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THE COUNCIL OF
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September 29, 2016

Sue Ellen Dodell, General Counsel
NYC Campaign Finance Board
100 Church Street, 12th Floor
New York, NY 10007
Via e-mail to: Rules@nyccfb.info

Re: Proposed CFB Rule Amendments

Dear Ms. Dodell,

I write in regard to amendments proposed by the New York City Campaign Finance Board ("CFB") to the campaign finance rules, and in particular to the change to Rule 1-08(f) regarding independent expenditures ("IEs"). While I am a strong supporter of NYC's campaign finance law, a proponent of aggressive enforcement against illegal coordination, and in fact an opponent of IEs in general, I am concerned that the proposed rule as drafted would place elected officials seeking to follow the law in an unfair and untenable position.

To begin, I want to make clear that I strongly support the NYC Campaign Finance Act and Campaign Finance Board, and I am opposed to independent expenditures. I am proud to have submitted an amicus brief in *Ognibene v. Parkes* defending NYC's strong campaign finance system.

My policy preference would be to eliminate independent expenditures entirely. I believe that the Supreme Court's ruling in *Citizens United* has been deeply harmful to American democracy, and I would support a Constitutional amendment to prohibit IEs, or allow cities and states to do so. To me, IEs are a noxious influence in politics, allowing wealthy special interests to have undue influence in our elections. Since we are required by the Supreme Court's ruling to allow IEs, we should do all we appropriately can to restrain their potentially corruption influence. That's why I was the lead sponsor of Local Law 41-2014, which established the strongest "on-communication" disclosure requirements for IEs anywhere in the country. And it is why I want the CFB to aggressively enforce the rules against illegal coordination, which I have no doubt takes place, and to have the tools necessary to do so. I recognize that it is difficult to achieve aggressive enforcement, since illegal coordination can be easy to hide, through phone calls and in-person conversations.

However, I am deeply concerned with the consequences of the proposed rule for elected officials who are trying to follow the law and do the right thing. The combination of adding additional factors for determining independence – several of which will very likely be present in many situations where no coordination is involved – along with shifting the burden to candidates through the presumption of coordination, and requiring implicated candidates to "prove a negative," is unfair and unreasonable.

The proposed additional factors exist in many situations that do not involve any coordination, and would create undue and unreasonable burdens on elected officials, their staff, and not-for-profit organizations.

Staff: In many situations, staffers for City Council Members are hired into entry-level positions, in which they stay for a year, or two, or three, and then move onto other organizations. In many cases, these individuals – who are interested in politics, and have skills in communications, fundraising, policy, and organizing – go on to work at advocacy organizations or labor unions. Many of these advocacy organizations (e.g. Planned Parenthood, New York League of Conservation Voters) and labor unions in NYC make IEs. In some cases, these individuals are quickly promoted to positions that may involve a professional or managerial role in the entity making an IE.

In just my seven years in the Council, we have had more than a dozen staffers go on to work at other organizations, and several of them have risen quickly into managerial positions. For citywide elected officials, the numbers are dramatically higher. As drafted, the rule could create a presumption of coordination, if any one of these staff went on to work at an organization that made an independent expenditure, regardless of whether they were in fact directly involved in the IE, or whether there was any ongoing communication at all.

While overlapping staff is obviously one factor that should be *considered* by the CFB as part of a broader review, it is completely unreasonable for it to create a *presumption* of coordination. Where there is truly a "revolving door" between a candidate's staff and an IE entity, or where there is evidence of close and ongoing contact that suggests coordination, that should be one factor in bringing a potential case. But the proposed rule would extend far beyond this, creating a presumption of guilt based on the natural trajectory of someone's career, over a period of several years.

As a result, the proposed rule could chill hiring and limit people's career options. Elected officials might feel the need to require employees to sign restrictive agreements about their future career pathways, which would either prevent them from obtaining employment at a wide array of advocacy and labor organizations, or prevent NYC elected officials from hiring strong staff looking to build a career in New York City.

Fundraising: Similarly, the mere fact that an elected official has engaged in fundraising for an organization should not establish a presumption of coordination. This is not to say that fundraising is irrelevant. I believe that elected officials should be further restricted from fundraising for 501c3/c4 organizations, especially (but not only) where they have some degree of control. In particular, I believe we should amend the NYC conflicts of interest law to restrict elected officials from fundraising from entities doing-business or seeking-business from the City.

However, the simple fact that an elected official has helped to raise funds to support a charitable organization – for Planned Parenthood, NYLCV, Make the Road New York, or one of many other organizations – does not mean that there is coordination between that elected official and an IE established by such a group.

Moreover, the proposed rule defines "candidate" to include his or her "agent" and, in practice, treats consultants as agents. As a result, the proposed rule would create risk not only when the candidate engages in fundraising for an organization, but also when a candidate's consultant does so at any point in the election cycle, even when that act precedes or post-dates retention by the candidate. While I understand the CFB's concerns about the role of consultants, the fact is that there are many firms in NYC with a broad client base of elected officials, advocacy organizations, and labor unions, who are retained for their fundraising, communications, or political expertise, not because of their relationships. The rule as drafted could instantly create a presumption of guilt in hundreds of cases where no coordination occurred.

Again, it is reasonable for the CFB to be able to consider such factors among others in reviewing a case. Where money was raised in a time, manner, and amount that suggests it was directed to an IE, that could be a strong piece of evidence of illegal coordination. However, using this factor, on its own, to establish a presumption of coordination is entirely unreasonable. It might well mean that these organizations – which rely on raising charitable and philanthropic dollars – would no longer be able to have NYC elected officials participate in their events, or engage professionals to assist in their work.

Creating a presumption and shifting the burden of proof puts candidates in the completely untenable position of "proving a negative."

As noted above, I suspect that there is, in some cases, illegal coordination, and I want the CFB to be able to investigate, penalize, and prosecute it. Moreover, I can appreciate the challenges that CFB enforcement staff face investigating and finding evidence of illegal coordination which may have taken place through phone calls, in-person conversations, text messages, or electronic communications which may be deleted.

However, I urge you to consider the impossible situation you would be placing a candidate in by requiring them to prove that coordination did not occur. Would a candidate need to record all of his or her conversations, both on the phone and in person, and provide all of them to the CFB? Without doing this, how could s/he truly prove that there had been no conversations that included illegal coordination? The standard of "proving a negative" is an unreasonable burden to place on a candidate – especially where the presumption is based on such potentially innocuous acts as having a staff person move onto an organization, or participating in fundraising for a worthy cause.

While I support the CFB's efforts to root out illegal coordination, I therefore strongly urge the CFB to eliminate the "rebuttable presumption" element from the proposed IE rule, and to provide clearer definitions of the factors in staffing and fundraising that you would look to as evidence in those cases.

As always, thank you for your consideration, and for your strong efforts to make sure that New York City has the best campaign finance laws – and therefore the cleanest elections, and a government least likely subject to corrupting influences – of any place in the country.

Sincerely,

Council Member Brad Lander
Deputy Leader for Policy
Chair, Committee on Rules, Privileges, and Elections
39th District, Brooklyn