



CITIZENS UNION OF THE CITY OF NEW YORK
Comments to the New York City Campaign Finance Board on the
Revised Proposed Rules on Disclosure of Independent Expenditures
March 2, 2012

Citizens Union (CU) is an independent, non-partisan, civic organization of New Yorkers who promote good government and advance political reform in our city and state.

Citizens Union applauds the Campaign Finance Board (Board) for providing three different opportunities to weigh in on its proposed rules for disclosure of independent expenditures. The commentary below represents the third formal submission by Citizens Union. It is focused on the latest version of the proposed rules released in February 2012, revised from those issued in September 2011.

CU also commends the Board and its staff for their continued hard work, thoughtfulness, collaboration and transparency in crafting new rules implementing the city charter change voters approved in November 2010 requiring disclosure of independent expenditures. This is undoubtedly a challenging task to navigate in the new landscape created by the *Citizens United* decision, and we commend the Board for its continued leadership in the area of campaign finance regulation, which continues to serve as a model for other jurisdictions across the country.

Our recommendations for the February revised proposed rules are summarized immediately below and explained in detail in the body that follows.

Recommendation #1: The rules should include as a covered communication electioneering messages delivered by phone banking, robocalls, canvassing and leafleting (above a certain threshold, such as 500 calls or pieces) and internet ads made 30 days before a primary and 60 days before a general election.

Recommendation #2: Any member-to-member delivery of literature should not require disclosure provided it can be reasonably assured it is only delivered to members.

Recommendation #3: The disclaimer on ads and other independent communications should refer the recipient to the Board's website so that the public will know where to look for further information, including regarding donors to the independent spenders.

Recommendation #4: Third-party spenders' reporting requirements should not only include the name of the candidate but whether the independent spending was in support of or opposition to the targeted candidate.

Recommendation #5: Contributions by an entity to an independent spender should be reported for the full election cycle rather than solely reported when donated on or after January 1st of the year prior to an election year.

Recommendation #6: Any reform to the law requiring disclosure of independent expenditures should require disclosure of donors to independent spending targeting ballot initiatives and should require that individual contributions to independent campaigns targeting candidates be made for the full election cycle.

I. SCOPE OF REGULATION: EXPRESS ADVOCACY & ELECTIONEERING

CU commends the Board for including in the drafting of its September and February preliminary rules many of the recommendations Citizens Union put forth at the March 2011 hearing held on this issue, in particular a broad definition of independent expenditures that includes not only express advocacy but also electioneering. As we detailed in our October testimony, the inclusion of electioneering as a covered communication is essential for real disclosure and transparency of third-party spending. Without the inclusion of electioneering in regulated activity, the change to the Charter affirmed by the voters will be gutted to the point of disclosing very little of the independent spending that is likely to take place in our city's elections.

The February proposed rules, to the credit of the Campaign Finance Board and in sharp contrast to recently proposed regulations of the State Board of Elections, continue to recognize that electioneering and expressed advocacy are covered communications that must be disclosed under the rules. The latest revisions to the proposed rules, however, result in less disclosure for electioneering communications.

We understand that the Board felt that the narrowed definition was necessary in part to address the concerns raised in particular by 501c3 organizations and other groups who may engage in legitimate lobbying on issues just before an election. Unlike sham issue ads, for example, it is argued that this lobbying activity is not intended to influence the outcome of elections. Citizens Union is sympathetic to those concerns, and noted in its last testimony that traditional lobbying activity aimed at influencing a vote on a specific, particular legislative bill, administrative regulation, or budget item should not be subject to disclosure under the new law. We therefore recommended that safe harbor language be provided as a guide by the Board to organizations legitimately engaged in lobbying before an election. We also suggested narrowing the window for which communications would have to be reported from 90 days to 30 days before a primary and 60 days before a general election.

While the Board did narrow the window for reporting electioneering communications as we recommended, it took a different but equally reasonable approach to addressing the potential for legitimate lobbying activity to be confused as electioneering. Rather than focusing on the content of the communication as Citizens Union had proposed to draw the contrast between legitimate lobbying and lobbying intended to influence an election, the Board focused on the medium through which the communication is delivered. Disclosure of electioneering communications was pared back from all communications to only those

delivered through broadcast communications, paid ads (exempting internet ads) and mass mailings. 501c3 organizations were exempted entirely, irrespective of the mode of delivery of electioneering communications. The Board, however, also expanded disclosure of electioneering communications in reworking its scope of regulation by including communications related to ballot proposals and requiring disclosure any mention of a candidate rather than messages limited to a candidate's character, fitness, record or positions on issues.

While Citizens Union would have preferred a content-based approach to regulation rather than focusing on mode of delivery, we encourage the Board to include electioneering messages delivered by phone banking, robocalls, canvassing and leafleting (above a certain threshold such as 500 calls or pieces) and internet ads as part of a covered communication. Under the most current proposed rules of the Board, an organization or individual could construct a website, post paid internet ads, do thousands of robocalls, organize phone banking, and conduct door-to-door canvassing around a particular issue, even if decided long ago, in the days before an election and not disclose any of their spending or donors. These activities together make for a robust independent campaign. The fact that 501c3 organizations could use all of these tactics in addition to utilizing mass media is even more troubling. While an argument can be made that an individual or entity seeking to influence the outcome of an election would likely do so through express advocacy, it is not hard to envision an anonymous sham issue-based campaign using sharper language that would have a similar effect. For example, an anonymous entity launching an "issue-based" based campaign in the weeks prior to the next mayoral contest around a candidate's role in the unpopular decision to extend term limits would likely be just as effective as any express advocacy campaign.

II. MEMBER to MEMBER COMMUNICATIONS

Citizens Union stated in its October 2011 testimony that regulation of member-to-member communications should be narrowly construed and that most legitimate member-to-member communications should be exempted. We suggested exempting literature at that time, provided disclaimer language was required to be placed on the literature to make clear that the targeted audience is the organization's members.

The Board's approach to refining the proposed rules to regulate via mode of delivery rather than audience means that certain forms of literature delivered from an organization to its members would still have to be reported, namely literature that has an express advocacy message or is through a mass mailing. Given that literature in fact is often delivered to members through means such as a mass mailing, Citizens Union believes any member-to-member delivery of literature should not require disclosure.

III. ADDITIONAL DISCLOSURE & REPORTING REQUIREMENTS

CU was largely supportive of the reporting requirements in the September proposed rules and does not believe they are unduly burdensome. The new rules diminish reporting, in some instances sensibly, but a few issues remain.

We continue to recommend that the disclaimer on ads and other independent expenditures refer the recipient to the Board's website so that the public will know where to look for further information about the independent individuals and entities, including donors. This will give the public one-stop shopping for information about donors and independent spending and rely on the solid record of transparency demonstrated by the Board rather than the unknown disclosure practices of third-party spenders.

We still hold firm to our position that third-party spenders' reporting requirements should not only include the name of the candidate, but whether the independent spending was in support of or opposition to a specific, targeted candidate. This is critical to allow the public to understand which candidates are being favored and disfavored by individuals and entities without going through the arduous, time-consuming process of looking at all of the disclosed communication, particularly since some independent spenders will focus on multiple candidates. The exemption from disclosure of 501c3 organizations who claimed such categorization would imperil their tax status makes this labeling less objectionable. To not label such communications as favoring or disfavoring a specific candidate runs counter to the purpose of disclosing independent spending to begin with.

Citizens Union is also concerned that the latest rules allow for an entity to contribute money in the first two years of an election cycle without reporting it, even if that contribution is made to a 501c4 organization or other entity expressly for the purpose of running an independent campaign calling on New Yorkers to vote for or against a particular candidate. Contributions by an entity to an independent spender should be reported for the full election cycle. With a four-year term, the city election cycle is more protracted than the shorter 2-year term of congressional candidates, for example, and donors presumably can think ahead when making donations. To allow a long window of unreported donations creates an incentive for donors to give in the period prior to disclosure. The ability of organizations to enable donors to earmark funds received for purposes other than campaigns negates any argument that disclosure during the full election cycle would have a chilling effect on fundraising by 501c4 organizations.

On a matter not subject to the CFB's rules, Citizens Union wishes to note that the charter question on the ballot in November 2010 did not require disclosure of donors to independent spenders on municipal ballot proposals. The charter amendment also does not require disclosure of funds contributed by individuals to independent spenders except for in the year prior to an election. We know of no reason why the reporting of donors should be done for independent spending related to candidates but not for ballot proposals. Likewise, individual's contributions to independent expenditure campaigns should be reported for the full election cycle, not just in the year prior to a city election. The Council and Mayor should amend the City Charter to allow for disclosure of donors related to ballot proposals so that no entity could spend millions of dollars getting a measure on the ballot without the public ever knowing who is funding this effort. It should also require disclosure of individual contributions for the full election cycle for the targeting of candidates so that a wealthy individual could not hide in the shadows by giving money to a planned independent campaign early in the first three years of an election cycle without it ever being known.

We thank the Board for the opportunity to provide comment again through this submission, and for the thorough and collaborative process through which these rules were developed.