CITIZENS UNION OF THE CITY OF NEW YORK
Testimony to the New York City Campaign Finance Board on the Disclosure of Independent Expenditures
October 27, 2011

Good morning, members of the New York City Campaign Finance Board (Board). My name is Dick Dadey, and I am the Executive Director for Citizens Union of the City of New York (CU). Citizens Union is an independent, non-partisan, civic organization of New Yorkers who promote good government and advance political reform in our city and state.

CU applauds the Campaign Finance Board and its staff for their thoughtful and judicious approach in breaking new and arguably challenging ground in developing important rules implementing the city charter change voters approved last fall calling for disclosure of independent expenditures.

As an organization long involved in the cause of effective and workable campaign finance reform, I would like to lay out the principles that guided Citizens Union's consideration of this issue and our ultimate view.

1. Without inhibiting political speech, we support strong and effective disclosure when it comes to how elections are conducted and political campaigns are funded. New Yorkers, whose taxes help fund candidates' campaigns for city elected office here in New York, have a right to be well-informed about the sources of funding and expenditures of campaigns, be they candidates or groups or individuals waging campaigns not connected to the candidates, that affect who is elected to office in New York City.

2. In light of the consequences of the federal case now widely known as Citizens United, no matter who the individual or what the entity is - corporations, businesses, unions, non-profit organizations, trade associations - if it intentionally participates in activity that is intended to influence the outcome of a city election or uses the timing of an election to affect candidates' positions or how candidates are perceived by voters during an election campaign – the same set of rules need to apply to all. Fairness in the equal application of the law is a tenet of our democracy.

3. Traditional lobbying activity aimed at affecting a vote on a specific, particular legislative bill, administrative regulation, or budget item should not be subject to disclosure under the new law.

I. SCOPE OF REGULATION: EXPRESS ADVOCACY & ELECTIONEERING

CU also commends the Board for putting in its preliminary rules many of the recommendations Citizens Union put forth at the March hearing held on this issue when we suggested a broad definition of what constitutes independent expenditure spending that includes not only express advocacy but also electioneering. While the language related to the disclosure of independent expenditures in the Charter relates to "support" or "opposition" of candidates, we believe it is legally permissible for the Board to interpret this language to include electioneering that is designed to affect an election or the electorate's view of a candidate during an election campaign. The City Law Department has affirmed this very approach, certifying in its evaluation of the Board's preliminary rules (p. 17) that the rules are, "drafted so as to accomplish the purpose of authorizing provisions of the law" and "narrowly drawn to achieve its stated purpose."

The inclusion of electioneering as qualifying as an independent expenditure is essential for real disclosure and transparency of third-party spending. If regulated activity is confined to express advocacy, independent expenditures will only be reported if "magic words" such as "vote for" or "vote against" candidate X are used in public communications. This would create a gigantic loophole that would enable third parties to run ads, distribute printed literature, or make robocalls right before an election that state a candidate was "dead wrong on the budget" or "jeopardizing our children's education" or an infinite number of other phrases that would have the effect of informing and influencing voters without ever having to declare that spending, identify the entity or individual behind such communications, or the money funding such spending. The same lack of disclosure would apply if the candidate were praised and supported by third-party spending. In short, without the inclusion of electioneering in regulated activity, the change to the Charter affirmed by the voters will be gutted to the point of disclosing very little in independent expenditures.

That being said, we do hear the concerns of those entities engaged in traditional lobbying activity that their actions genuinely intended to exclusively advocate on legislation or the budget will be misinterpreted as directed to support or oppose a candidate. This concern is heightened by the potential that the primary election may be moved to June, placing the campaign season right in the middle of the city's budget season when much lobbying takes place.

To ensure that highly targeted lobbying activity is not captured as electioneering, Citizens Union recommends two changes:

RECOMMENDATION # 1
Narrow the timeframe for disclosure of electioneering to the federal window of 30 days before a primary and 60 days before a general election rather than 90 days for both.

RECOMMMENDATION #2
The Campaign Finance Board should provide numerous examples of specific safe harbor language as guidance for organizations for their own communications related to legitimate lobbying activity on specific bills and determinations by governmental entities so it is not confused with or has to be reported as independent expenditures. This would limit if not

eliminate organizations' concern over the need to disclose legitimate lobbying activity. We believe that the qualifying language be specific in referencing a bill or a clearly identified item in the city budget that is being decided at that time.

Organizations engaged in communications around their lobbying should also take full advantage of what is already provided in the preliminary rules - the ability to submit communications to the Campaign Finance Board for feedback as to whether such a communication would need to be reported. Making such a service available will enable groups to craft appropriate language for their lobbying-related ads or literature so it would not have to be reported as an independent expenditure.

While we make these recommendations to improve the rules, certain realities need to be acknowledged by those entities voicing concerns about legitimate lobbying activities being confused with independent expenditures:

1. While an organization may truly only intend to advocate about an issue, the public and the voters may perceive it as a judgment about a candidate when it is so close to an election. It is the perception of the voters that matters most in determining whether a communication is an independent expenditure, not the intent of those delivering it. Organizations leveraging the occurrence of an election to influence city action or candidates' views on their issues are using the potential influence of voters who are paying attention to candidates running for office to advance their agenda. That is exactly why it is electioneering and, in instances when advocacy crosses the line from particular bills and determinations to more general issue advocacy, needs to be reported.

2. The scenario of legitimate lobbying being confused with electioneering only arises a few months every four years, and in one twenty year cycle, an additional one election. For all but a few months every election cycle, organizations can conduct lobbying or broad issue activity without having to be concerned that they have crossed a line and need to report such activity as electioneering.

3. The regulation under consideration is disclosure, the least intrusive form of campaign finance regulation in an area increasingly being rolled back by the courts. If disclosure is only tepidly applied in the very city where a model campaign finance system is increasingly an island in a world of unregulated campaign spending, how will we inform the public about, if not limit, the continued flow of enormous amounts of money in our politics?

II. MEMBER to MEMBER COMMUNICATIONS

Citizens Union did not take a position on the regulation of member-to-member communications during our March testimony. We believe, however, the preliminary rules are narrowly constructed, as they should be, and exempt most legitimate member-to-member communications.

To ensure clear understanding as to what constitutes strict member-to-member communication that would be protected and not disclosed, we make the following recommendation:

RECOMMENDATION # 3
Additional exemptions for literature distributed to members should be added when it is clear that the communication is intended only for providing information to members and not the general public. Written language should be included in the communication specifically saying that the communication is being provided to inform members so that it is not seen as an organized attempt by the entity to use its membership to reach a broader audience. One cannot restrict a members' right to distribute information he or she receives, but one can limit the organization's intent by requiring such language.

Without such a disclaimer, the communication would have to be reported as an independent expenditure since it would be implied that this communication is being made available for general distribution beyond the membership. This additional exemption would allow for literature to be distributed to members at work sites or via email with an attachment.

III. ADDITIONAL DISCLOSURE

While generally including electioneering in the definition of independent expenditures is critical for full disclosure, other measures also need to be taken to complete disclosure.

RECOMMENDATION #4
Citizens Union supports requiring the Campaign Finance Board website be listed as part of the disclaimer required on ads and other independent expenditures so that the public will know where to look for further information, including donors. Listing donors as part of the ads themselves is too unwieldy, so we suggest this as an alternative.

RECOMMENDATION #5
We also believe that reporting requirements should not only include the name of the candidate but whether the independent spending was in support of or opposition to the targeted candidate.

On a matter not subject to the CFB's rules, Citizens Union wishes to note that the charter question on the ballot in November 2010 does not allow for disclosure of donors to the Campaign Finance Board by independent spenders on municipal ballot proposals. We know of no reason why the reporting of donors should be done for independent spending related to candidates but not for ballot proposals. The Council should change the statute to allow for disclosure of donors related to ballot proposals so no entity could spend millions of dollars getting a measure on the ballot without the public ever knowing who is funding it.

IV. REPORTING REQUIREMENTS

CU understands there have been issues raised about the reporting requirements in the preliminary recommendations. We are generally supportive of the reporting requirements and do not believe they are unduly burdensome. For three of the four years in an election cycle, independent spenders are only required to report twice a year on January and July 15th

as is done by candidates. If no spending is done, no report needs to be filed. Those solely engaging in electioneering would not have to report at all during those three years or during half of the election year.

The arguably burdensome reporting requirement is in the 14 days prior to Election Day when reporting is required every 24 hours. Citizens Union would be open to narrowing this more robust reporting period before Election Day to 10 days, as we originally testified to in March. However, it is important that routine and timely reporting occur just before Election Day. To do otherwise would increase the likelihood of dirty tricks and smear campaigns in which independent spenders make outlandish claims about candidates knowing disclosure will only come after the election results are in.

RECOMMENDATION #6

We would also recommend that the Board consider developing a statement that could be submitted by entities which have engaged in some spending, but do not intend to make further expenditures in a given election cycle. Similar to how committees file "no activity statements" to the State Board of Elections when no expenditures or contributions are received in a given reporting period, this type of filing could help clarify to the public that entities are not making expenditures rather than not complying with the law. Rather than requiring these statements for each reporting period, a single statement could be filed. If entities do choose to make further expenditures, they would be required to submit reports, however.

It should also be noted that under the preliminary rules, organizations would not have to disclose all sources of their funding if independent expenditures were made. Exemptions exist in the preliminary rules for those who have donated to the organization and earmarked their contributions for non-political purposes or for elections not regulated by the Campaign Finance Board.

We thank you for the opportunity to provide comment, and are available to answer any questions you may have.