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The Honorable Jeanette K. White
Chair, Senate Committee on Government Operations
Vermont State House
115 State Street
Montpelier, Vermont 05633

BY E-MAIL ONLY

Re: Report from the Joint Committee on Campaign Finance

Dear Senator White:

Please find enclosed a copy of the report from the Joint Committee on Campaign Finance Education, Compliance and Reform ("Committee").

The Committee conducted a number of public hearings in 2017. Based upon both public comments and the experience of legal practitioners on the Committee, the report identifies potential areas where the existing campaign finance laws can be clarified to assist those participating in the electoral process. In addition, the report contains recommendations for further study to enhance the regulation of campaign finance in the State of Vermont.

The Committee considers this report to be the initial phase of its work. The Committee anticipates further meetings in 2018 to develop more concrete recommendations for the Legislature's consideration during the next biennium.

Sincerely,

A handwritten signature in black ink, appearing to read "J. Diamond", written over a horizontal line.

Joshua R. Diamond
Deputy Attorney General

The Joint Committee on Campaign Finance, Education, Compliance and Reform
Report on Public Comment and Recommendations

INTRODUCTION

In February of 2017 the Vermont Secretary of State and Vermont Attorney General established the Committee on Campaign Finance Education, Compliance and Reform (“the Committee”). The Committee was established to foster outreach and promote education about the current legal framework applicable to financing elections in Vermont; solicit input from the public and elected officials on ideas and concerns about Vermont’s campaign finance system; and offer suggested solutions and reforms to improve the operation, transparency and effectiveness of Vermont’s campaign finance system.

The membership of the Committee represents a broad political spectrum and a deep background in Vermont campaigns and election law. The Committee is chaired by Jake Perkinson, Esq., the former Chair of the Vermont Democratic Party and includes the following members: Brady Toensing, Esq., an advocate for transparency and accountability in government who serves as the Vice Chair of the Vermont Republican Party; Josh Wronski, the Executive Director of the Vermont Progressive Party; Liz Blum, County Chair of the Windsor County Progressive Party, Madeline Motta, Esq., Chair of the Vermont State Ethics Commission; Vermont Secretary of State Jim Condos; Will Senning, Esq., Director of Elections at the Office of the Vermont Secretary of State; Vermont Attorney General T.J. Donovan, Esq.; and Josh Diamond, Esq., Chief Deputy Attorney General for the State of Vermont. Administrative support was provided by Eric Covey of the Secretary of State’s Office and Natalie Silver of the AG’s Office.

Over the past year the Committee held public hearings throughout Vermont and invited public comment and input on Vermont’s campaign finance system. The meetings were well attended and resulted in constructive opportunities to educate candidates and the public. The hearings reinforced many consistent themes and offered the presentation of new ideas.

After hearing from the public, the Committee met repeatedly to discuss the issues raised and explore responses that could improve Vermont’s campaign finance regime based on the suggestions of the public and other approaches informed by the collective experience of the Committee’s members. This report sets forth the results of the Committee’s initial analysis and suggestions for modifications in the current campaign finance laws and practices.

Section I outlines the summary of the public comments the Committee heard around the state. These issues were brought up at most of the public meetings.

Section II presents initial recommendations of the Committee for amendments to Vermont’s existing campaign finance laws found at 17 VSA §§ 2901-2986. Based on both public comment and the experience of legal practitioners on the Committee it is apparent that the wording of the existing statute leads to confusion in many cases that could be avoided with clearer language. The Committee believes that the suggested areas for amendment will benefit those who seek to run for office and the citizenry of Vermont by providing greater clarity and more reliable guidance.

Section III sets forth the recommendations of the Committee for issues that require further study including the issue of public campaign financing.

SECTION I -SUMMARY OF PUBLIC COMMENTS

Enforcement

- There should be penalties for not complying with filing dates, non-disclosure of expenditures or donations. This came up at every meeting.

Contribution Limits

- The reporting requirements for small donations is confusing – whether the name and address of all contributors should be required despite the amount of the donation.
- Lower limits for municipal elections.

Ombuds

- There should be an independent ombuds for Campaign Finance Complaints.

Financial Disclosures

- The reporting schedule should require more frequent reporting.
- We should consider changing the dates of the August primary to increase voter participation.
- There should be more clarity on revolving door limits.
- There should be more clarity on conflict of interest rules.
- There should be more clarity on conflict of interest advisory opinions.
- Should contributions to a county committee count as contributions to the State Party?

Public financing of elections,

- Publicly financed candidates need to be able to compete equitably for public office and should be allotted more funds so that they are able to do so.
- The February 15th start date should be eliminated. The candidates should be able to start with everyone else

Term Limits

- Change the Governor's term from two years to four years. Elected officials should focus more on governing than fundraising and a longer term in office would allow for more time spent working.

SECTION II- SUGGESTED AREAS FOR PRACTICAL AMENDMENTS TO VERMONT'S CAMPAIGN FINANCE LAWS

A. Definitions. 17 V.S.A. §§ 2901, 2902.

1. Definition of "Candidate's Committee." The current definition is limited to a candidate's campaign staff. Further consideration should be given to expanding this definition to include agents of the campaign to help ensure the effectiveness of the provisions addressing coordinated activity. Any edits to this provision should account for developments in current case law that have interpreted the statutory language addressing coordinated activity.
2. Definition of Electronic Communications. This definition should be updated to address changes in electronic communications.
3. Exclusions. These sections should be reviewed and possibly reworded and reorganized to provide greater clarity. One example includes the various exemptions from the definition of a contribution for party activity and whether they are necessary in light of the fact that parties currently may make unlimited contributions to candidates.

B. Penalties. 17 V.S.A. § 2903.

1. The committee heard reports about delinquent (or delayed) filing of campaign finance reports by candidates. A liquidated penalty schedule like the one used for lobbyists who fail to file timely reports may assist in achieving greater compliance.

C. Civil Investigation. 17 V.S.A. § 2904.

1. The legislature should consider the creation of an Ombuds to investigate campaign finance violations. Competing policy interests include the value of an independent official charged with these responsibilities versus political accountability and available funding.
2. Given the complexity of Vermont's campaign finance laws, it may be helpful for interested parties to be allowed to obtain advisory opinions that could be relied upon by candidates, parties, and political committees concerning compliance and enforcement. The legislature should consider models from either the FEC or other states.

D. Contribution Limits. 17 V.S.A. § 2941.

1. The committee heard public comments raising concerns that the \$1000 limit for municipal elections is too high. The legislature should examine whether to lower this limit to avoid potential *quid pro quo* corruption or its appearance. See *Vermont Right to Life Comm. v. Sorrell*, 758 F.3d 118, 140 (2d Cir. 2014) (citing *McCutcheon v. Fed.*

Election Comm'n, — U.S. —, 134 S. Ct. 1434, 1441–42, 1450(2014)). A \$340 election cycle limit for local candidates was struck down in *Lair v. Mott*, 189 F. Supp. 3d 1024 (D. Mont. 2016). In contrast a limit of \$500 per year (not necessarily the election cycle) was upheld in *Thompson v. Dauphinis*, 217 F. Supp. 3d 1023 (D. Alaska 2016).

E. Surplus Campaign Funds. 17 V.S.A. § 2924.

1. The committee identified a concern that excess contributions raised by statewide candidates could be rolled over for campaigns in local or legislative elections that have significantly lower contribution limits. Consideration should be given about limitations on such roll overs to protect the integrity of the contribution limits for local and legislative elections. For instance, it could be required that any surplus funds from a previous campaign may only be used for a campaign for an office with equal or higher contribution limits.

F. Campaign Reports. 17 V.S.A. § 2963.

1. The committee recommends greater transparency of the source of funds from contributors who are not natural persons.

SECTION III- FUTURE WORK

A. Public Financing of Elections

Support for reform of Vermont's Public campaign financing system was expressed in every public forum. The number of public comments on the subject were overwhelmingly in favor of a strong and effective public campaign finance system. It is our intent to lay out some of the issues we heard relating to public financing. The issues presented in this document are beyond the purview of this joint committee to fully address and should be explored fully by the Legislature or a committee with the explicit mission of reforming Vermont's public campaign finance law.

Issues

- Lack of funding
 - The current law is unfunded. The Secretary of State must request reimbursement from the Legislature after providing publicly financed candidates with funding. This situation presents a serious challenge, especially if multiple candidates were to file for public campaign financing in the same election.
- Underfunding of a candidate
 - The current law provides at most \$415,000 to a gubernatorial candidate and \$132,000 to a lieutenant gubernatorial candidate after they meet their required amount of qualified contributions. In 2016, each major party gubernatorial candidate spent over \$1.5 million.
- February 15 date for candidate announcements

- Statewide candidates are increasingly announcing their campaigns prior to the February 15 start date for publicly financed candidates. In 2017 there is at least one candidate who has announced a campaign for 2018. This puts publicly financed candidates at a competitive disadvantage.
- In-kind contributions and coordination with political parties
 - Publicly financed candidates are barred from accepting in-kind contributions. This is especially problematic for a candidate running with the nomination of a political party whose mission is to support their nominated candidates. This is further complicated by a lack of clarity in the current law about what level of coordination and support from a political party constitutes an in-kind contribution.
- Underutilization
 - The issues presented in this section have led to an underutilization of our current public campaign finance law for Governor and Lt. Governor. No candidate has attempted to use our public campaign financing since 2014.
- Expanding public financing of elections
 - Many public comments spoke to a concern with the ever-increasing level of money required to run for local, State Representative, State Senate, and Statewide office. This presents a barrier for many to run for office. Expanding public financing to more offices has been suggested as one solution to this problem.

Recommendations

While the scope of this committee is too limited to provide detailed recommendations for this incredibly complex and important issue, we do recommend the creation of a public campaign finance reform committee to explore:

1. Fully funding our public campaign finance system. The committee should explore funding mechanisms for public campaign financing.
2. Expanding or eliminating the February 15 start date for publicly financed candidates.
3. Clarifying the rules for in-kind contributions for publicly financed candidates, particularly as they relate to a publicly funded candidate's relationship with their political party.
4. Expanding public campaign financing to other offices. A future committee should explore the public campaign finance system in states such as Maine and Connecticut which allow legislative candidates to be publicly financed and have achieved high rates of utilization.

B. Campaign Finance Ombudsman Within the Vermont State Ethics Commission¹

In the last twenty years, the cornerstone of reforming our system of financing political campaigns was to require candidate financial disclosures, lower campaign contribution limits, and prohibit the use of soft money and other accountability measures. Today, most states have demonstrated a strong commitment to fair and transparent elections by designating a state agency, division or commission to direct their campaign finance laws.

¹ This recommendation has not been unanimously endorsed by the committee.

A recent survey of campaign finance enforcement in the United States indicates that most states are committed to campaign finance oversight.² Some states have an entire commission or division that specializes in campaign finance, handling both financial disclosures and campaign finance compliance.

At least eleven states explicitly delegate the authority to enforce campaign finance violations to a designated agency. Some states provide for a quasi-judicial hearing procedure, sometimes overseen by an administrative law judge, after a commission or board finds that the evidence supports a reasonable belief that a violation may have occurred. While in other states, the authority is tasked with managing campaign finance reporting and complaint investigation, but the authority to litigate a campaign finance violation rests with the attorney general.

In a quarter of states, the oversight of campaign finance law is under the authority of the state ethics commission.³ Many state ethics commissions utilize senior ethics officers/generalists with expertise in campaign finance regulation. Senior ethics officers/generalists are charged with administering, interpreting and enforcing campaign finance laws relating to conflicts of interest, financial disclosures and regulation of lobbying activities.

The Wisconsin Ethics Commission has a senior ethics officer as the designated campaign finance expert responsible for managing the campaign finance complaint process, issuing campaign finance advisory opinions, compliance, enforcement and overseeing ethics officers who field campaign finance questions.

The Kansas Ethics Commission has a campaign finance ombudsman or specialist that publishes campaign finance advisory opinions and handles the complaint process of investigating and resolving allegations of non-compliance with the law.⁴

Based on NCSL data, there appears to be a trend to locate a campaign finance ombuds/specialist within state ethics commissions. This approach to campaign finance administration is coherent with the necessity for impartial oversight distinctively independent of Secretary of State Offices that have little resources and no authority to respond to allegations of campaign finance violations.

Recommendations:

2017 Act 79, State Ethics Commission and Standards of Governmental Ethical Conduct,⁵ mandates that the State Ethics Commission is responsible for financial disclosure filings, restrictions on state contracting and campaign contributions, post-employment restrictions and accepting complaints, some of which will be allegations of non-compliance with campaign finance laws. Accordingly, it is reasonable and practicable that a campaign finance

² State Campaign Finance Enforcement Agencies, National Conference of State Legislatures, March 30, 2017.

³ See attached Unpublished NCSL survey of campaign finance oversight in the 50 states including D.C. Dec. 8, 2017.

⁴ State Ethics Commissions: Powers and Duties, National Conference of State Legislatures Updated 12/8/2017, available at www.ncsl.org.

⁵ 2017, Acts and Resolves No. 79, An Act Relating to Establishing the State Ethics Commission and Standards of Governmental Ethical Conduct.

ombuds/specialist position be created within the State Ethics Commission to oversee campaign finance compliance.

The campaign finance ombuds/specialist duties would include:

- Provide information to the public, and candidates regarding campaign finance laws;
- Issue campaign finance advisory opinions and guidelines;
- Establish policies and procedures for receiving, investigating, and mediating and adjudicating campaign finance laws;
- Develop and implement a reporting system to collect and analyze information relating to complaints,
- Receive and investigate complaints or violations relating to an elected official, legislator or lobbyist;
- Compel by subpoena, affidavits, documents and financial records;
- Hold quasi-judicial hearings if there is probable cause of a violation;
- Upon a finding of a violation, may require the violator to cease and desist the violation;
- Submit to the House and Senate Committees on Government Operations, a report on work performed by the campaign finance ombuds/specialist during the previous calendar year.

Funding Source:

In terms of funding source for a campaign finance ombudsman/specialist position, one option would be a surcharge assessed to all Executive Branch agencies, departments and offices and paid by the assessed entities entirely with State Funds.

Another option utilized by several states is to garner revenue generated from registration fees paid by candidates and lobbyists as a funding source for campaign finance regulatory staff and activities. The Wisconsin Ethics Commission funds their campaign finance compliance program in this manner and is worth further examination.

C. Valuing of E-Mails and Contact Lists

Greater clarity should be provided on how to value e-mails, e-mail lists and the use of social media as in-kind contributions. At least one court has found that email lists are valuable and the use of them on behalf of a candidate can be a donation to that candidate.⁶ In clarifying this issue, the legislature may also want to consider whether and how to value the coordinated use of social media on behalf of a candidate or regarding a public question.

⁶ See *Catholic Leadership Coalition of Tex. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014) (email mailing lists and the email addresses that comprise them have actual monetary value); see also Molly Ball, Sharron Angle, & Joe Miller, "Christine O'Donnell Fall Forward After 2010 Flops," Politico, Mar. 25, 2011, 2:11 PM, available at <http://www.politico.com/news/stories/0311/51950.html> ("[T]oday's failed candidates came away from the election with something perhaps more valuable than a seat in Congress: email lists of supporters and small donors numbering in the tens of thousands.").

IV. CONCLUSION

The Committee emphasizes that the analysis and improvement of Vermont's campaign finance laws are not static enterprises and developments in technology, election strategies, and communication norms require that Vermont continually evaluate the effectiveness of its laws and regulations touching on the financing and conduct of elections.