



700 Thirteenth Street, N.W., Suite 600

Washington, D.C. 20005-3960

PHONE: 202.654.6200

FAX: 202.654.6211

www.perkinscoie.com

Marc Erik Elias
PHONE: (202) 434-1609
FAX: (202) 654-9126
EMAIL: MElias@perkinscoie.com

October 9, 2013

State Elections Enforcement Commission
Attn: Legal Unit—Compliance
20 Trinity Street—5th Floor
Hartford, CT 06106

Re: Request for a Declaratory Ruling

To Whom It May Concern:

We write to request a declaratory ruling regarding the State Elections Enforcement Commission's (the "Commission") interpretation of Connecticut Public Act No. 13-180 ("Act No. 13-180") as applied to several of our clients' contemplated activities. We seek to confirm the following:

1. That organizations exempt from taxation under section 527 of the Internal Revenue Code ("section 527 organizations") whose only election-influencing activity in Connecticut is the making of independent expenditures are not required to register as "political committees" and, as a result, may accept unlimited "covered transfers" from individuals, corporations, and labor unions. These would include:
 - a. An organization whose major purpose is something other than making independent expenditures to influence Connecticut elections and does not accept donations earmarked to make such independent expenditures ("Organization 1").
 - b. An organization whose major purpose is something other than making independent expenditures to influence Connecticut elections but does accept donations earmarked to make such independent expenditures ("Organization 2").
 - c. An organization whose major purpose is the making of independent expenditures to influence Connecticut elections ("Organization 3").

2. That a person does not “obligate to make” independent expenditures, for purposes of Act No. 13-180 § 8(a) or Conn. Gen. Stat. Ann. § 9-601c(c), until that person incurs a legal obligation to pay for the creation, production, or distribution of an independent expenditure.
3. That a candidate’s non-earmarked fundraising activity for an entity that makes “covered transfers” is not a basis to find coordination between the candidate and the entity receiving such covered transfers.

I. Factual Background

We represent several organizations organized under section 527 of the Internal Revenue Code that intend to accept contributions without limit from individuals, corporations, labor unions, and other section 527 organizations, and spend these funds on independent expenditures in connection with Connecticut state elections in 2014. None of these organizations has a major purpose of making expenditures to influence Connecticut elections.

Our clients would like the flexibility to operate in one of three ways. *First*, some clients may wish to operate like Organization #1 (see above), by using general treasury funds to make independent expenditures in Connecticut. *Second*, some clients may wish to operate like Organization #2, by soliciting funds specifically for use on independent expenditures in Connecticut and spending the funds accordingly. *Third*, some clients may wish to join together with like-minded organizations to form a new entity, whose major purpose is the making of independent expenditures in Connecticut (Organization #3).

These organizations would not make contributions to, or coordinated expenditures with, candidates or political party committees in connection with Connecticut state elections (or to political committees that make contributions to such candidates or committees), nor would their expenditures be made in concert, coordination, or consultation with a candidate, candidate’s agent, candidate committee, or party committee. *See* Conn. Gen. Stat. Ann. § 9-601c(a). Their only activity to influence elections in Connecticut would be the making of independent expenditures. When these organizations make or become obligated to make independent expenditures, they would file reports in accordance with Act No. 13-180 § 8.

II. Legal Analysis

A. Request 1

We request a declaratory ruling that Organizations 1, 2 and 3 (as defined above) would be permitted to accept unlimited “covered transfers,” as defined under Connecticut law and would not be required to register or report as “political committees.”

1. *Public Act No. 13-180*

Act No. 13-180 established a new regulatory scheme to govern persons that make independent expenditures.

First, Act No. 13-180 clarified that “[a]ny person, as defined in section 9-601 of the general statutes, as amended by this act, may, unless otherwise restricted or prohibited by law, including, but not limited to, any provision of chapter 155 or 157 of the general statutes, *make unlimited independent expenditures*, as defined in section 9-601c of the general statutes, as amended by this act, and *accept unlimited covered transfers*, as defined in said section 9-601.” Act No. 13-180 § 8(a) (emphasis added). The term “covered transfer” means “any donation, transfer or payment of funds by a person to another person if the person receiving the donation, transfer or payment makes independent expenditures or transfers funds to another person who makes independent expenditures.” Conn. Gen. Stat. Ann. § 9-601(29)(A). Act No. 13-180 also amended the definition of “entity” to include “any tax-exempt political organization organized under Section 527 of [the Internal Revenue] code,” clarifying that such organizations may make unlimited independent expenditures and accept unlimited covered transfers, unless otherwise prohibited by law. *Id.* § 9-601(19).

Second, Act No. 13-180 created a new reporting regime for persons making independent expenditures. Unlike political committees, persons that make independent expenditures are not required to register with the Commission. Conn. Gen. Stat. Ann. § 9-602(a) (“[N]o contributions may be made, solicited or received and no expenditures, *other than independent expenditures*, may be made, directly or indirectly, in aid of or in opposition to the candidacy for nomination or election of any individual or any party” prior to registration) (emphasis added). Persons incur a reporting obligation only when they “make[] or obligate[] to make an independent expenditure or expenditures” in certain races. Act No. 13-180 § 8(a). This differs from political committees, which incur a reporting obligation when they receive “contributions.” *See* Conn. Gen. Stat. Ann. § 9-602. As part of their reporting obligations, persons who make independent expenditures must disclose certain covered transfers that they receive, unless the transfers are otherwise disclosed to the Federal Election Commission or the Internal Revenue Service. Act No. 13-180 § 8(f).

When he signed Act No. 13-180, Governor Malloy indicated that it had two purposes. The first was to bring Connecticut law in line with the Supreme Court’s decision in *Citizens United* and subsequent cases, which held that states may generally not restrict the source or amount of funds used to finance independent expenditures. The second was to ensure that the sources of such funding were publicly disclosed. *See* Statement of Governor Malloy on Signing Campaign Finance Legislation (June 19, 2013) (“Faced with that tragic decision [in *Citizens United*], which is now the law of the land, we can at least shine a light on the sources of private money in politics. The bill I’m signing today requires a level of disclosure that few if any other states

is now the law of the land, we can at least shine a light on the sources of private money in politics. The bill I'm signing today requires a level of disclosure that few if any other states require.”).

2. *Applying Public Act No. 13-180 to IE-only entities*

Organizations 1, 2, and 3 would operate as independent expenditure-only entities (“IE-only entities”). Act No. 13-180 allows IE-only entities to accept unlimited covered transfers and make unlimited independent expenditures, unless otherwise prohibited by law. Nothing in chapters 155 or 157 of the general statutes, or any other provision in Connecticut law, purports to restrict IE-only entities from accepting unlimited covered transfers or making unlimited independent expenditures. Accordingly, the plain language of the statute suggests that Organizations 1, 2, and 3 may accept unlimited covered transfers and make unlimited independent expenditures.

However, the Commission’s staff informed us by telephone of its view that the phrase “unless otherwise restricted or prohibited by law, including, but not limited to, any provision of chapter 155 or 157 of the general statutes” in section 8(a) of the new law injects ambiguity into what would otherwise be a clear statutory directive. As we understand it, the staff believes that this phrase may allow the Commission to regulate IE-only entities as “political committees” and thereby restrict the source and amount of covered transfers that they receive.¹

Basic canons of statutory construction counsel against reading the statute to allow the Commission to regulate IE-only entities as political committees. “It is a well-settled principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling.” *Charlton Press, Inc. v. Sullivan*, 214 A.2d 354, 357 (Conn. 1965) (internal citation and quotation marks omitted). Section 8(a) of the new act deals specifically with the ability of persons to accept

¹ Even this reading would not authorize the Commission to regulate Organizations 1 or 2 as “political committees” or limit their covered transfers. A “political committee” is a type of “committee”; to be a “political committee,” one must first meet the definition of “committee.” Conn. Gen. Stat. Ann. § 9-601(1). A “committee,” in turn, is defined to mean a “party committee, political committee or a candidate committee *organized*, as the case may be, for a single primary, election or referendum, or for ongoing political activities, to aid or promote the success or defeat of any political party, any one or more candidates for public office” *Id.* (emphasis added). As national groups, Organizations 1 and 2 are not “organized” to influence Connecticut elections and therefore do not meet the definition of “committee.” An interpretation that defined every section 527 organization that made independent expenditures as a “political committee” would directly conflict with Act No. 13-180, which expressly contemplates that entities other than committees will make independent expenditures, *see id.* § 9-601c(c), and defines “entity” to include “any tax-exempt political organization organized under Section 527 of [the Internal Revenue Code].” *Id.* § 9-601(19). Such a definition would also directly conflict with Supreme Court precedent. *See Buckley v. Valeo*, 424 U.S. 1, 79 (1976) (holding that in order to constitutionally regulate an entity, that entity must have as its “major purpose” “the nomination or election of a candidate.”).

unlimited covered transfers and make unlimited independent expenditures; section 9-601, on the other hand, is a general provision that does not speak directly to the issue. Where the two are in conflict, the specific provision, which authorizes IE-only entities to make unlimited independent expenditures and accept unlimited covered transfers, trumps the more general one. Likewise, “[w]hen two legislative enactments are in conflict and cannot reasonably be reconciled, the later one repeals the earlier one to the extent of the repugnance.” *Pizzola v. Planning and Zoning Comm’n of Town of Plainville*, 355 A.2d 21, 24 (Conn. 1974). See also *Tomlinson v. Tomlinson*, 46 A.3d 112, 121 (Conn. 2012) (citing *State ex rel. State v. Reidy*, 209 A.2d 674, 677 (Conn. 1965)). Section 8(a) of Act No. 13-180 was enacted after section 9-601 of the general statutes; to the extent they conflict, the more recently enacted provision trumps the older one.

Interpreting the statute to restrict the source and amount of covered transfers to an IE-only entity would also raise serious constitutional concerns under *Citizens United* and subsequent cases. The Connecticut Supreme Court has opined that it is a “fundamental principle of statutory interpretation that dictates that we read legislation to avoid, rather than raise, constitutional challenges.” *Ramos v. Town of Vernon*, 761 A.2d 705, 717 (Conn. 2000). “[I]t is well understood that when there are two reasonable constructions for a statute, yet one raises a constitutional question, the court should prefer the interpretation which avoids the constitutional issue.” *Cambodian Buddhist Soc. of Connecticut, Inc. v. Planning & Zoning Comm’n of Town of Newtown*, 941 A.2d 868, 886 (Conn. 2008), (quoting *Legal Services Corp. v. Velazquez*, 121 S.Ct. 1043, 1050 (2001)). That is particularly apt in this case, in which the legislation was specifically designed to address the constitutional infirmity of the prior law.

In 2010, the U.S. Supreme Court issued its decision in *Citizens United v. FEC*, striking down a federal law banning independent electoral and issue advocacy sponsored by corporations. *Citizens United v. FEC*, 130 S.Ct. 876 (2010). The Court reasoned that “independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption” and, accordingly, the government lacked a compelling basis to bar particular speakers from sponsoring them. *Citizens United*, 130 S.Ct. at 909. Two months later, the U.S. Court of Appeals for the District of Columbia Circuit concluded in a unanimous en banc decision that, in light of *Citizens United*, “the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.” *Speechnow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) (en banc). As a result, “the limits on contributions to [such organizations] cannot stand.” *Id.* Shortly thereafter, the Ninth Circuit Court of Appeals barred enforcement of a municipal law prohibiting corporations and labor unions from making contributions to IE-only entities. *Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011). Other federal circuits have followed suit. See *Wis. Right to Life State Political Action Comm. v. Barland*, 664 F.3d 139 (7th Cir. 2011); *Long Beach Area Chamber of Commerce v. City of Long Beach*, 603 F.3d 684 (9th Cir. 2010); *N.C. Right to Life v. Leake*, 525 F.3d 274 (4th Cir. 2008).

The Federal Election Commission (“FEC”) reacted swiftly to the *Citizens United* and *Speechnow.org* decisions, recognizing that it could no longer impose restrictions on the contributions received by IE-only entities:

Following *Citizens United* and *SpeechNow*, corporations, labor organizations, and political committees may make unlimited independent expenditures from their own funds, and individuals may pool unlimited funds in an independent expenditure-only political committee. It necessarily follows that corporations, labor organizations and political committees also may make unlimited contributions to organizations such as the Committee that make only independent expenditures.

FEC Adv. Op. 2010-11 at 3 (Commonsense Ten) (footnote omitted). *See also* FEC Adv. Op. 2010-09 (Club for Growth).

Many state regulators subsequently announced that they would no longer enforce state source restrictions or contribution limits against IE-only entities. In Wisconsin, a state that generally prohibits corporations and labor unions from making political contributions, the Government Accountability Board enacted an emergency rule allowing IE-only entities to raise unlimited contributions from individuals, unions, and corporations. *See* Wis. Adm. Code § GAB 1.91.² In Massachusetts, which also generally bars corporate contributions and sharply limits the amounts that other sources may contribute, the Office of Campaign and Political Finance issued new regulations allowing “independent expenditure PACs”—defined as PACs “that only receive[] donations to make independent expenditures, and only make[] independent expenditures”—to “receive donations from individuals without limit, and from corporations and other entities that are otherwise prohibited from contributing to PACs.” 970 Mass. Code Regs. 2.17(3). Reflecting the broad consensus among state regulators, the Kentucky Registry of Election Finance concluded last year that “the First Amendment prevents the government from applying contribution limits to a political committee that makes independent expenditures only,” notwithstanding the state’s general prohibition on corporate contributions. Ky. Registry of Election Fin. Adv. Op. 2012-005, at 2 (Kentucky Family Values) (Aug. 17, 2012).

A handful of state regulators initially refused to abide by *Citizens United* and *Speechnow.org*. In May 2010, Michigan’s Secretary of State issued a declaratory ruling in which she acknowledged that *Citizens United* prevented her from enforcing the state law prohibiting “independent expenditures by corporations, labor organizations, and domestic sovereigns,” but ruled that she could prohibit IE-only entities from receiving contributions from corporations or labor unions to

² *See also* Press Release, Wis. Gov’t Accountability Bd., G.A.B. Announces Emergency Rule on Independent Political Ads (May 20, 2010), available at http://gab.wi.gov/sites/default/files/news/nr_gab_emergency_rule_05_20_10_pdf_34804.pdf.

finance independent expenditures. Letter from Secretary of State Terri Lynn Land to Robert S. LaBrant, Senior Vice President Michigan Chamber of Commerce (May 21, 2010).³ However, a federal district court quickly enjoined the Secretary from enforcing this ruling, finding that “if the State of Michigan has no constitutional authority to restrict the proposed independent expenditures when done or funded by one entity or person alone, it does not somehow magically acquire authority to restrict those expenditures merely because the spender joins together with other entities which also have the right to make or fund such expenditures.” *Michigan Chamber of Commerce v. Land*, 725 F. Supp. 2d 665, 693 (W.D. Mich. 2010). The Secretary was forced to rescind the ruling.

Courts in many other jurisdictions have struck down contribution limits and source restrictions as applied to IE-only entities, citing *Citizens United*, *Speechnow.org*, and their progeny. See, e.g., *Stay the Course W. Virginia v. Tennant*, No. 1:12-cv-01658, 2012 WL 3263623 (S.D.W. Va. Aug. 9, 2012); *Lair v. Murry*, 871 F. Supp. 2d 1058 (D. Mont. 2012); *Yamada v. Weaver*, 872 F. Supp. 2d 1023 (D. Haw. 2012); *Personal PAC v. McGuffage*, 858 F. Supp. 2d 963 (N.D. Ill. 2012); *Republican Party of New Mexico v. King*, 850 F. Supp. 2d 1206 (D.N.M. 2012). To date, no court has upheld a restriction on contributions to IE-only entities since *Citizens United*.⁴

Recent events in New Jersey are particularly instructive. New Jersey law prohibits political committees from accepting more than \$7,200 from each individual, labor union, or corporation per election. N.J.A.C. § 19:44A-11.5. Our client, the Fund for Jobs, Growth, & Security (the “Fund”), filed an advisory opinion request to confirm that, as an IE-only entity, it could solicit and accept unlimited contributions from individuals, corporations and unions to finance its independent expenditure program. Notwithstanding its stated misgivings about the law’s constitutionality as applied to the Fund, the New Jersey Election Law Enforcement Commission (“ELEC”) issued an advisory opinion on March 19, 2013, concluding that the Fund would have to abide by the \$7,200 contribution limit because it had a “major purpose” of influencing New Jersey elections. See ELEC Adv. Op. No. 01-2013 (March 19, 2013) (Fund for Jobs).

In response, the Fund filed a lawsuit in federal district court on April 5, 2013, seeking to enjoin enforcement of New Jersey’s contribution limits as applied to its activities. *Fund for Jobs, Growth, & Security v. New Jersey Election Law Enforcement Commission*, Civil Action No. 3:13-CV-02177-MAS-LHG (D.N.J.). The lawsuit contended that *Citizens United* and its

³ Available at http://www.michigan.gov/documents/sos/Labrant_Final_Response_5-21-2010_322021_7.pdf.

⁴ In *Vermont Right to Life Comm., Inc. v. Sorrell*, 875 F. Supp. 2d 376 (D. Vt. 2012), appeal docketed, No. 12-2904 (2d Cir. July 23, 2012), a federal district court in Vermont held that an organization that purported to be an IE-only entity, but did not clearly segregate its accounts from those of an affiliated organization that made contributions, could be subject to limits on incoming contributions. But, in the same opinion, the court emphasized that “the full weight of authority lines up against regulating contributions to independent-expenditure-only groups” and “reiterate[d] that the State has not offered a persuasive basis on which to limit contributions to PACs that only make independent expenditures.” *Id.* 875 F. Supp. at 403, 410.

progeny barred ELEC from limiting contributions to an IE-only entity. *See* Plaintiff's Mem. of Law in Supp. of Order to Show Cause for Prelim. Injunctive Relief at 16, *Fund for Jobs, Growth, & Security v. New Jersey Election Law Enforcement Commission*, Civil Action No. 3:13-CV-02177-MAS-LHG (D.N.J. April 5, 2013). Recognizing that its position was indefensible, ELEC did not contest the Fund's motion for a preliminary injunction. With ELEC's consent, the Fund obtained a preliminary injunction on April 26, 2013, which prevented ELEC from imposing contribution limits on the Fund while the case was pending. Prelim. Inj. Order, *Fund for Jobs, Growth, & Security v. New Jersey Election Law Enforcement Commission*, Civil Action No. 3:13-CV-02177-MAS-LHG (D.N.J. April 26, 2013). On July 11, 2013, the Fund obtained a consent order permanently enjoining ELEC from enforcing any contribution limits so long as the Fund did not make contributions to, or coordinated expenditures on behalf of, candidates or political party committees. Consent Order for Permanent Inj., *Fund for Jobs, Growth, & Security v. New Jersey Election Law Enforcement Commission*, Civil Action No. 3:13-CV-02177-MAS-LHG (D. N.J. July 11, 2013). As part of the consent order, ELEC was forced to withdraw its March 19 advisory opinion.

We recognize that the Second Circuit has not had the opportunity to join its sister circuits in finding that IE-only entities enjoy a First Amendment right to accept donations without limit. Nor are we asking the Commission to opine directly on the constitutional question. But when "there are two reasonable constructions for a statute, yet one raises a constitutional question," the Commission "should prefer the interpretation which avoids the constitutional issue." *Cambodian Buddhist Soc. of Connecticut, Inc.*, 941 A.2d at 886. The construction that we ask the Commission to adopt is not only reasonable; it faithfully executes the legislature's intent. In fact, Connecticut's own Office of Legislative Research concluded that Act No. 13-180 allows IE-only entities to accept unlimited covered transfers. *See* Conn. Bill Analysis, 2013 H.B. 6580, Office of Legislative Research (June 4, 2013) ("Under the bill, committees that will make only IEs do not have to register, or be registered, with SEEC, and may accept unlimited covered transfers.").

Act No. 13-180 created a separate and distinct regulatory scheme for IE-only entities, such as Organizations 1, 2, and 3. By allowing IE-only entities to accept unlimited covered transfers and make unlimited independent expenditures, the scheme comports with *Citizens United* and subsequent cases. And by requiring IE-only entities to disclose their spending and sources of funding, the scheme provides more transparency than nearly any other state in the country. Faced with the choice between implementing this constitutionally permissible scheme or reading the statute in a way that raises severe constitutional concerns, the Commission should declare that IE-only entities—such as Organizations 1, 2, and 3—may accept unlimited covered transfers, make unlimited independent expenditures, and satisfy their reporting obligations by complying with section 8(a) of the new law.

B. Request 2

We also seek confirmation that a person making independent expenditures does not incur a filing obligation under section 8 of the new law until it incurs a legal obligation to pay for the creation, production, or distribution of an independent expenditure.

Connecticut law requires that “any such person who *makes or obligates to make* an independent expenditure or expenditures in excess of one thousand dollars, in the aggregate, shall file statements” Act No. 13-180 § 8(a) (emphasis added). A person who “*makes or obligates to make* independent expenditures” that exceed \$1,000 in the aggregate during a primary or general election campaign, regarding a candidate for statewide office, state senator or state representative must file reports “not later than twenty-four hours after (1) *making any such payment*, or (2) *obligating to make any such payment*, with respect to the primary or election.” *Id.* § 8(b) (emphasis added).

The event that triggers a reporting obligation is “making or obligating to make” an independent expenditure. The term “obligate” is not defined in the statute. But the dictionary definition of “obligate”—to (1) bind legally or morally; or (2) to commit (as funds) to meet an obligation—is consistent with requiring a filing only after a person incurs a legal obligation to pay for the creation, production, or distribution of an independent expenditure. *See Merriam-Webster’s Collegiate Dictionary* (11th ed. 2003). In the absence of a statutory definition, giving the term its regular meaning is appropriate.

This approach also makes practical sense in the context of the statute. In some circumstances, the statute requires reporting within 24 hours after a person obligates to make an independent expenditure. *See Act No. 13-180 § 8(b)*. A person cannot file an accurate report of its independent expenditure activity, however, unless the person has already contracted for the expenditure that is disclosed in the report. Requiring disclosure before this point would not provide the public with meaningful information about the person’s independent expenditure spending.

Thus, we seek confirmation that a person making independent expenditures does not incur a filing obligation under section 8 of the new law until it incurs a legal obligation to pay for the creation, production, or distribution of an independent expenditure.

C. Request 3

Finally, we request a ruling that a candidate’s non-earmarked fundraising for an entity that makes a covered transfer to another entity is not a basis to find coordination between the candidate and the entity receiving the covered transfer. By non-earmarked, we mean fundraising for the group’s general purposes rather than funds earmarked specifically for covered transfers.

Act No. 13-180 provides that “[f]inancial support for, or solicitation or fundraising on behalf of

the entity by a candidate or agent of the candidate” does not result in a presumption of coordination “unless the entity has made or obligated to make *independent expenditures* in support of such candidate in the election or primary for which the candidate is a candidate.” Act No. 13-180 § 4(c) (emphasis added). This provision suggests—though does not state explicitly—that candidate fundraising for an entity *after* it makes or obligates to make independent expenditures is a basis on which the Commission can find coordination between the candidate and the entity.

However, nothing in the law authorizes the Commission to find coordination based on the candidate raising non-earmarked funds for an organization that has made covered transfers to that entity. Such a rule would unfairly hold entities responsible for the fundraising practices of their donors, which they cannot control. Moreover, such non-earmarked fundraising does not raise the same coordination concerns as fundraising for the entity that makes independent expenditures. It does not allow for direct communications between the candidate and the spender, nor does it provide direct financial support for the expenditures because the funds are not earmarked for that purpose.

Thus, we request that a ruling that a candidate’s non-earmarked fundraising for an entity that makes a covered transfer to another entity is not a basis to find coordination between the candidate and the entity receiving the covered transfer.

III. Conclusion

Based on the foregoing, we respectfully request a declaratory ruling in accordance with the request above. Please do not hesitate to contact us with any questions.

Very truly yours,



Marc E. Elias