

JUN 05 2019

ENFORCEMENT COMMISSION

**STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION**

In the Matter of a Complaint by J.R. Romano
Town of Southington

File No. 2017-065

FINDINGS & CONCLUSIONS

Complainant J.R. Romano of Southington filed this complaint alleging that a not-for-profit group had made expenditures and contributions to promote local candidates without forming a political committee. After an investigation of the matter, the Commission adopts the following findings of fact and conclusions of law:

1. The complaint, filed October 17, 2017, alleged that *Indivisible Greenwich* was “operating as a political committee without registering as such and therefore outside the prevue [sic] of applicable state election laws. Indivisible Greenwich is actively promoting the election and defeat of certain political candidates for the 2017 Greenwich municipal elections. ... Indivisible Greenwich is actively raising money for political activity. . . .”¹ The complainant attached several printouts from Facebook reflecting information that the *Indivisible Greenwich* group had posted to its page.
2. *Indivisible Greenwich* is a local affiliate of a national organization, which was founded following the 2016 presidential election. The Greenwich entity started in January 2017 and filed its corporate entity paperwork in June 2017 with the Secretary of the State. In April 2018, *Indivisible Greenwich* secured tax-exempt status from the Internal Revenue Service under § 501(c)(4) of the Internal Revenue Code.
3. The investigation into the actions of *Indivisible Greenwich* centered on actions in which the group engaged in the 2017 election cycle, which was a municipal election year in Greenwich.
4. In response to the initial complaint, respondent Nerlyn Pierson, one of the leaders of *Indivisible Greenwich* (IG), outlined the actions that the group had taken during the 2017 election cycle:

In connection with the 2017 municipal elections, IG 1) promoted member engagement in the political process in a myriad of ways, including encouraging members to run for office (some did) and provided information about voter rights; 2) endorsed candidates (including from both political parties) based on two criteria;

¹ Affidavit of Complaint, J.R. Romano, Southington, (October 13, 2017).

and 3) provided its members with public information on how they, in their individual capacities, could become involved in supporting candidate campaigns if they so desired. Participation with campaigns was and is purely up to individual members on their own time and outside any organized IG activities. IG itself has and had no participation in or with any campaign.

IG has also not raised or expended any funds for the purpose of advancing political campaigns or in connection with elections. IG funds have been and are solicited solely to pay for operating costs (i.e., state and federal filing fees, paying for meeting space, insurance and supplies). No funds have been contributed or expended for political campaigns as IG's bank statement would confirm.²

5. General Statutes § 9-601b defines an "expenditure" under Connecticut's campaign finance statutes as:
- (a)(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, 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;
 - (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;³
6. Several exceptions to the definition of "expenditure" also exist, including uncompensated services provided by individuals volunteering their time on behalf of a party or political committee⁴ and an expense valued at less than \$200 provided by an individual acting alone.⁵ General Statutes § 9-601a (b) (18) also exempts from the definition of "contribution:"
- (b) (18) The value associated with the *de minimis* activity on behalf of a party committee, political committee, slate committee or candidate committee, including for activities including, but not limited to, (A) the creation of electronic or written communications or digital photos or video as part of an electronic file created on a

² Letter from Nerlyn Pierson (Nov. 17, 2017).

³ General Statutes § 9-601b (a) (defining "expenditure").

⁴ See General Statutes § 9-601b (b) (4).

⁵ See General Statutes § 9-601b (b) (15).

voluntary basis without compensation, including, but not limited to, the creation and ongoing content development and delivery of social media on the Internet or telephone, including, but not limited to, the sending or receiving of electronic mail or messages, . . .;

7. A group of two or more individuals who intend to spend or raise more than \$1,000 to promote candidates regulated by Title 9 of the Connecticut General Statutes must form a political committee. Groups of two or more individuals who intend to spend or receive more than \$1,000 must form a political committee within 10 days of the group's organization, as specified in General Statutes § 9-605. Once formed, a political committee must file regular campaign finance disclosure reports.
8. A group of two or more individuals that spends more than \$1,000 must also place attributions on any written communication that it makes to promote candidates.⁶ General Statutes § 9-621, provides in pertinent part:

(a) No . . . group of two or more individuals acting together that receives funds or makes or incurs expenditures not exceeding one thousand dollars in the aggregate and has not formed a political committee shall make or incur any expenditure, . . . for any written, typed or other printed communication, or any web-based, written communication, which promotes the success or defeat of any candidate's campaign for nomination at a primary or election or promotes or opposes any political party or solicits funds to benefit any political party or committee unless such communication bears upon its face as a disclaimer (1) the words "paid for by" and the following: . . . (D) in the case of a group of two or more individuals that receives funds or makes or incurs expenditures not exceeding one thousand dollars in the aggregate and has not formed a political committee, the name of the group and the name and address of its agent, . . .

(h) (1) No person shall make or incur an independent expenditure for any written, typed or other printed communication, including on a billboard, or any web-based, written communication, unless such communication bears upon its face, as a disclaimer, the words "Paid for by" and the name of such person and the following statement: "This message was made independent of any candidate or political party." In the case of a person making or incurring such an independent expenditure during the ninety-day period immediately prior to the primary or election for which the independent expenditure is made, such communication shall also bear upon its face the names of the five

⁶ See General Statutes § 9-621 (a).

persons who made the five largest aggregate covered transfers to the person making such communication during the twelve-month period immediately prior to such primary or election, as applicable. The communication shall also state that additional information about the person making such communication may be found on the State Elections Enforcement Commission's Internet web site.

9. These attribution requirements apply to entities or groups that make expenditures to promote candidates or political parties that fall under the jurisdiction of Connecticut's campaign finance statutes. Those provisions, however, expressly do not apply to any candidate running for a federal office or any monies spent to promote those candidates.⁷
10. In the summer of 2018, the Commission issued Declaratory Ruling 2018-01 "Political Activity of Organized Groups" that specified the legal consequences for grassroots groups and other entities that might engage in certain activities related to Connecticut electoral politics. The declaratory ruling – about which *Indivisible Greenwich* and other groups commented and testified at public hearing – addressed several hypothetical scenarios where the nature of a group's spending to promote candidates or political parties would require it to create a political committee or otherwise conform to the registration, reporting, and attribution provisions under the Commission's jurisdiction.
11. According to the Commission's declaratory ruling, a group with tax-exempt status under IRS Code § 501(c)(4), like *Indivisible Greenwich*, is not required to register a separate political committee, as long as the group does not raise money specifically to engage in Connecticut elections. As long as the group engages in activities outside the definitions of "contribution" and "expenditure" in Chapter 155, the group may spend and raise money free of any registration, reporting, or attribution obligations under Connecticut's campaign finance statutes.
12. But, if an entity engages in activities that fall within the definition of "contribution" or "expenditure" then that entity may acquire registration, reporting, and attribution requirements. Depending on the nature and magnitude of the expenditure or contribution, Connecticut's campaign finance statutes could require the entity to register and report any expenditures that the entity makes related to a state election. Or the statutes could require the entity to create a political committee to raise money specifically to make expenditures that are coordinated with candidates or to make contributions to candidate or party committees.

⁷ See General Statutes § 9-600 (exempting from coverage of Chapter 155 elections for "presidential electors, United States senators and members in Congress").

13. In line with recent Supreme Court precedents, an IRC § 501(c)(4) tax-exempt entity may spend unlimited money to promote candidates or parties in the form of independent expenditures, as long as those expenditures are not coordinated with candidates or party committees. But, whether independent or coordinated, all expenditures from these tax-exempt entities must bear attributions stating who paid for the expenditure.
14. In its 2018 declaratory ruling, the Commission stated that even a purely independent expenditure for which the entity bore no additional reporting requirements must inform recipients of the message information about who paid for the message. But the Commission also allowed that a group could show “substantial compliance” with the statutory disclaimer language. The Commission defined what would meet this “substantial compliance” language.

In such cases, the Commission would find substantial compliance where there is a clear indication in the email, post or other social media communication as to the name of the group responsible for the communication and the name and address of an agent who can be reached to answer any additional questions in the event a complaint is filed, or which the public can use to research the speaker behind the communication in order to evaluate the message.

15. *Indivisible Greenwich* was incorporated in June 2017. According to bank records provided by the group, from the bank account’s establishment in August 2017 through July 2018, it deposited a total of \$5,647.99. During that same time, the group spent \$4,108.47, the majority of those funds – a total of \$2,459 – went to legal fees. *Indivisible Greenwich* also spent \$400 to apply for non-profit status with the IRS and spent at least \$818 to rent facilities for events it held in town.
16. Those events, however, according to accounts and documentation supplied by Indivisible Greenwich, were organizational and focused broadly on opposing the agenda espoused by President Donald Trump. Sandy Litvack, then a candidate for first selectman in Greenwich, attended a meeting of Indivisible Greenwich on September 10, 2017, which was only 58 days before the November 7 election. Promotional materials distributed by Indivisible Greenwich before the meeting identified U.S. Senator Chris Murphy and U.S. Representative Jim Himes as potential speakers but did not mention the attendance of any active candidates for office as being there or speaking at the event. Literature about the event invited the public “to attend and join the group’s campaign to promote non-partisan civic engagement in seeking results-oriented action at the federal and state levels.” At the meeting, Litvack, whose wife, Joanna Swomley, serves as president of Indivisible Greenwich, spoke about his own motivations for running for public office and encouraged others to get involved in civic activities. According to witnesses, however,

he did not promote his candidacy, seek contributions, or encourage those present to vote for him.

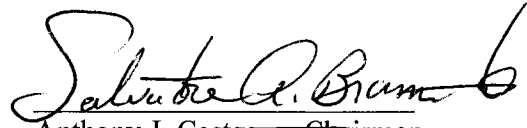
17. The commission has previously adopted a rubric to determine if an event is promotional of a candidate that attends. *See, e.g.*, In the Matter of a Complaint by Roberta Clapper, Norwich, File No. 2015-153 – Findings & Conclusions (State Elections Enforcement Comm’n., April 13, 2016) (reaffirming rubric to analyze campaign events); Advisory Opinion 2010-08:Allocating Pro Rata Share for Joint Campaign Events. The elements that the Commission considers to determine if an event is promotional of a candidate and thus a contribution include: “1) Whether the invitations for the event tout the candidate’s presence and/or the chance to hear [the candidate’s] message; 2) Whether the media was alerted as to the candidate’s presence at the event; 3) Whether the candidate notified ... supporters that [the candidate] would be present at the event; 4) Whether the candidate is distributing ... campaign literature at the event or in connection with the event; 5) Whether the candidate is fundraising at the event; 6) The extent to which the event targets the voters or in-district donors of the candidate; and 7) The extent to which the candidate is speaking at the event regarding [the candidate’s] campaign.” *Id.*
18. Here, the invitations for the event did not tout Sandy Litvak’s presence and/or the chance to hear his message; the media was not alerted as to Litvak’s presence at the event; Litvak did not notify his supporters that he would be present at the event; Litvak did not distribute campaign literature at the event or in connection with the event; Litvak did not fundraise at the event; and the event did not particularly target Litvak’s potential voters or in-district donors but rather focused on addressing issues occurring at the federal level and featured federal politicians. Litvak did speak at the event but, while his remarks did reference his motives for seeking office, he did not ask for votes or solicit donations. Based on all of the evidence about the event, the Commission finds that the event did not promote Litvak’s candidacy and therefore did not amount to an in-kind contribution to his campaign.
19. The Commission notes that the monies spent for events at which a candidate is allowed to speak regarding his campaign or candidacy may become contributions, particularly if other factors of the above indicia are met. When that happens a candidate must report the contribution and monies should be spent from a political committee, not a 501c4 organization. When spending money for such events right before an election that involve candidates, groups should exercise care and if Indivisible Greenwich plans on making any expenditures or contributions, it should form a political committee to pay for those expenditures or maintain strict independence from the candidates or parties the group is promoting in order to remain in compliance with Connecticut’s campaign finance statutes

20. On or about October 10, 2017, *Indivisible Greenwich* sent out an e-mail in which it listed various actions that recipients could take to get involved in the political process. As part of that e-mail, *Indivisible Greenwich* listed candidates that it endorsed for municipal elections. Those candidates were listed by name but were not affiliated with any political party. According to a comment in the e-mail communicating the endorsements, candidates were endorsed based on two issues: “Note that candidate positions on Trump and on the political takeover of the Greenwich Board of Education are dispositive.”
21. The endorsements were communicated via e-mail messages as well as posts on social media, specifically Facebook. The messages and postings were all written and disseminated by volunteers acting on behalf of the not-for-profit organization. Litvack was one of the candidates for municipal office in Greenwich whom *Indivisible Greenwich* endorsed prior to the November 7, 2017 election. The formal endorsement occurred after Litvack had spoken at the September 2017 gathering.
22. The endorsement e-mail included the name of the organization, *Indivisible Greenwich*, and included an e-mail address to contact the group if a recipient had any questions. The e-mail, which was disseminated via the Mail Chimp service, also included a copyright indicating that the message was under copyright to *Indivisible Greenwich*. Beneath that copyright was a mailing address for the group.
23. Applying the statutory provisions in Chapter 155 as well as the discussion about treatment of not-for-profit groups encapsulated in Declaratory Ruling 2018-001, *Indivisible Greenwich* made no “expenditures” or “contributions” during the 2017 municipal election cycle. In addition, the messages that the group disseminated through electronic means reflect clearly that *Indivisible Greenwich* had paid for those messages, meaning it “substantially complied” with the attribution requirements.
24. Based on the evidence and legal standards cited above, the Commission will dismiss this matter.

ORDER

IT IS HEREBY ORDERED THAT the Complaint will be dismissed.

Adopted this 5th day of June, 2019 at Hartford, Connecticut by vote of the Commission.



~~Anthony J. Castagno, Chairman~~

By Order of the Commission

Salvatore A. Bramante - Vice-Chair