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MEMORANDUM

To: State Board of Elections

From: Jared DeMarinis

Date: February 28, 2018

Re: Declaratory Ruling- Coordination Expenditures – Retention of Shared Fund-Raising Advisor or Consultant

On October 23, 2017, the State Board of Elections ("State Board") received a Petition for Declaratory Ruling pursuant to COMAR 33.01.02 ("Petition") from the Republican Governors Association ("RGA") regarding the employment of Rivet Strategies, LLC ("Rivet"), a professional fund-raising firm, by both the RGA and Larry Hogan for Governor (the "Hogan Campaign"). A declaratory ruling states how the State Board will apply a statute it administers to the set of facts set forth in the petition. In brief, the Petition sought a declaratory ruling that the RGA had presented sufficient evidence to rebut the presumption that its retention of Rivet, which had an ongoing engagement by the Hogan Campaign, amounted to the making of a coordinated expenditure with the Hogan Campaign under the Election Law article.

On April 12, 2018, at a regularly scheduled open meeting of the State Board, the State Board considered the Petition and the additional materials that had been submitted by petitioners and by the State Board's counsel and administrative staff regarding the Petition, and concluded that RGA had satisfied its burden of producing sufficient evidence to rebut the presumption that its retention of Rivet amounted to the making of a coordinated expenditure given Rivet's simultaneous engagement by the Hogan Campaign. This document constitutes the written declaratory ruling in response to the Petition required by COMAR 33.01.02.03B(2)(a).

Statutory Background

Section 13-249 of the Election Law Article of the Maryland Code prohibits a person from "mak[ing] a coordinated expenditure in excess of the limits established under § 13-226" or from "mak[ing] a donation to a person for the purpose of furthering a coordinated expenditure in excess" of such limits. Md. Code Ann., Elec. Law ("Elec. Law") § 13-249(b)(1)(i)-(ii). In addition, "[a] candidate . . . may not, directly or indirectly, be the beneficiary of" any such "coordinated expenditure." *Id.* § 13-249(b)(2).

A "coordinated expenditure" is defined as a "disbursement" (or action to cause a disbursement) that "promotes the success or defeat of a candidate or a political party at an election" and that is made "in cooperation, consultation, understanding, agreement, or concert with, or at the request or suggestion of, the candidate or political party that is the beneficiary of the disbursement." *Id.* § 13-249(a)(4)(i). The definition expressly includes disbursements "for any communication that republishes or disseminates, in whole or in part, a video, a photograph, audio footage, a written graphic, or any other form of campaign material prepared by the candidate or political party that is the beneficiary of the disbursement," but excludes disbursement for "any communication that is not a public communication." *Id.* § 13-249(a)(4)(ii)-(iii).[1]

A coordinated expenditure is "presumed to have occurred" when (*inter alia*) a person "that makes a disbursement" during the preceding 18 months:

- "employs or retains a strategic political campaign, media, or fund-raising advisor or consultant of the candidate or political party that is the beneficiary of the disbursement;" or

- "has retained the professional services of a vendor, an advisor, or a consultant that, during the election cycle, has provided professional services to the candidate or political party that is the beneficiary of the disbursement," ***and*** where such vendor, advisor or consultant "has not established a firewall to restrict the sharing of strategic campaign information between individuals who are employed by or who are agents of the person and the candidate or political party that is the beneficiary of the disbursement."

Id. § 13-249(d)(3)-(4). The presumption may be rebutted "by presenting sufficient contrary evidence and obtaining a declaratory ruling from the State Board before making a disbursement to promote the success or defeat of a candidate or political party at an election." *Id.* § 13-249(e).

Procedural History

On October 15, 2017, the RGA through counsel sought a declaratory ruling pursuant to EL § 13-249(e) that it had presented sufficient evidence to rebut the presumption that its

[1] A "disbursement . . . includes" – but is not necessarily limited to – "a deposit of money or a gift, a subscription, an advance, or other thing of value." Elec. Law § 13-249(a)(6). A "public communication," in relevant part, means any radio or television communication, "newspaper, magazine, outdoor advertising facility, mass mailing, e-mail blast, text blast, or telephone bank to the general public, or any other form of general public political advertising." *Id*. § 13-306(a)(6)(ii).

retention of Rivet – a fund-raising consultancy firm that has also been retained by the LHG campaign during this cycle – amounted to the making of a coordinated expenditure under the EL (the "Petition").

On December 7, 2017, the State Board issued its ruling, indicating that while the evidence presented "supports the belief that Rivet is not a strategic advisor for the . . . RGA," it did "not explain Rivet's role within the Hogan campaign" and also provided "insufficient" information regarding any firewall established to prevent "the sharing of nonpublic information from Rivet to RGA regarding the Hogan campaign." Letter from J. DeMarinis to M. Adams, Dec. 22, 2017 (the "12/22/17 Letter"). The State Board directed RGA to supplement its submission within thirty days of the 12/22/17 Letter. *Id*.

On January 22, 2018, RGA supplemented its submission. It provided an agreement effective October 1, 2017, between RGA and Rivet (the "Contract") under which Rivet (*inter alia*) agreed not to share confidential information pertaining to RGA with any third party, Contract ¶ 5, and agreed to "establish and adhere to a specific firewall policy in order to restrict the sharing of nonpublic strategic campaign information between a) individuals who are employed by, or otherwise agents of, RGA, and b) any Maryland candidate or political party committee." *Id.* ¶ 7.

RGA also submitted an affidavit from Allison M. Meyers, the "Managing Member" of Rivet. Affidavit of Allison M. Meyers, Jan. 22, 2018, at ¶ 1 (the "Meyers Aff."). Meyers stated that Rivet had provided fundraising consultant services to Governor Hogan since 2014, and that Rivet then served as a fundraising consultant to the Hogan Campaign. *Id.* ¶ 2. She stated that while, in the course of providing services to the Hogan Campaign through Rivet, she had become aware of the Hogan Campaign's fundraising plans and metrics and had visibility over the Governor's political schedule, she:

- had not acquired "any strategic, non-public information [regarding] Governor Hogan's plans, projects, activities and needs in his re-election campaign, or about specific expenditures the [Hogan Campaign] is considering or planning to make," *id.* ¶ 5;

- had not been provided "polling information, research, political plans, drafts of ads, mailers and other communications, targeting and scheduling information for such communications, or other strategic materials and information" by the Hogan Campaign," *id.* ¶ 6;

- was "generally not invited to meetings at which any of these matters are discussed," and where such matters did arise at meetings at which she was present, she was instructed to (and in fact did) "leave the room for the duration of the discussion," *id.*; and

- had been instructed by the Hogan Campaign "not to share with it or Governor Hogan any information about [her] work for the RGA," and had "abided and [would] continue to abide by that instruction for the duration of the gubernatorial campaign," *id.* ¶ 7.

Finally, Meyers stated that Rivet has a confidentiality policy pursuant to which she does "not share information acquired in the course of providing services to one client with any other client, individual or entity," unless authorized to do so, and that her then-current agreement with the Hogan Campaign "specifically prohibits me from sharing information about Governor Hogan's re-election campaign with any other client, individual or entity." *Id.* ¶ 8.

On February 28, 2018, the State Board received the recommendation of the administrative staff, which was informed by the counsel to the State Board's analysis of the Petition. We directed the administrative staff to share its recommendation (as well as the supporting views of counsel) with the petitioners, and to solicit a response to that recommendation from the petitioners, given that the law in question was new and that the State Board might benefit from an adversarial response in considering the matters raised by the Petition.

On March 14, 2018, the State Board received RGA's response letter, and considered the matter at its regularly scheduled meeting of April 12, 2018. At the meeting, the State Board approved a motion to issue the declaratory ruling as requested by RGA.

Written Declaratory Ruling

Based on the evidence submitted, and as made clear by various members at the April 12, 2018 meeting, we are satisfied that the RGA presented sufficient evidence to rebut any presumption of a coordinated expenditure based on its retention of Rivet. We find that the firewall imposed by Rivet is sufficient to prevent the sharing of strategic campaign information between the Hogan Campaign and the RGA. Rivet is subject both to a confidentiality agreement with RGA, which precludes it from sharing non-public "strategic campaign information" between RGA and any Maryland candidate, and has sufficiently established that it is not privy to any such information belonging to the Hogan Campaign.

Under Election Law Article §13-249(d)(4), a coordinated expenditure is "presumed to have occurred" when a person "that makes a disbursement" during the preceding 18 months "has retained the professional services of a vendor, an advisor, or a consultant that, during the election cycle, has provided professional services to the candidate or political party that is the beneficiary of the disbursement," ***and*** where such vendor, advisor or consultant "has not established a firewall to restrict the sharing of strategic campaign information between individuals who are employed by or who are agents of the person and the candidate or political party that is the beneficiary of the disbursement." Elec. Law § 13-249(d)(4). Because we conclude that Rivet has established a firewall to restrict the sharing of campaign information between individuals who are employed by or

who are agents of RGA and the Hogan Campaign, the arrangement does not give rise to the presumption of a coordinated expenditure.[2]

[2] RGA has also argued that its retention of Rivet does not give rise to the presumption of a coordinated expenditure pursuant to Elec. Law § 13-249(d) because it ***initially*** retained Rivet more than 18 months prior, and also because Rivet is not involved in "expenditures" (coordinated or otherwise) regardless of whether the firewall is sufficient. Because we conclude that the firewall is sufficient regardless of when Rivet was retained, we need not determine whether that retention has taken place within 18 months preceding the making of a disbursement, or whether the arrangement between Rivet and the Hogan Campaign or the RGA involves the making of any "expenditures" for purposes of Elec. Law § 13-249.