State of Rhode Island and Providence Plantations
Rhode Island Board of Elections

Public Notice of Proposed Rule-Making

Pursuant to the provisions of Title 17 of the General Laws of Rhode Island, and in accordance with the Administrative Procedures Act Chapter 42-35 of the General Laws, the Rhode Island Board of Elections hereby gives notice of its intent to adopt the following; Rules and Regulations on Reporting Requirements for Coordinated and Independent Expenditures

The purpose of this rule is to clarify the reporting requirements for independent and coordinated expenditures in the aftermath of the United States Supreme Court decision rendered in *Citizens United v. Federal Elections Commission*, 130 S. Ct. 876, - U.S. - (2010).

The proposed Rules and Regulations are available for public inspection online at www.elections.ri.gov, in person at the Rhode Island Board of Elections, 50 Branch Ave. Providence, R.I. 02904, requested by email at GMcBurney@elections.ri.gov or by calling Gregory McBurney at 401-222-1914.

In the development of the proposed adoption consideration was given to: (1) alternative approaches; (2) overlap or duplication with other statutory and regulatory provisions; and (3) significant economic impact on small business. No alternative approach, duplication, or overlap was identified based upon available information.

All interested parties are invited to submit written or oral comments concerning the proposed regulations by 7/13/2010 to Robert Kando, Rhode Island Board of Elections, 50 Branch Ave. Providence, R.I. 02904, 401-222-2345, Feedback@elections.ri.gov. A public hearing to consider the proposed adoption shall be held on 7/13/2010 at 4:00 p.m. at 50 Branch Ave. Providence, R.I. 02904 at which time and place all persons interested will be heard. The room is accessible to the disabled and interpreter services for the hearing impaired will be provided if requested 48 hours prior to the hearing. Requests for this service can be made in writing or by calling 401-222-2345.

RULES AND REGULATIONS ON REPORTING REQUIREMENTS FOR COORDINATED AND INDEPENDENT EXPENDITURES

PROPOSED

Promulgated by order of
The Rhode Island State Board of Elections
John A. Daluz, Chairman

RULES AND REGULATIONS ON REPORTING REQUIREMENTS FOR COORDINATED AND INDEPENDENT EXPENDITURES ADOPTED BY THE RHODE ISLAND BOARD OF ELECTIONS

The Rhode Island Board of Elections hereby adopts rules and regulations on reporting requirements for coordinated and independent expenditures pursuant to and in accordance with R.I. Gen. Law § 17-25 et seq., due to the United States Supreme Court decision rendered in Citizens United v. Federal Elections Commissioner, 130 S. Ct 876 – U.S. – (2010)

Said rules and regulations are adopted pursuant to the Administrative Procedures Act (R.I.G.L. § 42-35 et seq.) and are available for public inspection at the offices of the Rhode Island Board of Elections, 50 Branch Avenue, Providence, Rhode Island.

SECTION 1. Purpose and Scope

The following regulation is proposed by the State Board of Elections under the authority of Title 17, Chapter 25 of the Rhode Island General Laws and is promulgated for the purpose of clarifying the reporting requirements for independent and coordinated expenditures in the aftermath of the United States Supreme Court decision rendered in *Citizens United v. Federal Elections Commission*, 130 S. Ct. 876, - U.S. - (2010). That Supreme Court decision struck down portions of Congress' Bipartisan Campaign Reform Act of 2002 ("BCRA"), which prohibited corporations and unions from using their general funds to make independent expenditures for speech that is an "electioneering communication" or for speech that expressly advocates the election or defeat of a candidate. In light of First Amendment protection that extends to corporations, the Supreme Court held that there is "no basis for allowing the government to limit corporate independent expenditures." (slip op. at 50). However, the Supreme Court likewise upheld the constitutionality of the disclaimer and disclosure and disclaimer provisions of BCRA. Under that Act, a person who makes a disbursement for producing and airing

electioneering communications must file a report with the Federal Elections Commission which identifies the person making the disbursement, with related information, including the identities of those persons who shared or exercised direction or control over the activities of the person making the disbursement. BCRA also requires televised electioneering communications funded by anyone other than the candidate to include a disclaimer that the person funding the communication is responsible for the content of the advertisement. The disclaimer must be both audible and visibly displayed on the screen in a clearly readable manner. It must also display the name and address of the person or group that funded the advertisement.

These "disclaimer and disclosure requirements may burden the ability to speak, but they 'impose no ceiling on campaign related activities,' *Buckley*, 424 U.S. at 64 and 'do not prevent anyone from speaking,' *McConnell*, 540 U.S. at 201." Disclosure requirements are justified based upon a valid governmental interest in "providing the electorate with information" about the sources of election-related spending. *Buckley*, 424 U.S. at 66. Such disclosure requirements help citizens "make informed choices in the political marketplace." 540 U.S. at 197 (internal quotations omitted). Indeed, the Supreme Court found that "there was evidence in the record that independent groups were running election-related advertisements 'while hiding behind dubious and misleading names.'" *McConnell*, 540 U.S. at 197 (quoting *McConnell I*, 251 F. Supp. 2nd at 237).

Rhode Island law currently does not prohibit corporations from making independent expenditures. R.I. Gen. Laws § 17-25-10.1(h)(1) states, in part, that:

> It shall be unlawful for any corporation, whether profit or non-profit, domestic corporation or foreign corporation, as defined in § 7-1.1-2, or

> other business entity to make any campaign contribution or expenditure, as defined in § 17-25-3, to or for any candidate, political action committee, or political party committee, or for any candidate, political action committee, or political party committee to accept any campaign contribution or expenditure from a corporation or other business entity.

The terms "contributions" and "expenditures" are defined under R.I. Gen. Laws § 17-25-3 and do *not* include independent expenditures:

> "Contributions" and "expenditures" include all transfers of money, credit or debit card transactions on-line or electronic payment systems such as "PayPal," paid personal services, or other things of value to or by any candidate, committee of a political party, or political action committee or ballot question advocate. A loan shall be considered a contribution of money until it is repaid.

Thus, the existing statute on prohibitions for corporate expenditures does not reach independent expenditures, but only payments and expenditures to or on behalf of a candidate, committee of a political party or political action committee or ballot question advocate.

SECTION 2. Definitions

1. "Legal Entity" means any corporation, whether for profit or not for profit, domestic corporation or foreign corporation, as defined in R.I. Gen. Laws § 7-1.1-2, financial institution, cooperative, association, receivership, trust, holding company, firm, joint stock company, public utility, sole proprietorship, partnership, limited partnership, or any other entity recognized by the laws of the United States and/or the state of Rhode Island for the purpose of doing business. The term "legal entity" shall not include a political action committee organized pursuant to this chapter or a political party committee organized pursuant to this chapter or an authorized campaign committee of a candidate or office holder.

2. "Candidate" means any individual who undertakes any action, whether preliminary or final, which is necessary under the law to qualify for nomination for election or election to a state or local office in the State of Rhode Island, and/or any individual who receives a contribution or makes an expenditures, or gives his or her consent for any other person to receive a contribution or make an expenditure, with a view to bringing about his or her nomination or election to any state or local office in the State of Rhode Island, whether or not the specific state or local office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or file a declaration of candidacy at that time.

3. "Contributions" and "expenditures" include all transfers of money, credit or debit transactions on-line or electronic payment systems such as "PayPal," paid personal services, or other things of value to or by any candidate, committee of a political party, or political action committee or ballot question advocate. A loan shall be considered a contribution of money until it is repaid.

4. "Expenditures" shall include, but are not limited to the payment for any goods and services as set forth below:

(i) Any media advertising services or products, including, but not limited to, newspapers, radio stations or television stations;

(ii) General advertising in letters, brochures, flyers, handbills, lawn signs, posters, bumper stickers, buttons or other materials except for newsletters and other communications paid for and transmitted by an organization to its own members and not to the general public; or

(iii) Paid personal services, including advertising agency services or other professional services including accounting services, printing, secretarial services, public opinion polls, research and professional campaign consultation or management, media production or computer services. A written contract, agreement or promise to make an expenditure is an expenditure as of the date such contract, expenditure or obligation is made.

5. "Clearly identified candidate" means any reference to the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through any reference or link to a candidate's website or through an unambiguous reference such as "the Governor," "Your state representative," or "the incumbent," or through an unambiguous reference to his or her status as a candidate such as "the Democratic gubernatorial nominee" or the "Republican candidate for District 500 in the State of Rhode Island."

6. "Expressly advocating" means any communication that (a) uses phrases such as "Vote for the Governor," "Re-elect your State Senator," "Support the Gubernatorial Nominee," "Cast Your Ballot for the Democratic Challenger for the State Senate Seat 500," "Smith for Lt. Governor," "John Doe in 2010," "Vote for a Balanced Budget" accompanied by a listing of clearly identified candidates described as being in favor of a balanced budget, "Vote Against John Doe," "Defeat" accompanied by a picture of one or more candidates, or "Reject the Incumbent" or repeats or adopts slogans/themes associated with a specific candidate who is identified within the communication, or communications of slogans or individual words which n context can have no other

reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers and advertisements.

7. "Other thing of value" means any item of tangible real or personal property, or paid personal services, donated to or benefiting any person required to file reports with the Board of Elections and that in the aggregate has a fair market value in excess of one hundred dollars ($100).

8. "Paid personal services" means personal services of every kind and nature, the cost or consideration for which is paid or provided by someone other than the committee or candidate for whom the services are rendered, but shall not include personal services provided without compensation by persons volunteering their time.

9. "Person" means either an individual, partnership, committee, association, corporation, or any other organization.

SECTION 3. Reporting Requirements for Independent Expenditures

It is lawful for any person, including any corporation or any other organization not otherwise prohibited by law and not making an expenditure to or with any candidate, political committee, political party, or political action committee, to independently expend from a person's own funds, including from the treasury of a corporation or organization, a sum which is not to be repaid to said person for the purpose of expressly advocating for the support or defeat of a candidate.

Whenever any person makes an independent expenditure that in the aggregate exceeds one hundred dollars ($100.00) in a calendar year, said person shall file a report with the Board of Elections, designated as CF-8, which shall state, under the penalty of perjury, the following information:

(1) The identification of the person making the independent expenditure, including the person's address and principal place of business, if not an individual, and the amount expended;

(2) The identification of any person sharing or exercising direction or control over the activities of the person making said expenditure, including that person's address and the principal place of business, if not of an individual; and

(3) The name and address of every person or entity receiving an expenditure which in the aggregate exceeds one hundred dollars ($100.00), and the amount of each expenditure.

The first report must be filed within seven (7) days from the date that said expenditure exceeds the aggregate of one hundred dollars ($100.00). Thereafter, said person shall file additional CF-8 reports with the Board of Elections no later than seven (7) days after the independent expenditure is made.

The date for such expenditure is the date that a written contract, oral agreement or other promise is made to make an expenditure, rather than the date that the funds are actually expended.

For each expenditure made, a report must be filed with the Board of Elections identifying the source of monies used for said expenditure. For example, where an association or corporation uses monies provided by its members for the purpose of expressly advocating the support or defeat of a candidate, each person from whom said monies was received shall be identified in the filings with the Board of Elections, which shall include the person's name, address, and amount contributed for the purpose of making an electioneering communication or other such expenditure by said corporation or association. Each such person shall be identified on Form CF-8.

Further, when a member of a legal entity that is making independent expenditures transfers money or other thing of value to said legal entity, and knows that

the monies or other thing of value is to be used by the legal entity for the purpose of making an expenditure in support of or in opposition to a candidate for office, said donor must file a Form CF-8 with the Board, within seven (7) days of the transfer. Additionally, any legal entity receiving said monies or other thing of value must likewise report to the Board the receipt of said monies or item of value within seven (7) days. The legal entity receiving said monies or other thing of value shall forward a copy of Form CF-8 to the donor member with notice that said form may be required to be completed by the donor member. This shall apply whenever a legal entity receives any money or other thing of value in excess of one hundred dollars ($100.00) from any single source. No corporation, whether for profit or non-profit, domestic or foreign, or any other legal entity as defined herein, is permitted to make any expenditures to or with any candidate, political action committee, or political party committee, or for any candidate, political action committee, or political party committee to accept any campaign contribution or expenditure from such corporation or other legal entity.

An expenditure shall be deemed to be made to or with any candidate, political action committee, or political party, if one or more of the following factors are present:

(a) There is any arrangement, coordination, or direction with respect to the expenditure between the candidate or the candidate's agent and the person making the expenditure;

(b) In the same election cycle, the person making the expenditure, including any officer, director, employee, or agent of the person, is or has been authorized to raise or expend funds on behalf of the candidate or the candidate's authorized committees, or is or has been an officer of the candidate's authorized committees, or is or has been

receiving any form of compensation or reimbursement from the candidate, the candidate's authorized committees, or the candidate's agent;

(c) The person making the expenditure, including any officer, director, employee, or agent of the person, has communicated with, advised, or counseled, the candidate or the candidate's agents at any time on the candidate's plans, projects, or needs relating to the candidate's pursuit of election to office in the same election cycle, including any advice relating to the candidate's decision to seek election to office;

(d) The person making the expenditures retains the professional services of any individual or other person also providing those services to the candidate in connection with the candidate's pursuit of election to office in the same election cycle, including any services relating to the candidate's decision to seek election to office;

(e) The person making the expenditure, including any officer, director, employer, or agent of the person, has communicated or consulted at any time during the same election cycle about the candidate's plans, projects, or needs relating to the candidate's pursuit of election to office, with:

(i) Any officer, director, employee, or agent of a party committee that has made or intends to make expenditures or contributions, in connection with the candidate's campaign; or

(ii) Any person whose professional services have been retained by a political party committee that has made or intends to make expenditures or contributions;

(f) The expenditure is based on information provided to the person making the expenditure directly or indirectly by the candidate or the candidate's agents about the candidate's plans, projects, or needs; provided, that the candidate or the candidate's agents

are aware that the other person has made or is planning to make expenditures expressly advocating the candidate's election; or

(g) The expenditure is made by a person with the intention of seeking or obtaining any governmental benefit or consideration from the candidate by reason of the expenditure.

Nothing contained in this regulation shall be construed to limit the amount of monies expended by an independent candidate advocate for the purpose of independent candidate advocacy.

Independent candidate advocates shall maintain and preserve all records and supporting documentation for a period of four (4) years from the filing date.

Independent candidate advocates found in violation of this regulation may be fined within the provisions of Chapter 25 of Title 17.

SECTION 4. Disclaimer Requirement for Independent Expenditures

For any communication made for the purpose of expressly advocating the support or defeat of a candidate, by any person which is an independent expenditure and has not been authorized, or financed by a candidate, political party, candidate committee, or political action committee, a disclaimer statement identifying the person paying for the communication shall include a disclaimer statement, which must:

- State that the communication is not authorized by any candidate or the candidate's committee; and
- Identify the name and street address, telephone number and web address, if any, of the persons or legal entity who financed said communication.

An example of a disclaimer notice for a printed independent expenditure by a corporation would be as follows:

Paid for by Acme Corporation and not authorized by any candidate or candidate's committee. Contact us at: Acme Corporation, 111 Adams Street, Warwick, Rhode Island.

All disclaimers required by this section must be presented in a clear and conspicuous manner in order to give the reader, observer, or listener adequate notice of the identity of the person that paid for, and where required, authorized the communication. A disclaimer is not clear and conspicuous if it is difficult to read or hear, or if the placement is easily overlooked.

With respect to printed communications covered by this section, the disclaimer must also be of sufficient type size to be clearly readable by the recipient of the communication. If the communication is on printed material that measures no more than 24 inches by 36 inches, the disclaimer must be in 12-point type size. The disclaimer must be contained in a printed box set apart from the other contents of the communication. The disclaimer must also be printed with a reasonable degree of color contrast between the background and the printed statement. The disclaimer satisfies the color contrast requirement if it is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest text used in the communication.

Where the communication is made by radio, television or through any broadcast, cable, or satellite transmission, said communication must include the following audio statement: "xxx is responsible for the content of this advertisement," which must be spoken clearly, with the blank to be filled in with the name of the person paying for the communication and the name of the connected organization, if any, of the payer. Additionally, any communication transmitted visually through television or through any

other broadcast, cable or satellite transmission, must also include a similar written statement that must appear in clearly readable writing at the end of the visual communication. In order to be deemed clearly readable, the statement must include the following:

(1) The statement must appear in letters equal to or greater than 4% of the vertical picture height;

(2) The statement must be visible for a period of no less than 4 seconds; and

(3) The statement must appear with a reasonable degree of color contrast between the background and the disclaimer statement. The color contrast requirement is satisfied if the statement is printed in black text on a white background or if the degree of color contrast between the background and the text of the disclaimer is no less than the color contrast between the background and the largest type size used in the communication.

SECTION 5. Disclosure Requirements

No person shall make any contribution to any other person, including a corporation, association, or union, for the purpose of an electioneering communication in any name except its own or in any manner for the purpose of disguising the true origin of said contribution. No person shall form or use a corporation or other legal entity to make electioneering communications with the intention to either disguise the true origin of the funds or evade the reporting requirements of this chapter.

Section 6. Implementation

The Board of Elections may promulgate procedures and forms necessary to implement the within rules and regulations required under the Rhode Island General Laws.

These rules and regulations were adopted at a meeting of the State Board of Elections held on the _____day of _____2010 pursuant to the Administrative Procedures Act (R.I.G.L. 42-35-1, *et seq.*).

By Order of the Rhode Island Board of Elections

_____ _____

John A. Daluz, Chairman Date

Witnessed by

_____ _____

Robert Kando, Executive Director Date