



STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

October 12, 2014

By Electronic Mail

Adav Noti, Esq.
Acting Associate General Counsel for Policy
Federal Election Commission
999 E. Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request 2014-16 (Connecticut Democratic State Central Committee)

Dear Mr. Noti:

The Connecticut State Elections Enforcement Commission ("SEEC" or "state commission") strongly objects to the request by the Connecticut Democratic State Central Committee ("state party") to allow the state party to circumvent and violate Connecticut state laws that were enacted for the benefit of all of the state's citizens, that have been effective since enactment, and that have been sustained in several court challenges. The state party's efforts to circumvent strong state laws are at odds with both the public good and the clear intent of the citizens of Connecticut. They are justified by neither the letter nor the spirit of the federal law. The SEEC is disappointed to see a state party committee utilizing such a tactic and respectfully requests that this Commission reject the effort in its entirety.

The state party's Advisory Opinion Request 2014-16 ("Request") asks the Commission to confirm that a proposed mailing that will support Connecticut's candidate for Governor (and other communications like it that will support other state candidates¹ in this and future elections) are considered by the Commission to be "federal election activity as defined by 52 U.S.C. § 30101(24) and 11 C.F.R. § 100.24(a)(3)." The state party asks the Commission to confirm that, under federal law, such mailings constituting federal election activity may be paid for either entirely with federal funds or with a combination of federal and Levin funds. And, finally, the state party asks for confirmation from the Commission that the State of Connecticut is precluded from

¹ For purposes of these comments, the phrase "state candidates" means candidates under the jurisdiction of Connecticut's state campaign finance laws – i.e. candidates for statewide Constitutional offices, General Assembly, municipal office, and Judge of Probate.

requiring that funds compliant with Connecticut state law be used to pay for the proposed mailing.²

In order to fully understand the state party's request and the swath of destruction it is asking the Commission to perform under the guise of a preemption analysis, it is necessary to understand Connecticut's history of corruption as well as the strong and effective measures taken by the state legislature to reform its campaign finance system for state candidates. Leading up to Connecticut's campaign finance reforms, the state suffered repeated pay-to-play corruption scandals involving high ranking state and local elected officials:

- In 1999, the State Treasurer pled guilty to federal racketeering and money laundering charges stemming from a kick-back scheme involving state pension investments. In return for investing over \$500 million of the state's pension funds with certain financial institutions, the state's Treasurer had directed millions of dollars in "finder's fees" to be paid to various friends and associates, who then funneled part of the money back to his campaign fund. He was sentenced in federal court to a term of imprisonment of 51 months. In addition he paid a forfeiture sum of \$230,000. Many of the Treasurer's co-conspirators also either pled guilty or were convicted on counts arising out of the public official bribery scheme and received terms of imprisonment.
- In March 2003, a jury convicted a Bridgeport mayor of sixteen counts of federal racketeering, extortion, bribery, mail fraud, and tax evasion arising from a scheme to award city contracts in exchange for illegal kickbacks from contractors. At least three contractors also pled guilty to their role in that scheme, with one stating that he had agreed to raise funds for the mayor's anticipated run for governor in exchange for the mayor's support with a development project.
- On June 21, 2004, Connecticut's Governor resigned after being accused of improperly accepting tens of thousands of dollars in gifts and services from state contractors in return for facilitating the award of several state contracts. He subsequently pled guilty to federal criminal charges and was sentenced to a term

² The state party has also asked for an expedited consideration of the Request due to the proximate timing of the election. We note that the state party's own choices and delays are the cause of any purported time-induced difficulties. Discussions between the state party, Sandler Rieff Lamb Rosenstein & Birkenstock, P.C. (the law firm which filed the Request on the state party's behalf) and the Connecticut SEEC regarding these and similar issues began in 2010 and resumed again in early 2014. These more recent discussions resulted in the SEEC issuing Advisory Opinion 2014-01, attached to the state party's Request, being issued in February 2014. The state party could have submitted its Request to the Commission back in the late winter, spring, or summer of 2014. Moreover, the SEEC Advisory Opinion 2014-01 could have been appealed to the SEEC for reconsideration or to the Connecticut Superior Court. See CONN. GEN. STAT. General Statutes §§ 4-181a & 4-183. Instead, the state party has waited until the eve of the November 2014 election to create a false sense of emergency, and now seeks expedited consideration by the Commission, which runs the risk of core issues regarding the intersection of federal and state campaign finance laws not being thoroughly digested and analyzed.

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of imprisonment of one year and a day. His chief of staff, his deputy chief of staff, and several state contractors also pled guilty to federal charges stemming from their roles in that corruption scandal.

- In 2005, a state senator pled guilty to federal bribery charges in connection with a kick-back scheme involving a non-profit organization. In return for \$5,000, he had agreed to assist a non-profit group in its quest to secure a \$100,000 grant from the state. He also pled guilty to federal mail fraud and tax evasion charges for diverting \$40,000 in campaign contributions to his personal use. The senator was ultimately sentenced to sixty months in federal prison and ordered to pay over \$13,000 in restitution.³

These scandals received widespread press coverage, leading the media to dub the state “Corrupticut.”⁴ The public had lost confidence in their state officials. A 2004 poll revealed that 78% of likely Connecticut voters agreed that the way political campaigns were financed in Connecticut encouraged candidates to grant special favors and preferential treatment to their contributors.⁵ In fact, of those polled, 49% strongly agreed that was true. According to that same 2004 poll, 44% of likely Connecticut voters believed that state lawmakers voted the way that campaign contributors wanted them to vote in exchange for contributions “a lot” of the time; another 44% believed that happens “sometimes.” Only 9% stated they believed that happened “rarely” or “never.” In a 2005 poll of likely Connecticut voters, 62% stated that elected officials in Connecticut are more concerned with the needs of those who pay for their campaigns than the needs of everyone. In that same poll, 82% of Connecticut voters agreed that it was necessary to limit the influence of money on politics.⁶

Connecticut responded to these parades of corruption with comprehensive campaign finance reform legislation, dramatically changing the way state officials could raise campaign funds and sharply limiting the role of special interest groups coordinating with candidates and their party committees. As part of the legislative response, Public Act 05-5, *An Act Concerning Comprehensive Campaign Finance Reform for State-wide Constitutional and General Assembly Offices*, was passed during a special session in December 2005. This 2005 Reform Act instituted the landmark public campaign financing system, the Citizens’ Election Program (the “CEP”), banned certain state contractor and lobbyist contributions and implemented strong anti-circumvention rules such a “one-person-one-pac” rule.⁷ Since its passage, Connecticut has consistently guarded and improved these core reforms.⁸

³ See *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288, 304-07 (D. Conn. 2008) (“Green Party I”), aff’d in part, rev’d in part, *Green Party of Conn. v. Garfield*, 616 F.3d 189 (2d Cir. 2010).

⁴ *Green Party I*, 590 F. Supp. 2d at 306.

⁵ *Id.* at 307 (internal citations omitted).

⁶ *Id.*

⁷ CONN. GEN. STAT. §§ 9-605(e)(1), 9-610(e)-(i), 9-611(a), 9-612(a) & (f), 9-613(a), 9-614(a), 9-615, 9-617, 9-618.

⁸ See e.g. Public Act 07-1, *An Act Concerning the State Contractor Contribution Ban and Gifts to State and Quasi-Public Agencies*; Public Act 10-1, *An Act Concerning Clean Elections*; Public Act 10-2, *An Act*

A cornerstone of the response to Connecticut's history of corruption was the legislature's carefully tailored and comprehensive state contractor and lobbyist provisions. Under these provisions:

- State contractors⁹ may not contribute to a party committee, nor may they contribute to a candidate seeking office in the branch (legislative or executive) for which the contractor holds a contract.¹⁰
- Lobbyists and members of the lobbyist's immediate family may only contribute up to \$100 per calendar year to a party committee.¹¹
- Other individuals (who are not state contractors or lobbyists) may contribute up to \$10,000 to state central party committees and \$2,000 to town committees.¹²
- When a contributor gives more than \$50, party committees must obtain a certification from the contributor containing information about the contributor's status as a lobbyist or principal of a state contractor, and the name of the contributor's employer.¹³
- Party committees are required to file campaign finance statements with the SEEC that are made publicly available and fully searchable on the SEEC's electronic Campaign Reporting Information System ("eCRIS")¹⁴ These campaign finance disclosure statements contain information regarding contractor and lobbyist status as well as reporting of organization expenditures made on behalf of candidates for state and local office.¹⁵

Concerning the Citizens' Election Fund; Public Act 11-48, An Act Implementing Provisions of the Budget Concerning General Government.

⁹ The state contractor provisions in Connecticut's campaign finance law apply to state contractors, prospective state contractors, and principals of state contractors or prospective state contractors. These terms are defined in Connecticut General Statutes § 9-612(f)(1). For purposes of this letter, unless otherwise stated, when the term "state contractor" is used it refers to state contractors, prospective state contractors, and principals of state contractors or prospective state contractors. The term principal includes those holding certain positions such as president, treasurer, executive vice president, or chief executive officer, board members of a for-profit agency, owner of 5% or more, and officers or employees who have managerial or discretionary responsibilities with respect to the state contract. It includes the immediate family members of those people as well. CONN. GEN. STAT. § 9-612(f)(1)(F).

¹⁰ CONN. GEN. STAT. § 9-612(f)(2).

¹¹ CONN. GEN. STAT. § 9-610(e) & (g).

¹² CONN. GEN. STAT. § 9-612(a).

¹³ CONN. GEN. STAT. § 9-608(c)(3). So that the donor may accurately provide the certification, the law requires the committee receiving the contributions to provide definitions to help the contributor understand the meaning of the important terms such as "principal of a state contractor," "immediate family," "lobbyist," and "state contract." *Id.* This information must be included in *any* written solicitation by the party committee. *Id.*

¹⁴ See <http://seec.ct.gov/eCris/>; see also CONN. GEN. STAT. §§ 9-608, 9-675-77.

¹⁵ CONN. GEN. STAT. § 9-608(c)(1), (5), & (6).

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- Incumbents holding statewide and General Assembly office, and candidates for such offices, may not solicit contributions from state contractors on behalf of party committees.¹⁶
- State contractors may not solicit contributions from their employees or subcontractors on behalf of party committees.¹⁷
- State contractors found in violation of these provisions may have their contracts voided and be prohibited from entering into further state contracts for one year.¹⁸

Connecticut's pay-to-play laws do not simply ban known state contractors, they also provide the means to identify the contractors so that compliance is possible and they provide penalties for failing to follow the rules.

Moreover, these strong laws are the heart of the CEP, Connecticut's full public financing program. Under this voluntary clean money program, candidates may not accept money from state contractors of either branch and may only accept organization expenditures from their party committees (which also may not accept state contractor money). Practically speaking, organization expenditures are basically in-kind donations or things of value excluded from the definition of contribution that may be provided by party committees to state and local candidates.¹⁹ The state party may use unlimited funds raised under the Connecticut system to support CEP statewide candidates through organization expenditures.²⁰ Importantly, these funds include *zero* state contractor contributions. One of the four categories of organization expenditures is "party candidate listings" such as the sample mailer submitted to the Commission with the Request ("Malloy mailer").

Connecticut's pay-to-play laws and the CEP have been extraordinarily successful. One hundred percent of Connecticut's current statewide officials came to office with clean money and 84% of our sitting legislature has done the same.

I. The Malloy Mailer is not Federal Election Activity Triggering Application of Federal Law

The proposed ad itself is unremarkable for an ad supporting a single candidate running for a state office. It is double-sided with approximately 285 square inches of surface area, featuring nine photographs, all of Governor Malloy. There are 203 words and numbers. Included is the information in one corner of one side, taking up one square inch, with the poll hours and saying that a ride to the polls can be had by calling a provided number. That is, 92% of the words and numbers in the ad, all of the

¹⁶ CONN. GEN. STAT. § 9-612(f)(2)(3).

¹⁷ CONN. GEN. STAT. § 9-612(f)(2)(A).

¹⁸ CONN. GEN. STAT. § 9-612(f)(2)(C) & (D).

¹⁹ CONN. GEN. STAT. § 9-601(25).

²⁰ CONN. GEN. STAT. § 9-718.

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photographs, and 99.6% of the surface area of the ad are dedicated to the promotion of a state candidate, while the remaining .4% of space instructs people how to vote.

Federal statutes define “federal election activity” as including get-out-the-vote activity.²¹ Congress left it to the Commission to define what constitutes get-out-the-vote activity. The Commission has now clarified that “get-out-the-vote-activity” includes encouraging potential voters to vote; providing information about times when polling places are open, the location of particular polling places, early voting or voting by absentee ballot; and offering or arranging transportation to the polls.²² The regulations go on to provide, however, that “[a]ctivity is *not* get-out-the-vote activity solely because it includes a brief exhortation to vote, so long as the exhortation is incidental to a communication, activity, or event.”²³ This exception applies here.

Because the message regarding voting is indisputably brief and incidental in the Malloy mailings planned by the state party, the mailings are not get-out-the-vote activity as defined by current federal regulation. In its explanation of the rules, the Commission states that the exception “covers an exhortation made at the end of a speech at a rally, for example, as well as one appearing at the end of an email.”²⁴ In determining what is brief and incidental, the Commission clarified that the amount of activity determines whether it is covered:

For example, a speech . . . that devotes several minutes to providing listeners with information on how and where to vote would not qualify under the exception Instead, the exception is intended to ensure that communications that would not otherwise be GOTV activity do not become GOTV activity merely because they include a brief, incidental exhortation to vote.²⁵

The Commission provided two examples of brief and incidental exhortations in the regulations.²⁶ The state party seems to assume that these two examples are exclusive and that, if the Malloy mailing does not fall squarely within them, the exception cannot apply. This is not true. When the Commission meant to adopt a definitive list of that

²¹ 52 U.S.C. § 30101(20)(A)(ii).

²² 11 C.F.R. § 100.24(a)(3)(i).

²³ 11 C.F.R. § 100.24(a)(3)(ii) (emphasis added).

²⁴ Final Rules: Definition of Federal Election Activity, 75 Fed. Reg. 55257, 55264 (Sept. 10, 2010) (codified at 11 C.F.R. § 100).

²⁵ Id. The Commission explained the meaning of “brief” and “incidental” when commenting on an almost identical exception within the definition of voter registration activity. See 11 C.F.R. § 100.24(a)(2)(ii). It is not brief when “[e]xhortations . . . occupy a large amount of space in a mailer” Final Rules: Definition of Federal Election Activity, 75 Fed. Reg. at 55261. The Commission also supplied examples of when something is incidental to the communication: “a one-line exhortation . . . appearing at the end of a campaign flier would be incidental to the larger communication, whereas a communication stating only ‘Register to Vote by October 1st!’ and containing no other text would not be incidental” Final Rules: Definition of Federal Election Activity, 75 Fed. Reg. at 55261. Clearly, the amount of space or time devoted to the exhortation is the key consideration in determining whether something is incidental and brief.

²⁶ 11 C.F.R. 100.24 (a)(3)(ii)(A) & (B).

which qualified for an exception, it did so.²⁷ In contrast, with respect to the exception for brief and incidental exhortations, the Commission provided examples, not a definitive list. To interpret the regulations otherwise would lead to absurd results. Perhaps this is why the state party avoids an analysis of the law and instead asks the Commission not to determine whether or not the text regarding voting in the Malloy mailing is incidental, but to simply confirm that the mailer provides enough voting information to fall within the definition of federal activity.²⁸

The Commission has discretion to promulgate definitions that leave unaddressed gray areas of activity and to fill them in later through the advisory opinion process.²⁹ This is what the Commission did when it adopted the exception for “brief and incidental” exhortations. The Commission now needs to fill in the gray area by making a determination as to whether the exhortations that occupies less than one-half of one percent of the Malloy mailing are “brief” and “incidental.” They are.

II. The State Party Asks the Commission to Issue a Warning to the SEEC against Administering and Enforcing Connecticut Law Relating to Connecticut State Elections

The state party is essentially requesting that the Commission issue an advisory opinion stating that Connecticut may not bring an enforcement action against it for choosing to break Connecticut’s campaign finance laws by using state contractor money to pay for the portion of the Malloy mailer that is dedicated to promoting the success of a Connecticut publicly-financed candidate for Governor -- an activity that is expressly prohibited by Connecticut state law.

Like the SEEC, this Commission does not issue advisory opinions regarding the activities of third parties.³⁰ The advisory opinion process is designed to allow an actor to obtain a ruling from the regulating agency about how that actor will be regulated by that agency when the agency applies the laws under that agency’s jurisdiction to the actor in specific circumstances. Here, the state party is asking the Commission to declare that the SEEC may not enforce the state’s carefully tailored pay-to-play provisions with respect to the Malloy mailer. This is a request for an opinion regarding the actions not of the requesting party but instead regarding the actions of a state agency applying state law to the election of state candidates. The state party’s request is not appropriate and the Commission should not treat it as a valid request for an advisory opinion under 2 U.S.C. § 437f(a)(1) as interpreted by 11 C.F.R. § 112.1(b).

²⁷ See 11 C.F.R. 100.24(c)(7) and corresponding comments at Final Rules: Definition of Federal Election Activity, 75 Fed. Reg., at 55265 (“The Commission notes that this provision only covers *de minimis* costs associated with the enumerated activities.”).

²⁸ Request at 3.

²⁹ See *Shays v. Fed. Election Comm’n*, 528 F.3d 924, 931 (D.C. Cir. 2008).

³⁰ 11 C.F.R. § 112.1(b).

This effort by the state party is particularly troubling since the state party may comply with both federal and state law here even if the Commission declares that the exhortation to vote contained in the Malloy mailer is not brief and incidental. Levin funds are non-federal funds *raised in compliance with state laws* and having some additional federal restrictions on them.³¹ Just as the state party does not want the Commission to consider whether or not the exhortation in the Malloy mailer is incidental, it also explicitly states it does not want clarification regarding the scope and use of Levin funds, which by definition are compliant with Connecticut's pay-to-play laws, would be disclosed and could be monitored to determine that they are in fact compliant.³²

The state party's position is that the Commission should essentially declare that the state party's compliance with Connecticut's pay-to-play laws is voluntary. It implicitly recognizes the problems with this assertion when it states "it is worth noting that the [state party] has established a segregated federal account in which it deposits contributions from known contractors."³³ What the state party does not note is that absent compliance with all of Connecticut's well designed and comprehensive pay-to-play laws, it is impossible to know whether the money they are accepting and using is state contractor money forbidden by state law to be used in support of state candidates. If they were going to effectively remove state contractor funds, they would use Levin funds as allowed under federal law.

In this regard, it is important to note that the state party misrepresents the SEEC's position when it states that the SEEC has stated "communications that reference non-federal candidates must be paid exclusively from the party's non-federal account."³⁴ The SEEC regularly allows allocation of costs between benefiting candidates and/or parties.³⁵ The state party has chosen not to seek advice from the SEEC regarding how this could work. Nor, as it specifically states in footnote 7 of its Request, does it seek advice from this Commission as to how that could work.

Instead, the state party asks this Commission to issue an advisory opinion to a state agency that did not request it, declaring that that state agency may not apply Connecticut's campaign finance law to require allocation allowed by federal law to the Malloy mailer. It asks, in essence, for the Commission to declare that Connecticut's law – its pay-to-play provisions, its public financing program – is irrelevant. This the Commission should not do.

³¹ 11 C.F.R. § 300.2(i).

³² Request at 3 n.5.

³³ Request at 4 n.7.

³⁴ Request at 4.

³⁵ See Advisory Opinion 2010-08: *Allocating Pro Rata Share for Joint Campaign Events*; Declaratory Ruling 2011-03: *Candidate Committees and Joint Communications*.

III. Connecticut's Pay-to-Play Laws with Respect to State Candidates are not Preempted by Federal Law

If the Commission does decide to consider the state party's request for a preemption determination, it should find that the SEEC is not precluded from enforcing its pay-to-play laws with respect to the Malloy mailer and others like it. To do otherwise would be to eviscerate Connecticut's campaign finance law. At its core, the federal campaign finance preemption system was designed to prevent lax state laws from allowing funds prohibited by federal law into federal elections. At the time, federal law regarding contribution dollar and source limits was far stricter than most state laws. In the instant case, Connecticut's legislature carefully tailored a law in response to Connecticut's dark history of corruption and its appearance, and Connecticut's citizens have a genuine and legitimate interest in the regulation of the process by which their own state officials are elected.

In support of its effort to have the Commission give it permission not to follow Connecticut's pay-to-play laws with respect to the Malloy mailer, the state party cites two FEC advisory opinions from 14 and 21 years ago and declares them to be "indistinguishable." To the contrary, FEC Advisory Opinion 2000-24 addressed a state's attempt to regulate allocation of costs for generic voter drive and administrative costs such as utility bills and office supplies. FEC Advisory Opinion 1993-17 similarly addressed only allocation of administrative costs. In contrast, the Malloy mailer at issue here devotes 99.6% of its surface area to directly supporting a candidate seeking to be the Governor of Connecticut. Allocation of the Malloy mailer and the application of Connecticut's pay-to-play rules to a communication which devotes such a large portion to directly supporting a non-federal candidate and 0.4% to generic get-out-the-vote is certainly factually and legally distinguishable.

To the extent that Advisory Opinions 2000-24 and 1993-17 are similar, we urge the Commission to carefully consider the thoughtful dissents of Vice Chairman Trevor Potter and Commissioner Joan D. Aikens to Advisory Opinion 1993-17 and of Commissioner Mason to Advisory Opinion 2000-24. The Commission should not interpret the law to allow state party committees to assume the powers of the federal government at will, by giving the parties the discretion to invoke FEC regulations to preempt any state control which is stricter than federal law by simply adding few lines of small text noting when the polls are open and providing a phone number for a ride to the polls to a mailer devoted almost entirely to explicitly advocating for a gubernatorial candidate.

Substantial time has elapsed since those opinions on different provisions of FECA were issued. Much has changed. In the intervening time Connecticut has endured a parade of corruption scandals, affecting every level of state and local government. Connecticut's legislature has acted decisively to reform Connecticut's campaign finance laws with respect to the election of state and local officials. These comprehensive reforms have withstood multiple constitutional challenges. Candidates have participated

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in the clean money program. Connecticut citizens value the reforms and want them to remain intact.

On behalf of the State Elections Enforcement Commission, we respectfully request that the Commission does not allow the state party to cynically circumvent our state's carefully tailored pay-to-play state contractor provisions by glibly including a stray get-out-the-vote message in a communication that inarguably promotes a Connecticut candidate, and then contending that the inclusion of a minute phone number and the polling hours transforms the communication into federal election activity outside the jurisdiction of the SEEC. Connecticut's landmark campaign finance laws have been upheld by the federal courts,³⁶ and the SEEC urges the Commission to recognize the state's interest in administering and enforcing state election laws, in state elections, on behalf of the citizens of Connecticut.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/Michael J. Brandi
Michael J. Brandi
Executive Director & General Counsel
Connecticut SEEC

/s/Shannon Clark Kief
Shannon Clark Kief
Legal Program Director
Connecticut SEEC

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Copy to: Each Commissioner
Ms. Shawn Woodhead Werth, Secretary & Clerk of the Commission
Ms. Amy L. Rothstein, Assistant General Counsel

³⁶ *Green Party v. Garfield*, 616 F.3d 189 (2d Cir. 2010); *Green Party v. Garfield*, 616 F.3d 213 (2d Cir. 2010); *Democratic Governors Association v. Brandi*, 2014 WL 2589279 (D. Conn. June 10, 2014).