

MINUTES
(Subject to Approval by the Committee)
Campaign Finance Reform Interim Committee
Tuesday, October 16, 2018
9:30 A.M.
Room EW41
Boise, Idaho

Co-chair Wood called the meeting to order at 9:57 a.m.; a silent roll call was taken. Committee members in attendance: Co-chair Senator Patti Anne Lodge and Co-chair Representative Fred Wood; Senators Mary Souza, Mark Harris, and Jeff Agenbroad; and Representatives John Vander Woude, Thomas Loertscher, Sage Dixon, and Mathew Erpelding. Senator Michelle Stennett participated via conference-phone. Absent and excused: Representative Megan Blanksma. Legislative Services Office (LSO) staff present were: Kristin Ford, Maggie Smith, and Ana Lara.

Other attendees: Betsy Russell - Idaho Press; Brody Aston - Westerberg Associates; Steve Olsen and Robert Berry - Office of the Attorney General; John Eaton and Jess Harrison - Association of Idaho Cities; Phil McGrane - Ada County Clerk's Office; and Emily Patchin - Risch Pisca.

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 Wood welcomed the committee members and the public. He apologized for the delay; a couple of committee members were caught in traffic behind a car accident. He explained that the committee would review draft legislation [DRKMF036](#), which encompassed all the changes, section by section and discuss which sections to present to the Legislature.

New technology update - Chief Deputy Tim Hurst, Secretary of State's Office

Mr. Hurst responded to a question posed at the previous committee meeting regarding the number of reports filed late. He stated that there were about 70 late filings, mostly from political action committees (PACs). He stated that the Secretary of State's Office (SOS) is moving forward with a contract with Tenex Software Solutions. Tenex is currently working on the lobbyist reporting section, which would become available in January 2019. The campaign finance report section would become available in April 2019. He stated that Tenex is currently adapting its software to the needs of the state of Idaho. He noted that the most significant challenge for Tenex is to make the software applicable to all the taxing districts.

Discussion

Senator Stennett inquired as to how many people were notified regarding their late filings. Mr. Hurst responded that each person who had not filed on time was notified and made aware of the potential late filing fee. Senator Souza asked if any reporting will be completed on the SOS's website during city elections in 2019. Mr. Hurst responded that it would depend on the Legislature; the draft legislation would require all taxing districts to report to the SOS.

Representative Vander Woude inquired about the procurement process for selecting the vendor. Mr. Hurst responded that the SOS is exempt from purchasing requirements. However, the SOS worked with the Division of Purchasing and proceeded with the bidding process; the evaluation team selected Tenex Software Solutions. The SOS utilized the same procurement process that the Dept. of Administration uses for its bidding process. Representative Vander Woude asked what would occur if the program is not functional by January 2019. Mr. Hurst responded, in the event that the new

software is not ready by January, the SOS would continue with its current system. He added that Tenex would be penalized if it did not meet certain deadlines.

U.S. Supreme Court decision regarding dark money - Steven Olsen and Robert Berry, Office of the Attorney General (OAG)

Mr. Olsen referred to the [Citizens for Responsibility and Ethics in Washington v. Federal Election Commission](#) case (CREW case) and stated that both he and Mr. Berry would present the U.S. Supreme Court's decision to the committee. Mr. Berry clarified that it wasn't quite a supreme court decision; the case sought review on an immediate basis, but was denied. He briefly described the context of the case and explained that the case explores the arrangement between a 501(c)(4) (nonpolitical committee) and super PACs. He noted that super PACs have to disclose the identity of their donors and 501(c)(4)s do not. He explained that the donor failed to earmark his donation to any specific communication and the 501(c)(4), which received the donation, declined to disclose the identity of the donor. CREW then filed suit to obtain the name of the donor. CREW challenged the reliance on the regulation [11 CFR 109.10 \(e\)\(1\)\(vi\)](#). The 501(c)(4) responded that it was not required to disclose the identity of the donor because the donation was not earmarked for communication; the FEC agreed and declined to challenge the 501(c)(4)'s determination. CREW challenged this determination, stating it was contrary to statute 42 U.S.C. 30104(c)(1) and (c)(2).

Mr. Berry stated that the courts ruled that 501(c)(4)s have to disclose the identity of their donors where there were contributions in excess of \$250. It also ruled that they had to disclose the identity of donors where there were contributions made for the purpose of furthering the reported independent expenditure. Mr. Berry stated that this decision created two new categories of disclosures that the FEC had not previously required to be disclosed. He explained that prior to this decision, a person could contribute to a 501(c)(4) that would then contribute to a super PAC, and then the super PAC would only identify the 501(c)(4), but not the identity of the donors to the 501(c)(4). This court's decision created more transparency and more disclosures, and found that the disclosure requirement was not an undue burden on 501(c)(4)s.

Mr. Olsen stated that both he and Mr. Berry had the opportunity to review the draft legislation that the committee is considering. He commented that a court is generally going to uphold legislation that requires more disclosure, but would be less likely to uphold legislation that limits campaign spending. He noted that the CREW case is on appeal at this time.

Co-chair Wood asked which court had rendered the decision on the case. Mr. Olsen responded that it was a district court decision in Washington D.C. Representative Erpelding referenced an article in The Atlantic and inquired further about the court's decision on CREW. Mr. Berry referred to [slide 1](#) and reiterated that the decision applies to 501(c)(4)s.

Mr. Olsen referred to statements made by the courts on [slides 2-4](#). He explained that the court determined that the government can require disclosure because it has a legitimate interest in ensuring there is no corruption in the election process and to make citizens aware of who is funding electioneering communications.

Discussion

Senator Souza referred to slide 3 and asked how it is determined whether a reasonable probability that a donor would suffer threats exists. Mr. Olsen stated that the organization challenging the law would need to provide evidence of this probability. He referred to the Citizens United case and commented that the court in that case felt that evidence of this probability was not shown. Senator Souza asked whether there is any recourse for donors who find themselves no longer employed or whose businesses have suffered due to donations they have made. Mr. Olsen responded that these types of retaliations could provide a factual basis for challenging a statute. He explained that, beyond this, it would largely depend on state law. In Idaho, there are legal theories that allow people to assert that they have been wrongfully terminated in violation of public policy.

Discussion of draft legislation

Co-chair Wood stated the committee would review draft legislation [DRKMF036](#) and determine which sections to refer to the Legislature for the next legislative session. He asked Ms. Ford to explain the changes in each section and remind the committee of its previous decisions.

Section 67-6601

Ms. Ford explained that due to the action of extending campaign finance reporting to the local levels, the references to solely state levels were removed. Senator Souza asked if the word "secrecy" could be changed to "transparency." Ms. Ford attributed the word secrecy to the 1974 initiative by the citizens of Idaho. Senator Souza suggested modifying page 2, line 6, to read "... promote openness and transparency in government..." **Co-chair Lodge made a motion to accept Section 67-6601 with the changes suggested by Senator Souza. Representative Vander Woude seconded the motion. The motion passed by voice vote.**

Section 67-6602

Ms. Ford explained that the definition for "candidate" had not substantively changed; it was reordered and reformatted. She stated that under subsection 4, the definition of "election" was amended to include state, local, and recall elections. In subsection 6, the definition of "electioneering communication" adopts the committee's previous suggestion to expand the reporting period from the last day of filing for candidacy through the general election. It also adds electronic mail and electronic messaging to the types of communications that apply. The term "political committee" was added to the exceptions of electioneering communications and mirrors the federal language.

Ms. Ford proceeded to the definition of "expenditure" on page 4 and reminded the committee that this change was requested by some organizations to clarify when an expenditure is considered to have been made. The general rule is that an expenditure is made at the time the funds have been obligated or committed, unless otherwise specified in statute. She proceeded to the definition of "independent expenditure" and explained that it is made at the time any portion of goods is delivered or any portion of services is provided. She added that an independent expenditure cannot be made with the collaboration or coordination of a candidate or his agent, employee, volunteer, or political committee supporting or opposing a measure.

Senator Souza referred to the "electioneering communication" definition, voiced her discomfort with the expanded time frame, and stated her preference for the federal requirement. Co-chair Wood stated that electioneering communication occurs 365 days a year and opined that the proposed time frames did not encompass enough time. Representative Loertscher stated that expanded time frames would ensure that reporting requirements apply to everyone participating in electioneering communication. He commented that candidates are often unaware of the activity occurring outside of the current time frames. Co-chair Wood stated that shorter reporting time frames penalize candidates and do not solve the issue of transparency. He reminded the committee that the proposed time frames encompass only a few months for every two years.

Representative Vander Woude concurred with Senator Souza and suggested that most electioneering communication occurs just prior to an election. Co-chair Lodge concurred with Co-chair Wood and Representative Loertscher. She emphasized the importance of transparency and establishing firm reporting periods.

Senator Souza requested permission to read aloud a [letter](#) containing public testimony from Mr. Tyler Martinez, attorney for the Institute for Free Speech. Co-chair Wood granted permission. Senator Souza reminded the committee that the filing period begins during the last month of the legislative session and many serious issues are debated and voted on during the last few days of session. She stated that if the reporting time frames were expanded, groups and individuals who wish to disseminate information regarding public policy considered during session would fall under the reporting requirements. She opined that the federal definition provided a more balanced

approach regarding transparency, protection, and free speech. Representative Loertscher explained that the difficulty does not come when people discuss public policy, but when they associate public policy with individuals, and that in turn becomes an electioneering communication. He stated that some people or organizations disseminate information to the public suggesting their intent to have someone in office removed because of the official's stance on an issue and that becomes an electioneering communication rather than advocating for or against public policy.

Senator Souza inquired about SOS's enforcement requirements. Mr. Hurst responded that, unless they are provided with additional resources, they would handle enforcement in the same current manner, by complaint forms filed with the SOS.

Ms. Ford referenced page 3, lines 32-33 of draft DRKMF036 and reminded the committee that proposed language change to the definition of electioneering communication would not include references made to public policy, but to something that unambiguously refers to a specific candidate or measure on the ballot.

Representative Erpelding asked whether someone serving as both a candidate and legislator would create ambiguity with regard to electioneering communication. Ms. Ford suggested specifying references made to a candidate's campaign rather than just the candidate.

Representative Vander Woude asked why the definitions for "expenditure" and "independent expenditure" were different in the draft. Mr. John Eaton, Vice-President of the Idaho Association of Commerce and Industry, was unsure as to why the definitions were different. Co-chair Wood recalled an argument made for different definitions was that media time could be obligated at one time and expended at another time. Mr. Eaton suggested that the definitions could cause conflicts; someone could report that funds have been committed, but then the person could change his mind and decide to use the funds towards another area (e.g., door knocking). He offered to speak with his organization's attorneys for possible suggestions to resolve this potential conflict.

Mr. Eaton voiced his organization's concern regarding the ambiguity in the language prohibiting volunteers from having any connection with independent expenditures. He suggested the ability to pinpoint when a person is considered a volunteer would be of vital importance. Co-chair Wood recalled that the language was included to address the fact that, while there shouldn't be any collaboration between campaigns and independent expenditures, it had occurred in the past with the assistance of a volunteer, and argument was made for plausible deniability. Mr. Eaton expressed concern that people may be hesitant to offer any counsel or advice to campaigns due to the language in this section. Representative Erpelding stated that the purpose of the language was to limit the flow of information from campaigns (through volunteers) to PACs. Mr. Eaton suggested that it would be difficult to enforce.

Mr. Hurst explained the difference between expending funds and receiving services. He noted that a radio ad could be purchased months before it goes on air. He stated that the issue with independent expenditures isn't the people involved with the activity. He explained that if the committee wished to address the collaboration issue, then collaboration and coordination should be defined in statute. He reminded the committee that a volunteer can work with multiple campaigns and it is important to note how much influence or control the volunteer has in the campaign. He explained that if a person decided to use funds for a different purpose than what had been reported as expended earlier, then the person could file an amended report at a later date.

Representative Erpelding referenced the complaint that was filed with the SOS that demonstrated clear coordination between a campaign and an independent expenditure, but the ruling stated that nothing could be done because the coordination was done via a "volunteer." He asked Mr. Hurst for suggested language to address this matter that would not limit the ability for people to volunteer on campaigns. Mr. Hurst replied that he would provide some language.

Co-chair Lodge asked how someone should report an expense for campaign mailings when a vendor cannot supply a total cost amount at the time of ordering. Mr. Hurst responded that if the total cost is unknown at the time the report is due, an estimated cost should be reported. He explained that in accounting, an expense is when something is identifiable and quantifiable. Mr. Hurst clarified that it is not the SOS's intent to obtain the campaign plan ideas, only what funds were expended and where they were expended.

Section 67-6602(14)

Ms. Ford directed the committee to the definition for "measure" and explained that some existing language was removed to make it applicable to city elections and ballot measures. She noted that language was inserted regarding the roles of county prosecutors or city attorneys in terms of deeming a measure sufficient.

Section 67-6602(19)

Changes were made to make campaign finance laws applicable to local elections except for the office of precinct committeeman, which is a political party position.

Section 67-6602(20)

The definition of social media was parceled together using recommended language by Assistant Chief Deputy Attorney General Brian Kane and definitions found in other states' statutes.

Co-chair Wood noted the need to define "collaboration" or "coordination." He suggested that if these two terms were defined, then it wouldn't matter who had collaborated between an independent expenditure and a campaign. Mr. Hurst concurred. Co-chair Wood asked Ms. Ford to produce definitions for collaboration and coordination and language that would prohibit the activity.

Senator Souza expressed concern regarding the definition of "electioneering communication" and suggested the committee should produce a bill without a revised definition for electioneering communication. She suggested that a bill without the modification to electioneering communication would have a better chance of passing. Ms. Ford noted that draft [DRKMF026](#) included the local election components, but many other definitions discussed in Section 67-6602 (e.g., electioneering communication, independent expenditure) were absent. After some discussion, **Co-chair Lodge made a motion to accept draft DRKMF026 and to include the definition for "social media" and the term "political committee" to mirror the federal guidelines. Senator Harris seconded the motion. The motion passed by voice vote.**

Section 67-6604

Ms. Ford explained that this section added language to include local government to campaign finance reporting, specifically the ability for county clerks to inspect accounts.

Co-chair Lodge made a motion to accept Section 67-6604 as drafted in draft DRKMF036. Representative Erpelding seconded the motion. The motion passed by voice vote.

The committee recessed for lunch break at 11:57 a.m.

The committee reconvened at 1:31 p.m.

Section 67-6607

Ms. Ford explained that this section dealt with the timing of the reports; no changes were made from the last draft. She explained that the language calls for monthly reporting during the four months prior to an election and it requires that the reports be filed by the 10th day following the month that is being reported. She noted that the last paragraph exempts reporting for smaller campaigns until such time as the candidate or political committee receives contributions or expends funds in the amount of \$500 or more.

Representative Loertscher opined that monthly filings would be a burden for candidates and smaller PACs.

Senator Stennett expressed concern that local candidates may be potentially penalized during the transition phase of filing their reports online with the SOS. She noted that local governments have a small amount of staff and was unsure whether the SOS had the necessary resources either. Mr. Hurst shared her concern and noted that SOS staff would probably spend a significant amount of time assisting first-time filers with training to ensure that reports are filed online correctly. Mr. Phil McGrane, chief deputy at the Ada County Clerk's Office, explained that regarding the division of labor and the frequency, the county clerk's offices will continue to oversee campaign finance reporting at the county and local levels. He clarified that while the reporting will be filed in a central database, the clerk offices in 44 counties will continue to be involved and divide the labor. He suggested that there may be a reduction of overall filings due to the \$500 threshold. Senator Stennett commented that not all the offices have the necessary resources or technology and cautioned that the transition may not go smoothly.

Senator Agenbroad inquired whether the four-month reporting process preceding the primary would provide an advantage to a challenger who wasn't required to file for office until shortly before the primary. Mr. McGrane reminded the committee that the reporting model easily overlays all the different types of elections (e.g., city officials). He explained that the time period still requires an annual report that would end on the calendar year for the off-season and monthly reporting thereafter for the primary cycle. He explained that there are two different types of filings. He suggested that this would create greater transparency; under this draft, both the incumbent and the challenger would be required to file on a monthly basis even before filing for office.

Representative Loertscher inquired about report filing dates during the month of elections. Mr. McGrane noted that the report filing dates were similar to the current filing dates; the draft just shifts the report filing date to a predictable date (10th day of the following month). For example, the primaries were held on May 15 this year and the report filing deadline was May 7.

Co-chair Lodge made a motion to accept Section 67-6607. Representative Erpelding seconded the motion. The motion passed by voice vote. Representative Loertscher was recorded as voting nay.

Section 67-6608

Ms. Ford stated that this section allowed people who have an unexpended balance of contributions or campaign debt to file semi-annual reports instead of annually until there is no unexpended balance or deficit; the reports would be filed the 10th day of the month following the six-month period. Co-chair Wood understood that the report filing dates would be January 10 and July 10. Mr. McGrane and the committee members agreed. The committee members requested that Ms. Ford modify the language to specifically reference January 10 and July 10 as semi-annual reporting dates. **Co-chair Lodge made a motion to accept Section 67-6608 to include language clarifying the semi-annual report filing deadlines. Representative Vander Woude seconded the motion. The motion passed by voice vote.**

Section 67-6610A

Ms. Ford explained that language was inserted to clarify that the limitation is on aggregate contributions. A reference to special elections was inserted for purposes of contribution limits. She noted that language was moved from Subsection 6 to another subsection in the section. Representative Vander Woude commented that the language in Subsection 67-6610(1)(a) was somewhat unclear. After some discussion, Ms. Ford suggested striking "or candidate committee" from line 43. The language was revised further to clarify that the subsection would not apply to a candidate contributing or loaning money to his own campaign account. **Co-chair Lodge made a motion to accept Section 67-6610A with the two modifications requested by the committee to Subsection 67-6610(1)(a). Senator Souza seconded the motion. The motion passed by voice vote.**

Section 67-6610B

Ms. Ford stated that cross-references were corrected; both sections would no longer exist due to modifications. **Co-chair Lodge made a motion to accept Section 67-6610B. Representative Erpelding seconded the motion. The motion passed by voice vote.**

Section 67-6611

Co-chair Wood suggested postponing discussion on this section until there is consensus regarding independent expenditures.

Section 67-6615

Ms. Ford explained that changes in this section pertain to the division of duties between the SOS and county clerks. **Co-chair Lodge made a motion to accept Section 67-6615. Representative Dixon seconded the motion. The motion passed by voice vote.**

Section 67-6616

Representative Vander Woude asked which report would be examined by the SOS during the three-month time frame. Mr. McGrane clarified that each report would have a three-month window for the SOS to review and make corrections. **Co-chair Lodge made a motion to accept Section 67-6616. Representative Erpelding seconded the motion. The motion passed by voice vote.**

Section 67-6623

Ms. Ford explained that the section combined two efforts: establish a consolidated online database and divide the responsibilities between the SOS and the county clerks. **Co-chair Lodge made a motion to approve Section 67-6623. Senator Harris seconded the motion. The motion passed by voice vote.**

Section 67-6625A

Co-chair Wood stated that the section pertained to late filing fees; draft [DRKMF024](#) had different proposals for late filing fee amounts. Representative Vander Woude, Senator Harris, and Senator Souza preferred keeping the fine amount at \$50 and allowing the fine to be assessed immediately. Co-chair Wood preferred increasing the late filing fee. **Co-chair Lodge made a motion to accept Section 67-6625A as written in draft DRKMF036. Senator Agenbroad seconded the motion. The motion passed by voice vote.**

Section 67-6626

Ms. Ford stated that reference to county clerks was inserted to allow citizens to file a complaint with the SOS or county clerks. **Co-chair Lodge made a motion to accept Section 67-6626. Representative Dixon seconded the motion. The motion passed by voice vote.**

Section 67-6628

Co-chair Wood suggested postponing discussion on this section until there is consensus regarding electioneering communications.

Draft DRKMF036 - Sections 15 to 21

Co-chair Wood inquired about the repealed sections referenced in draft DRKMF036. Ms. Ford explained that the remaining sections in the draft are cross-references in other parts of the code that were either no longer necessary or were addressed in other parts of the draft. Co-chair Wood recommended that the language in the sections repealed in the bill should be provided to the Legislature when it comes time to consider the bill. **Co-chair Lodge made a motion to approve sections 15 to 21 in draft DRKMF036. The motion was seconded. The motion passed by voice vote.**

Final Discussion

Co-chair Wood asked the committee members for their thoughts regarding whether the bill should be separated into a few different bills or whether it should be presented as an omnibus bill.

Representative Erpelding suggested presenting an omnibus bill and, if it fails, separating certain parts of the bill. Co-chair Wood clarified that the omnibus bill would only include the language that the committee had approved. After some discussion, Co-chair Wood asked Ms. Ford to draft a new omnibus bill containing the sections approved by the committee.

Representative Erpelding inquired about the language on page 15, lines 15-17. After some discussion, Ms. Ford stated that "candidate, political committee, or other" would be removed and replaced with "person." She clarified that this section would not be included in the omnibus bill, though, because it had not been approved by the committee.

Co-chair Wood asked the committee members for feedback regarding what kind of meeting format the committee should hold next month to discuss electioneering communication. Representative Erpelding suggested that committee members should provide their suggestions on electioneering communications directly to Ms. Ford. Senator Souza asked for the committee members' current stance on expanding reporting time frames for electioneering communication. Co-chair Wood, Senators Agenbrood and Harris, and Representative Loertscher favored expanding reporting time frames for electioneering communication. Representative Erpelding referenced accountability pieces made by some organizations regarding policy stances he had taken in the past. He cautioned that while the accountability pieces may at times feel like electioneering communications, they are in fact accountability pieces. Senator Souza and Representatives Vander Woude and Dixon were not in favor of expanding reporting time frames for electioneering communications.

Co-chair Wood clarified that it was not the desire of the committee to regulate speech, but felt comfortable with legislation that would provide disclosure. He opined that if money is used to influence an election or proposition, then that money should be reported.

After some discussion, the committee selected October 24 for its next meeting date. Senator Souza asked Co-chair Wood if the committee could hear from the Institute for Free Speech and another entity who could provide an opposing view. Co-chair Wood responded in the affirmative, but emphasized only if there was another entity that could provide a counterbalance.

Co-chair Wood asked staff to request Mr. Brian Kane's presence for the next committee meeting.

Senator Stennett made a motion to approve the August 20, 2018 minutes. Representative Loertscher seconded the motion. The motion passed by voice vote.

Senator Souza had worked with her campaign staff to update the purpose codes for reporting expenditures. She offered to share her suggestions with committee staff. Mr. Hurst offered to share the suggestions with the new systems' vendor.

The meeting adjourned at 3:25 p.m.