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Statement of the New York Civil Liberties Union

Before

The New York City Campaign Finance Board

Regarding

Proposed Rules Requiring the Disclosure of Independent Expenditures

October 27, 2011

On behalf of the New York Civil Liberties Union, I write to express serious concerns about the proposed independent expenditure rules promulgated by the New York City Campaign Finance Board. Our concerns relate to three matters: first, the broad definition of "electioneering communication" as set forth in the proposed rules; second, the failure, in the rules, to provide for an exemption from disclosure for organizations that are controversial and whose contributors may well experience retaliation and harassment were it revealed that they were supporting the organizations; third, the unequal treatment of mass media organizations that are exempted from disclosure under the rules.

The right of individuals and organizations to speak out on the issues of the day lies at the core of the First Amendment. *Buckley v. Valeo*, 424 U.S. 1, 39 (1976). Yet the proposed rules will burden such core ideological expression by extending their regulatory reach well beyond speech that "expressly advocates the election or defeat of a candidate" and, therefore, well

beyond what is commonly regarded as campaign speech. Under the broad definition of "electioneering communication" the proposed rules would reach issue-oriented expression, advanced by ideological organizations, where such communication is not designed to endorse or oppose any candidate but is directed at government policies or practices and discusses the role of officeholders who are seeking re-election regarding such policies. Such issue-oriented expression by non-partisan organizations is a common feature of our political landscape. A transportation advocacy group might be critical of a public official's failure to promote bicycle lanes or might be praising of an official's opposition to passenger vehicles in lower Manhattan; a civil rights group might be critical of the NYPD's "stop and frisk" practices and might choose to praise public officials who have sponsored legislation seeking to curtail such practices; an anti-abortion group might express opposition to measures that secure reproductive choice and to public officials that promote such measures. In all of these circumstances, organizations that may be required by Section 501 (c) (3) of the Internal Revenue Code to remain non-partisan and that rigorously adhere to their non-partisan obligations will be treated, by the proposed rules, as engaging in campaign speech if their non-partisan, issue-oriented communication occurs within 90 days of an election and such communication criticizes or praises candidates in the broader context of pursuing the organizations' ideological missions. In this respect, the proposed rule over-reaches.

Our second concern with respect to the proposed rules derives from the fact that the proposal provides for no exemption from the disclosure laws for those organizations that are controversial and whose contributors may, therefore, experience retaliation for supporting such organizations. An exemption for controversial organizations is constitutionally required. *Brown*

v. Socialist Workers '74 Campaign, 459 U.S. 87 (1982). The failure to adhere to this constitutional requirement represents a significant failing.

Our third concern rests upon an exemption that the proposed rules do allow. The proposal contains what it describes as a "media exemption," permitting, *inter alia*, newspapers, magazines, websites or broadcasters to report or write editorials or otherwise engage in commentary about candidates without being required to disclose their expenditures or contributors. Such unequal treatment poses a number of thorny problems.

Each of these concerns will be amplified, in turn.

I.

The proposed rules apply to three categories of communication by speakers who are independent of any political campaigns and whose speech is not coordinated with political campaigns. First, the rules apply to communication that "expressly advocates the election or defeat" of a candidate for public office. The term "express advocacy" emerged from the Supreme Court decision in *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) where, in order to avoid the invalidation of provisions of the Federal Election Campaign Act upon grounds of unconstitutional vagueness,[1] the statute was construed to reach only communication containing express words of advocacy such as "vote for" or "vote against."

Second, the proposed rules at issue here extend beyond "express advocacy" to communication that is the "functional equivalent of express advocacy." In *F.E.C. v. Wisconsin Right to Life (WRTL)*, 5551 U.S. 449 (2007), the Supreme Court loosened the limitations imposed by *Buckley* and allowed that the regulatory reach of campaign finance measures could

[1] Concern about the vagueness of the statutory formulation rested upon the well-recognized observation that where First Amendment rights are at stake "[p]recision of regulation must be the touchstone" (*NAACP v. Button*, 371 U.S. 415, 438 (1963)) and that imprecise enactments lead to needless self-censorship and confer excessive discretionary authority upon those who must enforce the law.

extend beyond "express advocacy" to communication that is the "functional equivalent of express advocacy" but only if the communication "is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate". *WRTL*, 551 U.S. at 469-70. The definition advanced by the proposed rule is narrow. It may well fall within a constitutionally acceptable definition of communication that is the "functional equivalent of express advocacy". [2] We, therefore, take no issue with this second category of expression.

It is the third category of communication that remains problematic. As suggested above, that category involves "electioneering communication" which contains a definition that is so broad as to swallow the first two categories under circumstances where the communication occurs within 90 days of an election. "Electioneering Communication" is defined as "any public communication disseminated within 90 days of a covered election that clearly identifies a candidate and (1) refers to the personal qualities, character or fitness of that candidate; (2) supports or condemns that candidate's position or stance on issues; or (3) supports or condemns that candidate's public record." By its terms, this category of communication extends well beyond "express advocacy" or even the "functional equivalent of express advocacy." It would apply to a communication by a non-partisan group that is not campaign speech, in the sense of supporting or opposing candidates, but is simply issue-oriented expression that advances a public policy position.

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[2] The definition in the proposed rules reads as follows:

> When taken as a whole and with limited reference to external events, such as the proximity to the primary or election, a public communication could only be interpreted by a reasonable person as containing advocacy of the passage or defeat of a ballot proposal or the election or defeat of one or more clearly identified candidates because:
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> 1. The electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning; and
> 2. Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more ballot proposals or clearly identified candidates or encourages some other kind of action.

Such issue-oriented speech will fall within the regulatory ambit of the proposed rule where it names a public official who is running for office and where it criticizes or supports that public official for the policy position that he or she has taken. For example, suppose a non-partisan organization were to publish a legislative scorecard that commends a legislator for certain votes and criticizes the legislator for other votes; and suppose the legislator were now a candidate for municipal office and that the scorecard made no mention of an election or of the legislators' candidacy. Such a scorecard that both criticized and praised the legislator could not be regarded as supporting or opposing the legislators' candidacy. Nevertheless, as the sponsor of a scorecard that costs $1000 to publish, the organization would be required under the proposed rules to, *inter alia*, disclose the names, addresses and occupations of individuals that contributed more than $1,000 to the organizations. Such regulatory reach extends well beyond appropriate bounds. The burden of these requirements may seem modest. But such issue-oriented speech that does not endorse or oppose a candidate should remain entirely unfettered. Moreover, for some small non-profit organizations, even these modest recordkeeping requirements may prove significantly burdensome.

It is no answer to these concerns that the Supreme Court upheld the disclosure requirements that were applied to the producers of the film at issue in *Citizens' United v. F.E.C.*, 130 S.Ct. 876 (2010). This is so because, in *Citizens' United*, the Court concluded that the particular communication at issue in that case was "equivalent to express advocacy [because it was] ... in essence ... a feature-length negative advertisement that urge[d] viewers to vote against Senator Clinton for President." *Citizens' United*, 130 S.Ct. at 890. As the equivalent of express advocacy, the Court subsequently held that the communication could be appropriately subjected to the disclosure requirements. It is true that in *dicta*, the *Citizens' United* Court

expressed the view that the disclosure requirements need not be limited to "express advocacy" or to the "functional equivalent of express advocacy." *Citizens' United*, 130 S.Ct. at 915. But, the holding in the case with regard to the reach of the disclosure requirement occurred in the context of an "as applied" challenge. And, as the statute was "applied," the Court was considering a communication that it regarded as "the equivalent of express advocacy" in upholding the disclosure requirements at issue. So understood, *Citizens' United* provides no precedential authorization for the broad definition of "electioneering communication" at issue here. Moreover, even if constitutional, the broad reach of "electioneering communication" well beyond campaign speech is unsound as a matter of policy.

II.

The proposal is also deficient for failure to exempt from disclosure contributions to controversial organizations. In *Buckley*, the Court held that disclosure requirements could not be applied to controversial parties where disclosure might result in harassment or retaliation against contributors. *Buckley*, 424 U.S. at 74. In subsequent decisions, the Court reaffirmed this holding. *Brown, supra.* The failure of the proposed rule to provide for such an exemption violates clear Supreme Court precedent.

III.

Finally, the proposed rules contain an exemption that raises a number of difficult questions. Section 13-02(b) of the proposed rules provides an exemption from the regulation for "expenditure[s] made in connection with covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer) website, newspaper, magazine, or other periodical publication, including any Internet

or electronic publication ... unless the entity making the expenditure is owned or controlled by any political party, political committee, or candidate."

This exemption creates an Orwellian regime in which all potential speakers are treated equally, except that some are treated more equally than others. Most organizations are required to disclose their contributors if they fall within the broad definition of "electioneering communications," but the *New York Times* and Rupert Murdoch and his press colleagues are not.

Those who drafted this exemption for the media may have believed that the First Amendment would prohibit imposition of registration and disclosure obligations on the *New York Times* or the *New York Post* whenever they write editorials supporting or opposing candidates. But if it is a First Amendment violation to tell Rupert Murdoch that he must disclose his financial supporters if he publishes an editorial in the *New York Post* supporting or opposing a candidate, by what logic is it appropriate to tell Murdoch's next door neighbor that she must disclose the names of those who contributed to her purchase of an advertisement in the *New York Times* if, in that advertisement, she expresses support for, or opposition to, a candidate? The distinction cannot turn on the fact that Murdoch owns a printing press while the next door neighbor does not. But once you allow Rupert Murdoch to endorse candidates without being required to disclose his financial supporters -- on the theory that the First Amendment bars such disclosure requirements -- the entire regime of disclosure for independent expenditures begins to unravel.

Indeed, the Supreme Court addressed this problem in *Citizens' United.* At issue in that case was a media exemption similar to that proposed here. In commenting on this exemption, the Supreme Court observed that

> "[t]he media exemption discloses further difficulties .... [as] [t]here is no precedent supporting laws that attempt to distinguish between corporations which are deemed to be

> exempt as media corporations and those which are not. 'We have consistently rejected the proposition that the institutional press has any constitutional privilege beyond that of other speakers.' [Citations omitted]. [And] [w]ith the advent of the Internet and the decline of print and broadcast media ... the line between the media and others who wish to comment on political and social issues becomes far more blurred.
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> "The laws' exception for media corporations is, on its own terns, all but an admission of the invalidity of the anti-distortion rationale. And the exemption results in a further separate reason for finding this law invalid .... This differential treatment cannot be squared with the First Amendment." *Citizens United*, 130 S.Ct. at 905-906.

If the lesson of *Citizens' United* is that all organizations must be treated equally and that media outlets cannot be privileged over other speakers, then all must be subjected to the disclosure requirements or none can. And if the drafters of the proposed rules are of the view that media corporations, like the *New York Times* or the *New York Post*, cannot be required to register and disclose their financial supporters when they write editorials supporting or opposing candidates, it follows that no organizations can be required to disclose the names of contributors even when they engage in express advocacy. Under such circumstances the entire regime of regulating independent expenditures would crumble.

At this juncture, the NYCLU takes no position about how the equality principle, articulated by the *Citizens' United* decision, should be accomplished. We are mindful of the unfortunate influence of money on our electoral process. We recognize that those with money acquire access to office seekers – and ultimately to officeholders – that others do not enjoy. We further hold to a strong interest in seeking, if possible, to develop campaign finance rules that equalize the electoral competition and create electoral fairness in ways that preserve traditional First Amendment doctrine. But, perhaps the lesson to be learned from all of this is that campaign finance reform should be more modest in its reach. Practical realities flowing, in large measure, from the broad variety of institutions, organizations and individuals that debate public issues in our country render it virtually impossible to close every loophole. Efforts to do so,

drive us to distort traditional First Amendment doctrine in our attempt to achieve the illusory and unrealistic goal of complete reform. Perhaps, therefore, our regulatory regime should concentrate on the direct participants in elections, namely the candidates, their parties and their coordinated supporters. And, perhaps, we should not try to regulate the broad variety of speakers who remain independent and outside the circle of direct electoral participants. For, it is our efforts to police those outside the circle of direct electoral participants and to reach the broad array of ideological expression by diverse and independent groups and individuals that provides the greatest source of our constitutional difficulties.