

California Cracks Down on Coordination Through New Rules

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The California Fair Political Practices Commission (FPPC) recently amended its regulations to crack down on many practices by super PACs that have become commonplace in federal races and in some other jurisdictions. The FPPC's rules, which apply only to elections for California state and local office, were hailed by critics of the post-Citizens United campaign finance landscape as much-needed remedies to curb perceived abuses in political spending. Free speech advocates criticized the rules for being excessively vague, overbroad, and having the potential, in effect, to prohibit independent political speech altogether.

Super PACs are political committees that may accept unlimited contributions from individuals, corporations, and unions for the purpose of sponsoring independent expenditures that support or oppose candidates. Because super PACs are not subject to California's contribution limits, however, they are prohibited from making contributions (whether monetary or in-kind) to California state and local candidates. The FPPC's revised rules address the crucial distinction between independent expenditures, which are permitted for super PACs, and expenditures that are deemed to be coordinated with candidates and regulated as in-kind contributions, which Super PACs are prohibited from making.

Perhaps the most open-ended aspect of the FPPC's revised rules is that an expenditure is presumed to be coordinated if it is made on the basis of information about a candidate's "campaign needs or plans" (such as "campaign messaging, planned expenditures, or polling data") if such information is conveyed "directly or indirectly"

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to the sponsor of an independent expenditure. As one set of comments opposing the FPPC's rulemaking noted, candidates and their campaigns discuss their campaign messaging, planned expenditures, and polling data with the media all the time, and sponsors of independent expenditures are thus able to learn about candidates' campaign needs or plans "indirectly" through news reports.

Unlike the federal rules, the FPPC's new rules do not provide an exemption for information obtained through publicly available sources. Thus, sponsors of independent expenditures may be forced to prove that they have completely isolated themselves from any news reporting about the campaigns, which is impracticable and unreasonable. Alternatively, campaigns will either have to stop talking to the media altogether about their campaign plans and strategies, or independent groups will have to stop sponsoring independent expenditures—a result that is incompatible with recent court rulings and the First Amendment.

Super PACs' reliance on former employees and consultants of candidates is another issue that frequently arises. Because these individuals may possess information about a candidate's campaign plans and strategy, the federal rules impose a 120 day cooling-off period before these individuals may work on an independent expenditure campaign benefitting the candidate. Otherwise, the expenditure may not qualify as being independent. The FPPC's amended rules impose a far lengthier cooling-off period in California for former employees and consultants that begins 12 months prior to the date of the primary or special election in which the candidate for whom these individuals used to work is on the ballot, and going through the date of the general or special runoff election. Effectively, a candidate's employees and consultants will be precluded from working on independent expenditures supporting that candidate for the entire campaign.

The FPPC's revised rules further diverge from the federal rules in their treatment of candidate fundraising and family support for super PACs. While the Federal Election Commission (FEC) has permitted candidates for federal office to appear at super PAC events and to solicit contributions to super PACs under certain circumstances, the FPPC's revised rules would treat these practices as presumptive evidence of coordination with California state and local candidates.

Super PACs that are established, run, or principally funded by an immediate family member of a California candidate also would be presumed to be coordinating with that candidate under the revised FPPC rules. The federal rules, by contrast, do not address family contributions to super PACs supporting federal candidates. As comments on the FPPC rulemaking noted, the U.S. Supreme Court upheld limits on direct contributions from family members to federal candidates in *Buckley v. Valeo*, but questioned the anti-corruption rationale for such limits. Because the Supreme Court's *Citizens United* decision held that independent speech poses an attenuated risk of corruption, the FPPC's severe regulation of independent speech by candidates' family members may be susceptible to a constitutional challenge.

Lastly, the revised FPPC rules presume that an independent group's use of video footage created by a California candidate is coordination, regardless of whether the footage was obtained from a publicly available source, and regardless of how minimal the use of the footage may be. On the other hand, the FPPC rules still permit independent groups to use campaign photos. Regulators at the FEC have been unable to agree on this issue.