

Lewis Roca Rothgerber Christie LLP
1200 Seventeenth Street
Suite 3000
Denver, CO 80202

303.623.9000 main
303.623.9222 fax
lrrc.com

Digitally signed by
Kathryn Ross
Date: 2018.07.03
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Thomas M. Rogers III
Admitted in Colorado
303.628.9506 direct
303.623.9222 fax
trogers@lrrc.com

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VIA E-MAIL (CELA@FEC.GOV)

Federal Election Commission
Office of Complaints Examination
& Legal Administration
Attn: Kathryn Ross, Paralegal
1050 First Street, NE
Washington, D.C. 20463

Re: MUR 7412

Dear Ms. Ross:

We are in receipt of the complaint ("Complaint") filed with your office by the Libertarian National Committee ("LNC") against the Denver Metro Chamber of Commerce ("DMCC") alleging violations of the Federal Election Campaign Act in connection with the U.S. Senate Candidate Forum that was held on October 17, 2016 in Denver (the "Forum").¹ We are attorneys for the DMCC and the Denver Metro Chamber Leadership Foundation. We write now to explain why the allegations in the Complaint fail to state a violation of the Federal Election Campaign Act ("FECA") and, therefore, do not warrant an investigation or enforcement action by the Commission.

RESPONSE

As an initial matter, the Complaint should be dismissed because it names the wrong respondent in connection with the Forum. The Forum was hosted by the Denver Metro Chamber Leadership Foundation, which is a separate 501(c)(3) entity affiliated with the Denver Metro Chamber of Commerce. The Complaint is therefore defective because respondent DMCC did not host the event about which the LNC complains.

Nevertheless, we respond on behalf of DMCC and the Denver Metro Chamber Leadership Foundation (together, hereinafter, "DMCC").

The LNC raises four arguments regarding DMCC's candidate selection process for the Forum:

1. DMCC had no pre-established criteria to determine which candidates may participate in the Forum;

¹ The DMCC received the Complaint on June 20, 2018. This response is therefore timely under 11 CFR 111.6.

2. DMCC used nomination by a particular party as the sole objective criterion to determine which candidates could participate in the Forum;
3. DMCC's objective criteria were structured to result in the selection of pre-chosen participants; and
4. DMCC kept its debate criteria secret and failed to disclose them, thus denying a Libertarian candidate the opportunity to participate in the Forum.

As explained below, The DMCC has a longstanding policy that was used to select participants in the Forum, which policy was provided to the LNC prior to the Forum upon its request. The criteria in the policy comply with the Commission's rules on candidate debates, and are also consistent with the recent caselaw on this issue. Finally, because the DMCC's policy uses past election results to determine which candidates to invite to the Forum, it is not (and cannot be) structured to result in the selection of pre-chosen participants.

More generally, the Complaint is grounded in the notion that the FECA and existing Commission rules do not provide an adequate level of access for third-party candidates. The Complaint in effect argues for adoption of a rule mandating broad access to debates for third-party candidates. We note that the Commission has considered and rejected such a rule in the recent past. See 82 Fed. Reg. 15468 (Mar. 27, 2017) (declining to commence a rulemaking amending the criteria for staging candidate debates) and explaining that:

The rule at section 110.13(c) . . . is not intended to maximize the number of debate participants; it is intended to ensure that staging organizations do not select participants in such a way that the costs of a debate constitute corporate contributions to the candidates taking part." Id. That is the only basis on which the Commission is authorized to regulate in this area. The Commission has no independent statutory basis for regulating the number of candidates who participate in debates, and the merits or drawbacks of increasing such participation—except to the limited extent that they implicate federal campaign finance law — are policy questions outside the Commission's jurisdiction.

In addition to the specific reasons explained below, we emphasize that the Commission has already spoken to the broader policy issues raised by the LNC and that it need not revisit its longstanding rules regarding candidate debates under the guise of the investigation requested by the LNC.

I. The Denver Metro Chamber of Commerce Used Objective Criteria to Decide Which Candidates Would be Invited to the Forum.

The Commission's rules explain that: "For all debates, staging organization(s) must use pre-established objective criteria to determine which candidates may participate in a debate. . . ." 11 C.F.R. § 110.13. The LNC acknowledges that the DMCC has a policy governing candidate invitations to debates and that the Complainant was provided a copy of the policy prior to the debate in response to its request. (Compl. ¶ 28). Although it admits these facts, the LNC

nevertheless complains that no policy was used because the policy was not specifically referenced in response to an earlier informal inquiry. (Compl. ¶ 26.)

The LNC's allegations fail in this regard. First, while the Commission's regulations require an organization to use objective criteria to determine which candidates may participate, nothing in the regulations specifically requires that the criteria be shared with candidates seeking to participate in a debate (or with the public more generally). See 11 CFR 110.13. Nevertheless, the DMCC provided the criteria to LNC upon its formal request in advance of the Forum. See 60 Fed. Reg. 64260, 64262 (Dec. 14, 1995) ("Although the new rules do not require staging organizations to do so, those staging debates would be well advised to reduce their objective criteria to writing and to make the criteria available to all candidates before the debate.").

Furthermore, the LNC has not alleged any facts in support of its argument that invitations to the debate were made without reference to objective criteria. While the Complaint quibbles with how the criteria were *communicated* to the LNC, it does not explain why the LNC believes that the DMCC policy was not used to *determine* which candidates would be invited. Instead, the Complaint advances only a bare conclusion that the criteria were not used. (Compl. ¶ 43.)

The LNC advances this complaint despite the fact that it is clearly in possession of the DMCC's policy, which is attached to the Complaint as Exhibit C. The relevant section explains that:

The host organization will invite candidates to participate who represent all major political parties. A major political party is defined by the Colorado Secretary of State as "any political party that at the last preceding gubernatorial election was represented on the official ballot either by political party candidates or by individual nominees and whose candidate at the last preceding gubernatorial election received at least ten percent of the total gubernatorial votes cast."

(Compl. Ex. C). The DMCC has used the same policy on candidate debates since well before the Forum, and the LNC has not raised any specific factual allegations in its Complaint alleging otherwise. Ultimately, because the policy is based on prior election results, it is easy to verify that the candidates who appeared at the debate were the only candidates who met the criteria established by the policy.²

Therefore, the LNC's claims that: (1) the DMCC had no pre-established criteria and (2) the DMCC kept those criteria secret do not warrant any further investigation by the Commission.

II. The Criteria Used to Select Candidates for the Forum Comply With the Commission's Rules

The LNC also complains that the policy used by the DMCC violates the FECA and its implementing regulations because it relies on the results from the last gubernatorial election as its objective selection criteria. (Compl. ¶¶ 29, 43.) While the LNC may not prefer the results of

² See <http://results.enr.clarityelections.com/CO/53335/149718/Web01/en/summary.html> (showing that in the 2014 gubernatorial election, only the candidates from the Republican and Democratic parties received at least 10% of the total vote).

the DMCC's objective policy, that does not render the policy illegal. "The choice of which objective criteria to use is largely left to the discretion of the staging organization" and the Commission "gives great latitude in establishing the criteria for participant selection" to debate staging organizations under 11 CFR 110.13. 82 Fed. Reg. at 15469. The Commission has repeatedly affirmed this broad view of acceptable objective criteria in past matters under review in which it had approved a wide range of criteria as acceptably objective, "including percentage of votes by a candidate received in a previous election. . . ." First General Counsel's Report, MUR 6072 (citing MURs 4956, 4962, 4963, 5395, and 5650). The Commission has also explained that "[t]he objective criteria may be set to control the number of candidates participating in a debate if the staging organization believes there are too many candidates to conduct a meaningful debate." 60 Fed. Reg. at 64262.

While the LNC is correct that the Commission's rules prohibit "nomination by a *particular* political party as the sole objective criterion to determine whether to include a candidate in a [general election] debate," 11 C.F.R. § 110.13(c) (emphasis added), the Complaint misapplies that standard to the DMCC's policy. (Compl. ¶¶ 29, 43.) Nowhere does the DMCC policy identify *particular* political parties that are eligible to participate in a debate. (Compl. Ex. C.) Instead, the policy states that:

The host organization will invite candidates to participate who represent *all* major political parties. A major political party is defined by the Colorado Secretary of State as "any political party that at the last preceding gubernatorial election was represented on the official ballot either by political party candidates or by individual nominees and whose candidate at the last preceding gubernatorial election received at least ten percent of the total gubernatorial votes cast."

(Compl. Ex. C) (emphasis added). No particular political parties are singled out in this policy. In fact, candidates from *all* parties meeting the 10% threshold requirement will be invited. Such a policy is consistent with the Commission's rules and was expressly endorsed in *Buchanan v. Fed. Election Comm'n*, 112 F. Supp. 2d 58, 73 (D.D.C. 2000). That case explains that "the automatic inclusion" of a candidate selected by a party whose candidate qualified for federal funding by receiving at least 5% of the popular vote in the preceding election "would probably be an objective selection criteria." *Id.* The DMCC's policy is nearly identical to what was endorsed in *Buchanan*.

Indeed, much like the federal funding threshold of 5% that was endorsed in *Buchanan* as an acceptable objective measure, the DMCC's policy relies on a state law threshold that is defined in statute. The DMCC policy relies on the definition of "major political party" in Colo. Rev. Stat. § 1-1-104(22), which definition is also used throughout Colorado's other election laws as a threshold level for participation in various areas. See, e.g., Colo. Rev. Stat. § 1-6-109 (entitling major political parties to select election judges in partisan elections). This threshold is likewise used by the DMCC to ensure that candidates have some minimum level of support to participate in the Forum.

While the objective selection criteria requirement precludes debate sponsors from selecting a level of support so high that only the Democratic and Republican nominees could reasonably achieve it, the DMCC's threshold of 10% is well within the acceptable range. *Buchanan* at 74 (approving a 15% threshold and noting that some third-party candidates have achieved levels of support that would qualify them under a 15% threshold); 82 Fed. Reg. at 15474 (noting that while a 15% support threshold may create "certain challenges" for some candidates, such a threshold is not "so high that only Democratic and Republican nominees could reasonably achieve it.").

In fact, a third-party candidate has garnered over 10% of the vote in a recent Colorado gubernatorial election. Tom Tancredo, an American Constitution Party candidate, received 36% of the vote in the 2010 gubernatorial election, thereby qualifying his party as a "major party" under Colorado law.³ Notably, the Republican Party candidate in that election received only 11% of the vote, which is very nearly below the 10% threshold used by the DMCC. These results show that the 10% threshold in the DMCC's policy can reasonably be achieved by third-party candidates (and could also possibly *exclude* a Republican or Democratic candidate).

Because the criteria in the DMCC's policy meet the requirements of the Commission's rules and are squarely in line with the *Buchanan* decision, the Commission should not initiate any further investigation in this area.

III. The DMCC's Policy Cannot Result in the Selection of Pre-Chosen Candidates Because it Relies on Past Election Results

For many of the same reasons, the LNC's allegation that the DMCC's objective criteria were structured to result in the selection of pre-chosen participants do not warrant investigation by the Commission. The 10% threshold requirement, as described above, is not only a longstanding practice of the DMCC, but also is grounded in an objective provision of state law. It does not contain subjective factors and, because it relies on past election results, it does not contain factors that could even arguably be manipulated to produce certain results. Moreover, the LNC has not alleged any specific facts about how the DMCC structured its policy to select pre-chosen participants.

While the LNC may not like the fact that the DMCC's policy resulted in participation only by the Republican and Democratic candidates, that is not a basis for objection to the DMCC's policy.

IV. Conclusion

The Commission's regulations allow the DMCC considerable discretion in crafting its candidate selection criteria within specific limits. We have explained here why the DMCC policy is within those limits and why the allegations raised by LNC have no merit. Beyond that limited inquiry, the broader policy questions raised by the LNC regarding the need to increase third-party participation are not properly raised in the context of a complaint. DMCC has crafted a policy that suits its needs as an organization while complying with the Commission's rules, and for that

³ See <https://www.sos.state.co.us/pubs/elections/Results/Abstract/pdf/2000-2099/2010AbstractBook.pdf>.

reason, we request that the Commission declined to investigate or take enforcement action with respect to the DMCC.

Please do not hesitate to let us know if we can provide any additional information.

Very truly yours,



Thomas M. Rogers III
Dietrich C. Hoefner
Lewis Roca Rothgerber Christie LLP

Attorneys for DMCC

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