



STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

DECLARATORY RULING 2014-01:

Construction of the Phrase "Make or Obligate to Make" as Applied to Disclosure of Independent Expenditures

At its regular meeting on October 16, 2013, the Commission voted to issue notice of receipt of a October 9, 2013 petition for a declaratory ruling (the "petition") from the law firm of Perkins Coie on behalf of some of its clients (the "petitioner"), and to initiate a declaratory ruling proceeding concerning the application of General Statutes §§ 9-602 and 9-612, as amended by sections 8 and 33 of Public Act No. 13-180, An Act Concerning Disclosure of Independent Expenditures and Changes to the Campaign Finance Laws and Election Laws, (hereinafter referred to as "the 2013 Act"), to certain activities of persons making independent expenditures on and after June 18, 2013, the effective date of the 2013 Act.¹ Subsequent to receiving the October 9, 2013 petition, Commission staff asked the petitioner for clarification concerning Question No. 2 contained in the petition concerning when a person making or obligating to make independent expenditures is required to file campaign finance disclosure statements pursuant to section 8 of the 2013 Act. The petitioner submitted a supplement to its petition as to this question on November 1, 2013 (the "supplement"). At a special meeting held on December 3, 2013, the Commission issued a *Resolution and Order Setting Forth Specified Proceedings for the Matter of Perkins Coie Petition for Declaratory Ruling*, which set a schedule for responding to the petition and directed Commission staff to prepare a draft responding to Question No. 2 in the petition no later than the date of its regular meeting scheduled on February 19, 2014.

Question Presented

The 2013 Act added General Statutes § 9-601d (a) which expressly provides that any person who "*makes or obligates to make* an independent expenditure or expenditures in excess of one thousand dollars, in the aggregate, shall file statements according to the same schedule and in the same manner as is required of a treasurer of a candidate committee pursuant to section 9-608 of the general statutes, as amended by this act."²

¹ Note that Question No. 1 of the petition was addressed by the Commission in Declaratory Ruling 2013-02, *Contributions to Political Committees, Independent Expenditures and State Contractor Contribution Limitations* and Question No. 3 will be addressed in a separate declaratory ruling.

² General Statutes § 9-601d (a) provides:

(a) Any 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. Except as provided pursuant to this section, any such

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General Statutes § 9-601d (a) of the 2014 Supplement to the General Statutes (Emphasis added.). Subsection (b) goes on to provide that any person who “makes or *obligates to make* an independent expenditure or expenditures” in excess of one thousand dollars for candidates for legislative or statewide office during a primary or general election campaign must disclose such expenditures not later than twenty-four hours³ after making the payment or “obligating to make any such payment.” General Statutes § 9-601d (b) of the 2014 Supplement to the General Statutes (Emphasis added.).⁴ The petitioner asks for clarification as to when a person triggers the requirement that it file campaign finance disclosure statements due to an independent expenditure, specifically requesting a ruling as to the Commission’s construction of the phrase “obligates to make.” In the supplement, the petitioner outlines two factual scenarios and asks the Commission to “clarify the date on which the organization has ‘obligated to make’ an independent expenditure and provide analysis so that we can apply the ruling to real-world fact scenarios that may arise.”

Scenario A: [A 527] organization contracts with a media consultant to produce advertisements. The contract calls for the media consultant to receive a commission for each advertising buy placed with a television station and to receive reimbursement for any costs incurred in the production of the advertisement. On March 1, the [527] organization directs the media consultant to purchase stock footage for use in future advertisements some of which may be independent expenditures and some of which may be communications that do not qualify as independent expenditures. On June 1, the [527] organization reserves airtime with three television stations for the week of June 16-22. On June 10, the [527] organization creates a television advertisement that qualifies as an

person who **makes or obligates to make** an independent expenditure or expenditures in excess of one thousand dollars, in the aggregate, shall file statements according to the same schedule and in the same manner as is required of a treasurer of a candidate committee pursuant to section 9-608 of the general statutes, as amended by this act.

General Statutes § 9-601d (a) of the 2014 Supplement to the General Statutes (Emphasis added.).

³ Of note, this twenty-four hour reporting requirement only applies to independent expenditures for candidates for General Assembly and statewide office, and then only applies to expenditures made or obligated after the nominating convention for such candidates during the primary or general election campaign. General Statutes § 9-601d (b) of the 2014 Supplement to the General Statutes. Thus for independent expenditures made for General Assembly and statewide candidates prior to the convention, disclosure would only be required on a quarterly basis pursuant to General Statutes § 9-608 (a).

⁴ General Statutes § 9-601d (b) provides:

(b) Any person who **makes or obligates to make** an independent expenditure or expenditures in an election or primary for the office of Governor, Lieutenant Governor, Secretary of the State, State Treasurer, State Comptroller, Attorney General, state senator or state representative, which exceed one thousand dollars, in the aggregate, during a primary campaign or a general election campaign . . . shall file such 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.

General Statutes § 9-601d (b) of the 2014 Supplement to the General Statutes (Emphasis added.).

independent expenditure; the advertisement includes some of the stock footage that was purchased on March 1. On June 15, the [527] organization ships this advertisement (the one created on June 10) to the stations; the same day, it is entered into the station's lineup, at which point it may not be substituted. The advertisement first aired on June 16. ***[The petitioner's] view is that the [527] organization has first obligated to make an independent expenditure on June 15; prior to that date no legal obligation had been incurred to make an independent expenditure because the [527] organization could have chosen to use the stock footage and/or airtime for communications that did not qualify as an independent expenditure.***

Scenario B: [A 527] organization creates a newspaper advertisement that qualifies as an independent expenditure on the Wednesday before the election. The [527] organization calls the newspaper on Thursday to reserve space for the Sunday newspaper. Under the newspaper's advertising policy, the advertisement may be cancelled or substituted as late as midnight on Friday; but as of 12:01 AM Saturday, there are no substitutions or refunds allowed. The advertisement appears in the Sunday newspaper. ***[The petitioner's] view is that the [527] organization has first obligated to make an independent expenditure on Saturday. Prior to that date, no legal obligation has been incurred to make an independent expenditure because the [527] organization could have chosen to cancel the advertisement or substitute an advertisement that did not qualify as an independent expenditure.***

Analysis

As an initial matter, by using the phrase "makes or obligates to make" rather than simply using the term "makes," it is clear that the legislature intended the law to mandate reporting prior to the point in time at which a person actually spends its funds on an independent expenditure. "As with all issues of statutory interpretation, we look first to the language of the statute." *Rocco v. Garrison*, 268 Conn. 541, 550 (2004), quoting *State v. Ledbetter*, 263 Conn. 1, 12 (2003). "We presume that the legislature did not intend to enact meaningless provisions. Statutes must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant. . . ." *Marchesi v. Board of Selectmen of Town of Lyme*, 309 Conn. 608, 615 (2013) (Internal citations and quotation marks omitted.). Thus, we are required to construe the phrase "obligates to make" to have a meaning different and apart from the term "make." At issue here is this question of when a person obligates to make an independent expenditure such that General Statutes § 9-601d mandates disclosure.

The term "obligate" is not defined in the campaign finance statutes, nor is it defined in the General Statutes. When the legislature does not define a term, "it is appropriate to look to the common understanding expressed in the law and in dictionaries." *Conn. Natural Gas Corp. v. Dep't of Consumer Protection*, 43 Conn. App. 196, 200 (1996); see also *Groton v. Mardie Lane Homes, LLC*, 286 Conn. 280, 288 (2008) ("[i]f a statute or

regulation does not sufficiently define a term, it is appropriate to look to the common understanding of the term as expressed in a dictionary” [internal quotation marks omitted]). Black’s Law Dictionary defines the verb “obligate” as “1. To bind by legal or moral duty. 2. To commit (funds, property, etc) to meet or secure an obligation.” Black’s Law Dictionary, 1101 (6th ed. 1990). The term “obligation” is defined as: “1. A legal or moral duty to do or not do something. 2. A formal, binding agreement or acknowledgement of a liability to pay a certain amount or to do a certain thing for a particular person or set of persons.” Black’s Law Dictionary, 1102 (6th ed. 1990).

Thus, the plain meaning of the term “obligate” as it is used in this context would encompass taking those actions after which a person has incurred a duty to pay for goods or services for an independent expenditure. Put another way, a person has obligated to make an independent expenditure when the facts evidence that the person has taken affirmative action and promised to make a payment of funds for an independent expenditure. As is discussed in greater detail below, in the context of the advertisement in petitioner’s scenario, this would be when the 527 organization has decided to secure goods or services to develop or publish an independent expenditure advertisement and promises or agrees to make a payment for such goods or services, in a contract or otherwise.⁵

The petitioner argues that a person only obligates to make an independent expenditure when it has reached some point in time after which it can no longer change its mind about the nature of the expenditure. Accordingly, the petitioner argues as to Scenario A that the 527 organization in question has not obligated to make an independent expenditure until the date that the advertisement entered the television station’s lineup and could no longer be substituted. So too, as to Scenario B, the petitioner argues that the 527 organization has not obligated to make an independent expenditure in the form of a newspaper advertisement until the deadline passes after which the advertisement could not have been substituted. We disagree.

If the Commission employs the suggested construction, it would lead to the absurd result that the person making an independent expenditure could simply structure its relationship to avoid meaningful disclosure when it is engaging in activities it would otherwise be mandated to disclose. For example, under this construction a person could negotiate a contract with a media consultant containing a term that it may reject an advertisement up

⁵ It is important to note that independent expenditures are not limited to those outlays of funds for communications. Under Connecticut law the term expenditure is defined broadly to include: “Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made to promote the success or defeat of any candidate seeking the nomination for election, or election, of any person or for the purpose of aiding or promoting the success or defeat of any referendum question or the success or defeat of any political party.” General Statutes § 9-601b (1). Furthermore, an independent expenditure may be obligated without a formal contract. This is consistent with how the campaign finance provisions treat the concept of “expense[s] incurred but not paid” as being more than simply a contractual obligation. See General Statutes § 9-601b (c) (defining “expense incurred but not paid” to mean “any receipt of goods or services for which payment is required but not made or a written contract, promise or agreement to make an expenditure.”)

until the time of publication, or even refuse to pay for it if polling does not demonstrate that it reached a certain number of people. Thus, even if the advertisement in question has been contracted for, designed and created, disclosure would not be mandated until the advertisement has been published or even afterward. Likewise, the person making the independent expenditure could reserve airtime and then wait until the last possible moment to submit for publication an advertisement it has been developing for weeks or even months. It is not reasonable to conclude that the legislature would only mandate disclosure at such a late hour and we cannot find that they intended to limit disclosure in this way. To the contrary, “[i]n construing a statute, common sense must be used and courts must assume that a reasonable and rational result was intended.” *Rocco v. Garrison*, 268 Conn. 541, 550 (2004), quoting *Nickel Mine Brook Assoc. v. Joseph E. Sakal, P.C.*, 217 Conn. 361, 370-71 (1991).

Although the Supreme Court in *Citizens United* upheld the right of persons, including corporations, labor unions, 501 (c) and 527 organizations, to engage in free speech in the form of making independent expenditures, it found that such speech must be coupled with meaningful disclosure. The *Citizens United* Court, in upholding the challenged federal disclosure provisions, found that the public has a strong interest in receiving timely information about independent spenders: “The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.” *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 371 (2010); see also *First National Bank v. Bellotti*, 435 U.S. 765, 791–92 (1978) (“[T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate.”); *Human Life of Washington Inc. v. Brumsickle*, 624 F.3d 990 (9th Cir. 2010) (“Campaign finance disclosure requirements thus advance the important and well-recognized governmental interest of providing the voting public with the information with which to assess the various messages vying for their attention in the marketplace of ideas. An appeal to cast one’s vote a particular way might prove persuasive when made or financed by one source, but the same argument might fall on deaf ears when made or financed by another.”). Robust timely disclosure is even more essential in the post-*Citizens United* landscape given the fact that corporations, labor unions, 501 (c) and 527 organizations may now engage in unlimited campaign speech. *Free Speech v. Federal Election Comm’n*, 720 F.3d 788, 798 (10th Cir. 2013) (“These disclaimer and disclosure requirements become even more essential and necessary to enable informed choice in the political marketplace following *Citizens United’s* change to the political campaign landscape with the removal of the limit on corporate expenditures.”).

The very purpose of campaign finance disclosure provisions is to provide the electorate, candidates and the media with sufficient information about an independent expenditure so that they can fully evaluate the speech and make informed decisions regarding the election. Such disclosure of independent expenditures is only meaningful to the extent that there is enough time to evaluate both the message and the messenger. Accordingly,

we must read General Statutes § 9-601d broadly to provide the public with the most timely, and thus meaningful, disclosure of the source of independent expenditures.

Furthermore, the petitioner's narrow proposed construction is at odds with the stated purpose of the 2013 Act in the legislative history. The legislative history makes clear that a primary objective of the 2013 Act was to achieve the highest level of disclosure of independent spending permissible in the wake of the Supreme Court's decision in *Citizens United*. Specifically, the proponents of the bill were concerned with providing the public and candidates with adequate time to process and respond to independent expenditures. As Senator Musto explained when he introduced the underlying bill:

Mr. President, now that the dais has changed, it is a large bill. I do expect to be discussing it for some time, but the underlying function is clear. We need to make sure people understand what's going on in the State of Connecticut.

We need to make sure that people can respond to those kind of out-of-state attacks in the State of Connecticut. And we need to ensure that by doing this our democracy is kept public and open and that the free and fair exchange of information and ideas is maintained here in the State of Connecticut.

56 S. Proc., Pt. 15, 2013 Sess., P. 04724 (cmts. of Sen. Musto).⁶

Instead of employing the petitioner's narrow construction, we must read the statute to require disclosure of an independent expenditure when the facts evidence that a person has taken affirmative action and promised to make a payment of funds in excess of one thousand dollars for an independent expenditure. Employing this common sense standard, the Commission will address each of the proposed scenarios in turn.⁷

Scenario A

In Scenario A, a 527 organization ultimately produces an advertisement which qualifies as an independent expenditure. Thus, as soon as it obligates to make an expenditure in excess of one thousand dollars for the development or publication of that advertisement, it has triggered the requirement that it disclose pursuant to General Statutes § 9-601d. The petitioner argues that the organization in question has not obligated to make an independent expenditure until June 15th, the date that the advertisement enters a television station's lineup and can no longer be substituted. As noted above, we disagree.

⁶ Similarly, Representative Jutila remarked when introducing the bill in the House of Representatives that 2013 Act aims to increase disclosure of independent expenditures to enable "the electorate to make informed decisions and give proper weight to different speakers and messages . . . [and] help to shine light on that money so that we know who is behind it and where it is coming from." 56 H.R. Proc., Pt. 25, 2013 Sess., p. 08404 (Remarks of Rep. Ed Jutila).

⁷ For purposes of this declaratory ruling, we presume that the expenditures discussed herein exceed the one thousand dollar trigger mandating disclosure pursuant to section 9-601d.

In the proposed scenario, the 527 organization has, at some point prior to March 1, entered a contract with a media consultant to produce advertisements. The scenario does not specify whether some or all of these advertisements will be independent expenditures. These are facts which, if evident, would mandate disclosure of at least some of the obligated payments to the consultant under the contract. For example, if the contract expressly provides that the consultant is to design a media campaign to attack any and all opponents of gubernatorial Candidate X, then the act of entering this contract would be an act of obligation requiring disclosure.⁸ If however, the organization has hired the consultant to provide more neutral services that are not yet directly for an independent expenditure, such as monitoring states nationwide to identify potential candidates the organization should support or oppose in the next election, that, without more would not constitute an obligated independent expenditure.

Similarly, there are additional facts outside of the contract terms which could mandate disclosure of payments obligated to be made to the media consultant. In the proposed scenario, the organization has directed the consultant to purchase stock footage for use in advertisements and has contracted to reimburse the consultant for such costs. As with the initial contract with the consultant, the payments made to reimburse this consultant for the stock footage do not in and of themselves constitute independent expenditures. If, however, the stock footage features a clearly identifiable candidate such that its use is clearly only for an expenditure under the law⁹, then the act of directing the consultant to purchase said footage would qualify as obligating to make an independent expenditure

⁸ Due to the timing of this obligation prior to the primary or general election campaign period, such disclosure would be required in the next quarterly filing according to the reporting schedule for political committees. See General Statutes § 9-601d (a) of the 2014 Supplement to the General Statutes (Emphasis added.).

⁹ The term "expenditure" is defined broadly to include the following:

(1) Any purchase, payment, distribution, loan, advance, deposit or gift of money or anything of value, when made to promote the success or defeat of any candidate seeking the nomination for election, or election. . .

(2) Any communication that (A) refers to one or more clearly identified candidates, and (B) is broadcast by radio, television, other than on a public access channel, or by satellite communication or via the Internet, or as a paid-for telephone communication, or appears in a newspaper, magazine or on a billboard, or is sent by mail;

General Statutes § 9-601b (a) (1) and (2), as amended by Public Act 13-180. There is a narrow exception to subsection (2) as follows:

(7) A communication described in subdivision (2) of subsection (a) of this section that includes speech or expression made (A) prior to the ninety-day period preceding the date of a primary or an election at which the clearly identified candidate or candidates are seeking nomination to public office or position, that is made for the purpose of influencing any legislative or administrative action, as defined in section 1-91, or executive action, or (B) during a legislative session for the purpose of influencing legislative action;

General Statutes § 9-601b (b) (7), as amended by Public Act 13-180.

and the organization must disclose this obligated expenditure in the next quarterly statement. *See* General Statutes § 9-601d (a) of the 2014 Supplement to the General Statutes (Emphasis added.). Moreover, even if the stock footage contains neutral images, if the organization's board of directors has met and voted to pay for a media campaign opposing Candidate Y's education policy and in furtherance of that decision directs the consultant to purchase the stock footage for use in said campaign, then the obligated reimbursement would have to be disclosed.

In the proposed scenario, the 527 organization, on June 1, reserved airtime at three television stations for advertisements. The act of reserving airtime is not, on its own, an independent expenditure triggering the need to disclose. Again, there are facts which would trigger disclosure. Once the organization has directed paid staff or consultants to produce an advertisement which will qualify as an independent expenditure, it has changed the neutral nature of the reserved airtime. Thus, in addition to the payment for designing the advertisement, the organization will have triggered the need to disclose the reservation of airtime when it directs the staff or consultant to produce the advertisement. In addition, if the organization's board of directors met prior to the reservation of time and voted to reserve the airtime specifically for advertisements it is developing or plans to develop that will qualify as independent expenditures, then this reservation of airtime would constitute an obligated independent expenditure and would have to be disclosed according to the appropriate schedule. Note that the timing is also a factor for consideration. Reserving airtime in Connecticut for the night prior to a primary or election strongly supports the conclusion that the advertisements will be expenditures and the obligation should be disclosed.

Scenario B

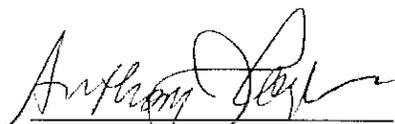
In Scenario B, the 527 organization creates a newspaper advertisement that qualifies as an independent expenditure on Wednesday and reserves the space with the newspaper for the advertisement on Thursday. The petitioner argues that the 527 organization has not obligated to make an independent expenditure until Saturday—the newspaper's deadline after which the advertisement cannot be substituted. We disagree. In this scenario, the 527 organization has certainly obligated to make an independent expenditure when it reserved the advertising space for the advertisement on Thursday. The petitioner seems to base its proposed obligation date on the fact that, before Saturday, we will not know whether or not the independent expenditure advertisement will actually be published. This fact is inconsequential to the determination of whether or not the organization has obligated an independent expenditure. The inquiry hinges on when, after the decision is made to produce an advertisement that qualifies as an independent expenditure, the organization takes some action to obligate the payment of funds to produce or publish that advertisement. In addition, as with Scenario A, there are facts which would mandate earlier disclosure of obligated expenditures relating to this advertisement. If the 527 organization, at some earlier point, decided to engage in a media campaign opposing Candidate X, and it directed paid employees or consultants to produce the advertisement

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in question, it has obligated to make an independent expenditure as soon as it so directs the employees or consultants.

This constitutes a declaratory ruling pursuant to General Statutes § 4-176, and provides guidance about the disclosure requirements for independent expenditures. This declaratory ruling is only meant to provide general guidance and addresses only the issues raised. Questions about the disclosure requirements for a specific independent expenditure should be directed to the Commission staff. A declaratory ruling has the same status and binding effect as an order issued in a contested case and shall be a final decision for purposes of appeal in accordance with the provisions of General Statutes § 4-183, pursuant to General Statutes § 4-176 (h). Notice has been given to all persons who have requested notice of declaratory rulings on this subject matter.

Adopted this 19th day of March, 2014, at Hartford, CT by vote of the Commission.


Anthony J. Castagno, Chair
By Order of the Commission