MASSACHUSETTS AFL-CIO

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November 30, 2018

Michael J. Sullivan
Director
Office of Campaign & Political Finance
One Ashburton Place, Room 411
Boston, MA 02108

Re: **Advance Notice of Proposed Rulemaking Regarding OCPF Regulations on the Applicability of the Campaign Finance Law to Groups That Do Not Engage in Political Fundraising, but Do Make Expenditures or Contributions**

Dear Mr. Sullivan:

The Massachusetts AFL-CIO, on behalf of our affiliates, respectfully submits these comments regarding the Office of Campaign and Political Finance ("OCPF" or "the Agency") Advance Notice of Proposed Rulemaking concerning the applicability of M.G.L. c. 55 to organizations that do not engage in political fundraising but that do make expenditures or contributions. We write to urge OCPF to leave Interpretive Bulletin ("IB") 88-01, "The Applicability of the Campaign Finance Law to Groups That Do Not Engage in Political Fundraising," in place as the source of guidance for compliance with M.G.L. c. 55 for the groups to which it applies. OCPF has acted well within the scope of its explicit statutory permission to issue interpretive bulletins, and the Massachusetts Legislature has tacitly endorsed OCPF's exercise of that permission in this particular context for over thirty-six years. The Supreme Judicial Court's decision in <u>1A Auto, Inc. v. Director of the Office of Campaign and Political Finance</u>, 480 Mass. 423 (2018), does not require OCPF to reconsider its use of the Interpretive Bulletin approach and OCPF should be cautious about doing so absent clear judicial requirement, especially in light of the fact that the regulated community relies on more than a dozen well-explicated Interpretive Bulletins to guide their compliance with the law. In the alternative, if OCPF determines that a formal rule is the most appropriate course of action, it should codify the policy embodied in IB-88-01 without change to its substance.

I. The Enabling Statute Explicitly Allows OCPF to Issue Interpretive Bulletins

the members of the general court and other persons affected by the laws under his jurisdiction, and to advocate and sponsor legislation." Id. The Massachusetts Administrative Procedure Act states that agencies "may" make advisory rulings about the applicability of a statute or regulation enforced by the agency "to any person, property or state of facts." M.G.L. c. 30A § 8.

The campaign finance law gives the director of OCPF explicit permission to issue interpretive bulletins:

> The director ... shall, from time to time as he deems necessary or advisable, issue rules and regulations in conformity with the provisions of this chapter and chapter thirty A, **and shall also issue interpretative bulletins** and respond with reasonable promptness to requests for information, interpretations and advice presented by candidates, state committees, political committees and members of the public.

M.G.L. c. 55 § 3 (emphasis added). The director of OCPF is also "free to advise and consult with legislative committees, the members of the general court and other persons affected by the laws under his jurisdiction, and to advocate and sponsor legislation." Id. The Massachusetts Administrative Procedure Act states that agencies may make advisory rulings about the applicability of a statute or regulation enforced by the agency "to any person, property or state of facts." M.G.L. c. 30A § 8.

While OCPF enabling statute allows the director to issue regulations, nothing in the statute or the Massachusetts Administrative Procedure Act requires the agency to use the formal rulemaking procedure to issue guidance on this matter. As the Supreme Judicial Court noted in its *dicta* discussion of IB 88-01, although they "do not carry the force of law," interpretive bulletins are "entitled to substantial deference," 1A Auto, Inc., 480 Mass. 423 at 442 (n. 10) (2018) (quoting Global NAPs, Inc. v. Awiszus, 457 Mass. 489, 496-97 (2010)). The OCPF has issued over a dozen interpretive bulletins on subjects ranging from filing late contribution reports to the use of the Internet for political activity. The Agency should be cautious about abandoning the long-standing, statutorily-permitted interpretive bulletin process. The Supreme Judicial Court has not required such reconsideration with respect to IB-88-01, nor does its opinion in 1A Auto, Inc. provide any guidelines for OCPF to determine when an interpretive bulletin is sufficient versus when a formal rulemaking process must be followed. Absent such direction from a court or the Legislature, OCPF should continue to utilize the interpretive bulletin process, lest it run the risk that all interpretive bulletins come into question as providing appropriately clear guidance to persons engaging in political activity in Massachusetts

II. IB-88-01 Is an Appropriate Interpretation of Massachusetts Campaign Finance Law and Should Be Maintained

For over 25 years, IB-88-01 in successive iterations has carried out the Commonwealth's policy not to impose the full panoply of regulations that apply to PACs to organizations that can lawfully make contributions but that do so only incidentally to their unrelated primary purposes, such as labor, social welfare, civic, issue advocacy and other groups. This policy is both practically useful and constitutionally sound: if not for this policy, OCPF would either impose onerous requirements on such groups, or it would effectively prohibit them from contributing, despite the Commonwealth's longstanding law that they *can* contribute, in contrast to business and professional corporations, limited liability companies, limited liability partnerships and partnerships, which cannot. *See* M.G.L c. 55 § 8.

IB-88-01 is an appropriate interpretation of Massachusetts' campaign finance law as it relates to political contributions. Since enacted in 1975, Section 8 of M.G.L. c. 55 has prohibited corporations from making contributions "for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding or promoting or antagonizing the interest of any political party." The statute specifies that the prohibition applies to business and professional corporations, partnerships, limited liability companies and partnerships as well as to officers or agents acting on behalf of corporations. M.G.L. c. 55 does not prohibit nonprofits or associations from making political contributions. Other parts of the statute suggest that the Legislature considered whether nonprofits and associations could make contributions and decided they could: Section 10 prohibits "any trust, foundation or association other than a political committee" from making campaign contributions without disclosing the names and addresses of its principal officers, thereby allowing campaign contributions from such entities so long as their principals are disclosed. Moreover, the statute has been amended by the Legislature several times since its original passing, most recently in 2014. During the 43 years since its passage, the Legislature has never prohibited nonprofits and unincorporated associations from making political contributions.

If OCPF determines a formal rule is required, it should maintain the balance struck by IB-88-01, considering the Commonwealth's policy determinations about who may contribute to political committees, candidates, or parties, the burdens that come with full political committee status, and the need for meaningful disclosure of money spent to influence Massachusetts elections.

A. Commonwealth Policy Imposes Significant Burdens on Political Committees, as Recognized by OCPF, the Supreme Judicial Court, and Petitioners.

The statute prohibits "political committees" other than those organized on behalf of a ballot question campaign from soliciting or receiving contributions from corporations. A "political committee" is defined in § 1 as "any committee, association, organization or other group of persons, including a national, regional, state, county, or municipal committee, which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate, or candidates, or of presidential and vice presidential electors, or for the purpose of opposing or promoting a charter change, referendum question, constitutional amendment, or other question submitted to the voters." Regulations promulgated by the Agency prohibit political committees from "pay[ing] or expend[ing] money or any thing of value unless such transaction will enhance the political future of the candidate or principal on whose behalf the committee was organized." Therefore, if an organization is deemed to be a "political committee" it is prohibited from making any expenditures other than for that political purpose. As noted by OCPF:

> A strict application of this definition would, however, place an extraordinary burden, **not intended by the Legislature**, on non-political organizations making only incidental expenditures for a political purpose. Accordingly, OCPF considers groups and organizations that make contributions or independent expenditures but do not solicit or receive funds for any political purpose differently than groups and organizations that actively engage in political fundraising.

IB-88-01 at 3 (emphasis added). The Supreme Judicial Court similarly recognized the particularly strict burdens imposed on political committees when it noted the existential change that could befall unions or nonprofit organizations subjected to the statute's "broad definition" of political committee:

> 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 nonprofit organization.

1A Auto, Inc., 480 Mass. 423 at 442 (n. 10) (2018). The approach taken by OCPF in IB-88-01 is the correct balancing of the Commonwealth's clear policy that individuals, non-profit organizations, unions, and trade associations may contribute to candidates, PACs, and parties from their treasuries, with the wholesale character change that would be required if such persons were treated as political committees by virtue of making contributions.

Petitioner similarly recognized the significance of the burdens imposed by political committee status in its Amicus Brief in 1A Auto, Inc., referenced in its Petition for Rulemaking. Petitioner suggested that the court could strike down IB 88-01, leaving only the text of M.G.L c. 55 in its place, which "would functionally eliminate direct contributions from nonprofit entities to candidates," because "[i]n practice, G.L. c. 55 would treat for-profit corporations and nonprofit entities the same; the former would be barred from directly contributing to candidates, and the latter would have to become different entities (i.e., political committees) to do so, which none would ever do." Brief of Amici Curiae Common Cause and Free Speech For People, 1A Auto, Inc., No. SJC-12413 at 42-43.

To the extent what Petitioner really seeks is an end to the differences in the treatment of business corporations and non-profit entities and other associations under state law, or a ban – direct or indirect – on contributions from organizations the Commonwealth has long permitted, such substantive change in the existing law can only be provided by the Legislature. Absent a change in the statute, the task before OCPF is to harmonize the policy determinations made by the Commonwealth.

B. The Incidental Threshold Approach is Reasonable in Light of The Competing Policy Determinations in The Statute.

The approach taken by OCPF in IB-88-01 to balance the burdens of political committee status against the clear policy that non-profit organizations, unions, and trade associations may make contributions from their own treasuries in imposing the "incidental threshold" requirement is reasonable and should be adopted in any potential rulemaking.

IB-88-01 applies only to organizations permitted by Commonwealth policy to make contributions to candidates, political committees, and parties but that do not solicit or receive funds for any political purpose – broadly defined to include efforts "to support or oppose candidates, political action committees, or political parties, whether in Massachusetts or elsewhere." IB-88-01 at 1 (emphasis added). In other words, an organization's fundraising for federal elections or elections in other states removes the organization from the purview of IB-88-01 and require political committee registration. This aspect of IB-88-01 narrows the scope of its application and eliminates any potential circumvention of its purpose by organizations that fundraise for general political activities, but do not primarily fundraise (or even fundraise at all) for Massachusetts-specific political activity. Moreover, IB-88-01 contains a further anti-circumvention provision by barring indirect contributions – organizations that receive corporate or partnership funds may not make contributions from an account kept segregated from the prohibited funds. IB-88-01 at 2.

In addition to its narrow application to only those organizations that neither engage in political fundraising for elections *anywhere* nor receive funds from sources prohibited by Section 8 of the statute, IB-88-01 imposes rigorous requirements on such organizations to track their combined contribution and independent expenditure spending over multiple years. IB-88-01 provides that an organization under its purview may contribute and make independent expenditures in accordance with an "incidental threshold" of the lesser of $15,000 or 10% of the group's previous year's gross revenues, whichever is less, without being subject to the Commonwealth's outgoing contribution limits and without reporting to OCPF. When that threshold is exceeded, however, the usual contribution limits begin to apply, and the organization must report *all* of its contributions and expenditures from the first penny on Form CPF-111. Once exceeded in a given year, the reporting obligation and the contribution limit applies to all of the organization's activities from the first dollar in the next year, and so on until the year following one in which the organization does not exceed the incidental threshold.

Taken together, the multi-year approach of IB-88-01 and the combination of independent expenditures *and* contributions to candidates to calculate whether a group has met the "incidental threshold" leaves organizations under its scope with a choice: limit your total regulated political activity to less than the incidental threshold *or* abide by the contribution requirements in subsequent years. In this way, IB-88-01 embodies a reasonable approach to the statute's silence concerning any amount limitations on contributions by non-individual entities that fall outside the prohibitions of M.G.L. c. 55, § 8.[1]

OCPF's threshold for when contributions and independent expenditures are "more than incidental" is also in line with the Supreme Court's "major purpose" test. Buckley v. Valeo, 424 U.S. 1, 79 (1976). Court cases since then have indicated that a group can be considered to be a political committee where its political spending is sufficiently "extensive" such that the organization's "major purpose" can be regarded as campaign activity. Fed. Election Comm'n v. Massachusetts Citizens for Life, Inc., 479 U.S. 238, 262 (1986). Guidance from the FEC has indicated that it considers a group to be a political committee where more than half of its spending is for campaign activity. FEC, Political Committee Status, 72 Fed. Reg. 5595-02, 5605.

In our opinion, IB-88-01 strikes the correct balance between the wording and intent of the statute and regulations on the one hand and the practical recognition that nonprofits and associations

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[1] We also note that the $15,000.00 threshold originated in June 1986, when OCPF issued amended Interpretive Bulletin IB-104, which was adopted by the superseding IB-88-01 and remains the threshold today. *See* OCPF, "IB-88-01 Time Line: OCPF analysis of 'Political Committee' definition," http://files.ocpf.us/pdf/guides/IB-88-01history.pdf (last visited Nov. 30, 2018). The threshold amount has not been adjusted to account for inflation in the thirty-two years it has been in place; if it had, the threshold would be set at nearly $35,000.00 today. Official Data Foundation, CPI Inflation Calculator, http://www.in2013dollars.com (last visited Nov. 30, 208). As a result, the threshold determined to be "incidental" in 1986 is even more so in today's dollars.

should be able to make incidental political contributions without being automatically transformed into political committees. As OCPF put it, the standard "balances the public interest of disclosure and regulation of campaign finance activity in Massachusetts with the administrative and legal burdens imposed on organizations participating financially in the Commonwealth's political process." IB-88-01 at 4.

C. The Accommodations For Organizations That Utilize Dues-Financed Separate Segregated Accounts For Federal Tax Purposes Should Be Maintained.

Another aspect of the rigorous analysis that has developed through the successive iterations of IB-88-01 that must be preserved in any formal rule is the accommodation afforded to Internal Revenue Code ("IRC") § 501(c) tax-exempt groups whose IRC obligations otherwise would operate at cross-purposes with their obligations under the Commonwealth's campaign finance law. Specifically, IRC § 527(f), 26 U.S.C. § 527(f), imposes a tax on a labor union, which is tax-exempt under IRC § 501(c)(5), 26 U.S.C. § 501(c)(5), if it uses a *regular dues-financed general-fund account* for what the IRC terms "exempt function" activity, see 26 U.S.C. § 527(e)(2), that is, contributions to state or local candidates or other general-public partisan political spending such as independent expenditures. This federal tax is levied for a particular tax year at the highest corporate tax rate applied to the *lesser* of either (a) the union's exempt-function spending or (b) the union's net "investment income" over $100, meaning interest earned on any of its regular accounts as well as rental, royalty, dividend and capital gains income received by any of those accounts during that year. See *id.;* Treas. Reg. 1.527-6(a).[2]

IB-88-01's application to dues-financed separate accounts relies upon the *substance* of the union's account and not its form; the *sources* of its funds control – nothing solicited or received for political purposes, and nothing from business and professional corporations, partnerships, LLPs or LLCs – rather than the federal tax status of the union's account (§ 501(c)(5) or § 527). As IB-88-01 explains, at 3, OCPF makes a critical distinction between groups that "do not solicit or receive funds for any political purpose" and those "that actively engage in political fundraising." The former may be *any* "account" of a union, "such as" – but not confined to – its "general treasury fund." Id. And, per OCPF in a Disposition Agreement entered into with the United Food and Commercial Workers International Union ("UFCW") in 2009, so long as the account is "funded solely using dues proceeds," its "designation as a political fund under [IRC §] 527" does not matter." UFCW Disposition Agreement ("DA") at 5 fn. 3 (July 24, 2009).

As we wrote in response to OCPF's Notice Regarding Proposed Changes to IB-88-01 in 2014, compliance with these IRS requirements directly complements IB-88-01, which enables a union to use a separate "527" account that *is* self-financed with dues rather than funds that are raised for political purposes in order to contribute in Massachusetts elections. Notably, not every union or other group's SSF *will* qualify under IB-88-01; under Treas. Reg. 1.527-6(e), such an account may be financed with *either or both* dues and "political contributions," but IB-88-01 covers only an SSF that is financed by dues *alone*. We urge that OCPF maintain this aspect of IB-88-01 in any potential rule it considers.

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[2] Section 527(f) applies in the exact same manner to other § 501(c) organizations that, by definition are *not* political organizations and many of which, like unions, rely on regular dues income, and which are also treated by IB-88-01 in the same manner.

D. IB-88-01 Provides Meaningful Disclosure of Political Contributions.

The rigorous regime contained in IB-88-01 provides for meaningful disclosure of *all* of a non-profit organization's, union's, or trade association's contributions, whether under or over the incidental threshold, because all contributions are reported by the OCPF-registered *recipients of them*. And, if the union or non-profit contributor *exceeds* the threshold, the contributor itself (including its separate account) must file Form CPF-111 to report the contributions. This CPF-111 reporting obligation then continues for the rest of the year and "every year thereafter until one year after the incidental threshold is not reached in a particular year." IB-88-01 (2011). And, the union (including its separate account) already must report its independent expenditures after a $250/yr. spending threshold *irrespective of the incidental threshold* and irrespective of whether Form CPF-111 is *also* due and reports that same spending. And, while that form requires only an itemization of spending and not of receipts, by definition only a separate account that is entirely self-financed by its union or other group sponsor with regular organizational dues is covered by IB 88-01, *so there are no incoming "contributors" to report.* As currently in force, IB-88-01 provides meaningful disclosure of the money spent to influence Massachusetts elections and this disclosure regime should be maintained as well.

III. Conclusion

For the reasons detailed above, we urge OCPF to maintain the guidance contained in IB-88-01. OCPF has acted well within the scope of its explicit statutory permission to issue interpretive bulletins, and the Massachusetts Legislature has tacitly endorsed OCPF's exercise of that permission in this particular context for over thirty-six years. Should OCPF determine that a formal rule is the best course of action, we urge OCPF to codify the policy embodied in IB-88-01 without change to its substance. We would be pleased to meet and confer with OCPF about these comments and any concerns that OCPF may have about the current operation of IB-88-01. Thank you for your consideration.

Respectfully submitted,

Steven A. Tolman

Steven A. Tolman
President, Massachusetts AFL-CIO