

Memorandum

To: Kari Fresquez, New Mexico State Elections Director
From: The Brennan Center for Justice at NYU School of Law
Date: August 25, 2017
Re: Second Review of Proposed Campaign Finance Rules

On July 12, 2017, the Brennan Center submitted comments addressing the Secretary of State's proposed rules 1.10.13.1 through 1.10.13.31. Thereafter, the Secretary distributed a modified version of the proposed rule. We commend the changes made to the rule's coordinated expenditure provisions and submit this brief memorandum to make one additional suggestion.

The newest version of § 1.10.13.28 contains a robust definition of "coordinated expenditures." The additional coordination provisions proposed in § 1.10.13.28(E), which provide detailed guidance concerning the types of expenditures that will be deemed coordinated, will substantially strengthen the rules. For example, under proposed § 1.10.13.28(E)(3), an expenditure is coordinated if it is made by a committee that was established by the candidate supported by the expenditure. This will prevent a candidate (or his aides) from starting a super PAC and then receiving its support during the campaign.¹

Any of the six scenarios listed in § 1.10.13.28(E) should lead to a determination that an expenditure is coordinated — each, on its own, shows that a candidate has somehow indicated her approval of spending that will support her campaign, thereby raising corruption concerns.² However, as written, it is not clear that an expenditure that fits only one of these scenarios would necessarily be deemed coordinated. For that reason, we suggest amending the prefatory language in § 1.10.13.28(E) that now reads: "The following non-exhaustive list shall be considered to determine whether an expenditure is a coordinated expenditure" with something similar to: "The following is a non-exhaustive list of scenarios in which an expenditure will be deemed coordinated."³

¹ This tactic was used most prominently during the 2016 presidential campaign. *See, e.g.,* Nicholas Confessore, *Jeb Bush Outstrips Rivals in Fund-Raising as 'Super PACs' Swell Candidates' Coffers*, N.Y. TIMES, July 9, 2015, <https://www.nytimes.com/2015/07/10/us/politics/jeb-bush-races-past-rivals-in-fund-raising-aided-by-super-pac-cash.html>.

² *See* Brent Ferguson, *Beyond Coordination: Defining Indirect Campaign Contributions for the Super Pac Era*, 42 HASTINGS CONST. L.Q. 471, 508-15 (2015) (arguing that coordination regulations are permissible when a candidate takes some action indicating she believes the expenditure would be useful).

³ If this change is made, the word "whether" should be deleted in §§ 1.10.13.28(E)(1)-(6).

This clarification is important because almost no expenditure would satisfy more than one or two of the six criteria listed, and such a standard would mean that many functionally coordinated expenditures would go unregulated. For example, a candidate’s campaign manager might be allowed to operate a super PAC and spend unlimited amounts supporting the candidate, making contribution limits meaningless. Further, a multi-factor test would give less certainty to campaigns and their supporters, who would be unsure what activities might lead to a decision that their spending coordinated. The language we suggest would add clarity and align New Mexico’s rules with several other states that seek to ensure all super PAC spending is truly independent.⁴

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Once again, we believe the proposal will significantly strengthen campaign finance rules in New Mexico. We thank you for the opportunity to provide our comments, and are available to discuss this memorandum and any of the proposed rule changes.

⁴ *See, e.g.*, CAL. CODE. REGS. tit. 2, § 18225.7(d) (creating rebuttable presumption of coordination “under any of the following circumstances”); CONN. GEN. STAT. ANN. § 9-601c(b) (presuming “that the following expenditures are not independent expenditures”); *see also* 11 C.F.R. § 109.21(d) (2010) (“Any one of the following types of conduct satisfies the conduct standard of this section.”). *Contra* N.Y.C. CAMPAIGN FIN. BD. R. 1-08(f).