



# STATE OF CONNECTICUT STATE ELECTIONS ENFORCEMENT COMMISSION

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## **DECLARATORY RULING 2011-03:** **Candidate Committees and Joint Communications**

At its regular meeting on January 26, 2011, the Commission initiated a declaratory ruling to memorialize guidance repeatedly requested throughout the 2008 and 2010 election cycles regarding candidate committees and joint communications. This Declaratory Ruling addresses when and how to allocate and report certain communications that reference or include more than one candidate.

Campaign finance law has long provided that a candidate committee may not make a contribution to another candidate committee. *See* General Statutes § 9-616 (a). In addition, a candidate committee may *only* make expenditures to promote the nomination or election of the candidate who established the committee. *See* General Statutes § 9-607 (g) (1) (A) (i). These parameters are particularly important with respect to the Citizens' Election Program (the "CEP" or "Program"), which requires that a candidate demonstrate a threshold of public support before receiving public funds. A candidate who meets this threshold voluntarily limits campaign contributions, in-kind as well as monetary, to small dollar amounts from individuals and, furthermore, agrees that his or her campaign funds will be spent only to directly promote such candidate's own campaign. It is therefore particularly important for participating candidates to avoid spending public funds to promote another candidate who may not have made the requisite showing of public support, and to refrain from accepting in-kind contributions in the form of advertising from other candidates that might cause an expenditure limit violation.

This Declaratory Ruling advises campaigns and committees regarding the identification and allocation of joint expenditures for video, audio, and printed advertisements.

### ***Issues Addressed and Brief Answers:***

- 1. Whether a communication represents a joint expenditure requiring cost allocation between multiple committees**
  - To avoid making an impermissible contribution from one candidate committee to another, committees of candidates who appear or are identified in a communication should pay their proportionate share of the communication's costs as a joint expenditure.

- Several indicia will factor into the analysis of whether a share of the costs of a communication must be allocated to a particular candidate committee, including but not limited to the following: whether the candidate appears or is identified in the communication; when the communication was created, produced, or distributed; how widely the communication was distributed; and what role the candidate or an agent of the candidate played in the creation, production and/or dissemination of the communication.

## **2. How to allocate proportionate share of a joint communication**

- Candidate committees must pay for their *proportionate* share of the costs of a joint communication. Treasurers should determine a reasonable proportionate share based on several factors including, but not limited to the following: whether the candidate's campaign message was incorporated into the communication; whether the candidate's identifying logo or theme was used in the communication; the extent of the candidate's appearance or identification in the communication, e.g., in photographs, video, or audio clips; and where the communication was distributed.
- Candidates do not always benefit equally from a joint communication, and accordingly, candidate committees will not always have to, nor would it always be permissible to, split the costs of a joint communication equally.
- If, after receiving a grant, a candidate committee of a candidate participating in the CEP receives the benefit of a joint communication and cannot pay its share of the costs directly to vendors, the committee should reimburse the expending committee for its reasonable proportionate share of the costs.<sup>1</sup>
- The Commission recognizes that balancing these indicia is not an exact science. The more costly a communication, the more important the allocation and documentation supporting that allocation will become. Traditionally, the Commission has not disputed a committee's determination of its proportionate share of a joint expenditure unless the Commission found that allocation to be clearly erroneous.

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<sup>1</sup> The CEP regulations prohibit a qualified candidate committee which has received grant funds from making a payment to any other committee, for any reason. Regs., Conn. State Agencies § 9-706-2 (b) (8). However, in these very narrow circumstances, in order to prevent an impermissible contribution from or to another committee, a CEP candidate may make such a payment, as described more fully in the body of this Declaratory Ruling.

***Legal Analysis and Conclusions:***

**Whether a Communication Represents a Joint Expenditure Requiring Cost Allocation Between Multiple Committees**

Connecticut campaign finance law prohibits a candidate committee from making a contribution to another candidate committee. *See* General Statutes § 9-616 (a). The term “contribution” is defined broadly in the General Statutes to include “anything of value, made for the purpose of influencing the nomination for election, or election, of any person.” General Statutes § 9-601a (a). The law does not distinguish between the provision of funds and the provision of non-monetary items – both constitute contributions under the law.

A candidate committee may only make expenditures to promote the nomination or election of the candidate who established the committee.<sup>2</sup> *See* General Statutes § 9-607 (g) (1) (A) (i); *see also In the Matter of a Complaint by Arthur W. Mocabee, Jr.*, Bristol, File No. 07-340 (finding violation of General Statutes §§ 9-616 and 9-621 where a candidate committee’s communication included biographies of other candidates). Like contributions, expenditures are broadly defined under Connecticut law. The provision that defines “expenditure” contains multiple definitions for the term. *See* General Statutes § 9-601b (a). Generally, it defines “expenditure” as anything of value that promotes the nomination or election of a candidate or candidates. *See* General Statutes § 9-601b (a) (1). It also provides a definition of “expenditure” that depends on the timing of an advertisement, Specifically, *every* advertisement referring to one or more clearly identified candidates that is broadcast by radio or television or appears in a newspaper, magazine or on a billboard during the ninety day period preceding a primary or election. *See* General Statutes § 9-601b (a) (2).

Where a candidate appears or is identified in a communication distributed to some or all of the electors residing within the geographical boundaries of the elective office that the candidate is seeking, the candidate generally obtains a benefit, even if the appearance is brief and the communication’s main focus is to promote another candidate. Because there is almost always a value and campaign benefit derived from even a brief appearance in a communication distributed to a candidate’s potential electors, the candidate committee choosing to include another candidate in its communications should work with the treasurer of the other candidate’s committee to ensure that each committee pays its proportionate share of the cost. Accordingly, if a candidate committee makes expenditures for a communication which benefits another candidate committee and the latter has not paid for its share of the communication, this results in an impermissible in-kind contribution from the expending candidate committee to the benefiting candidate

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<sup>2</sup> Because a candidate committee may only make expenditures to promote the candidate who established the committee, it should not spend funds to promote any other candidate, unless it is reimbursed for the other candidate’s proportional share of the communication.

committee or an impermissible independent expenditure on behalf of the other candidate.<sup>3</sup>

Several indicia will factor into determining whether a share of the costs of a communication should be allocated to a particular candidate committee, including but not limited to the following: whether the candidate appears or is identified in the communication; when the communication was created, produced, or distributed; how widely the communication was distributed; and what role the candidate or an agent of the candidate played in the creation, production and/or dissemination of the communication.

Of course, in certain narrow circumstances, a candidate might choose to include another candidate who is also running for election in campaign materials without creating a joint expenditure. For example, when a candidate committee pays for an advertisement on behalf of its candidate and that advertisement includes an endorsement from someone who also happens to be a candidate at that time, there may still be no expenditure on behalf of the person who is making the endorsement if there is no mention of the endorser's candidacy, no mention of the endorser's record or experiences, and the communication is distributed to individuals outside of the endorser's district.

Similarly, another common scenario wherein a candidate committee creating a mailer on behalf of its candidate would not create a joint expenditure is when the committee pulls an old picture off of the internet (such as a group shot at a bill signing that happens to include its candidate as one of several legislators, incidentally also now candidates, in the background) and uses that old photograph as one of several in a mailer that otherwise features only its candidate's photos and platform and does not hold its candidate out as part of a ticket or team with the other legislators/candidates who happen to be included in one of the group photographs used in the mailer. *See e.g. In the Matter of a Complaint by Carl Strand, Cheshire*, File No. 2008-150 (Dec. 8, 2008) (finding no expenditure was made to promote two candidates who appeared in the background a small photograph that took up 1/25<sup>th</sup> of the backside of a mailer promoting one candidate (Candidate One), where the photograph was one of five photographs on the mailer's backside, and where the mailer featured numerous photographs of Candidate One, contained Candidate One's name in large bold typeface, highlighted Candidate One's legislative experience and accomplishments, and which did not identify the other two candidates, discuss their records or experience, solicit funds on their behalf, or request

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<sup>3</sup> This declaratory ruling addresses only the situation where a candidate subject to Connecticut campaign finance laws appears or is identified in a communication paid for by another such state or local candidate's committee. This ruling does not address the situation where a federal candidate, regulated by the Federal Elections Commission ("FEC") and ineligible to participate in the Citizens' Election Program, endorses a state or local candidate in a communication paid for in whole by that state or local candidate's committee. The FEC has adopted a regulation creating a safe harbor for such an endorsement, which exempts it from treatment as a "coordinated communication" for which the federal committee must pay its proportionate share so long as the communication does not promote or support the endorsing federal candidate or attack or oppose the endorsing federal candidate's opponent in the election. *See* 11 C.F.R. 109.21(g). The Commission hereby adopts this safe harbor for any federal candidate endorsing a state or local candidate who is subject to Connecticut campaign finance law in a communication paid for by the state or local candidate.

voters to vote for them); *see also* General Statutes § 9-601b (a) (2) (limiting the temporal element of the expenditure definition to mass advertisements such as newspaper, magazines, billboards, radio and television) and General Statutes § 9-601a (b) (18) (creating an exception to the definition of contribution for a *de minimis* campaign activity on behalf of a candidate committee).

### ***Reasonable Allocation***

Campaign finance law offers no bright-line rule to guide committees' calculation of proportional allocation; instead, it allows several candidates to allocate costs amongst their committees on a proportional basis. Given that candidates may not benefit equally from a joint communication, candidate committees need not (and in some circumstances should not) always divide the costs of a joint communication equally. The Commission has traditionally afforded great weight to the determinations made by candidate committees about allocating the proportionate costs of a communication between multiple committees. *See In the Matter of a Complaint by Joseph P. Secola*, Brookfield, File No. 97-294.

Generally speaking, expenditures for creating, producing, and distributing any such joint communication should be allocated based on measurable criteria, including but not limited to the amount of time or space devoted to each candidate, air time, area of distribution, consultant or staff time devoted by a particular committee, and consultant or staff time devoted to the underlying communication. Typically, the candidate committees stand in the best position to determine a reasonable allocation of costs, based on the intended purpose of the expenditure and any underlying services, including consultants, utilized to create the communication.

The many facets of advertising can add a level of nuance to the valuation and allocation determinations involved in joint communications. For instance, a candidate's television advertising incorporates not just visual and audio components but also more subtle messages delivered in the form of logos and captions, as well as advocacy on behalf of a candidate. Accordingly, additional factors to consider when determining the proportionate allocation include, but are not limited to, the amount of frames or other measurable visual space allocated to each candidate; the amount of the written or oral script in the advertisement devoted to each candidate (e.g. the amount of time that each candidate speaks in the communication, or is spoken about by another narrator); the degree to which each candidate is identified in the advertisement (e.g. by printed text on the screen, by spoken text or narration, by other graphics or campaign logo, or attribution); advocacy or encouragement to vote for each particular candidate (e.g. by direct appeal from the candidate or another narrator in the advertisement; by a visual or oral communication of the candidate's record, positions on issues, or campaign promises); and the geographic area where the communication is distributed amongst a candidate's potential electorate.

Consider the following example: one candidate (Candidate One) plans a television spot where another candidate (Candidate Two) announces her endorsement of

Candidate One. The focus of the advertisement would be the attributes of Candidate One, but the advertisement would also represent an expenditure on behalf of Candidate Two, since Candidate Two appears in the advertisement and would also know of the content of the advertisement and mode of distribution prior to its release. Candidate Two would also derive some benefit from the advertisement, especially when the advertisement reaches Candidate Two's constituents who may be persuaded to vote for that endorsing candidate given her obvious relationship with Candidate One.

In this instance, however, Candidate One would pay for the bulk of the advertising costs because he is the main focus of the advertisement. That candidate's logo and campaign themes are featured, and ultimately Candidate One controls the final tenor and content of the message. Candidate One may also determine where the advertisement appears and how often it airs.

But Candidate Two must also bear some share of the advertisement's cost. In this scenario, her proportionate share would be significantly less than Candidate One's share. Among the factors that might weigh in the calculation of the relative benefit are:

- *Visual Appearance* – To what extent did the candidate appear in the advertisement?
- *Name / Logo* – Did the advertisement include the candidate's name, campaign logo or text which clearly identifies the candidate and/or the fact that she is running for office?
- *Audio* – Did the candidate speak in the advertisement?
- *Message* – Did the candidate advocate for her own candidacy in the message or deliver her personal campaign message in the advertisement? Did any third party advocate on behalf of her candidacy?
- *Distribution* – To what extent was the advertisement distributed or targeted to electors who could vote for the candidate?

This calculus represents an example of how one could analyze a joint expenditure and determine the reasonable allocation of the costs between multiple candidates. The prior factors are by no means exhaustive and other factors or methods of calculating the proportionate allocation exist. Treasurers may contact Commission staff with any questions they may have regarding these calculations. **The Commission recognizes that balancing these indicia is not an exact science and encourages treasurers to carefully record the basis for their good-faith efforts to estimate the proportionate allocation of a communication's costs. The more costly a communication, the more important the allocation and documentation supporting that allocation will become.**

The candidate committees making a joint expenditure must be able to articulate a reasonable basis for the allocation, and each campaign treasurer must retain internal

records to substantiate all expenditures. *See* General Statutes § 9-607 (f); Advisory Opinion 2010-07: *Attribution Requirements for Joint Expenditures for Written, Typed, or Printed Communications, Television or Internet Video Advertising, and Radio or Internet Audio Advertising*. As stated above, traditionally, the Commission has not disputed a committee's determination of its proportionate share of a joint expenditure unless the Commission found that allocation to be clearly erroneous. *See In the Matter of a Complaint by Joseph P. Secola*, Brookfield, File No. 97-294. In some circumstances, where a communication predominately features one candidate and the second candidate appears only briefly, a cost allocation of five percent, or even one percent, to the second candidate might be reasonable if the committees can demonstrate reasonableness under the specific facts and circumstances. As with all such communications, in order to ensure proper disclosure to the public, the attribution must identify each committee making the joint expenditure. *See* General Statutes § 9-621.

### **Making Payments for Joint Expenditures**

Once committees of candidates participating in the CEP receive grant funds, they may not make expenditures to other committees. Regs., Conn. State Agencies § 9-706-2 (b) (8). It is also impermissible after the receipt of a grant for grant recipients to make expenditures "in conjunction with another candidate for which the participating candidate does not pay his or her proportionate share of the cost of the joint expenditure." Regs., Conn. State Agencies § 9-706-2 (b) (10). Ideally, after the receipt of a grant, a participating candidate committee should pay for its proportionate share of the costs of a joint communication by paying vendors directly.

The Commission has received many questions about what a committee should do if a mistake was made resulting in one committee paying the vendors in full for a joint expenditure. The Commission has determined that the tension between the two relevant provisions of the law must be resolved in favor of a participating candidate curing the receipt of an impermissible in-kind contribution and preserving compliance with the expenditure limits. Accordingly, the Commission advises that if, subsequent to receiving a grant, a participating candidate committee receives the benefit of a joint expenditure and cannot pay its share of the costs directly to vendors, the committee should reimburse the expending committee for its reasonable proportionate share of the costs. The Commission will of course consider the circumstances of the reimbursement and the necessity of such a cure in evaluating any potential violation of CEP requirements set forth in the regulations and any committee facing this scenario should keep detailed records concerning the need for the reimbursement and the steps taken to avoid breaching the Program's expenditure limits.

State Elections Enforcement Commission  
*Declaratory Ruling 2011-03*

This constitutes a declaratory ruling pursuant to § 4-176, and provides guidance about candidate committees and joint communications. 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 § 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.

This declaratory ruling is only meant to provide general guidance and addresses only the issues raised. Questions about whether a specific communication constitutes a joint communication benefiting more than one candidate should be directed to the Commission staff.

Adopted this 18th day of May, 2011 at Hartford, CT by a vote of the Commission.

  
Stephen F. Cashman, Chairman