Comments of SEIU Local 32BJ Regarding the New York City Campaign Finance Board Revised Proposed Independent Expenditure Disclosure Rules in New York City Municipal Elections

March 2, 2012

INTRODUCTION

SEIU Local 32BJ ("Local 32BJ") appreciates the opportunity to submit these comments to the New York City Campaign Finance Board ("CFB" or "Board") as it considers the promulgation of a final rule to implement the portion of Question 2 on the November 2, 2010 ballot that pertains to the reporting of "independent expenditures" in City elections ("the Charter Amendment"), and which is now codified at New York City Charter § 1052(a)(15). The City's voters approved Question 2, which also made six other unrelated changes to the Charter.

Revised Proposed Chapter 13 of Title 52 of the Rules of the City of New York ("the Revised Proposed Rules"), released on February 16, 2012, makes important and welcome changes to the draft rule that the CFB originally proposed last October. However, the Revised Proposed Rules retain or add several features that, variously, are unsupported by the Charter Amendment, raise other significant legal concerns or are unjustified on policy grounds.

SEIU Local 32BJ

Local 32BJ is a labor organization that has over 70,000 members who live in the City. Local 32BJ's members work as doormen, maintenance employees, porters, cleaners, security officers and other positions for hundreds of employers, primarily in the private sector. Local 32BJ is party to thousands of collective bargaining agreements in approximately 10,000 distinct workplaces that guarantee fair terms and conditions of employment for these workers, and a level of security for their families. Local 32BJ's members voluntarily join the union, determine their dues levels, elect their officers by secret ballot and otherwise participate in the union's activities. They *are* Local 32BJ. And, they rely upon each other and their union both to protect and advance their livelihoods as workers and to become active participants in the City's civic affairs. To that end, Local 32BJ maintains an active, year-round effort to involve its members in all aspects of City government that affect them, including the decisions of the Mayor and Public Advocate, the borough presidents, and the President and members of the City Council. Local 32BJ and its members are keenly interested in public decisions that affect their livelihoods, and they fully participate in City elections within the bounds of the law.

Overview

In considering the Revised Proposed Rules, we start from the premise that individuals and groups that seek to influence the public about how to vote on candidates and ballot measures should have to disclose who they are, what they are spending and the sources and amounts of funds that relate to that spending. These kinds of disclosures advance public understanding by letting people know who and what interests are aligned for and against particular candidates and major public proposals. Insofar as the Revised Proposed Rules would effectuate that goal, we support them and believe that they carry out the purposes of the Charter Amendment. But the Revised Proposed Rules in several respects would markedly, unnecessarily and, we would submit, in some instances unlawfully stray from imposing that kind of disclosure regime.

We explain those concerns in these comments. In doing so, we will necessarily repeat some of our October 27, 2012 submission insofar as it still pertains, and we respectfully request that the CFB to reconsider our arguments with a fresh eye as it prepares the final rules.

Our comments are rooted in our belief and experience that disclosure laws must accommodate the legitimate First Amendment speech and associational rights and interests of individuals and groups that make independent expenditures, and must be mindful of the realities of private and public interactions and the nature of civic life. Because the courts have conclusively determined that independent expenditures have no capacity to corrupt candidates or ballot proposition elections, *see, e.g., Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), disclosure rules should not be so inappropriate or burdensome that they chill the very undertaking of that public expression itself. Disclosure rules also should focus on providing meaningful information to the public and should not prompt the cluttering the public record with data about insignificant or irrelevant spending or data that is unduly costly to ascertain and report. In significant respects, several aspects of the Revised Proposed Rules fail to serve those goals. And, as we explain below, the *combined effect* of multiple aspects on a particular organization severely compound the proposal's inappropriateness and, we submit, its legal vulnerability, particularly given the proposal's conversion of non-electoral engagement with public officials into in-kind contributions to their campaigns.

The Revised Proposed Rules also must be considered in light of the potential penalties entailed by violating it. The Charter Amendment subjects *each violation* to a potential $10,000 civil penalty regardless of the speaker's intent or knowledge, and prosecution for a misdemeanor for those who act intentionally or knowingly. Because the amount of the penalty is not necessarily proportional to the amount that is spent in committing a violation, and could be much more (the $1,000 and $5,000 thresholds in the Charter Amendment guarantee that this is likely), and because any criminal enforcement is a serious matter, the CFB should treat all of the issues and choices before it with great care so as not to create traps for the unwary or unduly chill

ordinary citizens and small organizations in particular from exercising their established First Amendment rights to make their views known to the public about candidates and ballot measures. *See generally Citizens United*, 130 S. Ct. at 895-97; *Federal Election Commission v. Wisconsin Right to Life, Inc. ("WRTL"),* 551 U.S. 449, 455-57 (2007) (controlling opinion by Roberts, J.).

Commendable Revisions of the Proposed Rules and Remaining Areas of Concern

Local 32BJ appreciates and supports most of the modifications that the CFB has made to the original proposed rules. Specifically, we believe the revision has accomplished the following important improvements that strengthen the rule both legally and as an instrument of public policy:

1. The definition of "express advocacy" content in proposed Rule 13-01 straightforwardly and clearly describes communications that would be appropriately subject to the final rule.
2. The scope of reportable types of communications has been largely appropriately narrowed.
3. Unions, already-registered PACs and other "independent spenders" do not have to register with the CFB, and may instead report relevant information on reports concerning the distribution of independent expenditures themselves.
4. Disclosure is triggered by the actual dissemination of a reportable independent expenditure, so there is no requirement of advance disclosure of potential such communications.
5. Incoming "contributions" subject to reporting do not include individual membership dues or commercial transactions.
6. A reporting entity does not have to characterize its reported communications as "supporting" or "opposing" a candidate or ballot proposal.
7. The contents of the reports have been largely appropriately clarified and simplified.
8. The treatment of "coordination" makes clear that it applies only to dealings with a candidate or her opponent who is a subject of the reportable communication.

The Revised Proposed Rules, however, raise the following principal concerns and recommendations:

1. The final rule should not include a content standard of "electioneering communications" that differs from express advocacy and its functional equivalent.
2. The final rule should exempt union and other organizational membership communications in their entirety.
3. The final rule should clarify and set forth more explicitly which *means* of communication are subject to reporting.

4. The final rule should make less burdensome the required information and documentation about reportable communications.
5. The final rule should not convert non-electoral contacts with elected officials into "coordinated" "in-kind contributions."

I. "Independent Expenditures"

The Charter Amendment defines the term "independent expenditure" to mean "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 therefore defines the scope of communications content that is subject to disclosure as only that which is "in support of or in opposition to" a candidate or ballot proposal.

As in its original proposal, the CFB proposes to implement this content standard with a two-part definition: "express advocacy communications" and "electioneering communications." And, as we did before, we recommend that the CFB retain only the former.

The Revised Proposed "Express Advocacy" Content Standard

The revised definition of an "express advocacy communication" in Proposed Rule 13-01 aptly defines the following content standard for the final rule:

> [A] communication that contains a phrase including, but not limited to, "vote for," "re-elect," "support," "cast your ballot for," "[Candidate] for [elected office]," "vote against," "defeat," "reject," or "sign the petition for," or a campaign slogan or words that in context and with limited reference to external events, such as the proximity to the election, can have no reasonable meaning other than to advocate the election, passage, or defeat of one or more clearly identified ballot proposals and/or candidates in a covered election….

"Express advocacy" has long been the touchstone for defining speech that is "unambiguously campaign related" to an election and that explicitly urges a particular voting act. *See WRTL*, 551 U.S. at 465-74; *Buckley v. Valeo*, 424 U.S. 1, 81 (1976). The proposed definition is faithful to the formulations that the Supreme Court has repeatedly endorsed. *See id.*; *see also McConnell v. Federal Election Commission*, 540 U.S. 93,126 (2003). It also closely and appropriately tracks an FEC regulation dating from 1995 that defines the phrase "expressly advocating" that appears in the Federal Election Campaign Act's ("FECA") definition of an "independent expenditure." See 2 U.S.C. § 431(17)(A); 11 C.F.R. § 100.22(a). The proposed

language provides a bright-line rule and has gained broad acceptance due to its precision and adherence to *Buckley*'s description of the concept. See 424 U.S. at 44 n. 52.

More specifically, we support the "in context" clause on the understanding that "in context" means in the context of the message itself, as in the same language that appears in 11 C.F.R. § 100.22(a). This aspect of the definition also nearly mirrors the bright-line formulation that the Supreme Court identified as the "functional equivalent of express advocacy" and endorsed as sufficiently constitutionally precise in *WRTL*, 551 U.S. at 469-70, namely, a message that is "susceptible of no other reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The Revised Proposed "Electioneering Communication" Content Standard

The CFB rightly recognized in the Proposed Rules that the Charter Amendment content standard is narrower than one that would cover *any* reference to a candidate (or ballot proposal). But, as we explained in our comments last October, its definition of "electioneering communication" nonetheless failed to adhere to the limited authority granted by the Charter Amendment, and it included language that was unduly vague.

Revised Proposed Rule 13-01 would now define an "electioneering communication" as:

> [A] communication that: (1) is disseminated by means of a radio, television, cable, or satellite broadcast, a paid advertisement such as in a periodical or on a billboard, or a mass mailing; (2) is disseminated within 30 days of a covered primary or special election, or within 60 days of a covered general election; and (3) refers to one or more clearly identified ballot proposals and/or candidates for a covered election….

While this formulation solves the vagueness problem, a "refer[ence]" standard is simply contrary to the text of the Charter Amendment and prior judicial and Federal Election Commission ("FEC") constructions of that text in other statutes and regulations. The CFB has authority only to require reporting of communications expressly advocating the election or defeat of a clearly identified candidate or ballot proposal and communications that are the functional equivalent of express advocacy.[1]

[1] To be clear, we do not suggest that the CFB could not under any circumstances *constitutionally* require disclosure of public communications that do not comprise express advocacy or its functional equivalent; *Citizens United*, 130 S. Ct. at 915-16, makes clear that is not the case. But, as explained below, the fact is that the Charter Amendment *does not provide the CFB with that authority* because the Commission, and then the City's voters, embraced a reporting standard that plainly chose *not* to adopt the mere "reference" standard that is a feature, for example, of the FECA "electioneering communication" disclosure requirements that was partly at issue in *Citizens United.*

The Charter Review Commission and the Voters[2]

When the Charter Revision Commission ("the Commission") presented the final version of the proposed Charter Amendment to the public, 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 Report of the New York City Charter Revision Commission ("Final Report") at 12 (emphasis added). The Commission explained that "independent expenditures have become an 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 (emphases added). The Commission nowhere suggested 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.

The Commission's Final Report reflects and relied upon what *the CFB itself advocated* and sent to the Commission for its consideration intwo letters from CFB Executive Director Amy M. Loprest in May 2010. *See* Final Report at 12-14. Ms. Loprest's May 4 letter asked the Commission 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 Amy M. Loprest to Matthew Goldstein (May 4, 2010) ("CFB May 4 Letter") (emphasis added). Ms. Loprest asked the Commission to 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). The Commission also referenced

Ms. Loprest followed up on May 24, 2010, with a letter that enclosed reproductions of the text of the FEC regulations for the reporting of "independent expenditures" under FECA as well as statutes or regulations of 29 states and three municipalities that provide for the reporting of independent expenditures in their respective elections. Letter from Amy M. Loprest to Lorna Goodman (May 24, 2010) ("CFB May 24 Letter"). As noted earlier, under FECA an

[2] Some of the argument in this subsection echoes the excellent comments submitted to the CFB last October by another labor organization, the American Federation of State, County and Municipal Employees, AFL-CIO ("AFSCME").

independent expenditure is defined as an "express[] advoca[cy]" communication. Meanwhile, *separately* from the scope of "independent expenditures," FECA defines and requires reports about "electioneering communications," which, like the Revised Proposed Rule here, include communications that "refer" *without* express advocacy to a candidate within 30 days of a primary or 60 days of a general election. See 2 U.S.C. § 434(f); 11 C.F.R. § 104.20. Likewise, 32 of the 33 state or municipal statutes and regulations require reporting and disclosure only for *express advocacy* communications.[3] Seven of those states have also legislated a distinct "electioneering communications" category for reporting mere "references" to candidates, yet the CFB provided *none* of those provisions to the Commission.[4] And, at no time did the CFB otherwise suggest to the Commission that it recommend or draft a "reference" standard for "independent expenditure" reporting.

The 2010 electorate was also explicitly led to believe that they were voting on a proposal that would cause disclosure of electoral advocacy communications only. Ballot Question 2 itself stated: "*Disclosure of Independent Campaign Spending* Require public disclosure of expenditures made by entities and individuals independent of candidates to influence the outcome of a city election or referendum." CFB, Charter Revision 2010, NYC Campaign Finance Board Voter Guide at 8 ("CFB Voter Guide"). The CFB's "Plain Language Summary" of the proposal stated, in full:

> When other people or groups [than candidates] (such as a political party, labor union, or corporation) spend money to support or oppose a candidate or a municipal referendum, it is an 'independent expenditure.' This spending is not reported to the CFB. Examples include an automated phone call from an environmental group urging you to vote for a City Council candidate, or a television commercial funded by a corporation opposing a candidate for borough president.

Id. Similarly, the CFB's "Reasons to Vote Yes on Question 2" included "[p]eople will know who paid for the *campaign* mailings, commercials, and other communications they see and hear during elections," *id.* at 9 (emphasis added), and its "Reasons to Vote No on Question 2" included "Persons and groups may not want to exercise their right to take part in the *political* process and make independent expenditures if they must disclose the

[3] The lone exception is Florida. The statutory provision included by Ms. Loprest covers primarily "independent expenditures," which are limited to express-advocacy communications, but also applies to certain "electioneering communications" that are not covered by Florida's *separate* reporting provision for electioneering communications. *See* Fla. Stat. §§ 106.071, 106.0703.

[4] They are: Florida: Fla. Stat. § 106.073; Idaho: Idaho Code §§ 67-6602, 67-6630; North Carolina: N.C. Gen. Stat. §§ 163-278.6(8j), 163-278.12C; Ohio: Ohio Rev. Code § 3517.1011; South Dakota: S.D. Codified Laws § 12-27-17; Washington: Wash. Rev. Code §§ 42.17A.005(19), 42.17A.300, *et seq*.; West Virginia: W. Va. Code § 3-8-1(11)(A), 3-8-2b.

details of their activities." and "Some people or groups may not want to put their name on *campaign* literature or advertisements, perhaps out of fear of harassment or retribution." *Id.* at 10 (emphases added). Commission Chair Goldstein was quoted as supporting "fuller disclosure of *campaign* expenditures," id. at 11 (emphasis added), and the various printed "pro" and "con" statements likewise characterized what would be disclosed in explicit electoral-advocacy terms. See statements of City Councilmember Daniel R. Galodnick, *id.* at 13; League of Women Voters of the City of New York, *id*. at 14; Gene Russianoff, New York Public Interest Group, *id*.; and Dan Jacoby, GrassrootsNYC, *id*. at 16.

Notably, also, the Commission's Final Report, statements in the CFB Voter Guide and the CFB in its letters to the Commission and the CFB's various publications and statements in connection with this rulemaking, have all emphasized the *Citizens United* decision as a triggering event that justifies the new City disclosure regime, in part because it would increase the sources and volume of electoral communications. *Citizens United* invalidated on First Amendment grounds the *only* then-recognized constitutional *restrictions* on organizational – that is, corporate and union – independent political speech: express advocacy and its functional equivalent. Other "references" to candidates, including via "electioneering communications," were permissible and, like express advocacy and its functional equivalent, already were subject to FECA reporting requirements. Accordingly, if "[a]s a result of this decision, some commentators anticipate[d] an increase in independent spending across the country, including in local elections," Final Report at 14, that increase would presumably consist of corporate- and union-funded express advocacy and its functional equivalent.

In connection with issuing the Revised Proposed Rules, the CFB released a report, "Disclosure of Independent Expenditures in New York City Elections" ("CFB 2012 Report") (February 2012), that on this issue and others apparently seeks to provide some *post hoc* legislative history to compensate for that which preceded the November 2010 election. But this report really bolsters the strength of the argument we have presented here, and not simply due to its considerable emphasis on the *Citizens United* decision. In this report the CFB explains its newly proposed "refer[ence]" standard as follows:

> Advertisements that constitute "express advocacy" may be clear and straightforward in their intentions to influence voters. Disclosure of spending for express advocacy is an important starting point. But for disclosure to be meaningful, it should be as inclusive as possible. Voters who pay close attention during election season know that some campaign messages do not rely on straightforward words like "vote for" or "defeat." Disclosure requirements limited only to expenditures for "express advocacy" messages would allow significant spending to go undisclosed.
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> As do the federal regulations on independent spending, the proposed rules take a more inclusive view. To ensure that the public has a full view of money in City

> elections, as the Charter requires, it is important that disclosure be required for spending on "electioneering communications" – advertisements and mass mailings run close to an election that refer to candidates or ballot proposals.

Id. at 8-9. This explanation fails to address the Charter language and the actual legislative history of this provision. And, its reliance on the "federal regulations:" is telling: as explained above, the FEC's regulations include a "refer[ence]" standard only because *FECA itself explicitly so requires* and imposes a separate reporting requirement on those communications The Charter Amendment does not.

The new CFB report also approvingly cites a submission to the CFB in advance of its March 2011 hearing in this rulemaking that cites this federal requirement and the "'seventeen states [that] have created a new category of independent expenditures – electioneering communications.'" CFB 2012 Report at 9, quoting Testimony of Ciara Torres-Spelliscy and Mark Ladov, Brennan Center for Justice, at 4 (March 10, 2011). But again, that is the point: those 17 states *legislated* a "refer[ence]" standard. The City's voters did not, as the CFB implicitly recognized when, *after* the March 2011 submissions and hearing, it proposed an electioneering communications content standard that, however imprecisely, sought to turn on content that was more opinionated than simply any reference whatsoever. The CFB's new report also fails to acknowledge that the Brennan Center's comments on that initial CFB proposal did *not* repeat its earlier recommendation that the Board instead adopt a "refer[ence]" content standard. See Testimony of Mark Ladov, Brennan Center for Justice (Oct. 27, 2011) ("Ladov Test.").

The CFB's new report also describes in detail two "examples of electioneering communications designed to influence voters during the [2009] City elections" that apparently did not include express advocacy. CFB 2012 Report at 9-11. Yet it appears that the CFB has never featured these advertising efforts in its previous publications concerning independent-expenditure activity. Most notably, its extensive (and post-*Citizens United*) report about the 2009 elections contained a chapter called "In Depth: Independent Expenditures" that features what appear to be *only* express-advocacy campaigns dating from 2003, and *not a single word* about the two 2009 efforts that are now showcased in its 2012 report or about "electioneering communications" more generally. See CFB, "New Yorkers Make Their Voices Heard: A Report on the 2009 Elections" at 165-78 (2010). The Commission specifically relied upon this chapter as well. *See* Final Report at 13 n. 23. With all due respect, and acknowledging the sincerity of the CFB's goal to achieve what it believes to be a "meaningful" disclosure regime, there is an unfortunate "bait-and-switch" aspect to the current "electioneering communication" proposal. and the CFB's arguments on its behalf would be most appropriately directed to the Commission or the City Council for their action.

Prior Judicial and FEC Construction of the Operative Charter Language

The CFB's lack of authority to impose a mere "reference" content standard flows not only from this history but also from applicable constitutional requirements in construing the operative Charter language. The Supreme Court in *Buckley* identified the word "support" as language of express advocacy. *See* 424 U.S. at 44 n. 52. In *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F. 3d 376, 389-91 (2d Cir. 2000), the Second Circuit stated that, due to constitutional vagueness concerns, "[a]ny attempt to save [the Vermont campaign finance disclosure statute] would at least require a court to (1) interpret the phrase 'supporting or opposing one or more candidates' to mean 'supporting or opposing one or more candidates expressly.'…" And, to our knowledge, in other judicial challenges based on vagueness and overbreadth grounds, the operative Charter language (or its substantively identical formulations from the root words "support" and "oppose") in campaign finance statutes and regulations have been saved through construction *only* by interpreting them to mean express advocacy and, at most, its "functional equivalent." *See, e.g., North Carolina Right to Life, Inc. v. Leake*, 525 F. 3d 274, 280-86 (4th Cir. 2008); *National Right to Life Political Action Committee v. Conner*, 323 F.3d 684, 689 n.5, 694 (8th Cir. 2003); *Yamada v. Kuramoto*, 2010 U.S. Dist LEXIS 120795, *53-55 (D. Haw. 2010); *South Carolina Citizens For Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 208, 725-28 (D.S.C. 2010); *Florida Right to Life, Inc. v. Mortham*, 1998 U.S. Dist. LEXIS 16694, *13-16 (M.D. Fla. 1998); *Doe v. Mortham*, 708 So. 2d 929, 932 (Fla. 1998). *Cf. Center for Individual Freedom v. Carmouche*, 449 F. 3d 655, 633-66 (5th Cir. 2006) (construing phrase "for the purpose of supporting, opposing or otherwise influencing" in Louisiana definition of "expenditure" to mean express advocacy in all applications of state's disclosure requirements); New Jersey Election Law Enforcement Commission Advisory Opinion 01-2011, at 2 (interpreting phrase "support or defeat" in New Jersey campaign finance statute to mean express advocacy as defined in *Buckley*).

Moreover, *FECA uses language identical to this key Charter Amendment phrase synonymously with express advocacy*: it requires that a disclosure report state "whether the independent expenditure" – which is defined as an uncoordinated communication "expressly advocating the election or defeat of a clearly identified candidate," see 2 U.S.C. § 431(17)(A) – "is in support of, or in opposition to, the candidate involved." See 2 U.S.C. § 434(c)(2)(A). And, the FEC follows suit in its treatment of the limited scope of FECA's reporting provision for membership communications: only communications "primarily devoted to…express advocacy" are subject to reporting, 2 U.S.C. § 431(9)(B)(iii), and the FEC requires the reporting entity to disclose "[w]hether the communication was in support of, or in opposition to, the particular candidate." FEC, "Instructions for Report of Communications Costs By Corporations and Membership Organizations (FEC FORM 7)." Accordingly, both the statute and the agency to which the CFB itself often looks for guidance in interpreting the CFA[5] consider the operative Charter Amendment language to mean express advocacy alone.

[5] *See, e.g.*, Advisory Opinion ("AO") 2003-1 (Feb. 11, 2003); AO 1999-4 (Jan. 15, 1999); AO 1993-10 (Sept. 23, 1993); AO 1989-36 (July 19, 1989).

Accordingly, when the CFB, the Commission and then the voters considered new disclosure requirements for "independent expenditures," they did so against the backdrop of recent, widespread and highly publicized federal and state campaign finance legislation and litigation over the crucial distinction between express advocacy and mere references to candidates. The meaning and lawfulness of that distinction had been a central feature of a trio of major Supreme Court decisions: *McConnell*, 540 U.S. at 189-94, 203-09; *WRTL*; and *Citizens United.* And, like the Congress and legislatures of most states, the Commission and the voters chose to regulate one form of communication and not another. The CFB should implement that decision.

Unwarranted Conversion of Non-Electoral Speech Into In-Kind Contributions

The proposed definition of an "electioneering communication" is especially inappropriate because it not only defines the scope of what must be *reported* under the Charter Amendment but also identifies speech content that, if "coordinated" with a candidate, would be an *in-kind contribution* to that candidate. That is because the Charter Amendment uses the same formulation for the conduct prong of an independent expenditure as does CFB Rule 1-08(f)(iii) ("authorized, requested, suggested, fostered or cooperated in"). Revised Proposed Rule 13-05 states that a coordinated communication "is not an independent expenditure and is not governed by this Chapter," and what that means is stated clearly in the accompanying guidance: "Under existing CFB rules, most expenditures made with the cooperation of a candidate are considered to have been made by that candidate, will count against any appropriate expenditure limits, and must be reported as both an expenditure *and an in-kind contribution*." CFB 2012 Guide at 5 (emphasis added). And, the New York City campaign Finance Act's ("CFA") contribution limits are modest: $2,750, $3,850 or $4,950 per four-year election cycle, depending on the office sought by the candidate. See NYC Admin. Code § 3-703(1)(f).

Because the proposed "electioneering communication" content standard does not require that the candidate be referred to *as a candidate* or that there be any reference to the election itself, a union's "covered expenditure" could deal with official conduct by an incumbent officeholder (either of the office to which she then seeks reelection or an office that she holds while seeking election to another office) yet be barred as an in-kind contribution. Here are two examples of activities that Local 32BJ has engaged in that could be affected by this scope.

First, Local 32BJ has purchased paid public advertising in order to applaud an incumbent elected official for a legislative achievement or taking a position that is important to the union and its members. This is a very effective means to inform the public of the action and why it is beneficial, and to provide the incentive of public approval, which is fundamental in an operating democracy, to persuade elected officials how to exercise their authority. Any coordination of such a message that occurred within 30 days of a primary or 60 days of a general election,

however, would be subject to the CFA contribution limits even if that official were running unopposed or with only token opposition, as is the case in many City elections.

Second, Local 32BJ often "partners" with an elected official in support of the union's contract campaign with respect to an employer or employer association. The validation and pressure that an elected official affords to such an effort is greatly valued by Local 32BJ members because they are influential in the community and with the employers. This is an entirely lawful, appropriate and time-proven tactic. These contract fights usually entail great stakes for the union's members – a loss can entail strikes, depressed wages, a reduction in health or pension benefits and the like. The union routinely reaches out to the local community as well as part of such a contract campaign, and through leaflets, telephone banks, robocalls and other means communicates its contract message and the supportive roles of particular public officials, and often invites people in the community to an event or tele-town hall that features an official who speaks only about the contract fight, and not about his or her simultaneous candidacy or an election. But if these messages are "electioneering communications," they will be subject to campaign reporting and limits. And, many Local 32BJ contracts are now scheduled to expire in 2013, meaning that either a June or September primary could trigger just these kinds of complications.

Unwarranted Federal Tax Complications for Labor Organizations

Inclusion of non-electoral communications in this definition, and covering a period of up to 90 days during an election year, increases the likelihood that a union itself rather than its sponsored PAC will become subject to the new reporting rules. That is because unions routinely spend from their regular general-fund accounts on legislative and issue advocacy communications, both because the law permits this; it is administratively easier to do so; and, there is a severe tax risk if the union uses its legally distinct political account for these non-electoral efforts: any such spending from a union's separate segregated *political* account that is more than "insubstantial" could cause that account to lose its tax-exempt status for the entire tax year. See Treas. Reg § 1.527-2(b).

For that reason, Local 32BJ always uses its regular general fund for legislative and other issue advocacy. If the Proposed Rules erroneously classify such activity as "independent expenditures," however, the union must either subject itself to the rule or risk the loss of its political account's tax status. The CFB should not and need not force a union to make that Hobson's Choice.

Preemption by the National Labor Relations Act

Finally, we raise another potential impediment to the inclusion of "electioneering communications" in the scope of regulated speech: this proposal may be preempted by the

National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq*. This is particularly so because coordinated electioneering communications would be subject to contribution limits and thus effectively prohibited, thereby interfering with the exercise of NLRA rights while serving no substantial campaign finance regulatory purpose. (The same problem arises with respect to membership communications, discussed next below.)

The NLRA affirmatively protects the right of employees to engage in concerted activity for "mutual aid or protection." NLRA § 7, 29 U.S.C. § 157. The Supreme Court has confirmed that this protection extends to employees when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship." *Eastex, Inc. v. NLRB,* 437 U.S. 556, 565 (1978). *Eastex* held that employees had a Section 7 right to distribute literature in support of candidates who supported a higher minimum wage and opposed a right-to-work constitutional amendment. The NLRA protects employees and union political activity only when there is a clear nexus between the activity and conditions of employment. "At some point the relationship [between employees' concerted activity and their interest as employees] becomes so attenuated that an activity cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Id.* at 567-68.

The National Labor Relations Board and courts read Section 7 to protect employees who engage in a variety of forms of legislative and other political activity. Employees have a federal labor law right to seek governmental action on matters concerning their employment. *See, e.g., Five Star Transportation, Inc.,* 349 NLRB No. 8, slip. op. at 6 (2007), *enf'd,* 522 F. 2d 46 (1st Cir. 2008) (letter to school board concerning whether new contractor would maintain conditions of employment); *Motorola, Inc.,* 305 NLRB 580, n. 1 (1991), *enf't denied in pert. part,* 991 F. 2d 278 (5th Cir. 1993) (distribution of literature suggesting messages to city council supporting ban on mandatory drug testing; court determined there was insufficient nexus to terms of employment); *Union Carbide Corp. Nuclear Division,* 259 NLRB 974, 977 (1981), *enf'd in pert. part,* 714 F. 2d 657 (6th Cir. 1983) (petition to Congress calling for investigation of employer); *GHR Energy Corp.,* 294 NRLB 1011, 1014 (1989), *enf'd mem.,* 924 F. 2d 1055 (5th Cir. 1991) (testimony at Senate hearing on environmental safety laws). Employees also have a right to complain to government agencies about their conditions of employment. *North Carolina License Plate Agency # 18,* 346 NLRB 293, n. 4 (2006), *enf'd,* 243 Fed. Appx. 771 (4th Cir. 2007) (employees threatened to file a complaint with Dept. of Motor Vehicles); *Riverboat Services of Indiana, Inc.,* 345 NLRB 1286, 1294, 1297 (2005) (employees complained to Coast Guard about employer hiring unlicensed workers); *Misericordia Hospital Medical Center,* 246 NLRB 351, 356, *enf'd.*, 623 F. 2d 808 (2nd Cir. 1980) (complaints to hospital accreditation commission concerning staff levels); *Frances House, Inc.,* 322 NLRB 516, 522-23 (1996) (same); *Petrochem Insulation, Inc.,* 330 NLRB 47, 49 (1999), *enf'd,* 240 F.3d 26 (D.C. Cir.), *cert. denied,* 534 U.S. 992 (2001)(complaint to environmental agency concerning permit application).

Federal labor law preempts state and local law and regulations and specific applications of such laws and regulations which affect conduct that arguably is protected or prohibited by the NLRA. *Building Trades Council (San Diego) v. Garmon,* 353 U.S. 26 (1957). "When an activity is arguably subject to § 7 or § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with National policy is to be averted." *Id.* at 244-45. So, for example, federal law preempted an attempt to prevent peaceful distribution of literature under state law. *Delta-Sonic Carwash Syst*., 168 Misc. 2d 672, 640 N.Y.S. 2d 368 (N.Y. Sup. Ct. 1995).

The Revised Proposed Rule would seriously interfere with union members' rights to engage in NLRA protected political activity. For instance, Local 32BJ's distribution of literature in support of a contract fight that favorably mentions a candidate's support for the union's struggle would, if coordinated, be deemed an in-kind contribution subject to contribution limits. Similarly, union literature urging support of a candidate because, for example, she supported a prevailing wage or worker retention bill, would be regulated, and if coordinated, limited, despite the clear protection offered by *Eastex.* The CFB should avoid such potential conflicts with federal law.

II. Membership Communications

Revised Proposed Rule 13-02(b)(2) sets forth a partial "[m]ember/[s]hareholder exemption"[6] to proposed Chapter 13: "When directed solely at an entity's own members or shareholders, routine newsletters or periodicals, telephone calls, and communications relating to the internal deliberations of the entity's endorsements, shall not be required to be reported." Last fall the CFB explained its closely similar, originally proposed exemption as follows:

> The Board provided the member/stockholder exemption to enable groups to educate their members to engage meaningfully and knowledgeably in the political process without disclosure. The Revised Proposed Rules also focus specifically on disclosure of spending for campaign materials, while providing exemptions for membership-building communications like newsletters and phone calls.

CFB, "Notice of Public Hearing" ("CFB Notice") at 3 (Sept. 22, 2011). The CFB also explained, then and now, that the exemption "recognizes the role that such organizations play in educating members and stockholders more generally about public policy and other issues, while requiring disclosure for communications that are otherwise similar to typical campaign material." See CFB, "Guide to the Proposed Independent Expenditure Rules for New York City Elections"

[6] We do not comment on this revised proposal insofar as it applies to corporate communications with "shareholders" or redefines since the original proposal the (unexplainedly different) term "stockholder" at Revised Proposed Rule 13-01(m), except to say that the analysis that follows regarding membership communications does not necessarily apply to the very different sphere of relationships between business corporations and their stockholders.

("CFB 2011 Guide") at 2 (Sept. 22, 2011); CFB, "Guide to the Revised Proposed Independent Expenditure Disclosure Rules in New York City Municipal Elections" ("CFB 2012 Guide") at 3 (Feb. 16, 2012).

We address in this section the proposed coverage in this rule of *any* membership-only communications, and we comment on the proposed selection and description of covered membership communications *media* in Part III, below.

The Charter Review Commission and the Voters

As with its proposed "electioneering communication" content standard, we do not believe the Board has authority to reach such communications in the first place. Until the 2010 Charter Amendment, City law did not directly regulate unions, other membership organizations and other private actors except for registration requirements for political committees and contribution limits on all sources under the CFA. And, in enforcing those contribution rules, the CFB has rarely suggested that membership communications that are coordinated with City candidates would be subject to treatment as in-kind contributions. To our knowledge, only once has the Board taken a formal position that internal communications may be regulated, in an advisory opinion over two years ago stating that the CFA and the Board's Rules do not distinguish between union membership and public communications in applying the CFA's coordination standard, although "[o]f course, the [CFA] does not directly regulate the activity of labor organizations or other third parties…." Advisory Opinion 2009-07 at n.8.

Since the CFA was enacted, the City has had six election cycles and is now midway through its seventh. There is a substantial experience throughout these elections of unions and other groups engaging with their members about those elections, and with endorsed candidates in making internal communications, without challenge or serious question that such coordination in fact carried with it the kinds of restrictions that apply to efforts to reach and persuade the general public about how to vote. The silence in the CFA and the Board's Rules, and the history of public understanding of the scope of the law and the political activity that has occurred, counsel heavily against a CFB-initiated reversal of all this in the absence of clear and fresh authorization or direction.

The Charter Amendment does not provide such authority. Like the CFA and the Board's Rules, it nowhere states that its new requirements to internal membership communications. As a Brennan Center witness observed at the CFB's March 10, 2011, hearing, "[w]e don't see anything in the charter language…to suggest" that "the Board might require disclosure of internal communication within a union or other type of organization, internal communications between members." CFB, Public Hearing Transcript at 22 (March 10, 2011) ("March 10 Tr.") (testimony of Mark Ladov). The Charter Amendment instead includes "employee organization or labor organization" among the "entit[ies]" that it covers, all of which plainly can be and are

sources of *public* communications about candidates and elections. Indeed, the term "entity" should be read to include a union and its members *together* for purposes of the reporting requirement, with required new disclosures then covering what that entity, like an individual, spends to influence *others* about how to cast their votes. It makes no sense to require an organization to report what, in essence, it is telling itself, and absent statutory authority the CFB may not do so. *Cf. Martin v. Curran*, 303 N.Y. 276, 282 (1951) (under New York tort law a union is inseparable from its members, and liability is available only "where the individual liability of every single member can be alleged and proven").

Nor during the proceedings that led to the proposal of the Charter Amendment did the CFB or the Commission even *mention* internal organizational communications, let alone articulate a goal to subject them to disclosure. The CFB's two letters to the Commission expressing a need for disclosure of independent expenditures mentioned unions along with other groups and plainly referred only to their *public* electoral advocacy. See CFB May 4 Letter at 1-2; CFB May 24 Letter at 4. And, the Commission itself plainly focused solely on public communications as well. In its report the Commission made no reference to internal communications. Rather, its discussion of "independent expenditures" comported with the commonly understood meaning of that phrase in New York and elsewhere as meaning a communication to persuade the *public* about voting; indeed, as discussed above, it focused on the impact of the then-recently decided *Citizens United*, which concerned restrictions *only* on independent expenditures to the public, and not members or shareholders (which the statute at issue, FECA, excludes from such classification, see 2 U.S.C. § 441b(b)(2)). See Final Report at 14. The Commission asserted that reporting about and self-identification on independent expenditures "would provide critical information and context to *members of the public* and help them evaluate *advertising* messages aimed at influencing their votes," as well as "enhance CFB's ability to enforce expenditure and contribution limits *under current law* by providing CFB with real-time data concerning expenditures of this nature." *Id*. at 13-14 (emphases added).

Further, there is no indication that the actual "legislators" who adopted the Charter Amendment – the City's voters themselves – were apprised or understood that they were approving a regime that would require unions and other membership groups to publicly disclose their internal relationships, let alone convert those dealings into in-kind contributions to candidates. We quote at page 7 above the pertinent text of 2010 Ballot Question 2 and the CFB's "Plain Language Summary" of the amendment in its official voter guide, neither of which suggested that the amendment would apply to internal communications. The CFB's two examples clearly indicated otherwise: "an automated phone call from an environmental group urging you to vote for a City Council candidate, or a television commercial funded by a corporation opposing a candidate for borough president." CFB Voter Guide at 8. And, not a single one of the CFB Voter Guide's "Reasons to Vote Yes [or No]" on the independent-expenditure portion of Question 2, and not a single one of the "Pro" or "Con" statements about this proposal, referred to internal communications either.

Against this backdrop, it cannot be said that the voters understood or intended to approve a first-ever system in New York where internal union communications would be subjected to unprecedented intrusive regulation and public disclosure. Again, we realize that silence about internal communications could be read as evincing no intention to exclude them from coverage, just as the CFA and the Board's Rules are silent about them. But the CFB's proposal now to cover some membership communications would strike such a significant departure from public understanding and enforcement practice that silence alone is an insufficient justification.

Inadequate Policy Justification and Lack of Public Support for Compelling Disclosure

Even if the CFB had the authority to reach membership communications in the final rules, it should not do so. The purpose of any independent expenditure reporting law is to reveal to the public the sources of messages that are trying to persuade them how to cast their ballots. This purpose is inapplicable to internal communications. Members know the nature of the group they voluntarily belong to and finance, and unions and their members should be left to their own democratic practices to determine how these internal communications should be paid for and identified. In any event, Local 32BJ and other unions universally self-identify in their internal communications, regardless of subject; that is a key aspect of the persuasiveness of the message to members, and no membership would stand for its group's practice of concealing that it is the source of a contact with them. The CFB implicitly acknowledges this reality by aptly proposing that the new self-identification requirements would not apply to membership communications. See Revised Proposed Rule 13-04(c).

These features of union/member relationships derive from the democratic, member-controlled nature of unions themselves. A union forms by its "designat[ion] or select[ion] for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purpose." 29 U.S.C. § 159(a). Following this voluntary formation, members elect their officers and national convention delegates by secret ballot, see 29 U.S.C. §§ 481-483; members determine their dues rates by these same methods, see 29 U.S.C. § 411(a)(3); and all union members enjoy equal rights to nominate candidates for union office, vote in union elections and otherwise participate in union affairs, and members exercise rights of speech and association. See 29 U.S.C. §§ 411, 481(e). Membership itself is completely voluntary, and resignation cannot be restricted. *Pattern Makers League v. NLRB*, 473 U.S. 95 (1985).

Indeed, the Supreme Court has observed that unions have "crucial differences" from business corporations: first, although unions, like corporations, "may be able to amass large treasuries, they do so without the significant state-conferred advantage of the corporate structure"; and, second, "the funds available for a union's political activities more accurately reflect members' support for the organization's political views than does a corporation's general treasury" because a union may not compel represented non-members to support, with dues or

other fees, the union's political, legislative and other ideological spending that is not directly germane to "'collective bargaining, contract administration and germane adjustment.'" *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 665-66 (1990)[7], quoting *Communications Workers of America v. Beck*, 487 U.S. 735, 746 (1988).

As Common Cause/New York aptly advised the CFB in urging a total membership communications exception, "[w]hen a union member or someone who has signed up for email alerts from an advocacy group receives the organization's endorsement, they are not confused as to the source of the communication. They have means readily available to them to determine the cost incurred by the organization of which they are a part to communicate with them." Testimony by Deanna Bitetti, Common Cause/New York at 2 (October 27, 2011). And, while we understand that it might be argued that the general public has an interest in knowing about a substantial organization's internal communications about City elections, we agree again with Common Cause/New York, which advised the Board that "the sheer numbers of members who receive a message does not automatically determine whether the communication should be reported"; rather, "a true democratic process actively encourages and welcomes the political participation of constituents and individuals." *See id.*

In fact, the overwhelming consensus of the comments and testimony that the CFB has received on the membership issue is that the final rules should accord a *complete* exemption for them. *See, e.g.*, Statement by Public Advocate Bill de Blasio at 1 (Oct. 27, 2011); Testimony of City Council Speaker Christine C. Quinn at 4-5 (Oct. 27, 2011); Testimony of Assemblyman Keith Wright, Congressman Joseph Crowley, Assemblyman Carl Heastie and Assemblyman Vito Lopez at 1 (Oct. 27, 2011); Testimony of Gene Russianoff, New York Public Interest Research Group, at 3 (Oct. 27, 2011); Comments of United Federation of Teachers (undated); Oct. 27, 2011 CFB Hearing Transcript at 17 (Human Services Council); 34-35 (Citizens Union); 55-58 (New York Hotel and Motel Trades Council); 89-90 (NYCLASS); 128-29 (Greenwich Center for Justice); 142 (AFSCME District Council 37; 153-55 (Freelancers Union), as well as the testimony of every union member who appeared. If the CFB nonetheless includes such coverage in the final rules, it will do so after having elicited virtually no public support whatsoever for that course.

The special status of membership communications is also recognized by the overwhelming consensus of states that either formally exempt membership communications from coverage under campaign finance laws,[8] or (as in New York) in my experience do so

[7] *Citizens United* did not question this aspect of *Austin* in overruling that decision's holding that corporate-financed independent expenditures could be constitutionally prohibited. *See, e.g., Minnesota Citizens Concerned for Life, Inc. v. Swanson*, 640 F. 3d 304, 317 n. 6 (8th Cir. 2011).

[8] *See, e.g.*, Alabama, Code of Ala. § 17-5-2(a)(5)(b)(3); Alaska, 2 AAC § 50.250(3)(D), AO 97-20-CD; Arizona, Ariz. Rev. Stat. § 16-920(A)(1); Arkansas, A.C.A. § 7-6-201(5); California, Cal. Govt. Code § 85312; Colorado, Colo. Const. art. XXVIII, §§ 2(7)(B)(III), 2(8)(b)(III); Connecticut, Gen. Stat. §§ 9-601a(b)(2), 9-601b(b)2; District of Columbia, DC Code § 1-1101.01(6)(B)(iii); Florida, Fla. Stat. § 106.011(4)(a); Illinois, Ill. Comp, Stat. §§ 5/9-1.4

informally by exercising administrative discretion not to apply general statutes to those communications for various reasons, including the absence of a governmental interest in doing so and First Amendment concerns.[9] FECA itself requires public reporting only of a narrow subset of internal union communications: those that *predominately* include *express advocacy* and exceed an aggregate monetary threshold, and only special, non-overhead costs are subject to reporting. See 2 U.S.C. § 431(9)(B)(iii); 11 C.F.R. § 104.6. These reports are far less frequent (five, pertaining only to a regular federal election year) and require far less information (the type, date and cost of a communication; the candidate named; and whether he or she was "support[ed]" or "oppose[d]") than what the Revised Proposed Rule would require. See *id.*; FEC Form 7. There is simply no reason why the CFB should impose the most stringent and potentially punitive provision in the Nation with respect to union and other organizations' membership communications.

Unwarranted Conversion of Membership Communications Into In-Kind Contributions

A complete exemption for membership communications in the final rule is also advisable because, as explained above with respect to non-electoral "electioneering communications," they would otherwise be subject to treatment as "in-kind contributions" if they are coordinated with a candidate. We submit that in no circumstance should a union's internal membership communications and mobilization activities concerning a City candidate be treated as a "contributions" to that candidate. The CFA has been enforced and understood to enable unions to associate with candidates without that association triggering in-kind contribution status for membership meetings with candidates, union communications to members about candidates, and similar practices that are the essence of democracy in the City.

This coordination concern is exacerbated because, for similar reasons as discussed above regarding union spending for non-electoral "electioneering communications," coverage of member communications under the final rule would increase the likelihood that a union itself

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(B)(c), 5/9 – 1.14(b)(5); Kansas, Kansas Admin. Reg. §19-24-3; Louisiana, La. Rev. Stat. § 18:1483(9)(d)(ii); Maine, M.R.S. tit. 21-A § 1012(3)(B)(3); Massachusetts, Mass. Gen. L. § 55:1, 970 C.M.R. § 2.02; Missouri, R.S. Mo. § 130.011(16)(e)(b); Montana, Mont. Code Ann.. § 1-101(7)(b)(iii), Mont. Admin. R.. § 44.10.321(2)(a)(v); Nebraska, Neb. Rev. Stat. Ann. §§ 14-1419(3)(b) and 4 Neb. Code R. § 10-002(06Bi); New Jersey, N.J. Admin. Code tit.19 § 19:25-16.3; North Carolina, N.C.G.S. § 163-278.19(b); Ohio, O.R.C. § 3599.03; Oklahoma, 21 Okla. Stat. § 187(7)(b)(7); Oregon, Or. Rev. Stat. § 260.007(7); Pennsylvania, 25 P.S. § 3253(c); South Carolina, S.C. Code Ann. § 8-13-1300(31); South Dakota, S.D. Codified Laws §§ 12-17-1(11), 12-27-16(8)(c),; Tennessee, Tenn. Code Ann. § 2-10-102-(4)(D); Texas, Tex. Elec. Code Ann. § 253.098(a), 1 Tex. Admin. Code § 24.11; Utah, Utah Code Ann. § 20A-11-1404(4); Washington, RCW §§ 42.17.020(15)(b)(v), 42.17.100(1); West Virginia, W.Va. Code § 3-8-1a(11)(B)(vi); Wisconsin, Wis. Stat. § 11.29(1); GAB Advisory Opinion 00-02; Wyoming, Wy. Stat. tit. § 22, 25-102(d).

[9] These states include Delaware, Indiana, Iowa, Kentucky, Maryland, Nevada, New Hampshire, New Mexico, Rhode Island and Vermont. The omission of some states in these footnotes does not necessarily mean that aspects of their campaign finance laws apply to membership communications.

rather than its sponsored PAC would become subject to the new reporting rules. As with public legislative advocacy, unions traditionally have spent their regular general-fund accounts on *internal* legislative and electoral communications, because all applicable law permits this; doing so minimizes intrusive disclosures about such internal matters; and doing so is administratively easier than using a separate account. Just as importantly, unions have a strong incentive to use only a legally distinct political fund for their *public* electoral communications, because that is the only way a union avoid paying an onerous 35% federal tax on that spending if the union uses its regular general fund. See 26 U.S.C. § 527(f); Treas. Reg. § 1.527-6(a), (f). In contrast, internal membership political communications of any kind are *not* subject to this taxation. See Treas. Reg. §§ 1.527-2(c), 1.527-6(b). But a union's monetary and in-kind *contributions* to candidates typically trigger taxation at the 35% rate if made from the union's regular general-fund account. *See id.*

It is also very important to unions like Local 32BJ and their members that they be able to freely associate with incumbent and non-incumbent candidates. Local 32BJ's members are ordinary citizens with a great stake in City government and its policies. Their union is a critical forum for their participation in civic life. As the Supreme Court has recognized, "[u]nions have traditionally aligned themselves with a wide range of social, political and ideological viewpoints," *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516 (1991), and they have always played a vital role in the public arena as advocates for both their members and all workers. *See generally Ellis v. Bhd. of Railway and Airline Clerks*, 466 U.S. 435, 446 (1984), *Eastex, Inc. v. NLRB*, 437 U.S. at 565-66 ; *Abood v. Detroit Bd. of Education*, 431 U.S. 209, 227-32 (1977); *Pipefitters v. United States*, 407 U.S. 385, 402-32 (1972); *Machinists v. Street*, 367 U.S. 740, 767 (1961); *id.* at 798, 800-03, 812-16 (Frankfurter, J., dissenting); *United States v. United Automobile Workers*, 352 U.S. 567, 578-86 (1957); *United States v. CIO*, 335 U.S. 106, 115-21 (1948); *id*. at 143-46 (Rutledge, J., dissenting). Unions and other membership organizations – such as environmental and civil rights groups – have important interests in associating with candidates and public officials, and they are constitutionally protected in doing so without thereby being deemed to be restricted as "contributors" to those candidates.

Here is an example, taken from recent Local 32BJ experience, as to how application of this rule could go awry and force Local 32BJ to *mis*report and confuse the public. In 2005, amidst the mayoral election, Local 32BJ successfully advocated the inclusion of affordable housing and wage standards for building service workers in the controversial Greenpoint/Williamsburg rezoning project. Mayor Michael Bloomberg and then-Speaker Gifford Miller, both mayoral candidates, played key roles in successfully shepherding this arrangement through the rezoning process. After the union's victory, the union mailed all of its City resident members about the project and commended both Mayor Bloomberg and Speaker Miller for their work and support. If the Revised Proposed Rules were in effect, then those communications would be "electioneering communications" via a "mass mailing" with respect to two competing mayoral candidates, and so an in-kind contribution to them, even though Local

32BJ had endorsed neither candidate and intended no electoral advantage or disadvantage to either.

In addition to the mailer to members commending both officials for their work on the Greenpoint/Williamsburg rezoning project, Local 32BJ hosted an event about this victory with its members and City Councilmembers at which Speaker Miller spoke, publicizing it in advance with both worksite flyers and telephone calls to Local 32BJ members. If the Revised Proposed Rules were in effect, then those flyers too (if not the meeting or phone calls) would be subject to the "contribution" limits to "candidate" Miller. No sound purpose would be served by forcing a union to navigate around such barriers.

Moreover, if internal communications were deemed to be contributions, it would undermine both the viability and constitutionality of New York City's public financing system; for, it would force candidates to choose between accepting public financing and exercising their right to associate with unions and other membership organizations. As noted earlier, the CFA imposes contribution limits of $2,750, $3,850 or $4,950 on a "participant" in the public financing system, depending on the office sought. See NYC Admin. Code § 3-703(1)(f). Because the cost of communications within many unions and membership organizations routinely exceeds these sums, if such communications were considered contributions then candidates who associated with the organizations would forfeit their eligibility for public financing and jeopardize both the rights of the organizations and their members to associate with the candidate and each other. The CFB should not create unnecessary disincentives to candidate participation in the public financing system.

First Amendment Considerations

The Revised Proposed Rules implicate important First Amendment concerns. Over 60 years ago, the Supreme Court recognized in *United States v. CIO*, 335 U.S. at 121, that construing the federal campaign finance statute to restrict communications between a union and its members would create "the gravest doubt" as to the statute's constitutionality. Accordingly, the Court construed the law to exclude from its scope a union's expenditure of funds on its own internal newsletter urging its members to vote for a particular candidate for Congress. The Court recognized this First Amendment principle again in *United States v. United Automobile Workers*, 352 U.S. at 592, when it remanded a case involving an alleged union violation of the federal campaign finance law involving a paid broadcast and asked, among other things: "[D]id the [union's] broadcast reach the public at large or only those affiliated with [the union]?"

Against this constitutional backdrop, Congress in 1971 enacted explicit exceptions to the key terms "contribution" and "expenditure" in FECA for "'communications by a corporation to its stockholders and their families or by a labor organization to its members and their families on any subject.'" *Pipefitters Local Union No. 562 v. United States*, 407 U.S. at 409-10 (quoting 86

Stat. 10). See 2 U.S.C. § 441b(b)(2)(A). Congress recognized that "'allowing [unions and corporations] to communicate freely with members and stockholders on any subject'" using their general treasuries, not just voluntary contributions from union members or corporate shareholders as required by federal law for *external* political activity, was "'required by sound policy *and the Constitution.*'" 407 U.S. at 431 (quoting Rep. Hansen, 117 Cong. Rec. 43381) (emphasis added).[10] Notably, Congress has recognized that this zone of constitutionally protected speech and association extends to such internal communications even if they are coordinated with a candidate. See 2 U.S.C. §§ 441a(a)(7)(B) and 441b(b)(2)(A); 11 C.F.R. § 114.3(a)(1). As we have explained, we believe the CFA and the Charter Amendment do so as well, albeit in a *de facto* manner.

Moreover, related but distinct First Amendment considerations would be implicated by subjecting unions to potential CFB investigations and audits – as Revised Proposed Rule 13-08(a)(6) would – on the basis of membership communications and associations with candidates about them. Such an enforcement proceeding, like a comparable FEC inquiry, seeks information "of a fundamentally different constitutional character from the commercial or financial data which forms the bread and butter of SEC or FTC investigations," and necessarily involves the "real potential for chilling the free exercise of political speech and association guarded by the first amendment." *FEC v. Machinists Non-Partisan Political League*, 655 F. 2d 380, 388 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981). *See also FEC v. Florida for Kennedy Committee*, 681 F. 2d 1281, 1284 (11th Cir. 1982). As the District of Columbia Circuit observed in precluding the FEC from making public documents that it acquired during an investigation of the AFL-CIO, when the FEC "compels public disclosure of an association's confidential internal materials, it intrudes on the privacy of association and belief guaranteed by the First Amendment, as well as seriously interferes with internal group operations and effectiveness." *AFL-CIO v. FEC*, 333 F. 3d 168, 177 (D.C. Cir. 2003) (interior quotation marks omitted).

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[10] The *Pipefitters* opinion explains why the state has no compelling interest in restricting the use of union or corporate treasuries for internal political communications:

> "[E]very organization should be allowed to take the steps necessary for its growth and survival. There is, of course, no need to belabor the point that Government policies profoundly affect business and labor…If an organization, whether it be the NAM, the AMA, or the AFL-CIO, believes that certain candidates pose a threat to its well being or the well being of its members of stockholders, it should be able to get its views 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 union members and stockholders have a right to expect this expert guidance."

407 U.S. at 431 n. 42 (quoting Rep. Hansen, 117 Cong. Rec. 43380). However, the availability of that guidance would be unwarrantedly diminished if membership communications become in-kind contributions.

In *Buckley* itself the Supreme Court recognized that "compelled disclosure [regarding political activities], in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment"; and, because that is so, "significant encroachments on First Amendment rights of the sort that compelled disclosure imposes cannot be justified by a mere showing of some legitimate governmental interest." *Buckley v. Valeo*, 424 U.S. at 64. Thus, "the subordinating interests of the State must survive exacting scrutiny," *id.*, and there must "be a 'relevant correlation' or 'substantial relation' between the governmental interest and the information required to be disclosed." *Id.*, quoting *NAACP v. Alabama*, 357 U.S. 449, 525 (1958), and *Gibson v. Florida Legislative Comm.*, 372 U.S. 539, 546 (1963). *See also Citizens United*, 130 S. Ct. at 914 (same). Neither the Commission nor the CFB has identified such an interest that would be served by compelling disclosure of membership communications and subjecting them to the coordinated-contribution rules.

It is notable that Revised Proposed Rule 13-01 would exempt from the definition of a "covered expenditure" any expenditure "made in the ordinary conduct of business in connection with covering or carrying a news story, commentary, or editorial" by various listed media outlets. We do not quarrel with this exemption insofar as it applies to enterprises when they engage in news and opinion communications; it is sound and mindful of constitutional concerns, even though media corporations in the City are powerful players and public influencers of City voters, and they lobby both the executive and legislative branches of City government in pursuit of their institutional and commercial interests, which vest them with a huge stake in the outcomes of City elections. But the CFB has explained only that a similar provision in the originally proposed rule "provided the media exemption as such exemption is typically provided in existing independent expenditure rules in other jurisdictions." CFB Notice at 3. As we have shown, the same is true in other jurisdictions with respect to union and other group disclosures about their membership communications.

Application of "Member" Definition to Senior Staff and Immediate-Family Householders

The proposed definition of "member" at Revised Proposed Rule 13-01 appears to be reasonable and well suited to labor and other organizations, and we commend the CFB's clarification that the specified indicia of "member" status are alternative rather than cumulative to each other. But we recommend that the definition also cover individuals in the immediate family of a member who reside in the same household, as well as executive, administrative and other field and programmatic personnel of the organization itself. This would closely match long-established aspects of the analogous FECA member/shareholder exemption. See 2 U.S.C. § 441b(b)(2); 11 C.F.R. §§ 100.134, 114.1(j); FEC AO 1990-18. These features are warranted because these other individuals are both so closely identified with the group or its members as to not be fairly considered the "public" with respect to them, and exempting them will also greatly facilitate the administration of the final rule, given that communications that are targeted to

members, such as mail and telephone calls, cannot be effectuated in such a way as to avoid reaching family householders.

Recognition of a "*De Minimis*" Exception

We also recommend that the rule include an explicit *de minimis* exception lest it be read and enforced to mean that any amount of slippage in distribution beyond members (as further defined, above) of an otherwise covered communication, no matter how unavoidable or inadvertent, would turn the communication into a covered communication and trigger disclosure and in-kind contribution treatment. The FEC has long embraced such an exception by advisory opinion, *see, e.g.*, FEC AO 2003-05, and it would be sound and helpful for the Board to recognize one formally from the outset of its new rule so that the rule is practical and does not chill membership communications themselves.

III. Means of Communication of "Independent Expenditures"

The Charter Amendment did not specify the scope of communications outlets to which its requirements apply. The Revised Proposed Rules make important and positive changes to the original proposal by eliminating some means of communication from potential coverage (such as confining Internet communications to paid advertising on another person's website or the creation of an election-only website) and clarifying the meaning of others (such as a "mass mailing"). And, subject to our objections set forth in Parts I and II, the revisions also aptly take into account that "electioneering communications" and membership communications, if covered at all, at least warrant greater exemptions with respect to the means of their communication than does express advocacy. Nonetheless, and subject to those objections (which, if accepted, would happily moot much of the following), we offer the following comments.

First, the CFB should explicitly import in the text of the final rule itself the clarifying distinctions among the various communications means that it specifies in its accompanying guide, and in doing so eschew imprecise catch-all phrases like "a paid advertisement *such as in* a periodical or on a billboard (Revised Proposed Rule 12-01, definition of "electioneering communication") (emphasis added) and "any other form of paid political[11] advertising" (*id*., definition of "express advocacy communication"). (The Brennan Center has also made this recommendation. See Ladov Test. at 7.) Individuals and groups ought to be able to find the guidance they need on the face of the rule itself, and cataloguing covered communications

[11] The word "political" is unique to this provision in the Revised Proposed Rules, and the undefined term "political" is unconstitutionally vague. *See, e.g. Hynes v. Mayor of Oradell*, 425 U.S. 610, 621 (1976); *Alabama Education Association v. Bentley*, 2011 U.S. Dist. LEXIS 45544 and 45641 **110-21 (N.D. Ala. March 18, 2011), and cases cited therein, *question certified*, 2011 U.S. App. LEXIS 25903 (11th Cir. Dec. 23, 2011); *Lecci v. Cohn*, 360 F. Supp. 1159, 1168 (E.D.N.Y. 1968), *vacated as moot*, 493 F. 2d 826 (2d Cir. 1974). The CFB did replace the word "political" with "electoral" in revised Proposed Rule 13-02(d)(3), and it should eschew it here as well.

outlets there with finite precision is as easy as doing so in the guide that will be findable, if at all, only elsewhere on the Board's website.[12] Moreover, the guide simply will not have the same legal force as the rule itself.

Second, with respect to membership communications, we recognize that Revised Proposed Rule 13-02(b)(2) would further narrow the reportable outlets (as did the original proposal) by excluding "routine newsletters or periodicals, telephone calls, and communications relating to the internal deliberations of the entity's endorsements…." Welcome and justified as that is, the proposed line between what is and is not subject to mandatory disclosure lacks coherence, and is an arbitrary prescription for confusion that will deter civic participation. While the CFB explains that it "recognizes the role that such organizations play in educating members and stockholders more generally about public policy and other issues, while requiring disclosure for communications that are otherwise similar to typical campaign material," see CFB 2012 Guide at 3, that is an odd distinction if disclosure of a group's efforts at electoral persuasion is the goal. And, as we have shown, it is not simply disclosure that is at stake: the lines that the CFB draws will also delineate which conduct is and is not subject to strict *limits* as in-kind contributions if the reportable internal communications are coordinated with a candidate.

Again, while every exemption for a means of communication brings the membership-communications aspect of the rule closer to where it should be, we submit that the far better course is to extend the membership exemption to *all* forms of internal communication, including "mass mailings," leaflets, flyers, palm cards and other printed matter, so that unions and other membership groups may operate with clarity, and retain the freedoms they now have to engage internally with their members, and for their members to engage with each other, without having to navigate a disruptive and counterintuitive disclosure requirement.

IV. Content of Disclosure Reports

The Revised Proposed Rules also reflect significant improvements in the original proposal's catalog of information that would be required by reporting entities. We especially commend the exemption from the definition of "contribution" for individual membership dues and "revenue from goods and services." We interpret the latter phrase to include all forms of routine organizational investment income, such as interest, dividends and capital gainsbecause such income is also ubiquitous and unrelated to a group's independent expenditures. The CFB could dispel any doubt on the point by adding it to the other two exemptions.

[12] In that connection, in addition to the different outlets that the CFB lists, CFB 2012 Guide at 2-3, the final rule should be clear that, as appears to be the case, it will not apply to holding a press conference, placing an unpaid op-ed piece or participating in a news media interview. This may be accomplished, of course, by phrasing the final rule to include only a finite list of outlets that *are* covered.

We also commend the Board for proposing a $100 expenditure threshold in order to relieve what could be the otherwise extremely burdensome scope of the phrase "[a]ll expenditures directly related to the design, production, or distribution of a covered communication." But we continue to believe that the lack of clarity of that phrase in Revised Proposed Rule 13-01 would be best alleviated if the rule specified that it reaches only costs that are *specially* incurred as well as directly attributable to the communication, and do not include any of the time of regular staff or the use of facilities that are more properly treated as organizational overhead. Again, the guide helpfully clarifies that, for example, "rent, management and other expenses not directly related" to communications are exempt, CFB 2012 Guide at 4, but that sort of precision would be better located within the final rule itself.

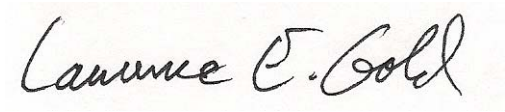
Finally, we also continue to urge that the requirement in Revised Proposed Rule 13-02(b)(1) that every disclosure statement include copies of the reported covered communication be dropped because it is redundant and onerous. Such copies are duplicative of information about the communications that will already be disclosed, and the 24-hour reporting deadlines in particular make this highly problematic for many groups. And, as it is, Revised Proposed Rule 13-07 would reasonably require the spender to retain these materials for three years.

Notably, the New York Election Law requires the submission of such materials to the New York State Board of Elections, but only once with the *post*-election report (and, of course, only by registered political committees). See N.Y. ELEC. LAW § 14-106; SBE, "Campaign Finance Handbook" 12 (2011), available at http://www.elections.state.ny.us/NYSBOE/download/finance/hndbk2011.pdf. The CFB would more reasonably achieve its evident goal of publicly disclosing the actual "covered communication" itself by mirroring that requirement. Indeed, requiring the immediate submission of these documents to the CFB ironically could convert the CFB itself into the most potent vehicle for their public dissemination and electoral influence, inasmuch as the CFB presumably will post in real time on its own widely known, reliable Internet repository membership and other communications that would reach a limited audience otherwise.

CONCLUSION

The 2010 Charter Amendment imposes important new requirements for participation in City elections by organizations and individuals. We believe the CFB's Revised Proposed Rules have made substantial improvements over the original Proposed Rules. In order to carry out the Charter Amendment faithfully, sensibly and in accordance with other law, we recommend that the final rule also include the revisions we describe above, including those that avoid the inappropriate conversion of vital speech and associational activities into prohibited or limited "contributions." We appreciate the opportunity to provide our views. Thank you for your consideration of these comments.

Respectfully submitted,



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