaking hearing on July 24, CLC staff attorney Austin Graham will be present to answer questions and provide additional information about these written comments. We appreciate the Secretary's consideration of our input and recommendations regarding this rulemaking.

Respectfully submitted,

/s/
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Director, Policy & State Programs

/s/
Austin Graham
Legal Counsel, State & Local Reform

[49] H.R. 1, 116th Cong., § 4207 (2019-2020). *See also* ATTACHMENT 1.
[50] Cal. Gov't Code § 84501(a)(2)(G).

ATTACHMENT 1

H.R. 1, § 4207 "Application of Disclaimer Statements to Online Communications"

...

"(e) SPECIAL RULES FOR QUALIFIED INTERNET OR DIGITAL COMMUNICATIONS.—

"(1) SPECIAL RULES WITH RESPECT TO STATEMENTS.—In the case of any qualified internet or digital communication (as defined in section 304(f)(3)(D)) which is disseminated through a medium in which the provision of all of the information specified in this section is not possible, the communication shall, in a clear and conspicuous manner—

"(A) state the name of the person who paid for the communication; and

"(B) provide a means for the recipient of the communication to obtain the remainder of the information required under this section with minimal effort and without receiving or viewing any additional material other than such required information."