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TESTIMONY OF ROBERT J. BISHOP AT THE OCTOBER 27, 2011 PUBLIC HEARING OF THE NEW YORK CITY CAMPAIGN FINANCE BOARD REGARDING PROPOSED INDEPENDENT EXPENDITURE RULES

Good morning Chairman Parkes and members of the Campaign Finance Board ("CFB"). Thank you for this opportunity to testify as you consider proposed amendments to the CFB's rules to regulate independent expenditures. My name is Robert J. Bishop of Pitta Bishop Del Giorno & Giblin LLC. My firm is a government relations and consulting firm, which in conjunction with its affiliated law firm, Pitta & Giblin LLP, represents more than forty labor unions, as well as a number of not-for-profit membership organizations, that would be affected by the proposed rules. I am testifying here today, not as a representative of any one of these clients, but on my own behalf. I have studied the CFB's proposed rules since their release on September 8, 2011. I am troubled by the expansive scope, the lack of meaningful differentiation between public communications and member-to-member communications, the severe penalties for violations, and the grant of seemingly unchecked auditing authority to the CFB by this proposal. These rules, if adopted as proposed, will result in a chilling effect on the political speech of membership organizations.

In drafting and ultimately putting the proposed charter amendment requiring disclosure of independent expenditures to the voters on November 2, 2010 , the 2010 Charter Review Commission ("Commission"), perhaps wisely, was responding generally to a marked expansion of independent expenditures in recent municipal elections[1] and more specifically to the United States Supreme Court's decision in *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), which some feared would fuel a proliferation of independent expenditures in elections across the country[2]. The concern about independent expenditures, however, as indicated in the Commission's Final Report, was that since independent spenders were not required to make any disclosures regarding their independent expenditures, there was a potential for "confus[ing]...*members of the public.*"[3] The purpose of the then proposed revision to the New York City Charter, now codified at §1052(a)(15), was to "provide critical information and context for *members of the public* and help them to evaluate advertising messages aimed at influencing *their* votes."[4]

The text of the charter amendment itself supports this expressed concern for the potential impact that independent expenditures would have on influencing electoral activity of the voting public at large. The definition of independent expenditure included in the charter amendment refers to "a monetary or in-kind expenditure made, or liability incurred, in support of or in

[1] *See*, Final Report of the 2010 New York City Charter Revision Commission, August 23, 2010, p. 13.
[2] *See*, Final Report at 14.
[3] *Id.* at 13, emphasis added.
[4] *Id.*, emphasis added.

opposition to a candidate in a covered election or municipal ballot proposal or referendum, where no candidate, nor any agent or political committee authorized by a candidate, has authorized, requested, suggested, fostered or cooperated in any such activity."[5] The heart of the regulated activity—communications "in support of or in opposition to a candidate in a covered election"—reaches only attempts by an independent spender to influence the votes of members of the public. When this text is construed against the background of its sole legislative history—the Final Report of the Commission—it is clear that the intent of the charter amendment was to capture only independent expenditures aimed at persuading the vote of the general electorate.

Despite this limited purpose of the charter amendment, however, the CFB's proposed rules would encompass activity that is neither related to electoral support or opposition nor directed at the general electorate. Proposed Rule 13-02 explains that the scope of regulated activity would be both "electioneering communication[s]" and "express advocacy communication[s]." While the definition of an "express advocacy communication" contained in the proposed rules indicates an intent to reach only communications that "advocate the election or defeat of one or more clearly identified candidates or ballot proposals,"[6] ironically, the definition of an "electioneering communication" would reach speech potentially unrelated to electoral activity as long as it occurs within the specified 90-day window periods. Indeed, the CFB's own example of "Tell Candidate X that her position on budget cuts is wrong"[7] certainly goes beyond speech of an electoral nature. Such appeals to listeners/readers are already regulated by New York State and Local laws governing lobbying, and the maker of such a statement would be subject to disclosure requirements for grassroots lobbying expenditures. To further subject the maker of such a statement to disclosure requirements would not only result in redundant regulation, but would also exceed the scope of the charter amendment in reaching speech not directed at influencing the vote of the general electorate. Furthermore, given the very likely prospect that the New York State primary election will be moved to an earlier date, the applicable window periods for "electioneering communications" could span nearly half of an election year, subjecting a tremendous amount of speech to disclosure requirements.

Perhaps the most troubling aspect of the CFB's proposed rules is their lack of meaningful distinction between communications directed at the public at large and the internal member-to-member communications of membership organizations. Although the proposed rules do specify a "[m]ember/[s]hareholder exemption,"[8] that exemption only extends to a "routine newsletter or periodical, or telephone calls, or communications relating to the internal deliberations of the entity's endorsements,"[9] failing to cover significant amounts of member-to-member communications. As explained above, the text of the charter amendment makes no reference to member-to-member communications, and its legislative history demonstrates a purpose wholly unrelated to regulating such member-to-member communications. In fact, no legitimate purpose is served by regulating member-to-member communications in the same manner as independent expenditures aimed at the public at large. The rationale for requiring disclosure of independent spenders directing electoral communications at the public at large is to ensure transparency of the

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[5] New York City Charter §1052(a)(15)(a)(i).
[6] New York City Campaign Finance Board Proposed Independent Expenditure Rules, Rule 13-01(f)(i).
[7] New York City Campaign Finance Board Guide to the Proposed Independent Expenditure Rules in New York City Elections, p. 1.
[8] Rule 13-02(c).
[9] *Id.*

source of the communications and to avoid "confus[ing]...members of the public."[10] These concerns are simply not implicated by member-to-member communications. Further, the proposed rules, to the extent they purport to require disclosure of membership organizations' communications with their own memberships, invade areas of voluntary associations in which the public has no justifiable interest.

Capturing member-to-member communications within the definitions of "express advocacy communications" and "electioneering communications" when coupled with the potential penalties, both civil and criminal, for violations of the proposed rules will surely chill the speech of membership organizations. Given the confusing distinctions contained in the proposed rules and the CFB's Guide to the Proposed Rules among various types of member-to-member communications that would be regulated as independent expenditures, various membership organizations, particularly smaller and less sophisticated ones, will choose to not engage in activities that might be construed as regulated conduct, in hopes of avoiding potential penalties. Obviously, this is a perverse result that will not advance the mission of the CFB "to encourage, promote, and facilitate...voting by all residents of New York City,"[11] since such organizations would refrain from communicating with their members regarding electoral issues.

Having advised many clients, both political committees and candidates, in connection with CFB oversight in the past, I am not unfamiliar with the scope and duration of a CFB audit. Based on that experience, any membership organization would rightfully be weary of "desk and field audits,"[12] which the CFB would have the authority to utilize in investigating potential violations of the charter amendment, pursuant to Proposed Rule 13-09(a). The prospect of having the CFB auditing the financial records of voluntary membership organizations, which can potentially reveal highly sensitive information wholly unrelated to political or electoral activity, is quite alarming. Not only would such audits be unduly intrusive into the internal workings of membership organizations, but the compliance with such audits would be extremely burdensome in terms of both time and money. As the CFB's schedule of post-election audits of candidate's committees demonstrate, it could be years after a given election that CFB begins asking for records. Also troubling is the undefined breadth of CFB's authority to audit entities suspected to be independent spenders. If the CFB "ha[d] reason to believe"[13] that a membership organization violated the charter amendment and made independent expenditures without filing a necessary disclosure statement (when in fact it had not), could it then just begin a desk and field audit of that organization's financial records to verify such a belief? Once again, the potential chilling effect of such actions by the CFB on perfectly lawful political speech should not be underestimated.

In light of the foregoing, I respectfully request that in considering amendments to the proposed rules the CFB ensure that the intent of the charter amendment is followed by confining the activity regulated by these proposed rules only to electoral advocacy directed at the general electorate, exempting in their entirety member-to-member communications, consistent with the purpose of the charter amendment.

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[10] Final Report at 13.
[11] New York City Charter §1052(e).
[12] New York City Campaign Finance Board Rule 7-01(f).
[13] Proposed Rule 13-09(b)(ii)(1).