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Preliminary Comments on the
NYC Campaign Finance Board's March 10, 2011 Public Hearing on
Disclosure of Independent Expenditures
For or Against Candidates or Any
Ballot Proposal or Referendum in NYC Elections
by
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Thank you for the invitation to comment on some of the issues the NYC Campaign Finance Board (CFB) plans to consider in developing its rules for the disclosure of certain independent expenditures. Clean Air Campaign Inc. (CAC) is a non-partisan, nonprofit citizen watchdog organization. Among other things, CAC has worked for decades to make government more open, democratic, accountable, and responsive to ordinary citizens. CAC has previously testified at CFB hearings on its pay-to-play ("Doing Business") regulations.

A ballot measure approved last fall amended the City Charter to give the CFB a new mandate: to write and administer rules requiring every individual and entity that makes independent expenditures aggregating \$1,000 or more to support or oppose any municipal ballot proposal or candidate in a covered New York City election to disclose their spending. People or entities spending \$5,000 or more in the twelve months preceding the election must also disclose any of their funders who contributed \$1,000 or more.

The following comments on questions the CFB raised in its background material try not to duplicate comments that NYPIRG and other groups have already made which we agree with.

I. Scope of regulated activity.

The disclosure requirements should apply to the broadest possible range of communications and activities, as long as they don't impose excessively burdensome requirements on underfunded groups of ordinary citizens.

The longest allowable time periods should be covered. The new rules should NOT limit disclosure of "non-express advocacy" to only 90 days before a covered City election, for example, since major donors with special interest agendas aggregate large contributions over long periods of time in their efforts to frame public debate, and push alternative positions they disagree with off the table.

II. Required information. "What information should an independent spender be required to disclose about itself, its funding sources, and its vendors? Within what timeframe?"

CFB's reference to "groups whose identities may not be obvious to the public [such as] 'New Yorkers for Apple Pie'" was right on target. At a time when astroturf groups are proliferating, it is especially important that every informative detail possible about such organizations' "sources of funding should be made available with their initial disclosure" and thereafter. Since the CFB disclosure rules will only apply to such an entity if the entity spends \$5,000 or more to influence the outcome of an election, and only individuals who give \$1,000 or more to that entity are required to be disclosed, disclosure should not create undue burdens which are out of proportion to the entity's

resources.

The rules should not limit disclosure of funding sources to a one-time only act. Updated disclosure of a group's contributors should be required "through the election." Otherwise one of the purposes of the new rules will be defeated--to give the public information that will help them evaluate where the group's messages are coming from in time to inform citizens' votes.

III. Exemptions.

Media/press. The CFB writes that "The U.S. Supreme Court has upheld laws that exclude media entities from disclosure on the basis that it "ensures that the [law] does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events." What does "the institutional press" refer to in this context? What happens when a special interest lobby creates or gains control over what amounts to a house organ, in an effort to mislead the public? More examples and discussion about this potential exemption would be helpful.

"Earmarked contributions." The CFB asks whether entities should be allowed "to withhold information about its contributors...[if donations] are specifically earmarked for non-political purposes (including, perhaps, membership dues)."

The term "non-political" needs to be carefully defined if it is used at all. The general public often uses the term "political" to refer to advocacy organizations and activities of any kind, while the CFB presumably uses the term "political" to refer only to support for or opposition to candidates in NYC elections. The Internal Revenue Service strictly prohibits 501(c)(3) public charities from supporting or opposing candidates, but does allow 501(c)(3) public charities to engage in a certain amount of "lobbying" (as the IRS defines it), as long as lobbying expenditures are disclosed to the IRS.

Additional issues: grassroots organizations that do not require formal membership dues may receive contributions which are not earmarked in any way. Also, a major donor could have an informal understanding that funding he contributes ostensibly for another purpose may free up available dollars for issue advertising, where those dollars had previously been budgeted for other expenses. These kinds of potential problems warrant more research, outreach and discussion.

"Threats, harassment or reprisal." CFB writes that CFB "should consider allowing an entity to withhold information about its contributors if there is a reasonable probability that disclosure would cause contributors to face threats, harassment, or reprisals....typically, the issue arises through litigation, as an agency seeks to compel disclosure, or an entity seeks to prevent disclosure."

If an entity has enough money to contemplate litigation, that entity is less likely to need protection from "threats, harassment or reprisal" than an underfunded neighborhood civic association with a blog--a group which is fighting a mega-development deal between a millionaire developer and New York City, for example. The noted developer Donald Trump was known for financing "SLAPP" suits (Strategic Lawsuits Against Public Participation) against some groups opposing his projects in the 1990's, for example. (Please google SLAPP suits to see a thought-provoking Wikipedia piece.) Rules need to guard against becoming a double-edged sword, with moneyed interests making complaints falsely or speculatively attributing unreported expenditures or funding to public interest groups that oppose the moneyed interests' goals, so as to create a reporting

nightmare distracting the public interest group from timely activity.

IV. Enforcement and VI. Outreach.

After the new disclosure rules are approved, the CFB plans to conduct outreach and training for potential independent spenders, and enforce the new rules.

Outreach. The CFB notes that while "CFB regularly conducts outreach to candidates" and "will communicate with the regulated community," "CFB has little contact with potential independent [donors and spenders under the new disclosure mandate]." "CFB will need to be creative and proactive in its approach," CFB's website says. We agree.

NYPIRG's testimony lists a number of categories of individuals or entities that should receive informational mailings. In addition, we suggest that CFB send mailings to everyone in its "pay-to-play" or "Doing Business Data Base" (DBDB) for every year in which the DBDB has been in existence.

Wealthy individuals and entities like the billionaire Koch brothers and their family conglomerate, Koch Industries, tend to funnel their money through a wide variety of different channels over long periods of time in order to frame the debate over issues in which they have a financial interest. While Jane Mayer's New Yorker piece about the Koch brothers Aug. 30, 2010 did not mention any independent expenditures they had made to influence New York City elections, the article did illuminate the kinds of entities, activities and orchestrated campaigns special interest money may finance these days.

The Koch brothers and Koch Industries don't just make campaign contributions, the New Yorker reported. They also fund think tanks, astroturf groups, front groups, foundations, trusts, both obscure and well-known nonprofits, lobbyists, litigators, advertising campaigns, media events, rallies, door-to-door canvassing, award luncheons, campaign consultants and other political operatives, and educational institutions to advance the particular public policy agenda they favor.

This suggests that the pool of wealthy donors to "issue" campaigns with budget or land use implications for New York City might be one focus for CFB's research and outreach efforts.

Enforcement. The CFB also asks "How should the Board uncover potential violations of the disclosure rules? Should it rely on complaints only, or initiate investigations of unreported activity?" "The rules should address the process for receiving and investigating complaints about potential violations," CFB says.

The CFB must not rely solely on formal complaints about potential violations, since ordinary citizens and unsophisticated and/or underfunded organizations rarely have the resources to put together and pursue formal complaints. The CFB should indeed initiate its own investigations of unreported activity.

These are Clean Air Campaign Inc.'s preliminary comments. We appreciate the useful research that went into the CFB's initial background white papers, and look forward to future mailings as this important rulemaking process goes forward.

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