

## **Report from the Campaign Finance and Elections Working Group to Boulder City Council**

December 11, 2018

This Working Group was asked to review the city's campaign finance and initiative processes and to make recommendations for any changes to City Council ("Council"). After presenting its report to Council on initiatives, referendum and recall, the working group met on April 11, April 17, April 25, May 23, June 13, June 27, July 25, August 22, August 29, September 26, and November 1, 2018 to work on campaign finance reform. This report covers the group's progress regarding the reform of campaign finance regulation in the Boulder Revised Code ("BRC" or "Code").

The Working Group's Charter tasked the group to recommend regulations "that promote the integrity of the election process by: (i) providing for maximum campaign finance disclosure under existing law; AND (ii) providing for maximum campaign finance disclosure in ways that have not previously been judicially recognized, considering both the objectives of election integrity and constitutional rights." The Working Group had assistance from outside counsel to research and advise on constitutional and other legal issues relating to elections. Based on the Council's directive, we focused on disclosure requirements, rather than on limiting expenditures, restrictions on speech, or other measures that were raised for consideration in the working group's discussions.

By way of background, many of our discussions revolved around various concerns members of the working group had with campaign activities in the 2017 municipal election. Specific areas of concern included the following:

- (1) campaign materials were distributed with check boxes next to pictures of candidates, and other materials had candidates' names and complimentary statements or affirmations about them. Many questioned why the organizations distributing these materials were not required to disclose the source of the funds or report how much had been spent on them;
- (2) campaign materials were distributed that included endorsements for candidates along with ballot measures, raising questions as to whether this was an improper combination of committees;
- (3) contributions to candidate and ballot measure committees and expenditures on advocacy materials made by entities rather than natural persons make it hard for the electorate to know who is supporting the candidates and measures and why; and
- (4) the silence of the City Clerk in response to queries about complaints that had been filed left citizens uninformed about the status of the complaints and the process for resolving them.

It is important to note that proposed regulations are not included for consideration with this report. To facilitate our discussions, staff presented draft regulatory language for possible amendments to the Code. While these working drafts were helpful, more time is needed to do the detailed and careful work of writing provisions that are narrowly tailored, understandable, effective, and consistent with current law. This is important because overly-broad language, gaps, and inconsistencies create risk of legal challenges to both new and existing requirements. Once Council has determined which changes it wants to pursue, we recommend further work be done to incorporate its desired changes in a comprehensive revision of the chapter.

### **PROBLEM STATEMENTS AND RECOMMENDATIONS**

Set forth below are the problem statements the Working Group sought to address together with the consensus of our recommendations for changes to the BRC. The members of the Working Group believe these recommendations satisfy the tasks we were assigned to tackle in our Charter.

#### **Expand the Definition of Express Advocacy:**

**Problem:** In the current BRC, the definition of “Express Advocacy” is used to determine which campaign advertisements and materials require disclosure of the contributions and expenditures related to their creation and dissemination. Presently, our campaign finance laws regulate activities that expressly advocate for the election or defeat of a candidate by using words such as “vote for,” “elect,” “support,” “cast your ballot for,” “Smith for council,” “vote against,” “defeat,” and “reject.” *Buckley v. Valeo*, 424 U.S. 1, 20, 96 S. Ct. 612, 635, 46 L. Ed. 2d 659 (1976). According to outside counsel, the definition set forth in our code does not capture all forms of advocacy that may be regulated under current law as express advocacy.

**Recommendations:** We recommend that Council broaden the definition of “express advocacy” to include all the terms set forth in *Buckley* along with words or symbols that are the “functional equivalent” of these terms. This change would bring our regulations up to date with other jurisdictions, ensuring that express advocacy can be regulated to the full extent allowed by the *Buckley* decision and subsequent case law. Making these changes means that, for example, the materials distributed in 2017 that had checkmarks next to the candidate pictures would be subject to our regulations requiring disclosure of the contributions and expenditures involved in their creation and distribution as well as to any applicable contribution limits.

#### **Require Disclosure for Electioneering Communications:**

**Problem:** We do not have any provision in the BRC that requires disclosure of contributions to or expenditures on materials or advertising that does not meet the definition of express advocacy, but nevertheless is intended to influence the outcome of the election.

**Recommendations:** We recommend that provisions be added to the BRC to define “electioneering communication” and to require disclosure of who is doing the communication and how much they are spending. Following the *Buckley* decision, the Bipartisan Campaign Reform Act of 2002 (commonly known as the McCain-Feingold Act) established disclosure requirements for “electioneering communications,” defined as advertisements that mention the names of candidates and are broadcast via television, satellite, cable and radio in the months prior to an election. Since then, more than 25 states, including Colorado, have adopted similar regulations, expanding the definition to encompass the forms of media outside of the federal definition, such as newspapers, handouts, and direct mail. The idea behind regulating these communications is that any dissemination of positive or negative associations with a candidate or ballot measure in the period before the election is designed to have an influence on the electorate. Citizens deserve to be informed about who is making the communication and how much has been spent.

Because electioneering communications are, by definition, not express advocacy, we recommend that a threshold amount be established for when such communications fall within the scope of our regulation. The BRC requires that all contributions and expenditures on express advocacy be disclosed. For electioneering communications, we recommend setting a threshold for expenditures of \$1,000 before such disclosures are required. In addition, as discussed below, we recommend that any required disclosures identify the natural person making the expenditure.

**Identify the natural persons who are making contributions and expenditures:**

**Problem:** Currently, the BRC allows contributions to candidate and ballot measure committees to be made by legal entities and does not require disclosure of the natural persons who are behind an entity’s contributions. While it may be possible to guess the interests of certain large, well-known and/or publicly-traded corporations, many legal entities are not publicly-traded and no information is available as to the purpose of the entity, the source of its funds, and/or the identity of its key decision-makers. This is a problem because the electorate is unable to determine any biases or other interests that may exist that motivate the entity to contribute.

For example, contributions to an Official Candidate Committee or an Unofficial Candidate Committee can be made by multiple LLCs that are all owned or controlled by a single person. This is not a violation of the \$100 per person cap on contributions because each LLC counts as a person. However, voters may be interested to know that an individual had essentially directed payments that add up to far more than a single natural person would be permitted to contribute. A voter’s decision on the weight to place on advocacy materials funded by an entity could be different if the voter had such disclosures. Although there is no limit on contributions to Ballot Measure Committees, the same problem arises when contributions to BMCs are made in the name of an entity rather than a natural person. We are concerned that the public may

not be able to determine who is attempting to influence the outcome of the vote and why.

**Recommendations:** We recommend amending the BRC to include detailed disclosure requirements for entities making contributions to candidate or ballot measure committees and/or expenditures on express advocacy or electioneering communications. The Working Group strongly advocates for identifying a natural person with every contribution because this provides maximum transparency for constituents, which can aid their final decision in the voting process and helps to maintain the trust in our election processes. There are a range of options as to which natural persons and how many should be disclosed for any particular type of entity. The Working Group did not settle on a specific recommendation, other than making sure that the important natural persons are identified.

**Note:** The issue of a single person making campaign contributions through multiple LLCs is included below in the list of issues for future Council consideration.

**Clarify the regulations for committees that coordinate advertising:**

**Problem:** The Working Group grappled with the matter of allowing unofficial candidate committees (“UCCs”) and issue committees (“ICs”) to jointly purchase advertising or collaborate on other forms of advocacy materials. There were 3 underlying concerns: (1) was it appropriate for UCC and ICs to jointly produce campaign materials?; (2) was this creating an unfair advantage for UCCs because the ICs do not have restrictions on the amount of their donations, or because joining together enabled the committees to buy larger ads at a discount?; and (3) were costs being properly shared between the groups?

Because of these concerns, the group created a subcommittee and met on August 29, 2018 to discuss this issue in detail. At that meeting, the subcommittee identified the primary provision in the Code that made this combining of monies problematic -- that UCCs have contribution limits and ICs do not.

**Recommendations:** The subcommittee was advised by outside counsel that efforts to address some of the concerns around coordination could run afoul of constitutional protections for freedom of association. In addition, outside counsel advised that, under current law, contributions to issue committees cannot be restricted nor can regulations be enacted with a goal of leveling the playing field between different groups engaged in political speech. As a result, the Working Group recommends that the Council adopt rules delineating how the costs of joint advertising should be allocated and reported.

Specifically, the subcommittee recommends establishing the following rules: (1) monies contributed to one committee cannot be contributed to another committee; (2) monies contributed to the cost of joint advertising must be proportional to the

committee's portion of advertising; (3) each committee must disclose the total cost of the joint material along with the amount it paid for its portion. The committees would continue to be subject to the existing requirements to establish separate bank accounts, maintain separate records, and report their contributions and expenditures.

Notes: These recommendations pertain to Unofficial Candidate Committees and Ballot Measure committees (which is the term we recommend using for what are currently known as Issue Committees). We do not propose changing the current regulations regarding coordination with Official Candidate Committees. Under current rules, any coordination with the Official Candidate Committee results in the committees being merged and all contributions and expenditures subject to the limitations applicable to the Official Candidate Committee.

### **Ensure proper disclosure for various types of media:**

**Problem:** The current BRC does not address the format of the disclosures required on campaign materials. In addition, the content required by the BRC is inadequate in that it only requires identification the committee's name and not the identity of the individuals who were paying for the material and/or its dissemination.

**Recommendations:** Based on the advice of outside counsel, we recommend adopting disclosure requirements that are in large part comparable to that those being used in California. Basically, these specify the size, type, font, clarity, duration, location, etc. of any required disclosures across a variety of media types. In addition, the working group recommends ensuring that certain disclosures include the names of the individuals/natural persons, and not just legal entities or committee names. As discussed above, there is a range of options that could be considered by Council for how best to accomplish this objective.

Note: More work is needed to draft language that adequately covers the multitude of uses and scenarios that we anticipate in upcoming elections.

### **Clarify the role of the City Clerk:**

**Problem:** The Code presently requires the city to keep confidential the complaints about potential election violations. The reason for this is the potential for politically motivated complaints to be made that may not be based in fact. The Code provides that the release of such information may "interfere with the appropriate workings of the democratic process." Thus, when a complaint is filed and released by the complaining party to the press, the Clerk is currently prohibited from commenting and required to keep the documents confidential. This means the citizens are kept in the dark about the status of the process and the next steps for handling the complaint.

Concerns were also raised about the inherent conflict of interest in the Clerk being the hearing officer for disputes about the Clerk's own decisions.

A similar conflict of interest arises with the BRC identifying the City Manager as the named person to administer election complaints, since the City Manager is hired by the very people whose actions may be under investigation.

**Recommendations:** The Working Group recommends the following changes to the roles of the City Clerk and the City Manager:

First, the Clerk, rather than the City Manager, should be named throughout the elections chapter of the BRC, other than as the person to bring in an outside hearing officer if a decision of the Clerk is challenged, as noted below. This is because the City Manager is a political appointee and his/her employers are those against whom complaints may be filed. This change is recommended to avoid the appearance of an inherent conflict of interest in order to maintain faith and trust in our election process.

Second, the Working Group recommends that the Council consider whether it wants to revise the practice for how the Clerk handles inquiries about complaints that have been filed. There were divergent points of view in the group about how and whether to address this concern. Some members favor disclosing or otherwise treating as a public record any election code violation complaints that are made. For complaints other than those that are resolved within a few days, the Clerk should make publicly available the related documents, but avoid expressing an opinion. Others favored keeping the Code as it is presently, with no disclosure of complaints unless it is determined that a complaint has merit and that there will be a hearing on the matter. Council should decide.

Third, if a decision of the Clerk is challenged or contested, the City Manager should be required to bring in an external hearing officer, and not put the Clerk in the untenable position of having to pass judgment on his or her own decisions. The City Manager already has the authority to appoint a hearing officer under the Code as currently written.

Note: The Working Group also thought that it was advisable for the City Clerk to use a hearing officer for complaints related to initiative, referendum and recall petitions due to the fact that the City Clerk also is the person responsible for checking for authenticity of signatures and that the form of petitions meets the rules.

**Review and update enforcement provisions:**

**Problem:** The members of the Working Group did not have time to review and make recommendations for enhancements to the enforcement provisions of the BRC. We generally believe that the existing mechanisms are weak, unclear, and should be improved. Among other issues, it is not clear the extent to which enforcement is handled on a pro-active basis by city staff, such as by monitoring news outlets and social media feeds, or whether the city depends upon citizen-filed complaints to identify potential violations. Also, the current BRC establishes that

decisions by the City Clerk are final. This means any further appeal requires citizens to undertake the time and expense of a civil court action. Finally, it is not clear that the monetary fines in the BRC are adequate to deter violations. Given the amount of money that can be spent on electioneering communications, stronger consequences may be necessary.

**Recommendation:** We recommend that further work be done to develop appropriate enforcement mechanisms that: (1) establish clear procedures for how violations will be handled; (2) can be consistently applied; and (3) provide meaningful consequences tailored to the impact of the violation.

We had a mix of opinions in the group as to whether to establish an administrative appeal process that could be chosen instead of escalating appeals to civil court. Among those supporting an administrative appeal option, there was a mix of opinion as to how it should be implemented. Questions include the following: (1) what would be the basis for filing an appeal, whether a *de novo* review of underlying facts or an appeal of the legal conclusion); (2) when such an appeal could be made, whether after a hearing and determination by the Clerk or also when the Clerk determines no probable cause for hearing; and (3) where the appeal should be made, whether (a) to the Clerk to revisit the issue; (b) to an independent hearing officer; or (c) to a newly-established citizen review panel convened for the purpose of monitoring and enforcing our election rules. These issues require further consideration, including research into how such matters are handled in other jurisdictions.

### **Revise BRC 13-2 Campaign Financing Disclosure in its entirety**

**Problem:** Title 13, Chapter 2 of the BRC governing campaign financing disclosure has been revised multiple times. Although the changes recommended by this Working Group are relatively easy to explain, incorporating them into the Code requires a careful analysis to ensure that the regulations overall are narrowly tailored, clear, consistent, and complete. The members of the Working Group are not confident that the proposed revisions as currently drafted by staff fit together properly and that the results in practice will accurately reflect our intentions.

**Recommendations:** The members of the Working Group recommend that the Council direct staff to undertake a careful review and revision of the entire section to incorporate the changes desired by Council. This effort should include a review of existing provisions that could be streamlined, clarified, and/or eliminated. Our objective here is to ensure that this portion of the BRC can be readily understood by persons who participate in campaigns as well as the general citizenry. Some members of this Working Group would volunteer to assist in this effort. The Council may also seek to recruit additional volunteers to tackle these issues with fresh perspectives.

**Going Forward:** As a group, we were pleasantly surprised at the extent to which we were able to reach unanimous decisions on most of the recommendations presented in this report. As discussed throughout this report, however, many of the issues we have identified warrant further consideration and careful analysis as to how best to incorporate the ideas into clear and enforceable regulations. In addition, there were a number of topics we agreed would be important to consider but we did not have time to do so. Listed below are several matters that we believe warrant further time and attention.

- (1) Consider whether donation limits to official candidate committee and unofficial candidate committees should be based on natural persons rather than entities in order to preclude an individual from giving donations via entities that cumulatively exceed per-person contribution limits;
- (2) Review our matching fund regime to ensure it is keeping up with the cost of living or other economic index. We may also wish to consider additional requirements or benefits we could establish, such as limiting contributions to natural persons rather than entities or scaling the matching ratio based on the size or number of contributions (e.g. providing a higher match for smaller donations);
- (3) Develop written guidelines for enforcement procedures, including an administrative appeal option (as discussed above); and
- (4) Revisit the issue of city contractors contributing to official and unofficial candidate committees due to concerns that such support may be tied to expectations for future actions or decisions should the candidate be elected.

Finally, several members of this group believe our community may benefit from the establishment of an “election commission” as is common in other jurisdictions. During the time we have been meeting, election law and regulation has been actively evolving. As jurisdictions enact different approaches, challenges to these laws and regulations are being decided by courts. For this reason, several members of this working group believe there may be good reason either to keep a subset of this group active or to convene a new group that will stay focused on election law developments over time. Either as an alternative or in addition, a volunteer election commission could serve as a citizen review panel for appeals of City Clerk decisions, as discussed above.