



June 13, 2018

State Elections Enforcement Commission
20 Trinity Street
Hartford, CT 06106

Re: Comments on Proposed Declaratory Ruling 2018-01

Dear Commissioners:

The Connecticut Association of REALTORS®, Inc. (“CTR” or the “Association”) appreciates the opportunity to submit these comments in response to the Connecticut State Elections Enforcement Commission’s (“SEEC”) “Proposed Declaratory Ruling 2018-01: Political Activity of Organized Groups” (the “PDR”). The Association strongly supports transparency in elections, reporting and disclosure requirements, and clarity for individuals and groups participating in the political process. We also staunchly support and defend the freedoms provided to individuals and groups under the First Amendment to the United States Constitution to engage in unfettered political speech, and agree with the United States Supreme Court when it said “political speech must prevail against laws that would suppress it, whether by design or inadvertence.”¹

Regrettably, instead of taking this opportunity to clarify ambiguities in the law and address common questions in a straightforward and simple manner, the PDR appears to adversely target even more activities and communications, including those that are purely educational or policy-related in nature. Public Act 13-180, which dramatically altered Connecticut’s campaign finance regime, was designed to allow “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.”² The SEEC’s PDR does neither, as its overly broad and speculative analysis regarding independent expenditures, coordination, membership communications, and policy-related discourse, results only in more chilled speech and a less informed electorate.

For these reasons, we respectfully request that the SEEC reevaluate its arbitrary interpretations set forth in the PDR and fashion new guidance that acknowledges the Supreme Court’s well-established conclusion that the “[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution,” and that “[t]he First Amendment affords the broadest protection to such political expression...”³

¹ *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 339 (2010).

² 56 H.R. Proc., Pt. 25, 2013 Sess., p. 8404 (Conn. 2013), (remarks of Representative Ed Jutila).

³ *Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

A. About Connecticut Association of REALTORS®

CTR is the largest statewide trade association in Connecticut, representing nearly 17,000 real estate professionals engaged in all aspects of real estate in the state. Organized in 1920, CTR was formed to protect the rights of property ownership, to elevate the standards of real estate practice, to educate the public about the real estate industry, and to disseminate real estate information. CTR's public advocacy role serves multiple purposes, including: 1) to protect the interests of real estate owners and prospective homebuyers before state government in Hartford; and, 2) to improve the business climate for its members. As the leading advocate for the real estate industry in Connecticut, CTR regularly advocates for its members' interests before the Executive and Legislative branches in Hartford. This activity includes meeting with members of the General Assembly, municipal government and others about legislation and policy issues that affect the real estate industry. Accordingly, CTR is registered as a client lobbyist and several on staff are registered as communicator lobbyists with the Office of State Ethics.

B. The Proposed Declaratory Ruling is Overly Broad and Chills Speech

- 1. CTR could be precluded from educating the public about officeholder's and candidates' positions on issues germane to the real estate industry under the SEEC's sweeping interpretation of what constitutes an "expenditure."***

Under the PDR's expansive view of what constitutes an "expenditure," CTR could be, for all intents and purposes, precluded from educating the public about candidates' stances on issues important to the real estate industry. As one of the most robust and active advocacy and lobbying organizations in the state, CTR, its leadership and members have regular interactions with members of the General Assembly. The vast majority of such interactions focus on legislative and policy issues that are important to CTR's members and the real estate industry, in general.

Of course, many of the issues important to CTR's members are also important to the general public, such as tax treatment for commercial and residential real estate, building standards, zoning, etc. This is precisely why, in addition to educating and communicating with its members, CTR also holds policy-oriented events and posts educational materials on its website and social media to be viewed by the general public. In fact, CTR's events will often involve the participation of public and elected officials so they are able to provide updates on policy proposals and legislation to members of the general public who are interested in learning more about the real estate industry. CTR also regularly interviews elected officials and candidates, both historically through written questionnaires and more recently on camera interviews using its new CTR.tv studio, so it can provide as much information as possible to its members and the general public. These interviews are generally focused on policy issues regarding the real estate industry.

Despite CTR's efforts and intention to educate its members and the public about policy issues germane to the real estate industry, the PDR's interpretation is so expansive and overly broad that it could be interpreted to effectively preclude CTR from disseminating such educational

communications and materials for almost 180 days before a general election because they could be considered a coordinated expenditure. As the PDR notes, Public Act 13-180:

broadened the definition of expenditure to include communications made within 90 days of the vote that refer to one or more clearly identified candidates, and are 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 are sent by mail.”⁴

This means that any communication made by a group that simply mentions a candidate after May 8, 2018⁵ could be considered an “expenditure” even if such communication was solely related to policy issues or legislation and did not expressly advocate for any candidate. Under the PDR’s interpretation, this is the case even if a communication is not a paid communication, such as an email to individuals outside an association’s membership or a social media post that is viewable by the general public.⁶

Such an expansive interpretation of “expenditure” may be acceptable for groups that never have any interactions with officeholders and candidates, but in light the SEEC’s views on what constitutes “coordination,” it is undeniably problematic for groups like CTR that have regular interactions with officeholders and candidates as part of their overall policy-related advocacy missions. For example, if CTR were to interview both Republican and Democrat incumbent members of the General Assembly running for reelection and/or their opponents using its CTR.tv studio, and the interviews focused on their policy stances on a bill considered during the legislative session, if CTR posts videos of these interviews on its website or social media to educate the general public, the posting could be treated as an impermissible coordinated expenditure and open up both CTR and the officeholders to scrutiny by the SEEC and potential fines. To be clear, no portion of these interviews would involve discussion of campaigns, and yet because they would fall within the 90-day window before the election, they would be treated as “expenditures” if posted on CTR’s website or social media. And, because the interviews involve actual discourse with an officeholder, they would be considered to be “coordinated.”

As the *Citizens United* Court said, “[i]f the First Amendment has any force, it prohibits [Government] from fining or jailing citizens, or associations of citizens, for simply engaging in

⁴ SEEC Proposed Declaratory Ruling 2018-01, at 9 (citing Conn. Gen. Stat. §§ 9-601b(a)(2) and 9-601b(b)(7)).

⁵ The 2018 General Election takes place on November 6, 2018, so any communications occurring after August 8, 2018 (90 days before the election) that mention a candidate would be considered an “expenditure.” Likewise, the state’s primary election takes place on August 14, 2018, so any communication mentioning a candidate after May 8, 2018 would also be considered an “expenditure.” Therefore, any group that has any non-political, policy-related interactions with an officeholder or candidate could be effectively precluded from making any paid or unpaid communications about that officeholder or candidate to the general public for over 180 days before the general election.

⁶ The PDR notes a limited exception for communications made through free social media, but only if a social media post is “created by volunteers.” This interpretation ostensibly does not apply to posts made by an association’s social media account, or a social media post by an association’s employee, despite the fact that social media is free.

political speech.”⁷ In this case, the SEEC’s overly burdensome and expansive interpretation is even worse because it would result in fining associations of citizens, like CTR, simply because they choose to engage in educational speech that is not even political. Furthermore, “it is well known that the public begins to concentrate on elections only in the weeks immediately before they are held,”⁸ and the PDR’s overly broad application of the law would effectively stifle speech not just in the weeks before an election, but half a year before the election. (emphasis added).⁹ Such a result is absurd on its face and is squarely at odds with the First Amendment.

2. The PDR contains guidance that is contradictory and illogical

Aside from the fact that the PDR’s interpretation of the law would sweep entirely non-political activities and speech under the SEEC’s enforcement rug, the PDR is deficient in that it provides so-called guidance that is contradictory. For example, the PDR states:

It would not result in a finding of coordination if an incidental spender and a candidate engaged in discussions solely grounded in that spender’s position on a legislative or policy matter, including urging the candidate or committee to adopt that spender’s position, so long as there is no discussion between the spender and the candidate regarding the candidate or spender’s campaign advertising, message, strategy, policy, polling, allocation of resources, fundraising, or campaign operations.

Remarkably, the guidance initially suggests it is permissible for associations like CTR to engage in discussions with officeholders and candidates about CTR’s “positions on a legislative or policy matter,” but then later states that there cannot be any “discussion between the spender and the candidate regarding the candidate or spender’s...policy.” The fact that the PDR says a spender can have policy discussions with a candidate in one sentence and then states that a spender cannot discuss policy with a candidate in the next sentence is contradictory on its face and chills speech to such a degree that speakers are left with a Hobson’s choice—either engage in policy discussions with candidates and officeholders and educate the public their views on important issues knowing they will face the wrath of the speech police at the SEEC or disengage altogether. Such a lose-lose proposition is precisely what the Supreme Court warned of when they explained that “[p]rolix laws chill speech for the same reason that vague laws chill speech: People ‘of common intelligence must necessarily guess at [the law’s] meaning and differ as to its application.’”¹⁰

3. The PDR benefits out-of-state groups at the expense of state organizations that actually have a stake in state and local policy outcomes.

As stated above, one of CTR’s primary functions is to educate its members and the general public about policies, legislation and executive action affecting the real estate industry in

⁷ *Citizens United*, 558 U.S. at 349.

⁸ *Id.* at 334.

⁹ *See supra* n. 5.

¹⁰ *Citizens United*, 558 U.S. at 324.

Connecticut. CTR is able to comprehensively educate its members and the general public about the most salient real estate policy issues not only because it employs experts in the area, but also because it maintains relationships with officeholders, and regularly meets with and lobbies officeholders, regarding matters that are germane to the industry. However, under the PDR's sprawling application of the state's campaign finance laws, groups like CTR are at a distinct disadvantage compared to well-funded outside groups with little interest or stake in policy outcomes in Connecticut if they seek to make educational communications that may mention the candidates or officeholders with whom they regularly interact. There must be ample allowance for permissible independent expenditures to be made by Connecticut organizations.

Therefore, a well-funded "dark money" nonprofit organization with little or no nexus to the state or its policies can freely make unlimited expenditures in support of state legislative candidates without having those expenditures deemed "coordinated" by the SEEC because the group would have not had any interactions with the state officeholders supported or opposed by its expenditures. Meanwhile, CTR and other state-based organizations that are non-partisan and actually concerned about policies in the state are automatically deemed to have made "coordinated" expenditures if they sponsor communications that simply mention the officeholders with whom they interact through advocacy and lobbying activities. In fact, under the PDR's guidance, any communication CTR may make to educate Connecticut homeowners on issues related to candidate positions on Connecticut real estate issues would not be viewed as "education," but instead as a per se "coordinated expenditure." It is difficult to fathom that the state legislature intended to advantage out-of-state spenders over in-state organizations with vested interests in state policy outcomes when it crafted Public Act 13-180, but that is precisely the effect of the PDR's overly broad application of the law.

C. Conclusion

In light of the foregoing, the Connecticut Association of REALTORS® respectfully requests that the SEEC reconsider the sweeping and unconstitutional limitations imposed on protected political speech set forth in the PDR.

Respectfully submitted,

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