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July 6, 2022

The Honorable David Scanlan
Secretary of State
107 North Main Street
Concord, NH 03301

Re: Coordination and common agents between political committees and candidate committees

Dear Secretary Scanlan:

You requested a guidance letter from this Office explaining the joint position of this Office and yours regarding whether New Hampshire law allows a political committee to coordinate expenditures with a candidate committee where the same agent is hired by both to execute the functions of the respective committees.

For the reasons stated below, the answer is yes. This Office concludes that there is no violation of New Hampshire law for a political committee and a candidate committee to hire the same agent to conduct the business of the committees, provided that (1) each committee is meeting all of its registration and reporting obligations relating to any financial and in-kind contributions occurring between or among the committees, and (2) there are no independent expenditures between the committees or among other political committees or candidates associated with the agent.

Compliance with registration and reporting obligations

New Hampshire law does not prohibit one vendor acting as an agent for both a “managing” political committee and a candidate committee that will be receiving financial and in-kind contributions from that same “managing” political committee.¹ In other words, there is no prohibition on a managing political committee and a candidate committee sharing a common vendor for campaign consulting or services. However, sharing a vendor does not relieve any entity of any campaign finance obligations.

¹ For the purposes of this letter, “managing political committee” would refer to a political committee that employs a common vendor with candidate committees, and from which financial and in-kind contributions flow to those candidate committees.

For example, the vendor may be acting to fulfill the appropriate registration and reporting requirements, such as cataloguing any financial and in-kind contributions and expenditures between the committees and then filing the required reports for each committee. Satisfaction of these obligations appears to be the primary burden imposed by Chapter 664, with no limitation on the *staff or individuals* associated with accomplishing the work of the managing political or candidate committees outside of the context of independent expenditures. Where all financial and in-kind contributions are coordinated and included on the respective reports for each committee, there is no prohibition of a single agent or entity conducting the business of a coordinating set of committees.

Additionally, political committee expenditures for express advocacy are either a contribution to the candidate or committee that benefits from that advocacy, or an independent expenditure. If the political committee making the expenditure does not provide the independent expenditure disclaimer and reporting, it must notify the candidate or committee that benefits to ensure that the beneficiary committee reports the contribution received, whether in funds or in-kind.

Independent expenditures

Sharing a vendor has consequences related to independent expenditures. RSA 664:2, XI defines an “independent expenditure” as follows:

[E]xpenditures that pay for the development and distribution of a communication that expressly advocates the election or defeat of a clearly identified candidate or candidates or the success or defeat of a measure or measures, which are made without cooperation or consultation with any candidate, or any authorized committee or agent of such candidate, and which are not made in concert with, or at the request or suggestion of, any candidate, or any authorized committee or agent of such candidate.

RSA 664:2, XI. When interpreting a statute, the New Hampshire Supreme Court first looks to the language of the statute itself, and, if possible, construes that language according to its plain and ordinary meaning. State v. Dor, 165 N.H. 198, 200 (2013). The Court does not consider what the legislature might have said or add language that the legislature did not see fit to include. Id.

RSA 664:2, XI speaks directly to “cooperation or consultation.” As such, there can be no independent expenditures between or among the managing political committees, candidate committees, or candidates associated with the common vendor.²

² Consistent with the below-referenced Federal Election Commission (FEC) regulations, this Office notes that it may be possible to demonstrate a firewall sufficient to establish independence between or among entities sharing a common vendor, but the threshold for such a demonstration is high and the involved entities would be required to prove it.

It is antithetical to “independence” to have the same vendor making and receiving the benefit of an expenditure. It also seems clear that no client of the common vendor could be the recipient of a managing political committee’s independent expenditure as that would still functionally mean the same agent making and receiving the benefit of an expenditure, which is a violation of the explicit language of the statute. However, the managing political committee could make independent expenditures that meet the definition of the statute, such as where the common vendor is not associated with the expenditure’s beneficiary, and there is otherwise no coordination.

With the 2021 repeal of campaign finance contribution cap provisions and the modifications to contribution limits in RSA 664:4, V³—resulting in candidate and non-candidate political committees having no contribution limits—there is no functional *enforcement consequence* relating to independent expenditures. In other words, when a cap was in place, the difference between a coordinated or independent expenditure was critical to compliance with contribution limits for political committees, but with the cap repeal and elimination of political committee contribution limits, political committees can spend freely on coordinated activities.

However, independent expenditures have a function in law beyond being an important part of sorting out when an expenditure is also a contribution to a candidate or committee for contribution limit compliance purposes. The disclaimer and special independent reporting requirements serve to notify the public that the electioneering communication is not from the candidate or candidate committee, but from someone or an entity that is acting independently from the candidate or candidate committee. This is beneficial to the candidate who benefits from the electioneering when the message is harsh or negative in a manner that may cause some in the public to hold it against the speaker. In other contexts, it may help the public decide how much weight to give the communication. For example, some people give more weight to independent endorsements over those that are explicitly solicited and used in a candidate’s communications. The primary function of RSA Chapter 664 is public disclosure. The requirements related to independent expenditures further that objective, even if it is no longer important to determining compliance with contribution limits.

While it is not controlling for the purposes of compliance with New Hampshire law, Federal Election Commission (FEC) regulations describe a three-pronged test to assess whether a communication is coordinated. A communication may be coordinated based on the following characteristics: (1) the source of payment (payment prong); (2) the subject matter of the communication (content prong); and (3) the interaction between the person paying for the communication and the candidate or political party committee (conduct prong).⁴ FEC regulations speak directly to the employment of a common vendor. There is no bar to using a common vendor, but the conduct standard

³ See Laws of 2021, Chapter 168:3.

⁴ “Making independent expenditures,” *Federal Election Commission*, accessed on June 22, 2022; available at: <https://www.fec.gov/help-candidates-and-committees/making-independent-expenditures/>; see also: 11 CFR 109.20, Definition of coordinated; 11 CFR 109.21, Definition of coordinated communication; 11 CFR 109.22, Who is prohibited from making coordinated communications?

will be met with any number of activities that demonstrate the lack of a firewall between or among entities. Essentially, there are numerous circumstances where, by the nature of sharing a vendor, coordination is presumed.

Conclusion

This Office concludes that there is no violation of New Hampshire law for a political committee and candidate committee to hire a common vendor to conduct the business of the committees, provided that (1) each committee is meeting all of its registration and reporting obligations relating to any financial and in-kind contributions occurring between or among the committees, and (2) there are no independent expenditures among the committees or other political committees or candidates associated with the agent.

Sincerely,



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