DECLARATORY RULING 2014-02:
Candidate's Solicitation of Contributions and Covered Transfers
Pursuant to Public Act 13-180

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 (the "petitioner") on behalf of its clients and to initiate a declaratory ruling proceeding concerning the application 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. The request consisted of three questions; this Declaratory Ruling responds to the third question.[1] 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. 3 in the petition no later than the date of its regular meeting scheduled on February 19, 2014.

Question Presented

The petitioner has asked the Commission to "confirm. . . that a candidate's non-earmarked fundraising activity for an entity that makes 'covered transfers' is not a basis to find coordination between the candidate and the entity receiving such covered transfers."

Legal Background

The 2013 Act amended the law regarding independent expenditures, in particular the definition of independent expenditure has been changed. General Statutes § 9-601c now provides as follows:

> (a) As used in this chapter and chapter 157, the term "independent expenditure" means an expenditure, as defined in section 9-601b, that is made without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee.

[1] 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.* Question 2 was addressed in Declaratory Ruling 2014-01*, Construction of the Phrase "Make or Obligate to Make" as Applied to Disclosure of Independent Expenditures.*

> (b) When the State Elections Enforcement Commission evaluates an expenditure to determine whether such expenditure is an independent expenditure, there shall be **a rebuttable presumption** that the following expenditures are not independent expenditures:
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> (1) An expenditure made by a person in cooperation, consultation or in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding with (A) a candidate, candidate committee, political committee or party committee, or (B) a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee;

The statute contains eight additional instances where the Commission is to presume that a coordinated expenditure was made. The full text of the statute is appended hereto. The statute also contains text regarding facts that, standing alone, are not presumed to indicate coordination:

> (c) When the State Elections Enforcement Commission evaluates an expenditure to determine whether an expenditure by entity is an independent expenditure, the following **shall not be presumed** to constitute evidence of consent, coordination or consultation within the meaning of subsection (a) of this section: (1) Participation by a candidate or an agent of the candidate in an event sponsored by the entity, unless such event promotes the success of the candidate's candidacy or the defeat of the candidate's opponent, or unless the event is during the period that is forty-five days prior to the primary for which the candidate is seeking nomination for election or election to office; (2) membership of the candidate or agent of the candidate in the entity, unless the candidate or agent of the candidate holds an executive or policymaking position within the entity after the candidate becomes a candidate; or (3) financial support for, or solicitation or fundraising on behalf of the entity by a candidate or an agent of the candidate, unless the entity has made or obligated to make independent expenditures in support of such candidate in the election or primary for which the candidate is a candidate.
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> (d) When the State Elections Enforcement Commission evaluates an expenditure to determine whether such expenditure is an independent expenditure, the commission shall consider, as an effective rebuttal to the presumptions provided in subsection (b) of this section, the establishment by the person making the expenditure of a firewall policy designed and implemented to prohibit the flow of information between (1) employees, consultants or other individuals providing services to the person paying for the expenditure, and (2) the candidate or agents of the candidate.

(Emphasis added.)

Analysis

To answer the petitioner's question it is first necessary to define the terms used in the question itself. To begin, the question discusses "non-earmarked fundraising activity." In Declaratory Ruling 2013-02, the Commission defined the term "earmarked" in regard to fundraising as follows:

> For purposes of this declaratory ruling, the Commission construes the term "earmarked" to generally mean funds provided for the purpose of promoting or opposing the nomination or election of Connecticut candidates or political parties. Funds are considered earmarked when the person giving or receiving them has manifested an intention that they will be used to promote attack support or oppose Connecticut candidates or parties.

As such, non-earmarked funds would be funds that are not designated to promote or oppose Connecticut candidates or are not given with the intent that they be used to promote or oppose Connecticut candidates. An example of non-earmarked fundraising activity would be if a candidate was the guest speaker at a conference that raised funds for open space preservation for a non-profit land conservation organization. The candidate would be fundraising for the organization so that it could carry out its purpose of preserving open space, not to support or oppose specific candidates or influence the selection, nomination, election, appointment or defeat of candidates to state or local public office.

Covered transfers are defined in General Statutes 9-601:

> (29) (A) "Covered transfer" means any donation, transfer or payment of funds by a person to another person if the person receiving the donation, transfer or payment makes independent expenditures or transfers funds to another person who makes independent expenditures.
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> (B) The term "covered transfer" does not include:
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> (i) A donation, transfer or payment made by a person in the ordinary course of any trade or business;
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> (ii) A donation, transfer or payment made by a person, if the person making the donation, transfer or payment prohibited the use of such donation, transfer or payment for an independent expenditure or a covered transfer and the recipient of the donation, transfer or payment agreed to follow the prohibition and deposited the donation, transfer or payment in an account which is segregated from any account used to make independent expenditures or covered transfers;

> (iii) Dues, fees or assessments that are transferred between affiliated entities and paid by individuals on a regular, periodic basis in accordance with a per-individual calculation that is made on a regular basis;
> (iv) For purposes of this subdivision, "affiliated" means (I) the governing instrument of the entity requires it to be bound by decisions of the other entity; (II) the governing board of the entity includes persons who are specifically designated representatives of the other entity or who are members of the governing board, officers, or paid executive staff members of the other entity, or whose service on the governing board is contingent upon the approval of the other entity; or (III) the entity is chartered by the other entity. "Affiliated" includes entities that are an affiliate of the other entity or where both of the entities are an affiliate of the same entity.

Thus, to return to the scenario given above, an example of a covered transfer would be if the land preservation nonprofit gave some of the funds that were raised at the conference at which the candidate was a speaker to an entity that intended to make independent expenditures to benefit candidates that supported open space legislative initiatives. The funds the nonprofit gave would be a covered transfer.

Next, there is the definition of an independent expenditure. The way that the statute defining independent expenditure is structured is that the term is described by what it is not: it is not a coordinated expenditure. It is, essentially, an expenditure made by someone that is made without the consent, coordination or consultation with, in this case, a candidate.[2]

The definition describes nine examples of behavior that the Commission can presume to be coordination (subject to rebuttal) between the person making the expenditure and the candidate. The scenario about which the petitioner has asked is not among these listed rebuttable presumptions. Additionally, General Statutes § 9-601c (c) provides that when the Commission evaluates an expenditure to determine whether an expenditure by entity is an independent expenditure, the following *shall not be presumed* to constitute evidence of consent, coordination or consultation within the meaning of subsection (a) of this section: . . . (3) financial support for, or solicitation or *fundraising on behalf of the entity* by a candidate or an agent of the candidate, *unless the entity has made or obligated to make independent expenditures in support of such candidate in the election or primary for which the candidate is a candidate*." (Emphasis added.) Understanding that the petitioner's question does not concern fundraising for the maker of an independent expenditure, but fundraising for a group that supplies funds to the maker, the intent of the statute is easily extrapolated: a candidate's non-earmarked fundraising activity for an entity that makes 'covered transfers' is not *presumed* to establish coordination between the candidate and the entity receiving such covered transfers.

[2] For purposes of this Declaratory Ruling, the discussion will be limited to coordination between a person making the expenditure and a candidate, and not coordination with a candidate committee, party committee or political committee, which are also the subject of 9-601c.

Returning to the petitioner's question, however, it did not use the term *presumption*, but *basis*, which here will be taken to mean *support for* or *a component of* a finding of coordination.[3] This is a much broader question than asking whether such fundraising creates a presumption of coordination. It is, in essence, asking whether such fundraising may ever constitute evidence of coordination.

The answer must be in the affirmative. Although it is impossible to envision all possible scenarios that might arise where non-earmarked fundraising could constitute evidence of coordination (and where it would not), they are not difficult to imagine. For example, if a candidate raised non-earmarked funds for an entity at one point in time, and later approached the entity with the proposal that they take a portion or a percentage of the funds raised and direct it to another entity who has told the candidate that it would like to make expenditures to benefit the candidate,[4] then the fact that the candidate had originally raised the funds (together with surrounding facts) might constitute evidence that the eventual benefitting expenditure was coordinated. Alone, the fact that the candidate fundraised non-earmarked funds would not prove coordination—nor would it even create the presumption that there was coordination: however, it is foreseeable that it might constitute evidence of a "general understanding" among the actors.[5]

As another example, the definition of independent expenditure provides that it shall not be presumed to constitute evidence of coordination if a candidate fundraises on behalf of an eventual maker of independent expenditures ***unless*** the maker has made or obligated to make independent expenditures on behalf of the candidate in the past. The implication is that if the maker had made them in the past, then said fundraising might be used as evidence of coordination. Similarly, if the entity in the petitioner's question—the one receiving the non-earmarked contributions—had previously made covered transfers to a maker of independent expenditures (who had made them on behalf of the candidate), then the candidate's fundraising activities vis-à-vis the entity also might constitute evidence of coordination.

Making an independent expenditure involves far more than simply paying for a communication. Fundraising is an indispensable part of making independent expenditures, which are fundamentally, the purposeful expenditure of funds, and not

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[3] Black's Law Dictionary defines *basis* as follows: "Fundamental principle, groundwork, support, the foundation or groundwork of anything; that upon which anything may rest or the principal component parts of a thing." (Black's Law Dictionary, 6th Edition (1990))

[4] This would also be an example of the candidate soliciting *earmarked* covered transfers, which would be considered contributions, as described in Declaratory Ruling 2013-02. This action would have the additional effect of obligating the entity making the benefitting expenditure to register as a political committee.

[5] An expenditure is presumed to be coordinated if it is made "by a person in cooperation, consultation or in concert with, at the request, suggestion or direction of, or pursuant to a *general or particular understanding* with (A) a candidate . . . or agent acting on behalf of a candidate. . . ." General Statutes § 9-601c (b) (1).

simply the end product. Communications must be created, and this may involve fundraising (acquiring the funds to be spent), budgeting, strategizing, design, planning, media acquisition, development, distribution and any number of additional prior acts. To the extent that any of these activities are done with the intention that the result will be a communication that fits the definition of an independent expenditure, any attendant expenditures for these activities are themselves independent expenditures, and cannot be coordinated. See SEEC Declaratory Ruling 2014-01.

In *McConnell v. FEC*, 540 U.S. 93 (2003), the Court recognized "the substantial threat of corruption or its appearance posed by donations to or *at the behest of* . . . candidates and officeholders," and that "the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself." *Id.* at 182-84. As the Minnesota Campaign Finance and Public Disclosure Board recently stated in an Advisory Opinion, the act of fundraising already "suggests a close relationship" between the fundraiser and the group for which he fundraises, and indicates common values and goals between the two. Minnesota Campaign Finance and Public Disclosure Board Advisory Opinion No. 437. The same would be true, albeit at one remove, with the candidate and an intermediary to the maker of an independent expenditure. See Kentucky Registry of Election Finance Advisory Opinion 2012-05.

It bears repeating that, as simple as it sounds, to qualify as an independent expenditure, the expenditure must be actually independent and not coordinated. Whether that coordination with a candidate is couched in terms of "prearrangement" (*Citizens United v. FEC*, 130 S. Ct. 876, 908 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47)), "concert" (2 USC § 431 (17)), "some to-and-fro" (*FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 49 (D.D.C.1999) or "wink or nod" (*FEC v. Colorado Republican*, 533 U.S. 431, 442 (2001)), the actual independence of an expenditure will depend on the particular facts of a particular situation. The Commission reserves its ability to consider all facts that might be relevant to it in making what must be a factual, as well as a legal, determination on whether an expenditure was independent or coordinated.

Establishing proof of a general or implicit understanding as set forth in the first rebuttable presumption of coordination under our statutes must necessarily require consideration of ancillary facts, as well as context. Such facts may include, but are not limited to the expenditure maker's history of making expenditures or covered transfers and for whom they were made, common personnel of intermediaries and expenditure makers, past relationships and actions of all actors, as well as the timing and amount of fundraising, whether for covered transfers or expenditures.

This constitutes a declaratory ruling pursuant to General Statutes § 4-176, and provides guidance about the disclosure requirements for independent expenditures. 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.

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.

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

Anthony J. Castagno, Chair
By Order of the Commission

Appendix

General Statutes § 9-601c provides as follows:

> (a) As used in this chapter and chapter 157, the term "independent expenditure" means an expenditure, as defined in section 9-601b, that is made without the consent, coordination, or consultation of, a candidate or agent of the candidate, candidate committee, political committee or party committee.
>
> (b) When the State Elections Enforcement Commission evaluates an expenditure to determine whether such expenditure is an independent expenditure, there shall be a rebuttable presumption that the following expenditures are not independent expenditures:
>
> (1) An expenditure made by a person in cooperation, consultation or in concert with, at the request, suggestion or direction of, or pursuant to a general or particular understanding with (A) a candidate, candidate committee, political committee or party committee, or (B) a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee;
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> (2) An expenditure made by a person for the production, dissemination, distribution or publication, in whole or in substantial part, of any broadcast or any written, graphic or other form of political advertising or campaign communication prepared by (A) a candidate, candidate committee, political committee or party committee, or (B) a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee;
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> (3) An expenditure made by a person based on information about a candidate's, political committee's, or party committee's plans, projects or needs, provided by (A) a candidate, candidate committee, political committee or party committee, or (B) a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee, with the intent that such expenditure be made;
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> (4) An expenditure made by an individual who, in the same election cycle, is serving or has served as the campaign chairperson, treasurer or deputy treasurer of a candidate committee, political committee or party committee benefiting from such expenditure, or in any other executive or policymaking position, including as a member, employee, fundraiser, consultant or other agent, of a candidate committee, political committee or party committee;
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> (5) An expenditure made by a person or an entity on or after January first in the year of an election in which a candidate is seeking public office that

benefits such candidate when such person or entity has hired an individual as an employee or consultant and such individual was an employee of or consultant to such candidate's candidate committee or such candidate's opponent's candidate committee during any part of the eighteen-month period preceding such expenditure;

(6) An expenditure made by a person for fundraising activities (A) for a candidate, candidate committee, political committee or party committee, or a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee, or (B) for the solicitation or receipt of contributions on behalf of a candidate, candidate committee, political committee or party committee, or a consultant or other agent acting on behalf of a candidate, candidate committee, political committee or party committee;

(7) An expenditure made by a person based on information about a candidate's campaign plans, projects or needs, that is directly or indirectly provided by a candidate, the candidate's candidate committee, a political committee or a party committee, or a consultant or other agent acting on behalf of such candidate, candidate committee, political committee or party committee, to the person making the expenditure or such person's agent, with an express or tacit understanding that such person is considering making the expenditure;

(8) An expenditure made by a person for a communication that clearly identifies a candidate during an election campaign, if the person making the expenditure, or such person's agent, has informed the candidate who benefits from the expenditure, that candidate's candidate committee, a political committee or a party committee, or a consultant or other agent acting on behalf of the benefiting candidate or candidate committee, political committee, or party committee, concerning the communication's contents, or of the intended audience, timing, location or mode or frequency of dissemination. As used in this subdivision, a communication clearly identifies a candidate when that communication contains the name, nickname, initials, photograph or drawing of the candidate or an unambiguous reference to that candidate, which includes, but is not limited to, a reference that can only mean that candidate; and

(9) An expenditure made by a person or an entity for consultant or creative services, including, but not limited to, services related to communications strategy or design or campaign strategy or to engage a campaign-related vendor, to be used to promote or oppose a candidate's election to office if the provider of such services is or has provided consultant or creative services to such candidate, such candidate's candidate committee or an agent of such candidate committee, or to any opposing candidate's candidate committee or an agent of such candidate committee after January first of the year in which the expenditure occurs. For purposes of

this subdivision, communications strategy or design does not include the costs of printing or costs for the use of a medium for the purpose of communications. For purposes of this subdivision, campaign-related vendor includes, but is not limited to, a vendor that provides the following services: Polling, mail design, mail strategy, political strategy, general campaign advice or telephone banking.

(c) When the State Elections Enforcement Commission evaluates an expenditure to determine whether an expenditure by entity is an independent expenditure, the following shall not be presumed to constitute evidence of consent, coordination or consultation within the meaning of subsection (a) of this section: (1) Participation by a candidate or an agent of the candidate in an event sponsored by the entity, unless such event promotes the success of the candidate's candidacy or the defeat of the candidate's opponent, or unless the event is during the period that is forty-five days prior to the primary for which the candidate is seeking nomination for election or election to office; (2) membership of the candidate or agent of the candidate in the entity, unless the candidate or agent of the candidate holds an executive or policymaking position within the entity after the candidate becomes a candidate; or (3) financial support for, or solicitation or fundraising on behalf of the entity by a candidate or an agent of the candidate, unless the entity has made or obligated to make independent expenditures in support of such candidate in the election or primary for which the candidate is a candidate.

(d) When the State Elections Enforcement Commission evaluates an expenditure to determine whether such expenditure is an independent expenditure, the commission shall consider, as an effective rebuttal to the presumptions provided in subsection (b) of this section, the establishment by the person making the expenditure of a firewall policy designed and implemented to prohibit the flow of information between (1) employees, consultants or other individuals providing services to the person paying for the expenditure, and (2) the candidate or agents of the candidate.