

Newly Created New Mexico Ethics Commission Goes After Groups for Independent Expenditure and Donor Reporting

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Despite the pandemic and being in its first year of existence, the New Mexico State Ethics Commission wasted no time in 2020. The agency recently took significant enforcement actions against two groups for alleged reporting violations for their independent expenditures. The matters illustrate the varying approaches states take to enforcement and spotlight issues that bedevil groups involved in issue and election advocacy.

The New Mexico State Ethics Commission only got off the ground at the beginning of 2020, after the state legislature passed legislation in 2019 implementing the agency pursuant to a constitutional amendment enacted by voters in 2018. Similar to the enforcement structure in some other states, enforcement of New Mexico's campaign finance laws previously had been handled primarily by the Secretary of State and state Attorney General.

The existence of a dedicated state campaign finance agency can be a double-edged sword for those in the regulated community. On the one hand, such agencies typically also have advisory powers (as is the case in New Mexico). Therefore, members of the public may have an easier time obtaining official guidance from these more-focused agencies concerning the contours of the state's campaign finance laws, which are often unclear. On the other hand, unlike states that vest enforcement authority in state officials who have a variety of other regulatory focus areas, having an agency that focuses on campaign finance laws also may mean more concerted enforcement

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of such laws.

All of this leads us to the two noteworthy enforcement actions the State Ethics Commission took in connection with the 2020 elections. Under New Mexico's broad campaign finance law, reportable "independent expenditures" include not only: (1) public communications that expressly advocate the election or defeat of a state candidate or the passage or defeat of a ballot measure, or (2) the "functional equivalent" thereof, but also (3) public communications that merely refer to a candidate or ballot measure within certain pre-election time windows. (In other states and under federal law, the third category is often referred to as "electioneering communications.")

Similar to the laws in other jurisdictions, New Mexico subjects groups sponsoring independent expenditures to reporting requirements, including identification of donors. Sponsoring independent expenditures also may cause a group to become a "political committee" (often known as a "PAC") if the group's "primary purpose" is to sponsor independent expenditures. PACs are subject to more extensive reporting and donor identification requirements. While New Mexico's independent expenditure law was separately challenged in federal court in 2019-2020, the litigation was initially unsuccessful in obtaining a preliminary injunction against enforcement of these provisions, and the case remains pending.

Enter the Committee to Protect New Mexico Consumers (the "Committee") and the Council for a Competitive New Mexico (the "Council"), two unaffiliated nonprofit groups. In August 2020, the Committee sent mailers educating voters about a constitutional amendment on the November general election ballot that would restructure the state Public Regulation Commission. The mailer did not expressly urge the ballot measure's passage or defeat. Nor did the mailer fall within the pre-election time window for when communications that merely refer to a ballot measure are regulated. However, the State Ethics Commission took the position that the mailers were the "functional equivalent" of express advocacy and therefore were independent expenditures. Ultimately, the Committee settled with the Ethics Commission and reported its spending. The Committee did not report its donors, relying on a statutory provision that protects donors' privacy if they provide written instructions that their donations not be used to fund independent expenditures.

For its part, the Council made independent expenditures in connection with several State Senate races during the 2020 primaries. Although the Council reported its spending to the State Ethics Commission, its reports also did not identify any of the group's donors. The Ethics Commission recently filed suit against the Council seeking to compel the organization to register and report as a PAC on the grounds that its "primary purpose" is to make independent expenditures.

These enforcement actions in New Mexico illustrate the legal challenges that both nonprofit and for-profit organizations face when sponsoring issue advocacy and election campaign ads. Whether your organization is preparing public advocacy campaigns related to upcoming elections or dealing with enforcement actions arising from the last election, Wiley's Election Law Practice can assist you in navigating the laws in any U.S. jurisdiction.