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United Healthcare Workers East

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Daniel J. Ratner

CHIEF FINANCIAL OFFICER &
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Michael Cooperman

* Acting

September 14, 2016

New York City Campaign Finance Board
100 Church Street, 12th Floor
New York, NY 10007

Dear Commissioners:

I write on behalf of 1199SEIU United Healthcare Workers East (“1199” or the “Union”) regarding the above-referenced Notice of Proposed Hearing and Opportunity to Comment on Proposed Rules issued by the Campaign Finance Board on August 15, 2016. 1199 has reviewed the notice and respectfully submits the following comments on the proposed rule amendments.

1199 regularly engages in both electoral and legislative advocacy, communicating with its members and with the public regarding candidate endorsements and issues of public concern. Under the proposed rule, any of these communications that feature candidates for New York City office could be subject to a vague and burdensome investigatory process at the broad discretion of the Campaign Finance Board, whether or not they advocate for the election or defeat of any candidate.¹

The proposed Rule 1-08(f) creates a presumption of coordination when even one of eight enumerated factors is present in a communication. The factors include whether the independent spender is also an “agent” of the campaign, a term that the CFB does not define and whether the candidate has participated in the operation of the entity making an expenditure. Those and other factors are described in such vague and expansive terms that the Campaign Finance Board is left with broad discretion to find the presence of a factor given 1199’s longstanding relationships and contacts with elected officials and candidates. Therefore, the presumption may attach even when there is no actual evidence that a candidate or committee authorized, requested, suggested, fostered, or otherwise cooperated in an 1199 communication.

Once a communication is presumed to be coordinated, an independent

¹ In Advisory Opinion 2016-1, the Campaign Finance Board announced the factors that it will use to determine whether a communication is related to a covered election, providing that when multiple factors are present a communication will be presumed to be election-related if made during an election year, and may be found election-related at any other time. Several of those factors are present in any effective legislative advocacy campaign.

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spender faces severe penalties if it cannot meet its burden of producing evidence that demonstrates the expenditure was not coordinated. The CFB provides no further information as to what evidence – internal memoranda, affidavits of those involved, or records of every communication with an affected candidate or anyone potentially deemed to be that candidate’s “agent” – could rebut the presumption.

Ultimately, proposed Rule 1-08(f) places a prior restraint on core protected speech, whether it be political campaign activity or grassroots issue advocacy. By requiring a spender to prove its independence without any guidance as to how that might be accomplished, “[m]any persons, rather than undertak[ing] the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech.” *Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (citation omitted). It is therefore unlikely that Rule 1-08(f) as proposed would satisfy strict scrutiny, which requires that a content-based restriction further a compelling governmental interest and be narrowly tailored to effectuate that interest.

Moreover, due process requires that that “regulated parties should know what is required of them so they may act accordingly... precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way.” *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). Because the CFB’s rules affect core First Amendment activity, “rigorous adherence to th[ese] requirements is necessary to ensure that ambiguity does not chill protected speech.” *Id.* The reliance on Rule 1-08(f)’s non-exhaustive list of factors for determining when an expenditure is independent, coupled with the failure to define key terms among the listed factors (e.g., “agent”) does not constitute “rigorous adherence” to the requirements of due process.

Even in its current form, Rule 1-08(f) is unconstitutionally vague. Rather than address existing problems with the rule, the Board has proposed amendments that further restrain protected First Amendment activity. For these reasons, the Union respectfully submits that the Campaign Finance Board should rescind its August 15 proposal and propose new rules providing meaningful guidance to independent spenders seeking to comply with the law and restraining the discretion of the Campaign Finance Board to burden protected speech.

Very truly yours,

Daniel J. Ratner
General Counsel

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