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Campaign Finance Board Hearing on Implementing City Charter Amendment Requiring Disclosure of Independent Expenditures in City Elections

March 10, 2011

Testimony of Laurence D. Laufer

Thank you for the invitation to testify. Last year, the Campaign Finance Board (CFB) advocated a City Charter amendment to require disclosure of independent expenditures in New York City elections. The Charter Revision Commission (CRC) approved the proposal and the voters ratified it into law. Now, the CFB now faces the challenge of implementing the new requirement.

This will not be an easy exercise. I wish you well in crafting appropriate rules. Indeed, in thinking about the challenge you – and your staff – now face, it's worth recalling the lesson of story of King Midas: be careful what you wish for.

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The CFB's hearing notice and briefing paper identify the following issues for consideration:

- Scope
- Disclosure details
- Exemptions
- Enforcement
- Disclaimers

Taken altogether, it is a very big topic. Therefore I'm limiting my remarks to just questions of scope and exemption.

1. Starting Point: Charter Definition

The CFB is not drawing on a blank slate and it is not writing legislation. Specifically, the Charter amendment directs:

> (e) The board shall promulgate rules concerning the form and manner in which independent expenditures are to be reported and disclosed, the information to be reported and disclosed, the periods during which reports must be filed, and the verification required. The board shall promulgate such additional rules as it deems necessary to implement, administer, interpret and enforce this paragraph and shall provide in such rules that information regarding independent expenditures be promptly made accessible to the public during the covered election cycle.

Charter §1052(a)(15)(e) (emphasis added). In other words a CFB rulemaking needs to answer the question of what activity is subject to disclosure under the Charter definition of independent expenditure as enacted, not what activity should be subject to disclosure as an independent expenditure as a matter of public policy. The rulemaking will be primarily an exercise in interpretation, not legislation.

The Charter contains a detailed definition of the activity subject to disclosure:

> "Independent expenditure" shall mean a monetary or in-kind expenditure made, or liability incurred, in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum, where no candidate, nor any agent or political committee authorized by a candidate, has authorized, requested, suggested, fostered or cooperated in any such activity. The term "independent expenditure" shall not include: (1) the value of services provided without compensation by individuals who volunteer a portion or all of their time, (2) the use of real or personal property and the cost of invitations, food and beverages voluntarily provided by an individual, to the extent such services do not exceed five hundred dollars in value, (3) the travel expenses of any individual who on his or her own behalf volunteers his or her personal services, to the extent such expenses are unreimbursed and do not exceed five hundred dollars in value, and (4) any expenditure made, or liability incurred, that is considered to be a contribution to a candidate under any provision of this charter or local law, or under any rule promulgated by the board.

Charter §1052(a)(15)(a)(i). This definition is not open ended. Also, for the most part, the language is derived from the state law and Campaign Finance Act definitions of contribution, with the exception of the phrase "in support or in opposition to". Thus, prior interpretations of state and City law should be taken into account in the rulemaking that reflects your interpretation of this new definition.

In terms of construing the new phrase, the CFB needs to decide whether that phrase confirms, broadens, or narrows the pre-existing meaning of independent expenditure under state and City law. I think the new phrase is somewhat clearer and certainly narrower than the phrase it supplants: "in connection with the nomination for election or election of any candidate". This is relevant to whether the definition encompasses more than just express advocacy.

2. A Failure to Communicate?

The CFB briefing paper describes the scope of regulated activity as "expenditures for communications." Does that mean the definition is presumed to exclude expenditures for other purposes?

On the one hand, the Charter Commission's (CRC) report identifies its concern as "independent advertising campaigns", "advertising materials", and "advertising messages" aimed at "members of the public."[1] Clearly, at a minimum, the definition covers expenditures for advertising.

The CRC report describes the purpose of the amendment as closing a "disclosure gap":

> [u]nder existing law ... the CFB has no power to require disclosure related to expenditures that are made independent of any candidate, but that are nevertheless made with the express intent of influencing the outcome of municipal elections and ballot proposals. This gap in the City's campaign finance system allows independent actors to spend lavishly on local elections while remaining largely insulated from public scrutiny.[2]

The CRC report states that "independent expenditures have become an increasingly significant part of election-related spending in New York City" and identifies "minor political parties, labor unions, political committees and other third-party actors" as sources of independent spending in the 2005 and 2009 municipal elections.[3] The reports political committees file with the Board of Elections under Article 14 "are narrower in scope and do not provide for the degree of

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[1] Final Report of the 2010 New York City Charter Revision Commission (http://www.nyc.gov/html/charter/downloads/pdf/final_report_2010_charte_revision_9-1-10.pdf) at 13, hereafter referenced as "CRC Report".

[2] *Id* at 12 (emphasis added).

[3] *Id.* at 13.

transparency contemplated by the Commission's proposal."[4] According to the CRC, the amendment "would provide critical information and context for members of the public and help them to evaluate advertising messages aimed at influencing their votes."[5]

From these statements, one may discern that the definition was meant to cover expenditures made with the express intent of influencing the outcome of an election, specifically advertising messages aimed at influencing votes. Indeed, if disclosure is limited to expenditures for advertising communications, the definition would cover the same general territory as federal law in the case of both independent expenditures and electioneering communications.[6]

But if the definition is limited to communications, the specified exemptions for non-compensated volunteers, use of real or personal property, invitations, food, beverages, and unreimbursed travel make little or no sense. These exemptions derive from similar exemptions in the state and City law definitions of contribution, although in those definitions the exemptions modify only the meaning of contribution, not the meaning of independent expenditure. The obvious implication of the exemptions in the Charter definition, is that the new definition of independent expenditure was designed to encompass activities that are the inverse of the specified exemptions, such as compensation paid to non-volunteer personnel; invitations, food and beverages not provided by individual volunteers or exceeding $500 per volunteer; and travel expenses of non-volunteers and volunteer travel expenses that are reimbursed. Did the CRC intend that such costs would be subject to disclosure as independent expenditures only when

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[4] *Id.* at 15.

[5] *Id.* at 13 (emphasis added).

[6] A narrow reading may also be supported by reference to the disclaimer provision, which covers only "literature, advertisement or other communication." *See* Charter §1052(a)(15)(c). But, then again, this provision may be read as merely requiring disclaimers only for communications paid by independent expenditure, not narrowing the meaning of that defined term.

incurred specifically for the purpose of producing or distributing an advertisement? Or, may the definition be understood more broadly as requiring disclosure of expenditures for activities such as internal administration, legal compliance, fundraising, research, and even the planning or preparation of advertising that is never actually produced. The CFB rulemaking should address this issue.

Similarly, the Charter definition makes clear that "independent expenditures" and "contributions" are meant to be mutually exclusive, as is the case under pre-existing state and City law. But that leaves open the question of whether these two terms are also meant to be comprehensive of all expenditures in City elections by individuals and entities other than City candidates and their authorized committees. If that were the case, then the CFB should conclude that the term "independent expenditure" is not limited to advertising expenditures. But then again, the CRC's choice of the phrase "in support or in opposition to", instead of the broader "in connection with the nomination for election or election of any candidate" that appears in the state and City definitions of contribution may indicate that the two terms were not meant to encompass all election-related spending. I'll return to the question of comprehensiveness in a moment.

3. Test for Independence

The heart of any definition of independent expenditure is the standard for determining the expenditure's "independence." The Charter definition creates the following test:

> no candidate, nor any agent or political committee authorized by a candidate, has authorized, requested, suggested, fostered or cooperated in any such activity.

Charter §1052(a)(15)(a)(i), *supra* (emphasis added). Again, a phrase has been drawn from the City and state definitions of contribution.

CFB rules implementing the Campaign Finance Act for City candidates include factors for determining whether an expenditure is an independent expenditure, including rules specifically addressed to independent expenditures by political parties and by other candidates.[7] While the CFB may instinctively turn to existing Rule 1-08(f) to derive rules for implementing the Charter amendment, the purpose of that rule is quite different. Rule 1-08(f) regulates candidate compliance. It addresses when a campaign expenditure is not independent.[8] It fails to shed light on whether an expenditure is "in support of or in opposition to a candidate" in the first place.[9]

For example, Rule 1-08(f)(3) states: "[a]n expenditure for the purpose of promoting or facilitating the nomination or election of a candidate, which is deemed not to be an independent expenditure, is a contribution to, and an expenditure by, the candidate." Hypothetically, a person may form a political committee for the sole purpose of making independent expenditures to support a particular candidate and incur costs to rent office space, raise funds, and hire staff. What if that political committee then pulls the plug and ultimately makes no advertising expenditures?

The CFB may well determine that preparatory costs for such an aborted advertising campaign is not the kind of spending that the Charter amendment aims to bring to light. If so, the costs would not be an independent expenditure. What policy would then be served by

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[7] *See* CFB Rule 1-08(f).

[8] Rule 1-08(f) provides standards for determining that an expenditure is actually an in-kind contribution, subject to contribution limits and candidate disclosure requirements. *See also* CFB Advisory Opinion No. 2009-7 (Aug. 8, 2009). A candidate's cooperation in alleged independent expenditures may have severe repercussions. *See* CFB Rule 2-02 (breach of certification).

[9] An either-in-kind-contribution-or-independent-expenditure treatment is necessarily premised on the activity at issue having a sufficient connection to the candidate's campaign for office.

automatically charging such costs to a candidate as an in-kind contribution in the manner of Rule 1-08(f)(3)?

Let's then take this to its logical conclusion: if the new CFB rulemaking accepts that the definition of independent expenditure in the Charter and that of contribution in the Act, taken together, are not comprehensive of all third party expenditures "made for the purpose of purpose of promoting or facilitating the nomination or election of a candidate" (alas, a third different phrase), then perhaps current Rule 1-08(f)(3) should be modified or repealed.

4. What about Candidates Helping Other Candidates?

Confusion may also arise from the Charter amendment's use of an indefinite article. It is unclear whether the two references to candidate, emphasized in the portion of the definition quoted on page 6, above, mean one and the same person. Further, the term "no candidate" is so broad as to suggest that if any candidate authorized an expenditure, that expenditure is not reportable under the Charter amendment, regardless whether that expenditure was made in support of or in opposition to a different candidate.[10]

Two problems result. First, the CFB has long been concerned that a candidate may make expenditures in support of a second candidate and has set standards for whether such expenditures would be treated as independent or an in-kind contribution.[11] Perhaps the CRC judged that it would not be necessary for candidate-authorized committees to disclose their independent expenditures in support of or opposition to a different candidate, since this

[10] In contrast, both the City and state law definitions of contribution make clear that the candidate supported by the expenditure and the candidate authorizing the expenditure would be one and the same person.

[11] *See, e.g.*, CFB, *Joint and Independent Spending by Candidates* (Jan. 1997) .

information could instead be included in the disclosure statements these committees must file with the CFB under the Act.[12]

The problem with this approach, however, is that it overlooks authorized committees of candidates for non-City offices, such as State legislators, which may independently spend to support or oppose City candidates. These non-City candidate committees do not file disclosure statements with the CFB. If this is what the CRC intended, a potential disclosure gap would remain under the Charter amendment, filled only by the more oblique information non-City-candidate-authorized-committees file with the State Board of Elections under State law.[13]

Greater mischief is possible by a wealthy candidate. A candidate may use personal funds to make large independent expenditures in support of or opposition to other candidates and not be subject to disclosure under the Charter definition, since such expenditures would have been authorized by a candidate. Thus, the potential for unresolved disclosure gaps grows, especially because the term "candidate" is not defined and could be construed to include prospective candidates who in the end do not make it onto the ballot.

5. Coverage or Exemption for Specific Categories of Speech

The CRC did the CFB no favor by omitting language from the Charter and its report that would support other exemptions from the definition of independent expenditure. The clamor for

[12] In its 1997 paper the CFB suggested that it intended to require participating candidates "to identify the candidate supported or opposed by a given expenditure and to state whether the expenditure was independent." *Id.* at p. 10. This suggestion was never implemented.

[13] The problem with defining independent expenditures by other candidates is additionally complicated because the Act permits City candidates to undertake certain "activities in support of other candidates" without those activities boomeranging into treatment as an in-kind contribution to the first candidate's campaign. *See* NYC Admin. Code §3-716. Thus, to the extent permitted by the Act, candidate A may endorse candidate B in a mailing paid for by candidate B without any portion of the mailing's cost being treated as an in-kind contribution to candidate A. That leaves open the question of whether the mailing would now be treated as an independent expenditure in support of candidate A reportable by candidate B under the Charter amendment, notwithstanding candidate A's manifest cooperation in the expenditure.

exemption will be significant, the case for exemption may be compelling, but, as an administrative agency (not a legislature or court), the CFB should understandingly be reluctant to undertake their creation.

a. Media, Old and New

Newspapers endorse candidates. This is express advocacy. The Internet is filled with robust political speech for and against candidates, much of it by individuals not affiliated with candidates' campaigns. The Charter and CRC report are silent on whether, if ever, communications in such forums would be subject to the Charter disclosure requirements for independent expenditures.

The U.S. Supreme Court has accepted statutory carve outs from campaign finance requirements for media companies.[14] New York state law also has one, expressly exempting "any newspaper or other publication issued at regular intervals in respect to the ordinary conduct of such business."[15] There is no similar carve out in City law.

As a matter of constitutional law, disclosure requirements (such as the new Charter amendment) are subject to exacting scrutiny, which requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.[16] The Charter amendment does not include an exemption for media companies or the Internet. Is there any basis for concluding that the First Amendment requires some kind of exemption in either case? If not, would a CFB attempt to exempt either category be beyond the scope of the authority delegated by the Charter?

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[14] *See McConnell v. FEC,* 540 U.S. 93, 208 (2003).

[15] N.Y. Election Law §14-124(1).

[16] *See Citizens United v. FEC,* 130 S.Ct. 876, 913 (2010).

b. Member Communications

Federal campaign finance law expressly exempts from treatment as an "expenditure" (which term encompasses "independent expenditure"):

> communications by a corporation to its stockholders and executive or administrative personnel and their families or by a labor organization to its members and their families on any subject. ...[17]

New York State and City laws do not codify a comparable exemption. Let's take labor unions as an example. A CFB advisory opinion states that the Act "makes no distinction" between a labor organization's communications to members and to the general public.[18] If, moreover, the Charter definition is read to extend to expenditures for purposes other than for communications, might the disclosure requirement also be applied to a union's "pre-communication" expenses, such as the cost of recruiting, training and deploying union members who volunteer to work phone banks, stuff envelopes, staff poll sites, or hand out slate cards prepared by a union?

There are at least two legal arguments in favor of an exemption. First, if the CFB feels compelled to derive an exemption for media companies based on "freedom of the press" under the First Amendment, it would appear that "freedom of association" under the First Amendment provides a similarly compelling constitutional concern in support of an exemption for labor union communications with members. In addition, the Charter definition exempts "the value of services provided without compensation by individuals who volunteer a portion or all of their time". In light of this exemption, it would be difficult to justify a distinction between the treatment of costs an individual incurs in recruiting, training and deploying other individuals in

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[17] *See, e.g.*, 2 U.S.C. §441b(b)(2)(A).

[18] CFB Advisory Opinion No. 2009-7 (Aug. 6, 2009).

his or her social network to volunteer their time in supporting (or opposing) a candidate and the costs a union incurs in getting its members to do precisely the same thing.

c. Political Parties

The U.S. Supreme Court has recognized that political parties have a First Amendment right to make independent expenditures in support of or in opposition to candidates.[19] Two courts have struck down, on constitutional grounds, New York's statutory limits on political party spending in party primaries, which has had the effect of allowing minor parties to play a role in major party primary campaigns.[20]

As noted above, the CFB has in place rules unique to political party expenditures. These rules draw distinctions between generic party activity and candidate-related expenditures for purposes of determining whether the Act's contribution limit is applicable.[21] If the CFB uses these same tandards for implementing the Charter disclosure requirement, will there be instances when the CFB treats "generic" party activity as a reportable independent expenditure?

For example, the CFB rule describes "training, compensating, or providing materials for poll watchers appointed by the party" as activities that are not in-kind contributions "unless it is demonstrated that the candidate in some way cooperated in the expenditure and that the expenditure was intended to benefit the candidate."[22] Following this rule, if a party funds a

[19] *See Colorado Republican Federal Campaign Committee v. FEC,* 518 U.S. 604, 618 (1996).

[20] *See Kermani v. New York State Board of Elections*, 487 F.Supp2d 101(NDNY 2006); *Avella v. Batt*, 33 A.D.3d 77 (App. Div. 3rd Dept. 2006). New York law defines "major political parties" as the two parties for which their respective gubernatorial nominees received the highest vote totals in the last preceding election. N.Y. Election Law §1-104(24). A minor party is any other political organization which in the last preceding gubernatorial election polled at least 50,000 votes for its candidate for governor. *See* N.Y. Election Law §1-104(3).

[21] CFB Rule 1-08(f)(4), *supra.*

[22] CFB Rule 1-08(f)(4)(i)(C).

"ballot security" operation with the intent of supporting or opposing particular candidates, without the cooperation of any candidate, the activity would appear to be reportable as an independent expenditure under the Charter definition.

A political party may take a different view, however. If the activity itself does not entail candidate-specific communications, the party may characterize it as serving a traditional "party-building" function, regardless of whether it was also intended to be in support or in opposition to particular candidates. Thus, a party may seek to use "housekeeping" funds to pay for these costs as "ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates."[23] State law exempts contributions to housekeeping funds from contribution limits.[24]

The CRC report may be read to lend support for a blanket exemption for party housekeeping expenditures, since the new disclosure requirement is directed to expenditures "made with the express intent of influencing the outcome of municipal elections".[25] Such an exemption would be a departure from the norm under the pre-existing CFB rule, however, potentially opening bigger vistas for party housekeeping expenditures that would likewise not be treated as in-kind contributions, even when the activity is coordinated with a candidate. A blanket exemption would also encourage parties to use housekeeping accounts, potentially pushing the envelope of the kinds of expenses for which unlimited contributions may be used.

But without a blanket exemption the CFB would potentially be drawn into clashes with parties over allegations that a housekeeping expense is reportable under the Charter as an

[23] N.Y. Election Law §14-124(3) (emphasis added).

[24] *Id.*

[25] CRC Report p. 12 (emphasis added).

independent expenditure. After all, a CFB finding that a party housekeeping account paid for an independent expenditure would be tantamount to concluding that the party had violated State election law. An exemption would spare the CFB clashes over political party compliance with a law that the CFB has no jurisdiction to enforce.

In the interest of time, I'm not addressing whether the CFB has authority to subject both express advocacy and electioneering communications to the disclosure requirement. I will just note that if you do decide to reach electioneering communications (as defined in federal law) and extend its reach beyond television and radio advertising, you may end up making some public opinion pollsters pretty miserable.

In conclusion, I once again wish you well in developing proposed rules. Unfortunately, I think you may find that this Charter amendment, as it is written, reflects a bit of "Midas Touch." Even in the realm of campaign finance disclosure, all that glitters may not be gold.