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NEWSLETTER

Draft Regulations in Arizona, Montana, and Texas Would Impact Campaign Finance Registration and Reporting

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By Caleb P. Burns and Eric Wang

There was an uptick of regulatory activity in the states last month, as administrative agencies in Arizona, Montana, and Texas issued draft campaign finance regulations that would impact registration and reporting requirements for entities engaged in political speech. Members of the public wishing to provide input on the rulemakings may submit comments up until the beginning of August in Texas and the end of August in Montana. The comment period for the proposed rules in Arizona closed shortly before this issue was finalized.

Montana

As we reported in the last issue, Montana Governor Steve Bullock signed the "Montana Disclose Act" (SB 289) into law in April of this year (*Election Law News,* May 2015). Among other things, the legislation directed the state Commissioner of Political Practices to implement a rulemaking defining when an organization has the "primary purpose" of being a full-fledged political committee that is required to report its donors (and not merely an "incidental committee" under Montana law). Although the Commissioner's office has not released its draft rules to the general public yet, it shared an initial draft with certain interested parties at the end of June. Wiley Rein has obtained a copy of the initial draft and has been authorized to redistribute and report on it.

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For groups accustomed to working with the federal tax and campaign finance rules—under which it is understood that there is generally some numerical threshold for determining a group's "primary" or "major" purpose based on its political spending—the Montana Commissioner's rules may be confounding. Under the draft rules, the term "'primary purpose' refers to a committee's major, principal, or important goal, function, or reason for existence." These concepts do not appear to be susceptible to being reduced to any numerical threshold for determining a group's "primary purpose."

Moreover, the draft rules provide that "primary purpose" may be determined not only by a group's spending, but also by its "staff or members' activity," "the number of persons, individuals, members, participants, or shareholders" an entity has, a group's "history," and any "election activity," among other things. The term "election activity" is defined extremely broadly, and includes "any action . . . that concerns, relates to, or could be reasonably interpreted as an attempt to influence or affect an election," and does not appear to be limited to activity required to be included on campaign finance reports. Under the proposed rules, the Commissioner also may consider other unspecified factors in determining a group's "primary purpose."

The Montana draft rules establish a presumption that any entity formed within or during the six months prior to voting in any election is a full-fledged political committee if the entity makes political expenditures or accepts political contributions of $250 or more during a calendar year.

The Montana draft rules also define when an "election communication," "electioneering communication," or "election activity" is deemed to be coordinated with a candidate, thereby resulting in an in-kind contribution. Of note, the proposed regulations presume that any "election activity" that is sponsored by an independent group and conducted by an individual who served as a paid agent, consultant, or vendor to a candidate within the previous 24 months is coordinated with the candidate. This is a significantly longer period of time than the 120-day cooling-off period under the federal coordination rules for former employees and vendors.

The Montana Commissioner of Political Practices' office has requested comments on the initial draft rules by July 15, after which it may modify the rules and then reissue them to the general public. The Commissioner's office has indicated that it expects to close the general public comment period on August 27.

Texas

The Texas Ethics Commission issued a revised version of its proposed rules defining what activities are considered to be "in connection with a campaign" last month. The definition of the term is crucial under Texas law to determining when speech is regulated as a "political expenditure." That, in turn, affects a group's obligations to file independent expenditure reports and to register and report as a political committee – an issue which the Ethics Commission also has addressed recently (*Election Law News*, November 2014).

Under the proposed rules first issued in April, political expenditures would include communications using the so-called "magic words" of express advocacy first articulated by the Supreme Court of the United States in *Buckley v. Valeo*, such as "vote for," "elect," "support," or "vote against." In addition, the initial draft treated as a political expenditure any speech within 30 days of a primary or 60 days of a general, special, or runoff election that references a candidate, is targeted to the geographical area the candidate seeks to represent,

and, "with limited reference to external events," is "susceptible of no other reasonable interpretation than to urge the election or defeat of the candidate."

The proposal to rely on unspecified "external events" and a "reasonable interpretation" standard in determining a communication's meaning was criticized as being excessively vague, insufficiently protective of First Amendment rights, and inconsistent with key state and federal court rulings. In response, the Ethics Commission has deleted the reference to "external events" from the proposed rule, but has added that "images" and "sounds" also may be considered in determining a communication's electoral meaning. The Commission also has shortened the time window in which the "no other reasonable interpretation" standard would be applied to 30 days prior to any type of election.

Additionally, the original proposed rule treated any donations made "for the purpose of supporting or opposing a candidate" as political contributions and expenditures subject to regulation under the state campaign finance laws. In response to criticism that the "supporting or opposing" standard was too vague, the Commission has narrowed the proposed rule so that only donations made to preexisting political committees will be treated as political contributions and expenditures.

The next meeting of the Texas Ethics Commission is scheduled for August 6 and 7. The agency is expected to discuss the revised draft rules then and will possibly vote to enact them. Public comments on the revised proposal should be submitted to the agency before then.

Arizona

The Arizona Citizens Clean Elections Commission has been involved in an unusual regulatory turf battle over the past several months with the Arizona Secretary of State's office. The dispute began when the Clean Elections Commission ruled that a non-profit group was required to file independent expenditure reports for its advertising in Arizona last year, notwithstanding that the Secretary of State's office had already determined that the reporting requirements did not apply. The dispute continued last month when the Clean Elections Commission proposed rules expanding the independent expenditure reporting requirements and defining when groups become political committees.

Under Arizona's preexisting law and regulations, sponsors of independent expenditures expressly advocating the election or defeat of candidates are not required to report their donors if they are not otherwise political committees and do not accept political contributions. The Clean Elections Commission's proposed rules, however, appear to require certain sponsors of independent expenditures to "comply with the requirements of" political committees, which presumably includes donor disclosure.

In addition, the Commission's proposed rules address when an organization has the "primary purpose" of being a political committee. Following a federal court ruling last December declaring Arizona's political committee law to be unconstitutionally vague and overbroad, the Arizona legislature passed, and the Governor signed into law, HB 2649 in April of this year. Under the new law, an organization is not a political committee unless it accepts political contributions or makes political expenditures of more than $500 in a calendar year and has "the primary purpose of influencing" elections.

Similar to the proposed rules in Montana, the Arizona Commission's draft rules would presume that any group that is formed during a legislative election cycle or in the preceding six months has a "primary purpose" of influencing elections. For other groups, it appears that "primary purpose" is to be determined over the course of an "election cycle," although there is considerable ambiguity in the wording of the proposed regulation as well as in the term "election cycle" itself which does not have a fixed meaning under Arizona law.

The Arizona Secretary of State's office has argued that the Clean Elections Commission has overstepped its authority when attempting to regulate independent expenditures. The Commission was created in 1998 pursuant to the Citizens Clean Elections Act to administer the state's public funding system for state candidates. Under that system, candidates accepting public financing were entitled to additional public funds if they were subject to independent expenditures opposing them. The Secretary of State contends that the Clean Elections Commission no longer has any authority to regulate independent expenditures after the Supreme Court invalidated the "matching funds" feature of the Arizona law. The Citizens Clean Elections Act also does not address political committees, and thus the Commission's statutory authority to regulate political committees is similarly in dispute.

The Clean Elections Commission stopped accepting public comments on its proposed rule on July 14.