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MEMORANDUM

To: Kari Fresquez, New Mexico State Elections Director
From: The Brennan Center for Justice at NYU School of Law
Date: July 12, 2017
Re: Review of Proposed Campaign Finance Rules

Introduction

The Brennan Center has reviewed the Secretary of State's proposed rules 1.10.13.1 through 1.10.13.31, which are intended to enhance New Mexico's campaign finance coordination and disclosure law by providing a definition of "coordinated expenditure" and clarifying reporting requirements for all non-candidate persons and entities spending money on elections. We strongly support the goals of reducing coordination between outside groups and candidates and providing voters with meaningful information about campaign spending, and we think the proposed rules will further those efforts. This memorandum provides some comments about the proposal and suggests a few alterations.

Comments and Suggestions

a) Definition of "Coordinated expenditure"

As proposed, rule 1.10.13.7(F) defines "Coordinated expenditure" as an expenditure "made by a person other than a candidate or campaign committee at the request or suggestion of, or in cooperation, consultation, or concert with" a candidate, candidate's agent or campaign committee, or political party.

This definition may be insufficient to enable regulators to enforce proposed rule 1.10.13.28, which treats coordinated expenditures as in-kind contributions, and to allow spenders and candidates to know when they may be coordinating. States and the federal government have used similar definitions of coordination for decades resulting in limited enforcement and a lack of clarity for those seeking to comply.[1] The rule would better accomplish these goals by explaining in greater detail the actions which suggest that a candidate and outside spender have coordinated.[2]

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[1] *See* Chisun Lee, Brent Ferguson & David Earley, After Citizens United: The Story in the States, Brennan Center for Justice 16, 21 (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf. The lack of enforcement is particularly troubling given the rise of super PACs which take unlimited contributions and can support a single candidate. *Id.* at 8-10.

[2] *See, e.g.*, Rules of City of New York Campaign Finance Board (52 RCNY) § 1-08(f); Conn Gen. Stat. Ann. § 9-601c(b); 94-270 Me. Code R. Ch. 1 § 6(9)(B).

Following a study of coordination between candidates and outside groups and of the regulatory landscape in states across the country, the Brennan Center has identified several indicators of coordination which should be a part of any expanded definition. Spending by an outside spender should be presumed coordinated:[3]

- If a candidate or her close associates played a role in forming or operating an outside spending group that supports that candidate. Associates of the candidate need not face a permanent bar from working for outside groups supporting that candidate; several jurisdictions view spending as coordinated only if the associate has worked for the candidate in the last year, election cycle, or some other reasonable time frame.

- If the candidate solicits donations to an outside spender supporting them. Under proposed rule 1.10.13.28(C), this type of fundraising might not constitute coordination. While it is reasonable to allow candidates to raise money for other candidates and committees, fundraising for an outside group supporting the candidate herself is itself a form of coordination and creates a clear potential for quid pro quo corruption.

- If an outside spender reproduces campaign material for its own communications. As currently written, rule 1.10.13.28(E) might allow outside spenders to remain independent while using any publicly available materials, including those produced by the campaign they are supporting. It is necessary, however, to limit the now-widespread practice of campaigns making publicly available images and videos primarily for use by outside groups. Indeed, federal law already treats expenditures funding the republication of campaign materials as contributions.[4] Since outside groups may use such footage without a candidate's knowledge, however, only the outside spender need be liable for coordination violations, not the candidate.

- If a candidate and an outside spender share resources such as consultants or office space. The rule can allow consultants to work for both a candidate and outside spender so long as they establish formal firewall policies preventing consultants working for each entity from coordinating with one another. As with former staff, a consultant that has not worked for the candidate in the same year or election cycle need not carry a presumption of coordination.

Additionally, the proposed definition of "Coordinated expenditures" may be interpreted to cover only expenditures funding express advocacy and expenditures funding any communication which "refers to a clearly identified candidate and is published and disseminated" thirty days before a primary election or sixty days before a general election in which that candidate appears on the ballot. The time constraints in the definition could unnecessarily allow unlimited contributions to fund communications which are fully coordinated with a candidate, reference

[3] For detailed discussions of these indicators, see Chisun Lee, Brent Ferguson & David Earley, After Citizens United: The Story in the States, Brennan Center for Justice 22-29 (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf.
[4] *See* 11 C.F.R. § 109.23.

that candidate, and air a mere two months prior to a primary election or three months prior to a general election. The state can safely regulate coordinated expenditures as if they are contributions, and thus no such time constraint is necessary.[5]

b) Independent Expenditure Reporting

Proposed rule 1.10.13.11 requires disclosure by all persons and entities who spend significant amounts of money on political campaigns in New Mexico, regardless of what other activities the group engages in. Such a requirement is essential to guaranteeing the public receives sufficient information, and courts have upheld similar disclosure requirements.[6] We have several suggestions for ways to best balance the need for comprehensive disclosure with the minor burdens it creates.

First, we recommend lowering the disclosure threshold for donors to entities making independent expenditures from $5,000 to $1,000.[7] Particularly because this proposed disclosure regime applies to non-statewide elections in which amounts smaller than $5,000 may prove significant, a lower threshold would better ensure that the disclosure requirements require spenders to identify all significant donors. As currently drafted, the rule would allow an entity spending $10,000 on a local campaign to conceal its donors so long as no contributions were earmarked for political activity and no donor gave the spender more than $5,000. Section 1.10.13.11(A) explains that the rules are responsive to court decisions determining that the state cannot subject groups that do not fall under 1.10.13.10(A) to registration and ongoing reporting requirements. Because the proposed rule responds to these decisions by removing such obligations, it is not also necessary to apply a high monetary threshold for disclosure.[8]

We are also concerned that the proposed rules would allow individuals or entities to avoid meaningful disclosure by funneling money through groups which, intentionally or not, obscure the true source of the spender's funds. Proposed rule 1.10.13.11(G) provides some protection against individuals intentionally concealing themselves or their donors, but the rules can go further. Foremost, the rules can require that any donor disclosures identify the "original source" of the funds at issue, defined as a person who contributed funds from its own resources, rather than from a contribution or gift from another person or entity.[9]

Finally, it is not clear from the proposed rule when independent spenders must report expenditures of greater than $3,000 made more than 14 days before an election. Currently,

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[5] *See* McConnell v. FEC, 540 U.S. 93, 202-03 (2003); Fed. Election Comm'n v. Christian Coal., 52 F. Supp. 2d 45, 88 (D.D.C. 1999) (warning against "collaps[ing] the distinction between contributions and independent expenditures" by failing to regulate coordinated expenditures like contributions).

[6] *See, e.g.*, Independence Institute v. Williams, 812 F.3d 787 (10th Cir. 2016).

[7] New York, a larger state with high levels of political spending, uses a $1,000 threshold. N.Y. Elec. Law § 14-107(4)(a).

[8] *Compare* Coalition for Secular Government v. Williams, 815 F.3d 1267 (10th Cir. 2016) *with* Independence Institute v. Williams, 812 F.3d 787 (10th Cir. 2016).

[9] *See* Conn. Gen. Stat. § 9-621(j)(1) (requiring spenders to name in advertising disclaimers their donors as well as the five largest recent contributors to those donors); *see also* Cal. Code Regs. tit. 2 § 18422.5(a)(5) (requiring committees to identify in disclosures the two largest donors of more than $50,000 to any of their own ten largest donors).

1.10.13.11(F) requires disclosure within 24 hours if the expenditure is greater than $3,000 and made within 14 days of an election, and disclosure per the schedules set forth in 1-19-29 NMSA if the expenditure is less than $3,000. Independent spenders should also be required to promptly report large expenditures that are not made within the 14-day window. From 60 days prior to an election until 14 days prior to an election, outside groups should report expenditures and the underlying contributions at least within 72 hours of making the expenditure.[10]

c) Disclaimer Requirements

Per sections 1-19-16 and 1-19-17 NMSA, the disclaimers required by proposed rule 1.10.13.31 require independent campaign advertisements or communications to identify their "sponsor or the name of a responsible officer". The rule could further require that this disclaimer name a natural person, not merely an organizational sponsor. Some jurisdictions go as far as to require that spenders name their largest donors in advertisement disclaimers, and Connecticut requires that spenders name the original source of any funds used.[11]

Conclusion

We are glad to support the Secretary of State's goals of clarifying New Mexico's coordination law and reporting requirements while guaranteeing meaningful and timely disclosure. We hope that these comments have been helpful and we are available to discuss in greater depth these and other changes the Secretary of State's office may be considering.

[10] *See, e.g.*, Wis. Stat. Ann. § 11.0505.

[11] *See* Wash. Rev. Code § 42.17A.320; Conn. Gen. Stat. § 9-621 (h), (j)(1). Research demonstrates that such information is important to voters on election day. *See, e.g.*, Travis Ridout, Michael M. Franz & Erika Franklin Fowler, Sponsorship, Disclosure and Donors: Limiting the Impact of Outside Group Ads, 68 Pol. Res. Q. 154 (2015) (finding that ads sponsored by unknown groups are more effective than those run by candidates, and that the advantage is reduced when the groups' donors are disclosed).