Advisory Opinion 2014-16
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10/21/2014 05:45 PM
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From: "Neil P. Reiff" <reiff@sandlerreiff.com>
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1 Attachment

SRYL051.pdf

Ms. Rothstein, this email is a follow up to our conversation earlier today regarding Advisory Opinion Request 2014-16 by the Connecticut Democratic State Central Committee ("CDSCC"). Please note the following:

1) Attached to this email is a letter that I sent to Michael Brandi, Executive Director and General Counsel of the Connecticut State Elections Enforcement Commission ("SEEC"). This letter was sent to Mr. Brandi via email and first class mail on April 3, 2014. As you can see this letter contradicts Mr. Brandi's assertions in his letter to the Commission on October 12, 2014, in which he states on page two that the CDSCC did not seek to engage its office subsequent to its issuance of Advisory Opinion 2014-01. In fact, I traveled to Hartford, CT on March 25, 2014, to meet, in person, along with state party staff and local counsel, to discuss the Opinion, and to better explain how federal law affected the application of various state laws. This meeting was actually one that had been scheduled for February 13, 2014, upon the request of CDSCC in January 2014. The Executive Director had reached out to Mr. Brandi at that point to be sure SEEC knew about and understood what CDSCC was doing to adhere to both the letter and spirit of federal and state law. Just two days prior this meeting scheduled to discuss the issues and inform both parties, SEEC held a special meeting and released Advisory Opinion 2014-01. The meeting on the 13th was postponed due to a snow storm. Despite the dropping of the Opinion, CDSCC rescheduled the meeting for March 25th, when all key participants could be present. At the rescheduled meeting, I would characterize SEEC's staff as generally unwilling to consider and explore my representations of the operation of federal law. The attached letter was sent to Mr. Brandi as a follow up to that meeting. My letter intended to lay out how federal law operated with respect to CDSCC activities, and the letter concluded with a specific request that Mr. Brandi and his office provide additional guidance as to his office's views on several proposed communications, including the scenario addressed in this request. Mr. Brandi never acknowledged or otherwise responded to my letter.

2) Much has been made in comments on our initial request as to the size or prominence of voting information and information about rides to the polls provided in the Exhibit attached to our request. The CDSCC did not, and does not believe that the size or proportion of space used to

disseminate voting information and poll ride information was relevant to the disposition of its Advisory Opinion Request. To be sure, the prominence and fonts used to provide this information may vary and the prominence of the presentation in the attached Exhibit should not be interpreted as the only way that such information will be presented in CDSCC mailings. Once again, we do not believe that the prominence or size of the information is relevant to the disposition of any Commission response of the questions presented by the CDSCC.

3) We note that Question 2 of our Request provided a very specific allocation ratio that only applies to the 2014 election cycle. Since the request asks for clarification for mailings for both the 2014 and future cycles, the CDSCC proposes to modify question 2 as follows:

> If the answer to Question 1 is Yes, may the CDSCC pay for the mailing, at its own discretion, either entirely with Federal funds, or with a combination of Federal and Levin funds, at a ratio of its own choosing so long as the share of Levin funds does not exceed the maximum percentage permitted by 11 C.F.R. § 300.33(b) for the applicable election cycle?

4) The CDSCC hereby withdraws its request that the Commission consider this matter on an expedited basis.

If you have any questions regarding the above, please let me know.

Neil P. Reiff

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April 3, 2014

Mr. Michael J. Brandi
Executive Director and General Counsel
State Election Enforcement Commission
20 Trinity Street
Hartford, CT 06106-1628

Dear Michael:

Thank you for taking the time to meet with my clients and me last week. We hope that the conversation provided a comprehensible and constructive framework for you to understand our situation regarding federal law. To that end, as a courtesy to your office, I am providing to you herewith, a concise summary, including citations, of the relevant provisions of federal law related to the party's efforts on behalf of federal and statewide candidates. Please note that this is intended solely as a summary of federal law and should not be construed as any indication of any actual planned activities of the Connecticut Democratic State Central Committee ("CDP").

This letter will summarize, as concisely as possible, the major federal rules that regulate any state party organization in the United States to engage in operating and candidate specific activities on behalf of their candidates. Since the limitations on the amounts that may or may not be spent on behalf of federal candidates by a party committee were not raised during our meeting, I will only address the types of funds that are used in connection with federal activities. If you would like me to include that information as well, I can address in a separate document, but for the sake of brevity, I will not include that information in this letter.

Contributions

Contributions to the federal account of a state party committee are regulated as follows:

Individuals, partnerships, unincorporated sole proprietors and certain Limited Liability Corporations may contribute up to $10,000 per calendar year to the federal account of a state party committee. 2 U.S.C. § 441a(a)(1)(D).[1]

[1] Federal law included aggregate limits on the amount an individual could contribute to candidates, party committees and PACs. As I am sure you know, those aggregate limits were found unconstitutional by the United States Supreme Court this week in McCutheon v. FEC.

Political Committees who have achieved multi-candidate status may contribute up to $5,000 to the federal account of a state party committee. 2 U.S.C. § 441a(a)(2)(C). Any political committee that has not achieved multi-candidate status may contribute up to $10,000 per calendar year to the state party.

Party committees, including national party committees and the federal accounts of other state and local party committees may transfer funds without limit to each other. 2 U.S.C. § 441a(a)(4).

Federal candidates may transfer funds without limit to the federal account of a state or local party committee. 2 U.S.C. § 439a(a)(4).

The federal account of a party committee may not accept any contributions from the treasuries of any corporation or labor union (2 U.S.C. § 441b), any federal contractor (2 U.S.C. § 441c), or any foreign national (2 U.S.C. § 441e).

While not germane to the federal account, I would also note that federal candidates and officeholders may not solicit contributions to the non-federal account of a political party unless they are consistent with the federal prohibitions and limitations. 2 U.S.C. § 441i(e)(1).

Operating Costs

Ordinary administrative costs of a party committee are strictly regulated by federal law. Although federal law permits non-federal money to be used to pay for ordinary operating costs, the payment for such expenses must initially be made from a federal account. 11 C.F.R. § 106.7(f). The FEC then allows a party committee up to 60 days to recoup up to a certain percentage of the administrative expense from its non-federal account. 11 C.F.R. § 106.7(f)(2). The amount of non-federal funds that may be recouped is limited based upon whether it is a presidential or non-presidential cycle and whether the state has a Senate race in that cycle. 11 C.F.R. § 106.7(d)(2). For the current cycle, the CDP may recoup up to 85% of any operating cost paid for by the federal account. It should be noted that the FEC has ruled that the recoupment of these non-federal funds is optional and a state may not force a state party to recoup the non-federal share of these operating expenses. See FEC Advisory Opinions 1993-17 and 2000-24.

Payroll Expenditures

The payment of payroll expenses, including taxes and benefits, are dependent on whether the employee spends more than 25% of their given time in a calendar month on federal elections and/or "federal election activities" which is a separately defined term, which will be described below. If an employee spends more than 25% of their time in a given month on these activities they must be paid exclusively with federal funds. 2 U.S.C. § 431(20)(iv). If an employee spends 25% or less of their time on federal elections or federal election activities, they may either be paid exclusively with federal funds or the party may recoup up to 85% of their salaries and benefits in the same manner as described above. 11 C.F.R. § 106.7(d)(ii). Employees who do not spend any time in a given month on federal elections or federal election activities may be paid exclusively with non-federal funds. 11 C.F.R. § 106.7(d)(iii). The initial rules promulgated

after the BCRA permitted state party committees to pay the salaries and benefits of party employees who worked less than 25% of their time on federal elections and federal election activities exclusively with non-federal funds. The Commission was required to change this rule after being sued by reform groups. See Shays v. FEC, 337 F.Supp 3d (D.D.C. 2004), *aff'd* 414 F.3d 76 (D.C. Cir 2005) (*Shays I*); 70 Fed. Reg. 75379 (December 20, 2005).

Federal Election Activities

As part of the Bipartisan Campaign Act of 2002 ("BCRA"), Congress federalized much of the activities undertaken by state and local party committees. In addition to the payroll rule described above (which is a type of Federal Election Activity), Congress created five additional categories of Federal Election Activity. Each one has their own temporal application and definition. The purpose of these provisions was not to regulate when and how a party committee can support a candidate but rather, whether the activity must be funded exclusively or in-part with federal, non-federal or Levin funds (which is a form of non-federal funds which will be explained below).

1) Public Communication that "promotes, supports, attacks or opposes" a federal candidate

Any public communication (a term defined at 2 U.S.C. § 431(22)) that "promotes, supports, attacks, or opposes" a federal candidate must be paid for exclusively with federal funds, even if that communication also references any state or local candidate. Public communication includes TV, radio, newspapers, billboards, mass mailings, phone banks, internet ads placed for a fee and any other form of general public political advertising (not a defined term). 11 C.F.R. § 100.26.

2) Levin Activities

The initial draft of the BCRA also purported to require that state and local party committees pay for certain grassroots activities exclusively with federal funds. The final BCRA was amended to allow state and local parties to allocate the costs of four categories of activities between federal and Levin funds with several conditions.

Levin Funds – If one of the four "Levin Activities" described below is triggered, a state or local party committee may either pay the expense entirely with federal funds, or they may (this is not required) recoup up to the non-federal share of the activity with Levin funds. 2 U.S.C. § 441i(b)(2); 11 C.F.R. § 300.31. Essentially, the state party can create Levin Funds which is up to $10,000 per calendar year from any non-federal donor. There are several conditions to the creation of Levin Funds, including i) it cannot be solicited by a federal candidate or officeholder (11 C.F.R § 300.31(e)(2)); ii) it cannot be solicited by any other national, state or local party committee (2 U.S.C. § 441i(b)(2)(iv)(I); 300.31(e)(1)); and iii) it cannot be raised using joint fundraising programs (11 C.F.R. § 300.31(f)). In addition, the federal share of an expense that has been paid for with a combination of federal and Levin funds may not be paid for with funds transferred by another party committee. 2 U.S.C. § 441i(b)(2)(B)(iv); 11 C.F.R. § 300.31(e)(1). Finally, it should also be noted that non-federal funds may not be designated as Levin

funds if the costs of raising those funds were not paid for from Federal or Levin funds. 2 U.S.C. § 441i(c).

Levin Activities – As explained above, Congress initially intended to federalize all grassroots get-out-the-vote activity. However, under a compromise brokered by Senator Carl Levin from Michigan, the Levin Amendment, allowed for the creation of Levin funds described above that could be used for the following four categories of activities (in lieu of a detailed explanation of each category, I have attached the relevant pages from the Federal Election Commission's Party Guide which describes each of these activities in further detail. It should be noted that each of these activities have a specific regulatory definition that is not necessarily the same as a normal lay understanding of these terms:

Voter Registration – This covers all voter registration activity undertaken within 120 days of any regularly scheduled election. 2 U.S.C. § 431(20)(A)(i); 11 C.F.R. § 100.24(a)(2).

Voter Identification, generic campaign activity and get-out-the-vote – the windows for these activities begin in the last day of ballot qualification for the primary election and end on the date of the general election.

The definition of voter identification includes any voter file updates undertaken within the window described above. 11 C.F.R. § 100.24(a)(4).

The definition of generic campaign activity is any public communication that promotes or opposes a political party but does not promote or oppose a clearly identified federal or non-federal candidate. 11 C.F.R. § 100.25.

The definitions of voter registration and get-out-the vote encompass virtually all exhortations or encouraging a person to vote or register to vote except those communications that are "brief and incidental." This term has not been further defined by the Commission. However, it is understood that a communication must contain a substantial amount of content in order to balance out any exhortation to vote or register to vote in order to fall outside of the scope of the regulation. In addition, any communication that provides information on how or where to vote or register to vote will qualify as a federal election activity regardless of whether an exhortation to vote is "brief and incidental." 11 C.F.R. §§ 100.24(a)(2) & (3). The current definition of voter registration and get-out-the-vote was significantly expanded in a recent rulemaking that was required by a lawsuit from reform groups that argued that the FEC's initial definition promulgated after the BCRA was too narrow. See Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008) (*Shays III*) and 75 Fed. Reg. 55257 (September 10, 2010).

It should be noted that there are certain circumstances where a Levin activity MUST be paid for exclusively with federal funds. These include:

1) If the communication references any federal candidate, regardless of whether it promotes, supports, attacks or opposes that federal candidate. 2 U.S.C. § 441i(b)(2)(B)(i); or

2) The communication is disseminated via broadcast media and is not exclusively for a non-federal candidate. (i.e. Vote Democratic TV or radio ad or any ad that generally encourages listeners to vote must be paid exclusively with federal funds). 2 U.S.C. § 441i(b)(2)(B)(ii).

There are several activities which are exempt from the definition of Federal Election Activity (activities undertaken under these exemptions may be paid for exclusively with non-federal funds):

1) Any public communication that refers solely to a clearly identified candidate and does not Promote, support, attack or oppose a federal candidate AND is not otherwise a voter registration, voter identification or get-out-the-vote activity (the redefinition of GOTV has largely narrowed this rule). 2 U.S.C. § 431(20)(B)(i);
2) A contribution to a state or local candidate provided that it is NOT designated for a federal election activity. 2 U.S.C. § 431(20)(B)(ii);
3) The costs of a state or local political party convention, conference or meeting. 2 U.S.C. § 431(20)(B)(iii); 11 C.F.R. § 100.24(c)(3); and
4) The costs of grassroots campaign materials that only name or depict state or local candidates, including buttons, bumper stickers, yard signs, handbills, brochures and posters). 2 U.S.C. § 431(20)(B)(iv); 11 C.F.R. § 100.24(c)(4).

Again, while taking into account that the conclusions below should not be construed as any indication of any actual planned activities by the Connecticut Democratic State Central Committee, what does this mean as a practical matter for communications disseminated by the CDP?

1) To the extent that any of its communications meet the definition of federal activity, all or a portion of the activity must be paid for initially from a federal account. In many cases, the CDP may be able to transfer up to 85% of the cost of the communication from a Levin Fund. In many cases, including any communication that references a federal candidate, the communication must be paid for exclusively with federal funds.
2) Any public communication that references only state and local candidates AND qualifies as a federal election activity as described above MUST be paid for from a federal account and *may* be allocated between federal (no less than 15%) and Levin Funds (no more than 85%), but the state party cannot be forced to allocate by the state.
3) Grassroots materials that only mention state and local candidates can be paid for exclusively with non-federal funds even if those materials would otherwise qualify as a federal election activity. However, it is quite plausible that, to the extent that paid staff is used to distribute those materials, and the activities undertaken by those employees trigger one of the federal election activities rules, the employee would have to be paid exclusively with federal funds.
4) Any public communication (such as a mailing) that provides information on where or how to vote or register to vote will qualify as a federal election activity, even if it only mentions state and local candidates.

5) A short TV or radio ad that only mentions state or local candidates where any exhortation to vote could not be considered "brief and incidental" will qualify as a federal election activity.

I hope this "short" summary of federal law is helpful. Of course there are many issues not discussed here but I have tried to summarize those that are most relevant to our current federal account quandaries. Of course, if you have any question about the information presented here or any other questions about federal law, do not hesitate to ask.

Sincerely,

Neil Reiff