ADVISORY OPINION 2014-01:
The Use of Federal and State Accounts of Party Committees

At its special meeting on February 11, 2014, the State Elections Enforcement Commission (the "Commission") voted to issue this Advisory Opinion on the permissible activities of a state party committee registered with the Federal Election Commission ("FEC") vis-à-vis state party committees registered with the State Elections Enforcement Commission ("SEEC" or "Commission") and Connecticut state elections.

As an initial matter, the Commission notes that it does not have jurisdiction over federal committees *per se*, but that its jurisdiction extends to the enforcement of Connecticut campaign finance laws. When federal committees make expenditures for the purpose of influencing Connecticut state elections, the Commission is charged with administering and enforcing the relevant Connecticut laws related to such elections.

This Advisory Opinion is in response to the many questions posed by the regulated community and the media about the reported fundraising activity of a state party committee registered with the FEC, which is alternatively known as the federal account (hereinafter, the "federal account" or "federal committee") and how those funds might be used to benefit the state central party committee registered with the SEEC (hereinafter, the "state account" or the "state committee"). Of most concern is the fact that much of the reported fundraising has involved Connecticut state contractors, who are prohibited from making contributions to party committees registered with the SEEC. It is a matter of great importance to the integrity of Connecticut elections that funds that are generally prohibited from being used in Connecticut elections are not, in fact, used to make expenditures in Connecticut elections.

In light of these developments, the Commission is taking this opportunity to clarify and publish advice on the use of money and assets of the federal account in Connecticut elections, which has been issued consistently by SEEC staff since the inception of the Citizens' Election Program and before.

Legal Background

As an initial matter, the federal account cannot make a contribution to the state account. General Statutes § 9-617 sets forth the permissible contributors to a Connecticut party committee and lists as one of them the national party committee (a committee registered with the FEC), but does not list state party committees registered with the FEC. General Statutes 9-617 (d) provides that "[a] party committee may receive contributions from a federal account of a national committee of a political party, but may not receive contributions from any other account of a national committee of a political party or from

a committee of a candidate for federal or out-of-state office, for use in the election of candidates subject to the provisions of this chapter."

Similarly, the federal account cannot make contributions to Connecticut candidate committees. General Statutes 9-616 (b) provides that "[a] candidate committee shall not receive contributions from any national committee or from a committee of a candidate for federal or out-of-state office." Of the permissible sources of contributions for candidate committees, state party committees registered with the FEC are not among them.

Generally speaking, the federal account cannot spend its funds to make expenditures with the state account for Connecticut candidates for statewide office or the General Assembly (i.e. non-federal offices). To be clear, this does not contravene longstanding advice given by the Commission's staff that federal committees, in some circumstances, may act as vendors to Connecticut party and candidate committees, which must in turn pay market value for services, products or facilities, such as headquarter space, purchased from a federal committee acting as a vendor. The overarching principle to be followed is simple: Connecticut committees pay for their expenses with money raised within the Connecticut campaign finance system, i.e. from permissible contributions or public financing grants, properly reported under Connecticut law.

A lack of clarity seems to have arisen due to the intersection of federal law and state law. Federal law prescribes when expenditures may be allocated between a federal account and another account, for example in the making of certain joint expenditures, and when expenditures may not be allocated but instead must be paid for in accord with federal law.[1] Unlike Connecticut law, which requires allocation, federal law declares certain areas to be "Federal Election Activity" (or "FEA") in order to avoid the circumvention of federal contribution limits through the use of state committees to provide certain services and goods that jointly benefit both the state and federal candidates, or disproportionately benefit federal candidates. While some activities that are FEA exclusively involve candidates in federal elections, certain FEA can also involve state candidates, such as for statewide office or the General Assembly. This is where confusion arises.

In preventing or limiting certain types of allocation, federal law focuses on the several types of activities, defined by federal law as FEA, which must be paid for out of funds raised, spent and disclosed in compliance with federal limits, i.e. funds from the federal account. These activities include (but are not limited to) the following: 1) Communications that identify specific candidates; 2) Staff; and 3) Voter identification, including voter or contributor databases and mailing lists.

In short, under federal law, these types of activities must be paid for with federal funds, which are funds raised and reported subject to federal law, when they are at all related to

[1] This Commission does not regulate or interpret federal laws; however, in order to opine on the application of state law it is necessary to lay out generally the outline of the federal requirements. Any specific questions regarding federal law should be referred to the FEC.

federal candidates. The first and third listed activities can also be paid for, in whole or in part, with Levin funds, a particular type of funds permitted to be raised by federal committees in keeping with state law restrictions.

The major issue of contention addressed by this Opinion, is whether, because certain activities benefitting federal candidates *cannot* be paid for by the state account, activities promoting, attacking, supporting or opposing state candidates may therefore be paid for outside of the Connecticut campaign finance laws with no reporting or source restrictions under Connecticut law. The answer is that they may not. Connecticut committees must pay for their expenses for state candidates with money raised within the Connecticut campaign finance system, i.e. from permissible contributions or public financing grants, properly reported under Connecticut law. They should structure their activities to allow for compliance with both state and federal law.

Analysis

The issue then is the extent to which expenditures can be made from the federal account that benefit Connecticut candidates, directly or indirectly, and who ultimately must pay for them. Borrowing from the categories listed above, we analyze these various types of expenditures specifically.

Communications that Identify Specific Candidates

The issue of communications that identify both state and federal candidates was one of the earliest issues that arose in the context of state and federal committees following the adoption of public financing and the other sweeping campaign finance reforms in 2005. Following those major reforms, Connecticut law became, in many ways, more restrictive than federal law, as with restrictions on state contractor and lobbyist contributions. This created an apparent overlap between state and federal law, which in turn created some confusion as to how to comply with both laws simultaneously.

As an initial matter, we note that both federal and state laws provide exemptions from their respective definitions of contribution for particular types of communications, such as slate cards and sample ballots. 2 U.S.C. 431 (8) (B) (v) and General Statutes § 9-601b (b) (8). These exemptions indicate that lawmakers at both the federal and state level contemplated that certain communications naming both federal and state candidates should be permissible, and that the lawmakers know how to craft such exemptions when they choose to do so. This opinion addresses other types of joint communications, such as promotional or oppositional pieces, for which there are no exemptions.

When there are no exemptions under Connecticut law, the rule is simple: Communications that support or oppose or, within a certain timeframe, identify specific state candidates are, by definition, expenditures under Connecticut law, and when not done independently, are also, by definition, contributions. General Statutes §§ 9-601b (a) (2), 9-601a (a) (4). Expenses associated with such communications must be properly allocated and reported. Declaratory Ruling 2011-03: Candidate Committees and Joint

Communications. This is a particularly important concept in a full public financing state such as Connecticut, where candidates voluntarily agree to abide by strict contribution and expenditure limits. There are narrow exceptions to this rule explicitly spelled out in the statutes such as for slate cards or when an unopposed candidate endorses a second candidate who pays for the entire advertisement. There is no such exception for any advertisement or communication by a federal account that, for example, promotes or opposes a state candidate but is paid for exclusively with federal funds.

To the extent, for example, that the federal committee may not accept payment from a state committee for that committee's share of the cost for communications promoting both state and federal candidates from non-federal funds, it should choose to design the communications differently. For example, creating a communication promoting a federal candidate to be paid for out of a federal account and designing a communication promoting a state candidate to be paid for out of a state account. Committees must structure communications to comply with both state and federal law.

Staff

Similarly, committees must structure their staffing and assignments to comply with both state and federal law. When a federal committee hires staff, that staff presumably will conduct some federal election activity. If the staff spend more than 25% of their time performing such activity, then the staff's wages must be paid for entirely with federal funds. Applying the principles outlined above, this would lead to several conclusions.

First, if the staff were conducting *only* federal election activity and none of the staff time was dedicated to supporting state candidates, then no allocation between state and federal accounts would be necessary under Connecticut law; there would be no contribution, to the state committees. This also would be true if, for example, the staff were conducting truly generic campaign activity or get-out-the-vote activity that did not reference or target state candidates.

Second, if the staff paid by the federal account were working with state committees to support and benefit state candidates, those candidates would be required to reimburse the federal committee for such time. If the federal committee may not accept such funds, then the arrangement would result in an impermissible contribution. The staffing must be structured to accommodate both state and federal law.

Staff that are working for the federal committee are not precluded from also being hired by a state committee to perform different (state permissible) activities such as designing communications that promote state candidates, oppositional research, or organizing door knocking campaigns for state candidates.

If the staff paid out of the federal account are spending their time compiling enhanced voter lists, mailing lists, contributor lists or similar databases, then this would result in the production of an asset (e.g. a database) that could then be sold or leased to a Connecticut

committee at fair market value, at the usual and normal charge, if such committee were interested in utilizing it.

Voter identification activity

Voter identification under the FEA provisions means acquiring information about potential voters, including obtaining voter lists and creating or enhancing voter lists by verifying or adding information about the voters and their inclination to vote for specific candidates.

Voter identification activity done for the purpose of aiding federal candidates may be paid for by the federal account. The result of a voter identification activity however is likely to be a valuable resource to other candidates, including candidates for state office. For example, it may result in an enhanced voter database or mailing list. Under Connecticut law such resources are assets of the federal committee that cannot be contributed to the Connecticut state party committee or Connecticut candidates. Connecticut law does contemplate voter lists being distributed to candidates, either under the CEP (see General Statutes § 9-715), or as an organization expenditure (see General Statutes § 601 (25) (b)). Voter lists given by a federal committee to a state committee, however, would be an impermissible contribution.

Understanding that voter databases are tools of the trade for campaigns, and that committees can and frequently do purchase such databases in the open market, the Commission staff has taken the position that the federal committee could act as a vendor to a state committee and sell the database (or a portion thereof) to such committee, so long as the sale was for fair market value.

Reviewing the FEC's Advisory Opinions on such sales, it would appear to be the FEC's position that the sale of mailings lists or databases is permitted provided that they have been developed by the committee in the normal course of its operation, and the asset is developed primarily for the committee's own use rather than for sale to others. FEC AO 1981-53. If such sale from federal to state committee occurs, proper valuation is of paramount importance. The FEC uses the "usual and normal charge" standard, which is defined as the price of goods or services in the market from which they ordinarily would have been purchased at the time of their contribution. Failure to properly value the database could result in a contribution. FEC AO 1979-18. The amount of the contribution would be the difference between the usual and normal charge at the time of sale for a list of potential contributors in the appropriate market and the amount actually paid for the list. *Id*. The FEC opines that it would view an appraisal by an expert using acceptable appraisal methods as *prima facie* evidence of the property's usual and normal market price, but it does not rule out the use of other valuation methods that would reliably establish such price or value. FEC AO 1984-60. In the opinion of the FEC, lists have a readily ascertainable fair market value, due to the existence of a broad and open market for such lists. FEC AO 2002-14.

The FEC's position on the sale of mailing and similar lists mirrors previous SEEC advice in regard to transactions between the federal and state accounts that has been given over the past years, and which is restated in this Opinion. If lists created to be used in federal elections—whether they are enhanced voter lists, mailing lists, or contributor lists or similar databases—are developed and paid for with federal funds, then access to those lists must be paid for at the usual and normal market price by any Connecticut committee desiring to use them, or else it will be considered an impermissible contribution. Again, committees must structure their activities to comply with both state and federal law.

Other Unrestricted Campaign Activity

The federal scheme for federal election activity omits certain election activities that do not appear to be restricted to being paid for entirely by federal funds. A partial list of such activities would include expenditures for headquarters space, petition drives, utilities, other overhead, etc. If not proscribed by the guidance given in this Opinion, and subject to federal law, expenditures for these unenumerated activities could be allocated between federal committees and state committees as joint expenditures, if a state candidate or committee obtained a benefit.

In conclusion, federal law does not create a loophole in the Citizens' Election Program and other Connecticut campaign finance laws that would allow federal committees to make expenditures that are also contributions regarding Connecticut candidates. This remains true even after the passage of Public Act 13-180. State committees should structure their plans to comply with both state and federal law. In some instances this may mean, for example, that they cannot support state and federal candidates within the same communication, that they have to compartmentalize staffing arrangements, or that they must purchase assets from the federal committees if they wish to utilize them.

This constitutes an Advisory Opinion pursuant to General Statutes § 9-7b (a) (14). This Advisory Opinion is only meant to provide general guidance and addresses only the issues raised. Additional questions about the specific requirements for a joint activity between federal and state committees should be directed to the Commission staff.

Adopted this 11th day of February, 2014 at Hartford, Connecticut by a vote of the Commission.

Anthony J. Castagno, Chair