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James B. Alcorn, Esq.
Dr. Clara Belle Wheeler
Singleton B. McAllister, Esq.
Virginia State Board of Elections
Washington Bldg. First Floor
1100 Bank St.
Richmond VA 23219

VIA EMAIL

RE: VIRGINIA BOARD OF ELECTIONS CONSIDERATION OF WHETHER TO
ADJUDICATE VIOLATIONS OF CAMPAIGN FINANCE LAW PRIOR TO
ELECTIONS.]

Landmark Legal Foundation (“Landmark”), a national public interest law firm committed to preserving the principles of separation of powers, federalism, rule of law and election integrity respectfully submits these comments regarding the Virginia Board of Elections (“Board” or “SBE”) decision to consider whether it will adjudicate violations of campaign finance law prior to general elections. For reasons stated below, Landmark urges the Board to adopt policies whereby it considers and adjudicates substantive allegations of campaign finance law in a timely manner and prior to the November date of the general election when practicable.

By adjudicating these allegations before the general election, the Board can impose appropriate penalties that will, presumably, remedy the violation before the election, mitigate the adverse effects of any improper activity, and deter those who would violate Virginia campaign disclosure law in the future.

I. BACKGROUND

During the December 16, 2015, public meeting, the Board considered a Memorandum submitted by Brooks C. Braun, that discussed protocols for “handling campaign finance complaints[.]” Brooks C. Braun “Memorandum: Protocol for Handling Campaign Finance Complaints,” SBE Working Papers, December 16, 2015. While discussing the matters raised in this memo, Vice Chair Clara Belle Wheeler proposed that the Board consider adjudicating substantive allegations of campaign finance law violations prior to the annual December meeting because post-election penalties imposed by the Board fail to prevent or even encourage perpetrators to reap the benefits of a violation.

A candidate, campaign committee or any other entity can, under the current system, issue a print media, radio, or television advertisement that violates Virginia law and use that improper advertisement to win an election essentially with impunity. Answering for those violations post-election deprives the Board of meaningful enforcement power and threatens free and fair elections in Virginia. Chair James Alcorn and Secretary Singelton McAllister agreed with Vice Chair Wheeler’s proposal, with both stating that it would be productive to implement a new policy where the Board considers campaign finance complaints before November general elections.¹

The current policy of imposing penalties following elections does not sufficiently punish nor dissuade candidates, campaign committees, political committees or other entities for violating Virginia’s campaign finance laws. Candidates and related entities have little incentive to adhere to disclosure mandates because any violation would not be adjudicated until after the general election. The voters have spoken and a successful candidate who may have circulated improper campaign materials would have already benefited. Furthermore, Virginia law specifies

¹ Landmark bases this recitation on contemporaneous notes taken by attorneys in attendance at the December 16, 2015 meeting.

that these types of violations will not void any election. Va. Code Ann. § 24.2-955.3.

Additionally, the Board's current policy removes the important principle of punishment serving as a deterrent because candidates and their related entities have little fear that violating Virginia law could adversely affect their campaigns. Implementing the proposed policy will remedy these deficiencies.

These comments: (1) Explain the legal framework pertaining to the Board's authority to adjudicate allegations of violations of campaign finance; (2) Propose a new policy of adjudicating substantive allegations prior to the November general election; and (3) Examine the practical applications of implementing a new policy.

II. LEGAL FRAMEWORK

Traditionally, the SBE has asserted jurisdiction to adjudicate complaints alleging violations of Chapter 9.5 ("Stand By Your Ad complaints") of Title 24.2 of the Virginia Code ("Code"). See Brooks C. Braun, "Memorandum: Protocol for Handling Campaign Finance Complaints," SBE Working Papers, December 16, 2015.

Title 24.2, Chapter 9.5 sets forth disclosure requirements for print media, television and radio advertisements by both candidate committees and other entities. Va. Code. Ann. § 24.2-956 *et seq.*, § 24.2-957 *et seq.*, § 24.2-958 *et. seq.* Chapter 9.5, article 5 establishes disclosure requirements for telephone calls for both candidate committees and other entities. Va. Code. Ann. § 24.2-959.

Generally, Chapter 9.5 requires candidate committees and other entities to include in their media specific information on who paid for the advertisement, whether an identified candidate has authorized the ad and whether the disclosure statement is placed in a conspicuous manner.

The disclosure obligations set forth in Chapter 9.5 are triggered when an advertisement constitutes an expenditure or contribution under the statutory definitions under Chapter 9.3. Chapter 9.3 in turn defines a “contribution” as “money and services of any amount, in-kind contributions, and any other thing of value, given... for the purpose of expressly advocating the election or defeat of a clearly identified candidate...” Va Code. Ann. § 24.2-945.1. The Code defines “expenditure” as “money and services of any amount, and any other thing of value... ..disbursed by any candidate, campaign committee, political committee, or person for the purpose of expressly advocating the election or defeat of a clearly identified candidate or by any inaugural committee for the purpose of defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General.” Va Code. Ann. § 24.2-945.1.

Penalties for violations of Chapter 9.5 range from fines up to \$1,000.00 for violations occurring 14 days or earlier of the election day and up to \$2,500.00 for violations within 14 days of an election. In the case of willful violations, penalties can result in finding the violator guilty of a Class 1 misdemeanor. Va. Code Ann. § 24.2-955.3.

As the authority for enforcing these provisions, the SBE “in a public hearing, shall determine whether to find a violation of [Chapter 9.5] and to assess a civil penalty.” Va Code. Ann § 24.2-955.3(D). The SBE however, “shall send notice by certified mail to persons whose actions will be reviewed at such meeting and may be subject to civil penalty” **at least 10 days** prior to such hearing. *Id.* (emphasis added). The Code is silent as to when the Board is to adjudicate allegations of violations of campaign disclosure law.

III. NEW POLICY

As stated previously, adjudications for alleged violations of Chapter 9.5 typically occur following the general election. For example, during the December, 2015 SBE public meeting,

the Board considered “Stand By Your Ad” complaints filed with the Department of Elections on September 14, 2015, and September 30, 2015. Under a new policy, these complaints could be adjudicated in mid-October and any violations could be remedied prior to the general election. Remediation prior to the general election would blunt the amount of influence improper advertisements would have on the election or defeat of candidates.

- 1. The Board should schedule a meeting in the second to third week of October with the express purpose of adjudicating all substantive complaints that have been filed at least 15 days prior to the meeting.**

Scheduling the SBE special meeting, for example, on October 15 would allow the Board to adjudicate any complaints received by September 30. The five day “flex” period would allow Department of Election Staff members who initially receive the complaints to screen said complaints to determine whether they are substantive and necessitate Board action. The October 15 (or thereabouts) adjudication would also be early enough in the election cycle to mitigate the potential negative impact that improper advertisements may have.

- 2. A mid-October meeting designated to address complaints will have the added effect of deterring candidates and campaign committees from violating Virginia law.**

Currently, violations of Chapter 5 will not void any election. At most, candidates and related entities pay a fine or address a Class 1 misdemeanor after the election. Presumably, candidates will want to avoid the political repercussions that result in a finding that he/she has violated campaign finance law. The consequences of the negative publicity surrounding such a finding in the middle of a political campaign provide additional incentive to comply with Chapter 5’s disclosure requirements.

- 3. Adjudicating these matters during the campaign season also minimizes the chances that candidates and/or campaign committees engage in ongoing or multiple violations.**

For example, the complaint pertaining to “Van Fleet for Alexandria Council” alleged violations that occurred on three separate occasions (on the dates October 1, 9 and 15, 2015 respectively) in the Alexandria Times. A timely notice and adjudication meeting could have prevented the third and (possibly) the second violation.

- 4. Holding a meeting in mid-October ensures that – to the extent possible – campaign advertisements contain the important disclosure language mandated under Virginia law. Citizens will be fully informed on who has financed the myriad of campaign media they are exposed to in the days leading up to an election.**

Finally, Landmark further urges the Board to adopt a flexible schedule when determining the exact date of the mid-October meeting.

IV. PRACTICAL APPLICATION

During the December 2015 meeting, the Board adjudicated a number of complaints that had been received in September and August of 2015. These complaints were deemed substantive and, in several instances, the Board assessed penalties for Chapter 5 violations. These infractions, however, went unaddressed during the November, 2015, elections and the perpetrators may have unduly benefitted from promulgating campaign literature that violated Virginia law.

By conducting a dedicated meeting on October 15, 2015, the Board could have adjudicated three of the complaints and assessed requisite penalties. For example the Department staff received a complaint alleging violations by Georgette Phillips for Commonwealth’s Attorney on September 14, 2015. Accounting for processing time, the Board could have held a public hearing and adjudicated this matter during its October 6 meeting or (had it deemed necessary) at a special meeting scheduled around mid-October.

Again, Landmark urges flexibility and commonsense when determining the exact date of the schedule. Should the Department of Elections receive a large number of substantive complaints in August or early September, the Board could schedule a special meeting at the end of September (or address these complaints at the regular September meeting). The goal should be to adjudicate these matters in timely manner and before the general election.

The Board is under no statutory obligation to adjudicate these violations after the November elections. It has the authority to address these matters prior to elections. By doing this, the Board will ensure that campaigns are conducted in a fair manner consistent with Virginia law.

Respectfully submitted,

Michael J. O'Neill, Esq.
Matthew C. Forys, Esq.
Richard P. Hutchison, Esq.
Landmark Legal Foundation

Cc: Eduardo Cortez, ELECT Commissioner
Brooks Braun, ELECT Policy Analyst