

# ARKANSAS ETHICS COMMISSION

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## ADVISORY OPINION NO. 2016-EC-001 Issued August 19, 2016

The Arkansas Ethics Commission has received a written request for an advisory opinion from H. Scott Smith, JD, who serves as Director of Governmental Affairs for the Arkansas Medical Society (hereinafter the "AMS"). The AMS is a Section 501(c)(6) health care organization which is funded by annual membership dues. It has reserves which have been gathering for years. In his opinion request, Mr. Smith seeks clarification concerning the reporting requirements applicable to a group such as the AMS which makes a contribution from its reserves to a ballot question committee in excess of the threshold amount set forth in Ark. Code Ann. § 7-9-402(2)(B).

The referenced statute, Ark. Code Ann. § 7-9-402, is part of the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters and defines various terms for purposes of that Act. It is noted that Ark. Code Ann. § 7-9-402(2) sets forth the following two (2) part definition of the term "ballot question committee":

(A) "Ballot question committee" means any person<sup>1</sup>, located within or outside Arkansas, that receives contributions for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of any ballot question<sup>2</sup>, or any person, other than an elected official expending public funds, or an individual, located within or outside Arkansas, who makes expenditures for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of any ballot question.

(B) A person other than an individual or an approved political action committee as defined in § 7-6-201, located within or outside Arkansas, also qualifies as a ballot

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<sup>1</sup> The term "person" is defined in Ark. Code Ann. § 7-9-402(11)(A) to mean: any individual, business, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting in concert.

<sup>2</sup> The term "ballot question" is defined in Ark. Code Ann. § 7-9-402(1) to mean: a question in the form of a statewide, county, municipal, or school district initiative or referendum which is submitted or intended to be submitted to a popular vote at an election, whether or not it qualifies for the ballot.

question committee if two percent (2%) or more of its annual<sup>3</sup> revenues, operating expenses, or funds are used to make a contribution or contributions to another ballot question committee and if the contribution or contributions exceed ten thousand dollars (\$10,000) in value[.]

In accordance with the foregoing, there are two (2) different ways to meet the definition of a ballot question committee. The first way is addressed in § 7-9-402(2)(A) and encompasses not only any person, located within or outside Arkansas, who *receives contributions* for the purpose of advocating the qualification, disqualification, passage, or defeat of a ballot question but also any person, other than an elected official expending public funds, or an individual located within or outside Arkansas, who *makes expenditures* for the purpose of advocating the qualification, disqualification, passage, or defeat of a ballot question. For the sake of convenience, a person meeting this part of the definition will hereinafter be referred to as a “Subpart (A) BQC”.

In order to become a Subpart (A) BQC, a person must be *receiving contributions* or *making expenditures* for the purpose of advocating the qualification, disqualification, passage, or defeat of a ballot question. Here, the common thread is that the person is engaged in expressly advocating the qualification, disqualification, passage, or defeat of a ballot question.

The second way to meet the definition of “ballot question committee” is addressed in § 7-9-402(2)(B) which reaches persons making a contribution or contributions to another ballot question committee. Under this part of the definition, a person (other than an individual or approved political action committee) qualifies as a “ballot question committee” if it makes a contribution or contributions to a ballot question committee that exceed ten thousand dollars (\$10,000) in value and the amount contributed constitutes two percent (2%) or more of its annual revenues, operating expenses, or funds. For purposes of convenience, this threshold will hereinafter be referred to as the “\$10,000/2% Test”.

It is noted that § 7-9-402(2)(B) is not aimed at persons engaged in expressly advocating the qualification, disqualification, passage, or defeat of a ballot question but, instead, at persons making a contribution or contributions to a ballot question committee. For the sake of convenience, a person who has met the \$10,000/2% Test of § 7-9-402(2)(B) will hereinafter be referred to as a “Subpart (B) BQC”.

The AMS is an organization and, as such, would be considered a “person” as that term is used in § 7-9-402(2). If the AMS were to make a contribution or contributions to a ballot question committee that met the \$10,000/2% Test, then the AMS would constitute a Subpart (B) BQC and become subject to the registration requirements of Ark. Code Ann. § 7-9-404 and the reporting requirements of Ark. Code Ann. §§ 7-9-406 through 7-9-409.

Application of those particular statutes to a Subpart (B) BQC deserves careful consideration because those statutes appear to have been written with a Subpart (A) BQC in mind. For example,

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<sup>3</sup> While the term “annual” is used here, no specific year is specified. At first blush, it would seem logical to use the year in which the contribution or contributions were made. However, there could be situations in which the exact amount of those figures will not be known until the end of the year. In those situations, the Commission can only suggest using a projected amount based on recent years and trends.

the registration requirements of Ark. Code Ann. § 7-9-404 provide that a ballot question committee file a statement of organization within five (5) days of receiving contributions or making expenditures in excess of five hundred dollars (\$500) for the purpose of expressly advocating the qualification, passage, or defeat of a ballot question. In that regard, it is clear that a person receiving contributions or making expenditures in excess of five hundred dollars (\$500) for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of a ballot question would be a Subpart (A) BQC.

On the other hand, Ark. Code Ann. § 7-9-402(2)(B) is aimed at a person (other than an individual or approved political action committee) using its own revenues, operating expenses, or funds to make a contribution or contributions to a ballot question committee. Such a person is not receiving contributions or making expenditures to engage in express advocacy. As it applies to a group such as the AMS which has met the \$10,000/2% Test and become a Subpart (B) BQC, the Commission reads Ark. Code Ann. § 7-9-404 to require the filing of a statement of organization within five (5) days of meeting both parts of said test.

In accordance with Ark. Code Ann. § 7-9-404(b), a statement of organization is required to include the following information:

- (1) The name, the street address, and where available, the telephone number of the committee. A committee address and telephone number may be that of the residence of an officer or a director of the committee;
- (2) The name, street address, and where available, the telephone number of the treasurer and the other principal officers and directors of the committee;
- (3) The name and address of each financial institution in which the committee deposits money or anything else of monetary value;
- (4) The name of each person who is a member of the committee. A person that is not an individual may be listed by its name without also listing its own members, if any; and
- (5) A brief statement identifying the substance of each ballot question, the qualification, disqualification, passage, or defeat of which the committee seeks to influence or of each legislative question, the passage or defeat of which the committee seeks to influence, and if known, the date each ballot or legislative question shall be presented to a popular vote at an election.

Again, the foregoing language appears to have been written with a Subpart (A) BQC in mind. As it applies to a group such as the AMS which has met the \$10,000/2% Test and become a Subpart (B) BQC, the Commission reads Ark. Code Ann. § 7-9-404(b) to require that the statement of organization include the following information:

**(1)** The name, the street address, and where available, the telephone number of the Subpart (B) BQC. A Subpart (B) BQC's address and telephone number may be that of the residence of an officer or a director of the Subpart (B) BQC;

**(2)** The name, street address, and where available, the telephone number of the treasurer and the other principal officers and directors of the Subpart B (BQC);

**(3)** The name and address of each financial institution in which the Subpart (B) BQC deposits money or anything else of monetary value;

**(4)** The name of each person who is a member of the Subpart (B) BQC. A person that is not an individual may be listed by its name without also listing its own members, if any; and

**(5)** A brief statement identifying the substance of each ballot question, the qualification, disqualification, passage, or defeat of which the Subpart (B) BQC seeks to influence and if known, the date each ballot question shall be presented to a popular vote at an election.

The reporting requirements applicable to a ballot question committee are set forth in Ark. Code Ann. §§ 7-9-406 through 7-9-409. Once again, these statutes appear to have been written with a Subpart (A) BQC in mind. For example, Ark. Code Ann. § 7-9-406 provides that a ballot question committee that receives contributions or makes expenditures for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of a ballot question shall file financial reports as required by Ark. Code Ann. §§ 7-9-407 through 7-9-409. Clearly, a person receiving contributions or making expenditures in excess of five hundred dollars (\$500) for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of a ballot question would be a Subpart (A) BQC. Nevertheless, the Commission is of the opinion that a Subpart (B) BQC is subject to filing reports.

The required contents of a financial report are set forth in Ark. Code Ann. § 7-9-407 which provides in pertinent part, as follows:

[a] financial report of a ballot question committee...shall contain the following information:

**(1)** The name, address, and telephone number of the committee...;

**(2)(A)** For a committee:

**(i)** The total amount of contributions received during the period covered by the financial report;

**(ii)** The total amount of expenditures made by the committee or on behalf of the committee by an advertising agency, public relations firm, or political consultant during the period covered by the financial report;

**(iii)** The cumulative amount of contributions and expenditures reported under subdivisions (2)(A)(i) and (ii) of this section for each ballot question or legislative question;

**(iv)** The balance of cash and cash equivalents on hand at the beginning and the end of the period covered by the financial report;

**(v)** The total amount of contributions received during the period covered by the financial report from persons who contributed less than fifty dollars (\$50.00) and the cumulative amount of that total for each ballot question or legislative question;

**(vi)** The total amount of contributions received during the period covered by the financial report from persons who contributed fifty dollars (\$50.00) or more and the cumulative amount of that total for each ballot question or legislative question;

**(vii)** The name and street address of each person who contributed fifty dollars (\$50.00) or more during the period covered by the financial report, together with the amount contributed, the date of receipt, and the cumulative amount contributed by that person for each ballot question or legislative question;

**(viii)** For each person listed under subdivision (2)(A)(vii) of this section, the contributor's principal place of business, employer, occupation, the amount contributed, the date the contribution was accepted by the committee, and the cumulative amount contributed for each ballot question or legislative question;

**(ix)** The name and address of each person who contributed a nonmoney item, together with a description of the item, the date of receipt, and the value, not including volunteer services by individuals;

**(x)** A list of all paid canvassers, officers, and directors and the amount each person was paid;

**(xi)** A list of all expenditures by category, including without limitation the following:

**(a)** Advertising;

**(b)** Direct mail;

**(c)** Office supplies;

**(d)** Travel;

**(e)** Expenses; and

**(f)** Telephone; and

**(xii)** The total amount of nonitemized expenditures made during the period covered by the financial report;

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(3) The name and street address of each person to whom expenditures totaling one hundred dollars (\$100) or more were made by the committee..., together with the date and amount of each separate expenditure to each person during the period covered by the financial report and the purpose of each expenditure.

It is again noted that a person receiving contributions or making expenditures in excess of five hundred dollars (\$500) for the purpose of expressly advocating the qualification, disqualification, passage, or defeat of a ballot question would be a Subpart (A) BQC. It necessarily follows that those parts of Ark. Code Ann. § 7-9-407 concerning contributions received or expenditures made for purposes of expressly advocating the qualification, disqualification, passage, or defeat of a ballot question would not be applicable to a Subpart (B) BQC. After parsing those parts of the statute, the Commission reads Ark. Code Ann. § 7-9-407 to require the reports of a Subpart (B) BQC to contain the following information:

**(1)** The name, address, and telephone number of the Subpart (B) BQC;

**(2)(A)** For a Subpart (B) BQC:

**(i)** The total amount of contributions made by the Subpart (B) BQC to another ballot question committee reported during the period covered by the financial report; and

**(ii)** The cumulative amount of contributions under subdivisions (2)(A)(i) of this section.

It bears mentioning that the foregoing information is essentially the same as the information which Ark. Code Ann. § 7-9-407 requires an individual person to report. That makes sense when you take into consideration the fact that a Subpart (B) BQC is essentially a person using its own money to make a contribution to another ballot question committee. It is important to note, however, that a person receiving contributions to make contributions to a ballot question committee (or a legislative question committee) would be required to register and report as an approved political action committee under Ark. Code Ann. § 7-6-215.

That leaves Ark. Code Ann. §§ 7-9-408 and 7-9-409 as the remaining reporting statutes to be addressed. The first of these statutes, § 7-9-408, requires that financial reports be verified by affidavit. The remaining one, § 7-9-409, sets forth the time to file financial reports. As written, it provides that the first financial reports shall be filed no later than fifteen (15) days following the month in which the five hundred (\$500) threshold of § 7-9-406 is met.

That particular language is clearly applicable to a Subpart (A) BQC. As applied to a Subpart (B) BQC, the Commission concludes that the first financial report should be filed within fifteen (15)

days following the month a person has met the \$10,000/2% Test and become a Subpart (A) BQC. It is noted that reporting would then proceed in accordance with the remaining provisions of § 7-9-409.

Finally, it is noted that the Disclosure Act for Public Initiatives, Referenda, and Measures Referred to Voters applies to legislative question committees<sup>4</sup> as well. Because the definition of “legislative question committee” is a two (2) part definition which basically mirrors the definition of “ballot question committee”, the analysis and conclusions of the instant advisory opinion would be the same for a person which has not met the \$10,000/2% Test of Ark. Code Ann. § 7-9-402(10)(B) and become a Subpart (B) LQC.

This opinion is issued by the Arkansas Ethics Commission pursuant to Ark. Code Ann. § 7-6-217(g)(2).

**ARKANSAS ETHICS COMMISSION**

By:   
Graham F. Sloan, Director

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<sup>4</sup> The term “legislative question committee” is defined in Ark. Code Ann. § 7-9-402(10) as follows:

(A) Any person, located within or outside Arkansas, that receives contributions for the purpose of expressly advocating the passage or defeat of any legislative question or any person, other than an elected official expending public funds, or an individual, located within or outside Arkansas, who makes expenditures for the purpose of expressly advocating the passage or defeat of any legislative question.

(B) A person other than an individual or an approved political action committee as defined in § 7-6-201, located within or outside Arkansas, also qualifies as a legislative question committee if two percent (2%) or more of its annual revenues, operating expenses, or funds are used to make a contribution or contributions to another legislative question committee and if the contribution or contributions exceed ten thousand dollars (\$10,000) in value.