

**Testimony of Lawyers Alliance for New York before the New York City Campaign Finance Board on Proposed Rules for the Disclosure of Independent Expenditures**

**October 27, 2011**

Lawyers Alliance for New York (Lawyers Alliance) respectfully submits this testimony to the New York City Campaign Finance Board (CFB) on CFB's proposed independent expenditure rules for New York City (NYC) elections. We urge the CFB to clarify and modify the rules in order to achieve appropriate transparency without unduly burdening nonprofit organizations, particularly organizations that are not engaged in partisan political activity.

Lawyers Alliance is the leading provider of business and transactional legal services to nonprofit organizations that are improving quality of life in New York City neighborhoods. As community-based and other nonprofit organizations increasingly seek to improve public policies through permissible advocacy activities, Lawyer Alliance regularly advises such organizations about the distinction between political activity and legislative advocacy and about the applicable lobbying reporting requirements.

Enhancing transparency in NYC elections and requiring appropriate disclosure of independent expenditures aimed at influencing elections are worthy goals. Since the United States Supreme Court's 2010 decision in Citizens United,<sup>1</sup> the media, voters and governmental bodies have focused more attention on the issue of third party spending in the political process. The CFB's proposed rules are an effort to implement the November 2010 NYC ballot referendum, approved by voters, to modify the NYC Charter "to require public disclosure of expenditures made by entities and individuals from candidates to influence the outcome of a city election or referendum." CFB Chair Joseph Parkes remarked at the CFB hearing held on March 10, 2011, "New Yorkers have spoken and they've asked for better and timelier disclosure to make election spending more transparent."<sup>2</sup> The proposed rules in turn should reflect voter and CFB intent to capture independent spending in the NYC political process.

However, Lawyers Alliance is concerned that the proposed rules unnecessarily go further. They appear to blur the distinction between a partisan political communication and a nonpartisan advocacy communication, and they may subject nonprofit organizations engaged in legislative advocacy to duplicative or onerous reporting. We therefore offer the following suggestions.

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<sup>1</sup> See *Citizens United v. FEC*, 130 S. Ct. 876 (2010).

<sup>2</sup> See 3/10/2011 "Official Transcript of the Disclosure of Independent Expenditures Hearing" at 2; available at <http://www.nyccfb.info/press/news/testimony/pdf/cfb/2011-03-10-IEH.pdf>.

## 1. Exempt 501(c)(3) Organizations from Disclosure Requirements

The New York City Charter defines “independent expenditures” to include expenditures made “in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum,” as long as the expenditure is not coordinated with a candidate.<sup>3</sup> We recognize that, under the CFB’s proposed rules, if a nonprofit organization spends \$1000 for a “public communication” that is an “electioneering communication” within 90 days of an election, or a partisan “express advocacy communication” during the election cycle, the organization would be required to file extensive financial reports with the CFB. While there is a disclosure exception for certain member communications, it is narrow and inapplicable to the majority of 501(c)(3) organizations, many of which do not have members but nevertheless seek to educate the public and advocate for improved public policies as part of their mission.

Lawyers Alliance recommends that the rules not apply to organizations that are tax-exempt under Section 501(c)(3) of the Internal Revenue Code (the Code). The Code prohibits 501(c)(3) organizations from participating in any political activity for or against candidates for elective political office.<sup>4</sup> Yet, the broad definitions used in the rules appear to require 501(c)(3) organizations to file reports with the CFB as though they engaged in impermissible political activity, when instead they are engaged in permissible legislative advocacy. This might occur, for example, if in the regular course of legislative advocacy, a 501(c)(3) organization suggests that members of the public contact specific NYC Council members, who happen to be running for reelection, about a pending bill to urge them to take or change a position. Section 13-04 of the rules says that the disclosure statement should name “candidates and/or ballot proposals for which the public communication is in support or against.”

Even if 501(c)(3) organizations are not technically taking a position for or against a candidate when reporting legislative advocacy to the CFB, filing reports with the agency tasked with regulating disclosure of political campaign contributions is counterintuitive for the filing organization. Yet, failure to report or erroneous reports could lead to investigations, high fines, and even criminal prosecution. For those who are seeking campaign finance information, the filing is confusing because the reported conduct is not political activity.

Meanwhile, 501(c)(3) organizations engaged in legislative advocacy in NYC already report lobbying activity to the New York City Clerk’s office and the New York State Commission on Public Integrity if they reach certain monetary thresholds.<sup>5</sup> The transparency benefits of also requiring disclosure to the CFB are unclear and outweighed by the burdens of duplicative reporting. Rather than taking on the added reporting burden or risk harsh penalties for noncompliance, 501(c)(3) organizations may refrain from communicating with the public about significant legislative issues being debated and decided by NYC elected officials within three months of an election.

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<sup>3</sup> See N.Y.C. Charter §1052(a)(15).

<sup>4</sup> I.R.C. §501(c)(3)-1(c)(3)(iii).

<sup>5</sup> See NY Leg Law § 1-e(a)(1).

Alternatively, if 501(c)(3) organizations are not fully exempt from the CFB rules governing independent expenditures, their reporting requirements should be limited to advocacy surrounding ballot initiatives because such activity is permissible for 501(c)(3) organizations to undertake and is not currently reportable to other governmental agencies. Such reporting requirements should be narrowly tailored to achieve the goals of the ballot referendum passed by voters in 2010.

## **2. Narrow the Definition of Electioneering Communication**

As currently drafted, the definition of “electioneering communication” in Section 13-01(e) of the proposed rules appears to capture legislative advocacy, not just communications made “in support of or in opposition to a candidate in a covered election.”<sup>6</sup> Lawyers Alliance questions the breadth of language that refers to communications that “support or condemn” an elected official’s “position or stance on issues” or “public record.” The legislative advocacy efforts of many organizations include grassroots lobbying activities that ask NYC residents to communicate with elected officials regarding their position on legislative issues. These communications typically are nonpartisan, issue-based advocacy, and the resulting expenses are reported to the Internal Revenue Service, the NYC Clerk, and the New York State Commission on Public Integrity. Not only 501(c)(3) organizations, but also 501(c)(4), 501(c)(6) and other types of tax exempt organizations, engage in permissible lobbying around substantive or budget issues. The mere fact that these communications take place during a pre-election window of time should not mean that nonprofit organizations now must report their nonpartisan legislative lobbying activities to the CFB as well.

Consider the following real-world examples from Lawyers Alliance’s clients:

*Example 1: New York City Charter School Center (NYCCSC) is working to advance state legislation relating to Community Education Councils. NYCCSC will seek City Council support for the state measure set for a vote before the State legislature within 30 days of a City election, and will engage with parents of children enrolled in New York City charter schools to reach out to sitting City Council members to pass a local Resolution in support of the State legislation. Expenses tied to this activity should not be reportable to the CFB because it is legislative activity and only coincidentally timed within 30 days of a City election.*

*Example 2: Council for Senior Centers and Services (CSCS) is an umbrella organization working with senior serving organizations to ensure New York City seniors receive high quality services. In October and November of 2010, the Department for the Aging announced mid-year budget cuts that would have resulted in a 30% cut to case management services for seniors. CSCS organized a letter writing campaign that resulted in 17,000 letters being sent to NYC elected officials. CSCS had no control over the fact that the mid-year cuts were announced and debated during an election season, and although it is a membership organization, it would not benefit from the membership exception set*

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<sup>6</sup> New York City Charter Section 1052 – 15(a)(i)

*forth in the rules because the seniors who participated in the campaign are not members of CSCS.*

We acknowledge that the line between genuine legislative advocacy and “sham issue ads” during an election season may be blurry, but we note that other regulatory bodies have successfully navigated this challenge. In particular, the IRS has issued a revenue ruling identifying factors that distinguish political activity from issue based advocacy during an election season.<sup>7</sup> Distinguishing factors set forth by the IRS to show that an advocacy communication is a political communication include, but are not limited to, the following:

- The communication identifies a candidate for public office;
- The timing of the communication coincides with an electoral campaign;
- The communications targets voters in a particular election;
- The communication identifies that candidate’s position on the public policy issue that is the subject of the communication;
- The position of the candidate on the public policy issue has been raised as distinguishing the candidate from others in the campaign, either in the communication itself or in other public communications; and
- The communication is not part of an ongoing series of substantially similar advocacy communications by the organization on the same issue.

Conversely, distinguishing factors that tend to show that an advocacy communication is a non-partisan advocacy communication include:

- The absence of any one or more factors listed above;
- The communication identifies specific legislation, or a specific event outside the control of the organization, that the organization hopes to influence;
- The timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence such as a legislative vote or other major legislative action;

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<sup>7</sup> IRS Rev. Rul. 2004-6, available at <http://www.irs.gov/pub/irs-drop/rr-04-6.pdf>. This ruling analyzes whether, under six different scenarios during an election period, a 501(c)(4), (c)(5) or (c)(6) organization would be subject to federal income tax because the communication is political activity and not legislative advocacy; however, the analysis is similar when determining whether a 501(c)(3) engages in impermissible political activity or when classifying the conduct of other types of organizations.

- The communication identifies the candidate solely as a government official who in a position to act on the public policy issue in connection with the specific event (such as a legislator who is eligible to vote on the legislation); and
- The communication identifies the candidate solely in the list of key or principal sponsor of the legislation that is the subject of the communication.<sup>8</sup>

Lawyers Alliance respectfully urges the CFB to re-define “electioneering communication” in order to capture partisan political communications rather than nonpartisan advocacy communications by incorporating the principles referenced above. We are available to provide input and assistance in crafting a definition that addresses the problem of “sham issue ads” but does not unnecessarily burden nonprofits.

### **3. Clarify Funder Disclosure Requirements**

We recognize the desire for disclosure requirements for individuals and entities funding independent expenditures intended to influence the outcome of NYC elections. However, we suggest that the CFB clarify that the rules do not require disclosure of the following: the identity of individual contributors to charitable organizations whose names and addresses are not otherwise publicly available; foundation funders who provide support to organizations engaged in lobbying activity; or those who provide general operating support to tax exempt organizations. Among the sections of the rules to be clarified would be Section 13-04(b) that asks the independent spender to report “the name of the individuals or entities paying for the expenditure.” While CFB guidance suggests that gifts restricted from being spent on CFB elections are not covered, there is still potential ambiguity.

Nonprofit organizations rely on a range of sources for contributions, including 501(c)(3) private foundations and individual donors. Because general operating support allows charities the most flexibility for achieving charitable purposes, they usually prefer this type of support. General operating support from foundations and private individuals is especially important in this economic climate, when nonprofit organizations are expected to provide ever more services with significantly reduced funding from City and State sources.

#### *Individual Donors*

An individual donor to a 501(c)(3) organization generally has a right to anonymity. The donor may wish to avoid inclusion on fundraising lists, or may seek to live beneath his or her means. This right to anonymity is recognized in the instructions to IRS Form 990, the annual financial report that tax exempt organizations file with the IRS. The Form 990 is a public document, and must be made available to any member of the public who requests it, except that Exhibit B containing the names of donors is not publically available. Such information should be exempt from disclosure, even if 501(c)(3) organizations are to file reports with the CFB.

#### *Private Foundation Grants*

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<sup>8</sup> *Id.*

Unlike 501(c)(3) charitable organizations, private foundations are a type of 501(c)(3) entity that generally are not permitted to engage in lobbying. Foundations can fund legislative advocacy but only in limited circumstances.<sup>9</sup> If foundations are concerned that their general operating support or advocacy grant could be interpreted as paying for independent expenditures for an election under the rules, they may be less eager to fund advocacy organizations out of concern about how they might be listed on reports to CFB.

This is not what NYC voters intended when they approved the ballot referendum requiring disclosure of independent campaign expenditures. We propose that the disclosure requirements be revised to exclude altogether sources of funding from individual donors and private foundations to 501(c)(3) organizations.<sup>10</sup>

#### **4. Shorten Time Period of Reportable Activity**

Lawyers Alliance supports narrowing the window of time within which “electioneering communication” would be reportable to the CFB from 90 days before an election to 30 days. Such an amendment would exclude most budget advocacy from the pre-election window, provided the budget cycle and election cycle proceed at different times. However, it would not address our fundamental concern that the rules unnecessarily extend to public policy advocacy rather than focus on political activity.

#### **5. Need for Training and Public Education**

Lawyers Alliance believes that education and outreach are valuable to ensuring that all nonprofit organizations are aware of the applicability and scope of the CFB’s disclosure rules. Nonprofit organizations are unfamiliar with CFB’s reporting scheme and may need training and support to ensure compliance. Lawyers Alliance appreciates guidance from the CFB to help organizations comply and offers its assistance to CFB and the nonprofit sector in carrying out this task. Our staff has vast experience conducting workshops and webinars on nonprofit legal issues of concern to resource-constrained nonprofit organizations.

We appreciate the opportunity to comment. Please contact Staff Attorney Elizabeth Perez, Senior Policy Counsel Irum Taqi or Deputy Executive Director Elizabeth Guggenheimer for further information at (212) 219-1800.

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<sup>9</sup> IRC §4945(d)(1). Private foundation expenditures are subject to excise taxes. However, the IRS does permit private foundations to fund organizations or projects that have a lobbying component, provided that expenditure for the non-lobbying component of the project is greater than the private foundation grant. See Treas. Reg. §53.4945-2(a)(6)(ii).

<sup>10</sup> Alternatively, if a determination is made that such information must be provided to the CFB, then such lists should not be made publically available.