March 15, 2019
Michael Sullivan, Director
Office of Campaign and Political Finance
One Ashburton Place
Boston, MA 02108

RE: Comments of Fiscal Alliance Foundation on Proposed Amendments to 970 C.M.R. § 1.00 et seq.

Dear Director Sullivan:

The Fiscal Alliance Foundation ("The Foundation") appreciates the opportunity to provide these comments on the proposed amendments to Office of Campaign and Political Finance ("OCPF") regulations 970 C.M.R. § 1.00 et seq. I am the Chairwoman of the Fiscal Alliance Foundation, a 501(c)(3) organization that provides targeted legal assistance to defend the civil rights of the public.

We were pleased to share with our members on February 4, 2019 that OCPF has recognized in the Proposed Rule that it is both arbitrary and unfair to allow unions to give $15,000 to a single candidate, and that OCPF has proposed significant reductions in the single-candidate donation limit. These are steps in the right direction. The Foundation also applauds OCPF for its decision to pursue rulemaking on replacing IB-88-01 with a different standard. Donors, nonprofit organizations, OCPF, and the general public alike benefit when campaign finance regulations provide clear, objective, and fair rules.

However, the central concern we raised in our December comments remains unchanged. As you recall, those comments explained that while the subregulatory authorization to unions and other nonprofits to give $15,000 to a single candidate is egregious, the more fundamental legal problem is that Chapter 55 does not authorize a so-called "incidental expenditure" exception to the statutory definition of political committee. Where such an exception is lacking a legal basis in statute, it cannot be perpetuated through regulation. Nor, as some stakeholders have asserted, is Chapter 55 ambiguous in this regard, and nor are there constitutional concerns that would preclude OCPF from applying Chapter 55 as passed by the Legislature and approved by the Governor.

We appreciate the desire of OCPF to get this right. But the only way to do so in accordance with the statute and controlling legal precedent is to confirm through regulation that Chapter 55 means what it says.

Background

The Foundation is on record with its belief that the existing G.L. c. 55, § 8 is inconsistent with federal law, and that this statutory prohibition on corporate contributions to candidates violates the free speech and free association clauses of the First Amendment to the United States Constitution, and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The Foundation believes that the Supreme Judicial Court erred as a matter of law in ruling to the contrary in *1A Auto Inc.* v. *Director of the Office of Campaign and Political Finance,* 480 Mass. 423 (2018). As such, The Foundation's position is that to be consistent with federal precedent and the United States Constitution, any codification of IB-88-01 in 970 C.M.R. should provide that *any* entity — individual, nonprofit, business, union, or otherwise — be allowed to solicit funds for political purposes and make donations in support of candidates.

Without waiver of this position, The Foundation recognizes that, for the moment, G.L. c. 55, § 8 has been upheld by the SJC, and that OCPF regulations must be consistent with state statute. In the context of notice and comment rulemaking pursuant to G.L. c. 30A, The Foundation believes it is precisely this fundamental obligation of agencies—to ensure regulatory consistency and alignment with its state statute—that precludes OCPF from codifying in regulation advantages for unions, nonprofits, and unincorporated organizations that not only appear nowhere in G.L. c. 55, but which directly contravene the plain language of the statue. "[A]n administrative agency has no authority to promulgate rules or regulations that conflict with the statutes or exceed the authority conferred by the statutes by which the agency was created." *Massachusetts Mun. Wholesale Elec. Co.* v. *Energy Facilities Siting Council*, 411 Mass. 183, 194 (1991).

I. The Proposed "Incidental Expenditure" Threshold Lacks Statutory or Legal Basis and Should Not Be Codified in Regulation

The definition of "political committee" in the Proposed Rule begins by tracking the definition of "political committee" from G.L. c. 55, § 1, which (in relevant part) is "any committee, association, organization or other group of persons [. . .] which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate or candidates." The Foundation agrees that any proposed rule pertaining to political committees must respect and adhere to the relevant statutory definitions established by the Legislature.

Yet the Proposed Rule then veers away from the statutory definition. In specific, it proposes adding an entirely new exception—appearing nowhere in G.L. c. 55, § 1—to the definition of "political committee". This new language would state that an organization need only register as a political committee if it "makes contributions to candidates, PACs . . . or party committees . . . . *that exceed the incidental threshold defined in 970 CMR 1.22(3)(b)* [emphasis supplied]." The $15,000 dollar amount of this "incidental threshold" is proposed to remain unchanged from IB-88-01, the same subregulatory guidance document whose legal veracity the Supreme Judicial Court openly questioned in *1A Auto*.

The addition of a regulatory "incidental threshold" is inconsistent with the plain and unambiguous statutory definition of "political committee" in G.L.c. 55, § 1. The Foundation strongly urges OCPF not to codify this legally untenable provision in the Final Rule. Where statutory language is clear, is it is well-established law in this Commonwealth that an agency simply has no discretion to depart from that statutory language, or to assert that it believes the Legislature has made a poor policy choice. *King v. Viscoloid Co.*, 219 Mass. 420, 425 (1914) ("we have no right to . . . read into the statute a provision which the Legislature did not see fit to put there, whether the omission came from inadvertence or of set purpose.").

Nor can OCPF credibly assert that the Legislature *meant* to add an incidental threshold exception in Section 1. To do so would require OCPF to contend that the Legislature repeatedly forgot to do so, despite having amended Section 1 *six times* since 1988 (Mass. Acts 1994, c. 43, §§ 9–15; Mass. Acts 1994, c. 292, §§ 4, 5; Mass. Acts 1998, c. 394, § 1; Mass. Acts 1998, c. 395, § 6; Mass. Acts 2009, c. 28, §§ 23-25; Mass. Acts 2014, c. 210, §§ 2-6). Apart from straining credulity, the Supreme Judicial Court recently reaffirmed that where statutory language has "remained unchanged in the statute despite the fact that the Legislature has amended [a statutory section] eight times since it was enacted," it is strong evidence that the *unamended* language means what it says. *Commonwealth v. Martin*, 476 Mass. 72, 76 (2016). The role of state agencies is to enforce the laws as written, not to write new ones. Exemptions that appear nowhere in statute—and particularly when they are on the order of magnitude of $15,000—can only be made by the Legislature.

Several stakeholders have urged OCPF to conclude that Chapter 55 is ambiguous in its treatment of "political committees," and thus that OCPF is entitled to discretion in interpreting the statute in a manner that departs from its text. Yet as an objective matter, nothing in the Legislature's definition of "political committee" in G.L. c. 55, § 1 is remotely ambiguous. Nor is there any indication that the Legislature's expansive definition was anything other than intentional. Where "a statute is unambiguous, we will reject any interpretation by an agency that does not give effect to the Legislative intent." *Franklin Office Park Realty Corp.* v. *Comm'r of the Dep't of Envtl. Prot.*, 466 Mass. 454, 460 (2013). And as OCPF is well aware, is it indisputably improper for an agency to attempt to ameliorate what some stakeholders may assert is a legally harsh policy outcome by asserting ambiguity as a basis for reinterpreting the statute. "Our conclusion . . . unquestionably causes an unusually harsh result for the plaintiff and his family. We are, however, bound by the Legislature's determination of the matter." *Keene v. Brigham & Women's Hosp., Inc.*, 439 Mass. 223, 242 (2003).

Instead of continuing the ill-advised approach of IB-88-01 and attempting to pound the square peg of "incidental expenditures" into the round hole of a statute that plainly does not acknowledge such an exception, The Foundation encourages OCPF to recognize that Chapter 55 *already* contains clear language on how unions can participate financially in campaigns. Similar to federal rules, unions are permitted to form and donate through PACs—and indeed, numerous unions already do exactly that. Confirming that approach—based on the expressed statutory intent of the Legislature, and consistent with numerous other states as well as federal law—is well within the regulatory authority of OCPF, and is the appropriate legal outcome for the Proposed Rule.

II. There is No Ambiguity Between Section 1 and Section 10 That Enables OCPF to Regulate Beyond the Text of the Statute

The Foundation also understands that OCPF may contend that the Legislature *must* have intended the G.L. c. 55, § 1 definition of "political committee" to include an implicit incidental expenditure exception, because G.L. c. 55, § 10 references allowing a "trust, foundation or association other than a political committee [to] make a campaign contribution. . . ." This argument presumably posits that an "association" that makes contributions both *is* a political committee (since "association" is included in the definition in Section 1) and potentially in some circumstances is *not* a political committee (per Section 10), thus providing a narrow window of statutory ambiguity that OCPF may interpret through regulation.

Yet upon a closer evaluation of the statutory text, such a window is nonexistent. Before declaring a statute ambiguous, every effort must be made to find a way to give independent effect to each provision. As the Supreme Judicial Court has held, "[s]eemingly contradictory provisions of a statute must be harmonized so that the enactment as a whole can effectuate the presumed intent of the Legislature." *Wilson v. Comm'r of Transitional Assistance*, 441 Mass. 846, 853 (2004). And consistent with *Wilson*, as a legal matter there is a plain reading of Section 1 and Section 10 that renders them entirely complementary to one another.

In specific, the Section 1 definition of political committee refers to associations that make "expenditure***s***" (plural), while in contrast, Section 10 refers to associations that make "***a*** campaign contribution" (singular). It is thus possible to give both sections independent and non-contradictory meaning, as Section 10 refers to associations that make only one contribution (which, per the Section 1 definition of "contribution", includes providing "anything of value [for] the purpose of influencing the nomination or election of said . . . candidate"), while Section 1 designates associations as "political committees" only if they make more than one such expenditure (which, per the Section 1 definition of "expenditure", includes providing "anything of value [for] the purpose of influencing the nomination or election of a . . . candidate").

To those who might dismiss the distinction between singular and plural as mere semantics, the Supreme Judicial Court has held otherwise. "The Legislature's affirmative use of the singular form is not insignificant . . . . We decline to interpret the Legislature's use of the singular form . . . to include the plural because that interpretation does not assure that the purpose of the statute will be fulfilled. Rather, the evidence demonstrates that use of the plural form . . . would defeat at least some of the statutory purposes listed above." *Leopoldstadt, Inc. v. Comm'r of the Div. of Health Care Fin. & Policy*, 436 Mass. 80, 87-88 (2002) (internal citations omitted). That reasoning applies with equal force here. Construing Section 10 to *include* the plural would improperly put it in direct conflict with Section 1, because multiple donations by an association would, under Section 1, require that association to register as a political committee. Doing so would not only create contradiction where none existed previously, but would defeat the very statutory purpose authorized in the plain language of Section 10: allowing one contribution before an association is required to register as a political committee.[1]

[1] On the question as to the proper dollar limit for that one contribution, The Foundation observes that OCPF is required to act in a manner that is both consistent with legislative intent and neither arbitrary nor capricious. Where

Put simply: there already *is* a "de minimis" incidental expenditure threshold in Chapter 55 for associations. Yet it is based on the *number* of contributions the organization makes (one), not the total *amounts* contributed. Even if OCPF disagrees with the clear textual choices made by the Legislature in Chapter 55, OCPF does not have discretion to ignore those choices in its Final Rule.

III. OCPF Lacks a Rational Basis for the Proposed $15,000 Incidental Expenditure Threshold

The legally problematic notion of an agency-created "incidental expenditure" exemption is further compounded by lack of any factual support or rational basis for the Proposed Rule's extraordinarily high dollar threshold for what constitutes such "incidental" expenditures. In specific, the Proposed Rule declares that

> If an organization does not receive funds for political purposes, but uses its existing funds to make political contributions that are more than incidental when compared to the organization's revenues, it must register as a political committee and comply with 970 CMR 1.22(4). "More than incidental," for purposes of 970 CMR 1.22, means making contributions in any calendar year that exceed, in the aggregate, **either $15,000 or 10% of the organization's gross revenues for the previous year, whichever is less**. [Emphasis supplied]

At OCPF's December 6, 2018 listening session, OCPF officials stated on the record that it was unclear how or why the $15,000 figure had been chosen by OCPF in 1988. It is a fundamental tenet of administrative law that an agency acts arbitrarily and capriciously when it promulgates a regulatory threshold without any factual evidence to support that decision. *See Howe v. Health Facilities Appeals Bd.*, 20 Mass. App. Ct. 531, 537 n.6, (1985) ("Without some factual support, an agency decision would ordinarily be viewed as arbitrary").

Even setting aside the unambiguous plain language of G.L. c. 55, § 1(which provides no authorization for an "incidental expenditure" exemption whatsoever), OCPF has provided no factual basis for setting that incidental expenditure threshold anywhere close to $15,000. Ironically, the only basis in the record for an incidental expenditure threshold of $15,000 is that this was the same figure used in IB-88-01: the very subregulatory guidance that OCPF now intends to abolish in light of the Supreme Judicial Court's skepticism of its validity in *1A Auto*. In short, OCPF not only failed to provide any plausible rationale for the $15,000 threshold in 1988, it concedes that it has not developed any rationale that supports selecting this threshold in its Proposed Rule in 2019.

Indeed, undermining both the notion of an "incidental threshold" and the proposal to set that threshold at $15,000 is the fact that throughout Chapter 55, the Legislature has demonstrated

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the Legislature in G.L. c. 55, § 7A has established a maximum contribution limit of $1,000 to a given candidate by a single contributor, The Foundation suggests this is a reasonable limit with a clear legislative basis.

repeatedly not only that it is well aware *how* to establish de minimis thresholds when it finds them warranted, but that when it chooses to do so, it sets those thresholds *at very low levels*. *See* Section 9 ($50 maximum on cash contributions); Section 18A ($250 minimum reporting threshold for independent expenditure expenditures); Section 18F ($250 minimum reporting threshold for electioneering communication contributions and expenditures); Section 22 ($250 minimum reporting threshold for ballot question expenditures). In repeatedly setting a wide variety of thresholds at very low levels, the Legislature has clearly expressed a desire for more disclosure and oversight, not less. The Proposed Rule's "de minimis" threshold of $15,000 is wildly inconsistent with any other similar provision in Chapter 55, and as such runs directly contrary to legislative intent.

As a fundamental matter of statutory interpretation, where the Legislature has chosen to include a provision (such as a de minimis exemption) in one part of a statute but omit it in another part, the presumption is that this choice is intentional, not inadvertent. *See Fernandes* v. *Attleboro Housing Auth*., 470 Mass. 117, 129 (2014) ("The omission of particular language from a statute is deemed deliberate where the Legislature included such omitted language in related or similar statutes."). And where the Legislature has repeatedly set de minimis thresholds in Chapter 55 at levels in the low *hundreds* of dollars, for OCPF to promulgate a de minimis threshold pursuant to the same statute in the multiple *thousands* of dollars is arbitrary, capricious, and in excess of its delegated authority. An agency may not "further regulate [on a topic] by the adoption of a regulation which is repugnant to the statute." *Commonwealth v. Johnson Wholesale Perfume Co.*, 304 Mass. 452, 457 (1939).

IV. There Are No Constitutional Burdens in Requiring Associations to Comply with the Obligations of Chapter 55

Certain stakeholders have asserted during the rulemaking process that OCPF has no choice but to adopt an "incidental expenditure" exception, because of alleged (although unspecified) constitutional infirmities that would otherwise result from imposing the allegedly burdensome political committee registration and reporting obligations upon organizations whose primary purpose is not political. A similar claim was made in IB-88-01, which contended that "a strict application of the [G.L. c. 55, § 1] definition would, however, place an extraordinary burden, not intended by the Legislature, on non-political organizations making only incidental expenditures for a political purpose." IB-88-01 at 3.

As a preliminary matter, The Foundation presumes that OCPF is well aware of a basic tenet of constitutional law that several stakeholders appear to misapprehend: It is fundamentally improper for an agency—an entity of the executive branch—to regulate in a manner inconsistent with the language of a statute, *particularly* on the grounds that the agency has some obligation to "save" a statute the agency believes is unconstitutional if enforced as written. The Supreme Judicial Court has been unequivocal on this point: "The duty of a public official is simply to enforce duly enacted and presumptively constitutional statutes." *Cote-Whitacre* v. *Dep't of Pub. Health*, 446 Mass. 350, 374 (2006). The determination of the constitutionality of a statute is solely, and exclusively, a function of the judicial branch. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

Thus, it is not for an agency to determine whether an alleged burden is or is not "extraordinary," or to opine on whether such a burden—if it exists at all—was intended by the Legislature. The Legislature is well aware of how to create incidental thresholds for registration where it believes they are warranted. For instance, in the state lobbying registration statute, G.L. c. 3, § 39, the Legislature provided that "a person shall be presumed to be engaged in executive lobbying that is *simply incidental* to his regular and usual business or professional activities if he: (i) engages in executive lobbying for not more than 25 hours during any reporting period; and (ii) receives less than $2,500 during any reporting period for executive lobbying [emphasis supplied]." *Id.* Yet the Legislature clearly chose *not* to establish an incidental threshold for political committee registration in Chapter 55. The Legislature "is presumed to understand and intend all consequences" of its enactments. *Rambert v. Commonwealth,* 389 Mass. 771, 774 (1983). Unintended outcomes that result as a consequence of plain statutory language are for the Legislature, not the agency, to rectify if it sees fit.

Turning from the procedural point to the substantive one, the assertion that the absence of an incidental expenditure threshold will result in an unconstitutional burden on certain organizations lacks any basis in controlling law. In *National Organization for Marriage v. McKee*, 649 F.3d 34, 58-59 (2011), *cert. denied,* 565 U.S. 1234 (2012), the First Circuit—the circuit court whose decisions constitute binding precedent in Massachusetts—affirmatively held that there was *no* unconstitutional burden in requiring minor or occasional participants in the political process to comply with reasonable campaign finance registration and reporting requirements. At issue in *McKee* were Maine regulations that deem "an entity to be a non-major-purpose PAC when it receives contributions or makes expenditures of more than $5,000 annually 'for the purpose of promoting, defeating or influencing in any way' a candidate's election." *Id.* at 52-53. Under Maine law, a non-major-purpose PAC must "register with the Commission, maintain records of certain expenditures as well as donor contributions aggregating more than $50, and file reports both on a quarterly basis and shortly before and after each election." *Id.* at 53.

In *McKee*, the plaintiff organization had alleged that because its "major purpose" was not to influence elections, it should be exempt from these burdensome registration and disclosure requirements under the First Amendment. The *McKee* Court soundly rejected this argument, finding "a substantial relation between Maine's disclosure-oriented regulation of non-major-purpose PACs and its interest in the dissemination of information regarding the financing of political speech . . . ." *Id.* at 58. Where the Massachusetts Legislature has similarly decreed in G.L. c. 55, § 1 that associations making contributions to candidates must register as political committees, *McKee* teaches that this choice is constitutional and must be honored by OCPF.

V. Any New Regulation Should Reaffirm that Entities whose Expenditures Are Limited to Electioneering Communications Are Not "Political Committees"

Consistent with G.L. c. 55 and as currently stated in IB-88-01, The Foundation encourages OCPF to codify in any new regulation that standards applicable to political committees are expressly *inapplicable* to entities whose expenditures are limited to electioneering communications. Electioneering communication expenditures are, by statutory definition, not "for the purpose of influencing the nomination or election of a candidate or candidates." As a consequence, an entity whose OCPF-regulated expenditures are limited to electioneering communications is not a "political committee" as that term is defined by G.L. c. 55, § 1, and thus cannot be governed by any regulations promulgated with respect to that term. Electioneering communications are already governed by G.L. c 55, § 18F and 970 C.M.R. § 1.22, the latter of which was comprehensively revised in 2018 by OCPF.

VI. Conclusion

The Foundation appreciates OCPF's recognition of the legal shortcomings of certain portions of the existing subregulatory guidance IB-88-01, and understands the competing demands of various stakeholders that OCPF must weigh as it considers the Proposed Rule.

Yet in doing so, OCPF's sole guiding principle must be fidelity to the plain text of Chapter 55 as enacted by the Legislature. G.L. c. 55, § 1 defines any organization that "makes expenditures for the purpose of influencing the nomination or election of a candidate or candidates"—without any mention of a de minimis exemption—*as* a political committee. The Proposed Rule asserts the exact opposite: that under certain circumstances an organization can make contributions and expenditures "for the purpose [of making] contributions to candidates, PACs (other than independent expenditure PACs) or party committees" and *not* be a political committee. Both cannot be right. In such circumstances, the statute must control.

The Foundation encourages OCPF to adhere to the unambiguous statutory definition of "political committee" provided by the Legislature in G.L. c. 55, § 1, and to eliminate the proposed "incidental expenditure" exception from the Proposed Rule. There is no statutory or legal basis on which to justify allowing unions, nonprofits, and unincorporated organizations to donate up to $15,000 annually to candidates without being required to register as political committees.

Instead of creating via regulation a shadow parallel contribution scheme for unions and associations that the Legislature has never authorized, OCPF should instead focus its Final Rule on the option that the Legislature *has* affirmatively authorized for such entities: forming a PAC and contributing to candidates and causes through that mechanism.

The Foundation is pleased to provide any further clarification or elaboration that would be beneficial to OCPF. The Foundation looks forward to working with OCPF to establish clear, objective, and fair rules that provide a level playing field for all participants in our political system.

Sincerely,

Danielle Webb

Danielle Huntley Webb, Esq.
Chairwoman
The Fiscal Alliance Foundation