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October 27, 2011

VIA ELECTRONIC & REGULAR MAIL

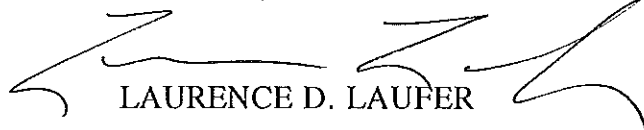
Amy Loprest
Executive Director
New York City Campaign Finance Board
40 Rector Street
New York, NY 10006

Dear Ms. Loprest,

Enclosed please find an analysis we prepared on the Campaign Finance Board's proposed independent expenditure rules. We hereby submit this analysis as comments for the Board's consideration. Thank you for the opportunity to participate in this rule making.

Very truly yours,

GENOVA, BURNS & GIANTOMASI


LAURENCE D. LAUFER

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Enclosure

October 2011

CFB Proposed Rules on Independent Expenditure Reporting**An Analysis**

The NYC Campaign Finance Board (CFB) has proposed for public comment rules requiring individuals and entities to disclose their independent expenditures (IE) in NYC elections. These proposed rules would implement NYC Charter amendments adopted by referendum in 2010. The proposed rules and the CFB's explanatory guide are at: [http://www.nyccfb.info/PDF/rulemaking/Proposed Rules 2011-09-08.pdf](http://www.nyccfb.info/PDF/rulemaking/Proposed_Rules_2011-09-08.pdf).¹

This memorandum highlights questions and concerns posed by the proposed rules as drafted.

Definitions

Candidate: The term is not defined. The Charter provision states that it is addressed to independent expenditures for or against candidates in covered elections for five NYC offices (mayor, public advocate, comptroller, borough president, City Council). The broader definition of candidate set forth in CFB Rule 1-02 (candidate as defined in NY Election Law) does not appear applicable.

Thus, political committees authorized by candidates (other than candidates in covered elections) may be subject to the IE reporting requirements, as proposed. Note that candidates often authorize committees for unspecified offices and elections – or change the office sought/election during the course of an election cycle. **Should a change in office sought occur between a covered and a non-covered election, how would this change affect the committee's obligations under the IE reporting rules?**

For example, a candidate's authorized committee for City Council may make express advocacy expenditures attacking the incumbent. What if that candidate then decides to run instead in a non-covered election, such as for State Legislature, or decides not to run for office at all – are the IE reporting rules retroactively applicable to the authorized committee? What if

¹ Prior to the issuance of these proposed rules, Genova, Burns & Giantomasi submitted testimony (<http://www.corporatepoliticalactivitylaw.com/wp-content/uploads/2011/03/Testimony.pdf>) and published general commentary (<http://www.corporatepoliticalactivitylaw.com/index.php/2011/08/independent-expenditures-transparency-duplication-and-conflict/>; <http://www.corporatepoliticalactivitylaw.com/index.php/2010/11/disclosure-of-independent-expenditures-in-nyc-elections/>).

the candidate decides to run for a different covered office, say borough president: would reporting its express advocacy expenditures against the Council incumbent as IEs create a basis for exempting these expenditures from the spending limit applicable to the borough president race? What if a person makes and reports IEs, but then subsequently, in the same election cycle, becomes a candidate for a covered office?

Contribution: The proposed rules define “contribution” much more broadly than either State Election Law or the New York City Campaign Finance Act. A “gift, advance or deposit” need not have any connection with the covered election or the IE in order to be reportable. The definition expressly extends to contributions to individuals; the reason is unclear since individuals making IEs are not required to disclose the contributions they receive.

Nonetheless, the proposed rules would require individuals to keep “records of all contributions received”, subject to CFB review, for three years. See Proposed Rule 13-08. What possible purpose would be served by requiring individuals making IEs to keep records of personal gifts, such as birthday, wedding, anniversary, graduation or other presents they receive, as well as paychecks and other items they deposit?

Expenditure: The term is not defined. For purposes of the Campaign Finance Act, other CFB rules describe expenditures as including disbursements made, liabilities incurred, and in-kind contributions. See CFB Rule 1-08(a). The duty to report arises when the individual or entity “makes” IEs. See Proposed Rule 13-03(a).

When is an IE made:

- i. **When the liability is incurred?**
- ii. **When the disbursement is made?**
- iii. **When the public communication is “published, aired, or otherwise distributed”? See Proposed Rule 13-04(a).**

In other words, is there an obligation to publicly disclose an IE before the communication itself becomes public?

Ballot proposal: The proposed rules contain a definition. See Proposed Rule 13-01(a).

When does a proposition become a municipal ballot proposal:

- i. **Before the initiative petition is circulated?**
- ii. **Upon the initial circulation of the initiative petition?**
- iii. **Upon the filing of an initiative petition – and which filing in the event the Municipal Home Rule Law’s two-stage initiative procedure is used?**
- iv. **Upon the City’s clearance of the petition for placement on the ballot?**

A related question: are the costs of circulating the initiative petition reportable as IEs?

Are litigation or other costs to place a question on the ballot (or to oppose its placement on the ballot) public communications reportable as IEs?

The Charter (and proposed rule) definition of IE excludes expenditures cooperated in by a candidate. Elsewhere, however, the CFB recognizes that candidates may make expenditures for or against ballot proposals. See, e.g., NYC Admin. Code §§3-703(1)(o); 3-704(2)(i); CFB Advisory Opinion No. 2003-2 (July 14, 2003) (participating candidate establishes a separate political committee to publicize a position on a ballot proposal).

Do any IE reporting requirements apply to candidate-connected advocacy of ballot proposals? If not, may disclosure of ballot proposal advocacy be avoided altogether simply by the spender discussing its planned public communication with a candidate? See also discussion of in-kind contributions, below.

Electioneering communication: The proposed definition does not include any expenditures in relation to ballot proposals. Thus, in the absence of express advocacy, a public communication that takes a generally supportive or negative position on a ballot proposal would not be subject to the IE reporting requirements. Is this distinction between the scope of IEs for candidates and for ballot proposals consistent with the Charter's uniform definition of IE?

The proposed rule establishes a 90 day pre-election period for coverage of public communications as reportable IEs. Currently the primary election is held in September, although state law is likely to be amended to establish an earlier primary date. In any event, the 90-day pre-primary period will encompass public communications made in June, which is the peak of the City budget adoption process. Many complex issues may arise concerning whether advocacy on City budget issues will be reportable as IEs if it is targeted to or against particular elected officials. These problems could be minimized by shortening the look back period or exempting communications on the City budget reportable as lobbying from disclosure as IEs.

Public communication: The proposed definition broadly includes "any other form of communication to the general public." The CFB Guide states that this term does not include "individual phone calls, in-person communication or the text of emails", but these excluded categories are not set forth in the proposed rules.

In any event, are any of the following public communications subject to the IE reporting requirements?

A public opinion poll?

A live rally?

A field operation to get-out-the-vote?

A press conference?

Sound trucks?

Candidate debates?

Exemptions

Media. The proposed rules contain a definition that appears narrower than the exemption set forth in State Election Law §14-124(1). Thus, expenditures made in the ordinary course of a publication owned by a candidate for mayor would be exempt from disclosure under the State law exemption but may not exempt be from disclosure under the proposed CFB exemption.

Member/Stockholder Communications. The analogous federal exemption provides a safe harbor against treatment as an IE or an in-kind contribution. **If a candidate cooperates (e.g., by being interviewed or providing a photograph) for a member/stockholder communications that is exempt from the IE reporting requirement, is the cost of those communications an in-kind contribution or exempt from treatment as an in-kind contribution?**

Perhaps the goal here is especially subtle and complex: to exempt these communications from reporting as IEs, regardless of candidate cooperation, but, nonetheless subject these communications to contribution limits under the Campaign Finance Act when cooperation occurs. See CFB Advisory Opinion No. 2009-7 (Aug. 6, 2009) (fn. 8). If this is what the tea leaves mean, a labor union, for example, may freely communicate with its members (to the extent and in the manner permitted by proposed Rule 13-02(c)) without triggering an IE reporting obligation, but a candidate may nonetheless be charged with receiving an in-kind contribution if found to have cooperated in that communication.

Registration Requirement

The proposed rules would require individuals and entities to register with the CFB in order to make IEs. The Charter does not hint at a registration requirement. The required registration is akin to State and City law treatment of political committees.

The registration requirement appears tantamount to giving the public (and potential opponents) advance notice of an intention to make IEs. Given that the Supreme Court has recognized greater constitutional protection for making IEs than for making political contributions, it is odd – to say the least – to impose the potential chilling effect of advance

registration for making IEs where no such requirement applies to the making of political contributions. Are there examples of IE reporting regimes elsewhere that require advance registration and have these been upheld against constitutional challenge? Why cannot the CFB collect the registration information it seeks in the first disclosure statement?

Q. 14. Would an IE report filed without advance registration be subject to civil penalty? If so, it compounds the chilling effect.

Disclosure Statements

Pursuant to the Charter, entities making IEs must report contributions they receive from individuals and entities above specified threshold amounts. The proposed rule establishes a four year period to be covered by disclosure statements. If the entity reaches the IE reporting threshold late in this four year period, its first disclosure statement would nonetheless “look back” and cover contributions from other entities dating back to the beginning of the four year period and contributions of \$1,000 or more from received individuals in the 12 months preceding the covered election. No allowance is made for excluding contributions that precede the effective date of the proposed rules.

Since a contribution is reportable without regard to whether it was received or used in connection with the covered election or the IE, the identification and total amount of contributions required to be reported may far exceed the amount of IEs to be reported. The rationale for such an extensive contribution disclosure is unclear. Also, as noted above, entities and individuals making IEs must keep records of contributions without regard to whether the contribution is subject to the reporting requirements. See Proposed Rule 13-08.

The proposed rules draw a distinction between the reporting of public communications and of expenditures. **Must an Independent Spender report all public communications it makes, regardless whether these public communications are reportable as independent expenditures?**

Only those expenditures that are “directly related” to the “design, production, and distribution” of a public communication must be reported. What “pre-communication” expenditures are directly related? Does this language eliminate from reporting all expenditures for general strategy meetings and consulting, polling and research, equipment purchases, and salaries for personnel who perform ultimately both “directly related” and “non-directly related” work? The CFB Guide indicates that the cost of sending out emails and the purchase of mailing lists are not reportable as IEs. These exceptions, however, are not set forth in the proposed rules. In any event, would this exception hold when a person is hired solely to write express advocacy emails and a mailing list is purchased solely for determining the recipients of express advocacy communications?

The disclosure statements contain more extensive information about IE transactions than is the case for the CFB's candidate disclosure statements. For example, the IE reports must include, apparently, a copy of a printed communication and an audio, video or source file or script for a broadcast or Internet communication. IE reports must include detailed invoices for reported expenditures, which also is not a feature of candidate disclosure statements. Perhaps it is overly intrusive to require Independent Spenders to disclose detailed invoices to the general public (including political opponents).

The IE reports (like candidate disclosure statements) are segmented into separate schedules for the primary and general elections. Unlike the requirements applicable to candidates, which concern separate primary and general election spending limits, however, the proposed rules do not provide standards for the reporting of communications that somehow "straddle" these reporting periods. For example, if a public communication solely concerns a general election candidate, must it nevertheless be reported during a primary election reporting period based on when the liability was incurred, disbursement made, advertisement published, or other considerations? What if a single ad buy extends from a primary into a general election reporting period: do the proposed rules contemplate an apportionment between disclosure statements?

Another can of worms is opened by the requirement that the IE spender report the individual or entity "paying for the expenditure, if not the independent spender". Under standard campaign finance law, this third party payor would be an in-kind contributor. But since the proposed definition of "contribution" is limited to "monetary" gifts, it is not clear that the CFB intends to treat these third party payments as contributions.

While individuals making IEs are not required to report contributions, must they nonetheless report these third party payments since these are not defined as contributions?

If a third party payor is paying for the IE, why isn't that individual or entity filing its own IE report (assuming its payment reaches the threshold for IE disclosure)? And if a separate IE report must be filed, wouldn't that mean the same transaction would be reported by two different Independent Spenders, resulting in duplicative reporting?

When a detailed invoice reflects a discount below fair market value (a defined term), has the vendor made an IE triggering a reporting obligation? And, if yes, wouldn't this also result in duplicative reporting?

The proposed rule requires Independent Spenders to apportion the cost of IEs in support or opposition to more than one candidate (or ballot proposal). This requirement derives from apportionment requirements for joint candidate expenditures that pertain to the enforcement of contribution and spending limits. What purpose does apportionment serve in the case of IEs

for which contribution and spending limits are not applicable? Why not allow the Independent Spender to report the full amount of the expenditure as being in relation to all the candidates and ballot proposals referenced – without apportionment? Not requiring apportionment could greatly facilitate compliance.

The proposed rules on apportionment make clear that an IE may include photographs of the candidate. Does this permission for candidate photographs override the CFB Guide's contention that an expenditure is not independent if it was "arrang[ed] for the candidate to pose for a picture"? Or is the permission limited to "non-arranged" photographs – and, if so, what is a "non-arranged" photo?

The proposed rules require 24 hour reports in the last two weeks of an election. Candidates file analogous reports, but with reduced content and streamlined submission procedures to facilitate compliance with the rapid turnaround. Duplicative and more comprehensive disclosure is then required in the first post-election report. The proposed rules do not make clear whether similar streamlining is contemplated for the 24 hour IE reports.

Absent from the proposed disclosure rules is any rule addressed to the Charter direction that CFB rules provide that the information regarding IEs be promptly made accessible to the public during the covered election cycle.

Verification

The proposed rules require that the Independent Spender verify that IEs were not made in cooperation with any candidate. Pursuant to proposed Rule 13-06, if a candidate cooperated in the expenditure, it would be reported by the candidate as an in-kind contribution. Both the verification and the in-kind provisions erase any distinction between the candidate who is supported by the express advocacy or (electioneering communication) and the candidate who cooperated in the expenditure. But these two are not necessarily one and the same candidate.

Proposed Rule 13-06 references current CFB Rule 1-08(f) factors for determining whether an expenditure is independent or non-independent. These factors are primarily concerned with identifying cooperation between the candidate and the spender and generally presume that the candidate who is the subject of the expenditure is identical to the candidate who potentially cooperated in the expenditure. On the other hand, Rule 1-08(f)(3) may be read as establishing that an expenditure must be made "for the purpose of promoting or facilitating the nomination or election of a candidate" in order for it to be treated as either an IE or an in-kind contribution. If correct, this reading has the potential of resolving the problem in the verification by distinguishing the candidate whose nomination or election the IE was intended to promote or facilitate from the candidate who cooperated in the IE. The CFB should clarify just what it means here.

When an entity makes an express advocacy communication only in support of candidate A, after consultation with candidate B:

- i. Is the expenditure reportable as an IE? If so, would candidate A be the only candidate named in the disclosure statement?
- ii. Is the expenditure simultaneously reportable as an IE on behalf of candidate A but an in-kind contribution to candidate B?
- iii. Alternatively, is the expenditure reportable only as an in-kind contribution to candidate B?
- iv. In answering these questions, is it relevant whether candidate B was separately in communication with candidate A? Does the spending entity have a duty of inquiry with candidate B before completing the verification?
- v. If the communication mentions both candidates A and B, may the full (or apportioned) cost be reported as an IE for candidate A and an apportioned share reported as an in-kind to candidate B?
- vi. If candidate B pays for an apportioned share, must the spending entity list candidate B as a contributor or third party payor on the IE report?

On the other hand, appropriately, the verification concerns only whether a candidate cooperated in a reported expenditure. An individual or entity that makes and reports IEs may properly verify that no candidate cooperated in those expenditures regardless whether the individual or entity has separately made monetary or in-kind contributions to the same candidate.

Disclaimers

Proposed Rule 13-05 requires a disclaimer identifying the Independent Spender in the communications as the individual or entity who “paid for” the communication. Will this be accurate in the event that the disclosure statement indicates a third party payor or a discount from the vendor?

Proposed Rule 13-05(b) describes the form of the required disclaimer for printed material, Internet advertisements, radio, tv and Internet broadcasts, and telephone communications. Are these categories (together with the “impractical” for disclaimer items noted in Proposed Rule 13-05(c)) meant to be co-extensive with the definition of public communication, such that other forms of communication with the general public are not treated as public communications subject to the IE rules (e.g., live events, films shown in theaters, sound trucks, clothing)?

Preclearance

As with the registration requirement, the Charter does not set forth a procedure for the CFB to pre-clear whether a communication will be subject to the IE rules. Is preclearance an appropriate or wise role for the Board? Will the CFB appear to be taking on the role of censor or non-censor, opening its decision to pre-clear (or not pre-clear) to criticism? For example, what would the Board do if presented with a proposed communication in the form of a t-shirt or website content containing “F__k [Candidate Name]”? Given the potentially controversial nature of some communications, isn’t there similar potential for the Independent Spender to seize on a CFB pre-clearance as some kind of imprimatur that effectively draws the CFB into the controversy?

Document Retention

Again, the proposed rules address a subject not specifically mentioned in the Charter revision. What is the purpose of the document retention requirement? Will the Board audit Independent Spenders for under-reporting, over-reporting, and other discrepancies between reports and records? Some of the required records duplicate records to be included in disclosure statements (invoices, copies of advertisements) and some are not subject to disclosure (contributions received by individuals; “all contributions” received by entities). Why must duplicative records and records of non-reportable transactions be retained? Where is the Board’s authority to audit for “accuracy”?

Complaints and Investigations

The Charter grants the CFB authority to assess civil penalties for violations. Proposed Rule 13-09 contains procedures for complaints, investigations and Board determinations that, in general, appear to mirror procedures applicable to candidates under the Campaign Finance Act.

On its face, the proposed rules’ reference to investigatory powers under NYC Admin. Code §§3-708(5) and 3-710(1) appears to be a mistake, since such authority only pertains to matters under the Campaign Finance Act and other provisions of the Administrative Code. (Investigatory powers under NYC Charter §1052(a)(5), which is not referenced in the proposed rules, appear to be similarly limited in scope.)

If this assertion of investigatory powers is not in error, however, does it suggest that the primary purpose of investigating individual and entity compliance with IE requirements is to shed light on candidate violations arising from unreported in-kind contributions (non-independent expenditures)? If this is the goal, the CFB may be asserting that it has legal authority to compel testimony under oath and subpoena records from these individuals and

entities regarding communications they had with candidates they support with their IEs (or with opposing candidates in the case of a negative IE communications).