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Holding Power Accountable

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BY EMAIL AND FIRST CLASS MAIL

Michael Sullivan, Director
Office of Campaign and Political Finance
One Ashburton Place, Suite 411
Boston, MA 02108

Re: Rulemaking Concerning Political Activity by Nonprofit Entities

Director Sullivan,

We write on behalf of Common Cause of Massachusetts. We appreciate that the Office of Campaign and Political Finance (OCPF) granted our request to initiate this rulemaking process. In our view, the task before OCPF is to clarify the circumstances, if any, under which G.L. c. 55 permits a nonprofit entity, organization, association, or other group of persons (collectively, "nonprofit entities") that does not engage in political fundraising to make political contributions.

In the past, that issue has been addressed by an interpretive bulletin first published in 1988. *See* OCPF, Interpretive Bulletin, OCPFIB-88-01 (Sep. 1988) (rev. May 9, 2014). As you know, we believe public participation in an open regulatory process, via comments and testimony, produces better and clearer results. *See* G.L. c. 30A, § 1; *1A Auto, Inc. v. Director of Office of Campaign and Political Finance*, 480 Mass. 423, 442 n. 10 (2018). We look forward to playing an active role in that process.

When it comes to political contributions, Common Cause of Massachusetts espouses certain core principles. We believe that state law should limit corruption and foster public confidence in our electoral system. Accomplishing both of these goals is essential to promoting a thriving and inclusive democratic government. On the whole, we believe these goals are advanced by promoting transparency, meaningful government oversight, and contribution limits. Though there is much work left to do, the Commonwealth's current body of campaign finance law, as codified in G.L. c. 55, uses each of these tools and seeks to achieve the same goals.

In its current rulemaking, OCPF should hew as closely as possible to the statutory language of G.L. c. 55 in light of the legislative purposes the law seeks to accomplish. *See, e.g., Franklin Office Park Realty Co. v. Commissioner of Dep't of Envtl. Protection*, 466

Mass. 454, 461 (2013) ("When called upon to interpret the statutory language, we look to the intent of the Legislature ascertained from all its words construed by the ordinary and approved usage of the language, considered in connection with the cause of its enactment, the mischief or imperfection to be remedied and the main object to be accomplished").

Certain aspects of G.L. c. 55 are clear, others less so. There are three issues as we see them.

First, the text of G.L. c. 55 is clear: for-profit corporations are not permitted to make political contributions. G.L. c. 55, § 8. The law is equally clear that the bar does not apply to nonprofit entities. The distinction the law draws between these two types of entities is perfectly sensible and consistent with long-standing historical practice. Federal and state law treat for-profit corporations and nonprofit entities in vastly different ways. Under state law, for-profit corporations are not transparent and are not closely overseen—an effectively infinite number of for-profit corporations may be created with a moment's notice and no information concerning their funding sources, expenditures, or founders would be available. Nonprofit entities, by contrast, may exist only to accomplish certain purposes; depending on their type, they are subject to oversight by the Attorney General's Office or various federal or state regulatory agencies. They may not be created on a whim and must serve purposes separate and apart from the desire to influence the electoral process.

Second, the text of G.L. c. 55, § 1 suggests that *any* nonprofit entity "which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate" would be within the definition of a political committee and subject to considerable regulatory requirements. Becoming a "political committee" imposes substantial filing and disclosure obligations on an entity, *see* G.L. c. 55, §§ 5, 18, and limits the organization's ability to spend money for non-campaign related purposes, *see* G.L. c. 55, § 6 and 970 Code Mass. Regs. § 2.06(6)(b). It would be possible to construe the G.L. c. 55, § 1 language to suggest that any time a nonprofit entity made a political contribution to a candidate or any expenditure at all, it would be required to register as a political committee. Under that construction, no nonprofit entity could make a political contribution or an independent expenditure because doing so would trigger obligations as a political committee that would eliminate the characteristics that made it a nonprofit entity. *See 1A Auto*, 480 Mass. at 442 n. 10 ("If, under this broad definition, a union or nonprofit organization that makes even a nominal political contribution is considered a political committee, such entities effectively would be prohibited from making any contribution because, once characterized as a political committee, they would be required not only to meet burdensome disclosure requirements, but also to dedicate their resources exclusively to their political purpose, meaning that they could no longer serve their intended purposes as a union or a nonprofit organization").

Though that is a possible construction of G.L. c. 55, it is not one we believe is consistent with the overall structure of the statute. We do not believe that the Legislature intended to bar contributions by for-profit entities expressly in G.L. c. 55, § 8, while barring such contributions indirectly via the definition of "political committee" in G.L. c. 55, § 1.

In addition, were small political expenditures to give rise to significant regulatory requirements, constitutional concerns might be implicated. *See generally FEC v. Massachusetts Citizens for Life*, 479 U.S. 238 (1986).

More consistent with G.L. c. 55 and constitutional caselaw is a regulation defining *de minimis* contributions or expenditures that fall short of triggering the law's requirements. This approach is workable and simple. Below the *de minimis* threshold, nonprofit entities would be permitted to make contributions or expenditures, subject to certain existing and well-established transparency requirements: (i) contributions to candidates would be required to be disclosed by the candidate committee under G.L. c. 55, § 18; and (ii) independent expenditures would be required to be disclosed by the nonprofit entity under G.L. c. 55, § 18A. Above the *de minimis* threshold, the nonprofit entity would be considered a political committee, subject to the state's appropriately demanding registration, filing, and oversight requirements. Common Cause of Massachusetts is comfortable with the *de minimis* threshold as currently set by Interpretive Bulletin 88–01, *i.e.*, the lesser of $15,000 or 10% of the annual gross revenue of the nonprofit entity.

The third issue — whether the nonprofit entities should be subject to contribution limits for any *de minimis* expenditures — seems to us an easy one. Any "committee, association, organization or other group of persons" that expends money in the Commonwealth "for the purpose of influencing the nomination or election of a candidate" may contribute only $500 to candidates for office. G.L. c. 55, §§ 1, 6, para. 4. That limitation is clear and it should apply here. There is no basis for an exception, as both the general structure of G.L. c. 55 and constitutional considerations reinforce the applicability of the $500 limit. In other words, while it makes sense to excuse nonprofit entities that do not raise money for and expend little on political purposes from the regulatory requirements imposed on political committees, it does not make any sense at all to excuse them from the contribution limits to which a committee is subject. Otherwise a rule meant to accommodate *de minimis* expenditures *because they are small* becomes a vehicle to make the largest contributions allowed under state law. Such an approach simply cannot be reconciled with G.L. c. 55.

We look forward to the hearing set for December 6, 2018, at which we intend to participate, and to participating in the regulatory process going forward.

Very truly yours,

Pam Wilmot
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Common Cause Massachusetts

Patrick Moore

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cc: Greg Birne, General Counsel, OCPF