ADVISORY OPINION NO. 2016-1 (July 6, 2016)

The New York City Campaign Finance Board (the "Board") issues this Advisory Opinion[1] to clarify the application of the Campaign Finance Act (the "Act") and Board Rules to situations in which candidates cooperate with outside organizations.

The Board is concerned about candidates engaging in cooperation with outside organizations that have made expenditures on issue advocacy communications promoting the candidate. These interactions raise the question of whether these organizations are making expenditures in connection with a covered election.[2]

If the Board finds that an organization's expenditures are for an activity made in connection with a covered election, and that the activity is not independent, some or all of the organization's expenditures will be considered in-kind contributions to the candidate subject to the Act's contribution and expenditure limits.

New York City's Campaign Finance Program (the "Program") mitigates the influence of large, special interest contributions by matching small-dollar contributions with public funds. It is essential to the integrity of the Program that candidates not be permitted to sidestep the Act's limits on expenditures and contributions by outsourcing essential campaign activities to coordinated organizations that face no limits on what they can raise and spend. Coordinated relationships of

[1] In this Advisory Opinion, the Board relies on the following sources: New York Election Law § 14-112 (2015); New York City Charter § 1052(a)(15), 1136.1(2)(a); Administrative Code of the City of New York § 3-702(7), (8), (11), 3-716; Board Rules 1-08(f), 13-01 *et seq.*; Advisory Opinion Nos. 1989-53 (October 26, 1989), 1993-9 (September 9, 1993), 1993-10 (September 23, 1993), 1997-6 (June 24, 1997), 2000-1 (March 7, 2000), 2000-4 (September 14, 2000), 2003-2 (July 14, 2003), 2007-6 (December 21, 2007), 2009-7 (August 6, 2009), 2012-1 (June 21, 2012), 2013-1 (January 10, 2013); Final Board Determination 2015-1 (October 8, 2015).

[2] An expenditure is considered to be made in connection with a covered election "if it was for the purpose of promoting or facilitating the nomination or election of a candidate . . . ." *See* Board Rule 1-08(f)(3).

this sort have the potential to grant vast influence over elections and candidates to wealthy interests, far beyond what is allowed by the Act—or even under existing Supreme Court precedent.

The 2016 presidential election will be the second since the Supreme Court decision in *Citizens United v. FEC*[3]. As in 2012, a number of candidates for President in 2016 have appeared to test federal prohibitions on coordination with outside groups by closely associating with super PACs organized to support their candidacies. Particularly in light of these activities, it is more important than ever to ensure that the rules protecting city elections from the impact of unlimited special interest spending remain strong.

As such, expenditures coordinated by candidates and outside groups will be carefully analyzed to determine whether they are being made in connection with the candidate's election.

<u>Analysis</u>

If an organization's expenditures are made in connection with a covered election and the expenditures are not independent, those expenditures will be subject to the Act and Board Rules governing candidates. This Opinion provides guidance regarding what factors may determine whether coordinated activities are considered to be made in connection with a covered election. It

[3] *Citizens United v. FEC*, 558 U.S. 310 (2010).

is not intended to expand or alter the Board's guidance regarding coordination[4] or independence, including independent entities' reporting requirements.[5]

Issue advocacy, by itself, is not considered to be in connection with a covered election—the Act does not apply to a "committee or organization for the discussion or advancement of political questions or principles without connection with any vote." Admin. Code §3-702(11). *See also* Advisory Opinion Nos. 2003-2, 1989-53; *but see* N.Y.C. Charter §1052(a)(15); Admin. Code §§ 3-702(8), 3-716; Board Rules 1-08(f), 13-01 *et seq*; Advisory Opinion No. 1993-9.

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[4] Activity is independent if "the candidate or his or her agents or political committees … did not authorize, request, suggest, foster or cooperate in such activity . . . ." Admin. Code § 3-702(8); Board Rules 1-08(f)(2), (3). Therefore, "non-independent" or "coordinated" activity includes any activity by another party that is authorized, requested, suggested, or fostered by, or done in cooperation with, the candidate, and is considered to be an in-kind contribution pursuant to the Act and Board Rules.
Board Rule 1-08(f)(1) provides that the "[f]actors for determining whether an expenditure is independent include, but are not limited to:

> (i) whether the person, political committee, or other entity making the expenditure is also an agent of a candidate;
> (ii) whether the treasurer of, or other person authorized to accept receipts or make expenditures for, the person, political committee, or other entity making the expenditure is also an agent of a candidate;
> (iii) whether a candidate has authorized, requested, suggested, fostered, or otherwise cooperated in any way in the formation or operation of the person, political committee, or other entity making the expenditure;
> (iv) whether the person, political committee, or other entity making the expenditure has been established, financed, maintained, or controlled by any of the same persons, political committees, or other entities as those which have established, financed, maintained, or controlled a political committee authorized by the candidate;
> (v) whether the person, political committee, or other entity making the expenditure and the candidates have each retained, consulted, or otherwise been in communication with the same third party or parties, if the candidate knew or should have known that the candidate's communication or relationship to the third party or parties would inform or result in expenditures to benefit the candidate; and
> (vi) whether the candidate, any agent of the candidate, or any political committee authorized by the candidate shares or rents space for a campaign-related purpose with or from the person, political committee, or other entity making the expenditure."

In Advisory Opinion No. 2009-7, the Board noted that "whether a particular expenditure is independent or non-independent is necessarily fact-specific," and the information about whether campaign-related activity has been discussed or otherwise coordinated between a campaign and a third party is uniquely within the campaign's possession. *See* Advisory Opinion No. 2009-7; *see also* Advisory Opinion Nos. 2013-1 and 2012-1.

[5] Independent expenditures for certain types of communications that reference a candidate in a covered election or a ballot proposal are subject to reporting requirements. *See e.g.*, N.Y.C. Charter §1052(a)(15); Admin. Code §§ 3-702(8), 3-716; Board Rules 1-08(f), 13-01 *et seq.*; Advisory Opinion Nos. 2013-1, 2012-1, 2009-7.

However, as the Board has previously noted, communications that refer to candidates may be considered to be made in connection with a covered election and thus subject to the Act and Board Rules. Previous Board guidance has considered this issue as applying not only to the activities of authorized[6] or political[7] committees, but also to activities by organizations that are not political committees. *See, e.g.*, Advisory Opinion No. 1993-9. Especially during an election year, an issue advertising campaign or other public communication prominently featuring a candidate who has cooperated in its production may appear to have a campaign purpose.

To determine whether a coordinated expenditure is made in connection with a covered election, the Board will consider the totality of the circumstances, including a number of factors. Such factors may include, but are not limited to:

(1) whether the content focuses on the candidate, his/her opponent, or otherwise promotes the candidate and/or denigrates his/her opponent;

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[6] Under Admin. Code § 3-702(7) "[t]he term 'authorized committee' shall mean a political committee which has been authorized by one or more candidates to aid or take part in the elections of such candidate or candidates and which has filed a statement that such candidate or candidates have authorized such political committee pursuant to 14-112 of the election law." Under New York Election Law § 14-112, "[a]ny political committee aiding or taking part in the election or nomination of any candidate, other than by making contributions, shall file, in the office in which the statements of such committee are to be filed pursuant to this article, either a sworn verified statement by the treasurer of such committee that the candidate has authorized the political committee to aid or take part in his election or that the candidate has not authorized the committee to aid or take part in his election." N.Y. Elec. Law § 14-112 (2015). A committee may file a statement indicating that it is aiding or taking part in an election or nomination for a candidate or candidates who have not authorized the committee to do so. Additionally, there may be committees that, in violation of the Act, aid or take part in an election or nomination without filing a statement of intent to support a candidate or candidates.

[7] Under Admin. Code § 3-702(11), "[t]he term "political committee" shall mean any . . . committee, political club or combination of one or more persons operating or cooperating to aid or to promote the success or defeat of a political party or principle, or to aid or take part in the election or defeat of a candidate for public office or to aid or take part in the election or defeat of a candidate for nomination at a primary election . . . or of a candidate for any party position voted for at a primary election, or to aid or defeat the nomination by petition of an independent candidate for public office; but nothing in this chapter shall apply to <u>any committee or organization for the discussion or advancement of political questions or principles without connection with any vote</u>." (emphasis added).

(2) whether, in cases where the communication refers to more than one individual, the content references the candidate in a manner that overshadows references to the other individuals, or otherwise promotes the candidate and/or denigrates his/her opponent;

(3) whether the distribution of a communication appears designed to reach the candidate's electorate;

(4) whether the communications are focused on the candidate's past accomplishments or positions, rather than focusing on issues being discussed by a governmental body;

(5) whether there is consistent and repeated overlap between campaign staff, the organization's staff, and/or their consultants' staff, or the candidate or his/her agent has raised funds for the organization;

(6) whether the organization lacks a history of advocacy on issues or other work that is separate from a candidate or campaign; or

(7) whether the timing coincides with the candidate's campaign.[8] *See* Advisory Opinion Nos. 2003-2, 2000-1, 1997-6, 1993-10, 1993-9.

When determining whether a coordinated expenditure is made in connection with a covered election, the Board will consider the timing of the expenditure of particular importance. On or after January 1 in the year the covered election will be held, the Board will presume that such expenditures are made in connection with the election where some of the factors discussed above are present.[9] Prior to January 1 of the election year, such expenditures often will be found not to have been made in connection with the election. When, however, numerous or substantial factors

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[8] *See, e.g.*, Final Board Determination 2016-1 (July 6, 2016).

[9] This is in keeping with the rationale of New York City Charter § 1136.1(2)(a) which prohibits officials, officers, and employees of the City who are running for office, and their spouses, from appearing in any advertisement funded in whole or part by government resources between January 1 in the year of the election and the last election in that year for that office, with certain narrow exceptions. *See* N.Y.C. Charter § 1136.1(2)(a); *see also* Advisory Opinion Nos. 2007-6, 2000-4.

are present such that those expenditures closely overlap with election activity, including by focusing on the candidate's past accomplishments or otherwise promoting the candidate and/or denigrating his/her opponent, the Board may consider activity occurring prior to January 1 of the election year to be in connection with a covered election, particularly if it occurs closer to the election year.

Conclusion

If coordinated expenditures are made in connection with a covered election, those expenditures will be subject to the Act and Board Rules governing candidates. Coordinated expenditures will be presumed to have been made in connection with a covered election on or after January 1 in the year of the election, under the totality of the circumstances. When such expenditures are made prior to January 1 in the year of the election, they will often not be considered in connection with a covered election unless numerous or substantial factors are present as described above. Candidates should exercise significant caution to ensure that their coordinated involvement with organizations does not trigger the application of the Act and Board Rules.

NEW YORK CITY
CAMPAIGN FINANCE BOARD