STATE OF CONNECTICUT
STATE ELECTIONS ENFORCEMENT COMMISSION

TESTIMONY PRESENTED BEFORE THE GOVERNMENT ADMINISTRATION AND ELECTIONS COMMITTEE

March 11, 2010

Albert P. Lenge, Executive Director
State Elections Enforcement Commission

Good Morning, Senator Slossberg and Representative Spallone, and distinguished members of the Government Administration and Elections Committee, once again, I appreciate and thank you for the opportunity to present testimony today.

I would like to speak in support of several bills today, specifically House Bill 5428, which raises the Commissions legislative proposals, and House Bill 5471, a vital piece of legislation intended to bring Connecticut's campaign finance laws into line with the recent Supreme Court decision *Citizens' United v. FEC*, which was announced in January.

Your committee has rightly propelled campaign finance to the top of your agenda for this legislative session; and I cannot stress to you enough the importance of a quick reaction to both rulings and to preserve the Citizens' Election Program, by protecting the fund and making necessary changes to the Program which includes the repeal of section 9-717. Working with you I have every confidence that we can find solutions to these difficult problems.

Initially, I would like to spend the bulk of my time today talking about the *Citizens United* case, trying to place it in context and laying out response. Let me start by offering some background on:

- What the Supreme Court said about corporate speech in this decision;
- What parts of our current statutory regime the *Citizens United* analysis affects; and
- How the proposed legislation attempts to amend Connecticut's campaign finance law to accommodate for the *Citizens United* decision.

Whatever your political stripe or personal convictions, the Supreme Court's decision in *Citizens United v. FEC* represents one of those rare high-court decisions that will likely have long-lasting, far-reaching effects on our society. The 5-4 decision basically declared that the First Amendment's guarantees of free speech extended not only to individuals but also to corporations, and that the federal government had no authority to discriminate against certain speakers based on their identity. In one stroke, the Supreme Court wiped away well-established precedent preventing unbridled spending from corporate treasuries that may register in the billions of dollars. *Citizens United* nullified any restriction on corporate independent expenditures that advocated on behalf of – or against – a political candidate or party. The Court reasoned that corporate communications coupled with attribution and reporting requirements would allow voters to gauge the value of some of the messages in the "marketplace of ideas."

Connecticut, like the federal government and other states, prohibits business entities from spending money directly from their corporate treasuries on contributions as well as independent expenditures that promote or oppose a political candidate or party. Specifically, Connecticut General Statutes Section 9-613 states that "[n]o business entity shall make any contributions or expenditures to, or for the benefit of, any candidate's campaign for election to any public office" and that "[n]o business entity shall make any other contributions or expenditures to promote the success or defeat of any political party." Such contributions and expenditures by corporations must be made instead through political committees, a vehicle which affords disclosure and attribution. The *Citizens United* decision touched only upon one part of our existing ban on corporate spending, namely the expenditures that a corporation may make to promote a candidate or party. The Supreme Court did not say that corporations could make contributions to candidates or parties, and that portion of our law prohibiting such contributions remains viable.

Under *Citizens United*, our prohibition on independent expenditures by corporations, in my opinion, would not survive constitutional scrutiny. Our statute, which imposes an outright ban on direct expenditures by corporations and other business entities when those expenditures are designed to advocate for or against a candidate or party, violates the Supreme Court's newly enunciated rule.

The Commission, however, retains the ability to require reporting of independent expenditures that these corporations may make and to require corporations to place attributions on any messages they create so that voters can identify them and evaluate their efficacy. The Court said that its *Citizens United* decision created a campaign finance system "pair[ing] corporate independent expenditures with effective disclosure."

We have drafted our responsive legislation to capitalize on the ability of the state to require prompt disclosure of these independent expenditures and attributions on individual pieces of communication.

The legislation that we propose in House Bill 5471 brings our current law into line with the Supreme Court's direction in *Citizens United*. First, in section 1, the bill amends the definitions section of Chapter 155 by defining "entity," a new designation that includes specific state-authorized business models, such as corporations, partnerships, and other enumerated corporate forms in Connecticut statutes as well as labor unions. Creating this new definition allows us to afford corporations and other organized groups the ability to speak in the political marketplace by making independent expenditures. Adding this new category of "entity" to the landscape means that independent expenditures would come from three potential sources: individuals and committees acting alone – which was always the case – and under this legislation from the newly defined "entities."

In conjunction with expanding the potential universe of legal participants in the political discussion, this legislation buttresses our ability to determine who is speaking. Section 6 of the bill requires individuals, entities, and committees acting alone who make independent expenditures valued at more than $1,000 in the aggregate to file an independent expenditure report. On that report the Commission will have the ability to tailor the information that those making independent expenditures supply so that we can respond with supplemental grants when necessary for those candidates participating in the Citizens' Election Program and identify speakers in cases where further enforcement or legal action is needed.

Another effective tool to facilitate public disclosure of independent expenditures will be the broadened attribution requirements proposed in section 10 of the bill. Entities that make independent expenditures will not only have to identify any message they create. but the CEO or equivalent officer of the corporation will also have to "stand by" the ad as is required of candidates in their ads. The CEO's name and title would appear with other attribution information in any printed ad. Like candidates, CEO's would be required to provide their voice and visage to any televised or Internet video message along with a statement that they approved the content of the message and that it was made independent of any candidate or party. The same message in the CEO's voice would be required in radio or Internet audio messages.

All of these things – opening the political landscape to direct expenditures by corporations; comprehensive, timely reporting of independent expenditures; and ample attribution requirements that connect entities to the candidates or parties they advocate and oppose – bring Connecticut's campaign finance statues into line with the law laid out by the Supreme Court in Citizens United.

Other sections of House Bill 5471 address aspects of our independent expenditure regime that needed to be brought up to date with our present campaign landscape. Specifically, we took the definition of coordinated expenditure that currently exists in our statute and rewrote it in light of independent expenditures. We created a rebuttable presumption for those making specified expenditures to show that the expenditures were indeed independent of any candidate or committee. In all but one instance could we say"generally speaking" instead, this burden-shifting did not alter the substance of already existing definitions but rather simply recast them.

Specifically, in section 2 of the raised bill, we defined "independent expenditure" and then listed types of expenditures are by their nature presumed to be coordinated with a candidate, a candidate committee, political committee, or party committee. The new definition focuses on corporate expenditures where a leader of the corporate entity making the expenditure may also play a role in a campaign or party that benefits from the expenditure. In that case, the company making the expenditure would need to show why given the circumstances under which the expenditure was made, where one individual had his feet in both camps – corporate and campaign – that expenditure was not coordinated between the two.

Given the increased number of independent expenditures that we expect to see in light of the *Citizens United* case, shifting the burden to the entities making those expenditures to show that they truly were independent is essential. It requires the agency to prove that a certain scenario exists, then shifts the burden to the entity that has access to the evidence that characterizes whether the expenditure was independent. It will also will create an incentive for corporations and other entities to act with extra vigilance and caution to avoid making a coordinated expenditure on behalf of a candidate or party. Absent this fix, proving that a corporate expenditure was coordinated would be too burdensome on the Commission's limited staff and would make enforcement difficult if not impossible.

I would also like to take this opportunity to speak in favor of House Bill 5428, which combines the proposals that the Commission asked the Committee to raise this session. House Bill 5428 will help the Commission fulfill its statutorily mandated obligation to administer elections and to protect the public funds it disburses from the Citizens' Election Fund to participating candidates. This bill amends General Statutes § 9-7b to retain SEEC jurisdiction over new optical scan voting machines, which are codified in regulations promulgated by the Secretary of the State instead of state statute, like the old lever voting machines. This bill also clarifies that Registrars of Voters, who serve as local eyes and ears for the Commission in detecting voter fraud, can file a statement with the Commission like the Secretary of the State and Town Clerk, instead a statement under oath like members of the public. The proposed legislation also authorizes the Commission to impose a civil penalty for violation of the Help America Vote Act and for any violation of a prior Commission order. We also seek an amendment to Section 9-236b to clarify that it creates a substantive right attached to violating any portion of the Voter's Bill of Rights enumerated in that section, and is not merely a notice provision.

House Bill 5428 also mandates expansion of electronic filing to more committees spending and raising money under the auspices of our campaign finance system. The bill requires all participating candidates and those non- participating candidates who raised or spent more than $5,000 to file with the SEEC via electronic means. All state central committees and legislative caucus and leadership committees will also be required to e-file, as will other PACs and party committees that have balances of $5000 as of December 31, 2009. This language also appears in a number of proposed bills and the Commission supports the language contained in House Bill 5428.

As the Supreme Court pointed out in its *Citizens United* decision, democracy depends on timely, comprehensive, and accurate reporting of the money spent on elections. Achieving transparency, accuracy, and prompt disclosure of campaign finances will be advanced most notably by electronic filing, which allows the public instantaneous access to data on how candidates, parties, and other political players are spending money in the system. Our electronic reporting system e-CRIS proved very effective in 2008, when many of your treasurers utilized the online reporting system to track and report contributions and expenditures and to apply for public financing grants. Requiring more participants in the political process to file electronic campaign finance statements will secure our position as a national leader in campaign financing reform and help to retain the public's confidence that their elected officials' campaigns observe the campaign finance laws and limits.

Before closing, I would like to briefly speak in opposition to House Bill 5470, which places several new duties and requirements on the Commission and its staff. First, the bill requires the Commission to determine whether to waive otherwise mandatory late filing fees on case-by-case basis if the treasurer can show "hardship." The bill also requires the Commission to notify treasurers "of any change to any provision . . . or any interpretation of any such provision, regulation, special or public act." It also mandates a written response within 10-days to any telephone inquiry from a campaign treasurer.

The administrative burden that these new requirements would impose is staggering. Offering the potential for waiving a late fee based on "hardship" would mean that most if not all treasurers who filed a report late would claim hardship. Likewise the incentive to file on time would drop since the law would offer potential relief if one could show "hardship." Notice, hearings, and rendering decisions under the UAPA would, I fear, create a system marked by confusion and added cost for the Commission. It would clearly create a fiscal impact on the Commission as it would have to adjudicate claims of hardship. As presently drafted, the non–waiverable penalty at both the town and SEEC level removes any discretion and insists upon a uniform standard for all filers.
The same is true of the other two duties imposed on the Commission under this bill. In 2008, 343 candidates ran for the General Assembly. The Commission consulted with the campaign treasurers representing those candidates regularly, informing them of deadlines and requirements that they faced. Requiring a written response to almost 400 campaign treasurers', deputy treasurers and candidates telephonic questions would create an extraordinary burden on the agency.

I understand the genesis for this measure and have heard the complaints from many of you and your treasurers regarding the speed and accuracy of our responses to your questions. I have made improving our customer service one of my top priorities but cannot support legislatively mandated deadlines that, in my opinion, will not improve the answers you hear or the functioning of your campaigns and in fact will only harm our service to you, our clientele. I urge you to reject House Bill 5470.

We also support Senate Bill 389. With our support for Senate Bill 389, we offer the following friendly amendment which is consistent with the language we have proposed in House Bill 5428. We suggest that the language substitute "tabulator <u>or other voting system approved for use in the election by the Secretary of the State</u>" for "tabulator" throughout the bill. This change takes into account that here are two voting systems in each polling place now and will provide assistance to handicapped voters using the AVS system. We also note that section 3 Senate Bill 389 overlaps amendments made to our enabling statute 9-7b in House Bill 5428. We support the amendments in House Bill 5428.

Finally, we have noticed that there is considerable overlap between House Bill 5022, House Bill 5428 and Senate Bill 421 for some of the sections of the law that are impacted and the changes that are being effectuated. The Commission is committed to working with this Committee to ensure that the language in the final bill will be consistent and will work from a legal and administrative standpoint.

Thank you for your time and consideration of the Commission's views. I look forward to answering any questions you may have.