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Comments Regarding Proposed Rules on Disclosure of Independent Expenditures

The New York City Campaign Finance Board has published proposed rules to implement the November 2010 New York City Charter amendment requiring disclosure and reporting of independent expenditures. The proposed rules are strong and will directly advance the City's compelling interest in maintaining a well-informed electorate—recognized recently by the Supreme Court in *Citizens United*, where eight of the Court's nine justices upheld the federal "electioneering communication" disclosure requirement against constitutional challenge. Please consider the following modifications to the proposed rules, intended to clarify and strengthen the rules.

Section 13-01(e) definition of "electioneering communication" is unnecessarily narrow in scope.

The proposed definition of "electioneering communication" at section 13-01(e) is unnecessarily limited to communications that "refer[] 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."

Unlike the proposed section 13-01(e) definition of "electioneering communication," the federal law definition of the term has no narrowing content requirements and, instead, applies to any broadcast, cable or satellite ad that refers to a clearly identified candidate within the specified pre-election timeframes. *See* 2 U.S.C. § 434(f)(3)(A). The principal virtue of the federal law definition of "electioneering communication" is its clarity. Applying the federal law definition of "electioneering communication" does not require determination of whether a particular communication's content amounts to support or condemnation of a candidate's positions or public record, or discussion of a candidate's personal qualities, character or fitness. Instead, under federal law, if an ad clearly identifies a candidate within the specified pre-election timeframes, the communication is an "electioneering communication"—period. This is the approach New York City should take with respect to disclosure of "electioneering communication."

To be certain, the Supreme Court in *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449 (2007), did note that taking a position on a candidate's character, qualifications or fitness for office would be "indicia of express advocacy" that might render an ad the "functional equivalent of express advocacy" for the purpose of the now-invalidated federal law prohibition on corporation and labor union "electioneering communication." *Id.* at 469-70.

However, disclosure laws of the sort the Campaign Finance Board is now implementing need not be limited to express advocacy and its functional equivalent. Last year in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), eight of the Court's nine Justices rejected the argument that "electioneering communication" disclosure requirements "must be confined to speech that is the functional equivalent of express advocacy." *Id.* at 915. The *Citizens United* Court acknowledged that the principal opinion in *Wisconsin Right to Life* limited the federal law prohibition on corporate and labor union "electioneering communication" to express advocacy and its functional equivalent and went on to explain that Citizens United sought "to import a similar distinction" into the "electioneering communication" disclosure requirements. *Id*. The Court stated directly, "[w]e reject this contention[,]" *id*., and went on to explain:

> The Court has explained that disclosure is a less restrictive alternative to more comprehensive regulations of speech. In *Buckley*, the Court upheld a disclosure requirement for independent expenditures even though it invalidated a provision that imposed a ceiling on those expenditures. In *McConnell*, three Justices who would have found [the corporate and labor union spend ban] to be unconstitutional nonetheless voted to uphold BCRA's ["electioneering communication"] disclosure and disclaimer requirements. And the Court has upheld registration and disclosure requirements on lobbyists, even though Congress has no power to ban lobbying itself. For these reasons, we reject Citizens United's contention that the disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.

Id. (internal citations omitted).

We strongly encourage the Campaign Finance Board to delete from the proposed definition of "electioneering communication" the language limiting the definition to communication that "(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." Instead, the definition should apply to any "public communication," as defined at section 13-01(f), disseminated within 90 days of a covered election that clearly identifies a candidate. Such a definition would be clearer and more effective at providing voters with important information regarding those financing the full range of ads used to influence New York City voters and elections.

Section 13-01(g) definition of "express advocacy communication" unnecessarily redundant.

The proposed definition of "express advocacy communication" at section 13-01(g) seems unnecessarily redundant. Subpart (ii) articulates a standard that would be materially indistinguishable in its application from the "no reasonable meaning other than" language in subpart (i). Although inclusion of subpart (ii) would not raise any legal issues or problems, it may be confusing to readers who might ponder whether it covers any communications not covered by subpart (i). For this reason, the CFB should consider eliminating subpart (ii).

Section 13-03 should be clarified to explicitly require registration and filing in connection to an "electioneering communication."

Although the proposed rules define "electioneering communication" at section 13-01(e) and then include such "electioneering communication" in section 13-02(a) as "regulated activity," the registration and filing requirements of section 13-03 apply only to "independent expenditures" and that term is not defined explicitly to include "electioneering communication." It is therefore unclear whether the proposed rules require registration and filing for "electioneering communication." We strongly encourage the Campaign Finance Board either to define the term "independent expenditure" to include "electioneering communication" or to instead amend proposed section 13-03(a) to require reporting for "electioneering communication" that exceeds the specified monetary thresholds.

Section 13-03(a)(ii) contribution disclosure requirement should apply not only to candidate ads, but also to ballot proposal ads.

Whereas the reporting requirement established by section 13-03(a)(i) applies to expenditures in support of or in opposition to a candidate or a ballot proposal, the reporting requirement established by section 13-03(a)(ii)—which requires reporting of contributors to those making independent expenditures—applies only to independent expenditures supporting or opposing a candidate and does not require such reporting for expenditures supporting or opposing a ballot proposal. We encourage the Campaign Finance Board to apply the reporting requirement of section 13-03(a)(ii) to expenditures supporting or opposing ballot proposals.