November 30, 2018

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

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

Dear Director Sullivan:

The Massachusetts Fiscal Alliance ("Mass Fiscal") appreciates the opportunity to provide these initial comments on the extent to which Interpretive Bulletin OCPF-IB-88-01 ("IB-88-01") should be codified or superseded in the Office of Campaign and Political Finance regulations, 970 C.M.R. § 1.00 et seq. Mass Fiscal is a non-partisan, IRS-recognized 501(c)(4) non-profit organization that advocates for fiscal responsibility, transparency, and accountability in state government, and increased economic opportunity for the people of our Commonwealth.

Mass Fiscal offers three main comments in this initial phase, and elaborates upon them in more detail below.

- **First**, Mass Fiscal believes the "incidental expenditure" exemption in IB-88-01 lacks any statutory basis and unfairly tilts the playing field toward unions, nonprofits, and unincorporated organizations, allowing them to donate up to $15,000 annually to candidates without being required to register as political committees, in direct contravention of the plain language of G.L. c. 55, § 1.

- **Second**, Mass Fiscal believes the language in IB-88-01 suggesting a historical tendency of unions to utilize general treasury funds to support or oppose candidates without registering as political committees is inconsistent with the plain language of G.L. c. 55, § 1 and should not be codified in any new regulation.

- **Third**, Mass Fiscal encourages OCPF to codify in any new regulation—as currently stated in IB-88-01 and consistent with G.L. c. 55—that the standards articulated in any new regulations regarding when an entity is considered a "political committee" are expressly *inapplicable* to entities whose expenditures are limited to electioneering communications.

Donors, nonprofit organizations, OCPF, and the general public alike benefit when campaign finance regulations provide clear, objective, and fair rules. Mass Fiscal appreciates and values the detailed and thorough subregulatory guidance that OCPF has generated over the years, and does not wish to discourage OCPF from continuing to provide timely guidance to candidates, donors, and the public. However, determinations of "general application and future effect" — such as when an entity should be considered a "political committee," a topic central to the functioning of the campaign finance system — are properly promulgated through notice and comment rulemaking pursuant to G.L. c. 30A, § 1(5). *See Haverhill Manor, Inc.* v. *Commissioner of Pub. Welfare*, 368 Mass. 15, 21 (1975). Mass Fiscal applauds OCPF for its decision to pursue rulemaking on whether IB-88-01 should be codified in 970 C.M.R. or replaced therein with a different standard.

I. Background

Mass Fiscal 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. Mass Fiscal 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 Mas. 423 (2018). As such, Mass Fiscal'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, Mass Fiscal 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, Mass Fiscal 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).

II. The "Incidental Expenditure" Threshold in IB-88-01 Lacks Any Statutory or Legal Basis and Should Not Be Codified in Any New Regulation

IB-88-01 correctly recites 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." [Emphasis in IB-88-01]. Mass Fiscal agrees that any proposed regulation pertaining to political committees must respect and adhere to the relevant statutory definitions established by the Legislature.

However, Mass Fiscal's longstanding concern with IB-88-01 is that it then departs from the statutory text, and declares an "incidental expenditure" exception to the statutory definition of "political committee" that is not found in or supported by G.L. c. 55, and which is affirmatively inconsistent with the plain and unambiguous statutory definition. Mass Fiscal strongly urges OCPF not to codify this legally untenable provision in any new regulation.

In specific, IB-88-01 states 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. This assertion has no statutory foundation. 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."). 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 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. The Legislature has not done so here.

The problematic notion of an agency-created "incidental expenditure" exemption from G.L. c. 55 is further compounded by the establishment of a dollar threshold for what constitute a "more than incidental" expenditure. In specific, IB-88-01 declares

> contributions and independent expenditures made by an organization that is not a political committee are "more than incidental" if they are made (1) for the purpose of aiding, promoting or preventing the nomination or election of any person to public office, or aiding, promoting or antagonizing the interest of any political action committee or political party, and (2) they exceed, in the aggregate, in a calendar year, ***either $15,000 or 10 percent of such organization's gross revenues for the previous calendar year, whichever is less (the "incidental threshold").*** [Emphasis in original].

As summarized by the SJC in *IA Auto*, "under OCPF's interpretation, a union or nonprofit organization can spend up to $15,000 or ten per cent of its gross revenues, whichever is less, without triggering the regulations applicable to political committees." *1A Auto*, 480 Mass. at 442 n. 10. Yet the legal justification of IB-88-01 is even more tenuous than the SJC described: IB-88-01 actually asserts that such expenditures are permissible not only without triggering the *regulations* application to political committees, but are permissible despite contravening the express *statutory definition* of political committee. While 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, IB-88-01 asserts the exact opposite: that under certain circumstances an organization can make contributions and expenditures "for the purpose of aiding [or] promoting . . . the election of any person to public office" and *not* be a political committee. Where subregulatory guidance directly contradicts a statute, the former must yield to the latter. 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).

Finally, IB-88-01 attempts to justify this unwarranted departure from the statutory text by asserting that "[t]his [incidental expenditure] 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." Given the unambiguous plain language of G.L. c. 55, § 1, this is simply not a discretionary balance that OCPF has the legal authority to strike, regardless of whether in OCPF's expert opinion it makes good public policy. And indeed, in numerous places within G.L. c. 55 itself, the Legislature has demonstrated that it is well aware how to strike precisely such balances and establish such thresholds when warranted (for instance, the $50 maximum on cash contributions in Section 9, or the $250 minimum reporting thresholds in Sections 18A (independent expenditure expenditures) 18F (electioneering communication contributions and expenditures) and Section 22 (ballot question expenditures). As a fundamental matter of statutory interpretation, where the Legislature has chosen include a provision in one part of a statute but omit it in another part, it is presumed that the choices are 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.").

III. Prior Union Practice of Utilizing General Treasury Funds to Contribute to Candidates Without Registering as a Political Committee Is Inconsistent with the Statute and Should Not Be Codified in Any New Regulation

After establishing the "incidental expenditure" test, Section I of IB-88-01 offers the following language, suggesting a historical tendency of unions to utilize their general treasury funds to support or oppose candidates without registering as political committees.

> For example, a union, like any group, may not solicit or receive funds for the purposes of influencing Massachusetts elections without first organizing a political committee in accordance with M.G.L. c. 55. *It is not uncommon, however, for unions to use their general treasury fund[s] to make contributions or independent expenditures to support or oppose candidates.* For a union to make contributions or independent expenditures in Massachusetts *without first organizing a separate political action committee,* the union must make expenditures from an account containing funds that were not raised for a political purpose, such as the union's general treasury fund. IB-88-01 at 3 [emphasis supplied].

The quoted language implies that because the union practice of making contributions to candidates from general treasury funds without registering as a political committee is "not uncommon," that it is therefore reasonable and appropriate for this practice to be accommodated by OCPF. It is not. Such a justification has no legal basis and is fundamentally inconsistent with the plain language of G.L. c. 55, § 1. The fact that past practices were inconsistent with law is hardly a rationale for sanctioning their continued use.

Moreover, this justification only serves to highlight the inherent unfairness of the "incidental expenditure" exemption. As is clear from the above-quoted paragraph from IB-88-01, unions are not *precluded* from organizing a separate political action committee if they wish. To the contrary, IB-88-01 identifies forming a political action committee as an option for unions in *addition* to unions being authorized to contribute up to $15,000 to candidates through the "incidental expenditure" exemption. In contrast, incorporated entities have the right only to form a political action committee and be subject to their lower contribution limits. Affirmatively granting unions the right to *also* contribute up to $15,000 directly to candidates is not only unsupported by the plain language of G.L. c. 55, it is fundamentally and inherently unfair. The justification of past union practice should not be codified in any new regulation.

IV. 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, Mass Fiscal 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, entities whose expenditures subject to OCPF oversight are limited to electioneering communications are not "political committees" 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 earlier this year by OCPF.

V. Conclusion

Mass Fiscal appreciates OCPF's recognition of the legal shortcomings of certain portions of the existing subregulatory guidance IB-88-01, and welcomes OCPF's decision to open this notice and comment rulemaking to establish a more statutorily-compliant standard.

Mass Fiscal encourages OCPF to adhere to the unambiguous statutory definition of "political committee" provided by the Legislature in G.L. c. 55, § 1, and to promulgate draft regulations that eliminate the "incidental expenditure" exemption created by IB-88-01. 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. Mass Fiscal also encourages OCPF to codify in any new regulation, consistent with G.L. c. 55, that any rules governing political committees are expressly *inapplicable* to entities whose expenditures are limited to electioneering communications.

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

Sincerely,

Paul D. Craney

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