TESTIMONY
of
GENE RUSSIANOFF
Senior Attorney
NEW YORK PUBLIC INTEREST RESEARCH GROUP
before the
NEW YORK CITY CAMPAIGN FINANCE BOARD
hearing on
INDEPENDENT EXPENDITURES
October 27, 2011
New York City

Thank you for the chance to comment today on the implementation of the new City Charter provisions on independent expenditures in City elections.

I would like to start by praising the Campaign Finance Board for its process in considering rules to implement the charter changes. This included holding hearings last March on questions raised by the new charter provision, giving the interested public eight weeks between issuing draft regulations, and meeting with interested parties, including representatives of good government groups.

NYPIRG supported the ballot proposal that now requires that people or entities making more than $1,000 in independent expenditures for a candidate or ballot proposal in a covered New York City election to disclose their spending. Entities that spend an aggregate of $5,000 in a twelve-month period prior to the election are required to disclose spending and also contributors of $1,000 or more.

Requiring that these dollars be disclosed is essential to the health of our landmark campaign finance legislation, which places restrictions on spending by candidates who voluntarily agree to them. As the CFB wrote in its report on the 2009 elections: "In a voluntary system of public financing that includes spending limits, the impact of independent expenditures can be magnified." This new requirement should provide valuable data on whether the City's campaign finance program needs to react to the growing role of independent expenditures.

We address below several questions raised by the proposed regulations in its notice for this hearing.

1. Electioneering (Rule 13-01 (d).The draft regulations would require independent expenditures to be reported when they are: 1) public communications; 2) exceed $1,000; and 3) are "electioneering" within 90 days of an election. Electioneering is defined as a communication that "refers to the personal qualities, characteristics, or fitness of a candidate, or supports or condemns that candidate's public record or position on issues, such as "Tell Candidate X that her position on budget cuts is wrong."

This provision may chill the speech of groups like ours. NYPIRG often praises or criticizes City elected officials in an election year over their stances on issues we are advocating. These range from higher education to mass transportation to enacting campaign finance and ethics reforms. Like many groups, NYPIRG often tries to get our issues discussed during the election cycle. Our approach is non-partisan: We don't seek to aid or oppose a candidate.

Here's one real world example: In the 1997 municipal elections, then-Mayor (and candidate) Rudolph Giuliani used hundreds of thousands of dollars of City funds to film and air recycling commercials. The television ads – featuring the Mayor and Yankee manager Joe Torre throwing cans and bottles into a recycling bin – ran over the summer and into September 1997. We sharply criticized him for misusing City funding, just as we did then-Mayor Dinkins in the 1993 election for misusing City funds promoting himself on commercials hawking municipal bonds.

After the election, the City Council passed Local Law 40 of 1998 prohibiting City officials "to appear or otherwise participate in any television, radio or printed advertisement or commercial or by electronic means on the Internet which is funded, in whole or in part, by governmental funds or resources on or after January first in the year an election for such office shall be held."

NYPIRG did not then and does not now consider this an act of electioneering. It was legislative advocacy and public education that is at the heart of our mission. Reporting it as electioneering risks associating ourselves with the advancement or decline of candidates, when we are strictly non-partisan.

We realize the CFB is trying to address a legitimate problem, which is sham committees injecting their issues into a campaign through ads or materials designed to aid or injure candidates. So can one regulate fairly and effectively? Among possible changes in the draft rules to consider are to.

• **shortening the electioneering period.** In the CFB rules, the period for disclosure of independent spending is 90 days before either election. The proposed 90-day electioneering now includes the City's budget process. The federal rules cover electioneering if it is within 60 days of a general and 30 days of a primary election. The question here is: Does the public's need to know outweigh the intrusion of mandating disclosure during a four and eight week period?

• **expand definition of "express advocacy" and eliminate "electioneering."** Is this possible?

• **apply electioneering to only broadcast, cable or satellite communications.** This is what is done at the federal level. Practically, this would limit electioneering to citywide races, as there is little or no broadcast communications in elections for borough president and City Council.

• **require disclosure of electioneering, but have a "no stance" category.** In theory, this would allow groups like mine – deemed by the CFB as engaged in electioneering – to disclose to the Board without being linked to a candidate. But groups like mine would object to having a government agency define our work as electioneering.

I would also like to note that our views on the issue of electioneering have evolved since our testimony in March, based on further reflection and discussion.

• **Member Communication.** (13-01 (h) and (j), 13-02(c.)) According to the CFB's Guide to the Proposed Independent Expenditures, a wide range of communications to an organization's members or shareholders are exempt from disclosure under the draft rules. The exemptions are not because they are between an organization's members, but for other reasons. The examples offered include (Chart, page 2.):

1) discussions at meetings among members (deemed not a public communication);
2) member activation activities (deemed not a pubic communication);
3) internal deliberations (deemed not a pubic communication);
4) dissemination of statements from elected officials; and
5) phone calls or routine newsletter or periodicals, regardless of contents.

That leaves "express advocacy materials," which are deemed independent expenditures, whether sent to an organization's members or non-members.

NYPIRG finds the CFB's list of exemptions sometimes inconsistent and complicated. For example, why are phone calls by a union or business to members exempt, but not printed flyers? A bright line standard line exempting all member-to-member communications might be easier to comply with and audit.

NYPIRG does agree with the CFB that "TV/radio/Internet ad targeted at member or targeted leaflet handed out in public" should be reported as independent expenditures. As the Board notes, "The fact that the wording is targeted at members or shareholders doesn't prevent the message from being received by the public."

• **"Pre-clearance"** (Rule 13-07.) This rule allows people or entities "to seek pre-clearance from the Board whether the communication will be subject" to the independent expenditure rules.

NYPIRG agrees that people should be able to get advice in advance. Our concern here is primarily word choice. We would prefer the word 'advice" or "advisory opinion."

"Pre-clearance" – in the voting context – refers to getting advanced approval from the United States Justice Department under the Voting Rights Act for changes in manner of voting.

Without pre-clearance by Justice, changes to voting cannot take effect.

Here, people and entities are free to accept or reject the Board's determination and risk a Board enforcement.