DISCLOSURE OF INDEPENDENT EXPENDITURES
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New York City's landmark Campaign Finance Program has long been a model for reform. Reasonable contribution limits and public matching funds ensure that candidates who participate can run competitive campaigns without relying on influence-seeking large contributions. In order for citizens to see how money impacts their elections, New York City law also requires comprehensive disclosure of candidates' fundraising and spending.

In any public campaign financing program, independent expenditures represent a distinct dilemma: candidates who agree to spending limits may be opposed by independent actors, to whom the limits do not apply. However, the First Amendment protects the rights of independent actors to spend unlimited amounts to support or oppose candidates. Until recently, New York City was among the many jurisdictions lacking a requirement that independent spending be disclosed.

The need for disclosure of independent expenditures has become increasingly urgent over the past few years. The 2009 elections brought forth an unprecedented level of third-party activity in New York City elections. In January 2010, the U.S. Supreme Court's decision in *Citizens United* held that the government may not limit independent political spending by corporations or unions in elections, which prompted fears that the role of independent expenditures in elections would increase even further.

Those fears were realized at the federal level, as independent groups spent more than $480 million in the 2010 Congressional elections — an increase of more than 60 percent from the previous midterm elections in 2006.[1] Nearly half of the $300 million in independent spending not affiliated with one of the political parties escaped disclosure completely.[2]

A Charter Revision Commission was appointed in March 2010 by Mayor Bloomberg to propose amendments to the New York City Charter. Against the backdrop of the midterm elections, the Commission's final report, released in August, included a recommendation to require disclosure of independent expenditures in City elections to the Campaign Finance Board. Question 2 on the November 2010 ballot included the mandate for disclosure of independent spending among several other issues; it was approved with the support of 84 percent of New York City voters.

As the CFB prepares to draft rules to administer the new requirements, the Board seeks public input on several questions that will inform the form and scope of its rulemaking.

I. Scope of regulated activity. *Should the requirements apply to communications containing express advocacy, or also to those that refer to a clearly identified candidate (or ballot measure) shortly before an election?*

The NYC Charter requires disclosure of independent expenditures made "in support of or in opposition to any candidate in any covered election, or in support of or in opposition to any municipal ballot proposal or referendum."[3]

Expenditures for communications. A fundamental issue is defining a standard for what constitutes support or opposition. Based on current law, the disclosure requirements could cover any communication that:

(1) Expressly advocates for the election or defeat of a clearly identified candidate or ballot proposal by using "magic words" (*express advocacy*);

(2) Is "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or ballot measure" (*functional equivalency*);

(3) Refers to a clearly identified candidate or ballot measure and is made, broadcast, or distributed shortly before an election (*electioneering communication*);[4] or

(4) Some combination of all of the above.

Federal law requiring disclosure of independent expenditures defines "electioneering communications" as any broadcast, cable, or satellite communication that refers to a clearly identified candidate within 60 days before a general election or within 30 days before a primary election.[5] Rather than relying on the presence of "magic words" or their functional equivalent,[6] electioneering communications are those in which a candidate is "clearly identified", *i.e.*, if his or her name or picture appears in the communication or if his or her identity is "apparent by unambiguous reference."[7]

The requirement to disclose spending on electioneering communications was recently upheld by the Supreme Court in *Citizens United*,[8] which made clear that third parties could be required to report their expenditures as long as those expenditures (1) refer to a candidate, and (2) are made shortly before an election.[9]

Expenditures for other electioneering activities. Independent expenditures in New York City elections often involve a broad range of activities, including mailings, phone banks and/or robo-calls, and online communications. Independent groups also often engage in traditional door-to-door canvassing operations.

There are questions about how the disclosure rules should apply to these activities. How should entities calculate and report the costs of an all-volunteer canvass, for instance? The Board will consider to what extent and in what manner expenditures in support of these activities must be reported.

II. Required information. *What information should an independent spender be required to disclose about itself, its funding sources, and its vendors? Within what timeframe should this information be reported to the Board?*

Required information. The Final Report of the 2010 New York City Charter Revision Commission recognized that the Commission's goal in proposing the disclosure of independent expenditures was to "provide critical information and context for members of the public and help them to evaluate advertising messages aimed at influencing their votes."[10]

In order for the public to fully understand the impact and magnitude of independent expenditures on City elections, the Board may choose to require that independent actors report a broad range of information about their spending. The National Institute on State Money in Politics, which collects and analyzes state disclosure data for their well-regarded website ***followthemoney.org***, suggests the following information is necessary for effective disclosure:

- information about the entity making expenditures must be detailed, including name, address and, for individuals, occupation and employer;
- the entity or entities contributing funds used to make the expenditures must be named, including the name and address and, for individuals, their occupation and employer;
- the entity receiving payments must be named, including the detailed purpose of the expenditure, name, address, type of business or, for individuals, occupation and employer;
- the target (candidate or ballot measure) of each expenditure must be identified, along with whether the expenditure supported or opposed that target.[11]

Timing of reporting expenditures. Of the 42 states that require some form of independent expenditure reporting, 28 states mandate expedited reporting, usually within 24 or 48 hours after the expenditure is made. In some jurisdictions, the 24/48-hour requirement applies year-round. Others establish a window of time — anywhere from one week to two months — before an election during which expedited disclosure is required.

Timing of reporting funding sources. The Charter requires that independent groups spending $5,000 or more in City elections must disclose the identities of their contributors. The rules should allow a reasonable timeframe for parties to report information about their funding sources. Whereas it may be reasonable to require disclosure of expenditures within 24 hours, it may be more burdensome to require the entity to disclose information about all its contributors in that same time frame.

Especially for groups whose identities may not be obvious to the public (*i.e.* "New Yorkers for Apple Pie"), it seems that at least some details about the organization's sources of funding should be made available with their initial disclosure. One approach would require entities to immediately disclose their largest contributors, and establish a later deadline to provide a comprehensive list.

In addition, the rules should establish whether disclosure of funding sources is a one-time act only, or a requirement to file updated disclosure of its contributors through the election.

III. Exemptions. *Should certain communications or actors be exempt from the disclosure rules? Should certain contributions, such as those earmarked for a specific non-political purpose, be exempted from source disclosure rules?*

Media/Press. Under federal law, disclosure is not required of "any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate."[12] Several states' laws also contain a disclosure exemption for media. The U.S. Supreme Court has upheld laws that exclude media entities from disclosure on the basis that it "ensures that the [law] does not hinder or prevent the institutional press from reporting on, and publishing editorials about, newsworthy events."[13]

Earmarked contributions. Many jurisdictions require entities that make independent expenditures to disclose information about *all* contributions received by the entity, regardless of their intended purpose.[14] The Board may want to allow entities to withhold disclosure of donations that are specifically earmarked for non-political purposes (including, perhaps, membership dues).[15] In such circumstances, the public has less of an interest in disclosure regarding those types of donations.

Threats, harassment or reprisal. The Board should consider allowing an entity to withhold information about its contributors if there is a reasonable probability that disclosure would cause contributors to face threats, harassment, or reprisals. If appropriate, the rule should provide for a mechanism to enable an entity to make such a showing. No other jurisdiction appears to have any such procedure codified; typically, the issue arises through litigation, as an agency seeks to compel disclosure, or an entity seeks to prevent disclosure. It may be advisable for the CFB to implement rules to establish an exemption prior to litigation.[16]

IV. Enforcement. *How should the Board uncover potential violations of the disclosure rules? Should it rely on complaints only, or initiate investigations of unreported activity?*

CFB enforcement of the disclosure requirements should cover a range of potential violations, including:

- Failure to report independent expenditures
- Untimely reporting of independent expenditures

- Misreporting of independent expenditures
- Failure to disclose contributors
- Failure to include a “paid for by” disclaimer
- Coordination with a candidate or campaign

The rules should address the process for receiving and investigating complaints about potential violations. The existing rules that govern campaigns and third-party expenditures will also need review.

V. Disclaimer requirements. *Should the disclaimer/identifier on the face of the communication be subject to language, font size and placement requirements? Should certain communications be exempt from such requirements?*

Disclaimer wording. Many state and local laws require specific wording. For example, many jurisdictions require the words, “Paid for by…” or “Sponsored by…” followed by the name and/or address of the party making the expenditure. In some jurisdictions, the disclaimer must also clearly state that the communication has not been authorized by any candidate. [17] If the party making the independent expenditure is not an individual, the Board may choose to require the name of the entity’s treasurer, CEO, or executive director, along with the organization’s name and/or address.[18]

Applicable Communications. The Board will also have to consider the range of communications for which the disclaimer requirements may apply: mailings, television and radio advertisements, e-mails, websites, YouTube videos, and live or recorded phone messages. Many jurisdictions mandate disclaimers for a wide range of traditional communications, such as press releases, pamphlets, flyers, form letters, signs, billboards, print as well as broadcast advertisements, or telephone calls featuring a recorded message.[19] However, the Board may want to go even further and require disclaimers for messages disseminated via any electronic means, including the Internet and email,[20] and all oral communications (which would capture live telephone calls).[21]

Technical Requirements. Current state and local laws regarding the technical requirements of disclaimers, including font size and placement, vary greatly. Many jurisdictions mandate a minimum font size; [22] others require only that a disclaimer is printed large enough to be clearly legible,[23] or simply that a disclaimer is printed in “conspicuous type.” [24] Others fail to mention the font size or legibility at all.

For advertisements broadcast on television or the Web, disclaimers may be required to be included both orally and visually,[25] may be displayed a specified length of time (*e.g.*, New Hampshire law mandates disclaimer be broadcast for 4 seconds),[26] and may include requirements regarding the size of the letters used.[27] For printed materials, many jurisdictions require the disclaimer to be on the front page of all literature and advertisements published or posted,[28] while others require it to be at either the beginning or end.[29]

Exemptions. It may not be practicable to include a disclaimer on certain small items, such as a button, or a sticker. The Board may consider exempting these small items from disclaimer requirements.

VI. Outreach. *How can the Board best conduct outreach and training to potential independent spenders once the independent expenditure rules are approved?*

In order to encourage compliance with the rules once they are approved, the CFB will communicate with the regulated community to educate them on the new requirements. While CFB regularly conducts outreach to candidates to educate them about the Campaign Finance Program, CFB has little contact with potential independent actors. CFB will need to be creative and proactive in its approach to educating those who will be required to disclose activities under the new mandate.

1 Center for Responsive Politics, ***http://www.opensecrets.org/outsidespending/index.php?cycle=2010&view=A&chart=A***

2 Center for Responsive Politics, ***http://www.opensecrets.org/outsidespending/index.php?cycle=2010&view=A&chart=N***

3 N.Y.C. Charter § 1052a(15)(a)(i), (b).

4 Although it is not settled how much time constitutes "shortly before an election," by upholding the federal definition of electioneering communications, the Court has indicated that "shortly before an election" constitutes at least sixty days, and possibly more.

5 2 U.S.C. § 434(f)(3)(A)-(C).

6 See McConnell v. FEC, 540 U.S. 93 (2003) (The functional equivalent of express advocacy includes electioneering communications that are "susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate")

7 2 U.S.C. § 431(18)(C)

8 See FEC v. Citizens United, 558 U.S. _ (2010). In addition to broadly upholding the federal disclosure and reporting requirements, the Court explicitly rejected the contention that such disclosure is limited to express advocacy or its functional equivalent. Id. at 915.

9 Id. at 915.

10 Final Report of the 2010 New York City Charter Revision Commission, p. 13

11 National Institute on Money in State Politics, "Indecent Disclosure: Public Access to Independent Expenditure Information at the State Level," August 1, 2007, p. 5

12 2 U.S.C.A. § 431(9)(B)(i).

13 Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 668 (1990), *rev'd on other grounds by* Citizens United.

14 In addition, in certain circumstances, entities that contribute to an entity that makes independent expenditures must disclose the underlying source of its funds. This second layer of disclosure attempts to get at the so-called "Russian nesting doll" problem.

15 *See, e.g.,* L.A. Mun. § 49.7.26(B) (requiring disclosure of contributions of $100 or more, but providing that "contributions that are received, but earmarked for any other candidate or ballot measure outside the City of Los Angeles need not be disclosed").

16 The CFB has long followed a policy of not providing public access to contributors' home addresses on its website, even though candidates are required to include them in their disclosure.

17 See NH ST § 664:14 ("This advertisement has been paid for by (name of sponsor) and has not been authorized by any candidate."); see also MD ELEC LAW § 13-401 ("This message has been authorized and paid for by (name of payor or any organization affiliated with the payor), (name and title of treasurer or president). This message has not been authorized or approved by any candidate.")

18 See MD ELEC LAW § 13-401 (Maryland).

19 See NJ ST 19:44A-22.3 (New Jersey).

20 See NE ST § 49-1446.06 (Nebraska).

21 See MN ST § 10A.17 (Minnesota).

22 See SMC 2.04.290(B) (Seattle, Washington).

23 See NH ST § 664:14 (New Hampshire).

24 See MN ST § 10A.17 (Minnesota).

25 See NH ST § 664:14 (New Hampshire).

26 Id.

27 Id. (The visual presentation on television shall be clearly legible and shall use letters equal to or greater than 12 percent of the vertical picture height.)

28 MN ST § 10A.17 (Minnesota).

29 Id.