American Federation of State, County & Municipal Employees, AFL-CIO
125 BARCLAY STREET • NEW YORK, NY 10007-2179

District Council 37 AFSCME AFL-CIO

LEGAL DEPARTMENT
Telephone: 212-815-1450
Fax: 212-815-1440

ROBIN ROACH
General Counsel

STEVEN E. SYKES
Associate General Counsel

ERICA GRAY-NELSON
Senior Assistant General Counsel

Assistant General Counsel
Alan M. Brown
Thomas Cooke
Jesse Gribben
Dena Klein
Meaghean Murphy
Ximena Castro
Aaron S. Amaral
Deena S. Mikhail

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

Re: Proposed amendments to the rules of the Campaign Finance Board

Dear Commissioners:

I write on behalf of District Council 37, AFSCME, AFL-CIO ("DC37" or the "Council"). DC37 is the largest public employee union in New York City, with 51 active locals representing 121,000 members serving in 1,000 job titles throughout the New York City government. DC37 works tirelessly to improve our members' lives on the job, but we also work for them in our communities. Our members understand that protecting and improving their jobs means preserving and advancing the vital services they provide to the people of New York City. For these reasons, DC37 shares the Campaign Finance Board's mission of empowering our members to have a greater impact on the political process. Members of DC37 are actively engaged in the political process, from endorsing candidates for office to participating in legislative actions and lobby days.

At the heart of DC37's efforts to build this engagement is our extensive use of member-to-member communications – including phone calls, canvassing, mail, workplace flyers, and newsletters – informing members of issues and elections affecting their work and the services they provide. Those communications often prominently feature government officials who either

have made or will make decisions affecting DC37 issues, thanking them for good work and pressuring them on issues that are currently before them. These communications will be severely imperiled by the regulations the CFB proposed in August, especially as they interact with several positions that the Board has previously articulated.

In footnote 8 of Advisory Opinion 2009-7, the CFB articulated that it makes "no distinction between 'member-to-member' activity and 'member-to-non-member' activity," and that "the Board's analysis of even purely member-to-member activity turns on… whether the campaign authorized, requested, suggested, fostered, or otherwise cooperated in such activity." In other words, the Board will find member-to-member communications (presumably those that are related to a covered election) to be contributions when they are coordinated with campaigns.

Previous Board Opinions

In Advisory Opinion 2016-1, the CFB further articulated its process for determining whether an expenditure is related to a covered election. In that opinion, the Board announced a non-exclusive list of factors it will consider in making such determinations. Among those are "whether the content focuses on the candidate," "whether the communications are focused on the candidate's past accomplishments or positions, rather than focusing on issues being discussed by a governmental body" and "whether the timing coincides with a candidate's campaign." The Board declined to explain the weight it will place on these different factors or define terms such as what it means to "focus on" a candidate. The Board did, however, clarify that during the year of a covered election, "the Board will presume that such expenditures are made in connection with the election where some of the factors discussed above are present" and that prior to an election year, when "numerous or substantial factors are present such that those expenditures closely overlap with election activity, including by focusing on the candidate's past accomplishments, the Board may consider [such communications' to be in connection with a covered election."]

Given the policies announced in Advisory Opinions 2009-7 and 2016-1, DC37 could easily find its legislative communications with members to be considered campaign contributions if the CFB found them to be coordinated with those campaigns. As with any effective legislative advocacy, these contributions focus on the people making the decisions in question. Furthermore, while the CFB appears to believe that legitimate issue advocacy looks forward and never backward, an effective issue advocacy campaign not only puts pressure on government officials but thanks them when they have done the right thing. With multiple factors present, such communications will be presumed election-related in an election year, and might be found to be election related at any time. Moreover, that they are directed only at members will apparently make no difference to the determination.

Proposed Rule 1-08(f)

The proposed amendments to Rule 1-08(f) are the last step in the process of bringing such legislative activities under the control of the CFB. Rule 1-08(f), which articulates factors for

determining whether an expenditure is independent, is already impossibly vague. For example, one factor is "whether the person or entity making the expenditure is also an agent of the candidate" but there is no way to know what contact or communication with a candidate - making an endorsement, assisting a candidate with contacting another Union, working with an elected official to craft legislation - makes one an "agent." Another factor is whether "the candidate has… cooperated in any way in the… operation of the person or entity making the expenditure; perhaps a candidate's having been a member or employee of a union, or having worked with the union on a legislative matter, might constitute cooperation with the operation of the union. As with the CFB's other lists, spenders have no guidance as to how the factors will be weighed in making a determination. Finally Rule 1-08(f) explicitly leaves open the possibility that factors not enumerated or known to a spender might also be considered in determining independence.

Rather than addressing any of the deficiencies of existing Rule 1-08(f), the Board has added two new factors to the list, demonstrating the expanding nature of the Board's analysis. Even worse, the Board proposes that if even one of the enumerated factors is present, an expenditure will be presumed coordinated, and the spender and candidate will bear the burden of rebutting that presumption. Given the vague nature of the list, the Board proposes to give itself almost unlimited discretion to presume a communication to be coordinated.

Once the presumption attaches, the regulation provides no guidance on how an independent spender might meet its "burden of producing evidence to demonstrate that such expenditure was made independently." Will it be sufficient to produce a firewall memo directing staff not to communicate with candidates? Will spenders be required to provide sworn testimony that candidates and their campaigns were not involved in an expenditure? Or will spenders be required to turn over their internal communications, e-mails, and phone records to be reviewed by the CFB for actual evidence of coordination. Without any further information a spender may easily assume that any legislative communication could subject the union to an invasive investigation in which it must undertake the almost impossible task of demonstrating a negative – that coordination not occur.

Analysis

Ultimately, the language of the proposed Rule 1-08(f) "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *F.C.C. v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). Thus, the regulations implicate "at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972)). Because the regulations impact core First Amendment activity, "rigorous adherence to th[ese] requirements is necessary to ensure that ambiguity does not chill protected speech." *Fox Television Stations, Inc.*, 132 S. Ct. at 2317 .The reliance on a 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"), is far from "rigorous adherence" to the requirements of due process.

The vagueness of the proposed regulations is also troubling on standalone First Amendment grounds. The regulations' burden-shifting scheme functions as the equivalent of a prior restraint. By requiring the spender to prove its independence without explaining how to accomplish that task, i.e., what evidence is sufficient and how much evidence is needed, "[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). For these reasons, it is unlikely that the proposed regulations would satisfy strict scrutiny, which requires that a content-based restriction further a compelling governmental interest and be narrowly tailored to effectuate that interest, as vague and overbroad language is never narrowly tailored.

Conclusion

The CFB's proposed regulatory amendments, in conjunction with policies it has announced in previous Advisory Opinions, leaves DC37 faced with the choice of curtailing or severely limiting its legislative advocacy activities or facing, despite the absence of all but superficial indicia of coordination, the very real possibility of having to commit significant resources to proving that those activities are not coordinated with any candidate or campaign at the risk of incurring fines and dooming candidates' chances of receiving public funds. Moreover, the Council has no guidance on how it might make such a case.

The CFB should withdraw the proposed Rule 1-08(f) and instead formulate a rule that provides spenders with meaningful guidance regarding the meaning of coordination and independence, requires the Board to have real evidence of coordination before placing any burden on the spender to prove independence, and provides safe harbors providing spenders with guidance on how they may avoid conduct that gives rise to coordination. Moreover, the Board should revisit and rescind its 2009 comment on member-to-member communications.

Very truly yours,

Robin Roach