

MINUTES
(Subject to Approval by the Committee)
Campaign Finance Reform Interim Committee
Wednesday, October 24, 2018
9:30 A.M.
Room EW42
Boise, Idaho

Co-chair Lodge called the meeting to order at 9:39 a.m.; a silent roll call was taken. Committee members in attendance: Co-chair Senator Patti Anne Lodge and Co-chair Representative Fred Wood; and Representatives John Vander Woude, Sage Dixon, and Megan Blanksma. Senators Mary Souza and Mark Harris and Representative Mathew Erpelding participated via conference-phone. Absent and excused: Senators Jeff Agenbroad and Michelle Stennett; and Representative Thomas Loertscher.

Legislative Services Office (LSO) staff present were: Kristin Ford, Maggie Smith, and Ana Lara. Other attendees: Betsy Russell - Idaho Press; Fred Birnbaum - Idaho Freedom Foundation; Phil McGrane - Ada County Clerk's Office; Brian Kane and Robert Berry, Office of the Attorney General.

Note: presentations and handouts provided by the presenters/speakers are posted on the Idaho Legislature website: legislature.idaho.gov; and copies of those items are on file at the Legislative Services Office located in the State Capitol.

Introductory remarks

Co-chair Lodge welcomed the committee including the committee members participating via conference-phone. She noted that Representative Blanksma (ad hoc member) would vote in Representative Loertscher's absence.

Chief Deputy Attorney General Brian Kane's comments

Mr. Kane began by informing the committee that in the event that he needed to step out early, Deputy Attorney General Robert Berry was present to provide any information needed. He stated that the Office of the Attorney General (OAG) had reviewed draft [DRKMF038](#) and several other drafts prepared for the committee's consideration. He noted that OAG's assessment of the drafts is that they are legally defensible and he felt comfortable defending what has been advanced by the committee. He suggested that in the event there was an unforeseen legal issue, the timing is such that the Legislature would have the opportunity to address the issue in a following session.

Presentation on disclosures for independent expenditures and electioneering communications (via conference-phone) - Austin Graham, Legal Counsel, Campaign Legal Center

Mr. Graham introduced himself as legal counsel for the Campaign Legal Center's state and local reform program. He explained that the Campaign Legal Center is a nonpartisan, nonprofit organization that works to protect and strengthen campaign finance laws at all levels of government. Last year, the Campaign Legal Center submitted written testimony to the committee about campaign finance disclosure, and was happy to learn that the Idaho Legislature is again considering campaign finance reform for next session. His presentation included the following three topics related to transparency in political spending: U.S. Supreme Court precedent, disclosure of electioneering communications, and online campaign advertising.

U.S. Supreme Court disclosure precedent

Mr. Graham began with an overview of the Supreme Court's recent decisions on campaign finance disclosure. In 2010, the Court decided *Citizens United v. FEC*. The opinion is best known for its invalidation of federal law's long-standing prohibition on corporations and unions making direct expenditures in federal elections, but he stated that *Citizens United* was also a major ruling in favor of disclosure. Eight of the nine Supreme Court Justices joined the part of the decision upholding

federal law's electioneering communication disclosure requirements as applied to *Hillary: The Movie*, a video-on-demand documentary, and to commercial advertising for the film.

Mr. Graham said that in *Citizens United*, the Supreme Court recognized that "disclosure is a less restrictive alternative to more comprehensive regulations of [political] speech" since it "impose[s] no ceiling on campaign-related activities." Further, the Court explained that disclosure advances a critical government objective by providing voters with information about who is making public communications about a candidate before an election. The Court maintained that disclosure served this informational interest even if a public communication did not amount to "express advocacy" for or against a specific candidate's election.

Mr. Graham said that *Citizens United* unequivocally affirmed the constitutionality of disclosure requirements for political advertising. More recently, in 2017, the Supreme Court again signaled its view that disclosure is constitutional by summarily affirming a lower court decision that rejected an as-applied challenge to federal disclosure requirements for electioneering communications.

Electioneering communication disclosures

Mr. Graham explained that at the federal level, Congress enacted reporting requirements for electioneering communications in the early 2000s. The regulation of these communications was meant to close a major loophole in federal law that had enabled political groups to fund advertising referring to federal candidates without having to file disclosure reports as long as the advertisements avoided the use of "express advocacy" language. The enactment of electioneering communication disclosures expanded transparency requirements to cover a more comprehensive range of public communications relating to candidates.

Mr. Graham noted that multiple states require reporting of electioneering communications within a longer time frame than the 30/60-day periods in federal law. For instance, Alabama's definition of "electioneering communication" covers communications that reference a candidate and are publicly distributed within 120 days of a primary or general election. Under Massachusetts law, an electioneering communication includes a communication that is publicly distributed within 90 days of either a primary or general election. He also noted that both Maryland and Washington define "electioneering communication" to include a communication that refers to a candidate during the 60-day period before an election.

Mr. Graham stated that similarly, many states have defined "electioneering communication" to include additional types of media beyond those covered under federal law, including internet and electronic media. He noted that Idaho's existing definition of "electioneering communication" encompasses a broader range of media than federal law, as it includes direct mail and printed communications. He suggested that the federal definition is not an outer limit on the timing or scope of political advertisements that states may classify as electioneering communications.

Online political advertising

Mr. Graham discussed online political advertising. He stated that, according to the research firm Borrell Associates, approximately \$1.4 billion was spent on online advertisements in federal, state, and local elections in 2016. This figure represented an almost 800% increase over digital campaign spending in 2012. The amount spent on online campaign advertising also exceeded the total spent on political ads on cable TV, for the first time, in 2016. He opined that the growing prominence of digital advertising in campaigns is likely to continue.

Mr. Graham suggested that campaign finance law has largely failed to keep pace with the exponential growth of digital advertising. He noted that many jurisdictions' campaign finance laws, including Idaho's, do not define electioneering communication to explicitly include internet advertisements, which leaves voters in the dark about who is funding a substantial amount of candidate-related advertising online.

Mr. Graham stated that the lack of disclosure around digital advertising directly facilitated Russia's illicit efforts to influence the 2016 presidential election using social media and other electronic means, and the foreign efforts to influence U.S. elections have not stopped. He noted that in recent months, both Facebook and Microsoft had uncovered foreign-backed attempts to impact the 2018 midterm elections through social media and other digital means.

Mr. Graham said that the continuing threat of foreign interference in U.S. elections underscores the need for lawmakers to ensure online political campaign spending is transparent and free from foreign meddling. While congressional efforts have stalled, multiple states have enacted new disclosure requirements for online political advertising within the past year (e.g., Maryland, California, Vermont, Washington, New York).

Discussion

Senator Souza asked if most states currently mirror the time frame for the federal reporting requirements. Mr. Graham responded that the time frame for federal reporting requirements is pretty common among the states. He noted that in 2013, about 25 states distinctly regulated electioneering communications, and while a good portion of those states use the federal time frame, other states have expanded the time frames.

Representative Dixon asked how broadly online advertisement is being defined. Mr. Graham stated that the general approach that they advocate for refers to paid online advertisement on another person's website and, as long as it meets the financial threshold, it should be treated as a political expenditure. Representative Dixon asked if any lawsuits had been presented in other states (e.g. Ohio) in expanding reporting time frames. Mr. Graham was not aware of any lawsuits presented in the case of Ohio.

Representative Erpelding asked whether Mr. Graham was aware of a financial threshold expenditure average. Mr. Graham did not have an average number readily available, but suggested that the reporting threshold tends to be a policy decision based on what is deemed appropriate in each individual state. He noted that reporting thresholds between \$500 to \$1,000 were common, but several states had reporting thresholds below those amounts.

Presentation on disclosures for independent expenditures and electioneering communications (*via conference-phone*) - Tyler Martinez, Attorney, Institute for Free Speech

Mr. Martinez introduced himself as an attorney for the Institute for Free Speech, a 501(c)(3) nonpartisan, nonprofit organization that focuses on protecting the rights of speech, press, assembly, and petitions.

Independent expenditures and electioneering communications

Mr. Martinez suggested that if Idaho passes the language as proposed in the draft, it would be an outlier in the states. He stated that in the area of campaign finance, the Supreme Court has demanded that the state show a substantial interest in demanding disclosure; the government can only regulate speech that is unambiguously campaign-related. He stated that *Buckley v. Valeo* articulated the difference between issue advocacy and political advocacy. He opined that mentioning a candidate for political office is not always political advocacy, depending on what the focus of the speech is. He suggested that people speaking about public policy often mention candidates because they are often incumbents and have the power to change public policy. The *Buckley* decision defined political advocacy as using communications that expressly advocate the election or defeat of a clearly defined candidate. He explained that sometimes a speaker will not name a candidate, but is clearly speaking about a candidacy and a person's fitness for office.

Mr. Martinez explained that in a later decision, the U.S. Supreme Court defined the functional equivalence of "express advocacy" - such as an ad susceptible to no reasonable interpretation other than an appeal to vote for or against a specific candidate. He suggested that certain ads, depending

on the proximity of elections, may or may not be considered electioneering communications. The federal government produced a study that reported that, within 30 days of a primary or 60 days of an election, ads that mentioned a candidate were actually referring to an election and not expressing issue advocacy. He suggested that in the case of *McConnell v. FEC*, the Supreme Court upheld the electioneering communication definition. He suggested that the decision in this case is the primary reason for why most states adhere to the 90-day federal reporting time frame.

Mr. Martinez said that most states that have electioneering communication regulations follow the federal guidelines, although a few split the 90-day time frame differently. He suggested that nowhere in the federal system does an electioneering communication trigger general donor disclosure; only for those donors who earmark their money specifically for an electioneering communication. He noted that the committee's drafts proposed a 181-day time frame that effectively doubles the federal time frame upheld by the U.S. Supreme Court. He opined that it is a lengthy time frame to regulate speech. He suggested that the time frames would invite legal challenges. He referenced ongoing litigation in Montana and Colorado regarding additional campaign finance regulation. He noted the high cost of litigation and the resources needed to defend additional campaign finance regulations. He also noted the low threshold of \$100 in Idaho. He disagreed with Mr. Kane's comment that litigation regarding these drafts would be quickly resolved.

Social media

Mr. Martinez referred to social media and suggested that it would be easy to spend \$100 on Facebook advertising. He suggested that the definition for "social media" is extremely broad. He suggested that people could run into issues if they are playing on Xbox Live or Halo and also advocate for a candidate while playing games in an online community. He stated that the FEC has had a difficult time creating rules for disclaimers and applying them to social media because it is difficult to define social media in a constitutionally viable manner.

Discussion

Senator Souza asked if someone were to share a campaign ad on social media, and had not paid for said ad, would that person be required to file a report? Mr. Martinez responded that under the present draft, it appeared that someone would have to spend at least \$100 to promote it. He explained that, generally, for states to regulate campaign finance there has to be some dollar amount attached.

Representative Erpelding asked for clarification regarding Mr. Martinez' Xbox example. Mr. Martinez responded that it depends on what the law considers to be an expenditure. Representative Erpelding asked how a private citizen playing a game ties into an electioneering communication solely based on something a player might say. Mr. Martinez responded that Xbox Live costs more than \$100 to play. Representative Erpelding suggested that the argument that someone not involved in politics (e.g., his wife) using a subscription service to e-mail friends asking them to vote for a politician (e.g., Representative Erpelding) would be considered an electioneering communication was far-fetched. Mr. Martinez responded that it would depend on how broadly social media is defined in the draft; he encouraged the state to continue to refine the definition for social media or the internet. He informed the committee that the federal government only regulates e-mails that come from e-mail marketing services (e.g., Constant Contact, Mailchimp) that are paid to send e-mails to a mass amount of people. Representative Erpelding asked whether increasing the minimum expenditure would help control some of the concerns he raised. Mr. Martinez responded that it could help, but suggested proper narrow tailoring regarding transparency requirements.

Co-chair Lodge called upon Deputy Attorney General Robert Berry to provide his perspective on some of the points that Mr. Martinez had made. Mr. Berry referred to the definition of electioneering communication as well as the requirements of Section 67-6628 in draft [DRKMF038](#). He noted that on page 6, lines 31-33, a person incurring costs in an aggregate amount exceeding \$100 when making an electioneering communication would be required to file a statement with

the Secretary of State (SOS). He referred to Mr. Martinez' Xbox Live example and noted that the cost for Xbox Live would have been incurred preceding any speech regarding a candidate, and did not believe that it would fall under the rubric of an electioneering communication. He stated that regarding Twitter, he did not believe a cost exceeding \$100 or more is incurred when retweeting twitter posts, and thus would not fall under the definition of electioneering communication. He commented that while the definition of electioneering communication is broadened in the draft legislation, it is also tied to when the funds are expended. He noted that Idaho is one of the least populated states in the country and also offered one of the lowest minimum wage pay rates. He opined that the financial thresholds were more significant to the citizens of Idaho as opposed to other states with a greater population or greater income.

Mr. Berry stated that regarding the potential for injunctive relief filed by citizens, Section 67-6626, Idaho Code, allows private citizens to bring a suit. He was unsure whether it would allow for PACs or other organizations to file suit because he did not believe that they are considered citizens of the State of Idaho. He acknowledged that Montana and Colorado have had many challenges to statutes, but noted that Idaho has not had the same history or culture of challenging statutes, comparatively.

Co-chair Lodge asked if Mr. Berry had any comments regarding the election cycle extending more and more each year. Mr. Berry believed that when the sunshine laws were originally established for electioneering communication, the campaigns were much more defined and limited, hence the 30/60-day reporting time frame. He commented that regarding the current trend for longer campaigns, the justification could be that if the time frame for campaigning is extended significantly, then the time frame for electioneering communications should be extended as well.

Senator Souza noted Idaho's growing economy and fast population growth and opined that it would be best to keep that in mind when formulating statutes in Idaho. Mr. Berry remarked that the threshold amounts are well within the discretion of the Legislature and it is their policy decision to make.

The committee adjourned at 10:40 a.m. for a break.

The committee reconvened at 10:57 a.m.

Committee discussion of electioneering communications, independent expenditures, and other business

Co-chair Lodge asked Ms. Ford to explain the changes removed from the omnibus bill draft [DRKMF047](#) to the committee. Ms. Ford noted that in the prior meeting, the members had referenced some deadlines that were not part of the new language; the language was reinserted beginning on page 2, line 31. She commented that working with the newly approved language proved to be too difficult and warranted significant rewriting of the section.

Co-chair Wood made a motion to approve drafts DRKMF047 and DRKMF048 and to include them into the omnibus bill. Representative Dixon seconded the motion.

Representative Vander Woude referred to page 2, line 39 of draft DRKMF047, and asked if there was a report due seven days prior to the primary election as well. Ms. Ford responded that the draft legislation only called for monthly reporting prior to a primary election, but presently there is a provision that calls for a report to be filed seven days before the primary election. Representative Vander Woude suggested keeping the current reporting time frame of seven days prior to the primary election; this would provide consistency for both elections. Mr. Phil McGrane, chief deputy for the Ada County Clerk's Office, reminded the committee that the general election is held the first Tuesday following the first Monday in November, which occurs before the 10th day of November; the primary election is held the third Tuesday in May. In essence, the report date of May 10 would serve the same purpose as the current seven-days prior to the primary election deadline for the pre-primary election report. He explained that the seven-days before the November election deadline was used to provide for the pre-general election report.

Co-chair Lodge called for a rollcall vote. **The motion passed with 8 voting aye, 0 voting nay, and 3 absent and excused. Voting in favor of the motion: Co-chairs Lodge and Wood; Representatives Vander Woude, Dixon, Blanksma, and Erpelding; and Senators Souza and Harris.**

Ms. Ford proceeded to draft [DRKMF038](#) and explained that the draft contained the sections regarding electioneering communications and independent expenditures. She informed the committee that the draft did not include the changes made in the omnibus bill, but none of the changes would conflict. She directed the committee to the proposed definition for "electioneering communication" with the expanded reporting time frame. She noted the definition for "independent expenditure" had been revised after the committee's prior discussion regarding volunteers and types of actions that should apply or not apply to independent expenditures. She had reviewed the federal definitions and a number of states' definitions for "collaborating" or "coordinating." She noted that most states do not define collaborating and coordinating, but some states do. She directed the committee to page 3, line 46, and explained that she chose the federal term "coordination" because it is the term most used by states and provides the most examples to the Secretary of State (SOS). She added that rather than using the term "volunteer" she opted to use language that referred to a paid or unpaid agent. Ms. Ford directed the committee to page 4 and explained that she had borrowed language from the state of Delaware to provide more details about what is not considered an independent expenditure.

Ms. Ford proceeded to page 5 of the draft and informed the committee that the definition of "social media" had not changed since the last meeting. Ms. Ford reminded the committee that the reporting requirements require that a communication, including social media, be paid in an aggregate amount exceeding \$100. Representative Erpelding opined that the \$100 threshold is too low and suggested raising it as both presenters had suggested. Ms. Ford reminded the committee that the threshold for both independent expenditures and electioneering communication expenditures is \$100 in the draft. Representative Erpelding had no issue with keeping the thresholds for independent expenditures to \$100, but suggested raising the threshold for electioneering communication from \$100 to \$1,000. Senator Souza concurred with Representative Erpelding. Ms. Ford explained that the same people (including PACs) can make both independent expenditures and electioneering communication; the difference between the two is the language used.

Co-chair Wood reminded the committee that a lot of advertising can be done on social media for \$100. He was not opposed to raising the threshold, but preferred an amount more reasonable to Idaho (e.g., \$250). Representative Vander Woude concurred with raising the threshold to \$1,000. Representative Blanksma advocated for removing "aggregate" for expenditures and lowering the threshold for one-time expenditures. After some discussion, Senator Souza suggested narrowing the electioneering reporting time frame and lowering the total per-expenditure amount. Mr. Hurst emphasized that the difficulty with enforcement is that they rely on official complaints made and cannot enforce expenditures that are not reported to the SOS.

Co-chair Wood stated his opposition to reducing the reporting time frame referenced in the draft. He explained that, regarding independent expenditures, the aggregate is current language. He noted that in Section 67-6628 of the draft, "aggregate" was added for electioneering communication. He had no issue increasing the aggregate amount to \$500, or even to \$1,000, if the committee wished, as long as it was an aggregate amount. He opined that the \$500 aggregate amount was more appropriate to Idaho. Co-chair Lodge suggested raising the threshold to \$250. Co-chair Lodge asked Mr. Berry for his thoughts on whether raising the threshold to \$250 would help avoid some lawsuits. Mr. Berry agreed with Co-chair Lodge's comments that any person could file a lawsuit for any reason. Mr. Berry noted that the first presenter commented that both Massachusetts and Maine have a threshold of \$250, not \$1,000.

Representative Erpelding preferred to extend the time frame for reporting requirements to increase transparency. He suggested raising the threshold to \$500 in the aggregate. Representative Vander Woude preferred raising the threshold to \$1,000, but keeping the reporting time frame as provided

in the draft. Representative Dixon and Senator Souza concurred with Representative Vander Woude's suggestion. Co-chair Wood was willing to raise the threshold to \$1,000 if it meant expanding the reporting time frame. **Co-chair Wood made a motion to change the threshold amounts for independent expenditures and electioneering communications to \$1,000 on page 6, lines 1 and 33. Representative Vander Woude seconded the motion.** Co-chair Lodge called for a rollcall vote. **The motion passed with 8 voting aye, 0 voting nay, and 3 absent and excused. Voting in favor of the motion: Co-chairs Lodge and Wood; Representatives Vander Woude, Dixon, Blanksma, and Erpelding; and Senators Souza and Harris.**

Ms. Ford directed the committee to page 6, line 6 and noted that everyone would report on the same schedule. She proceeded to line 19 and noted that Senator Agenbrood had brought to her attention that the draft did not specify in terms of when one should disclose donors that have contributed toward making an independent expenditure in support of or in opposition to a candidate or measure. She noted that Mr. Martinez' suggestion that the draft required disclosure of all donors was incorrect because the definition of "contribution" means money given for a political purpose. She emphasized that people are not required to disclose donors that give to charitable portions of the business, etc. as noted on page 6, line 17.

Ms. Ford referenced lines 19 and 40, and noted that the reporting requirement in the draft called for reporting donors for the current calendar year in which the expenditure or communication is made, but suggested that the committee could select a different time frame. Mr. Hurst expressed concern with limiting requirements for reporting to only those who contribute specifically to advertisements. He emphasized that, essentially, the definition of "dark money" is linked to an organization that receives donations and isn't required to disclose a person's name, that then gives funds to someone else. Mr. Hurst suggested striking "in support of or in opposition to any candidate or measure" on line 17. He explained that this would require the identification of anyone that donates more than \$50 to a group that is either supporting or opposing a candidate or measure. Ms. Ford suggested changing the term from "contribution" to "donation" in this section, to accomplish Mr. Hurst's suggestion. She noted Mr. Berry's belief that changing the language, as Mr. Hurst suggested, by requiring identification of any persons making donations, would still be legally defensible by the OAG.

Co-chair Wood asked if using the term "contribution" versus "donation" would cause any issues, especially since "donation" is not defined in the draft. Mr. Berry stated that the common understanding of donation is that it's provided to be used in a certain manner and opined that the term would be broader; "contribution" has a defined parameter within the draft.

Representative Dixon referred to page 6, lines 37 and 38 and suggested raising the \$50 amount to \$500 to prevent dissuading individuals from supporting something they believe in due to fear of reprisals. Ms. Ford noted that the same amount appears on page 6, line 10 for independent expenditures, in case the committee wished to raise the threshold in both places. Representative Erpelding stated his opposition to raising the threshold by ten times its current amount. Co-chair Wood stated his preference for raising the amount somewhere between \$100 to \$250. Co-chair Lodge stated her preference for raising the amount to \$100. Senator Souza concurred with Co-chair Wood's suggested amount. Representative Dixon and Senator Harris felt comfortable with raising the threshold to \$250. Representative Erpelding asked how increasing the thresholds for donations for the purposes of independent expenditures and electioneering communication increases transparency. Representative Blanksma stated that increasing the amounts would offer a balance between increasing transparency and free speech.

Co-chair Wood asked whether the figure on line 18 would need to be changed as well. Ms. Ford clarified that she misspoke earlier; she meant to reference line 18 instead of line 10. **Co-chair Wood made a motion to increase the aggregate amount on page 6, lines 18 and 38, from \$50 to \$250. Representative Dixon seconded the motion. The motion passed by voice vote. Representative Erpelding asked to be recorded as voting nay.**

Ms. Ford proceeded to the bottom of page 6 and page 7 and explained that the aggregate amount language was added to make it conform with the SOS's practices. She commented that the language on page 7 had been introduced to the committee in previous drafts. **Co-chair Wood made a motion to approve draft DRKMF038 with the revisions that the committee approved by motion; the draft would remain separate from the omnibus bill. Representative Vander Woude seconded the motion. The motion passed by voice vote.**

Ms. Ford proceeded to draft [DRKMF048](#) and explained that Mr. Hurst, Mr. McGrane, and she had discussed the definitions of "independent expenditure" and "expenditure," per the committee's request. After some discussion, they decided to leave the definitions for "expenditure" and "independent expenditure" as is on page 4.

Co-chair Wood proposed sending a new draft to the committee for one more final review, and then to RS the draft prior to the start of the legislative session. He recommended that the committee members be present for the germane committee hearing. He suggested Representatives Blanksma and Vander Woude present the bill to the House State Affairs Committee.

Senator Souza provided a brief overview of the proposed changes to the SOS's expenditure categories to allow the public to better understand how campaign money is spent. Mr. Hurst appreciated Senator Souza's list of suggested changes. He noted the need to expand the categories and thought Senator Souza's suggestions were a good starting point.

Co-chair Wood thanked LSO staff, SOS, OAG, Mr. McGrane, and the committee for the good work. He encouraged the committee to present a united front on the omnibus bill. Co-chair Lodge thanked the committee for their engagement and participation. She emphasized that it wasn't the committee's intent to be onerous or limit free speech, but to provide more transparency.

The committee adjourned at 12:19 p.m.