

STATE BOARD OF ELECTIONS

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To: Maryland State Board of Elections members

From: Jared DeMarinis
Director of Candidacy and Campaign Finance

Date: September 17, 2014

Re: Change Maryland Complaint

The Division of Candidacy and Campaign Finance (CCF Division) has completed its review of the complaint filed by the Maryland Democratic Party (MDP) against Change Maryland and the *Hogan-Rutherford Committee to Change Maryland* (Hogan Committee).

At issue is whether Change Maryland:

- (1) engaged in campaign finance activity without establishing a campaign finance entity,
- (2) failed to report an in-kind contribution to the Hogan committee, and
- (3) had incorrect authority lines on its social media pages.

Campaign Finance Activity:

As previously reported, Change Maryland is a registered limited liability company with only one member, Larry Hogan. Its purpose is to inform the citizens of Maryland on the activities in “State government, identify bad policy, and provide alternatives through social and earned media.”¹ In furtherance of its stated purpose, Change Maryland held fundraising events and made expenditures from 2011 to 2014. In January 2014, Change Maryland released two reports; one on the alleged unethical relationships between the O’Malley-Brown Administration and State contractors and another as an energy report card of the O’Malley-Brown Administration.

Pursuant to Election Law Article §13-202(a), a campaign finance entity must be established prior to engaging in “campaign finance activity.” The Election Law Article does not define “campaign finance activity.” Furthermore, the definitions of “candidate” and “political committee” do not state precisely when a person must establish a campaign finance entity. The policy of the State Board has been to define campaign finance activity as “the raising and spending [of] money in connection with an effort to promote or assist in the promotion of the success or defeat of a candidate, political party, or question.” See

¹ Articles of Organization of Change Maryland, dated May 6, 2011.

Summary Guide §1.2 (emphasis added). Therefore the issue presented is whether Change Maryland engaged in raising or spending monies for *a candidate*.

Unlike federal law, Maryland law does not recognize exploratory committees, whose purpose is to determine the viability of a potential candidate for a particular office. Therefore, exploratory activities are not regulated or required to be disclosed under State law. The Attorney General's Advisory Committee on Campaign Finance recognized the current limitation of the law, and its report stated "for non-candidates, the line between 'exploratory activity' and 'campaign finance activity' is sometimes blurry."²

Again, as reported earlier to the Board, the Office of the Attorney General has advised that some exploratory or "testing the waters" activities are permissible but only for non-candidates. Exploratory activities are limited in their scope and purpose, mainly, raising and spending funds for conducting surveys, polls, mailings, or other activities in an effort to determine if the potential candidacy is viable.³ However, once the exploratory committee exceeds these limitations and engages in campaign finance activity, or once an authorized candidate campaign committee is established, all further activity by the entity is subject to campaign finance regulations and the entity must register as an authorized candidate campaign committee (i.e., file the Statement of Organization with the State Board). See Summary Guide, §4.2.

Mr. Hogan officially became a candidate for public office on January 10, 2014, with the establishment of an authorized candidate campaign committee, *Larry Hogan for Governor*. On February 3, 2014, he became a candidate on the 2014 gubernatorial ballot by filing his certificate of candidacy. The complaint offers no new evidence that was not previously considered and weighed regarding the actions and expenditures by Change Maryland.

Consistent with past policy, conducting a poll and hiring staff in order to conduct exploratory activities is permissible without triggering campaign finance registration. The actions and expenditures made by Change Maryland prior to January 10, 2014, appear to have been within the limits of an exploratory committee for Mr. Hogan, who was not yet a candidate.

Based on the facts presented, CCF Division reaffirms its prior decision that Change Maryland did not engage in campaign finance activities, nor was it required to register as a political committee prior to January 10.

Again, as the Attorney General's Advisory Committee on Campaign Finance noted in its report "SBE currently lacks adequate authority to regulate in this area [exploratory committees], the Committee further agreed that legislation granting such authority should be enacted."⁴ To date, no legislation granting SBE authority over exploratory activities

² See Attorney General's Advisory Committee on Campaign, January 4, 2011, page 22.

³ Exploratory activities do not have to be reported to SBE and are not subject to contribution limits.

⁴ See Attorney General's Advisory Committee on Campaign, January 4, 2011, page 23.

has been enacted. Until such legislation is enacted, SBE's civil enforcement authority is limited to campaign finance activity by filed candidates.

Failure to Report an In-Kind Contribution

Pursuant to Election Law Article §13-304(b), a campaign finance report must include all contributions received and expenditures made during the designated reporting period. Contributions are any "gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political, or question." See Election Law Article §1-101(o).

On September 23, 2013, Change Maryland engaged the services of WPA Opinion Research to conduct a survey of likely general election voters in order to determine whether Mr. Hogan was a viable candidate against Lt. Governor Anthony Brown or Attorney General Doug Gansler in the election for governor. At the time of the survey, Mr. Hogan was not a candidate for public office and had not established a campaign finance entity.

On January 13, 2014, *Larry Hogan for Governor*, which turned into the Hogan Committee for administrative purposes in order to receive public contributions from the Fair Campaign Financing Fund, agreed to purchase all assets of Change Maryland. The assets included the following:

- Change Maryland Facebook account
- Change Maryland supporter lists
- Change Maryland website
- 30 event signs
- 5 light sticks
- 2 traffic vests
- 9 photographs
- 2500 envelopes
- 30 Change Maryland signs
- Internal "testing the waters" poll

The Hogan committee sought the independent valuations of two commercial vendors to determine the valuation of Change Maryland. Based upon on information received by the commercial vendors, the Hogan committee valued the Facebook page, supporter lists, and website at \$79,720.00. The other items procured were "accorded no monetary value due to their inapplicability to the committee's purpose or their lack of value in the open market due to associated potential sales costs."⁵ The issue presented is whether the committee accurately valued each item in the acquisition.

CCF Division agrees that signs and other minor items from past events or elections have no monetary value. Envelopes may have a monetary value if usable. In this case, the envelopes are not usable by the committee because of the lack of authority line on them. However, poll results do have value to a candidate. Polls reflect the current political

⁵ See Affidavit of John C. Wobensmith dated September 8, 2014.

landscape, help define electoral strategies, and are used to show momentum in campaigns. Polls must be considered a “thing of value to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate” and so their value should be reflected as a contribution.

In this case, the September 2013 poll was referenced in a May 12, 2014 press release contrasting the results of a new poll showing an increase of voter support to Mr. Hogan in a potential general election matchup with the likely Democratic nominee Lt. Governor Anthony Brown in an attempt to influence Republican primary voters to vote for the strongest candidate. This use reaffirms the CCF Division policy regarding the value of polls to a candidate. However, polls and the information contained within them are only relevant for a brief period of time before the information becomes stale and loses its value.

Maryland law has no specific standard for valuing a poll conducted by one entity and then shared or given as an in-kind contribution to another. Federal regulations, however, offer some guidance on how a campaign might reasonably place a value on polling information. For example, 11 CFR 106.4 provides a method for valuing a poll depending on the length of time between when the poll was conducted and the release of the result to a third party.

On September 4, 2014, CCF Division informed the Hogan Committee that that the poll it had acquired had value and requested that a fair market value be assigned to it. The Committee accepted the position of the CCF Division and as a result, the *Hogan-Rutherford Committee to Change Maryland* will amend its campaign finance report to reflect an in-kind contribution of \$825.00 from Change Maryland.

In conducting my review, I found no evidence that the Hogan Committee knowingly or willfully failed to disclose the in-kind contribution from Change Maryland. On the contrary, the poll was listed among the assets of Change Maryland (though it was assigned no value), and the Hogan Committee was forthcoming and cooperative with the inquiry. Pursuant to COMAR 33.18.01.02(E)(1), the fine for non-willful failure to include less than 10 contributions on a campaign finance report is \$50.

The Hogan Committee has requested that the State Board waive the penalty and not issue a civil citation. In determining the amount of the penalty, the State Board must consider:

- (1) the severity of the violation;
- (2) the good faith of the violator; and
- (3) any history of prior violations.

The present matter is a case of first impression in the State. Maryland laws or regulations did not offer any specific guidance for the valuation of a poll purchased by one person then used by a political committee after a period of time. Additionally, the regulations

regarding the civil penalty were just recently enacted and were not effective during the primary election.⁶

I request a vote by the Board on whether to impose the civil penalty in accordance with §13-604.1(b)(5) of the Election Law Article.

Authority Line

The complaint alleges that the Hogan Committee used an incorrect authority line on the Change Maryland website and social media pages⁷. An authority line is required on every item of campaign material that is published or distributed by a campaign finance entity. Campaign material includes websites authorized by the campaign finance entity and any social media pages authorized by the committee or the candidate.

The intent of the law was to inform the public of the entity behind the communication and distinguish speakers in the electoral arena. The speaker must identify itself and provide an opportunity for the public to contact them⁸.

Larry Hogan for Governor and the Hogan Committee are functionally the same campaign finance entity. The campaign material in question is the official communication of the candidacy of Larry Hogan. The Hogan Committee has not attempted to deceive the public or conceal that fact. *Larry Hogan for Governor* is a registered political committee with SBE and its contact information is readily available on the MD CRIS website, www.campaignfinance.maryland.gov.

CCF Division will not issue a civil citation regarding the authority line complaint.

⁶ COMAR 33.18.01.02 was approved for final adoption unanimously by the Board at the July 10, 2014 meeting. The regulations were published in the March 21 and April 18, 2014 editions of the *Maryland Register*.

⁷ The authority line currently used on the Change Maryland website and social media pages is *Larry Hogan for Governor*, John C. Wobensmith, Treasurer.

⁸ Election Law Article §13-401 requires that the name and address of the treasurer or person responsible for the publication or distribution be include on campaign material. The address may be omitted if the address is on file with the State Board.