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NEWSLETTER

New Campaign Finance Disclaimer, Fundraising, and Reporting Laws in California, Michigan & New Mexico

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Significant new campaign finance laws and rules either were enacted and/or went into effect in three states during the past two months. California's new law and New Mexico's new regulations impact the donor identification and disclaimer requirements for organizations that engage in independent expenditures or issue advocacy in these states. In Michigan, individual and corporate donors may find themselves subject to more solicitations for super political action committees (PACs) by state candidates and elected officials.

California (IE Disclaimers)

California already has some of the nation's toughest campaign finance laws, and the so-called "California Disclose Act," which was signed into law recently, only adds to the existing regulatory burdens and complexity. Primarily, the new law would impose additional and exacting disclaimer requirements for organizations that sponsor independent expenditures in connection with California candidates and ballot measures. These changes are so complex that the state Fair Political Practices Commission has put out a 28-page chart (which itself is not a model of clarity) comparing the new and existing disclaimer requirements.

To begin, A.B. 249 generally expands the preexisting contributor identification requirement for independent expenditure (IE) disclaimers. Under existing law, any organization that triggers "committee" status – such as by sponsoring IEs of $1,000 or more per calendar year – is required to identify in disclaimers in its IEs its two largest contributors of $50,000 or more during the prior 12-month

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period. An IE is defined as an ad that "expressly advocates the election or defeat" of a candidate or the qualification, passage, or defeat of a ballot measure, or that "unambiguously urges a particular result in an election," and that is not coordinated with a candidate or ballot measure committee. A.B. 249 increases the number of $50,000-or-more contributors that disclaimers are required to identify to the three largest such contributors.

Recognizing that disclaimers have to be spoken in radio and audio-only ads, and that the expanded disclaimer requirement may swallow the entire ad, the new law only requires the top two contributors to be identified in such ads. Moreover, if the radio or audio ad is 15 seconds or less, or if the disclaimer otherwise would last more than eight seconds, then only the largest single contributor of $50,000 or more is required to be identified.

The most dramatic change is the new disclaimer requirement for television and video ads, which must contain a disclaimer within a black box that, at a minimum, takes up the entire bottom one-third of the display screen. This black-box disclaimer must be displayed for at least five seconds in ads of up to 30 seconds, and for at least 10 seconds in ads of more than 30 seconds. The new law also contains many other exacting requirements for the text disclaimer, such as use of uppercase versus lowercase, font style, font size, which information must be underlined or center-justified, etc.

For committees that do not have any contributors of more than $50,000, or if the contributor information is not required, then the black-box disclaimer is only required to take up the bottom quarter of the display screen. (California excludes from the definition of a "contribution" any funds where "it is clear from the surrounding circumstances" that the funds were not given "for political purposes," although it is not always clear under this standard what is and is not a "contribution" that may trigger the top-three contributor identification requirement.)

Most "electronic media" ads, other than video and audio ads, are required to include a disclaimer that says, "Who funded this ad?," with a hyperlink to a landing page that displays the full required disclaimer. However, if this disclaimer is "impracticable," then the ad only has to allow viewers to click through the ad to be redirected to a landing page containing the full disclaimer.

Under the new law, penalties for disclaimer violations could be as much as three times the cost of the ad (including both placement and production costs). These expanded disclaimer requirements take effect on January 1, 2018.

Michigan (Super PACs)

Michigan recently enacted amendments to its campaign finance law that went into effect immediately. Notably, the amendments formally recognize state super PACs, and broadly permit state candidates and elected officials to raise money for super PACs, with some limitations. The candidate super PAC solicitation provision illustrates the divergent approaches different jurisdictions have adopted on this issue.

Super PACs emerged for federal races in 2010, when a U.S. Court of Appeals for the D.C. Circuit panel, applying the logic of the Supreme Court's *Citizens United* decision, held that the federal contribution limits are unconstitutional as applied to a PAC that only makes independent expenditures to support or oppose candidates. In an advisory opinion, the Federal Election Commission (FEC) subsequently extended this holding to also conclude that the federal prohibition against corporate and union contributions to PACs also could not apply to contributions to independent-expenditure-only PACs. These PACs became commonly known as "super PACs." Super PACs are not permitted to make direct contributions to candidates, party committees, and conventional PACs.

Congress and many states have not amended their statutes to codify super PACs into their laws. Thus, in many jurisdictions, super PACs operate pursuant to agency advisory opinions or other guidance. The new Michigan law not only codifies super PACs into the state statute, but it also broadly permits candidates to solicit contributions for super PACs. Moreover, candidates may solicit contributions for super PACs in any amount (notwithstanding Michigan's various limits that apply to contributions if they were to be made directly to candidates) and also from corporations (which are otherwise prohibited from making political contributions in the state). Importantly, however, if a super PAC only supports one candidate during an election cycle, that candidate may not solicit contributions for the super PAC.

Michigan's largely hands-off approach to candidate solicitations for super PACs diverges with two other approaches. At the federal level, the FEC has concluded that federal candidates may only solicit contributions subject to the federal amount limitations and source prohibitions that ordinarily apply to contributions to PACs (i.e, $5,000 per calendar year from individuals and other PACs only). By contrast, Minnesota, for example, generally prohibits state candidates from soliciting contributions for state super PACs. (*Election Law News*, March 2014)

New Mexico (IE Donor Disclosure)

New rules adopted by the New Mexico Secretary of State went into effect last month that require reporting of donors by sponsors of independent expenditures and issue ads. The rules were adopted after an extended and contentious rulemaking proceeding over the summer, in which the Secretary was criticized for proposing to implement many measures similar to ones contained in a bill that the Governor had vetoed earlier this year.

The most significant part of the rules is a new requirement to report independent expenditures (IEs), which are defined as not only ads that expressly advocate the election or defeat of state candidates, but also ads that refer to state candidates within 30 days before a primary or 60 days before an election and that are targeted to the relevant electorate.

For IEs of lesser amounts, sponsors are only required to report information about donors of funds "that were earmarked or made in response to a solicitation to fund" IEs. However, for IEs of larger amounts, sponsors must report information about each donor that gave the sponsoring entity $5,000 or more during the previous 12 months. Donors that explicitly requested in writing that their funds not be used for IEs are exempt from

being reported. Alternatively, sponsoring entities may pay for IEs using a segregated account, in which case only donors who gave more than $200 to the segregated account during the previous 12 months are required to be reported.