Connecticut
COMMON CAUSE
Holding Power Accountable

October 14, 2014

By Email

Adav Noti, Esq.
Acting Associate General Counsel for Policy
Office of the General Counsel
Federal Election Commission
999 E Street N.W.
Washington, DC 20463

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

Dear Mr. Noti:

These comments are filed on behalf of Common Cause Connecticut with regard to Advisory Opinion Request 2014-16. The request, submitted by the Connecticut Democratic State Central Committee (CDSCC or State Party), seeks a ruling from the Commission that the Federal Election Campaign Act (FECA) preempts Connecticut law with regard to the funding of a State Party mailer that advocates the re-election of Governor Dan Malloy.

Common Cause Connecticut is an organization that works for reform of the campaign finance and ethics laws in Connecticut. Common Cause Connecticut strongly supported the adoption of the Connecticut Campaign Finance Reform Act of 2005, which provides for comprehensive public financing for state elections and other related reforms, and the organization has advocated for effective implementation of that state campaign finance reform law.

The State Party argues that the Malloy mailer at issue constitutes "get-out-the-vote" (GOTV) activity under 11 C.F.R. § 100.24(a)(3) and, as such, is "Federal election activity" under 52 U.S.C. § 30101(20)(a)(ii). Under the provisions of the Bipartisan Campaign Reform Act (BCRA), a state party must use Federal funds, or an allocated mixture of Federal funds and "Levin funds," to pay for "Federal election activity." 52 U.S.C. § 30125(b)(1). Thus, the State Party contends that it must use Federal funds (or Federal and Levin funds) to pay for the Malloy mailer, and any contrary state law requirement is preempted by operation of the FECA preemption provision at 52 U.S.C. § 30143(a).

What really is going on here is that Connecticut law has stricter funding requirements for state campaign activities than Federal law has for Federal campaign activities. For instance, state

law prohibits contributions by state contractors from being used to influence state campaigns. Conn. Gen. Stat. §9-612. The State Party is seeking to take advantage of the more relaxed Federal rules for funding its Malloy campaign mailer by characterizing its mailer not as state campaign material, but as GOTV, and thus as "Federal election activity." As such, the State Party argues, the mailer falls exclusively under Federal rules and must be paid for with Federal funds. And by this mechanism, the State Party argues, the more stringent state law rules are preempted.

With regard to this particular mailing, the State Party represents that, on a voluntary basis, it will not use funds donated by state contractors. Instead, it asserts that it will use funds from a Federal account that does not contain money from state contractors. *See* Email dated Oct. 2, 2014 from Neil P. Reiff (attached to AOR) ("It is the intent of the CDSCC not to use the federal account which contains state contractor funds for any mailings described in the Advisory Opinion Request.").[1]

While helpful, there will be no way to verify the State Party's compliance with this representation. And more so, while this representation may apply to the particular Malloy mailing "described" here, the State Party makes no similar commitment with regard to other similar mailings or activities, whether relating to Governor Malloy's campaign or to other state campaigns.

Indeed, it is clear that what the State Party seeks here is to establish a precedent that permits it to avoid compliance with Connecticut fundraising rules to pay for mailings and other activities that promote state candidates, so long as the activities are characterized as "Federal election activity." *Id.* ("CDSCC seeks only to confirm that the State of Connecticut cannot compel the CDSCC to pay for the costs of the mailings directly from a non-federal account. . . .").

With regard to the narrow issue posed by the AOR, the crux of the State Party argument is that the Malloy mailer is "Federal election activity." But the State Party devotes little attention to this key argument and indeed, it is incorrect: the mailer instead is express advocacy for the Malloy re-election campaign and as such, it is state campaign material that falls under the ambit of the state campaign finance law and must be paid for with funds compliant with Connecticut rules.

The fact that this is state campaign advocacy material is clear from the mailer. The front page of the mailer is dominated by the statement, "Democratic Governor Dan Malloy has put us on a path of progress." Below this is a listing of six achievements by the Governor, and below that, in the largest typeface in the mailing, is the classic express advocacy statement, "On November 4th, vote for Dan Malloy for Governor." The back of the mailer is devoted exclusively to a quote by Governor Malloy that promotes his re-election, accompanied by photos of the Governor.

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[1] This representation would similarly appear to preclude the State Party's use of Levin funds, since such funds must be "paid from amounts which are donated in accordance with State law. . . ." 52 U.S.C. § 30125(b)(2)(B)(iii).

None of this constitutes GOTV or, therefore, "Federal election activity." The GOTV issue is raised only by two lines in small type on the bottom left corner of the front of the mailer. The first line provides a phone number to call "for a ride to the polls," and the second line states the "poll hours."

This information is characteristic of GOTV activity. But this scant information in the mailer does not convert the mailer, which in sum and substance is State Party advocacy for a state candidate, into a GOTV expenditure or, therefore, into "Federal election activity."

The Commission's definition of "Get-out-the-vote activity" contains an express exception for GOTV activity that is both "brief" and "incidental":

> Activity is not get-out-the-vote activity solely because it includes a brief exhortation to vote, so long as the exhortation is incidental to a communication, activity, or event.

11 C.F.R. §100.24(a)(3)(ii). The 2010 Explanation and Justification for this rule further explains that "certain *de minimis* activities are not subject to the Federal election activity funding restrictions." FEC, "Definition of Federal Election Activity," 75 Fed. Reg. 55257, 55260 (Sept. 10, 2010). The E&J states that "activities that are *not* otherwise GOTV activity do not become GOTV activity simply because they include a brief, incidental reminder to vote." *Id.* at 55263 (emphasis in original). Further:

> To qualify for the exception, the exhortation to vote must be both brief and incidental. Exhortations to vote that consume many minutes of a speech, for example, or that occupy a large amount of space in a mailer are not brief and will not qualify for the exception. Similarly, exhortations, however brief, must also be incidental to a communication, activity, or event.

Id. at 55263-64 (emphasis added).

Here, the two lines of GOTV information—the phone number and polling hours—constitute a "brief" and *de minimis* part of the mailer (15 words out of a total of 195 words in the mailer). The GOTV component certainly does not "occupy a large amount of space in a mailer. . . ." It is also an "incidental" part of the mailer, limited to the lower left corner of the mailer which, otherwise, is entirely devoted to promoting and expressly advocating Governor Malloy's re-election.

The State Party makes no serious argument in support of the proposition that the Malloy campaign mailer should be treated as GOTV. Instead, it says only that it "believes that the activities proposed in this request may constitute 'get-out-the-vote'" as defined in the regulation. AOR at 3 (emphasis added). It notes that the regulation provides that GOTV "does not include a brief exhortation to vote 'so long as the exhortation is incidental to the communication…'" Then, it states, *id.*:

> The CDSCC is not requesting that the Commission determine whether the exhortations to vote made in the attached mailing are "incidental" as the mailing includes sufficient voting information that appears to trigger a separate portion of the rule at section 100.24(i)(B) and (C).

This argument is based on a mis-reading of the regulation. The cited sections (which, correctly cited, are §§ 100.24(a)(3)(i)(B) and (C)) are two of the four sections setting forth examples of the types of GOTV encompassed by the definition. But these two sections do not operate as exceptions to the rule that "brief" and "incidental" GOTV activities are not treated as GOTV; they are themselves subject to the brief/incidental exclusion. In other words, even assuming that the mailer "includes sufficient voting information" to be described in subparagraph (B) (containing information about the times of polling) or (C) (offering to arrange transportation to the polls), that information is not GOTV activity if it is a "brief exhortation" to vote that is "incidental to a communication," within the exclusion in § 100.24(a)(3)(ii).

Thus, even if the State Party is not "requesting" the Commission to determine whether the "incidental" exclusion applies, the Commission must nonetheless apply that exclusion to determine whether the mailing constitutes GOTV. For the reasons set forth above, the mailing at issue is not GOTV, because the brief/incidental exclusion applies.

The AOR makes no other argument that the mailer is Federal election activity. Instead, it simply assumes that conclusion and then argues that state law is thereby preempted. But the Commission need not reach the preemption issue because, if the mailer is not GOTV and is therefore not Federal election activity, it is simply state campaign advocacy material that is plainly subject to state law, and state law alone. If FECA/BCRA does not apply, there is no occasion to determine whether FECA preempts state law which does apply.

While it is possible that the State Party could disseminate other material that both advocates the election of a state candidate and also constitutes GOTV, the mailing at issue here falls short of that standard. There is accordingly no reason for the Commission to reach out and decide the preemption issue based on a hypothetical.

The Commission should be especially hesitant to decide the preemption question here. Connecticut has one of the most robust, successful and progressive campaign finance systems in the country. In addition to laws that restrict the use of contributions from state contractors in state elections, Connecticut has a comprehensive and groundbreaking system of public financing for state elections. *See Green Party of Connecticut v. Garfield,* 616 F.3d 213 (2d Cir 2010) (describing and upholding Connecticut Citizen Election Program); *Green Party of Connecticut v. Garfield,* 616 F.3d 189 (2d Cir 2010) (upholding ban on campaign contributions by state contractors).

It is perhaps no surprise that the State Party would seek to have the Commission interfere with this state law reform regime and rule broadly that Federal law preempts it. But the State Party's argument for the Commission to do so turns BCRA on its head. The soft money provisions of BCRA, including the state party provisions relating to Federal election activities, were intended to ensure that Federal law applied to certain state party activities in order to close

a massive loophole in Federal law, whereby soft money—funds compliant with more relaxed state law rules but contrary to Federal law requirements—was being used by state parties to influence Federal elections. As the Supreme Court said in upholding these provisions in *McConnell v. FEC,* 540 U.S. 90, 163 (2003):

> BCRA's restrictions on national committee activity would rapidly become ineffective if state and local committees remained available as a conduit for soft-money donations. Section 323(b) is designed to foreclose wholesale evasion of §323(a)'s anticorruption measures by sharply curbing state committees' ability to use large soft money contributions to influence federal elections.

Thus, for activities that were deemed to affect Federal elections, BCRA was drafted to require state parties to use Federal funds raised pursuant to more rigorous Federal rules.

Here, the situation is the opposite. State law rules are more rigorous than Federal law in prohibiting state contractor funds from being used in state elections, and in other state law provisions that protect and promote the system of public financing for Connecticut elections. By invoking Federal law, the State Party here tries to open loopholes in the state campaign finance laws, through which it seeks to evade more rigorous state law rules and spend money to influence state elections raised subject to more relaxed Federal rules, in contravention of state law.

While the Commission is charged with administering FECA and BCRA, it should do so with a sensitivity to the facts at play, and should avoid wielding its power of preemption unless absolutely necessary. This is especially the case where the exercise of that power would serve to undermine a model state campaign finance system, and would be contrary to the very purpose of BCRA, which sought to prevent the use of money raised under one set of laws to compromise and weaken the anti-corruption goals of another. Yet that is precisely the result the State Party seeks here.

Respectfully submitted,

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Copy to:

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