



**New Mexico**  
*Holding Power Accountable*

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November 25th, 2020

State Ethics Commission  
800 Bradbury Drive SE, suite 215  
Albuquerque, NM 87106

**Comments on Legislative Proposals**

Dear commissioners:

We are writing in response to the Commission's request for public comments on the draft amendments to certain statutes that the Commission will decide, at its meeting of December 4, whether to recommend to the legislature pursuant to §10-16G-5(B)(5) NMSA.

**General Considerations**

With one narrow exception, we agree with the substance of the draft amendments and would normally be more than willing to support their recommendation to the legislature and enactment into law. We have strong reservations, however, about the advisability of presenting these amendments to the legislature at this particular time. We suggest that several of them should not be proposed until the pandemic has passed and the legislature is once again able to conduct a regular session with full public participation in its deliberations.

It seems likely at this point that the next legislative session will be conducted under emergency procedures with serious constraints on public access and on the ability of experts and lobbyists to participate fully in the legislative proceedings. From what we have been told, the procedures for the next session will probably be similar to those that were utilized during last summer's special session. Our work at that session has made us acutely aware that these procedures are inadequate to allow the sort of ample participation by experts and members of the public that is needed to ensure thorough and thoughtful consideration of complex pieces of legislation.

This concern has particular force with respect to the proposed amendments to the State Ethics Commission Act and the provisions of the Campaign Reporting Act governing disclosure of campaign spending by PACs and other independent groups. Our organization was intimately involved in the drafting and advocacy of both of these laws during the many years of legislative deliberations that preceded their ultimate enactment in 2019, and we have closely followed their application and enforcement by the Commission in the year since they took effect.

We know from this experience that these enactments are not perfect, and we are in accord with the Commission's staff's assessment that they could benefit from some refinements to clarify their terms and improve their enforceability. We are also mindful, however, that each of these statutes is a delicate fabric, crafted during lengthy discussions and legislative hearings in which much of the work of the sponsor and the advocates consisted of fending off ill advised proposals that would have effectively thwarted the goals of the legislation. We are very concerned that if these statutes were opened up for amendment during a session in which full public participation and expert input was not available, the outcome might well be unfortunate. There is a genuine risk that the amendments resulting from such a process would do more harm than good.

We have therefore concluded that proposed amendments to these statutes should be pursued at this time only if they are urgently needed and can be presented in such a way as to minimize the risk that legislative deliberations on the amendments might spill over into a broader review and revision of these statutes. With this standard in mind, we offer the following comments on the staff's specific proposals.

### **Proposed Amendments to the State Ethics Commission Act**

In Attachment 1 to the draft Annual Report, the staff has presented drafts of amendments to four sections of the State Ethics Commission Act. The proposed amendments are: (1) amendments to the "definitions" section of the Act and the section specifying procedures for the adjudication of complaints that would repeal a requirement for complaints to be notarized, (2) an amendment to the section prescribing the qualifications of commissioners that would require commissioners to file annual financial disclosure forms, and (3) an amendment to the section defining the jurisdiction and powers of the Commission that would change a single word ("respondent" to "defendant") in the final subsection.

Of these proposed amendments, we believe that only the last one - the change from "respondent" to "defendant" - should be recommended by the commission and presented to the legislature at the next session. We appreciate the importance of that amendment as a clarification and confirmation of the Commission's authority to enforce the law by means of a lawsuit in district court without the need to conduct an administrative proceeding in advance of filing its complaint. Since the amendment would entail changing only a single word in one subsection of the law, we think it would be feasible for the sponsor, who we will hope will be Sen. Stewart, the sponsor of the 2019 Act, to forestall other amendments and to keep the debate from expanding into a general reexamination of the terms of the SECA. We therefore support the staff's proposal to present this amendment to the legislature at its next session.

We cannot presently support, however, the other three amendments to the SECA that are proposed in Attachment 1 - that is, the two amendments repealing the requirement that complaints be notarized and the amendment imposing a requirement for commissioners to file financial disclosure forms. These amendments would open up for debate three additional lengthy sections of the Act that are central to its structure - namely, the "definitions" section, the section delineating the qualifications of commissioners and the section on complaint procedures. Although we have no doubt that these proposed amendments have merit and should be adopted at some point, we do not believe they are of sufficient importance or urgency to justify the risk that this debate might invite additional amendments that would weaken the Act. We therefore urge the Commission to withhold these proposals until the legislature has resumed normal procedures and experts and advocates are once again allowed to participate fully in the deliberations.

### **Proposed Amendments to the Campaign Reporting Act**

The staff has proposed several amendments to the Campaign Reporting Act in Attachment 2 to the draft Annual Report. All but one of these are addressed to the enforcement provisions of the CRA and would make no change in the sections prescribing the substantive rules for campaign finance reporting. Although we must confess a certain wariness toward opening debate about any part of this complex Act under the constraints on public participation that are likely to be imposed at the next session, we are reasonably confident that the sponsor, who we hope will be Sen. Wirth, sponsor of the 2019 amendments, would be able to maintain a clear demarcation between these purely procedural

amendments and the substantive provisions of the reporting law, and to prevent the deliberations from expanding to encompass these latter provisions.

At the same time, we appreciate the importance of these amendments in streamlining the Commission's procedures and eliminating opportunities for delay in the enforcement of the Act. With some trepidation, therefore, we support the inclusion of these proposals to amend the CRA's enforcement provisions among the amendments that the Commission will recommend to the legislature for the next session.

We must oppose, however, inclusion of the remaining amendment to the CRA that appears in Attachment 2 - namely, the proposal to add a further proviso to §1-19-27.3(D)(2) NMSA that would create an exception to the reporting exemption conferred by the first proviso to that subsection. We recognize that this proposal is aimed at resolving a genuine problem - namely, the potential for abuse of this exemption that was revealed in the enforcement action against the Committee to Protect New Mexico Consumers, one of the independent spending groups that was active in the recent election. For several reasons, however, we urge the Commission not to present this proposal to the legislature at this time.

First, we do not think the specific amendment proposed in Attachment 2 would actually solve the problem it is meant to solve. For reasons we have discussed with the executive director, we believe the suggested language would fail in the typical case to close the loophole in §1-10-27.3(D)(2) NMSA that was identified in the CPNMC case, and would permit many independent spenders to continue exploiting this statutory exemption to conceal the identities of the donors who have financed their spending. We have offered the executive director alternative language, suggested to us by the Campaign Legal Center, that we think would more effectively close this loophole, and we are continuing to discuss this issue with him.

Secondly, however, even if appropriate language for solving this particular problem could be agreed upon, it would not correct all of the shortcomings of this section of the statute that should eventually be addressed. Since before the 2019 legislative session, we have been aware of two additional potential gaps in the coverage of this complex statutory provision that might allow certain kinds of independent spenders to avoid disclosing the sources of their funding. With the help of the Campaign Legal Center, we drafted proposed amendments that we think would have resolved these problems, but for a variety of

reasons, we were unable to get these incorporated into the bill that was finally enacted at the 2019 session. We have shared these proposals with the executive director and would at some point like to enlist the Commission's support in renewing the effort to get some version of them adopted. Discussion of these issues is ongoing, however, and any resulting proposed amendments will not be ready in time for the next legislative session. Any consideration of amendments to §1-19-27.3 NMSA at that session would therefore be partial and premature.

Thirdly, there is yet another reason why it would be premature for either the Commission or the legislature to undertake a reexamination of this statutory section at this time - namely, the pendency of litigation that may affect its interpretation and application. We understand that the Commission's staff may seek authorization at its next meeting to pursue a lawsuit against the Council for a Competitive New Mexico, another independent spender that participated in the 2020 elections, and that a principal issue in that case will be the meaning and scope of the all-important term "contribution" as it is used in §1-19-27.3. In addition, both the state and the City of Santa Fe are currently defending constitutional challenges to their disclosure requirements for independent spenders. These laws are very similar to each other, the 2019 amendments to the state law having been partly modeled on Santa Fe's law. In the Santa Fe case, which is much further along than the state case, the federal district court issued a thorough and thoughtful opinion ruling in the city's favor last January. The case is now on appeal to the Tenth Circuit, which has scheduled oral argument for next January. It seems likely that the outcome of some or all of these cases will reshape or refine the application of §1-19-27.3 and, therefore, the nature of any amendments that may be needed to clarify its terms and improve its administration.

This brings us to the final and most important reason why we are urging the Commission to refrain from presenting to the legislature the amendment to §1-19-27.3 NMSA that is proposed in Attachment 2. Besides falling short of fixing the problem it addresses and inviting a legislative reconsideration of this section that would necessarily be piecemeal and premature, the proposed amendment would initiate this reconsideration at a time when it will be impossible, under the emergency protocols likely to be adopted for the next session, to provide the public participation and expert advice that will be essential to the proper completion of such a complex project. This reason alone, we think, should suffice to persuade the Commission to omit the proposed amendment to this section from the recommendations it will send to the legislature.

We all hope that the pandemic will soon pass and that the legislature will be able to resume its normal procedures by the 2022 regular session. When this happens, it will be appropriate to undertake the challenging task of refining the provisions of §1-19-27.3 to close loopholes, take account of any intervening court decisions and generally improve disclosure of independent spending under that section in time for the next elections in 2022. We hope to work with the Commission and its staff to develop a set of recommendations for the 2022 session that would accomplish all these goals. For now, however, we urge the Commission to stay its hand.

In summary, with respect to the proposed amendments to the Campaign Reporting Act appearing in Attachment 2 to the draft Annual Report, we support all the proposals for amending the enforcement sections of the Act, but we urge the commission to omit the proposed amendment to §1-19-27.3 NMSA from the recommendations it will send to the legislature.

#### **Other Proposed Amendments**

The remaining parts of Attachment 2 propose amendments to the enforcement sections of the Voter Action Act, the Lobbyist Regulation Act and the Financial Disclosure Act. These statutes are not as complex or sensitive as the Campaign Reporting Act, and we see no problem with proposing to amend them even at a legislative session in which public participation will be less than optimal. These proposed amendments would facilitate enforcement of these laws, and we support their inclusion among the Commission's recommendations.

We thank the Commission and its staff for the opportunity to comment on its draft legislative recommendations and to participate in its deliberations. We hope the Commission will give our views careful consideration.

Yours truly,

COMMON CAUSE NEW MEXICO

By         /s/                          
Heather Ferguson  
Executive Director

/s/

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Jim Harrington  
State Board Chair