

New York State Emergency Rulemaking Substantially Broadens Regulation of Political Speech

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The New York State Board of Elections adopted emergency rules in late May 2014 expanding the state's regulation of political speech. The emergency rules set forth an open-ended, multifactor test for determining whether certain political advertisements run during an election year will be considered independent expenditures, which will have major implications for groups engaged in issue advocacy in New York.

Previously, New York State law had provided that regulated independent expenditures only included communications that contained certain "magic words" of express advocacy, such as "vote for," "oppose," "support," "elect," or "reject" when used in reference to candidates or ballot measures.

In 2013, the New York State legislature and Governor Andrew Cuomo agreed to omnibus legislation that, among other things, provided that independent expenditures also would include mass advertising that "refers to and advocates for or against a clearly identified candidate or ballot proposal" beginning on January 1 of an election year in which the candidate or measure is on the ballot.

The emergency regulations recently adopted by the Board Elections further provide that, in determining whether a communication "advocates for or against" a candidate or ballot measure, the Board would consider "whether it expresses approval or disapproval for said candidate's positions or actions; whether it is part of an ongoing series by the group on the same issue and the series is not timed to an election; has the issue raised in the communication been raised

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as a distinguishing characteristic amongst the candidates; and whether its timing and the identification of the candidate are related to a non-electoral event (e.g., a scheduled vote on legislation or a position on legislation by an officeholder who is also a candidate).” The regulations indicated that this list of factors was not exhaustive, thus leaving open the possibility that other unspecified factors also could be considered in regulating an ad as an independent expenditure.

Organizations that sponsor any communications that meet the definition of independent expenditures must register as a political committee before expending any funds. Additionally, they must file periodic reports detailing their spending and information about their donors, as well as expedited reports whenever they receive large contributions shortly before an election.

Under New York administrative procedure law, the Board's emergency regulations, adopted on May 22, are effective for 90 days, after which they may be readopted for a maximum of 60 days, provided that the agency also initiates the process to formally adopt the rules on a permanent basis. In addition to the public notice and opportunity for comment the Board will eventually have to provide as part of the formal rulemaking process, the Board also is accepting comments now on the emergency rules. Comments may be submitted via e-mail to regcomments@elections.ny.gov.

The Election Law practice group at Wiley Rein routinely assists clients with drafting comments on agency rulemakings and is closely monitoring the proceedings in New York. Please contact us if your organization would like to submit a comment