H.3928

Report of the committee on Rules (under the provisions of House order No. 60) of its investigation and study of the existing House standing and emergency rules to ensure efficiency and transparency in the legislative process and in the administration of the House of Representatives (received by the Clerk on July 1, 2021).

H.R., July 6, 2021,— Placed on file.

House Rules Committee

Rules Report

Ordered pursuant to H.60 "An Order relative to a study of the rules of the House

Representative William C. Galvin, Chair, House Committee on Rules &
Representative Sarah K. Peake, Second Assistant Majority Leader

July 1, 2021

PART I: House Rules and Lessons Learned During Remote Operations

Introduction

The 192nd Biennial Session of the General Court began while Massachusetts remained under a continued State of Emergency and the country entered into what President Biden called at the time "the toughest and deadliest period of the virus." New daily case counts were consistently in the thousands and many of our local hospitals were overwhelmed with COVID-19 cases. As a result, the House voted to extend the Temporary Emergency Rules that were put in place to operate remotely rather than adopt permanent rules, which are traditionally approved in the first year of each biennial session. The House also approved an order to "conduct an investigation and study of the existing House standing and emergency rules to ensure efficiency and transparency in the legislative process and in the administration of the House of Representatives."

The Rules Order came at a time when the House was continuing to discharge its duties remotely and House Members were focused on responding to the pandemic and supporting constituents through unprecedented hardships including unemployment, access to vaccines and housing instability. The agility and flexibility required by the pandemic provided valuable lessons to the House both procedurally and administratively. As we emerge from the worst of the pandemic, we have a unique opportunity to incorporate lessons learned, thereby providing for a more efficient, flexible, and accessible legislative process. While the Temporary Emergency Rules expire on July 15, 2021, we understand that how the House Rules debate proceeds depends on the timeline for reopening the State House. We recommend debating House Rules in July with an effective date in the future that will be determined based on conversations with our

partners in the Senate, and further recommend that the current Temporary Emergency Rules remain in place until that date.

Remote Operations

The Temporary Emergency Rules (TER) drafted and passed at the onset of the COVID-19 pandemic represented a prodigious effort to nimbly adapt a centuries-old institution to unprecedented circumstances. The House of Representatives faced significant obstacles to implementing remote voting procedures, ranging from the practical to the constitutional. Before the House could even consider the technological and logistical hurdles of implementing remote voting procedures for a 160-member body, preliminary questions had to be resolved about whether remote participation was constitutionally permissible given the frequent use of the word "assemble" in the Massachusetts Constitution when referring to the authority of the General Court. By its nature, the House of Representatives is a deliberative body that is centered on debate and prudent consideration of legislation through the committee process. The TER that were ultimately adopted maintain the core democratic principles of the House, balance equity and access, and prioritize public health.

We believe the current TER provide a solid and reliable foundation that should be preserved for future use in the event the Commonwealth encounters an emergency—public health or otherwise. The most immediate concern is the potential for a resurgence of COVID-19 infection rates during the fall and winter months as pockets of the U.S. with low vaccination rates allow the Delta variant to take hold. We recommend embedding the TER into the standing rules as a Remote Voting Protocol with the option to activate remote voting procedures if needed.

Continued Flexibility and Accessibility

Remote operations provided an important opportunity for the House to evaluate its technological capabilities and to meet the demands of the digital age. The House implemented several changes that have increased public access to legislative proceedings that should be made permanent.

- The House made it easier to locate roll call votes on the Legislature's website. We recommend embedding this change permanently within the rules and continuing to work with Legislative Information Services (LIS) and the Clerk's office to ensure the House has the infrastructure to maintain the timely posting of all roll-call votes.

- The House began broadcasting informal sessions during the pandemic. We recognize that informal sessions often include long recesses and that this update requires additional staff and planning by the broadcasting and LIS teams. However, we believe these investments are worth pursuing. We therefore recommend that the House provide additional internal resources to continue livestreaming informal sessions.

- Similar to the language in the House's joint rules proposal, we recommend nuanced changes to the availability of committee votes. A committee vote is reflective of a specific proposal at a moment in time during the committee process and policy-development stage of legislation. Support or opposition can and should change as the legislation is refined through the Committee process and as Members learn more about any given topic from colleagues, experts and the public.

This Committee recommends that individual committees cause to be displayed on the General Court's website two sets of information: for any given petition, the aggregate number of votes in the affirmative, Members not voting and Members reserving their rights at an executive session or poll of a committee. The website should also display the individual names of members voting in the negative. This balanced approach allows for the development and redrafting of bills as they go through the committee process.

Hybrid Hearings

Throughout the spring and early summer, a House Working Group led by the Representative Kate Hogan (Speaker Pro-Tempore), Representative Bill Driscoll (House Chair – Joint Committee on COVID-19 and Emergency Preparedness) and Representative Joseph McGonagle (Chair - House Committee on Operations, Facilities and Security) surveyed House Chairs regarding the physical return to the workplace. We expect that work to continue as we engage with our counterparts in state government towards a safe and productive reopening of the State House. The vast majority of Chairs reported positive experiences with remote hearings and expressed a desire to retain elements of remote hearings in the future. We recommend transitioning from the current virtual hearing model to a robust and flexible structure for hybrid hearings in the long-term.

At its core, a hybrid structure is about equity. Such a structure not only helps increase ease and access for our constituents but should also help empower those who have faced barriers to physical participation in the past. Legislative hearings provide an opportunity for the public to lend their voices to policy development, as well as for House Members to gain a deeper understanding of feedback on any given policy proposal. We must seek to elevate voices of those

who have traditionally been underrepresented, and should focus on BIPOC voices, geographic diversity, and the disability community, among other constituencies.

There are, however, several outstanding decisions regarding such a model that the House must continue to explore, including the following:

- Testimony: Will committees continue to accept live, interactive video testimony and participation by Members and the public? Do we need to create flexibility, given scheduling and technology concerns, for a livestream-only option? What parameters do we need to put in place?

- Technology: What personnel and technical investments will the House need to make to implement a hybrid model? Will the MALegislature website continue to host the hearings or is another platform needed?

- Administration: Will we require that all hearings be livestreamed or will it be at the discretion of the Chair? Some Chairs have experienced problems with decorum given the anonymity inherent to remote hearings. Do we need to consider updated committee rules to address these issues?

House Personnel

The House of Representatives is a unique work environment: it is both a place of employment for staff, aides and officers (hereafter referred to as "staff"), as well as a constitutionally independent and deliberative branch of government, comprised of Representatives who are duly elected by their constituents to serve them. By design, the House is

the closest to the people of the Commonwealth and structured to be the most responsive. Integral to this function is the work of House staff who support both the efforts of the Member for whom they work and the constituents that Member serves. The House must continuously refine its efforts to support staff as we continue to seek a balance between providing an important public forum and protecting the employment rights and wellbeing of appointed staff.

In 2018, the House undertook comprehensive rules reforms and administrative changes to formalize the human resources function in order to better support staff and, as a result, improve the institution. Included in those efforts was the implementation of uniform leave policies and benefits for legislative aides; a detailed process for investigating and resolving equal opportunity and non-equal opportunity complaints; mandated harassment prevention trainings; and the creation of an Employee Engagement Officer.

Currently, the Employee Engagement Officer, who has already standardized staff onboarding sessions, is continuing to design and implement professional development opportunities beyond the established trainings for employees by classification (for example, staff director, researcher, legislative aide). We first undertook these trainings in 2019 just as the pandemic emerged and the Human Resources Department turned its attention to creating remote supports for staff. We recommend continuing trainings based on employment classifications and creating additional opportunities both based on subject matter expertise and job role.

Given the unique nature of legislative work, these opportunities are often hosted by external organizations such as the National Conference of State Legislatures (NCSL). Opportunities that highlight national best practices should be more widely available to staff on a continuing basis. We therefore recommend that the Employee Engagement Officer and House Human Resources create partnerships with national trade associations to provide a thoughtful

professional development program and encourage staff to participate. These opportunities may include virtual and physical seminars and workshops that may require travel. We also recommend that the House consider creating a fund within its operating account to ensure equitable access to these professional development opportunities.

Office Technology

The House values information technology as a tool for transparency and access and has a strong record of investing in our information and website infrastructure. We have twice been awarded the NCSL Online Democracy Award for the Legislature's public-facing, user-focused website, which supports filtered searches, the creation of user profiles to track bills, provides an at-a-glance budget timeline, and showcases popular bills and laws using a unique algorithm. The House has also invested heavily in an internal end-to-end document management system that allows legislators and staff to draft, sponsor, and publish legislation online. The "LAWs" application helps streamline the legislative process and manages all online sessions, hearings, and events. Throughout the development of both systems, the House collaborated with the State House ADA Coordinator to ensure our virtual content was in conformance with, or exceeded, ADA guidelines.

The next phase in the House's efforts to modernize operations is the development of enhanced inter-office communication. Under House Rule 91, House Human Resources and LIS are currently in the process of creating an internal web portal which will "provide relevant information on human resource policies and procedures, including, without limitation, the Rules of the House, each handbook published by the Director, explanations of complaint and investigation procedures, contact information for the Director, the EEO Officer and Counsel, and training schedules." We expect the House Intranet to be available to Members and staff during

the Fall of 2021 and trust that it will enhance the House's ability to effectively provide resources, information, and professional development opportunities to all staff. To help facilitate connections to the proper committee staff – while being mindful that staff are not elected officials and should not have their personal information made publicly available – we recommend including a committee directory on the House Intranet to help foster more seamless collaboration between offices. Best efforts must be made during the creation and use of this directory to ensure the personal information and privacy of unelected staff are protected.

To that end, while we continue to elevate information technology and believe in the power of online tools for fostering public discourse, we must respect the distinction between duly-elected Members and the private citizens who work in public service. Platforms like Zoom have recording features which are commonly employed by users to keep a record of meetings or to disseminate the record to those not in attendance. Therefore, this Committee also recommends that the House make training and education materials available that are focused on the privacy rights of employees, and pursue other internal policy changes that will better protect House staff in the digital age and allow for more candid and productive meetings with outside advocates.

Bill Summaries

This session, Speaker Mariano has placed an emphasis on empowering subject matter committees and bolstering staff functions within committees. It is our hope that these recommendations will reinforce the Speaker's vision for fostering a robust and professionalized committee structure. In an effort to provide additional, reliable information to the Members and create an internal resource library that can serve as a reference for future legislative work, we recommend that section-by-section summaries are sent to the Membership when a bill is being taken up in Full Formal Session. We also understand that committees of first report are the

places in which policy development is undertaken and that, by the very structure the committee process, it is natural and necessary for bills to change as the move through the Legislature. We therefore recommend that committees of first report produce a legislative overview, available upon request by Members, when releasing a bill that makes meaningful policy changes. The latter part of this recommendation is not meant to be exhaustive, and we believe that additional conversations are required within the Membership to effectuate this recommendation.

PART II: Preserving the Integrity of Massachusetts Lobbying and Campaign Finance Laws

Background and Purpose

The study order passed by the House on January 28, 2021 also tasked the Rules Committee with evaluating House policies and procedures "related to the conduct of advocates, including registered lobbyists and unregistered advocates and coalitions." Speaker Mariano elaborated on these concerns in an email to Members, echoing the experiences of Members and staff who have noticed a troubling rise in communications filtered through unregistered entities. As the House transitioned to remote operations due to the pandemic, the frequency and scale of these interactions continued to increase. While telecommunication software and social media hold tremendous promise for fostering a robust public dialogue on the important policy matters facing the Commonwealth, ease of access to public officials and employees does not render our lobbying and campaign finance laws obsolete. On the contrary, strict compliance and rigorous enforcement of these laws are even more urgently needed.

Various organizations have exploited gaps in our current laws, and the result has been a process that disadvantages the voices of advocates that make good-faith efforts to follow the

rules that safeguard our democracy. These organizations have been created in the regulatory vacuum in which organizations active in both lobbying and campaigning can classify themselves as neither lobbying organizations nor political committees. Statutory and regulatory changes are needed in order to maintain the integrity of these important laws.

As Part II of this report details below, there is a strong public interest in knowing the identities of those spending money to influence government decisions or the election of government officials. Of particular concern is the reliance on "coalitions" to engage in advocacy with government officials, whether unregistered or officially registered as nonprofit corporations. Our lobbying and campaign finance laws exist for this purpose, but these protections may be under siege by organizations shielding the true identities and activities of political actors. Much of this dynamic relates to the post-*Citizens United* landscape in which 501(c)(4) organizations have come to dominate public discourse as the preferred method of obscuring political speech. These organizations also avoid scrutiny and inspection by paying officers and staff to deploy to various campaigns and whose work may amount to unreported in-kind contributions. These same professionals also avoid detection under our lobbying laws by training volunteers to adopt and communicate the organization's message to government officials on the organization's behalf.

Strong lobbying and campaign finance laws are a core tenet of our democracy. They help preserve and maintain the integrity of the legislative process and prevent the corruption or appearance of corruption by public officials and employees. Still, it must be noted that the implementation and enforcement of regulations in this area is extraordinarily challenging as "discussion of public issues and debate on qualifications of candidates are integral to the operation of the system of government established in our Constitution." *Buckley v. Valeo*, 424

U.S. 1, 14 (1976). These activities, therefore, implicate "the most fundamental First Amendment activities" of speech, association, and petition. *Id*.

The discussion below focuses on important areas of Massachusetts's lobbying and campaign finance laws. An exhaustive overview is beyond the scope of this report, but the sections highlighted here focus on areas of potential improvement, either through statutory change or more vigilant enforcement by the relevant state offices. In particular, this Committee recommends that the House reform and revitalize section 44 of chapter 3 of the General Laws in order to better address gaps in the lobbying law. Where possible, and out of deep respect for the First Amendment activities of those engaged in our public discourse, regulators should focus resources on providing improved educational programming and resources in order to encourage self-compliance.

The Massachusetts Lobbying Law

The Massachusetts lobbying law (G.L. c. 3 §§ 39-50) uses a system of registration and disclosure of information by those seeking to influence the decisions of government officials. First enacted in 1973, and most recently amended in 2009, the original statement of intent remains instructive. According to that statement, the purpose of the lobbying law is to

> preserve and maintain the integrity of the legislative process, [by requiring] that the identity, expenditures and activities of certain persons who engage in reimbursed efforts…to persuade members of the General Court or the executive branch to take specific legislative actions, either by direct communication to such officials, or by solicitation of others to engage in such efforts, be publicly and regularly disclosed.

St. 1973, c. 981 § 1.

The statutory scheme seeks to accomplish this goal by requiring covered persons and entities to annually register with the Office of the Secretary of the Commonwealth, and file

periodic statements detailing lobbying activities, including operating expenses, political contributions, and the positions taken by their clients on relevant legislation. Clients themselves are also subject to certain registration and disclosure requirements. This information is accessible to the public on a searchable database maintained by the Office of the Secretary of the Commonwealth. Lobbyists, referred to in the statute as "executive agents" and "legislative agents," must also disclose any and all direct business associations with public officials in order to avoid the appearance of a conflict of interest. Lobbyists are also subject to various restrictions under not only the lobbying law, but the financial disclosure, conflict of interest, and campaign finance laws as well. For example, unless otherwise authorized by the State Ethics Commission, executive and legislative agents are prohibited from giving gifts "of any kind or nature" to public officials or public employees. G.L. c. 268B § 6. In addition, executive and legislative agents may not contribute more than $200 per calendar year to any one particular candidate or political committee, while individuals not covered by the lobbying law may contribute substantially more. It is therefore of great importance that public officials, public employees, candidates for public office, and persons and entities in frequent contact with the legislative process understand who is covered under the lobbying law.

Key terms and distinctions

For the purposes of this report, there are four terms that are particularly important to define fully: (i) legislative lobbying, (ii) legislative agent, (iii) lobbying entity, and (iv) Section 44 organization.

(i) Legislative lobbying is defined as

> any act to promote, oppose, influence or attempt to influence legislation, or to promote, oppose or influence the governor's approval or veto thereof including, without limitation, any action to influence the introduction, sponsorship, consideration, action or non-action with respect to any legislation; provided further,

> that legislative lobbying shall include acts to influence or attempt to influence the decision of any officer or employee of a city or town when those acts are intended to carry out a common purpose with legislative lobbying at the state level; and provided further, that legislative lobbying shall include strategizing, planning and research if performed in connection with or for use in an actual communication with a government employee…

G.L. c. 3 § 39.

This is a broad definition that encompasses "any act" to attempt to influence the prospects of legislation, including "strategizing, planning and research" performed for the purpose of eventual use in a communication to a government employee. Importantly, one does not have to actually communicate to a governmental official, nor be compensated, in order to satisfy the statutory definition of legislative lobbying. These two criteria are distinguishing characteristics of legislative agents.

(ii) Legislative agent is defined as

> a person who for *compensation or reward* engages in legislative lobbying, which includes *at least 1 lobbying communication* with a government employee made by said person. The term "legislative agent" shall include a person who, as part of his regular and usual business or professional activities and not simply incidental thereto, engages in legislative lobbying, whether or not any compensation in addition to the salary for such activities is received for such services.

G.L. c. 3 § 39 (emphasis added).

A legislative agent must be both compensated and communicate with a government official in order to satisfy this definition. However, legislative lobbying that is merely incidental to one's "regular or usual business or professional activities" is exempted. *Id*. One's lobbying activity is presumed to be incidental if one engages in legislative lobbying for less than 25 hours during a reporting period *and* receives less than $2,500 in compensation for such lobbying. *Id.*

(iii) A lobbying entity is defined as

> an entity providing lobbyist services, consisting of at least 1 legislative or executive agent, including foreign or domestic corporation, association, sole

> proprietor, partnership, limited liability partnership or company, joint stock company, joint venture or any other similar business formation.

G.L. c. 3 § 39.

A lobbying entity is what may be commonly called a "lobbying firm," and its definition is important to this report insofar as it helps distinguish it from the entity that is referred to in other chapters of the General Laws as a "lobbying organization" or "lobbying group": organizations registered under section 44 of chapter 3.

> (iv) A Section 44 organization is defined as
>
> any group or organization, however constituted, not employing an executive or legislative agent which as part of an organized effort, expends in excess of two hundred and fifty dollars during any calendar year to promote, oppose, or influence legislation, or the governor's veto or approval thereof, or to influence the decision of any officer or employee of the executive branch or an authority, including, but not limited to, statewide constitutional officers and employees thereof, where such decision concerns legislation or the adoption, defeat or postponement of a standard, rate, rule or regulation pursuant thereto, or to do any act to communicate directly with a covered executive official to influence a decision concerning policy or procurement…

G.L. c. 3 § 44.

Organizations that do not employ lobbyists but expend more than $250 during a calendar year on lobbying activity are required to register with the Office of the Secretary of the Commonwealth and to file detailed reports of their lobbying activity, including the names of every person who has contributed more than $15 toward the organization's lobbying efforts. *Id.* The $250 spending threshold can be satisfied by in-kind contribution of time and materials. LAO/10-16. The organization must also disclose their total lobbying expenditures, as well as all campaign contributions made by the organization. The registration and reporting requirements of section 44 do not apply, however, to an organization that meets all of the following criteria: the organization (i) does not employ an executive or legislative agent; (ii) does not realize a profit;

(iii) does not make a contribution to a political candidate; (iv) does not pay a salary or fee to any member for any activity for the benefit of the organization; and (v) spends not more than $2,000 on lobbying in a calendar year. *Id.*

Under the structure of the lobbying law, an organization that engages in legislative lobbying, but does not hire a legislative agent, or whose employees engage in only "incidental lobbying," or that relies predominately on the work of unpaid volunteers, must comply to the registration and reporting requirements of section 44, if not otherwise exempt.[1] Activity that would trigger the registration and disclosure requirements of this section include "calls to action" or "provid[ing] direction for an organized effort intended to influence a particular piece of legislation." LAO/11-32. An "organized effort" is one in which "two or more persons [are] engaged in coordinated conduct for the purpose of achieving a common goal." LAO/10-16. In addition, section 44 does not necessarily require that the organization communicate directly with a government official; soliciting others to make contact would be sufficient. LAO/11-32.

Section 44 compliance and future reforms

Section 44 organizations have escaped notice by the general public and, seemingly, state regulators: according to an official in the Secretary of the Commonwealth's office, there are zero organizations registered under this section for the year 2021. While the Secretary of the Commonwealth's lobbyist database contains registration information and reports for lobbyists, lobbying entities, and clients, Section 44 organization are noticeably absent, leaving them undiscoverable to the general public. Section 44 requires the Secretary to make filings under the section "open and accessible for public inspection during normal business hours." To date, this statutory requirement seemingly can only be met by an in-person visit to the Secretary's office.

[1] Organizations that Lobby Without a Paid Lobbyist, by Benjamin Fierro III from the MCLE, Inc. publication "Massachusetts Election Administration, Campaign Finance, and Lobbying Law" (5th Edition 2020).

Similarly, the required forms that must be completed by these organizations are not available online and must be requested by calling or emailing the Secretary's office. The absence of satisfactory online access to information about section 44 organizations may be preventing organizations that are potentially covered under the section from complying with its requirements.

Another obstacle to compliance may be irrelevance of the section as a result of a narrowing window of applicability. There are many ways in which an organization can become exempt from the requirements of section 44. Part of this may be the result of the Legislature's history of favoring the registration of individual persons as executive and legislative agents. Notably, the 2009 reform effort reduced the hours and compensation requirements for incidental lobbying by half. This means that a greater number of people are required to register as lobbyists, thereby exempting an associated organization from registering under section 44.

Recalling back to the statement of intent from the original lobbying law enacted in 1973, the Legislature sought to achieve its goal of preserving and maintaining "the integrity of the legislative process" by scrutinizing attempts to persuade public officials by *both* direct communication *and* "by solicitation of others to engage" in communication. St. 1973, c. 981 § 1. In the years since 1973, the Legislature has created a rigorous regulatory structure as applied to individual executive and legislative agents. During that process, and perhaps as a result of it, the similarly rigorous requirements for lobbying organizations under section 44 may have atrophied. Given the amorphous nature of organizations, the ease of communication and organization, and troubling financial practices in the post-*Citizens United* age, reforms to section 44 of the lobbying law may be necessary to truly capture the full scale of the organized efforts to influence

government officials.

The Massachusetts Campaign Finance Law

Overview

If the lobbying law relates to the spending of money on speech intended to influence a government official in the performance of their duties, then the campaign finance law deals with the spending of money on speech intended to influence voters in their selection of those government officials. Put simply, the campaign finance law imposes certain restrictions on contributions to candidates and political committees and the expenditure of those contributions, and mandates detailed record-keeping and public disclosure of these transactions. The primary vehicle of campaign finance activity and, consequently, regulation, is the political committee, which is defined 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

G.L. c. 55 § 1.

"Political committee" is therefore a generic term for four broad categories found in the campaign finance law: (i) candidate committees; (ii) political action committees (PACs), including traditional PACs, People's Committees, and independent expenditure PACs; (iii) political party committees; and (iv) ballot question committees.[2] Once formed, these political

[2] Candidate Committees, Political Action Committees, People's Committees, Party Committees, and Ballot Question Committees, by Maura D. Cronin from the MCLE, Inc. publication "Massachusetts Election Administration, Campaign Finance, and Lobbying Law" (5th Edition 2020).

committees must comply with various registration and reporting requirements with the Office of Campaign and Political Finance (OCPF). These requirements "form the foundation of the campaign finance law: that voters know on a timely basis who is attempting to influence the election process, and how and to what extend (through raising and spending money) that process is being influenced."[3] This report focuses primarily on candidate committees and political action committees, and when entities must register as political committees and disclose campaign contributions and expenditures.

A contribution is defined, in part, as

> a contribution of money or *anything of value* to an individual, candidate, political committee, or person acting on behalf of said individual, candidate or political committee, for the purpose of influencing the nomination or election of said individual or candidate…

G.L. c. 55 § 1 (emphasis added).

A contribution must be disclosed by the recipient political committee and are subject to contribution limits that vary depending on the contributor. Contribution includes "in-kind" contributions, which is the "use of anything of value by a political committee, other than of those things which are owned by the political committee or for which the political committee has paid the fair market value." 970 CMR 2.07(3).

In contrast, an independent expenditure is defined as

> an expenditure made or liability incurred by an individual, group, association, corporation, labor union, political committee or other entity as payment for goods or services to expressly advocate the election or defeat of a clearly identified candidate…

G.L. c. 55 § 1.

[3] Candidate Committees, Political Action Committees, People's Committees, Party Committees, and Ballot Question Committees, by Maura D. Cronin from the MCLE, Inc. publication "Massachusetts Election Administration, Campaign Finance, and Lobbying Law" (5th Edition 2020).

Independent expenditures—in order to remain independent—cannot be made in cooperation or in consultation with a candidate or political committee. Independent expenditures are not subject to maximum limits as a result of the decision in *Citizens United*.

Corporate ban on contributions

Since 1907, Massachusetts has banned corporations from making campaign contributions, a ban that has survived decades of corporate attack, most recently in 2018 with the SJC decision in *1A Auto, Inc. v. Director of Office of Campaign and Political Finance*, 480 Mass. 423 (2018). In 2009, the Legislature responded to the growth of modern business entities by broadening the ban to include any "professional corporation, partnership, [or] limited liability company partnership." G.L. c. 55 § 8. This ban prohibits all profit-making business entities from making contributions to candidate and candidate committees and from establishing or contributing to a PAC. Non-profit-making entities, such as unions, associations, and nonprofit corporations, in contrast, are permitted to contribute to campaigns and form and administer PACs.

The controlling U.S. Supreme Court decision on this topic is *Federal Election Commission v. Beaumont*, 539 U.S. 146 (2003), in which the Court upheld the federal corporate contribution ban by distinguishing campaign contributions and independent expenditures. According to the Court, campaign contributions are mere "general expressions of support" for a candidate while independent expenditures are themselves a complete form of political expression. *1A Auto, Inc.*, 480 Mass. 423 at 429 (2018) citing *Beaumont*, 539 U.S. 146 at 162 (2003). Restrictions on corporate contributions, therefore, encroach on First Amendment rights to a lesser extent, and will be upheld if they are closely drawn to match a sufficiently important state interest. Chief among these import state interests is the prevention of corruption and the

appearance of corruption, and to prevent corporations from being used by individuals to circumvent contribution limits. *Id.* Importantly, the notorious decision in *Citizens United* did not disturb *Beaumont*, but rather, *Citizens United* struck down limits on independent expenditures by corporations. As a result, Massachusetts corporations are permitted to make unlimited independent expenditures. However, corporations must still report the independent expenditure to OCPF. G.L. c. 55 § 18A.

The rise of the 501(c)(4) organization

While there may be no dollar limit on independent expenditures, there are still reporting requirements. *See* G.L. c. 55 § 18A. The nonprofit corporation organized under section 501(c)(4) of the Internal Revenue Code is recognized as the vehicle of choice for those who wish to obscure their political contributions from public inspection. These organizations are referred to as "social welfare organizations" which exist exclusively to promote a social welfare purpose. IRS guidelines make clear that the term "social welfare" does not include "direct or indirect participation or intervention in political campaigns on behalf of or in opposition to any candidate for public office," but may include "some" political activities, which requires only that the political activities are not their primary purpose.[4] Absent additional IRS guidance, most 501(c)(4) organizations interpret this restriction to mean that at least 51 percent of their expenses should be dedicated to anything but political activity. That 51 percent could instead be spent on lobbying, for example, which the IRS has distinguished from political activity.

As a result, nonprofits that operate entirely in the policy and political sphere have proliferated as they raise unlimited funds through "membership dues." If a 501(c)(4) organization solicits funds for a political purpose, the funds received would be considered

[4] https://www.irs.gov/charities-non-profits/other-non-profits/social-welfare-organizations

political contributions and subject to disclosure. Consequently, in Massachusetts and elsewhere, solicitations by 501(c)(4) organizations are carefully worded to distinguish their activity as "advocacy" and "voter education efforts." Importantly, corporations and other profit-making entities barred from making political contributions may make donations for the purported advocacy and education efforts of the 501(c)(4) organization. These dues and other fundraising revenues can then be used to make independent expenditures on behalf of a particular candidate or transferred to an affiliated PAC. While a PAC must disclose the identify of its contributors and the amount contributed, both for the sake of transparency and to track applicable campaign contribution limits, a contribution made by a nonprofit would reveal only the organization's name and not the identity of the individuals channeling money to the organization.

Political nonprofits

With 501(c)(4) organizations operating so closely to their legal boundaries, regulators and lawmakers alike should take great interest in the question of when a nonprofit organization engages in enough political activity that would require them to register as a political committee. As a preliminary matter, an organization that receives any funds from business entities may not make political contributions. According to OCPF regulations, an organization may contribute up to $1,000 to a candidate's committee, $500 to a traditional PAC, and $5,000 in the aggregate during a calendar year to all political party committees of any one particular party without having to register as a political committee. 970 CMR 1.22(2). However, an organization must register as a political committee if it either (i) receives political contributions *or* (ii) makes contributions to candidates, traditional PACs, or party committees that exceed the "incidental threshold." Any receipt of money or anything of value to be used to make a contribution to a candidate or political committee triggers the registration requirement. Whether a donation

satisfies the definition of a political contribution depends on careful scrutiny of the timing and content of solicitations and the timing of receipts. 970 CMR 1.22(3)(b). If the organization does not receive contributions but uses its existing treasury funds to make contributions that are "more than incidental when compared to the organization's revenues," then the organization must register as a political committee. 970 CMR 1.22(b)(3). Aggregate contributions are "more than incidental" when they exceed the lesser of $15,000 or 10 percent of the organization's gross revenue. *Id*. If either of these conditions are met, an organization must immediately register as a PAC which will allow the public greater access.

Given the difficulty of enforcement of these rules and the nature of the conduct on display by some nonprofit corporations, OCPF retains the authority to seek additional verifications to ensure compliance. For example, OCPF may require unregistered organizations to file a written disclosure that affirms the organization did not make contributions in excess of the incidental threshold. 970 CMR 1.22(5)(a). In addition, OCPF may require political committees that receive contributions from unregistered organization to affirm that the organization made the contribution solely from general treasury funds and not from funds received for a political purpose. 970 CMR 1.22(5)(b). Importantly, these are discretionary safeguards and it is unclear how frequently OCPF employs these tools.

Conclusion

While the 501(c)(4) vehicle has shown a potential for abuse, most are engaged in good-faith efforts to advocate for the particular cause for which they were created within the confines of the law. It bears repeating that strict compliance to the intricacies of the lobbying and campaign finance laws is challenging, especially for the relatively inexperienced. It should be noted that since the announcement of this study order and the following press coverage,

organizations that may have been operating in violation of the current lobbying laws, campaign finance laws, or both, have since made efforts to be in compliance. These efforts are appreciated, and all operators engaged in our vital civic conversation should continue to seek professional guidance and use helplines operated by state regulators.

Massachusetts is not unique in experiencing these challenges. Every state is facing the same legal landscape created by the U.S. Supreme Court's decision in *Citizens United*. Many states have begun experimenting with solutions, and the Massachusetts House of Representatives is equally committed to protecting the integrity of our legislative process.