



GEORGIA GOVERNMENT TRANSPARENCY & CAMPAIGN FINANCE COMMISSION

Advisory Opinion No. 2017-05

Summary Response

In response to five questions submitted to the Commission regarding the legality of candidates or their committees creating or contributing to nonprofit entities that may engage in advocacy directly or indirectly related to the candidate's campaign, the Commission opines that other than creating a campaign committee as permitted by law, neither a candidate nor the candidate's campaign committee may establish, operate, solicit donations for, nor coordinate communications with a nonprofit or other entity that expends money for communications referring to the candidate or the candidate's opponent. In such instances of solicitation and coordination, the expenditures on the communications are contributions to the candidate reportable on the candidate's or candidate committee's Campaign Contribution Disclosure Report ("CCDR"). This result pertains regardless of whether the communications are "express advocacy," regardless of whether the entity was initially created as an "independent committee," and regardless of the specific federal tax section under which the entity is formed or with which it intends to comply. The answer to the specific questions is, of course, controlled by the specifics of the detailed overview and discussion of the issues, below.

Questions Presented

In a letter from Douglas Chalmers of Chalmers, Pak, Burch & Adams, LLC,¹ the following specific questions were presented for an advisory opinion from the Commission:

- (1) May a candidate and/or his or her agents directly or indirectly establish, operate, and/or solicit funds for a nonprofit corporation or other entity that will make expenditures for public communications that will reference that candidate, and/or that candidate's opponent(s) in an election, if those communications do not contain express advocacy?
- (2) Does the answer to Question #1 turn in any way on whether the entity described has been established as a political organization under Section 527 of the Internal Revenue Code, meaning that it has been established for the primary purpose of influencing elections?

¹ A copy of this letter is attached as Exhibit "A."

- (3) If a candidate and/or his or her agents solicit contributions to the type of entity described in Question #1, are such contributions regulated or limited by the Act or the Rules?
- (4) May a candidate and/or his or her agents coordinate (as that concept is applied in the Rules) with an entity of the type described in Question #1 on expenditures for public communications that will reference that candidate, or that candidate's opponents(s) in an election, if those communications do not contain express advocacy? In other words, may a candidate and/or his or her agents request or suggest that such an entity make such expenditures, or cooperate or consult with the entity with respect to such expenditures? If such expenditures are coordinated in such a way with the candidate and/or his or her agents, are such expenditures regulated or limited by the Act or the Rules?
- (5) May a candidate and/or his or her agents establish, create and/or solicit contributions for an independent committee that will make expenditures for communications that expressly advocate the election of that candidate if neither the candidate nor his or her agents coordinate with the independent committee on the expenditures themselves?

Background and Overview of the Law

The question of the extent a candidate² may create or coordinate campaign activities or communications with other organizations that advocate related to his or her campaign is one rapidly rising in national prominence.³ At the federal level this issue is partly controlled by (and is enmeshed with) federal tax law, which currently permits different types of nonprofit organizations directly or indirectly related to campaigns or political issues and has disclosure rules regarding such nonprofits' donors and limits on the nonprofits' political activities. *See, e.g.*, 26 U.S.C. §§ 501(c)(3) (religious, charitable, scientific, and educational groups, which may, among other things, engage in voter registration, and limited lobbying but otherwise no political activity), 501(c)(4) (non-profit social welfare groups not required to publicly disclose their donors and who may engage in some political activity relevant to their purpose or members if doing so is not their primary purpose), 501(c)(5) (labor and agricultural groups, which may perform some political activities related to their members' common interests and are not required to publicly disclose their donors), 501(c)(6) (business leagues, chambers of commerce, real estate organizations and trade boards, which may perform some political activities related to their members' common interests and are not required to publicly disclose their donors⁴), 527 ("political organizations" that are organized and operate to influence elections and must disclose their donors).

² As used in this opinion "candidate" includes the candidate's campaign committee and includes campaign committees organized to bring about or oppose the recall of a public officer or the approval or rejection of a constitutional amendment or referendum or question on a ballot. *See* O.C.G.A. §§ 21-5-3(2), 21-5-30(a), (b), (c), 21-5-42.

³ *See, e.g.*, Exhibit "B" hereto.

⁴ Because donors to a § 527 organization may be other entities that are not required to publicly disclose their donors, such as § 501(c)(4) nonprofits, the names of individuals indirectly funding a § 527 organization may be unknown.

Of note among these groups are so-called “Super PACs,” which are § 527 organizations that do not coordinate their activities with a candidate and, in light of this non-coordination, may receive unlimited contributions and make unlimited expenditures. The wide use of “Super PACs” arose from the United States Supreme Court’s decision in *Citizens United v. FEC*, 558 U.S. 310 (2009) (holding *inter alia* that the First Amendment permits unlimited corporate funding of independent political broadcasts in candidate elections although it is lawful to require that donors be disclosed) and *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (holding unconstitutional contribution limits on a § 527 organization that engaged in “express advocacy” not coordinated with a candidate⁵ and otherwise upholding federal donor disclosure and other reporting requirements on the organization). Following these cases, it is now established that federal and state elections commissions may regulate some aspects of organizations that make independent expenditures and engage in express advocacy but they may not limit the size of contributions to or expenditures by such organizations.

Georgia law is similar to but does not mirror federal campaign finance law.⁶ Georgia law defines a “political action committee” (referred to herein and elsewhere as a “PAC”) as:

(A) Any committee, club, association, partnership, corporation, labor union, or other group of persons which receives donations during a calendar year from persons who are members or supporters of the committee and which contributes funds to one or more candidates for public office or campaign committees of candidates for public office; and

(B) A "separate segregated fund" as defined in Code Section 21-5-40.

Such term does not include a candidate campaign committee.

O.C.G.A. § 21-5-3(20).

Since PACs, by definition, are organizations that “contribute[] funds to one or more candidates,” O.C.G.A. § 21-5-3(20), they are governed by the contribution limits imposed by Georgia law. O.C.G.A. § 21-5-41. In addition, if they make more than \$25,000 in “aggregate contributions and expenditures to or on behalf of candidates,” they must register with the Commission and file CCDRs. O.C.G.A. § 21-5-34(e).

An “independent committee,” on the other hand, is:

any committee, club, association, partnership, corporation, labor union, or other group of persons, other than a campaign committee, political party, or political action committee, which receives donations during a calendar year from persons who are members or supporters of the committee and which

⁵ The federal statutory definition of “independent expenditure” refers explicitly to “expressly advocating.” 52 U.S.C. § 30101(17); *see also* 11 C.F.R. 100.16 (more detailed regulatory definition of “independent expenditure”). There is no federal statutory definition of “expressly advocating,” but a detailed regulatory definition is provided at 11 C.F.R. 100.22.

⁶ Compare 52 U.S.C. §§ 30101 to 30111 with O.C.G.A. §§ 21-5-2 to 21-5-43 (showing that federal and Georgia campaign finance law are fundamentally different in their overall structure although they often have similar definitions and requirements).

expends such funds either for the purpose of affecting the outcome of an election for any elected office or to advocate the election or defeat of any particular candidate.

O.C.G.A. § 21-5-3(15).

While Georgia law imposes registration and donor/expenditure disclosure requirements on independent committees, it does not impose caps on the amount of contributions or expenditures they may make. *See* O.C.G.A. § 21-5-34(f). That is because “independent committees” do not make contributions directly to candidates. *See id.* In this regard, the Commission’s regulations provide that

Campaign contribution limits on contributions to candidates do not apply to independent expenditures made to influence candidate elections. An independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate but which is made independently of any candidate’s campaign. However, an expenditure is “independent” only if it meets certain conditions. It must not be made with the cooperation or consent of, or in consultation with, or at the request or suggestion of any candidate or any of his or her agents or authorized committees. An expenditure which does not meet the above criteria for independence is considered a contribution which is subject to limits.

Ga. Comp. R. & Regs. r. 189-3-.01(f).

Similarly, the Commission’s regulations define an “independent expenditure” as

a political campaign communication that expressly advocates the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with or at the request or suggestion of a candidate or candidate's authorized committees.

Ga. Comp. R. & Regs. r. 189-2-.01(12).

In two advisory opinions the Commission expressly limited independent committees to organizations that “expressly advocate,” referring to this as the “express advocacy standard set out in *Buckley v. Valeo*, 424 U.S. 1, at 44 (1976) ...” AO 2001-32; *see also* AO 2010-05 (reaffirming AO 2001-32 and its reference to *Buckley v. Valeo*). *Buckley v. Valeo*’s specific formulation of “express advocacy” was 35 years old at the time AO 2001-32 was issued, and it was outdated and superseded as a constitutional standard at the time AO 2010-05 was issued. *See McConnell v. FEC*, 540 U.S. 93, 192-93 (2003); 11 C.F.R. 100.22 (current federal regulatory definition of “expressly advocating”).

This raises the question, however, of when communications and similar activity that are not express advocacy nonetheless constitute a “contribution” to a candidate. Under the Campaign Finance Act a “contribution” is defined, in pertinent part, as:

[A] gift, subscription, membership, loan, forgiveness of debt, advance or deposit of money or **anything of value conveyed or transferred for the purpose of influencing the nomination for election or election of any person for office** The term specifically shall not include the value of personal services performed by persons who serve without compensation from any source and on a voluntary basis. The term "contribution" shall include other forms of payment made to candidates for office or who hold office when such fees and compensation made can be reasonably construed as a campaign contribution designed to encourage or influence a candidate or public officer holding elective office. ...

O.C.G.A. § 21-5-3(7) (emphasis added); *cf.* O.C.G.A. § 21-5-3(12) (similar language in definition of "expenditure").

The Commission's regulations state regarding "in-kind contributions" that:

- (1) An in-kind contribution is deemed a "contribution" for purposes of the Act, and refers to any item of value other than money received by a candidate or any committee.
- (2) The aggregate of monetary and in-kind contributions from the same contributor shall not exceed the maximum contribution limits authorized by the Act.

Ga. Comp. R. & Regs. r. 189-6-.07.

Similarly, they define "In-kind expenditure" as:

An expenditure of any goods or services for which a candidate or campaign committee did not extend payment to an end-recipient for the goods or services provided, but for which the campaign received the use / benefit of said goods or services (e.g., A computer is loaned to the campaign and the computer is returned to the donor upon the conclusion of the campaign).⁷

Ga. Comp. R. & Regs. r. 189-2-.01(11).

A paradigmatic example of an "in-kind" expenditure is printing campaign signs for a candidate. *See, e.g., In re: Michael Payne*, case no. 2007-0023 before the Commission. Such signs are "speech," and so it is evident that under some circumstances speech or communications by a third party can constitute in-kind contributions. Of course, typically campaign signs are both "express advocacy" by anyone's standard and, moreover, are coordinated with a candidate. Yet, it is possible that there are instances where communications (whether particularly obscure signs or something else) might not be "express advocacy" under a narrow definition of the phrase and yet still be communications made "for the purpose of influencing the nomination for election or

⁷ It is evident that, given the regulation's example of loaning a computer to a campaign, that the regulation is, in fact, referring to an "in-kind expenditure" made by a donor, which is an in-kind contribution to a candidate.

election of any person for office” -- that is, within the scope of Georgia’s statutory definition of a “contribution.” O.C.G.A. § 21-5-3(7). In this instance, while the communication is not one of an “independent committee,” as there is no express advocacy, it may, nonetheless, be an in-kind contribution to a campaign. The evidence that it is an in-kind contribution to a campaign is strongest when the communication was made at the behest of or in coordination with the candidate. That is, if a candidate asks for a communication or speech of some sort, the cost of providing it may be an “in-kind” contribution to the candidate regardless of whether the speech was “express advocacy.” *Cf. FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 442, 446 (2001) (the effect of coordination between candidates and outside supporters fundamentally transformed the expenditure, noting a “wink or nod” often will be “as useful to the candidate as cash.”).

Against this background, then, we consider the specific questions presented.

Discussion of the Specific Questions Presented

- (1) May a candidate and/or his or her agents directly or indirectly establish, operate, and/or solicit funds for a nonprofit corporation or other entity that will make expenditures for public communications that will reference that candidate, and/or that candidate’s opponent(s) in an election, if those communications do not contain express advocacy?**

In considering this question it must be noted at the outset that it overtly assumes that the communications made are not “express advocacy.” Therefore, under the Commission’s existing advisory opinions, the third person entity would not be an independent committee since an independent committee must, among other things, engage in express advocacy.⁸ AO 2001-32; AO 2010-05. Nonetheless, the question also assumes that the communications “reference that candidate, and/or that candidate’s opponent(s),” a situation that is often “express advocacy.”⁹ In

⁸ See the discussion regarding independent committees and express advocacy on pages 3-4, *supra*.

⁹ Under *Buckley v. Valeo* -- potentially still the test for “express advocacy” in Georgia per AO 2001-32 and AO 2010-05 -- “express advocacy” is determined by what has come to be called the “magic words” test. Per *Buckley* there must be “express words of advocacy of election or defeat, such as ‘vote for,’ ‘elect,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject’ ...” 424 U.S. at 44. In *McConnell* the Court disowned *Buckley*’s test, noting, *inter alia*, that “[Buckley] in no way drew a constitutional boundary that forever fixed the permissible scope of provisions regulating campaign-related speech” and it was “[i]ndeed, [an] unmistakable lesson from the record in this litigation ... that Buckley’s magic-words requirement is functionally meaningless.” 540 U.S. at 193-94. In the place of the “magic words” test, the Court formulated what has become known as the “functional equivalent” test: communications are “express advocacy” and subject to regulation when they are intended to influence voters’ decisions and have that effect. *Id.* at 204-205, 206 (2003). Nonetheless, in *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), the Court narrowed the functional equivalent test, holding “an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Id.* at 469-470. By regulation the FEC currently uses a test that appears to be a hybrid between the “magic words” and “functional equivalent” tests:

Expressly advocating means any communication that - (a) Uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent,” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one

other words, while the question disclaims express advocacy, it presents a fact situation that could well be express advocacy.

Georgia law currently provides a mechanism for candidates to create and operate an entity that advocates on their behalf: a campaign committee. O.C.G.A. § 21-5-30(a). The law permitting a candidate to have a campaign committee expressly provides that “no contributions to bring about the nomination or election of a candidate for any office shall be made or accepted except directly to or by a candidate or such candidate's campaign committee which is organized for the purpose of bringing about the nomination or election of any such candidate” *Id.*

In providing candidates with the option of creating a campaign committee, the General Assembly has provided a singular mechanism by which “a candidate [may] ... establish, operate, and/or solicit funds for [an] ... entity that will make expenditures for public communications that will reference that candidate, and/or that candidate’s opponent(s) in an election ...” per the question presented. This is patently *one* organization that operates on the candidate’s behalf: it is referred to in the singular and is required to have a unique bank account and to report and file with the Commission as part of the candidate’s filings. O.C.G.A. § 21-5-30. In referring to “campaign committee” in the singular throughout the Campaign Finance Act and in only providing for the creation of one campaign committee for a candidate, the Act perforce excludes the possibility that a candidate may create and operate multiple entities on his or her behalf. *Cf. Mooney v. Webster*, 300 Ga. 283, 288 (2016) (Supreme Court of Georgia follows “the long-recognized doctrine of statutory construction, *expressio unius est exclusio alterius*”). The Act does not provide for a candidate to have multiple campaign committees, nor does it allow or provide a mechanism for candidates to operate their campaigns and avoid lawful reporting to the Commission by creating entities that are not campaign committees. Indeed, as quoted above, the Act expressly prohibits “contributions to bring about the nomination or election of a candidate for any office” that are not made “directly to or by a candidate or such candidate's campaign committee which is organized for the purpose of bringing about the nomination or election of any such candidate.” O.C.G.A. § 21-5-30(a).

For this same reason it would not be lawful for a candidate to solicit funds for a nonprofit or other entity “that will reference that candidate, and/or that candidate’s opponent(s) in an election,” even if the candidate has not created or is in control of that organization, if funds solicited are “to bring about the nomination or election of a candidate for any office.” The Act requires such contributions

or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon's the One,” “Carter '76,” “Reagan/Bush” or “Mondale!”; or

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because -

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

11 CFR § 100.22. At the time of this opinion the Commission’s own regulations do not define “express advocacy.”

to go to the candidate or the candidate's committee, and a candidate cannot solicit the funds to go to a different organization than the candidate's committee.¹⁰ *Id.*

Finally, it must be noted that the question presented refers to communications that "reference that candidate, and/or that candidate's opponent(s) *in an election*" (Emphasis added.) There may be appropriate instances where "a candidate and/or his or her agents directly or indirectly establish, operate, and/or solicit funds for a nonprofit corporation," per the question, that happens to refer to the candidate or the candidate's opponent but which are not "to bring about the nomination or election of a candidate for any office," per O.C.G.A. § 21-5-30(a). This opinion does not address such activity.

(2) Does the answer to Question #1 turn in any way on whether the entity described has been established as a political organization under Section 527 of the Internal Revenue Code, meaning that it has been established for the primary purpose of influencing elections?

The answer to Question #1, above, does not turn on whether the outside entity is a § 527 organization or not. Regardless of whether an organization has been created under federal tax law (or corresponding provisions in the federal elections code) for the primary purpose of influencing elections, if the actual conduct or communications in question are "to bring about the nomination or election of a candidate for any office" then the answer to Question #1, above, applies.

(3) If a candidate and/or his or her agents solicit contributions to the type of entity described in Question #1, are such contributions regulated or limited by the Act or the Rules?

The only lawful way a candidate may solicit contributions during a campaign to support the candidate's election¹¹ is by and for the candidate or the candidate's campaign committee. O.C.G.A. § 21-5-30(a). The candidate or the candidate's campaign committee are regulated by the Campaign Finance Act and Commission's rules, and the amount of contributions they may receive (and in some instance the source of those contributions) are limited by law. *See* O.C.G.A. §§ 21-5-30.1, 21-5-41. The outcome if a candidate has violated the law is outside of the scope of this opinion and dependent on the specific facts presented in such an instance, and it may be subject to civil penalty pursuant to O.C.G.A. § 21-5-6(b)(14)(C) and or prosecution pursuant to O.C.G.A. § 21-5-9, among other possible remedies or actions.

¹⁰ Of course, entities that operate independently from a candidate or the candidate's committee -- PACs and independent committees -- can and lawfully do solicit funds to bring about the election or nomination of a candidate. PACs contribute, then, directly to a candidate while independent committees independently expressly advocate for the candidate. But the law separately provides for the independent existence of such organizations, O.C.G.A. §§ 21-5-3, 21-5-31.1, 21-5-34(e), (f), and § 21-5-30(a)'s requirement of contributions directly to a candidate or a candidate's committee must be read *in pari materia* with these provisions. And this is contemplated in the Act and Commission's regulations. For example, the regulations provide contributions to independent committees "must not be made with the cooperation or consent of, or in consultation with, or at the request or suggestion of any candidate or any of his or her agents or authorized committees. An expenditure which does not meet the above criteria for independence is considered a contribution which is subject to limits." Ga. Comp. R. & Regs. r. 189-3-.01(f).

¹¹ There may be instances where a candidate is not soliciting funds for the candidate's own election, and, indeed, where a candidate may be soliciting funds that have nothing to do with elections or overt political issues at all. This opinion is not meant to suggest or imply that such solicitations are invalid nor does govern those solicitations.

- (4) **May a candidate and/or his or her agents coordinate (as that concept is applied in the Rules) with an entity of the type described in Question #1 on expenditures for public communications that will reference that candidate, or that candidate's opponents(s) in an election, if those communications do not contain express advocacy? In other words, may a candidate and/or his or her agents request or suggest that such an entity make such expenditures, or cooperate or consult with the entity with respect to such expenditures? If such expenditures are coordinated in such a way with the candidate and/or his or her agents, are such expenditures regulated or limited by the Act or the Rules?**

Under Georgia law, if a candidate coordinates with a nonprofit or other organization on campaign communications or activities, then the expenditures for the communications or activities are likely in-kind contributions to the candidate. *See* pp. 4-6, *supra* (discussing in-kind contributions). As contributions to a candidate, they are subject to the contribution limitations under Georgia law. O.C.G.A. § 21-5-41.

Such a situation is, in fact, contemplated by the Commission's regulations:

Campaign contribution limits on contributions to candidates do not apply to independent expenditures made to influence candidate elections. An independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate **but which is made independently of any candidate's campaign.** However, an expenditure is "independent" only if it meets certain conditions. **It must not be made with the cooperation or consent of, or in consultation with, or at the request or suggestion of any candidate or any of his or her agents or authorized committees.** An expenditure which does not meet the above criteria for independence is considered a contribution which is subject to limits.

Ga. Comp. R. & Regs. r. 189-3-.01(f) (emphasis added). *See also* Ga. Comp. R. & Regs. r. 189-2-.01(12) (an "independent expenditure" ... "is not made in cooperation, consultation, or concert with or at the request or suggestion of a candidate or candidate's authorized committees.").

A purported "independent committee" or other political organization that consults with a candidate in making such expenditures has converted itself to a PAC, at least for the purpose of those expenditures. If it exceeds \$25,000 in such contributions, it must register and file CCDRs as a contributor. O.C.G.A. § 21-5-34(e). Likewise, such expenditures are contributions to the candidate and must be duly reported on the candidate's CCDR.

- (5) **May a candidate and/or his or her agents establish, create and/or solicit contributions for an independent committee that will make expenditures for communications that expressly advocate the election of that candidate if neither the candidate nor his or her agents coordinate with the independent committee on the expenditures themselves?**

In responding to Question #5, above, it must be noted that, prior to taking steps to run for office (including collecting or expending funds to run for office), a *potential* candidate may engage in this activity, and it is a commonplace occurrence, particularly in the arena of federal elections. In

such situations, once the candidate has taken steps that bring the candidate within the governing campaign finance law (and that varies between state and federal elections), then the coordination ceases and the entity created functions -- at least in theory -- independently of the candidate.

If a candidate attempts to establish or obtain funding for such a purported "independent committee" after the candidate begins campaigning -- that is, the candidate falls within the ambit of the Campaign Finance Act by accepting contributions or making expenditures, O.C.G.A. §§ 21-5-3(7), (12), 21-5-30(b) -- then the establishment of the committee by the candidate is *per se* a form of coordination with the committee. In such an instance, the purported "independent committee" would be a contributor -- i.e. a PAC and not an independent committee -- as the expenditures by the entity cannot be "independent expenditures." That is, they would *per se* "be made with the cooperation or **consent of**, or in consultation with, or at the request **or suggestion** of any candidate or any of his or her agents or authorized committees." Ga. Comp. R. & Regs. r. 189-3-.01(f); 189-2-.01(12). A candidate who seeks contributions to an "independent committee" for the purpose of its advocacy in the candidate's campaign is consenting to those communications and, indeed, is suggesting that they be made.

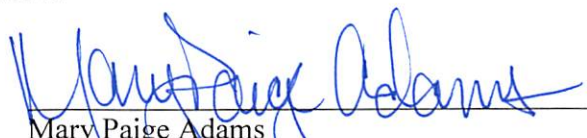
As discussed above, such expenditures are contributions to the candidate and must be duly reported on the candidate's CCDR. Likewise, the entity exceeds \$25,000 in such contributions, it must register and file CCDRs as a contributor.

Conclusion

For the forgoing reasons, the Georgia Government Transparency & Campaign Finance Commission advises that, other than creating a campaign committee as permitted by law, neither a candidate nor the candidate's campaign committee may establish, operate, solicit donations for, nor coordinate communications with a nonprofit or other entity that expends money for communications referring to the candidate or the candidate's opponent. In instances of such solicitation and coordination, the expenditures on the communications are contributions to the candidate reportable on the candidate's or candidate committee's CCDR. This result pertains regardless of whether the communications are "express advocacy," regardless of whether the entity was initially created as an "independent committee," and regardless of the specific federal tax section under which the entity is formed or with which it intends to comply.

This Advisory Opinion concerns the application of the Georgia Government Transparency and Campaign Finance Act, or regulations prescribed by the Georgia Government Transparency and Campaign Finance Commission, to the specific facts, transaction or activity set forth *supra*.

Advisory Opinion 2017-05 is hereby adopted by the Commission in conformity with O.C.G.A. § 21-5-6(13) on October 10th, 2017.


Mary Paige Adams
Chair of the Commission

AO 2017-05 prepared by Stefan Ritter and Robert S. Lane.

EXHIBIT:

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June 24, 2017

Stefan Ritter
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Re: Advisory Opinion Request

Dear Mr. Ritter:

Pursuant to O.C.G.A. § 21-5-6(b)(13), this is a request that the Government Transparency and Campaign Finance Commission (the "Commission") issue an advisory opinion addressing the following questions concerning application of the Government Transparency and Campaign Finance Act, O.C.G.A. § 21-5-1 et seq. (the "Act") and the Commission's Rules (the "Rules").

Background. Under the Act, an "independent committee" must register with the Commission prior to accepting contributions or making expenditures. O.C.G.A. § 21-5-34(e). The Act also provides that an independent committee must file disclosure reports with the Commission. O.C.G.A. §§ 21-5-34(f). The Act defines an "independent committee" to be:

any committee, club, association, partnership, corporation, labor union, or other group of persons, other than a campaign committee, political party, or political action committee, which receives donations during a calendar year from persons who are members or supporters of the committee and which expends such funds either for the purpose of affecting the outcome of an election for any elected office or to advocate the election or defeat of any particular candidate.

O.C.G.A. § 21-5-3(15).

In Advisory Opinion 2001-32, a 501(c)(4) nonprofit corporation asked the Commission whether it would be required to register as an independent committee if it made expenditures for

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communications that referenced candidates for office but that did not include express advocacy. The corporation stated in its request that it was not coordinating its activities with any candidate. In its response, the Commission concluded that the Act's provisions on independent committees "are intended to reach groups which raise and expend funds to expressly advocate the election or defeat of particular candidates." The Commission therefore concluded that the nonprofit corporation was not required to register with the Commission as an independent committee or file disclosure reports.

In AO 2010-05, the Commission reaffirmed that AO 2001-32 remained valid.

The Commission's Rules provide in relevant part as follows:

Campaign contribution limits on contributions to candidates do not apply to independent expenditures made to influence candidate elections. An independent expenditure is an expenditure for a communication which expressly advocates the election or defeat of a clearly identified candidate but which is made independently of any candidate's campaign. However, an expenditure is "independent" only if it meets certain conditions. It must not be made with the cooperation or consent of, or in consultation with, or at the request or suggestion of any candidate or any of his or her agents or authorized committees. An expenditure which does not meet the above criteria for independence is considered a contribution which is subject to limits.

Ga. Comp. R. & Regs. R. 189-3-.01(9)(f).

Accordingly, both the Commission's previous advisory opinions and its Rules limit the regulation of independent expenditures to those that involve express advocacy for or against a particular candidate for election.

Questions. The Commission's previous advisory opinions do not address the question of whether and to what extent a candidate and/or his or her agents may coordinate with a nonprofit corporation or other entity that is making or that will make expenditures for communications that will reference that candidate, or that will reference the candidate's opponent(s) in an election, but that do not contain express advocacy. In addition, the Commission's previous advisory opinions do not address the question of whether a candidate or his or her agents may solicit contributions for an independent committee that may make independent expenditures to expressly advocate for that candidate's election to office.

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It is respectfully requested that the Commission issue an advisory opinion on the following questions.

(1) May a candidate and/or his or her agents directly or indirectly establish, operate, and/or solicit funds for a nonprofit corporation or other entity that will make expenditures for public communications that will reference that candidate, and/or that candidate's opponent(s) in an election, if those communications do not contain express advocacy?

(2) Does the answer to Question #1 turn in any way on whether the entity described therein has been established as a political organization under Section 527 of the Internal Revenue Code, meaning that it has been established for the primary purpose of influencing elections?

(3) If a candidate and/or his or her agents solicit contributions to the type of entity described in Question #1, are such contributions regulated or limited by the Act or the Rules?

(4) May a candidate and/or his or her agents coordinate (as that concept is applied in the Rules) with an entity of the type described in Question #1 on expenditures for public communications that will reference that candidate, or that candidate's opponent(s) in an election, if those communications do not contain express advocacy? In other words, may a candidate and/or his or her agents request or suggest that such an entity make such expenditures, or cooperate or consult with the entity with respect to such expenditures? If such expenditures are coordinated in such a way with the candidate and/or his or her agents, are such expenditures regulated or limited by the Act or the Rules?

(5) May a candidate and/or his or her agents establish, create and/or solicit contributions for an independent committee that will make expenditures for communications that expressly advocate the election of that candidate if neither the candidate nor his or her agents coordinate with the independent committee on the expenditures themselves?

Thank you for your attention to this matter.

Sincerely,

/s/ Douglas Chalmers Jr.

Douglas Chalmers, Jr.

EXHIBIT:

B

Advisory Opinion 2017-05: Comparison with Other States

While the scope of the Act's regulation and application to the above detailed questions is answered in the forgoing proposed advisory opinion, the following analysis provides the Commission with differing examples of how Georgia's other similarly situated sister states have addressed these issues.

I. – FLORIDA

Florida, like Georgia, has separated all persons/entities into one of three separate and distinct classifications for the purpose of enforcing their campaign finance statutes and regulations, to wit:

- a. Candidate is defined as, *inter alia*, “a person who receives contributions or makes expenditures, or consents for any other person to receive contribution or make expenditures, with a view to bring about his or her nomination or election to, or retention in, public office.” *Compare* Fla. Stat. § 106.011(4), *with* O.C.G.A. § 21-5-3(2) (campaign committee defined as the candidate, person, or committee which accepts contributions or makes expenditures designed to bring about the nomination or election of an individual to any elected office).
- b. Electioneering communications organization is defined as “any group, other than a political party, affiliated party committee, or political committee, whose election-related activities are limited to making expenditures for electioneering communications or accepting contributions for the purpose of making electioneering communications and whose activities would not otherwise require the group to register as a political party or political committee under this chapter.” *Compare* Fla. Stat. § 106.011(9) (emphasis added), *and* O.C.G.A. § 21-5-3(15) (independent committee defined as any committee, club, association, partnership, corporation, labor union, or other group of persons ... which receives donations during a calendar year from persons who are members or supporters of the committee and which expends such funds either for the purpose of affecting the outcome of an election for any elected office or to advocate the election or defeat of any particular candidate) (emphasis added).
- c. Political committee is defined as “a combination of two or more individuals, or [corporation], that, in an aggregate amount in excess of \$500 during a single calendar year accepts contributions for the purpose of making contribution to any candidate, political committee, affiliated party committee, or political party; [and who accept contributions for and makes expenditures that expressly advocate the election or defeat of a candidate].” *Compare* Fla. Stat. § 106.011(16)(a) (emphasis added), *with* O.C.G.A. § 21-5-3(20)(A) (political action committee defined as any committee, club, association, partnership, corporation, labor union, or other group of persons which receives donations during a calendar year from persons who are members or supporters of the committee and which contributes funds to one or more candidates for public office or campaign committees of candidates for public office) (emphasis added).

Under Florida's campaign finance regulatory scheme, once a person/entity has been properly classified, one must also ascertain what constitutes an expenditure, independent expenditure, and public political campaign communication, to see if an act qualifies for further regulation under Florida law, to wit:

- a. Expenditure is defined as "a purchase, payment, distribution, loan, advance, transfer of funds by a campaign treasurer or deputy campaign treasurer between a primary depository and a separate interest-bearing account or certificate of deposit, or gift of money or anything of value **made for the purpose of influencing the results of an election or making an electioneering communication.**" Compare Fla. Stat 106.011 (emphasis added), with O.C.G.A. § 21-5-3 (expenditure defined as a purchase, payment, distribution, loan, advance, deposit, or any transfer of money or anything of value **made for the purpose of influencing the nomination for election or election of any person**) (emphasis added).
- b. Independent expenditure is defined as "an expenditure by a person for the purpose of expressly advocating the election or defeat of a candidate or the approval or rejection of an issue, **which expenditure is not controlled by, coordinated with, or made upon consultation with, any candidate, political committee, or agent of such candidate or committee.**" Compare Fla. Stat. 106-.011(12)(A) (emphasis added), and Ga. Comp. R. & Regs. r. 189-2-.01(12) (A political campaign communication that **expressly advocates the election or defeat of a clearly identified candidate** that is not made in cooperation, consultation, or concert with or at the suggestion of a candidate or candidate's authorized committees) (emphasis added).

Unlike Georgia, Florida has also statutorily defined both "electioneering communication" and "political advertisement" as follows:

- a. Electioneering communication is defined as "[a] communication that is publicly distributed by a television station, radio station, cable television system, satellite system, newspaper, magazine, direct mail, or telephone and that refers to or depicts a clearly identified candidate for office **without expressly advocating the election or defeat of a candidate but that is susceptible of no reasonable interpretation other than an appeal to vote for or against a specific candidate** [and] is made within 30 days before a primary or special primary election or 60 days before any other election for the office sought by the candidate..." Fla. Stat. 106-.011(8)(a) (emphasis added).
- b. Political advertisement means "a paid expression in a communications medium prescribed in subsection (4), whether radio, television, newspaper, magazine, periodical, campaign literature, direct mail, or display or by means other than the spoken word in direct conversation, **which expressly advocates the election or defeat of a candidate or the approval or rejection of an issue.**" Fla. Stat. § 106-.011(15) (emphasis added).

In the application of the foregoing statutes and regulations, Florida has adopted both the "express advocacy" standard adopted in Buckley v. Valeo, 424 U.S. 1, 44 (1976) and the "functional

equivalent” standard adopted in McConnell v. FEC, 540 U.S. 93, 193 (2003). The express advocacy standard applies to a “political action committee” when said committee purchases ads that advocate for the election or defeat of a candidate and contains signal words/phrases like “vote for,” “vote against,” “replace,” “support,” etc. Whereas the “functional equivalent” standard applies to “independent committees” when said committees purchases ads that do not expressly advocate for the election or defeat of a candidate, but which leave no reasonable doubt that the ad is an appeal to the voter to vote for or against a specific candidate. *See* Florida Department of State Advisory Opinion DE 16-03, Campaign Financing (April 22, 2016).

In Georgia, the Commission has previously advised that, unlike in Florida, there is no firm delineation between a political action committee and an independent committee such that a group would need to organize two separate and distinct legal entities in order to make campaign contributions and/or independent expenditures. Instead, a Georgia political group may organize one entity that exercises functions consistent with both a political action committee and an independent committee provided that said entity maintains a separate segregated fund for its political campaign contributions and independent expenditures. *See* Commission’s Advisory Opinion 2015-02 (June 25, 2015). Further, there is no direct reference to “express advocacy” contained within the Act and given the evolution of the U.S. Supreme Court’s First Amendment jurisprudence there is no constitutional mandate that requires the Commission to read “advocate” as “expressly advocate” and impose a “magic words test” for purposes of ascertaining which public political communications are subject to regulation under the Act. Instead, the Commission need only ascertain if the public political communication is the functional equivalent of express advocacy which occurs when the communication leaves no reasonable interpretation other than an exhortation to the general public to support or oppose a named candidate.

Moreover, it is important to note that Florida, like Georgia, considers all “coordinated” expenditures to be direct and/or “in-kind” contributions to the candidate and/or candidate’s campaign committee. Florida has also directly addressed the issue of coordinated fundraising by permitting public officers and candidates for public office to directly and/or indirectly solicit contributions on behalf of organizations that are registered under Section 527 and 501(c)(4) of the Internal Revenue Code.¹ Fla. Stat. § 106.0701. In Georgia, the Act is silent as to the extent candidates and non-profit entities may coordinate their fundraising efforts. Thus, given the fact that there is no express bar to the direct or indirect solicitation by a candidate for contributions to the aforementioned non-profit entities, said solicitations would appear to be permitted by the Act provided there is no coordination between the candidate and/or the candidate’s agents with respect to the non-profit’s subsequent independent expenditures.

II. – SOUTH CAROLINA

South Carolina, like Georgia, originally adopted the “express advocacy” standard when determining whether a PAC was engaged in advocating for the election and/or defeat of a candidate or simply advocating for an issue. *See*, Op. S.C. State Ethics Commission, SEC AO2000-010, May 17, 2000. However, after the development of the U.S. Supreme Court’s “functional equivalent” standard in McConnell, the South Carolina General Assembly amended its campaign finance act so as to include both an express advocacy standard and a functional equivalent standard. S.C. Code Ann. § 8-13-1300(31) (“‘Influence the outcome of an elective office’ means expressly advocating

¹ 26 U.S.C.S. §§ 501(c)(4), 527.

the election or defeat of a clearly identified candidate using words including or substantially similar to “vote for”, [etc. and] communicating campaign slogans or individual words that, taken in context, have no other reasonable meaning other than to urge the election or defeat of a clearly identified candidate[.]”)

South Carolina has also promulgated, like Georgia, that coordinated campaign expenditures are contributions to a candidate subject to maximum campaign contribution limits. S.C. Code Ann. §§ 8-13-1300(33); 8-13-1304 (requiring registration of PACs/independent committees); 8-13-1308(A) (required disclosures of candidates and committees); 8-13-1314(A)(1) (limiting contributions to a candidate to \$3,500.00 and \$1,000.00 depending on office level); and, 8-13-1340(A) (prohibits a candidate from generally coordinating expenditures or controlling a PAC/independent committee). However, a candidate may solicit funds to a separate entity that is legally distinct from his campaign committee, which in most instances would be something akin to a “leadership PAC.” S.C. Code Ann. § 8-13-1340(E) (“The provisions of subsection (A) do not apply to a committee directly or indirectly established, financed, maintained, or controlled by a candidate or public official if the candidate or public official directly or indirectly establishes, finances, maintains, or controls only one committee in addition to any committee formed by the candidate or public official to solely promote his own candidacy and one legislative caucus committee.”)

South Carolina’s pertinent statutory definitions are as follows:

- a. Candidate is defined as “a person who seeks appointment, nomination for election, or election to a statewide or local office, or authorizes or knowingly permits the collection or disbursement of money for the promotion of his candidacy or election.” S.C. Code Ann. § 8-13-1300(4).
- b. Committee is defined as “an association, a club, an organization, or a group of persons which, to influence the outcome of an elective office, receives contributions or makes expenditures in excess of five hundred dollars in the aggregate during an election cycle[.]” S.C. Code Ann. § 8-3-1300(6).
- c. Contribution is defined as “a gift, subscription, loan, guarantee upon which collection is made, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit of money, or anything of value made to a candidate or committee to influence an election[.]” S.C. Code Ann. § 8-13-1300(7).
- d. Expenditure is defined as “a purchase, payment, loan, forgiveness of a loan, an advance, in-kind contribution or expenditure, a deposit, transfer of funds, gift of money, or anything of value for any purpose.” S.C. Code Ann. § 8-13-1300(12).
- e. Independent Expenditure is defined as “an expenditure made directly or indirectly by a person to advocate the election or defeat of a clearly identified candidate or ballot measure; and when taken as a whole and in context, the expenditure made by a person to influence the outcome of an elective office or ballot measure but which is not made to, controlled by, coordinated with, requested by, or made upon consultation with a

candidate or an agent of a candidate; or a committee or agent of a committee; or a ballot measure committee or an agent of a ballot measure committee.” S.C. Code Ann. § 8-13-1300(17).

- f. Noncandidate committee is defined as “a committee that is not a campaign committee for a candidate but is organized to influence an election or to support or oppose a candidate or public official, which receives contributions or makes expenditures in excess of five hundred dollars in the aggregate during an election cycle.” S.C. Code Ann. § 8-13-1300(23).

III. – MASSACHUSETTS

Massachusetts, unlike many of its sister states, utilizes a very minimal statutory scheme which is further broadened by very developed regulations. Like Georgia, Massachusetts originally adopted the “express advocacy” standard formulated in Buckley when determining whether a PAC was engaged in advocating for the election and/or defeat of a candidate or simply advocating for an issue. *See*, ALM GL ch. 55, § 1 (holding that independent expenditures must “expressly advocate” for the election or defeat of a clearly identified candidate). However, Massachusetts has steadily moved away from the express advocacy standard in favor of the functional equivalent standard as stated in McConnell, as evidenced by more recent changes in its campaign finance regulations. Specifically, Massachusetts has defined a new entity, not found within their campaign finance code, as an “independent expenditure PAC” which is defined as “political action committee that receives contributions to make independent expenditures [.]” 970 CMR 2.17(4) (2017). These “independent expenditure PACs” are subject to registration and disclosure requirements if they “make an independent expenditure[s] exceeding \$250.00 in the aggregate during a calendar year for the **express purpose of promoting the election or defeat of one or more clearly identified candidates.**” 970 CMR 2.17(1)(a) (emphasis added). Moreover, Massachusetts has explicitly held that “issue-oriented communications” are included in regulated “electioneering communication” if the communications are aired or published within 90 days of a general or special election and reference a clearly identified candidate. 970 CMR 2.21 (2017).

Also, like Georgia, Massachusetts holds that any expenditures by an independent committee/PAC that are coordinated with a candidate or candidate’s committee are to be treated as direct contributions to the candidate and subject to maximum campaign contribution limits. 970 CMR 2.21(4).

Massachusetts’s pertinent statutory definitions are as follows:

- a. Candidate is defined as “any individual who seeks nomination or election to public office, whether or not such individual is nominated or elected.” ALM GL ch. 55, § 1.
- b. Candidate’s committee is defined as “the political committee organized on behalf of a candidate, as provided in section five.” Id.

- c. Contribution is defined as “a contribution of money or anything of value to an individual, candidate, political committee, or person acting on behalf of said individual, candidate or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or for the purpose of supporting or opposing a political party committee, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters[.]” Id.
- d. Electioneering communication is defined as “any broadcast, cable, mail, satellite or print communication that: (1) refers to a clearly identified candidate; and (2) is publicly distributed within 90 days before an election in which the candidate is seeking election or reelection[.]” Id.
- e. Electioneering communication expenditure is defined as “any expenditure made or liability incurred by an individual, group, association, corporation, labor union or other entity as payment for an electioneering communication.” Id.
- f. Expenditure is defined as “any expenditure of money, or anything of value, by an individual, candidate, or political committee, or a person acting on behalf of said individual, candidate, or political committee, for the purpose of influencing the nomination or election of said individual or candidate, or of presidential and vice presidential electors, or for the purpose of promoting or opposing a charter change, referendum question, constitutional amendment, or other question submitted to the voters[.]” Id.
- g. Independent Expenditure is defined as “an expenditure made or liability incurred by an individual, group, association, corporation, labor union, political committee or other entity as payment for goods or services to expressly advocate the election or defeat of a clearly identified candidate; provided, however, that the expenditure is made or incurred without cooperation or consultation with any candidate or a nonelected political committee organized on behalf of the candidate or an agent of the candidate and is not made or incurred in concert with or at the request or suggestion of the candidate, a nonelected political committee organized on behalf of the candidate or agent of the candidate.” Id. (emphasis added).
- h. People’s committee is defined as “a political committee which is not a candidate’s committee, a political party committee or a ballot question committee, that: (i) only receives contributions from individuals; (ii) limits contributions received from any individual to the indexed amount provided for in the definition of “political action committee”; (iii) has been in existence for 6 months or more; and (iv) contributes to 5 or more candidates; provided, however, that a “people’s committee” shall initially organize as a political action committee and may become a people’s committee after 6 months.” Id.
- i. Political action committee is defined as “a political committee which is not a

- j. candidate's committee, a political party committee nor a ballot question committee[.]” Id.
- k. Political committee is defined as “any committee, association, organization or other group of persons, including a national, regional, state, county, or municipal committee, which receives contributions or makes expenditures **for the purpose of influencing the nomination or election of a candidate**, or candidates, or of presidential and vice presidential electors, or for the purpose of opposing or promoting a charter change, referendum question, constitutional amendment, or other question submitted to the voters.” Id. (emphasis added).
- l. Political party committee is defined as “a political committee organized in accordance with chapter fifty-two on behalf of a political party, as defined in section one of chapter fifty, whether elected or non-elected.” Id.

IV. – NEW YORK

New York has an interesting hybrid system that utilizes the express advocacy standard in Buckley for all public political communications irrespective of when the communications are aired or published, while also using the functional equivalent standard in McConnell for all communications that reference a clearly identified candidate when the public political communication is aired or published within, *inter alia*, 60 days of general election or 30 days of a primary election. NY CLS Elec § 14-107(1)(A).

Like the preceding three states, New York considers all coordinated expenditures between a candidate/candidate's committee and a PAC/independent committee to be direct contributions to the candidate; however, candidates are explicitly permitted by statute to participate in the independent committee's fundraising activities. NY CLS Elect § 14-107(1)(d)(ii) (The candidate or an agent of the candidate [may appear] at any fundraising event hosted by an independent expenditure committee, or its agent, making a payment or expenditure that benefits that candidate within two years of the general election, primary or special election in which the candidate is a candidate for nomination or election).

It is also noteworthy that New York's Joint Committee on Public Ethics has promulgated regulations which govern issue advocacy, or what is more commonly known as public service announcements (“PSAs”). Under New York's campaign finance regulatory scheme, a PSA is not a public campaign communication subject to regulation provided it promotes a program and is sponsored and paid for by a person or organization with a history that includes public outreach and PSAs. 19 NYCRR § 940.3(a)(1)-(2). Also, the PSA cannot be paid for by a candidate or a candidate's agent, the candidate may not appear in the PSA, and most importantly, the PSA cannot promote or support a candidate and/or criticize or oppose an individual running against a candidate. 19 NYCRR § 940.3(a)(5),(7). As one would expect, if a candidate were to participate in the issue advocacy/PSA, the PSA would become a direct contribution to the candidate, subject to maximum campaign contribution limits. NY CLS Elec § 14-100(9). Additionally, if a candidate were to appear in a PSA that airs within 90 days of any election, such an appearance would constitute a violation of New York's campaign finance law and subject the candidate to punishment under

campaign finance regulations and separate ethics legislation. *See* 19 NYCRR § 940.5 and NY CLS Pub O 74.

New York's pertinent statutory definitions are as follows:

- a. Political committee is defined as “any corporation aiding or promoting and any committee, political club or combination of one or more persons operating or co-operating to aid or to promote the success or defeat of a political party or principle, or of any ballot proposal; or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election or convention[.]” NY CLS Elec § 14-100(1).
- b. Party committee is defined as “any committee provided for in the rules of the political party in accordance with section two-one hundred of this chapter, other than a constituted committee.” NY CLS Elec § 14-100(2).
- c. Candidate is defined as “an individual who seeks nomination for election, or election, to any public office or party position to be voted for at a primary, general or special or New York city community school district election or election for trustee of the Long Island Power Authority[.]” NY CLS Elec § 14-100(7).
- d. Contribution is defined as, *inter alia*, “any payment, by any person other than a candidate or a political committee authorized by the candidate, made in connection with the nomination for election or election of any candidate, including any payment or expenditure where coordination has occurred as defined in section 14-107 of this article, or any payment made to promote the success or defeat of a political party or principle[.]” NY CLS Elec § 14-100(9).
- e. Clearly identified candidate is defined as “the name of the candidate involved appears, a photograph or drawing of the candidate appears, or the identity of the candidate is apparent by unambiguous reference.” NY CLS Elec § 14-100(12).
- f. Independent expenditure committee is defined as “a political committee, that makes only independent expenditures as defined in this article, and does not coordinate with a candidate, candidate’s authorized committees or an agent of the candidate.” NY CLS Elec § 14-100(15).
- g. Political action committee is defined as “a political committee which makes no expenditures to aid or take part in the election or defeat of a candidate, or to promote the success or defeat of a ballot proposal, other than in the form of contributions, including in-kind contributions, to candidates, candidate’s authorized committees, party committees, constituted committees, or independent expenditure committees provided there is no common operational control between the political action committee and the independent expenditure committee; or in the form of communications that are not distributed to a general public audience[.]” NY CLS Elec § 14-100(16).

V. – FIFTY STATE SURVEY

STATE:	Standard to regulate Independent Expenditures	Coordination of Expenditures between candidate and 527 organization allowed?	Solicitation by Candidate for Donations to 527 organization allowed?
Alabama	Functional Equivalent	N/A - No contribution limits	N/A – No contribution limits
Alaska	Functional Equivalent	Not Allowed	Not Addressed
Arizona	Express Advocacy	Not Allowed	Not Addressed
Arkansas	Express Advocacy	Not Allowed	Not Addressed
California	Functional Equivalent	Not Allowed	Not Addressed
Colorado	Express Advocacy	Not Allowed	Not Addressed
Connecticut	Functional Equivalent	Not Allowed	Not Addressed
Delaware	Express Advocacy	Not Allowed	Not Addressed
Florida	Functional Equivalent if expenditure made by Independent Committee; Express Advocacy if expenditure made by PAC.	Not Allowed	Not Addressed
Georgia	Express Advocacy	Not Allowed	Not Addressed
Hawaii	Functional Equivalent	Not Allowed	Not Addressed
Idaho	Functional Equivalent	Not Allowed	Not Addressed
Illinois	Functional Equivalent	Not Allowed	Not Addressed
Indiana	N/A – No Reporting Required	N/A– No Reporting Required	N/A – No Reporting Required
Iowa	Express Advocacy	Not Allowed	Not Addressed
Kansas	Functional Equivalent	Not Allowed	Not Addressed
Kentucky	Express Advocacy	Not Allowed	Not Allowed – Express Ban
Louisiana	No Test Adopted ²	Not Addressed	Not Addressed
Maine	Express Advocacy	Not Allowed	Not Addressed
Maryland	Express Advocacy	Not Allowed	Not Addressed
Massachusetts	Functional Equivalent	Not Allowed	Not Addressed

² Express advocacy adopted by 5th Circuit Court of Appeals; *Ctr. For Individual Freedom v. Carmouche*, 449 F.3d 655, 2006 U.S. App. LEXIS 11729 (5th Cit. La. 2006), cert. denied, 549 U.S. 1112, 1275 S. Ct. 398, L. Ed. 2d 704, 2007 U.S. LEXIS 63 (U.S. 2007). Compare, *Citizens United v. FEC*, 558 U.S. 310 at 325-326 (2009) (Holding that a political campaign communication billed as a “documentary film” known as *Hillary* was the functional equivalent of express advocacy as the closing message of the film left “[] no reasonable interpretation of *Hillary* other than as an appeal to vote against Senator [Hillary] Clinton.”)

STATE:	Standard to regulate Independent Expenditures	Coordination of Expenditures between candidate and 527 organization allowed?	Solicitation by Candidate for Donations to 527 organization allowed?
Michigan	Functional Equivalent	Not Allowed	Not Regulated
Minnesota	Express Advocacy	Not Allowed	Allowed – with no coordination of expense
Mississippi	Express Advocacy	Not Allowed	Not Addressed
Missouri	Functional Equivalent	N/A – No contribution limits	N/A – No Contribution Limits
Montana	Express Advocacy	Not Allowed	Not Addressed
Nebraska	Support or Oppose by Clear Inference	N/A- No Contribution Limits	N/A- No Contribution Limits
Nevada	Functional Equivalent	Not Allowed	Not Addressed
New Hampshire	Express Advocacy applies generally; however, Functional Equivalent is used when org. spends \$5,000 or more a year on communications	Not Allowed	Not Addressed
New Jersey	Express Advocacy; if made within 90 days of election, then Functional Equivalent	Not Allowed	Not Addressed
New Mexico	Functional Equivalent	Not Allowed	Not Addressed
New York	Functional Equivalent if made 90 days before election. Express Advocacy if made > 90 days before election.	Not Allowed	Permitted - Expressly
North Carolina	Functional Equivalent	Not Allowed	Not Addressed

STATE:	Standard to regulate Independent Expenditures	Coordination of Expenditures between candidate and 527 organization allowed?	Solicitation by Candidate for Donations to 527 organization allowed?
North Dakota	Functional Equivalent	N/A – No Contribution Limits	N/A – No Contribution Limits
Ohio	Functional Equivalent	Not Allowed	Not Addressed
Oklahoma	Express Advocacy; however, if communication is made within 60/30 days of the election, then Functional Equivalent.	Not Allowed	Not Addressed
Oregon	Functional Equivalent	N/A – No Contribution Limits	N/A – No Contribution Limits
Pennsylvania	Express Advocacy	N/A – No Contribution Limits	N/A – No Contribution Limits
Rhode Island	Functional Equivalent	Not Allowed	Not Addressed
South Carolina	Functional Equivalent	Not Allowed	Permitted - Expressly
South Dakota	Functional Equivalent	Not Allowed	Not Addressed
Tennessee	Express Advocacy	Not Allowed	Not Addressed
Texas	Functional Equivalent if made 30 days before election. Express Advocacy if made > 30 days before election.	N/A – No Contribution Limits	N/A – No Contribution Limits
Utah	Functional Equivalent	N/A – No Contribution Limits	N/A – No Contribution Limits
Vermont	Functional Equivalent	Not Allowed	Not Addressed
Virginia	Functional Equivalent	N/A – No Contribution Limits	N/A – No Contribution Limits

STATE:	Standard to regulate Independent Expenditures	Coordination of Expenditures between candidate and 527 organization allowed?	Solicitation by Candidate for Donations to 527 organization allowed?
Washington	Functional Equivalent	Not Allowed	Not Addressed
West Virginia	Functional Equivalent	Not Allowed	Not Addressed
Wisconsin	Express Advocacy	Not Allowed	Not Addressed
Wyoming	Express Advocacy	Not Allowed	Not Addressed