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MEMORANDUM

To: Interested Persons
From: Michael J. Sullivan, Director *mjs*
Subject: Reports of Electioneering Communications

M.G.L. c. 55, § 18F requires “every individual, group, association, corporation, labor union or other entity not defined as a political committee who makes an electioneering communication expenditure in an aggregate amount exceeding \$250 during a calendar year” to file reports of electioneering communications. OCPF promulgated regulations at 970 CMR 1.14 to govern the disclosure of electioneering communications.¹ This memorandum is intended to explain the statutory and regulatory requirements that apply where an individual, group, association, corporation, labor union, or other entity *not defined as a political committee* makes electioneering communications.

I. ELECTIONEERING COMMUNICATIONS DEFINED

M.G.L. c. 55, § 1 defines an electioneering communication as “any broadcast, cable, mail, satellite, or print communication that: (1) refers to a clearly identified candidate; and (2) is publicly distributed within 90 days before an election² in which the candidate is seeking election or reelection; provided, however, that ‘electioneering communication’ shall not include the following communications: (1) a communication that is disseminated through a means other than a broadcast station, radio station, cable television system or satellite system, newspaper, magazine, periodical, billboard, advertisement, or mail; (2) a communication to less than 100 recipients; (3) a news story, commentary, letter to the editor, news release, column, op-ed or editorial broadcast by a television station, radio station, cable television system, or satellite system, or printed in a newspaper, magazine, or other periodical in general circulation; (4) expenditures or independent expenditures or contributions that must otherwise be reported under this chapter; (5) a communication from a membership organization exclusively to its members and their families, otherwise known as a membership communication; (6) bona fide candidate

¹ OCPF has also issued an Interpretive Bulletin, IB-06-01, which discusses in more depth what constitutes an electioneering communication and the corollary disclosure requirements.

² “Publicly distributed within 90 days of an election,” for purposes of Section 18F, means the period within 90 days before a general or special election.” 970 CMR 1.14(1).



debates or forums and advertising or promotion of the same; (7) email communication; and (8) internet communications which are not paid advertisements.” M.G.L. c. 55, § 1.

II. ELECTIONEERING COMMUNICATION REPORTS

Electioneering communication reports (“EC reports”) are filed by any individual, group, association, corporation, labor union or other entity (excluding political committees) who makes an electioneering communication expenditure in an aggregate amount exceeding \$250 in a calendar year. M.G.L. c. 55, § 18F. EC reports are filed electronically with OCPF if the referenced candidates file with OCPF. If the referenced candidates file with the local election official, a paper EC report is filed with the local election official in the city or town in which the election is taking place. Id.

EC reports are due within seven (7) calendar days “after making the expenditure .” However, if an individual, group, association, corporation, labor union, or other entity makes electioneering communications aggregating \$1,000 or more within 7 days of the date of an election, the EC report is due within 48 hours of the date of the expenditure. Id.

The statute requires filing of an electioneering communication report within seven days of the date “of the expenditure.” See M.G.L. c. 55, § 18F. The date of the “expenditure,” for purposes of Section 18F must, however, be interpreted by reference to Section 1 of the campaign finance law, which states that a communication that clearly identifies a candidate may be an electioneering communication if it is “*publicly distributed*” within 90 days prior to an election.³ An individual or organization may pay for a communication well before the 90 day period prior to an election, but not distribute the item until the 90 day period preceding an election. In such instances, the purpose of the statute would be frustrated if no disclosure is required.

Accordingly, if an individual or organization pays for an electioneering communication, it must file EC reports *based on when the communication is publicly distributed*. For purposes of electioneering communication disclosure, public distribution takes place *on the date of expected receipt*. If the communication is expected to be received within 90 days before an election, the report must be filed within seven calendar days of the date of receipt. If received within seven days before an election and the aggregate cost is at least \$1,000, the report must be filed within 48 hours of expected receipt. For example, if an association purchases postcards referencing a candidate more than 90 days prior to an election (e.g., on August 1), but the postcards are not expected to be received until August 15 (which is within the 90-day period prior to the election), the EC report is due on August 22. If the postcards are never mailed, however, the association is not required to file an EC report because the goods or services were never distributed or made public.

EC reports must disclose the following: 1) the name and address of the individual or entity making the electioneering communication; 2) the name of any candidates clearly identified in the communication; 3) the total amount or value of the communication; 4) the date any

³ OCPF’s regulations refer to the date of the expenditure as the date the goods or services “are utilized.” See 970 CMR 1.14(1).

payments were made and the name and address of the vendor that received any such payments; (5) the date of expected receipt; and 6) the purpose of any payments made to a vendor. In addition, if any individual or entity making an electioneering communication receives \$250 or more from another source for the purpose of making that electioneering communication, the EC report must include the date the funds were received, the name and address of any individuals or entities that provided funds in excess of \$250, and the amount of the funds received. Id.

III. FILING AN ELECTIONEERING COMMUNICATION REPORT

Individuals or entities making electioneering communications referencing candidates who disclose their activity with OCPF must electronically file an electioneering communication report, using OCPF's web-based reporting system. Filers may register for a user name and password on OCPF's website. Once the filer has obtained a user name and password, he or she should take the following steps to file an EC report:

- 1) Log in with the user name and password;
- 2) Select "Create a Draft Report" and then "Create a Draft 18F Report";
- 3) The filer is automatically directed to the "File an Electioneering Communications Report" tab; once on that page, review the Filer Information to ensure the information is correct;⁴
- 4) Select the "Expenditures" tab;
- 5) On the Expenditures tab, select the candidate to whom this expenditure relates from a drop-down menu and enter the vendor information, specific purpose information (i.e., "mailing"), the amount of the expenditure that relates specifically to the candidate selected, the payment date, and the expected date of receipt;⁵
- 6) Once all fields in the Expenditures tab are complete, click "Save"; the "Total Expenditures" box at the bottom of the page will update to include the entered expenditures;
- 7) Continue to add expenditures until all expenditures related to a particular communication are represented in the Total Expenditures box (i.e., printing and postage for the same mailing may be separate entries if they are paid separately);
- 8) If the filer received any contributions in excess of \$250 for the purpose of making the electioneering communication, the filer must also enter the date, amount, name, and address of the person or entity making said contribution on the "Contributors" tab;
- 9) Once the contributor information has been entered, click "Save" and continue to enter the relevant contributor information until all required contributor information has been added to the EC report;

⁴ The first time a filer uses OCPF's web-based reporting system to file an IE or EC report, the filer will be asked to provide the filer type (individual, corporation or organization, or governmental unit) and the filer's name, address, and, if applicable, the filer's officer or treasurer, on the "Filer Information" tab. That information will be saved and pre-filled for any future IE reports or EC reports filed using the filer's user name and password. The information may be changed at any time by logging in to the reporting system and updating the information entered on the Filer Information tab.

⁵ If the expenditure relates to candidate who is not registered with OCPF, the filer may select "Unregistered Candidate" from the drop-down menu. A field will then appear in which the filer may enter the name of the unregistered candidate.

- 10) Once all expenditures and contributions (if applicable) have been entered into the appropriate tabs and the fields summarizing the Total Expenditures and Total Contributions accurately reflect the total cost of the communication and the total contributions received, **filers must check the acknowledgement at the bottom of the page and then click "E-File" to file the report.**

If an electioneering communication references more than one candidate, the filer is required to break down the total expenditure based upon the proportionate amount spent on materials referencing each candidate and whether the materials were distributed in that candidate's district. *See Examples 1-3*, below. The filer is required to disclose the attributions made for each candidate, even if an attribution to a particular candidate does not exceed \$250, if the expenditure, in the aggregate, exceeds \$250. *See Example 6*, below. If one communication requires expenditures to more than one vendor, the filer is required to enter the expenditures separately by vendor. *See Example 4*, below.

As noted above, any individuals or entities making electioneering communications referencing candidates who disclose their activity with a local election official must file an EC report on paper with the local election official in the city or town in which the election is taking place. The paper form, Form M18F, may be obtained from local election officials or on OCPF's website at ocpf.us.

IV. EXAMPLES

Example 1: On October 5, an association, using its general treasury funds, spends \$50,000 at ABC Printing Company to design, print, and mail a "scorecard", which references 10 candidates for state representative and compares their votes on issues of interest to the association. The scorecard is mailed in equal numbers to each candidate's district on October 20. The expected date of receipt is October 22. The association is required to file an EC report electronically with OCPF no later than October 29. The EC report will reflect an expenditure to ABC Printing Company on October 20 in the amount of \$50,000. Because the scorecard was sent to each candidate's district in equal numbers, the association will make ten expenditure entries and attribute the amount of the expenditure equally among the candidates - \$5,000 for mailings for each of the 10 candidates. No contributor information is required because the association did not receive money from another source to fund the electioneering communication.

Example 2: On October 8, an association receives \$10,000 from an individual so that the association can make electioneering communications. Using those funds, the association, on October 10, spends \$10,000 at ABC Printing Company to design, print, and mail a postcard referencing two candidates for state representative. The postcard is mailed in equal numbers to each candidate's district on October 15. The expected date of receipt is October 17. The association is required to electronically file an EC report with OCPF no later than October 24. The EC report will reflect an expenditure to ABC Printing Company in the amount of \$10,000 on October 15. Because the postcard referenced two candidates and was sent in equal numbers to their respective districts, the association will attribute the amount of the expenditure equally between the candidates - \$5,000 for mailings for each of the two candidates - by entering each item separately on the Expenditures tab of the EC report. The association must also disclose the

name and address of the individual who donated to the association for the electioneering communications, along with the date of the donation and the amount donated.

Example 3: On October 12, an individual spends \$30,000 of his personal funds at ABC Printing Company to design, print, and mail a scorecard, which references 5 candidates for state senate. The scorecard is mailed on October 20, in equal numbers to districts for Candidate A, B, and C, but no scorecards are mailed to districts for Candidate D or E. The expected date of receipt is October 22. The individual is required to electronically file an EC report with OCPF no later than October 29. The EC report will reflect an expenditure to ABC Printing Company on October 20 in the amount of \$30,000. Although the scorecard referenced 5 candidates, only 3 candidates' districts received the mailing. Therefore, the EC report will reflect 5 expenditure entries – three entries will attribute \$10,000 each to Candidates A, B, and C and two entries will attribute zero to Candidates D and E (with a note in the purpose field that no mailings were sent to their districts). The individual is not required to provide contributor information, as he did not collect funds from any other sources to fund the electioneering communications.

Example 4: On October 20, a union spends a total of \$40,000 to design, print, and mail a postcard referencing a gubernatorial candidate: \$2,000 is spent for design at ABC Graphics, \$13,000 is spent for printing at 123 Printing, and the remaining \$25,000 is spent on postage at XYZ Mailing House. Also on October 20, the union's parent organization contributes \$20,000 to the local union for the electioneering communications. The postcard is mailed statewide on October 24, prior to the November 4 election. The expected date of receipt is October 31. Because the expected receipt is within 7 days of the election, the union is required to file an EC report electronically with OCPF no later than 48 hours before the November 4 election, i.e., by November 2. The EC report will reflect total expenditures in the amount of \$40,000 on October 31, with separate expenditure entries for ABC Graphics (\$2,000), 123 Printing (\$13,000), and XYZ Mailing House (\$25,000) for a mailing referencing the gubernatorial candidate. The union will also disclose, on its report, the contribution received from the parent organization on October 28.⁶

Example 5: On November 1, an individual designs a flyer referencing 4 candidates for state senate, and spends \$400 at ABC Printing Company that day to make copies. The individual distributes those copies by hand to friends and neighbors. No disclosure is required; because the flyer was distributed by a means other than "a broadcast station, radio station, cable television system or satellite system, newspaper, magazine, periodical, billboard advertisement, or mail", the flyer does not meet the definition of an electioneering communication.

Example 6: On October 1, a group spends \$800 with ABC Printing Company for flyers (including postage) referencing Candidates D, E, and F – all candidates for state representative. The flyer is distributed by mail on October 6: Candidate D's district receives one half of the flyers and the other half of the flyers are split evenly between districts represented by

⁶ If the union contracts with a consulting or media company and the consulting or media company subcontracts some of the work (e.g., the union pays ABC Graphics \$40,000 for production and mailing, and ABC Graphics then pays \$13,000 for printing at 123 Printing and \$25,000 for postage at XYZ Mailing House), the union is required to file a subvendor report in addition to an EC report. For more information on subvendor reporting, please see OCPF Interpretive Bulletin 10-04 (Subvendor Reports).

Candidates E and F. The expected date of receipt is October 8. The group is required to electronically file an EC report with OCPF no later than October 15. The EC report will reflect a total expenditure in the amount of \$800 to ABC Printing Company on October 6, with three separate expenditure entries attributing \$400 (50%) to Candidate D, \$200 (25%) to Candidate E, and \$200 (25%) to Candidate F.

Example 7: On September 15, an individual spends \$5,000 with ABC Printing Company to design, print, and mail postcards referencing two candidates for school committee. The postcard is mailed to all residents of the municipality on October 1. The expected date of receipt is October 2. The individual is required to file an EC report on paper with the local election official no later than October 9. The EC report will reflect an expenditure to ABC Printing Company on October 1 in the amount of \$5,000. Because the postcards were mailed to the candidates' constituency in equal numbers, the individual will attribute the amount of the expenditure equally between the candidates - \$2,500 for mailings for each of the two candidates - by entering each item separately on the Form M18F and noting the candidate referenced in the "Purpose" field for each entry (i.e., \$2,500 spent at ABC Printing Company on October 1 for a mailing referencing Candidate G, and \$2,500 spent at ABC Printing Company on October 1 for a mailing referencing Candidate H, for a total expenditure of \$5,000).

Example 8: An association pays for flyers referencing a candidate on the ballot in the upcoming election. The flyers are delivered by the printer to a post office on August 1 (which is more than 90 days before the date of the election). The items will be mailed at a discounted bulk mail rate using the association's non-profit postage permit. Delivery is often delayed using bulk mail, and in this instance, the flyers will likely not be received until August 10 (which is less than 90 days prior to the election). For purposes of determining the date the items are "publicly distributed," the items are distributed on August 10. In this instance, a report would be required by August 17, i.e. seven calendar days after the date the items will be received.

For further information and guidance with respect to this memorandum, please contact OCPF at 617-979-8300.