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Comments of the American Federation of State, County and Municipal Employees, AFL-CIO Regarding the New York City Campaign Finance Board's Proposed Independent Expenditure Rules

Introduction

These comments on the proposed independent expenditure rules ("Proposed Rules") of the New York City Campaign Finance Board ("CFB") are submitted on behalf of the American Federation of State, County & Municipal Employees, AFL-CIO ("AFSCME"). AFSCME is a labor union whose 1.6 million members are predominantly public service workers employed in a wide variety of fields, including as health care workers, social services providers, school employees, child care providers, emergency first responders, corrections officers, and many others. Approximately 150,000 AFSCME members are residents of New York City ("City").

AFSCME and its affiliated unions communicate regularly with AFSCME members in the City on any number of subjects that may affect their work, their lives, their livelihoods and their communities. As a means of fulfilling its constitutional objectives,[1] AFSCME engages its members with respect to federal, state and local public policy issues, candidates and officeholders with a goal of fostering their active participation in our democracy.

Additionally, but not necessarily separately, AFSCME and its affiliated unions communicate with AFSCME members on matters that directly impact their wages, benefits and working conditions, including their contract negotiations with City officials, some of whom are elected officials and candidates for public office.

The importance of public policy issues dealt with by the City government to AFSCME members living in or employed by the City cannot be overstated. It affects their livelihoods, the children's education, their safety, their health care, their future, and countless other aspects of their lives. And, they rely, in part, on their union to analyze various proposals and provide them with relevant information about

[1] See, Int'l. Const., American Federation of State, County & Municipal Employees, at Art. II, § B (2010).

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how those proposals will affect them. Indeed, it is one of the reasons many AFSCME members join and pay dues to the union.

Apart from, and in addition to, the internal union membership communications from AFSCME or its affiliated unions to AFSCME members are the communications to the general public that AFSCME or its affiliated unions may fund. Many of these communications reference elected officials or candidates. Some of these communications truly are expenditures that advocate the election or defeat of candidates. Many are not. But, almost all of these communications contain substantial discussion of public policy issues important to our communities. Often, AFSCME communicates with the general public with the goal of persuading them to contact their elected officials about important legislative or executive issues on the immediate horizon. Key to persuading the general public to engage in these contacts is educating them about an issue and why a particular position on that issue is right or wrong. It is important to note that many of these grassroots lobbying communications are intended to affect public policy, not an election. This is true even when those communications occur close in time to an election. Policymaking does not pause for elections.

AFSCME is fully cognizant that the CFB is required to adopt rules "concerning the form and manner in which independent expenditures are to be reported and disclosed...." City Charter § 1025(a)(15). And, while AFSCME believes that individuals and entities who spend money on communications directed at influencing the votes of the general public at an election should disclose who they are, the amount they are spending, and the source of funds received for that purpose, we also believe that such disclosure requirements must be reasonable, easily understood, and not crafted so as to stifle political speech. It is our opinion that the CFB's proposed rules are so broad as to reach speech not intended to be encompassed by the Charter Amendment now codified at § 1052(a)(15), are unnecessarily burdensome, will hinder (rather than help) the public's efforts at better understanding which entities and what funds are being spent to influence their votes, and – considering the severe penalties mandated by the Charter Amendment - so imprecise as to suppress as to core First Amendment activities for fear of punishment.

Many, but not all, of our concerns relate to the CFB's Proposed Rule § 13-02 and definitions referenced therein. For this reason, our comments are largely (but not entirely) confined to that provision. As we explain more fully below, we urge the CFB to: (1) revise § 13-02 to omit its reference to "electioneering communication;" (2) modify its definition of "express advocacy communication;" and (3) exclude *all* membership communications from the reach of the Proposed Rules.

I. The Charter Amendment and the Scope of Proposed Rule § 13-02.

On November 2, 2010, New York City voters approved Question 2, a ballot issue proposal authored by the New York City Charter Review Commission ("CRC"), to amend the City Charter to require, among other things, the disclosure of "independent expenditures" with respect to City elections ("Charter Amendment"). The language of the Charter Amendment, now codified at § 1052(a)(15) of the City Charter, is limited in scope and sets forth a reasonable framework for providing adequate information to the general public about the source of independent expenditure directed at influencing their votes in City elections.

The Charter Amendment requires that "[e]very individual and entity that makes independent expenditures aggregating one thousand dollars or more in support of or in opposition to any candidate in any covered election, or in support of or in opposition to any municipal ballot proposal or referendum, shall be required to disclose such expenditure to the board." Charter § 1052(a)(15)(b). Those whose independent expenditures aggregate at least $5,000 in the twelve months preceding a covered election must also disclose the identity of any individual from whom they received contributions of at least $1,000, and the identity of any entity from which they received contributions in any amount, during those twelve months preceding the election. *See*, id.

With certain exceptions, the Charter Amendment defines "independent expenditure" as a "monetary or in-kind expenditure made, or liability incurred, in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum, where no candidate, nor any agent or political committee authorized by a candidate, has authorized, requested, suggested, fostered or cooperated in any such activity." Charter § 1052(a)(15)(a)(i).

The Charter Amendment also provides that the name of any individual or entity making independent expenditures aggregating $1,000 must be disclosed in any literature, advertisement or other communication paid for by the individual or entity. *See*, Charter § 1052(a)(15)(c).

The Charter Amendment does, however, authorize the imposition of severe penalties, *i.e.*, civil penalties of up to $10,000 for *any* violation – regardless of knowledge or intent – of the new disclosure requirement, and provides for misdemeanor prosecutions for intentional and knowing violations in addition to any other penalty imposed. See, Charter § 1052(a)(15)(d).

It is apparent from the language, the legislative intent and the legislative history of the Charter Amendment, that the reporting and disclosure regime established thereby was intended to encompass only communications expressly advocating the election or defeat of a clearly identified candidate, ballot proposal or referendum, or, at the very most, communications that are the functional equivalent of express advocacy.[2] The language of the Charter Amendment

[2] Language constituting the "functional equivalent of express advocacy" is "susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate." *See*, *Federal Election Commission v. Wisconsin Right to Life, Inc. ("WRTL")*, 551 U.S. 449, 469 (2007).

subjects to reporting and disclosure only expenditures "in support of or in opposition to a candidate," municipal ballot proposal or referendum and made independently of any candidate, candidate's agent or authorized political committee. *See*, Charter § 1052(a)(15)(a)(i). Not included in its language is any reference to issue education or advocacy, or grassroots lobbying on, for example, executive or legislative actions that may be taken by the Mayor or City Council, respectively. Judging by its plain language, its scope is narrow, restrained, and limited to communications aimed at moving voters to cast their ballot for or against a particular candidate, ballot proposal or referendum.

In contrast, the broad scope of the regulated activity encompassed by Proposed Rule § 13-02(a) and the various proposed definitions upon which § 13-02(a) depends for effect includes a wide range of activity not intended to influence voters at an election, but are instead legitimate issue advocacy communications or grassroots lobbying communications that may have no or only some casual relation to an election. *See*, *e.g.*, CFB's Guide to the Proposed Independent Expenditures Rules for New York City Elections at 1. Because the Proposed Rules reach well beyond the language and intended scope of the Charter Amendment, we urge the CFB to omit §§ 13-02(a)(i) and 13-01(e) from its final rules and revise the definition of "express advocacy communication" by deleting § 13-01(g)(ii) and revising § 13-01(g)(i) to clarify that it extends only express advocacy, or, at most, to and its functional equivalent, and does not reach grassroots lobbying, issue advocacy or other speech not aimed at exhorting a voter to cast his or her ballot in a particular way. In other words, we ask the CFB to hew its rules more closely to the language and intent of the Charter Amendment approved by City voters.

a. The Meaning of "Independent Expenditure" as Set Forth in the Charter Amendment.

The Charter Amendment imposes its reporting and disclosure requirements exclusively upon the funders of "independent expenditures" aggregating in excess of certain thresholds. *See*, Charter § 1052(a)(15)(b). For purposes of these requirements, "independent expenditure" is defined as "a monetary or in-kind expenditure made, or liability incurred, *in support of or opposition to a candidate* in a covered election or municipal ballot proposal or referendum...." Charter § 1052(a)(15)(a)(i). (Emphasis added.)

When the CRC presented the final version of the proposed Charter Amendment to the public, it explained its basis for doing so. It noted both the existing disclosure requirements the City's campaign finance law imposes upon candidates for City offices and the law's failure to provide for disclosure of "expenditures that are made independent of any candidate, but that are nonetheless made *with the express intent of influencing* the outcome of municipal elections and ballot proposals." *See*, 2010 Final Rep't. of the New York City Charter Rev. Comm'n ("Final Report") at 12 (emphasis added). The CRC explained that "independent expenditures have become and increasingly significant part of *election-related* spending" in recent years; that

requiring disclosure of these independent expenditures would "provide critical information and context for members of the public and help them to evaluate advertising messages *aimed at influencing their votes*[;]" that such requirements would assist citizens of the City in assessing "the content of political communications *intended to influence their behavior at the polls*[;]" and, that the proposed requirements would apply to "independent expenditures *supporting or opposing candidates*" or ballot proposals. Id. at 13, 15 (emphasis added). Missing from the CRC's explanation of the proposed Charter Amendment is any suggestion that the proposed reporting and disclosure requirements would apply to issue advocacy or education, grassroots lobbying, or any activity other than exhorting voters to vote for or against a candidate or ballot proposition.

As an additional basis for the need for City reporting and disclosure requirement for independent expenditures, the CRC pointed to a potential uptick in independent expenditures resulting from the U.S. Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission.*[3] *See*, id. at 14. In *Citizens United*, the Court struck down the Federal prohibition on corporate and union "independent expenditures[4]" as well as the Federal prohibition on corporate and union disbursements for "electioneering communications" containing the functional equivalent of express advocacy. *See*, 130 S.Ct. at 913.[5] The statutory provisions invalidated in *Citizens United* - as they have been construed by the Supreme Court[6] – did not prohibit the use of corporate or union funds to engage in genuine issue advocacy, grassroots lobbying, or any sort of communications other than express advocacy and its functional equivalent.[7] Because such communications were not prohibited prior to *Citizens United,* an increase in spending on such activities as a result of that decision does not logically follow. But, it may be presumed that an increase in spending on previously prohibited - but newly permissible - communications (corporate- and union-funded express advocacy and its functional equivalent) would result from a change in the law.[8] Thus, the reporting and disclosure regimes intended by

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[3] 130 S.Ct. 876 (2010).

[4] Under Federal law, as construed by the U.S. Supreme Court, "expenditure" as used in the term "independent expenditure" means a communication "that in express terms advocate[s] the election or defeat of a clearly identified candidate" for office. *See Buckley v. Valeo,* 424 U.S. 1, 44 (1976).

[5] The Court upheld the electioneering communications disclosure requirements as applied to Citizens United. *See, id.* at 916.

[6] *See WRTL*, 551 U.S.

[7] But, the corporate- and union-funded communications containing the functional equivalent of express advocacy were only prohibited when they were publicly distributed on television or radio in the 30 days before a candidate's primary election or in the 60 days before a candidates general election. Prior to *Citizens United*, corporations and unions were permitted to engage in speech constituting the functional equivalent of express advocacy through media other than television or radio at all times, and on television or radio at times other than those periods leading up to the primary and general elections.

[8] Under New York law, union spending on express advocacy or its functional equivalent was not prohibited with respect to State and local elections prior to *Citizens United.* However, corporate spending for express advocacy

the CRC to address increased spending resulting from *Citizens United* would naturally be directed at express advocacy and, in some media, its functional equivalent.

In its Final Report, and in support of its proposing the Charter Amendment, the CRC makes a number of references to two letters CRC Chair Matthew Goldstein received from CFB Executive Director Amy M. Loprest, one dated May 4, 2010, the other dated May 24, 2010. *See*, Final Report at 12 – 14. In Ms. Loprest's May 4 letter, Ms. Loprest asks the CRC to address the lack of a disclosure requirement under City law for independent expenditures "*on behalf of candidates*," resulting in a situation where "[i]ndependent actors are permitted to spend freely in *New York City elections in support of (or opposition to) candidates* and ballot proposals" and such spending is "hidden from public view." *See* Letter from Loprest to Goodman, May 4, 2010 (emphasis added). Ms. Loprest asked that CRC consider a Charter amendment requiring disclosure of "independent expenditures that *support or oppose candidates in City elections* or support or oppose ballot proposals." *See* id. (Emphasis added). Notably, it is not suggested that the desired reporting and disclosure requirements would encompass spending on grassroots lobbying on legislative matters before the City Council or on executive actions that may be taken by the Mayor.

With her May 24, 2010 letter to Mr. Goldstein, Ms. Loprest includes, along with a copy the Federal regulations governing the reporting of independent expenditures, statutes or regulations from three (3) municipalities and twenty-nine (29) states which provide for the reporting and of independent expenditures in their respective elections. Thirty-two (32) of those thirty-three (33) statutes and regulations provided by Ms. Loprest as examples of independent expenditure reporting regimes require reporting and disclosure only for express advocacy communications. The Florida statutory provision included by Ms. Loprest is Florida's, which covers primarily "independent expenditures," which are limited to express advocacy communications, but also applies to certain "electioneering communications" not covered by Florida's *separate* reporting provision for electioneering communications.[9] Tellingly, other than the Florida statute, in providing examples of independent expenditure disclosure regimes to the CRC, it appears that Ms. Loprest did *not* include any of the various Federal or state disclosure provisions covering non-express advocacy communications[10] even though many of the jurisdictions whose statutes or regulations she provided to and were cited by the CRC in its Final Report also have disclosure provisions that reach beyond express advocacy.[11] It is apparent from these circumstances that "independent expenditure," as defined in the Charter Amendment was meant to include only express advocacy.

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communications was capped at a maximum of $5,000 per year. So, it is possible that the lifting of this cap will result in increased corporate spending on express advocacy in New York.

[9] *See* Fla. Stat. § 106.0703.

[10] This includes the Federal electioneering communications disclosure and reporting provision upheld in *Citizens United.*

[11] *See, e.g.*, Colo. Const. art. 28 § 6; N.C.G.S.A. § 163-278.12C; Idaho Code § 67-6630.

b. The Communications Regulated Under Proposed Rule § 13-02 Extends Beyond "Independent Expenditures" as Defined in the Charter Amendment.

Under Proposed Rule § 13-02, the CFB construes the phrase "in support of or opposition to a candidate in a covered election, or a ballot proposal," which appears in the Charter Amendment's definition of "independent expenditure" to include a communication that falls within either of two definitions set forth in other provisions of the Proposed Rules. These definitions are: (1) "electioneering communication;" and (2) "express advocacy communication." Both of these definitions extend beyond the intended scope of the Charter Amendment, and, for that reason, we respectfully submit that the CFB is without authority to adopt Proposed Rule § 13-02 as currently drafted. The CFB should revise the Proposed Rules so that their regulatory scope does not exceed that of the Charter Amendment.

The CFB defines "electioneering communication" as "any public communication disseminated within 90 days of a covered election that clearly identifies a candidate and (1) refers to the personal qualities, character, or fitness of that candidate; (2) supports or condemns that candidate's position or stance on issues; or (3) supports or condemns that candidate's public record."[12] Proposed Rule § 13-01(e). As defined by the CFB, "electioneering communications" reaches well beyond express advocacy or its functional equivalent.

As is plain from its language, it encompasses grassroots lobbying activity directed at elected officials who may be candidates. For instance, a newspaper ad urging New Yorkers to contact their councilmembers thanking them for opposing privatization of public services, and which included a list of names and phone numbers for councilmembers who opposed privatization is an electioneering communication if it ran on one of the 180 days of an election year covered by the definition. Despite the fact that the ad makes no reference to any person's status as a candidate, does not mention an election and does not discuss voting, the ad's funder would be subject to the extensive reporting and disclosure requirements of the Proposed Rules.

As explained above, the Charter Amendment's reach was intended to cover only express advocacy and, perhaps its functional equivalent. It was not intended to regulate issue advocacy or grassroots lobbying communications, or any communication beyond those exhorting members of the general public to cast their vote a particular way. For this reason, we ask that the CFB bring the Proposed Rules into line with the intended reach of the Charter Amendment by omitting Proposed Rule § 13-02(a)(i), and removing Proposed Rule § 13-01(e).

In Proposed Rule § 13-01(g) the CFB defines an "express advocacy communication" as:

> (i) A public communication containing a phrase including, but not limited to, "vote for" "re-elect," "support," "cast your ballot for,"

[12] The Proposed Rules do not define the phrase "supports or condemns."

"[Candidate] for [elected office]," "vote against," "defeat," "reject" or a campaign slogan or words that in context and with limited reference to external events, such as the proximity to the primary or election, can have no reasonable meaning other than to advocate the passage or defeat of a ballot proposal or the election or defeat of one or more clearly identified candidates; or

(ii) When taken as a whole and with limited references to external events, such as the proximity to the primary or election, a public communication could only be interpreted by a reasonable person as containing advocacy of the passage or defeat of a ballot proposal or the election or defeat of one or more clearly identified candidates because:

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more ballot proposals or clearly identified candidates or encourages some other kind of action.

It is possible that the CFB intends for Part (i) of the definition *Buckley* express advocacy and its functional equivalent. If this is the case, we recommend that, in order assuage concerns over vagueness, that the CFB replace the language "that in context and with limited reference to external events, such as the proximity to the primary or election, can have no reasonable meaning other than to advocate the passage or defeat of a ballot proposal or the election or defeat of one or more clearly identified candidates" with the phrase "that is susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate, ballot proposal or referendum."

As for Part (ii) of the Proposed Rule, which closely tracks the language of 11 C.F.R. § 100.22(b), it is our view, and as other commenters in this proceeding have ably explained,[13] that that portion of the Proposed Rule is unconstitutionally vague and extends well beyond the scope of the Charter Amendment. The CFB should omit it from the final rules.

II. The CFB Should Exempt All Membership Communications from the Reporting and Disclosure Requirements.

As discussed above, that Proposed Rules subject a broad range of communications to reporting and disclosure. Falling within the ambit of the rules are communications are communication urging individuals to contact their elected officials (who may happen also to be

[13] *See*, Comments of Laurence E. Gold on Behalf of SEIU Local 32BJ at 6-7.

candidates) regarding policy issues, communications thanking elected officials (who may also happen to be candidates) for positions or votes taken, or to update members on contract negotiations with the Mayor. *See* Proposed Rule §§ 13-02(a), 13-01(e), 13-01(g). The broad sweep of these rules is especially problematic when applied to the non-public internal communications of a membership organization.

a. Failure to Exempt All Membership Communications From the Scope of Reportable Activities Will Subject Membership Organizations to Extraordinary Burdens.

Proposed Rule § 13-02(c) exempts from the reporting provisions of the Proposed Rules a narrow, limited class of membership communications. This limited exemption applies to a "routine newsletter or periodical, or telephone calls, or communications relating to the internal deliberations of the entity's endorsements, directed solely to an entity's own members or stockholders[.]" Proposed Rule § 13-02(c).[14] This exemption will leave subject to truly unnecessary public disclosure a great many non-public internal communications and associational activities. For example, AFSCME maintains on its website a password-protected, members-only page where certain political content is placed for viewing only by AFSCME members. Under the proposed rules, if, during the electioneering communications period described in Proposed Rule § 13-01(e), AFSCME posted in this area a report on its internal membership polling explaining that AFSCME members were opposed to the policy positions of City elected officials who are also candidates, or that AFSCME members were dissatisfied with a particular candidate's performance in City office, under the Proposed Rules, AFSCME would be required to turn over this internal report to the CFB, where it would be made available for public consumption, and the costs associated with that report must be reported, along with the all of the unions receipts from *any* entity and certain individuals during the *entire* covered election. *See* Proposed Rules §§13-04(a)-(b), 13-03(ii).

Likewise, if, during an election year, AFSCME members were in contract negotiations with an incumbent Mayor running for re-election, and the union, (or one of its affiliates) sent a mailing to members (on one of the 180 days within the electioneering communications period) updating them on the negotiations, setting forth the union's position and criticizing the Mayor's bargaining position on, for example, lay offs, the union must, under the Proposed Rules, turn that document over to the CFB, report the costs associated with mailer, and, again, open up the unions books for public inspection. *See*, id. This is the case, despite the fact that the mailing is entirely unrelated to any election, and was never intended to influence the public on any matter.

As you may imagine, the idea that providing its members with critical information relating to the process of negotiating the terms and conditions of their employment – a vital responsibility of any labor union – requires a labor union to place its accounts on the public records and provide its private, internal negotiating reports to the government and the general public during the course of those negotiations is repugnant. Neither this requirement nor its consequences were contemplated by the Charter Amendment, and inclusion of membership

[14] We note that the CFB does not define "routine newsletter" or "periodical."

communication within the sweep of reportable activities will impair both the collective bargaining process and diminish AFSCME's effective representation of its members.

It is easy to see from the examples above that including membership communications within the realm of communications subject to disclosure under the Proposed Rules will unnecessarily burden organization who are merely fulfilling their responsibilities toward their membership[15] and without any identifiable attendant public need or benefit. For this reason, the CFB should adopt a blanket exemption for membership organizations.[16]

b. Disclosure of Membership Communications Does Not Fulfill the Purposes of the Charter Amendment.

In its Final Report, the CRC recommended that the Charter "be amended to require the disclosure of independent expenditures" in order to "provide the *citizens of the City* with more complete and timely information so that they can properly assess the content of political communications *intended to influence their behavior.*" Final Report at 15. Further, the CFC stated that requiring independent expenditures to be reported to the CFB "would provide critical information and context for *members of the public* and *help them* to evaluate advertising messages *aimed at influencing their votes. See*, Final Report at 13. At no point during the drafting of the Charter Amendment did the CRC or CFB express concern about the effect that non-public communications from a membership organization to its members may have on the electoral process. Rather, the legislative history of the Charter Amendment shows that the concern to be addressed by the Charter Amendment was the general public's lack of information about messages intent on influencing the public's behavior at the polls.

If a communication is not disseminated to the general public, it will not influence their behavior and the polls. There is plainly no need for the public to assess the content of, have information or context about, or evaluate a communication that was neither distributed to them nor aimed at influencing their votes.

On the other hand, AFSCME members are familiar with their union and understand the role it serves in their workplace and their community. They are aware of the union's internal operation and organization, have the right to participate fully and freely in the union, including the right to vote for union officers and to run for union office, to vote on their bargaining contracts, and to withdraw from membership. Being dues payers, they know where the union

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[15] "If an organization...believes that certain candidates pose a threat to its well being or the well being of its members or stockholders, it should be able to get its view to those members and stockholders. As fiduciaries for their members and stockholders, the officers of these institutions have a duty to share their informed insights on all issues affecting their institution with their constituents. Both members and stockholders have a right to expect this expert guidance." *Pipefitters Local Union No. 652 v. United States*, 407 U.S. 385, 431 n. 42 (1972).

[16] As an alternative to promulgating a blanket exemption for membership communications, the CFB may interpret its definition of "public communication" as not encompassing membership communications, as such communications are not a "form of communication to the general public." *See*, Proposed Rule § 13-01(l). This presumes, of course, that in the CFB's final rules, only the making of public communications triggers the reporting and disclosure requirements, and, if so, the definition of public communication in that rule is substantially similar to that in the Proposed Rules.

receives its funds. Unlike a non-member who may receive a communication distributed by AFSCME to the general public, AFSCME members have a "reciprocal, voluntary and mutually agreed to relationship with the sponsor of the [membership] communication" they receive from their union. *See*, Washington Disclosure Commission Interpretation 08-01, *Internal Political Communications* (Apr. 17, 2008) (explaining the difference in relationships between the audience and sender of an internal communication *vis-à-vis* that between the audience and a sender of a mass communication). Members of an organization are well-positioned to assess for themselves the credibility of the source of the membership communications they receive and to evaluate the messages contained therein.

Thus, fully exempting membership communications from the reporting and disclosure requirements Rules will not prevent the Charter Amendment from fulfilling its purpose, and we respectfully urge the CFB to incorporate such an exemption into its final rules.

c. Required Disclosure of Membership Communications Raises Constitutional Concerns.

In addition to both the excessive burdens that membership organizations like AFSCME will face if its membership organizations are subject the CFB's reporting and disclosure requirements and the distinct absence of any need to compel disclosure of an organization's internal communications and accounts is the fact that such compulsion raises constitutional concerns that may not be at issue for publicly-distributed communications.

The Supreme Court has, on more than one occasion, expressed concern over the regulation of a union's internal communications to its membership. In *United States v. CIO,* 335 U.S. 106 (1948), in order to avoid addressing constitutional issues raised by a federal campaign finance statute's regulation of a union expenditures for membership communications, the Court construed that statute to exclude such communications from its reach. The Court noted that permitting the government restrict the union's right to engage in such communications with its members would leave the Court with "the gravest doubt" as to the statute's constitutionality. *See CIO*, 335 U.S. at 121. Likewise, in *United States v. United Automobile Workers*, 352 U.S. 567 (1957), which dealt with another challenge to the federal campaign finance law involving union funding of campaign-related materials, the Court remanded the case to the lower court for fact-finding to determine, among other things, whether the communication at issue was distributed beyond the union's membership.

Under the Proposed Rules, membership organizations whose independent expenditures directed only at their members cost at least $5,000 in the year preceding an election are required to report the costs associated with those communications, all receipts from *any* entity and certain individuals during the *entire covered election*, are compelled to turn over their membership communications to the government, must comply with strict recordkeeping requirements for at three (3) years, and are subject to CFB investigations and audits. *See* Proposed Rules §§ 13-03, 13-04, 13-08, 13-09.

The burden these Proposed Rules impose on organizations such as AFSCME cannot be overstated. When faced with the choice between: (a) collecting information regarding, and reporting, all receipts from any entity over the course of an entire covered election – receipts that amount to perhaps hundreds of millions of dollars from thousands of entities, including AFSCME's more than 3,000 affiliated unions, along with reporting the names of various individual dues payers over a 12-month period;[17] and (b) limiting itself to less than $5,000 in independent expenditures for the election year, it would be tempting to choose the latter. When the Charter Amendment's severe penalties – up to $10,000 for each violation, regardless of knowledge or intent – are taken into account, choosing the latter option may be necessary.

As you may imagine, the process of collecting, compiling and reporting (on an onerous schedule) such vast amounts of information is a daunting task and will almost certainly involve unintentional errors. We submit that the reporting requirements of the Proposed Rules, coupled with the penalties imposed by the Charter Amendment, when applied to an organization's internal communications to its members, raise the same "grav[e] doubts" about the constitutionality of the Charter Amendment's application to membership communication as were raised by the application of the statute at issue in the *CIO* to that organization's membership communications.

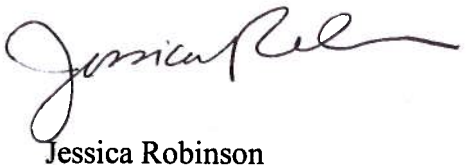
Again, we respectfully request that the CFB exempt all membership communications from the disclosure and reporting provisions of its final rules.

III. Conclusion

In sum, we urge the CFB to: (1) revise § 13-02 to omit its reference to "electioneering communication;" (2) modify its definition of "express advocacy communication" to reach only *Buckley* express advocacy and, at most, its functional equivalent and (3) exclude *all* membership communications from the reach of the Proposed Rules.

We appreciate the opportunity to submit these comments, and we thank you for your careful consideration.

Respectfully submitted,



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[17] All but the smallest fraction of "contributions" that AFSCME would be required to report under the Proposed Rules would be entirely unrelated to a New York City election. The dumping of such a vast amount of financial data having virtually no link to independent expenditures undertaken in the City will impede the public's understanding of how money is being raised and spent to influence their votes.