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Proposed Rules for Disclosure of Independent Expenditures in City Elections

New York City Campaign Finance Board
October 27, 2011

The Charter Amendment, proposed by the Charter Revision Commission and adopted by referendum, charged the CFB with an important task: to bring needed transparency to independent expenditures in City elections and in turn to improve the information available to the City's voters so that they can make informed decisions when they go to vote. I believe strongly in this goal. However, I have serious concerns about the proposed approach and I believe that the proposal goes beyond what was envisioned by the Charter Revision Commission or approved as part of the City Charter.

Since the Campaign Finance Board issued the proposed rules, I have discussed the proposals with a broad spectrum of individuals and organizations, including elected officials, not-for profit organizations, membership organizations and associations to hear how these proposed rules would affect their communications and activities. After listening to their views and concerns, I believe that the definition of electioneering and the scope of member to member communications that would be covered are overly broad, and that the corresponding compliance obligations that would ensue for individuals and organizations alike are unduly burdensome. As a result, these proposals, if adopted, would chill speech for both election and non-election activities and would be unnecessarily burdensome and costly.

The proposed rules must adhere to the central purpose of the Charter Amendment approved by the voters in November 2010. That is, to provide voters information about non-candidate election-related activity that seeks to influence their vote. The purpose was not to capture non-election-related activity, i.e., issue advocacy. Indeed, there would be significant First Amendment issues raised by a law that sought to regulate issue advocacy. Nor was the purpose of the Charter Amendment to capture the internal communications of membership organizations that are not directed to the general electorate. Yet, as detailed below, in several areas the proposed rules go beyond its purpose and impermissibly regulate issue advocacy and member-to-member communications.

First, I would urge you to revise the definition of "electioneering communications." The proposed rule covers public communications disseminated within 90 days of a City election that reference a clearly identified candidate and refer to such candidate's personal qualities/character/fitness, position or stance on issues, or public record. This definition deviates significantly from the federal definition of electioneering communications in several key respects. The federal definition is narrowly defined to capture so-called "sham issue ads." In contrast to the CFB's proposed rule, the federal definition limits the coverage of electioneering communications to 30 and 60 days before the primary and general elections, respectively. Perhaps most importantly, however, the federal definition is confined to specific types of mass communications, namely broadcast, cable or satellite communications, and does not apply to member-to-member communications. By expanding the definition to cover an unlimited range of activity (including member-to-member activity), and enlarging the window of coverage from 30 to 90 days, the CFB has created a definition of electioneering communications that is so broad

and far-reaching as to capture *genuine* issue ads. This was clearly not the purpose of the Charter amendment and raises serious First Amendment concerns.

Each year, many organizations, including 501(c)(3) non-profit organizations that are prohibited from engaging in political campaign activity, educate and mobilize members of the public regarding concerns about the proposed budget, such as the teacher layoffs and fire house closings that we thankfully avoided this year. I worry that your proposed rules would inadvertently sweep in this grassroots lobbying activity simply because these organizations may disseminate materials that reference elected officials running for office. The budget advocacy is, however, genuine issue advocacy that is not intended to influence elections and is not an attempt to influence an election, and the rules should not treat it as such. My concerns extend not only to budget-related advocacy, but all types of advocacy concerning legislation and public policy that would be captured by the proposed rules.

The Campaign Finance Board should eliminate, or at a minimum, revise the definition of electioneering communications. First, the "90-day window" should be shortened to 30 days in order to exclude the budget season and most other issue advocacy. Second, electioneering communications should be limited to specific types of "mass communications," such as television and radio ads, and significant mass mailings. This will ensure that the rules capture the types of communications that are most likely to be sham issue ads, but not activity that is more likely to be genuine issue advocacy or grassroots lobbying activity. Third, the rules must clarify that the activities or communications of 501(c)(3) non-profits do not constitute electioneering. As these entities are legally restricted from engaging in political campaign activity, it does not make any sense that their activity should fall within the definition of electioneering. Several other jurisdictions provide such an exemption for these entities.

Second, I have deep concerns about the inclusion of "member-to-member communications" as independent expenditures. I strongly urge you to reconsider this position.

The Charter Amendment itself provides no basis for treating member-to-member communications as independent expenditures. Moreover, at no point during the Charter Revision Commission's consideration of the Charter Amendement, or the information provided to voters for their consideration, was there any indication that the Charter Amendment was meant to capture anything other than communications directed to the general electorate. Indeed, the primary purpose behind the disclosure of information about independent expenditures is ensuring transparency of the source behind a message. This purpose is not served by the disclosure of information about member-to-member communications, since there is no obfuscation when members receive a message from the organization to which they have chosen to belong. The proposed rules contain an exemption from disclosure for some types of member-to-member activity, specifically routine newsletters, phone banks, and communications relating to a membership organization's internal deliberations about its endorsements. This exemption, however, does not cover other types of member-to-member communications that membership organizations engage in that are not "public" in the ordinary sense, and for which disclosure would serve no legitimate public purpose while unduly burdening the activities of such organizations. For example, I see no public purpose in requiring disclosure of information about work-site meetings during which members are educated about candidates' positions on issues of concern to the membership organization.

The fact that a membership organization may be "big" does not provide a sound basis for subjecting that organization to burdensome regulation. And make no mistake, the burdens on a membership organization to track and report internal communications would be significant. In

contrast to independent expenditures directed to the general public, member-to-member communications encompass a wide variety of different types of communications throughout an organization. Member-to-member communications come not just from an organization's leadership; they are initiated and occur between members themselves. As such, a membership organization is not able to easily anticipate and track its members' many communications, which run the gamut from explicit to implicit, are expressed in an enormous variety of venues, and may or may not be mixed with policy or other messages.

In the face of the daunting prospect of having to account for and report this amorphous range of activity, the response will be for many membership organizations, both big and small, to curtail or forgo legitimate political activity. As the agency that, in addition to running our public campaign financing program is also mandated to encourage and promote voter participation in elections, CFB should most certainly wish to avoid such a consequence. This can be avoided by excluding coverage of member-to-member communications entirely, which would be consistent with the purpose and intent of the Charter amendment.

Finally, the costs of compliance must not be onerous. The proposed rules adopt the same reporting schedule for independent expenditures as that which applies to candidates. Yet, the reporting schedule that applies to candidates may not be appropriate for independent expenditures. A "one size fits all" approach that imposes a significant burden on filers without benefitting voters is unacceptable.

I commend this Board for your dedication and hard work to ensure that we have the strongest, most accountable and democratic campaign program in the country. I recognize that these are complex and difficult issues you must tackle and have great confidence in your ability

to develop a balanced approach for the disclosure of independent expenditures. As you work toward this goal, I urge your close consideration of the many specific comments and recommendations from those individuals and groups who are most directly impacted by these rules. I ask you to proceed with caution and fully address the concerns that I and others have raised regarding the proposed rules. I am hopeful that at the end of the day, the CFB will promulgate rules that serve the true purpose of the Charter amendment without imposing undue burdens on individuals and groups who seek to participate in the democratic process.