M E M O R A N D U M

TO: ETHICS AND CAMPAIGN REVIEW BOARD

FROM: JIM HARRINGTON, COMMON CAUSE NEW MEXICO

SUBJECT: ISSUES RAISED BY THE 2014 ELECTION AND POSSIBLE CODE AMENDMENTS TO ADDRESS THEM

DATE: SEPTEMBER 26, 2014

CONTENTS

I. Introduction 1

II. Rescuing Public Financing from the Impact of PAC Spending 1

A. The Problem 1

B. The Constitutional Constraints 2

C. Designing a Solution 3

D. The Proposed Solution 5

E. The Cost of the Proposal 8

F. Alternative Proposals 9

G. Conclusion 12

III. Electronic Signatures on Contribution Forms 12

IV. Disclosure of Paid Phone-Banking 13

V. "Russian Dolls" and Contributions in the Name of Another 14

VI. Proof of Coordination 15

VII. Private Spending in the Initial Phase of a Campaign 17

VIII. Donations of Space for Campaign Events 18

IX. Additional Restrictions on Publicly Financed Candidates 20

X. Conclusion 21

I. Introduction

Many issues arose during the 2014 election campaign affecting the application of the city codes that the ECRB is charged with administering, and various proposals have been made to resolve them. All of these will presumably be addressed by the board as it conducts its legally mandated review of the codes with a view to recommending possible changes to the governing body. In this memorandum, Common Cause offers its comments on some of these issues in the hope that these may help the board in discharging this task.

With one exception, Common Cause's comments on each of the issues will be brief, merely describing the issue, stating Common Cause's position if it has one, and suggesting any possible amendments that may resolve the issue. The only subject that is discussed at greater length is the need to make the city's public financing system more resistant to the effects of private spending by PACs and other outside groups, which Common Cause believes will require some significant changes to the program. Common Cause's proposal for such changes is the first topic discussed below, followed by brief discussions of the other principal issues that arose during the campaign.

Two draft bills are attached to this memorandum. The first and shorter of these encompasses the few amendments to the Campaign Code that Common Cause has suggested in the discussion that follows. The other, longer bill would amend the Public Campaign Finance Code to implement the substantial revision of

that code that Common Cause is proposing, and to conform certain provisions of that code to the Campaign Code amendments that are proposed in the other bill.

II. Rescuing Public Financing from the Impact of PAC Spending

A. The Problem

At least from the point of view of campaign finance regulation, the most important event occurring during the 2014 campaign was the participation in the mayor's race of a pair of privately financed PACs and a privately financed national organization. These entities spent heavily - ultimately more than any of the candidates - to support one of the three mayoral candidates, all of whom had chosen to finance their campaigns with public funds. Although we will probably never know for certain how much, if at all, this activity actually helped the candidate these groups were supporting, it could well have had an impact on the outcome of the election.

If nothing else, it aroused considerable public controversy. Many civically active people and organizations roundly condemned the PACs' activities, including Common Cause, the candidates themselves and the editors of all three of the city's newspapers. All of them pointed out that this private spending tended to frustrate the achievement of the principal objective of Santa Fe's public campaign financing system, which is to eliminate or reduce the potentially corrupting influence of private campaign spending on the city's elected office-holders. Urgent pleas were made to devise some method by which this destructive activity could be discouraged, or by which its impact could at least be blunted, in future city elections.

B. The Constitutional Constraints

As the board knows, however, the city government is severely constrained in what it can do about this problem by the expansive version of the constitutional rights of these independent campaign participants that has been adopted by the current majority of the U.S. Supreme Court. Other than disclosure requirements, no legal restrictions of any kind - such as spending limits or contribution limits - can constitutionally be imposed on these groups' campaign activities. *Buckley v Valeo*, 424 U.S. 1, 47-48 (1976); *Republican Party of NM v. King*, 741 F.3d 1089, 1097 (10th Cir. 2013). Most recently, the Court has held that even the payment of additional subsidies to a publicly financed candidate who is outspent by independent groups opposing her candidacy is constitutionally impermissible because it could have the effect of discouraging these groups from fully exercising their right to spend as much as they please. *Arizona Free Enterprise Club PAC v. Bennett*, 131 S.Ct. 2806 (2011).

In the last cited case, the Court struck down the provision of most full public financing laws, including Santa Fe's original public financing ordinance (Ord. No. 2009-44), that provided for additional payments to publicly financed candidates to match the spending of their privately financed opponents and independent groups supporting their opponents. The Court reasoned that such public subsidies given "in direct response to the political speech of privately financed candidates and independent expenditure groups" effectively "discouraged" their spending and thus had an unconstitutional "chilling effect" on their exercise of their free-speech rights. *Id.* at 2818, 2823-24. The Court found that the impact of these subsidies on the rights of independent groups was "worse" than their effect on the privately funded candidates, because the latter could at least avoid trig-

gering the subsidies by agreeing to accept public funding for their own campaigns, whereas for the independent groups, who did not have that option, the subsidies amounted to "forcing [a] choice - trigger matching funds, change your message or do not speak - [that] contravenes the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message" *Id.* at 2819-20.

C. Designing a Solution

This decision leaves the city with very limited options for protecting its public financing system from the impact of PAC activity.[1] By forbidding additional payments to publicly financed candidates in response to private spending by opposing candidates and PACs, the Court's ruling has effectively disabled the city from adjusting the amount of the publicly funded candidates' subsidies according to the competitiveness of the particular election contest and the strength of the private opposition against which the candidate is running. This in turn means that any effort by the city to blunt the impact of the PACs and dilute the influence of private spending on city elections will have to take the form of expanding the resources available to all publicly financed candidates without distinction, in the ex-

[1] Common Cause does not believe that the force of this ruling can be sidestepped, as one councilor has proposed, by simply converting the city's response to these groups' activities from a subsidy for the candidates they oppose to a penalty for the candidates they support. The councilor's proposal, according to the council minutes, is "to establish requirements for candidates to reimburse the Public Campaign Finance Fund when a political committee or independent expenditure group has endorsed and made expenditures supporting the election or defeat of an identifiable candidate" (Minutes of February 26, 2014). Even apart from the issues (discussed below) of whether this proposal would be workable or amount to good policy, it would clearly fall afoul of the First Amendment as construed by the five-justice majority in *Arizona Free Enterprise*. If anything, such a threat to strip these groups' favored candidate of her campaign funds in direct response to their spending would seem even more likely to "discourage" and "chill" that spending than the Arizona law offering additional subsidies to their candidate's opponents that was struck down in that case. Indeed, this proposal might not even have gotten the votes of the four dissenters, whose principal argument was that Arizona's law imposed no penalty on anyone for exercising the right to speak, but instead merely subsidized additional speech, which the Court had previously held was constitutionally permissible as long as the subsidies were offered on a viewpoint-neutral basis. *Id.*, 131 S.Ct. at 2836-37 (Kagan, J., dissenting). This argument could not be invoked to defend the councilor's proposal, which would indeed impose a penalty on speech and reduce the overall quantity of campaign spending.

pectation that the candidates could then use these expanded resources to offset the PACs' spending in whatever manner they might deem necessary or suitable.

There are two ways that this could be accomplished. Both of these would have prohibitive disadvantages if employed by itself, but a combination of them, incorporating certain parts of each, could indeed, in Common Cause's view, achieve the desired aim at a reasonable cost.

The first and simplest way to augment the resources of the publicly financed candidates would be to increase substantially their public subsidies - by raising the allowance to mayoral candidates, for example, from $60,000 to $80,000 or $100,000, and the allowance to council candidates from $15,000 to $20,000 or $25,000. The downside of this approach, of course, is that it would be expensive and might prove very wasteful in election contests in which the publicly financed candidate was facing only lightly funded opposition.[2]

The other way to give publicly funded candidates more resources would be to modify the restrictions on private fundraising by these candidates in order to allow them to augment their public funds with private donations. The disadvantage of exclusive reliance on this method is that, to the very extent that it would be effective in providing substantial additional resources to the candidates, it could simultaneously undermine

[2] The code makes adequate provision for publicly funded candidates who have no opposition whatsoever, reducing their stipends by 90 per cent. Section 9-3.10(A)(4) SFCC 1987. But there does not appear to be any method acceptable to the Supreme Court for fine-tuning the candidates' allowances according to the seriousness of their privately funded opposition as evidenced by the amount of its spending. This is exactly what the Court has held unconstitutional.

The code also contemplates that publicly funded candidates will not always spend all the money they are allotted, and requires that any public funds that are unspent at the close of the campaign shall be refunded to the city. Section 9-3.11(C) SFCC 1987. In the 2012 election, two successful council candidates actually refunded substantial portions of their public funds pursuant to this provision. But this could not always be counted upon, and even one or a few examples of wasteful spending on uncompetitive races would embarrass the program.

the goal of reducing the influence of private spending on the outcome of city elections. That goal could only be preserved by setting very low limits on contributions to the publicly financed candidates, but this in turn would make it difficult for them to raise enough private funds to counteract the spending of well-funded PACs and privately financed opponents.

D. The Proposed Solution

The best solution to this dilemma that Common Cause can suggest, after extensive consideration of the issue and consultation with its national organization and its most knowledgeable sister organizations, is a particular combination of private fund-raising and additional public spending that we believe would maximize the advantages and minimize the disadvantages of each of these two methods of putting additional funds into the hands of publicly funded candidates. The resulting proposal is embodied in the attached draft of a bill amending the public financing law (Attachment 2). It is modeled upon a very similar bill that Common Cause is supporting at the state level, Senator Peter Wirth's SB 16 (2013), which passed both Houses of the State Legislature (unanimously in the House) in the last 60-day session before being vetoed by the governor, and will be reintroduced at the next 60-day session commencing in January, with high hopes that the governor will sign it this time. That bill in turn is modeled upon the Fair Elections Now Act (S.2023), a public financing bill for federal elections with twenty co-sponsors that has been introduced in the U.S. Senate.

As reflected in the attached draft of a Santa Fe version of this law, the central features of Common Cause's proposal are (1) an authorization for candidates participating in the public financing system to supplement their basic public stipends by

raising small private contributions limited to a maximum of $100 each, and (2) a requirement for the city to match these small private contributions with additional public payments of $4.00 for each dollar in small contributions raised by the candidates. The amounts of the initial public allowances and the requirements to qualify for them would remain largely unchanged from the present law except that, to simplify the ordinance, the private contributions of under $100 would be allowed to serve also as the contributions (now called "qualifying contributions") that qualify the candidates to receive their initial allowances. At least 600 such contributions of at least $5 each for mayoral candidates and 150 such contributions in the same minimum amount for council and judge candidates would have to be raised to qualify for the initial allowances of $60,000 for mayor and $15,000 for council and judge. The number of private contributions of less than $100 that could be raised by the candidates would not be limited, but the total amounts of the additional payments that the city would have to make to match these contributions would be capped at a maximum of $120,000 for mayoral candidates and $30,000 for council and judge candidates.

Common Cause believes that this proposal combines the best of the two alternative methods - additional public spending and allowing private fundraising - by which a public financing system can be fortified against private PAC spending in the wake of the *Arizona Free Enterprise* decision. The private fundraising that would be authorized under this proposal, first of all, would not undermine the overriding goal of curbing the influence of private campaign contributions on our elected officials, because the permissible amount of each donor's contribution would be small enough to forestall any risk of such influence. Sec-

ondly, the four-to-one public matching payments should ensure that this additional private fund-raising, even in such small amounts, could generate the financial wherewithal for the publicly financed candidates to protect themselves when necessary against heavy PAC spending. Thirdly, the system ensures that this additional public spending is not wasted on non-competitive races by requiring the candidates to have "skin in the game" in the form of small private contributions which they presumably would not take the trouble to raise in races in which they are not needed. Finally, the system would clearly pass constitutional muster because the trigger for the additional public payments would be the candidates' own fundraising rather than their opponents' spending.[3]

E. The Cost of the Proposal

The proposed new system would continue to be funded in the same manner as Santa Fe's present system - that is, from a Public Campaign Finance Fund supported by mandatory annual council appropriations of $150,000 and top-up appropriations to ensure that the fund will contain $300,000 in advance of each judge-council election and $600,000 in advance of each mayor-council election (§9-3.4 SFCC 1987). Although the additional matching payments to candidates contemplated by Common Cause's proposal would undoubtedly impose a greater drain on the fund than the system requiring only one-time stipends that has been in effect for the last two elections, its cost is actually likely to be

[3] The opinions in *Arizona Free Enterprise* make very clear that the majority's only objection to the system struck down in that case was the "chilling" effect on speech that can occur when public funds to support some candidates are provided "in direct response" to the campaign spending of other candidates and their independent supporters. *Id.*, 131 S.Ct. at 2818-20, 2821-24, 2836-37. Public financing matching systems where payments are instead triggered by the recipient's own fund-raising, such as the one proposed here, have been used for decades without constitutional challenge in other jurisdictions. *E.g.*, New York City Admin. Code §§3-701 et seq.; San Francisco Campaign and Govt'al. Conduct Code, §§1.100 et seq.; Tucson Charter, ch. XVI, subch. B.

significantly less than the anticipated cost of the public financing system that was originally enacted by the council in 2009 (Ord. No. 2009-44), on the basis of which the fund was originally designed and the funding mechanism was originally established (*id.*, §5).

That earlier system, as the board knows, was modeled on the Arizona law later struck down in *Arizona Free Enterprise*, and, like that law, provided for additional payments to publicly financed candidates to match the spending of their privately financed opponents and the opponents' independent supporters (Ord. No. 2009-44, §13). The citizens' committee that drafted the ordinance, whose recommendations in this regard were enacted by the council, anticipated that substantial additional matching payments for this purpose might well be necessary and set the amounts of the required appropriations high enough to both defray the cost of these payments and establish a sizable "war chest" that would present a credible deterrent to any effort to overwhelm the system with lavish private spending (Public Campaign Finance Advisory Committee, "Report and Recommendations to the Governing Body," January 9, 2009, pages 7-9, 11-13).[4] Although precise predictions are of course impossible, it is Common Cause's best guess that matching small donations to publicly financed candidates in the way that we are now proposing would prove much less costly than matching unlimited private campaign spending by these candidates' opponents in the manner that was thus contemplated when the funding mechanism was set up. If this is accurate - and we believe it is - the current funding scheme should be more than adequate to cover the cost of Common Cause's proposal.

[4] The undersigned and board-member Kovnat were both members of the drafting committee.

The proposed new system would also contain the same two "safety valves" that were built into the original ordinance to protect the city from any risk of runaway costs. The first of these, already mentioned above, would be a cap on the amount of the additional matching payments that a candidate could receive equal to two times the candidate's original public stipend - or $120,000 for mayoral candidates and $30,000 for council and judge candidates (Attachment 2, §10, enacting a new §9-3.12(D) SFCC; Ord. No. 2009-44, §13). In addition, as in the original ordinance and the current system, proportional reductions in the payments to candidates would be required in the event that their total entitlements at any stage of the process should exceed the amount in the fund (Attachment 2, §§8, 10, amending §§9-3.10, and enacting a new §9-3.12 SFCC; see §9-3.10(B) SFCC; Ord. No. 2009-44, §§11, 13). These two safety valves, which effectively limit the city's financial exposure to the amount contained in the fund, would protect the city budget from any greater costs than the costs that were fully contemplated at the time the current funding mechanism was set up.

F. Alternative Proposals

In the course of developing this proposal and during the more than three decades during which it has been advocating for this kind of reform, Common Cause has considered many different varieties of public financing programs, many of which have been enacted in states and cities around the country. It is from this experience with all these alternative systems that the public financing law being proposed here has emerged as the best system that Common Cause can recommend - the one that best accomplishes, at a reasonable cost and within the current consti-

tutional constraints, the objective of reducing the influence of private spending on city elections.

It would of course consume way too much of the board's time to describe all the many different systems that have been adopted or proposed in one jurisdiction or another in recent decades. But two alternative systems for making Santa Fe's law more PAC-resistant have actually been proposed in recent months, so these should at least be acknowledged and evaluated.

The first of these is the proposal by a city councilor mentioned earlier that would require publicly financed candidates to reimburse the city dollar-for-dollar for any spending by PACs in support of their candidacies. Besides the constitutional flaw in that proposal already described above, it also exhibits two serious practical problems. First, since most PAC spending can be expected to occur at a late stage of the campaign when the publicly financed candidates will have spent a large part of their public funds, the requirement for reimbursement could well impose a personal financial liability on the candidates that the city might have difficulty enforcing.[5] Secondly, and most importantly, this punitive provision would likely cause the entire public financing system to expire from non-use, since only a rare candidate would ever accept public financing under the threat of having her campaign funds suddenly stripped from her and perhaps being forced into debt because some outside group over whom she has no control decides to spend money to support her candidacy. For both these reasons, in addition to the constitutional

[5] Trying to solve this problem by limiting the candidates' reimbursement obligation to the amount of the public funds they still have on hand at the time the PAC spending occurs would only encourage the worst sort of abuse. Publicly funded candidates anticipating PAC support would be strongly motivated to spend their public funds early in the campaign while the PACs would hold their fire, and then, after most of the public funds had been exhausted and the threat of reimbursement was therefore no longer a serious concern, the PACs would take over the lion's share of the spending for the final weeks of the campaign.

issue, Common Cause suggests, with all due respect and appreciation for the councilor's good intentions, that this proposal should be rejected by the board.

The other alternative system that has been proposed is the one that was referred to in an op ed published by one of the PAC organizers, who argued that the harm being inflicted on the city's public financing system by the PACs' activities was actually the fault of the city and Common Cause for their failure to devise a system that would have more effectively "disincentivize[d]" these activities (SF New Mexican, "Reader View: the Real Fix for Public Financing," February 22, 2014). As an example of a system that might accomplish this result, she pointed to New York City's law providing public matching funds for small campaign donations.

In fact, however, the New York law creates a minimalist public financing system that would not suit the needs of Santa Fe. Although it does indeed provide a generous (six to one) match for small ($175 or less) contributions, it does not offer any initial public allowance for candidates who participate in the system, and, most importantly, it imposes no limit on private contributions to these candidates other than the same very high limits ($4,950 for mayor and $2,750 for council) that are imposed on all candidates for city office whether they participate in the program or not (NYC Admin. Code §§3-701 et seq.; http://www.nyccfb.info/candidates/candidates/law.aspx). Although the advocates of this system maintain that it amplifies the influence of small donors, one has to wonder whether a candidate will not still feel far more gratitude toward a donor who gives him $4,950 than one who gives him $175 and triggers a $1,050 matching payment from the city. In short, such a system

would not seem to accomplish the primary goal of eliminating the influence of big campaign donors on our elected officials, and Common Cause therefore recommends against its adoption.

G. Conclusion

Common Cause submits that the changes to the public financing system it has recommended offer the best hope of blunting the impact of PAC spending on city elections while still preserving the essential goals of the system and keeping costs to a reasonable level. We hope the board will give the proposal very serious consideration.

III. Electronic Signatures on Contribution Forms

A much less momentous issue that arose during the campaign was whether electronic signatures should be permitted on the forms signed by contributors that are required to accompany qualifying contributions and seed-money contributions to publicly financed candidates. The current language of the code does not seem to allow this, and so the city attorney's office concluded in its advisory opinion on the issue (Opinion dated November 4, 2013).

In that advisory opinion, however, the city attorney also suggested that the board should consider recommending an amendment to the code that would allow this kind of signature under appropriate safeguards. Common Cause agrees, and it has accordingly included a provision to this effect in its attached proposed revision of the public financing law. That provision takes the form of an authorization for the board to promulgate regulations allowing electronic signatures on the forms that would accompany the small private contributions that are permitted under the proposed new system (Attachment 2, §4, amending §9-3.6(C) SFCC). The reason for suggesting that the issue be

dealt with in this way is that a board regulation would be more readily adaptable to changing technology than a detailed prescription in the ordinance.

IV. Disclosure of Paid Phone-Banking

At one point in the campaign, it was revealed that a labor union was paying its members $11 an hour to make phone calls from the union office to their fellow members urging them to turn out to vote for the union-endorsed mayoral candidate. No report of these expenditures, however, was filed by the union with the city clerk. There are various possible explanations for this omission, but one of them may be an ambiguity in the code's coverage of this kind of activity.[6]

The code requires reporting by any person who spends over $250 for "the dissemination of campaign materials," and then defines "campaign materials" to include "any published communication, electronic or otherwise, disseminated to more than one hundred (100) persons" to support of oppose a candidate. §§9-2.3(E), 9-2.6 SFCC 1987. It is not clear, just from the literal language, whether the term "published communication" encompasses paid phone-banking or telephone calls. A clarifying amendment would therefore be appropriate. Common Cause has accordingly included such an amendment, in the form of an express statement that the term "published communication" includes paid organized phone-banking, in both sets of proposed amendments that are at-

[6] Some indications later appeared that this omission might also have been based on a mistaken notion that these "member-to-member communications" were constitutionally exempt from the law's disclosure requirements. Such a view could have arisen from a misreading of some older Supreme Court decisions exempting such communications from an outright ban on political campaigning by unions (a ban which has since been struck down in its entirety by the Supreme Court) and a confusion on the part of the union between the very different constitutional standards that are applicable, on the one hand, to outright prohibitions of political speech and, on the other hand, to laws that merely require disclosure of expenditures made to finance such speech. See *Citizens United v. FEC*, 130 S.Ct. 876, 913-16 (2010). Since this is a constitutional issue, it is not susceptible to resolution by means of code amendments and could only be settled if and when such a constitutional exemption should ever be asserted as a defense to a complaint alleging non-compliance with the code's reporting requirements.

tached to this memorandum (Attachment 1, §1, Attachment 2, §1, amending §§9-2.3(E), 9-3.3(B)).

V. "Russian Dolls" and Contributions in the Name of Another

Now that Santa Fe has experienced the initial participation in its election campaigns of vaguely named organizations with vaguely named contributors, it is probably time for the board to address what is known among campaign finance geeks as the "Russian Doll Problem." This term refers to a practice whereby campaign spenders identify themselves by unrevealing names and report as their contributors other groups with equally opaque labels, who in turn identify their own donors in the same uninformative manner, and so on *ad infinitum* like the carved wooden dolls-inside-dolls-inside-dolls that are popular in Russia. The result of this practice, intentional or not, is that campaign finance reports often end up conveying no real information to the voters about where the money is ultimately coming from.

This is a notoriously intractable problem that has bedeviled campaign finance reporting for a long time and that will probably never be completely solved given the ease with which new entities with legally separate identities can be created under typical state laws. There is one very simple step the board could take, however, that would help to address this problem. Many jurisdictions, including the federal government and the state of New Mexico, have a provision in their reporting laws to the effect that, to quote the New Mexico statute, "It is unlawful for a person to make a contribution in the name of another person, and no person shall knowingly accept a contribution made by one person in the name of another person." §1-19-34.3 NMSA 1978. See 2 U.S. Code §441f. The enforcing authorities in some jurisdictions have been able to rely upon such a

provision to sanction some of the more egregious uses of the Russian-doll device to conceal the sources of campaign spending - where, for example, it can be shown that a named contributor is an organization that has no purpose except to act as a conduit for political contributions from others.[7]

Although Santa Fe has a similar provision in its Public Campaign Finance Code governing qualifying contributions for publicly financed candidates (§9-3.7(C) SFCC) (which would be preserved in the attached proposed revision of the code for the small contributions that would be permitted under that proposal), there is no counterpart provision in the Campaign Code, which is the law that actually governs reporting by PACs and other independent spenders. Common Cause suggests that this omission should be corrected, and it has accordingly included two provisions of this kind, one in the reporting requirements for candidates and political committees and another in the section governing other independent spenders, in the attached draft of Campaign Code amendments (Attachment 1, §§ 2, 3, amending §§9-2.6 and 9-2.11 SFCC). If the suggested amendments are adopted, the board could then determine, either on a case-by-case basis or by appropriate regulations, when this provision should be deployed against those who appear to be using vaguely named groups to conceal the identities of the persons who are actually paying for the reported spending.

VI. Proof of Coordination

A complaint was filed with the board late in the campaign alleging that some of the spending by PACs and other groups was

[7] California's Fair Political Practices Commission, for example, recently used that state's version of this provision (Calif. Govt. Code §§84301, 84302) to impose a $1 million civil fine on the Koch Brothers organization when they were discovered hiding in the innermost chamber of a cluster of nested dolls called "Americans for Responsible Leadership," "California Future Fund," "American Future Fund," "Small Business Action Committee" and "Americans for Job Security," See http://www.fppc.ca.gov/press_release.php?pr_id=783.

actually being coordinated with the campaign of the candidate they were supporting. The representatives of the campaign and of the outside groups, however, adamantly denied that any such coordination was taking place, and the complaint was ultimately dismissed by the board based on the complainant's inability to produce sufficient evidence to support his allegations.

This outcome led to various proposals to make it easier to prove coordination between candidates and outside groups supporting their candidacies. The proposals have ranged from requiring the board to authorize discovery and issue subpoenas whenever a complaint is filed containing well-pleaded allegations of any code violation, to merely establishing some specific burden-switching presumptions of coordination that would arise whenever certain circumstances are present, such as the use of contiguous offices by the PAC and the candidate's campaign or close personal relationships between the two staffs.

Common Cause does not currently have a position on these proposals, because they implicate fundamental questions about the board's functions and the work load that its volunteer members should be expected to assume. We would therefore like to hear a thorough discussion of the issues by the members themselves before expressing any view of our own.

In the meantime, we would respectfully suggest that this might be another subject that the board would wish to deal with through its rule-making authority under §6-16.2(B) SFCC. The board could spell out by appropriate regulations, for example, exactly what kinds of circumstantial evidence would be accepted as establishing a presumption of coordination. The regulations might also begin to address some of the other difficult questions about the relationships between PACS and candidates that

have occupied the authorities in other jurisdictions, such as whether and to what extent a candidate should be permitted to solicit contributions to a PAC that plans to support her candidacy. See Minnesota Campaign Finance & Public Disclosure Board, Adv. Op. 437 (Feb. 11, 2014), accessible on the web at http://www.cfboard.state.mn.us/ao/AO437.pdf. Compare FEC Adv. Op. 2011-12 (June 30, 2011). Common Cause would be glad to offer any assistance it can provide if the board decides to undertake this task.

VII. Private Spending in the Initial Phase of a Campaign

Another issue that was the subject of two board complaints against publicly financed candidates was the question of how to treat campaign expenditures made at an early stage of a campaign using the personal funds of a candidate or campaign manager where the candidate later applies for public financing and avers in the application that "the candidate has made no expenditures for his or her current campaign from any source other than seed money contributions." Section 9-3.8(B)(3) SFCC. One of the two candidates who was later charged with a code violation for making such a private expenditure had made a subsequent payment of the same expense from her seed money account, telling the recipient of the earlier payment to either refund it or keep it as a personal windfall. The other candidate was unable to do this because he had already spent all his seed money by the time the issue arose. In its rulings on the two complaints, the board exonerated the first candidate, finding she had committed "no violation" of the code, and found the second candidate guilty of a violation, fining his campaign $1,000.

Though not the only possible resolution of these cases the board could have reached, these rulings seem to Common Cause to

reflect sensible applications of the relevant code provisions that adequately serve the purposes of the public financing program. By requiring, in effect, that any pre-application campaign expense must at some point be covered by a payment from the candidate's seed money, the board's disposition of these cases places an effective limit on the amount of such spending that may occur and ensures that it cannot be used by a candidate to gain a spending advantage over other publicly financed candidates. Since this represents a satisfactory resolution of this problem, Common Cause does not presently believe that any amendment to the current code language is needed to address it. Nor has Common Cause included any such amendment in its attached proposed revision of the public financing law.[8]

Common Cause may have to reexamine this conclusion, however, after it has heard further discussion by the board, because there is one aspect of the board's rulings that it has struggled to understand. Having exonerated the candidate who had eventually managed to cover the challenged expenditure from her seed-money account, and having convicted the other candidate who was unable to do this, the board then issued an advisory opinion to the recipient of the payment from the first candidate's seed-money account in which it concluded that this payment was not, after all, an expenditure of seed money, but was instead a "duplicative payment" that should be returned to the candidate and eventually refunded to the city clerk as unspent seed money (Advisory Opinion dated January 22, 2014). This opinion is hard to reconcile with the board's decisions exonerating one candidate

[8] Although Common Cause's proposal would do away with the concept of seed money, an issue similar to the one presented in these two cases might still arise under that proposal (and could presumably be resolved the same way by the board) if a candidate made an early campaign expenditure from her personal funds before she had raised a sufficient number of contributions under $100 to cover the expense.

and convicting the other when the only apparent distinction between the two was the first candidate's eventual payment of the challenged expense from her seed money account. Until Common Cause can resolve its resulting puzzlement about how the board is interpreting these code provisions, it can offer only a tentative view on the ultimate question whether they ought to be amended.

VIII. Donations of Space for Campaign Events

There were reports during the campaign that some publicly financed candidates held campaign events at commercial establishments that would normally be expected to charge a fee for the use of their facilities, yet no report of any such expenditure appeared in the candidates' spending reports. Although the issue was never presented to the board, the question naturally arose whether these events might have entailed the acceptance by a publicly financed candidate of an illegal private contribution in the form of either a donation of space by the owner of the establishment or payment of the rental fee by the candidate's supporters.

Common Cause believes the board should examine this issue, but that, in the end, it is probably not a problem that should be addressed by code amendments, because it involves subtle factual variations that would not be susceptible to resolution by a simple amendment. The easy cases - such as an outright donation of space by a commercial establishment or a cash payment for the space by campaign supporters - are already clearly covered by the code's current language (§§9-3.3(E), 9-3.11(D) SFCC; see §9-3.3(E)(2)(b) SFCC, exempting contributions to pay for events *only* where "the total cost of the event" is $200 or less), and the

remaining cases involve borderline situations that are probably better addressed case by case or by board regulations.[9]

Common Cause respectfully suggests that any regulations the board might choose to adopt on this issue should err on the side of permissiveness. As explained in the next section, one factor that may discourage candidates from accepting public financing is elaborate and intrusive regulation of the conduct of their campaigns. The goal here should be to prevent obvious in-kind private donations to campaigns, not to prescribe in detail how candidates should arrange their campaign events.

IX. Additional Restrictions on Publicly Financed Candidates

Proposals were made throughout the campaign to impose additional restrictions and requirements on publicly financed candidates. These included conditioning their entitlement to public funds upon a demonstration of good character, requiring them to attend debates and forums, requiring them to spend their funds only in Santa Fe and imposing limits on the amount of public funds that could be used for certain purposes, such as the purchase of meals for campaign volunteers. Common Cause does not presently support any of these additional limitations because it is concerned that they might needlessly diminish the attractiveness of public financing to the candidates.

The "name of the game" in public financing is persuading candidates to participate in the program. If most candidates refuse public funds and continue financing their campaigns from private donations, the overriding goal of reducing the influence

[9] An apparently common arrangement consists of a commercial establishment providing space for an event without charge in exchange for the opportunity to sell food or drink to those attending. Cases involving this kind of transaction should probably turn on the question whether the same terms are normally offered to other community groups wishing to hold events at the establishment. If so, the campaign is not really receiving anything that is not available to any member of the public. If not - that is, if the campaign is getting a special deal that is offered to no one else - a case could be made that the arrangement should be treated as an illegal private contribution.

of money on city politics is defeated at the outset. A proliferation of unnecessary restrictions on publicly financed candidates is one of the factors that might well contribute to this adverse outcome. Indeed, in the last campaign, some candidates who were in the process of deciding whether to accept public funds mentioned that one of their concerns was the number of detailed prescriptions already contained in the public financing law and the attendant risk that minor inadvertent transgressions might be seized upon to generate bad publicity for the campaign.

Common Cause therefore believes that any proposal for further restrictions on publicly financed candidates should have to be accompanied by a convincing demonstration that they are needed to serve the aims of the program. In Common Cause's view, no such demonstration has yet been made for any of the proposals that have so far been mentioned.[10]

X. Conclusion

Common Cause hopes that these comments will prove useful to the board in carrying out its duty to review the codes and recommend to the council any needed changes in the law. If the board has any questions or would like further elaboration of any issue, Common Cause would be glad to offer further assistance.

J.E.H.

[10] The proposal to impose character qualifications, while perhaps the most superficially appealing, is also probably the most problematic, because there is no obvious way to implement it. It would be difficult if not impossible to devise a general rule of disqualification based on criminal records, for example, that would be capable of properly distinguishing youthful convictions for pot possession or anti-war protests from more serious ethical breaches. The alternative would be to vest discretionary authority in the city clerk or some sort of vetting panel to do background investigations and disqualify candidates they found unfit, but this would necessarily be a somewhat subjective process that could easily lend itself to real or perceived politicization.

ATTACHMENT 1

CCNM Draft 9/26/14

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2014-_____

INTRODUCED BY:

_____

AN ORDINANCE

AMENDING THE CAMPAIGN CODE TO CLARIFY THE DEFINITION OF "CAMPAIGN MATERIALS" AND TO PROHIBIT THE MAKING, ACCEPTANCE OR REPORTING OF A CONTRIBUTION IN THE NAME OF ANOTHER PERSON OR FOR WHICH THE CONTRIBUTOR WILL BE REIMBURSED BY ANOTHER PERSON.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Section 9-2.3 SFCC 1987 (being Ord. No. 1998-41, §3) is amended to read:

9-2.3 Definitions.

As used in the Campaign Code:

A. *Anonymous contribution* means a contribution for which any of the information required to be recorded or reported by the Campaign Code is unknown to the persons who are required to record or report it.

B. *Ballot proposition* means any measure, amendment or other question submitted to, or proposed for submission to, a popular vote at a Santa Fe election.

C. *Campaign depository* means a bank, mutual savings bank, savings and loan association or credit union doing business in this state under which a campaign account or accounts are maintained.

D. *Campaign finance statement* means a report of all contributions received and expenditures made according to a form prescribed by the city clerk which, when completed and filed, provides the information required in the sections to follow.

E. *Campaign materials* means any published communication, electronic or otherwise, including recorded phone messages and organized phone-banking, disseminated to more than one hundred (100) persons that either supports the election or defeat of any identifiable candidate or candidates or supports the approval or defeat of a ballot proposal, other than communications to, or editorials, reports, or commentary by news media.

F. *Campaign treasurer and deputy campaign treasurer* means the individual who is responsible for keeping the financial records of the political committee or candidate (the candidate may be their own campaign treasurer or deputy campaign treasurer).

G. *Candidate* means any individual who seeks election to a Santa Fe municipal office. An individual shall be a candidate when they:

(1) Announce publicly;

(2) File for office;

(3) When contributions are accepted or expenditures made; or

(4) Any activity is held to promote an election campaign of an individual if that activity is endorsed or supported by that person or if the benefits of such activity are later accepted by such person.

H. *Charity* means an organization that is exempted from federal taxation by Title 26 United States Code, section 501(c)(3).

I. *Contribution* means a loan, loan guarantee, gift, advance, pledge, contract, agreement or promise of money or anything of value or other obligation, whether or not these items are legally enforceable, made directly or indirectly, to a candidate or political committee for the purpose of influencing the outcome of a municipal election.

(1) The term "contribution" includes:

(a) The transfer of funds or anything of value between political committees;

(b) The transfer of anything of value for less than full consideration;

(c) Interest, dividends or other income derived from the investment of campaign funds;

(d) The payment for the services of an individual serving on behalf of a candidate or political committee, which payments are made by a third party; and

(e) The purchase of tickets for fundraising events such as dinners, rallies, raffles, etc. and the proceeds of collections at fundraising events.

(f) An expenditure by a person other than a candidate or the candidate's political committee that is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate or the candidate's political committee.

(2) The term "contribution" does not include:

(a) A volunteer's personal services provided without compensation or the travel or personal expenses of such a campaign worker; and

(b) The cost of an event held in honor of or on behalf of a candidate when the total cost of the event amounts to no more than two hundred dollars ($200.).

J. *Contributor* means:

(1) *Individual contributor* means an individual who makes a contribution from their personal assets which are not those of a business, corporation, partnership, labor organization, unincorporated association or political committee.

(2) *Business or organizational contributor* means an individual who uses the assets of a business, corporation, partnership, labor organization, unincorporated association or political committee as a contribution, or any business, corporation, partnership, labor organization, unincorporated association or political committee which makes a contribution.

K. *Election* means any regular or special Santa Fe municipal election.

L. *Expenditure* means a payment or transfer of anything of value in exchange for goods, services, property, facilities or anything of value for the purpose of assisting, benefiting or honoring any public official or candidate, or assisting in furthering or opposing any election campaign for a candidate or ballot proposition. This includes contributions, subscriptions, distributions, loans, advances, deposits, or gifts of money or anything of value, and includes a contract, a promise or agreement, whether or not legally enforceable, to make an expenditure. The term "expenditure" also means the transfer of funds or anything of value between political committees. In determining the dollar value of an expenditure, only that proportion of a payment or transfer of anything of value that is directly related to the campaign shall be considered an expenditure.

M. *Political committee* means any entity formed for the principal purpose of:

(1) Raising or collecting, and expending or contributing money or anything of value for supporting the election or defeat of any identifiable candidate or candidates or for supporting the approval or defeat of ballot propositions; or

(2) Coordinating or cooperating in efforts to support the election or defeat of any identifiable candidates or of supporting the approval or defeat of any ballot proposition.

Section 2. Section 9-2.6 SFCC 1987 (being Ord. No. 2005-24, §29) is amended to read:

9-2.6 Independently Sponsored Campaign Materials.

Any person or entity that contracts for or initiates the dissemination of campaign materials supporting the election or defeat of an identifiable candidate or of a ballot proposition, and that spends in the aggregate two hundred fifty dollars ($250.) or more for such purpose shall thereafter, on each of the days prescribed for the filing of campaign finance statements of political committees, file with the city clerk a report of all expenditures made and all contributions received for such purpose on or before the date of the report and which have not been previously reported. Each report shall be submitted on a form prescribed by the city clerk. Contributions shall be specified by date, amount of contribution, name, address and occupation of the person or entity from whom the contribution was made. No person shall knowingly make, accept or report a contribution in the name of a person who is not the actual contributor or who has been or will be reimbursed or compensated for the contribution by another person. Expenditures shall be specified by date, the amount of the expenditure, the name and address of the person or entity where an expenditure was made and the purpose of the expenditure.

Section 1. Section 9-2.11 SFCC 1987 (being Ord. No. 1998-41, §10) is amended to read:

9-2.11 Campaign Finance Statement; Contents.

A. Each campaign finance statement shall be filed in accordance with subsection 9-2.10 SFCC 1987. The initial statement shall begin with the date of the first contribution or expenditure. Subsequent statements shall begin on the day after the end date of the previous reporting period. Statements shall contain the following information:

(1) The funds on hand at the beginning of the period. This shall include the cumulative total amount of all contributions and expenditures. This includes, but is not limited to, contributions and expenditures in aid of, or in opposition to, candidates or ballot propositions before they qualify for the ballot and contributions and expenditures following the election;

(2) The full name, home address, occupation, name of employer, date of receipt and amount of each contribution received from each individual contributor

from whom a contribution in money, goods, materials, services, facilities or anything of value has been received and whether the contribution was received in cash, by check, by credit card, by electronic transfer or otherwise;

(3) The full name, type of business, physical address, date of receipt and amount of each contribution for each business or organizational contributor, from whom a contribution in money, goods, materials, services, facilities or anything of value has been received, and whether the contribution was received in cash, by check, by credit card, by electronic transfer or otherwise;

(4) The date of receipt and amount of any anonymous contribution received by the campaign treasurer or deputy campaign treasurer and the disposition that was made of each such contribution pursuant to subsection 9-2.9B SFCC 1987, including the date when it was donated to the city or to a charity and the identity of the recipient of the donation.

(5) The full name and complete mailing address of each individual or business to whom an expenditure has been made, the purpose of each campaign expenditure and the date each expenditure was made. This report shall be itemized with the total amount paid to each individual or business for the goods, services or facilities provided;

(6) The full name of the candidate or political committee and the full name and complete address of the campaign treasurer or deputy campaign treasurer;

(7) For each contributor, the cumulative total of all contributions made; and

(8) Where goods, materials, services, facilities or anything of value other than money is contributed or expended, the monetary value thereof shall be reported at the fair market value.

B. No person shall knowingly make, accept or report a contribution in the name of a person who is not the actual contributor or who has been or will be reimbursed or compensated for the contribution by another person.

[~~B.~~] C. Loans of money, property or other things made to a candidate or political committee during the period covered by the campaign finance statement shall be reported separately in the statement, with the following information:

(1) The total value of all loans received during the period covered by the campaign finance statement;

(2) The full name and address of each lender, the date of the loan, the interest rate and the amount of the loan remaining unpaid;

(3) The cumulative total value of all loans received; and

(4) The total amount of loans remaining unpaid.

[~~C.~~] D. If a loan has been forgiven or paid by a third person, it shall be reported pursuant to this section.

[~~D.~~] E. Investments made with campaign funds under subsection 9-2.9 SFCC 1987 and interest, dividends and/or other income received shall be reported separately in the statement.

ATTACHMENT 2

CCNM Draft 9/26/14

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2014-____

INTRODUCED BY:

_____

AN ORDINANCE

AMENDING THE PUBLIC CAMPAIGN FINANCE CODE TO ENCOURAGE PARTICIPATION IN PUBLIC CAMPAIGN FINANCING BY ALLOWING PUBLICLY FINANCED CANDIDATES TO RAISE QUALIFIED SMALL CONTRIBUTIONS, MANDATING MATCHING PAYMENTS OF PUBLIC FUNDS FOR SUCH CONTRIBUTIONS AND AMENDING THE PUBLIC CAMPAIGN FINANCE CODE IN CERTAIN ADDITIONAL RESPECTS.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Section 9-3.3 SFCC 1987 (being Ord. No. 2009-44, §4) is amended to read:

9-3.3 Definitions.

As used in this section, the following terms have the following meanings:

A. *Campaign depository* means a bank, mutual savings bank, savings and loan association or credit union doing business in this state under which a campaign account or accounts are maintained.

B. *Campaign materials* means any published communication, electronic or otherwise, including recorded phone messages and organized phone-banking, disseminated to more than one hundred (100) persons that either supports the election or defeat of any identifiable can-

didate or candidates or supports the approval or defeat of a ballot proposal, other than communications to, or editorials, reports, or commentary by news media.

C. *Candidate* means any individual who seeks election to a Santa Fe municipal office. An individual shall be a candidate when they:

(1) Announce publicly;

(2) File for office;

(3) When contributions are accepted or expenditures made; or when

(4) Any activity is held to promote an election campaign of an individual if that activity is endorsed or supported by that person or if the benefits of such activity are later accepted by such person.

D. *Contested race* means a race in which there are at least two (2) candidates for the office sought.

E. *Contribution* means a loan, loan guarantee, gift, advance, pledge, contract, agreement or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly, to a candidate or political committee for the purpose of influencing the outcome of a municipal election.

(1) The term "contribution" includes:

(a) The transfer of funds or anything of value between political committees;

(b) The transfer of anything of value for less than full consideration;

(c) Interest, dividends or other income derived from the investment of campaign funds;

(d) The payment for the services of an individual serving on behalf of a candidate or political committee, which payments are made by a third party; and

(e) The purchase of tickets for fundraising events such as dinners, rallies, raffles, etc. and the proceeds of collections at fundraising events.

(f) An expenditure by a person other than a candidate or the candidate's political committee that is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate or the candidate's political committee.

(2) The term "contribution" does not include:

(a) A volunteer's personal services provided without compensation or the travel or personal expenses of such a campaign worker; and

(b) The cost of an event held in honor of or on behalf of a candidate when the total cost of the event amounts to no more than two hundred dollars ($200.).

F. *Election* means any regular or special Santa Fe municipal election.

G. *Expenditure* means a payment or transfer of anything of value in exchange for goods, services, property, facilities or anything of value for the purpose of assisting, benefiting or honoring any public official or candidate, or assisting in furthering or opposing any election campaign for a candidate or ballot proposition. This includes contributions, subscriptions, distributions, loans, advances, deposits, or gifts of money or anything of value, and includes a contract, a promise or agreement, whether or not legally enforceable, to make an expenditure. The term "expenditure" also means the transfer of funds or anything of value between political committees. In determining the dollar value of an expenditure, only that proportion of a payment or transfer of anything of value that is directly related to the campaign shall be considered an expenditure.

H. *Fund* means the public campaign finance fund created by subsection 9-3.4 SFCC 1987.

I. *Non-participating candidate* means a candidate who is not a participating candidate.

J. *Participating candidate* means a candidate who has qualified and has been certified pursuant to subsection 9-3.9 SFCC 1987 as eligible to receive payments from the fund.

K. *Qualified elector* means a person who is registered to vote in the City of Santa Fe.

L. *Qualified small contribution* means a contribution of no more than one hundred dollars ($100) made and accepted in compliance with the provisions of subsection 9-3.6 SFCC 1987.

[~~L. *Qualifying contribution* means a contribution of no more [or] and no less than five dollars ($5.00) that is received from a qualified elector during the qualifying period by a candidate seeking to become a participating candidate. A candidate for councilor shall only receive qualifying contributions from qualified electors registered to vote in the council district in which the candidate is running.~~]

[~~M. *Qualifying period* means the period during which a candidate seeking to become a participating candidate is permitted to collect qualifying contributions and to apply for certifi-~~

~~cation as a participating candidate. It begins one hundred eighty-three (183) days before the election and ends one hundred six (106) days before the election.~~]

[~~N.~~] M. *Race* means the electoral process in which one (1) or more candidates run and one (1) candidate is elected to the office of mayor, municipal judge or city councilor for a particular district.

[~~O. Seed money contribution means a contribution of no more than one hundred dollars ($100.) made and accepted in compliance with the provisions of subsection 9-3.6 SFCC 1987 and used exclusively for the purposes specified in that section.~~]

[~~P.~~] N. *Uncontested race* means a race in which there is only one (1) candidate for the office sought.

Section 2. Section 9-3.4 SFCC 1987 (being Ord. No. 2009-44, §5) is amended to read:

9-3.4 Public Campaign Finance Fund.

A. A dedicated public campaign finance fund ("the fund") is established to be administered by the municipal clerk for the purpose of providing public financing for the election campaigns of participating candidates. Monies in the fund and disbursed from the fund to participating candidates are public monies entrusted to the candidates to be used solely for the public purposes specified in this Section 9-3 SFCC 1987.

B. Beginning with the city budget for fiscal year 2009-2010 and in each fiscal year thereafter, the sum of one hundred fifty thousand dollars ($150,000.) shall be budgeted for and deposited in the fund.

C. Beginning with the election of 2014, the governing body shall appropriate and deposit in the fund such additional sums, if any, as may be necessary to ensure:

(1) That the balance in the fund one hundred nineteen (119) days preceding each election for mayor and four (4) council seats is at least six hundred thousand dollars ($600,000.); and

(2) That the balance in the fund one hundred nineteen (119) days preceding each election for municipal judge and four (4) council seats is at least three hundred thousand dollars ($300,000.).

D. In addition to the deposits required by paragraphs B. and C. of this subsection, the following shall also be deposited in the fund:

[~~(1) All seed money contributions received by candidates seeking to become certified as participating candidates which remain unspent;~~]

~~(2) All qualifying contributions received by candidates seeking to become certified as participating candidates;~~]

[~~(3)~~] (1) All amounts paid from the fund to participating candidates which have not been spent or obligated as of the date of the election;

[~~(4)~~] (2) All fines levied by the ethics and campaign review board or as decreed by a court of competent jurisdiction as a condition of probation;

[~~(5)~~] (3) Voluntary donations made to the fund;

[~~(6)~~] (4) All interest and other income earned from investment of the fund; and

[~~(7)~~] (5) Such other appropriations to the fund as may be made by the governing body as necessary to fulfill the requirements of this Section 9-3 SFCC 1987.

Section 3. Section 9-3.5 SFCC 1987 (being Ord. No. 2009-44, §6; Ord. No. 2011-28, §11) is amended to read:

9-3.5 Eligibility as a Participating Candidate.

Beginning with the election of 2012, any candidate for municipal office may qualify as a participating candidate eligible to receive payments from the fund pursuant to subsections 9-3.10 and 9-3.12 SFCC 1987 if the candidate:

A. Meets the requisites to be listed on the ballot as a certified candidate for municipal office pursuant to the provisions of Section 3-8-27 (B) through (E) NMSA 1978 and Article IV Section 4.03 of the Santa Fe Municipal Charter;

B. Has collected [~~the requisite number of qualifying contributions, as follows~~]:

(1) For a candidate running for the office of mayor, six hundred (600) qualified small contributions of no less than five dollars ($5.00) [~~qualifying contributions~~] from separate qualified electors;

(2) For a candidate running for the office of city councilor, one hundred fifty (150) qualified small contributions of no less than five dollars ($5.00) [~~qualifying contributions~~] from separate qualified electors registered to vote in the council district in which the candidate is running;

(3) For a candidate running for the office of municipal judge, one hundred fifty (150) qualified small contributions of no less than five dollars ($5.00) [~~qualifying contributions~~] from separate qualified electors.

C. Submits an application for certification pursuant to subsection 9-3.8 SFCC 1987 setting forth the agreement and the averments and accompanied by the forms[,] and reports [~~and payments~~] that are required by that section.

Section 4. Section 9-3.6 SFCC 1987 (being Ord. No. 2009-44, §7) is amended to read:

9-3.6 [~~Seed Money.~~] Qualified Small Contributions.

A. A participating candidate or a candidate seeking to become a participating candidate may solicit and accept [~~seed money contributions to defray expenses incurred in obtaining qualifying contributions and in seeking certification as a participating candidate~~] qualified small contributions.

B. The aggregate amount of [~~seed money~~] qualified small contributions from any one contributor to any one candidate shall not exceed one hundred dollars ($100.) [~~, and the aggregate amount of seed money contributions accepted by a candidate shall not exceed ten percent (10%) of the amount payable under subsection 9-3.10 SFCC 1987 to a candidate in a contested election for the office sought~~].

C. Each [~~seed money~~] qualified small contribution shall be accompanied by a form signed by the contributor, which shall include the contributor's name, home address, telephone number, occupation and name of employer. The Ethics and Campaign Review Board may, by regulation, permit the use of an electronic signature on such forms.

D. No person shall knowingly make and no candidate shall knowingly receive a qualified small contribution which is not from the person named on the form or for which the person named on the form has been or will be reimbursed or compensated by another person.

[~~D.~~] E. [~~All seed money contributions received by a candidate shall be deposited in a non-interest-bearing account in a campaign depository to be established by the candidate before soliciting or accepting any such contributions. All expenditures of seed money qualified small contributions shall be made from the campaign depository.~~] Before soliciting or accepting qualified small contributions, a candidate shall appoint a treasurer and establish a campaign depository in the manner required by subsection 9-2.8 SFCC 1987. All qualified small contributions received by a candidate shall be recorded by the candidate's campaign treasurer, deposited in a separate non-interest-bearing account in the campaign depository and used in the candidate's campaign or disposed of following the election in the manner required by subsection 9-2.9 SFCC 1987. All such contributions shall be timely reported in a campaign finance statement prepared in the manner and filed on the dates required by subsections 9-2.10 through 9-2.12 SFCC 1987. Campaign finance statements reporting the receipt of qualified small contributions shall be accompanied by copies of the forms signed by each contributor pursuant to paragraph C of this subsection.

Section 5. Section 9-3.7 SFCC 1987 (being Ord. No. 2009-44, §8) is repealed.

Section 6. Section 9-3.8 SFCC 1987 (being Ord. No. 2009-44, §9) is amended to read:

9-3.8 Application for Certification as a Participating Candidate.

A. A candidate who wishes to be certified as a participating candidate shall, on or before the 106th day preceding the election [~~before the end of the qualifying period~~], file an application for such certification with the municipal clerk on a form prescribed by the municipal clerk.

B. The application shall identify the candidate and the office that the candidate is seeking, and shall set forth:

(1) The candidate's averment under oath that the candidate satisfies the requisites for qualification and certification as a participating candidate prescribed by subsection 9-3.5 SFCC 1987;

(2) The candidate's averment under oath that the candidate has accepted no contributions to the candidate's current campaign other than [~~qualifying contributions and seed money~~] qualified small contributions solicited and accepted pursuant to subsections 9-3.6 SFCC 1987 and 9-3.7 SFCC 1987;

(3) The candidate's averment under oath that the candidate has made no expenditures for his or her current campaign from any source other than [~~seed money~~] qualified small contributions; and

(4) The candidate's agreement that his or her current campaign will not solicit, direct or accept any further contributions or make any further expenditures from any sources other than payments received from the fund pursuant to subsection 9-3.10 and 9-3.12 SFCC 1987 and qualified small contributions received pursuant to subsection 9-3.6 SFCC 1987.

C. The application shall be accompanied by:

(1) Reports listing all [~~seed money contributions and qualifying contributions~~] qualified small contributions received by the candidate [~~and all expenditures of seed money contributions made by the candidate,~~] and showing the aggregate amounts of all such contributions [~~and expenditures and the aggregate amounts of all contributions received from each contributor~~]; and

(2) Copies of forms signed by contributors for all [~~seed money contributions and qualifying contributions~~] qualified small contributions received by the candidate.[~~; and~~

~~(3) A check or checks issued to the City of Santa Fe from the candidate's campaign depository for the amount of all qualifying contributions received by the candidate [and all seed money contributions received by the candidate except:~~

~~(a) Amounts previously spent for the purposes specified in paragraph A of subsection 9-3.6 SFCC 1987; and~~

~~(b) The amount, if any, that has been temporarily retained by the candidate for the purpose of keeping open the bank account in the campaign depository pursuant to paragraph E of subsection 9-3.6 SFCC 1987.~~]

Section 7. Section 9-3.9 SFCC 1987 (being Ord. No. 2009-44, §10) is amended to read:

9-3.9 Certification as a Participating Candidate.

A. On or before the eighty-ninth (89th) day before the election the municipal clerk shall make a determination whether the candidate's application complies with the requirements of subsection 9-3.8 SFCC 1987 and whether the candidate satisfies the requisites for certification as a participating candidate prescribed by subsection 9-3.5 SFCC 1987, and shall thereupon issue a decision, in accordance with the determination so made, granting or refusing such certification to the candidate.

B. The municipal clerk may revoke a candidate's certification as a participating candidate for any violation by the candidate of the requirements of this section, and may require that any candidate whose certification has been revoked to pay over to the municipal clerk for deposit in the fund any amounts previously paid to the candidate pursuant to subsection 9-3.10 SFCC 1987.

C. Qualified small contributions in the campaign depository of a candidate who fails to obtain certification as a participating candidate, whose certification is revoked or who withdraws as a participating candidate may be retained by the candidate to be used in the candidate's campaign and disposed of after the election in the manner required by subsection 9-2.9 SFCC 1987.

Section 8. Section 9-3.10 SFCC 1987 (being Ord. No. 2009, §11) is amended to read:

9-3.10 Payments to Participating Candidates.

A. Within three (3) business days of certifying a candidate as a participating candidate, the municipal clerk shall disburse to the candidate from the fund:

(1) Sixty thousand dollars ($60,000.) for a candidate in a contested race for the office of mayor;

(2) Fifteen thousand dollars ($15,000.) for a candidate in a contested race for the office of city councilor;

(3) Fifteen thousand dollars ($15,000.) for a candidate in a contested race for the office of municipal judge; or

(4) For a candidate in an uncontested race, ten percent (10%) of the amount that would be due to a candidate in a contested race for the same office.

B. If the amounts required to be paid to candidates under paragraph A of this subsection exceed the total amount available in the fund, each payment shall be reduced in proportion to the amount of such excess. Any such proportionate reduction in the payment due to any candidate under paragraph A of this subsection shall give the candidate the option to reject the payment and to withdraw as a participating candidate. A candidate who withdraws as a participating candidate pursuant to this paragraph shall file an affidavit with the municipal clerk so stating and shall thenceforth be treated for all purposes as a non-participating candidate relieved of all obligations and restrictions and excluded from all benefits and exemptions imposed or conferred on a participating candidate by this Section 9-3 SFCC 1987.

[~~C. Within five (5) business days of the candidate's receipt of the amount disbursed under paragraph A of this subsection or the municipal clerk's refusal to certify the candidate as a participating candidate pursuant to paragraph A of subsection 9-3.9 SFCC 1987, whichever is sooner, the candidate shall pay over to the municipal clerk for deposit in the fund any amount of seed money that has been temporarily retained by the candidate for the purpose of keeping open the bank account in the campaign depository pursuant to paragraph E of subsection 9-3.6 SFCC 1987.~~]

Section 9. Section 9-3.11 SFCC 1987 (being Ord. No. 2009-44, §12) is amended to read:

9-3.11 Use of Payments from the Fund [~~; the Fund as Exclusive Source~~].

A. All payments received by a participating candidate from the fund shall be deposited in a separate non-interest-bearing account in the candidate's campaign depository and shall be used exclusively to pay expenses reasonably incurred in furtherance of the candidate's current campaign.

B. Payments received from the fund shall not be used for any other purpose, including:

(1) The candidate's personal living expenses or compensation to the candidate or the candidate's family;

(2) A contribution to another campaign of the candidate or a payment to retire debt from another such campaign;

(3) A contribution to the campaign of another candidate or to a political party or political committee or to a campaign supporting or opposing a ballot proposition;

(4) An expenditure supporting the election of another candidate or the passage or defeat of a ballot proposition or the defeat of any candidate other than an opponent of the participating candidate;

(5) Payment of legal expenses or any fine levied by a court or the ethics and campaign review board.

(6) Any gift or transfer for which compensating value is not received.

C. All payments from the fund received by a participating candidate which have not been spent or obligated for the purposes specified in paragraph A of this subsection and any tangible assets purchased with such payments remaining in the possession of the campaign as of the date of the election shall be returned by the candidate and shall be conveyed to the municipal clerk within forty-five (45) days after that date. Returned payments shall be deposited in the fund. Tangible assets shall be conveyed to the city for its use or disposition in accordance with the city's procurement code. Proceeds from such disposition shall be deposited in the fund.

D. In accordance with the agreement entered into pursuant to subparagraph B(4) of subsection 9-3.8 SFCC 1987, a candidate who has been certified as a participating candidate shall not thereafter accept any contribution to the candidate's campaign other than payments received from the fund pursuant to subsections 9-3.10 and 9-3.12 SFCC 1987 and qualified small contributions received pursuant to subsection 9-3.6 SFCC 1987, and shall not make any expenditure in support of the candidate's campaign from any source other than payments and contributions so received and previously deposited in the candidate's campaign depository.

Section 10. A new section 9-3.12 SFCC 1987 is ordained to read:

9-3.12 [NEW MATERIAL] Additional Reports of Qualified Small Contributions; Additional Matching Payments from the Fund

A. In addition to the dates specified for the filing of campaign finance statements by subsection 9-2.10 SFCC 1987, campaign finance statements reporting the receipt of qualified small contributions may also be filed by participating candidates on the eighty-third day preceding the election, the sixty-second day preceding the election and the fifteenth day preceding the election.

B. Within two business days after the filing of a campaign finance statement by a participating candidate reporting the receipt of qualified small contributions and accompanied by copies of the forms signed by the contributors as required by paragraph C of subsection 9-3.6 SFCC 1987, the municipal clerk shall disburse to the candidate an additional payment from the fund equal to four times the total amount of the qualified small contributions reported in the campaign finance statement; provided, however, that no such additional matching payments shall

be made for contributions reported in a campaign finance statement filed after the Tuesday preceding the election; and provided further that additional matching payments for contributions listed in a report filed with the candidate's application for certification under subsection 9-3.8 SFCC 1987 shall not be made until two business days after such contributions have been listed anew in a campaign finance statement filed under paragraph E of subsection 9-3.6 SFCC 1987 or paragraph A of this subsection.

C. Additional payments made to a participating candidate pursuant to paragraph B of this subsection shall be deposited in the separate account in the candidate's campaign depository that was established by the candidate for the deposit of payments received from the fund pursuant to paragraph A of subsection 9-3.11.

D. The aggregate amount of additional payments made to a participating candidate pursuant to paragraph B of this subsection shall not exceed two hundred percent (200%) of the amount initially paid to the candidate pursuant to subsection 9-3.10 SFCC 1987.

E. If the amounts required to be paid to candidates under paragraph B of this subsection exceed the total amount available in the fund, each payment shall be reduced in proportion to the amount of such excess.

Section 11. Section 9-3.14 SFCC 1987 (being Ord. No. 2009-44, §15) is amended to read:

9-3.14 Reports of Expenditures; Exemption from Certain Reporting Requirements.

A. A participating candidate shall file with the municipal clerk reports under oath of expenditures made from the payments received from the fund, indicating that the expenditures were made from that source and showing the date and amount of each such expenditure, the name and address of the person or organization to whom it was made, the purpose of the expenditure, the aggregate amount of such expenditures made to each person or organization and the aggregate amount of all such expenditures made by the candidate or by his or her campaign.

B. The reports required by paragraph A of this subsection shall be filed on each of the days prescribed for the filing of campaign finance statements by subsection 9-2.10 SFCC 1987.

C. A campaign finance statement filed by a participating candidate to report qualified small contributions pursuant to paragraph E of subsection 9-3.6 SFCC 1987 or paragraph A of subsection 9-3.12 SFCC 1987 shall also include a report of all expenditures made during the period covered by the statement from the separate account established by the candidate for the deposit of such contributions pursuant to paragraph D of subsection 9-3.6 SFCC 1987. The statement shall show that the expenditures were made from that source and shall contain all the information concerning the expenditures, account balances and funds on hand that is required for campaign finance statements filed pursuant to subsection 9-2.11 SFCC 1987.

[~~C.~~] D. Except as provided in paragraphs A [~~and B~~] through C of this subsection [~~and~~], paragraph E of subsection 9-3.6 SFCC 1987, paragraph C of subsection 9-3.8 SFCC 1987[~~,~~] and paragraph A of subsection 9-3.12 SFCC 1987, participating candidates are exempt from the requirement to file campaign finance statements imposed by subsections 9-2.10 SFCC 1987 through 9-2.12 SFCC 1987 and from the requirements to file campaign records with the municipal clerk imposed by paragraph C of subsection 9-2.9 SFCC 1987; provided, however, that campaign records shall be maintained in the manner required by the applicable provisions of the Campaign Code (Section 9-2 SFCC 1987) and shall be made available upon request to the municipal clerk and the ethics and campaign review board.

[~~D.~~] E. [~~A seed money and qualifying contribution report and an~~] Campaign finance statements and contribution and expenditure reports of a candidate for municipal judge are not required to be signed or acknowledged by the candidate.

SUMMARY

In the attached memo, Common Cause New Mexico offers its comments on some of the issues surrounding the 2014 municipal election by describing the issue, stating our opinion, and suggesting amendments.

The first and largest issue covered is how to fortify the public financing system against PAC spending and we believe our proposal combines the best of methods by:

- allowing candidates who participate in the public financing system to raise small private contributions limited to a maximum of $100 each
- matching the small private contributions with additional public payments of $4.00 for each dollar raised
- capping the total amounts of additional payments at a maximum of $120,000 for mayoral candidates and $30,000 for council and judge candidates

The other topics covered in the memo are:

- Electronic Signatures on Contribution Forms
- Disclosure of Paid Phone-Banking
- "Russian Dolls" and Contributions in the Name of Another
- Proof of Coordination
- Private Spending in the Initial Phase of a Campaign
- Donations of Space for Campaign Events
- Proposals for Additional Restrictions

M E M O R A N D U M

TO: ETHICS AND CAMPAIGN REVIEW BOARD

FROM: JIM HARRINGTON, COMMON CAUSE NEW MEXICO

SUBJECT: SUPPLEMENTAL PRESENTATION RE POSSIBLE ADDITIONAL CODE AMENDMENTS

DATE: OCTOBER 27, 2014

I. Introduction

Since submitting to the board its memorandum and draft bills dated September 26, 2014, Common Cause has received several suggestions regarding its proposals. Two of these suggestions appear meritorious and worth passing along to the board for its consideration. The first of these embodies a better method than was originally proposed by Common Cause for clarifying the reporting obligations of non-candidates who spend money to influence elections but do not meet the definition of "political committee." See §9-2.6 SFCC. The second suggestion concerns additional proposed amendments to the Public Campaign Finance Code to correct a previously overlooked discrepancy between publicly and privately financed candidates with respect to record-keeping obligations.

These additional suggestions are explained below. Common Cause is also attaching two draft bills to this memorandum, which consist of revised versions, incorporating these suggestions, of the bills that were attached to Common Cause's earlier memorandum.

II. Reporting Obligations for Non-Candidate Campaign Spenders Who Are Not Political Committees.

Common Cause's earlier memorandum pointed out a shortcoming in the provision of the Campaign Code that defines the reporting obligations of non-candidates who spend money to support or oppose candidates but who do not meet the "principal purpose" test that would qualify them as "political committees." §9-2.6 SFCC. See §9-2.3(M). The current code provision requires such persons to report certain information regarding their expenditures if they spend $250 or more for "the dissemination of campaign materials supporting the election or defeat of an identifiable candidate or of a ballot proposition." The term "campaign materials" is elsewhere defined to mean "any published communication, electronic or otherwise, disseminated to more than one hundred (100) persons." §§9-2.6, 9-2.3(E) SFCC. In the recent campaign, a labor union apparently failed to report significant expenditures for paid phone-banking to support one candidate, and it appeared that this omission may have been attributable to the ambiguity of the term "campaign materials" with respect to its coverage of phone-banking and telephone calls.

In its memorandum of September 26 and the bills attached thereto, Common Cause proposed to remedy this deficiency in the code by amending the definition of "campaign materials" to include an express statement that this term encompasses phone-banking and robo-calls. From comments on that proposal that have been received from others, however, Common Cause has since become convinced that this is not the best solution to this problem. Most obviously, even this expanded definition of "campaign materials" would still leave certain kinds of easily imaginable campaign spending that should clearly be reported, such as paid precinct-walking, beyond the scope of the reporting requirements. While this problem might be fixed by further amend-

ments naming these kinds of activities as well, such a piece-by-piece approach is probably not the best way to legislate, and in any event would soon begin to stretch the concept of "campaign materials" beyond any recognizable or common-sense notion of the literal meaning of those words.

The solution that Common Cause is now proposing in order to accommodate these concerns is simply to delete the reference to "campaign materials" from the section that defines the reporting obligations of these non-candidates, and to require them instead to file reports whenever they spend a certain threshold amount of money on any sort of activity that supports or opposes a candidate or ballot measure. Since the existing definition of "campaign materials" also serves a purpose in the separate code section requiring identification of the sponsor in certain campaign ads (§9-2.5 SFCC), it would be retained in the Campaign Code.[1] This term would no longer be used, however, in the section that imposes reporting obligations on non-candidates who spend money on city elections (§9-2.6 SFCC). The first sentence of that section would be amended to delete that term, as follows (Attachment 1, §1):

> Any person or entity that [~~contracts for or initiates the dissemination of campaign materials supporting the election or defeat of an identifiable candidate or of a ballot proposition, and that spends in the aggregate~~] makes an expenditure or expenditures of two hundred fifty dollars ($250.) or more

[1] The section that would have amended that definition in the previous version of Common Cause's draft of Campaign Code amendments is therefore omitted from the attached revised version of that draft bill (Attachment 1 hereto). On the other hand, the counterpart section of Common Cause's other draft bill amending the Public Campaign Finance Code has been retained in the attached revised version of that bill, though for an entirely different purpose than in the bill's original version (Attachment 2). Instead of changing the definition of "campaign materials" as in the earlier version, the revised draft bill would strike that item entirely from the definitions section of the Public Campaign Finance Code because it has turned out to be unnecessary in that context. While reviewing this issue, Common Cause discovered that, although the term "campaign materials" was used in the original version of the public financing law (Ord. 2009-44, §§13-14), it no longer appears anywhere in the current version (except of course among the definitions). The provision of that code defining that term (§9-3.3(B) SFCC) is therefore no longer needed and should be repealed.

[~~for such purpose~~] in the aggregate during a single election for the purpose of supporting or opposing an identifiable candidate or ballot proposition shall thereafter, on each of the days prescribed for the filing of campaign finance statements of political committees, file with the city clerk a report of all expenditures made and all contributions received for such purpose on or before the date of the report [~~and~~] which have not been [~~previously~~] otherwise reported.

Common Cause submits that such an amendment would represent a more clear and comprehensive solution to this problem than the sort of tinkering with the definition of "campaign materials" that was proposed in the original memorandum.

III. Record-Keeping Duties of Publicly Financed Candidates

It was also suggested to Common Cause that the codes should be amended to require both publicly and privately financed candidates to file receipts for all campaign expenditures with their expenditure reports. The same proposal was actually made and included in the initial draft of the comprehensive code revisions that were passed by the council in June of 2013 (Ord. No. 2103-28). This provision was removed from the bill before its passage, however, after discussions with the city clerk, who felt that the filing of receipts would impose a significant burden on the clerk's office, and that the purpose of this proposal was largely served in any event by the existing provisions requiring candidates' treasurers to preserve all receipts for two years and authorizing the ECRB to review and audit all campaign records. §§9-2.9(F), 6-16.2(D) SFCC.

Common Cause has ascertained that the city clerk's views on this issue remain unchanged and has therefore decided not to support the proposal to require filing receipts with all expenditure reports. In the course of reconsidering this issue, however, we noted that the Campaign Code provision requiring

campaign treasurers to preserve receipts applies only to privately financed campaigns, and that there is no counterpart provision for publicly financed candidates in the Public Campaign Finance Code. Common Cause therefore proposes, with the city clerk's concurrence, to amend the Public Campaign Finance Code to add such a requirement. In the attached revised draft of the bill amending that code, such an amendment has been inserted in the provisions governing reporting of expenditures made from both the public funds received from the public campaign finance fund and the private contributions of $100 or less that would be allowed under that bill (Attachment 2, §11, amending §9-3.14(A) and adding a new §9-3.14(C)).[2] Both amendments would read simply:

> "Receipts for all such expenditures shall be preserved for a period of two (2) years from the date of the expenditure."

IV. Conclusion

Common Cause hopes that these additional suggestions will receive serious consideration by the board as it carries out its task of reviewing the codes and recommending revisions. We are grateful for the board's attention.

J.E.H.

[2] The only other changes in the revised draft of this bill are corrections of some minor discrepancies in Section 6 of the bill proposing to amend §9-3.8(B) SFCC.

ATTACHMENT 1

CCNM Draft 10/__/14

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2014-_____

INTRODUCED BY:

_____

AN ORDINANCE

AMENDING THE CAMPAIGN CODE TO CLARIFY THE REPORTING OBLIGATIONS OF CERTAIN NON-CANDIDATES AND TO PROHIBIT REPORTING CONTRIBUTIONS IN THE NAME OF ANOTHER PERSON OR FOR WHICH THE CONTRIBUTOR WILL BE REIMBURSED BY ANOTHER PERSON.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Section 9-2.6 SFCC 1987 (being Ord. No. 2005-24, §29) is amended to read:

9-2.6 Independently Sponsored Campaign Materials.

Any person or entity that [~~contracts for or initiates the dissemination of campaign materials supporting the election or defeat of an identifiable candidate or of a ballot proposition, and that spends in the aggregate~~] makes an expenditure or expenditures of two hundred fifty dollars ($250.) or more [~~for such purpose~~] in the aggregate during a single election for the purpose of supporting or opposing an identifiable candidate or ballot proposition shall thereafter, on each of the days prescribed for the filing of campaign finance statements of political committees, file with the city clerk a report of all expenditures made and all contributions received for such purpose on or before the date of the report [~~and~~] which have not been [~~previously~~] otherwise reported. Each report shall be submitted on a form prescribed by the city clerk. Contributions shall be specified by date, amount of contribution, name, address and occupation of the person or entity from whom the contribution was made. No contribution shall be reported in the name of a person who is not the actual contributor or who has been or will be reimbursed or compensated for the contribution by another person. Expenditures shall be specified by date, the amount of the ex-

penditure, the name and address of the person or entity where an expenditure was made and the purpose of the expenditure.

Section 2. Section 9-2.11 SFCC 1987 (being Ord. No. 1998-41, §10) is amended to read:

9-2.11 Campaign Finance Statement; Contents.

A. Each campaign finance statement shall be filed in accordance with subsection 9-2.10 SFCC 1987. The initial statement shall begin with the date of the first contribution or expenditure. Subsequent statements shall begin on the day after the end date of the previous reporting period. Statements shall contain the following information:

(1) The funds on hand at the beginning of the period. This shall include the cumulative total amount of all contributions and expenditures. This includes, but is not limited to, contributions and expenditures in aid of, or in opposition to, candidates or ballot propositions before they qualify for the ballot and contributions and expenditures following the election;

(2) The full name, home address, occupation, name of employer, date of receipt and amount of each contribution received from each individual contributor from whom a contribution in money, goods, materials, services, facilities or anything of value has been received and whether the contribution was received in cash, by check, by credit card, by electronic transfer or otherwise;

(3) The full name, type of business, physical address, date of receipt and amount of each contribution for each business or organizational contributor, from whom a contribution in money, goods, materials, services, facilities or anything of value has been received, and whether the contribution was received in cash, by check, by credit card, by electronic transfer or otherwise;

(4) The date of receipt and amount of any anonymous contribution received by the campaign treasurer or deputy campaign treasurer and the disposition that was made of each such contribution pursuant to subsection 9-2.9B SFCC 1987, including the date when it was donated to the city or to a charity and the identity of the recipient of the donation.

(5) The full name and complete mailing address of each individual or business to whom an expenditure has been made, the purpose of each campaign expenditure and the date each expenditure was made. This report shall be itemized with the total amount paid to each individual or business for the goods, services or facilities provided;

(6) The full name of the candidate or political committee and the full name and complete address of the campaign treasurer or deputy campaign treasurer;

(7) For each contributor, the cumulative total of all contributions made; and

(8) Where goods, materials, services, facilities or anything of value other than money is contributed or expended, the monetary value thereof shall be reported at the fair market value.

B. No person shall knowingly make, accept or report a contribution in the name of a person who is not the actual contributor or who has been or will be reimbursed or compensated for the contribution by another person.

[~~B.~~] C. Loans of money, property or other things made to a candidate or political committee during the period covered by the campaign finance statement shall be reported separately in the statement, with the following information:

(1) The total value of all loans received during the period covered by the campaign finance statement;

(2) The full name and address of each lender, the date of the loan, the interest rate and the amount of the loan remaining unpaid;

(3) The cumulative total value of all loans received; and

(4) The total amount of loans remaining unpaid.

[~~C.~~] D. If a loan has been forgiven or paid by a third person, it shall be reported pursuant to this section.

[~~D.~~] E. Investments made with campaign funds under subsection 9-2.9 SFCC 1987 and interest, dividends and/or other income received shall be reported separately in the statement.

ATTACHMENT 2

CCNM Draft 10/__/14

CITY OF SANTA FE, NEW MEXICO

BILL NO. 2014-_____

INTRODUCED BY:

_____

AN ORDINANCE

AMENDING THE PUBLIC CAMPAIGN FINANCE CODE TO ENCOURAGE PARTICIPATION IN PUBLIC CAMPAIGN FINANCING BY ALLOWING PUBLICLY FINANCED CANDIDATES TO RAISE QUALIFIED SMALL CONTRIBUTIONS, MANDATING MATCHING PAYMENTS OF PUBLIC FUNDS FOR SUCH CONTRIBUTIONS AND AMENDING THE PUBLIC CAMPAIGN FINANCE CODE IN CERTAIN ADDITIONAL RESPECTS.

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF SANTA FE:

Section 1. Section 9-3.3 SFCC 1987 (being Ord. No. 2009-44, §4) is amended to read:

9-3.3 Definitions.

As used in this section, the following terms have the following meanings:

A. *Campaign depository* means a bank, mutual savings bank, savings and loan association or credit union doing business in this state under which a campaign account or accounts are maintained.

[~~B. *Campaign materials* means any published communication, electronic or otherwise, disseminated to more than one hundred (100) persons that either supports the election or defeat of any identifiable candidate or candidates or supports the approval or defeat of a ballot proposal, other than communications to, or editorials, reports, or commentary by news media.~~]

[~~C.~~] B. *Candidate* means any individual who seeks election to a Santa Fe municipal office. An individual shall be a candidate when they:

(1) Announce publicly;

(2) File for office;

(3) When contributions are accepted or expenditures made; or when

(4) Any activity is held to promote an election campaign of an individual if that activity is endorsed or supported by that person or if the benefits of such activity are later accepted by such person.

[~~D.~~] C. *Contested race* means a race in which there are at least two (2) candidates for the office sought.

[~~E.~~] D. *Contribution* means a loan, loan guarantee, gift, advance, pledge, contract, agreement or promise of money or anything of value or other obligation, whether or not legally enforceable, made directly or indirectly, to a candidate or political committee for the purpose of influencing the outcome of a municipal election.

(1) The term "contribution" includes:

(a) The transfer of funds or anything of value between political committees;

(b) The transfer of anything of value for less than full consideration;

(c) Interest, dividends or other income derived from the investment of campaign funds;

(d) The payment for the services of an individual serving on behalf of a candidate or political committee, which payments are made by a third party; and

(e) The purchase of tickets for fundraising events such as dinners, rallies, raffles, etc. and the proceeds of collections at fundraising events.

(f) An expenditure by a person other than a candidate or the candidate's political committee that is made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate or the candidate's political committee.

(2) The term "contribution" does not include:

(a) A volunteer's personal services provided without compensation or the travel or personal expenses of such a campaign worker; and

(b) The cost of an event held in honor of or on behalf of a candidate when the total cost of the event amounts to no more than two hundred dollars ($200.).

[~~F.~~] E. *Election* means any regular or special Santa Fe municipal election.

[~~G.~~] F. *Expenditure* means a payment or transfer of anything of value in exchange for goods, services, property, facilities or anything of value for the purpose of assisting, benefiting or honoring any public official or candidate, or assisting in furthering or opposing any election campaign for a candidate or ballot proposition. This includes contributions, subscriptions, distributions, loans, advances, deposits, or gifts of money or anything of value, and includes a contract, a promise or agreement, whether or not legally enforceable, to make an expenditure. The term "expenditure" also means the transfer of funds or anything of value between political committees. In determining the dollar value of an expenditure, only that proportion of a payment or transfer of anything of value that is directly related to the campaign shall be considered an expenditure.

[~~H.~~] G. *Fund* means the public campaign finance fund created by subsection 9-3.4 SFCC 1987.

[~~I.~~] H. *Non-participating candidate* means a candidate who is not a participating candidate.

[~~J.~~] I. *Participating candidate* means a candidate who has qualified and has been certified pursuant to subsection 9-3.9 SFCC 1987 as eligible to receive payments from the fund.

[~~K.~~] J. *Qualified elector* means a person who is registered to vote in the City of Santa Fe.

K. *Qualified small contribution* means a contribution of no more than one hundred dollars ($100) made and accepted in compliance with the provisions of subsection 9-3.6 SFCC 1987.

~~[L. *Qualifying contribution* means a contribution of no more [or] and no less than five dollars ($5.00) that is received from a qualified elector during the qualifying period by a candidate seeking to become a participating candidate. A candidate for councilor shall only receive qualifying contributions from qualified electors registered to vote in the council district in which the candidate is running.]~~

~~[M. *Qualifying period* means the period during which a candidate seeking to become a participating candidate is permitted to collect qualifying contributions and to apply for certifi-~~

~~cation as a participating candidate. It begins one hundred eighty-three (183) days before the election and ends one hundred six (106) days before the election.~~]

[~~N.~~] L. *Race* means the electoral process in which one (1) or more candidates run and one (1) candidate is elected to the office of mayor, municipal judge or city councilor for a particular district.

~~[O. Seed money contribution means a contribution of no more than one hundred dollars ($100.) made and accepted in compliance with the provisions of subsection 9-3.6 SFCC 1987 and used exclusively for the purposes specified in that section.~~]

[~~P.~~] M. *Uncontested race* means a race in which there is only one (1) candidate for the office sought.

Section 2. Section 9-3.4 SFCC 1987 (being Ord. No. 2009-44, §5) is amended to read:

9-3.4 Public Campaign Finance Fund.

A. A dedicated public campaign finance fund ("the fund") is established to be administered by the municipal clerk for the purpose of providing public financing for the election campaigns of participating candidates. Monies in the fund and disbursed from the fund to participating candidates are public monies entrusted to the candidates to be used solely for the public purposes specified in this Section 9-3 SFCC 1987.

B. Beginning with the city budget for fiscal year 2009-2010 and in each fiscal year thereafter, the sum of one hundred fifty thousand dollars ($150,000.) shall be budgeted for and deposited in the fund.

C. Beginning with the election of 2014, the governing body shall appropriate and deposit in the fund such additional sums, if any, as may be necessary to ensure:

(1) That the balance in the fund one hundred nineteen (119) days preceding each election for mayor and four (4) council seats is at least six hundred thousand dollars ($600,000.); and

(2) That the balance in the fund one hundred nineteen (119) days preceding each election for municipal judge and four (4) council seats is at least three hundred thousand dollars ($300,000.).

D. In addition to the deposits required by paragraphs B. and C. of this subsection, the following shall also be deposited in the fund:

~~[(1) All seed money contributions received by candidates seeking to become certified as participating candidates which remain unspent;~~]

[~~(2) All qualifying contributions received by candidates seeking to become certified as participating candidates;~~]

[~~(3)~~] (1) All amounts paid from the fund to participating candidates which have not been spent or obligated as of the date of the election;

[~~(4)~~] (2) All fines levied by the ethics and campaign review board or as decreed by a court of competent jurisdiction as a condition of probation;

[~~(5)~~] (3) Voluntary donations made to the fund;

[~~(6)~~] (4) All interest and other income earned from investment of the fund; and

[~~(7)~~] (5) Such other appropriations to the fund as may be made by the governing body as necessary to fulfill the requirements of this Section 9-3 SFCC 1987.

Section 3. Section 9-3.5 SFCC 1987 (being Ord. No. 2009-44, §6; Ord. No. 2011-28, §11) is amended to read:

9-3.5 Eligibility as a Participating Candidate.

Beginning with the election of 2012, any candidate for municipal office may qualify as a participating candidate eligible to receive payments from the fund pursuant to subsections 9-3.10 and 9-3.12 SFCC 1987 if the candidate:

A. Meets the requisites to be listed on the ballot as a certified candidate for municipal office pursuant to the provisions of Section 3-8-27 (B) through (E) NMSA 1978 and Article IV Section 4.03 of the Santa Fe Municipal Charter;

B. Has collected [~~the requisite number of qualifying contributions, as follows~~]:

(1) For a candidate running for the office of mayor, six hundred (600) qualified small contributions of no less than five dollars ($5.00) [~~qualifying contributions~~] from separate qualified electors;

(2) For a candidate running for the office of city councilor, one hundred fifty (150) qualified small contributions of no less than five dollars ($5.00) [~~qualifying contributions~~] from separate qualified electors registered to vote in the council district in which the candidate is running;

(3) For a candidate running for the office of municipal judge, one hundred fifty (150) qualified small contributions of no less than five dollars ($5.00) [~~qualifying contributions~~] from separate qualified electors.

C. Submits an application for certification pursuant to subsection 9-3.8 SFCC 1987 setting forth the agreement and the averments and accompanied by the forms[,] and reports [~~and payments~~] that are required by that section.

Section 4. Section 9-3.6 SFCC 1987 (being Ord. No. 2009-44, §7) is amended to read:

9-3.6 [~~Seed Money.~~] Qualified Small Contributions.

A. A participating candidate or a candidate seeking to become a participating candidate may solicit and accept [~~seed money contributions to defray expenses incurred in obtaining qualifying contributions and in seeking certification as a participating candidate~~] qualified small contributions.

B. The aggregate amount of [~~seed money~~] qualified small contributions from any one contributor to any one candidate shall not exceed one hundred dollars ($100.) [~~, and the aggregate amount of seed money contributions accepted by a candidate shall not exceed ten percent (10%) of the amount payable under subsection 9-3.10 SFCC 1987 to a candidate in a contested election for the office sought~~].

C. Each [~~seed money~~] qualified small contribution shall be accompanied by a form signed by the contributor, which shall include the contributor's name, home address, telephone number, occupation and name of employer. The Ethics and Campaign Review Board may, by regulation, permit the use of an electronic signature on such forms.

D. No person shall knowingly make and no candidate shall knowingly receive a qualified small contribution which is not from the person named on the form or for which the person named on the form has been or will be reimbursed or compensated by another person.

[~~D.~~] E. [~~All seed money contributions received by a candidate shall be deposited in a non-interest-bearing account in a campaign depository to be established by the candidate before soliciting or accepting any such contributions. All expenditures of seed money qualified small contributions shall be made from the campaign depository.~~] Before soliciting or accepting qualified small contributions, a candidate shall appoint a treasurer and establish a campaign depository in the manner required by subsection 9-2.8 SFCC 1987. All qualified small contributions received by a candidate shall be recorded by the candidate's campaign treasurer, deposited in a separate non-interest-bearing account in the campaign depository and used in the candidate's campaign or disposed of following the election in the manner required by subsection 9-2.9 SFCC 1987. All such contributions shall be timely reported in a campaign finance statement prepared in the manner and filed on the dates required by subsections 9-2.10 through 9-2.12 SFCC 1987. Campaign finance statements reporting the receipt of qualified small contributions shall be accompanied by copies of the forms signed by each contributor pursuant to paragraph C of this subsection.

Section 5. Section 9-3.7 SFCC 1987 (being Ord. No. 2009-44, §8) is repealed.

Section 6. Section 9-3.8 SFCC 1987 (being Ord. No. 2009-44, §9) is amended to read:

9-3.8 Application for Certification as a Participating Candidate.

A. A candidate who wishes to be certified as a participating candidate shall, on or before the 106th day preceding the election [~~before the end of the qualifying period~~], file an application for such certification with the municipal clerk on a form prescribed by the municipal clerk.

B. The application shall identify the candidate and the office that the candidate is seeking, and shall set forth:

(1) The candidate's averment under oath that the candidate satisfies the requisites for qualification and certification as a participating candidate prescribed by subsection 9-3.5 SFCC 1987;

(2) The candidate's averment under oath that the candidate has accepted no contributions to the candidate's current campaign other than [~~qualifying contributions and seed money~~] qualified small contributions solicited and accepted pursuant to subsection[s] 9-3.6 SFCC 1987 [~~and 9-3.7 SFCC 1987~~];

(3) The candidate's averment under oath that the candidate has made no expenditures for his or her current campaign from any source other than [~~seed money~~] qualified small contributions; and

(4) The candidate's agreement that his or her current campaign will not solicit, direct or accept any further contributions other than qualified small contributions or make any further expenditures from any sources other than qualified small contributions and payments received from the fund pursuant to subsections 9-3.10 and 9-3.12 SFCC 1987.

C. The application shall be accompanied by:

(1) Reports listing all [~~seed money contributions and qualifying contributions~~] qualified small contributions received by the candidate [~~and all expenditures of seed money contributions made by the candidate,~~] and showing the aggregate amounts of all such contributions [~~and expenditures and the aggregate amounts of all contributions received from each contributor~~]; and

(2) Copies of forms signed by contributors for all [~~seed money contributions and qualifying contributions~~] qualified small contributions received by the candidate.[~~; and~~

~~[(3) A check or checks issued to the City of Santa Fe from the candidate's campaign depository for the amount of all qualifying contributions received by the candidate [and all seed money contributions received by the candidate except:~~

~~[(a) Amounts previously spent for the purposes specified in paragraph A of subsection 9-3.6 SFCC 1987; and~~

~~[(b) The amount, if any, that has been temporarily retained by the candidate for the purpose of keeping open the bank account in the campaign depository pursuant to paragraph E of subsection 9-3.6 SFCC 1987.]~~

Section 7. Section 9-3.9 SFCC 1987 (being Ord. No. 2009-44, §10) is amended to read:

9-3.9 Certification as a Participating Candidate.

A. On or before the eighty-ninth (89th) day before the election the municipal clerk shall make a determination whether the candidate's application complies with the requirements of subsection 9-3.8 SFCC 1987 and whether the candidate satisfies the requisites for certification as a participating candidate prescribed by subsection 9-3.5 SFCC 1987, and shall thereupon issue a decision, in accordance with the determination so made, granting or refusing such certification to the candidate.

B. The municipal clerk may revoke a candidate's certification as a participating candidate for any violation by the candidate of the requirements of this section, and may require that any candidate whose certification has been revoked to pay over to the municipal clerk for deposit in the fund any amounts previously paid to the candidate pursuant to subsection 9-3.10 SFCC 1987.

C. Qualified small contributions in the campaign depository of a candidate who fails to obtain certification as a participating candidate, whose certification is revoked or who withdraws as a participating candidate may be retained by the candidate to be used in the candidate's campaign and disposed of after the election in the manner required by subsection 9-2.9 SFCC 1987.

Section 8. Section 9-3.10 SFCC 1987 (being Ord. No. 2009, §11) is amended to read:

9-3.10 Payments to Participating Candidates.

A. Within three (3) business days of certifying a candidate as a participating candidate, the municipal clerk shall disburse to the candidate from the fund:

(1) Sixty thousand dollars ($60,000.) for a candidate in a contested race for the office of mayor;

(2) Fifteen thousand dollars ($15,000.) for a candidate in a contested race for the office of city councilor;

(3) Fifteen thousand dollars ($15,000.) for a candidate in a contested race for the office of municipal judge; or

(4) For a candidate in an uncontested race, ten percent (10%) of the amount that would be due to a candidate in a contested race for the same office.

B. If the amounts required to be paid to candidates under paragraph A of this subsection exceed the total amount available in the fund, each payment shall be reduced in proportion to the amount of such excess. Any such proportionate reduction in the payment due to any candidate under paragraph A of this subsection shall give the candidate the option to reject the payment and to withdraw as a participating candidate. A candidate who withdraws as a participating candidate pursuant to this paragraph shall file an affidavit with the municipal clerk so stating and shall thenceforth be treated for all purposes as a non-participating candidate relieved of all obligations and restrictions and excluded from all benefits and exemptions imposed or conferred on a participating candidate by this Section 9-3 SFCC 1987.

[~~C. Within five (5) business days of the candidate's receipt of the amount disbursed under paragraph A of this subsection or the municipal clerk's refusal to certify the candidate as a participating candidate pursuant to paragraph A of subsection 9-3.9 SFCC 1987, whichever is sooner, the candidate shall pay over to the municipal clerk for deposit in the fund any amount of seed money that has been temporarily retained by the candidate for the purpose of keeping open the bank account in the campaign depository pursuant to paragraph E of subsection 9-3.6 SFCC 1987.~~]

Section 9. Section 9-3.11 SFCC 1987 (being Ord. No. 2009-44, §12) is amended to read:

9-3.11 Use of Payments from the Fund [~~; the Fund as Exclusive Source~~].

A. All payments received by a participating candidate from the fund shall be deposited in a separate non-interest-bearing account in the candidate's campaign depository and shall be used exclusively to pay expenses reasonably incurred in furtherance of the candidate's current campaign.

B. Payments received from the fund shall not be used for any other purpose, including:

(1) The candidate's personal living expenses or compensation to the candidate or the candidate's family;

(2) A contribution to another campaign of the candidate or a payment to retire debt from another such campaign;

(3) A contribution to the campaign of another candidate or to a political party or political committee or to a campaign supporting or opposing a ballot proposition;

(4) An expenditure supporting the election of another candidate or the passage or defeat of a ballot proposition or the defeat of any candidate other than an opponent of the participating candidate;

(5) Payment of legal expenses or any fine levied by a court or the ethics and campaign review board.

(6) Any gift or transfer for which compensating value is not received.

C. All payments from the fund received by a participating candidate which have not been spent or obligated for the purposes specified in paragraph A of this subsection and any tangible assets purchased with such payments remaining in the possession of the campaign as of the date of the election shall be returned by the candidate and shall be conveyed to the municipal clerk within forty-five (45) days after that date. Returned payments shall be deposited in the fund. Tangible assets shall be conveyed to the city for its use or disposition in accordance with the city's procurement code. Proceeds from such disposition shall be deposited in the fund.

D. In accordance with the agreement entered into pursuant to subparagraph B(4) of subsection 9-3.8 SFCC 1987, a candidate who has been certified as a participating candidate shall not thereafter accept any contribution to the candidate's campaign other than payments received from the fund pursuant to subsections 9-3.10 and 9-3.12 SFCC 1987 and qualified small contributions received pursuant to subsection 9-3.6 SFCC 1987, and shall not make any expenditure in support of the candidate's campaign from any source other than payments and contributions so received and previously deposited in the candidate's campaign depository.

Section 10. A new section 9-3.12 SFCC 1987 is ordained to read:

9-3.12 [NEW MATERIAL] Additional Reports of Qualified Small Contributions; Additional Matching Payments from the Fund

A. In addition to the dates specified for the filing of campaign finance statements by subsection 9-2.10 SFCC 1987, campaign finance statements reporting the receipt of qualified small contributions may also be filed by participating candidates on the eighty-third day preceding the election, the sixty-second day preceding the election and the fifteenth day preceding the election.

B. Within two business days after the filing of a campaign finance statement by a participating candidate reporting the receipt of qualified small contributions and accompanied by copies of the forms signed by the contributors as required by paragraph C of subsection 9-3.6 SFCC 1987, the municipal clerk shall disburse to the candidate an additional payment from the fund equal to four times the total amount of the qualified small contributions reported in the campaign finance statement; provided, however, that no such additional matching payments shall

be made for contributions reported in a campaign finance statement filed after the Tuesday preceding the election; and provided further that additional matching payments for contributions listed in a report filed with the candidate's application for certification under subsection 9-3.8 SFCC 1987 shall not be made until two business days after such contributions have been listed anew in a campaign finance statement filed under paragraph E of subsection 9-3.6 SFCC 1987 or paragraph A of this subsection.

C. Additional payments made to a participating candidate pursuant to paragraph B of this subsection shall be deposited in the separate account in the candidate's campaign depository that was established by the candidate for the deposit of payments received from the fund pursuant to paragraph A of subsection 9-3.11.

D. The aggregate amount of additional payments made to a participating candidate pursuant to paragraph B of this subsection shall not exceed two hundred percent (200%) of the amount initially paid to the candidate pursuant to subsection 9-3.10 SFCC 1987.

E. If the amounts required to be paid to candidates under paragraph B of this subsection exceed the total amount available in the fund, each payment shall be reduced in proportion to the amount of such excess.

Section 11. Section 9-3.14 SFCC 1987 (being Ord. No. 2009-44, §15) is amended to read:

9-3.14 Reports of Expenditures; Exemption from Certain Reporting Requirements.

A. A participating candidate shall file with the municipal clerk reports under oath of expenditures made from the payments received from the fund, indicating that the expenditures were made from that source and showing the date and amount of each such expenditure, the name and address of the person or organization to whom it was made, the purpose of the expenditure, the aggregate amount of such expenditures made to each person or organization and the aggregate amount of all such expenditures made by the candidate or by his or her campaign. Receipts for all such expenditures shall be preserved for a period of two (2) years from the date of the expenditure.

B. The reports required by paragraph A of this subsection shall be filed on each of the days prescribed for the filing of campaign finance statements by subsection 9-2.10 SFCC 1987.

C. A campaign finance statement filed by a participating candidate to report qualified small contributions pursuant to paragraph E of subsection 9-3.6 SFCC 1987 or paragraph A of subsection 9-3.12 SFCC 1987 shall also include a report of all expenditures made during the period covered by the statement from the separate account established by the candidate for the deposit of such contributions pursuant to paragraph D of subsection 9-3.6 SFCC 1987. The statement shall show that the expenditures were made from that source and shall contain all the information concerning the expenditures, account balances and funds on hand that is required for campaign finance statements filed pursuant to subsection 9-2.11 SFCC 1987. Receipts for all

such expenditures shall be preserved for a period of two (2) years from the date of the expenditure.

[~~C.~~] D. Except as provided in paragraphs A [~~and B~~] through C of this subsection [~~and~~], paragraph E of subsection 9-3.6 SFCC 1987, paragraph C of subsection 9-3.8 SFCC 1987[~~;~~] and paragraph A of subsection 9-3.12 SFCC 1987, participating candidates are exempt from the requirement to file campaign finance statements imposed by subsections 9-2.10 SFCC 1987 through 9-2.12 SFCC 1987 and from the requirements to file campaign records with the municipal clerk imposed by paragraph C of subsection 9-2.9 SFCC 1987; provided, however, that campaign records shall be maintained in the manner required by the applicable provisions of the Campaign Code (Section 9-2 SFCC 1987) and shall be made available upon request to the municipal clerk and the ethics and campaign review board.

[~~D.~~] E. [~~A seed money and qualifying contribution report and an~~] Campaign finance statements and contribution and expenditure reports of a candidate for municipal judge are not required to be signed or acknowledged by the candidate.

VIGIL, YOLANDA Y.

From: James Harrington <harr77@earthlink.net>
Sent: Thursday, November 20, 2014 7:31 PM
To: Justin Miller; SHANDLER, ZACHARY A.
Cc: VIGIL, YOLANDA Y.; Ruth Kovnat; Fred Rowe; Viki Harrison
Subject: more campaign finance issues

Dear Justin and Zach -

Having heard rumors that the ECRB would soon begin its consideration of possible changes to the campaign laws, I thought I should alert the board and the city attorney to two additional legal issues that were not addressed in Common Cause's earlier memos to the board. We haven't previously tackled these issues because the law on both of them is unsettled and still evolving, and we frankly can't offer a prediction about how they will eventually be resolved or specific advice about how they should affect the board's recommendations for revising the laws. But we thought that - just in case these issues hadn't already come to your attention - we should at least make sure that you're aware of them before the board's deliberations begin.

Both of the issues I'm referring to affect the reporting obligations of non-candidates - "political committees" and those independent campaign spenders who don't satisfy that definition but who are nevertheless required to report certain information about their expenditures under section 9-2.6 of the code. The first of these issues is whether a certain minimum level of spending should be required in order to trigger the reporting obligation, and if so, how low it can go without raising constitutional questions. This is an issue on which the federal courts have adopted widely divergent views. Compare *Coalition for Secular Govt. v. Gessler,* D.Colo., No. 12-1708, Opinion and Order dated October 10, 2014 (http://scholar.google.com/scholar_case?case=8459782204626324330&q=coalition+for+secular+government+v.+gessler&hl=en&as_sdt=6,32) ($3,500 threshold is too low), with *Bailey v. Maine Comm. on Govt. Ethics*, 900 F.Supp.2d 75, 91-93 (D.Me. 2012) (http://scholar.google.com/scholar_case?case=4814548461201161656&q=900+F.Supp.2d+75&hl=en&as_sdt=6,32) (first-dollar reporting requirement is constitutional). But the Tenth Circuit appears to have taken a particularly conservative position - even to the point of seeming to disregard several Supreme Court decisions on the value of disclosure of campaign funding - and a district court in this circuit has very recently adopted the extreme view that even a threshold of $3,500 may be too low in ballot-measure elections. *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010) (http://scholar.google.com/scholar_case?case=10357546265009295696&q=sampson+v.+buescher&hl=en&as_sdt=6,32); *Coalition for Secular Government v. Gessler, supra.*

If this is indeed the direction in which the law in this circuit is heading, the board may wish to consider whether Santa Fe's reporting thresholds may be too low to avoid constitutional challenges. The spending threshold to trigger the reporting requirements under section 9-2.6 is currently $250, and there is no threshold at all for reporting by political committees, which are required to register and file reports regardless of how little they may spend. Given the range of judicial views on the question, Common Cause is unable to make a specific recommendation and has therefore left these specific provisions unchanged in its suggested revisions of sections 9-2.6 and 9-2.11. But this is something the board should probably be thinking about.

The second issue concerns the exemption for communications to and by news media from the reporting requirements that are imposed on non-candidates. This general issue has been the subject of a recent exhaustive analysis in a Tenth circuit opinion by the same judge (Judge Hartz) who wrote the decision adopting the Tenth Circuit's very conservative view on spending thresholds. In this opinion, the court takes a particularly

expansive view of the kinds of political advertising that should be entitled to a media exemption, concluding that any jurisdiction that allows such an exemption from its campaign reporting law must extend it on a non-discriminatory basis to cover any organization, such as the conservative documentary filmmaker Citizens United, that has a sufficient "history of reporting and offering opinions" to render it comparable to a news outlet. *Citizens United v. Gessler*, 10th Cir., No. 14-1387, Opinion and Order dated October 27, 2014, pp. 28-29
(http://scholar.google.com/scholar_case?case=11054962748210356828&q=citizens+united+v.+gessler&hl=en&as_sdt=6,32).

Santa Fe law currently provides for such a media exemption from its reporting requirements for third-party spenders who are not political committees. These entities are required to report their spending only for "the dissemination of campaign materials," and the term "campaign materials" is defined to exclude "communications to, or editorials, reports, or commentary by news media." Because of the ambiguity of the term "campaign materials" with respect to its coverage of such activities as paid phone-banking and precinct-walking, Common Cause has suggested that this term be deleted from the section requiring reporting by these entities, and that this provision should instead simply call for reporting by anyone who "makes an expenditure or expenditures" of a certain minimum amount "for the purpose of supporting or opposing an identifiable candidate or ballot measure." Since the definition of "campaign materials," however, is presently the source of the media exemption, one effect of deleting that term from this section would be to eliminate any express exemption for news media from these reporting requirements.

Common Cause has viewed this result as acceptable and appropriate for two reasons. First, an express exemption would probably be unnecessary in any event to exclude most activities of the news media from the coverage of the reworded section, because it is difficult to conceive how a newspaper's decisions about which subjects to address in its daily editorial space, which stories to assign to its reporters or which op eds to accept for publication could be shown to fit within the code's definition of an "expenditure" (§9-2.3(L) SFCC), let alone how the newspaper would go about identifying the "contributors" for that expenditure. Secondly, the litigation in *Citizens United v. Gessler, supra*, had raised the specter, which has now materialized in the Tenth Circuit's opinion of October 27, that any express media exemption might be converted by the courts into a sizable loophole - an exception that would largely swallow the rule and allow many major independent spenders - all those with a sufficient "history" of publicly expressing their opinions - to avoid reporting their spending. See *Citizens United v. Gessler, supra*, Opinion of Phillips, J., dissenting, pp. 7-8.

This remains our view, but we acknowledge that the issue is a difficult one, and we therefore think it should be flagged for the board and directly addressed, considering all the pros and cons of retaining an express exemption for news media, when the board decides whether and how to revise section 9-2.6. If the board decides to retain the exemption, it could do so either by retaining the section's reference to the definition of "campaign materials," which excludes news media, or it could accept Common Cause's recommended rewrite of that section deleting the reference to "campaign materials," but add a final sentence to the section that would read "No report is required for expenditures made exclusively for communications to, or editorials, reports or commentary by news media." If the board decides, on the other hand, to eliminate any express exemption for news media, trusting that their usual activities would not in any event be found to constitute "expenditures," it could do this either by adopting Common Cause's proposed rewrite without adding the quoted sentence, or by simply deleting the exempting language from the definition of "campaign materials" in section 9-2.3 (although in that case, it might be advisable, in addition, to revise the language of section 9-2.6 to clarify that reporting is required only for activities that satisfy the code's definition of an "expenditure" - by, for example, deleting the words "spends in the aggregate $250 or more" and substituting the words "makes aggregate expenditures of $250 or more").

Please feel free to share these observations with the board members. We hope that our comments will prove helpful to the board and the city attorney as they undertake this important task. You all deserve a vote of thanks for all you do.

Jim Harrington
Common Cause NM