Comments Submitted by the United Federation of Teachers
To The Campaign Finance Board
Re: Proposed Independent Expenditure Rules

This testimony is submitted by the United Federation of Teachers (UFT), on behalf of its approximately 200,000 members including, among others, all non-supervisory educators and allied personnel employed by the NYC Board of Education, 20,000 home child care providers, nurses, administrative law judges, and retired members. We submit this testimony on behalf of our membership regarding the Proposed Chapter 13 of Title 52 of the Rules of the City of New York ("the Proposed Rules") and their corresponding effect on the reporting of "independent expenditures". UFT is a member of the New York City Central Labor Council and shares the major legal and policy concerns expressed in its testimony on the Proposed Rules.

The UFT strongly supports the intent of the 2010 amendment to the City Charter, which authorized the Proposed Rules that require the disclosure of independent expenditures by individuals and groups attempting to persuade voters on candidates for elective office and referenda on the ballot. The purpose of reporting campaign expenditures is to inform the public about who is trying to influence them and how much they are spending to do it. This laudable idea is that sunshine is the best disinfectant. Unfortunately, much of the CFB proposed rules are overbroad and go well beyond the mandate and intention of the authorizing 2010 City Charter Amendment. **In particular, the treatment of union member to member communications in the same manner as communications to the general public is bad law and bad public policy.**

Burdening Union Member to Member Communication Is Beyond the Scope of the Charter Amendment

The First Amendment protects union members' rights to freedom of speech and association. Various Federal courts (see e.g. *Toledo Area AFL-CIO Council v. Anthoney Pizz*, 898 F. Supp 554 (1995) and the United States Supreme Court (see e.g. *United States v. Congress of Industrial Organizations*, 335 U.S. 106 (1948), have considered union member to member communications and found that they are protected by the freedoms of association and speech under the First Amendment. These cases reflect the policy that membership organizations must have the ability to communicate with their members without the undue intrusion of government. When Congress enacted the Federal Election Campaign Act (FECA), it respected the constitutional protections afforded such communications. Under FECA, communications between a membership organization and its members are excluded from the definition of "expenditure" and are not reportable. See 2 USC §431(9)(B)(iii). Member to member communications are protected 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).

Discussion among members of an organization regarding political interests relevant to the members is at the core of freedom of association. UFT cannot operate without the unfettered ability to communicate with and among its members. The Proposed Rules define "public communication" as "a communication by means of a newspaper, magazine, billboard, mass mailing or other printed material; a telephone communication, Internet advertisement, or a communication by means of any radio, television, cable, satellite or Internet broadcast; or any other form of communication to the general public." See Proposed Rule 13-01(l). The

Campaign Finance Board (CFB) elaborates that "[p]aying people to hand out literature on the street or door to door" is covered, but emails are not, "except that the creation of an attached campaign flyer is covered." CFB Guide at 3. This definition and accompanying guide provide arbitrary distinctions between similar uses of media. The same message in the body of an email is treated differently than if it is attached to an email. This burdens speech and free association among members of the union and has the potential to chill the very speech widely acknowledged to be protected by the Supreme Court of the United States and FECA. The rule needs to be clarified so that it does not impinge on the political speech and free association among union members and their union.

The treatment of member to member communications in the same manner as public communications will chill and suppress the very communication that is protected by the First Amendment to the United States Constitution. In addition, such rules do not further the purposes of the Charter amendment. In many cases, the union's communications of a political nature provide information to members on the positions of down ballot candidates for office that do not receive much attention in the free and widely available media. UFT members already know who is communicating with them when they receive such information and are aware of how much the union is spending to communicate. Because UFT has private sector members, all union expenses and disbursements are disclosed in the union newspaper per the requirements of the Federal Labor Management Disclosure and Reporting Act (LMRDA or Landrum Griffin Act). Further, the UFT and many other unions raise voluntary member contributions to fund such communications.

The Proposed Rules Do Not Adequately Differentiate Between True Advocacy and Electioneering

The sweepingly broad definitions in these proposed rules improperly reach speech that is intended to educate through issue advocacy by treating it in the same manner as electioneering. The Proposed Rules regulate independent expenditures when they are for an electioneering communication or an express advocacy communication. See Proposed Rules 13-01(3) and 13-02. Requiring that any statement related to an elected official, candidate, or legislative issue identify whether the statement is in support of or opposition to the candidate changes the nature of the communication from advocacy to electioneering. Lobbying on an issue is not electioneering, and these rules confuse the two issues.

These proposed rules impinge on the right of the UFT to determine who will receive political endorsement by forcing UFT to give the appearance of political support or opposition to an elected official or candidate, when, in fact, all the union is doing is articulating support for or opposition to the position of an elected official on legislation or public policy. Often multiple candidates for office share a position on an issue that UFT agrees with – yet only one candidate may get a political endorsement for the elective office that all of these candidates seek. By requiring statements of support or opposition for each issue we will be creating confusion, rather than clarity, for our members, the media and the public. Statements of support could easily be misconstrued as union endorsements of the candidates. UFT has an internal democratic process for determining which candidate might receive an endorsement for a political campaign and

merely communicating about a candidate's position on one issue would not fulfill the internal requirements for endorsement.

Furthermore, legislative advocacy is regulated pursuant to the New York State Legislative and Public Officers Laws and is enforced by the State Commission on Public Integrity and the City of New York City Clerk's Lobbying Bureau. Both State and City lobbying laws require reporting of legislative advocacy. **To require reporting of these activities to the CFB is duplicative and beyond the jurisdiction of the CFB**. Defining advocacy communications in the same way as electioneering and requiring disclosure of this activity compels an organization to file reports on issues that the CFB has no jurisdiction over, violating the free speech clause of the First Amendment. See generally *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 197-200 (1999); *Gralike v. Cook*, 191 F.3d 911, 917 (8th Cir. 1999), and cases cited therein, *aff'd*, 5312 U.S. 510 (2001).

The Reporting Process is Onerous, Burdensome And Punitive

Third, reporting is not a simple process; it requires as many as 12 scheduled reports, plus up to 14 more just before the Primary or General Election. Under these proposed rules, reports are required to be filed within 90 days of any election. When you consider a year with a primary and general election that will mean that all activity during fully half the year will be reportable. During the last two weeks before an election expenditures must be reported within *24 hours*. See 13-03(c). Organizations often do not have final bills of the costs of advertisements, printing, or mailings until after the required time frame. Compliance with this Rule would be practically

impossible for even a large politically experienced organization such as UFT much less for a smaller union or not for profit.

By complicating the reporting requirements and increasing the frequency of reporting during the crunch time of campaigns, these rules could effectively shut down political participation by any organization, but again would be particularly onerous for not for profit and community groups, unable to hire attorneys or accountants to assist in compliance. To repeat, the CFB's mission is to increase participation in the electoral process; these rules would hinder the very participation CFB is supposed to foster.

The penalties associated with violation of these proposed rules are very severe. Failure to report, or reporting incorrectly, could lead to lengthy investigations with high legal defense costs, $10,000 fines per infraction and even criminal prosecution. Considering that in some City Council election cycles the UFT participates in fifty or more campaigns the potential fines for untimely reporting could exceed $500,000 per election cycle! All of this means, in practice, that nearly all groups subject to the new rules might either forgo speaking out or, if they can afford it and are willing to take the risks, incur significant new accounting and legal costs. This is not encouraging participation – it is discouraging participation by all but the most well heeled, and is unnecessary.

Strict rules and meaningful punishments associated with these new rules are entirely appropriate for the independent PACs and expressly political groups whose spending the 2010 charter amendment was intended to illuminate. But the same regulation becomes onerous when applied to groups whose clear intention is not electioneering but rather public education, advocacy, or member service and representation. The CFB can fulfill the City Charter amendment's goal of bringing transparency and accountability to independent political

expenditures without stifling speech that is critical to the democratic process by limiting its proposed rules to "express advocacy," the spending that targets the ***public*** with speech that clearly supports or opposes candidates in elections.

When organizations and wealthy people spend money communicating with the general public and say "Vote for Candidate X" or "Defeat Candidate Y," they should disclose who they are, how much they spent, and who else financed that advertising. And, the rule should focus on disclosure of funding that actually relates to the communications themselves. That is what the 2010 charter amendment was aimed at.

The CFB should not interfere with First Amendment protected union and membership relationships, impose onerous and chilling requirements on legislative and issue advocacy, or force organizations to report irrelevant private information just because they exercise First Amendment Rights. We urge the CFB to go back to the drawing board and consider a Rule that does not trample on unions and their members First Amendment Rights, does not discourage participation in political and civic affairs by working New Yorkers, and that requires appropriate practical disclosure of political expenditures made to influence the general voting population.

Thank you for your consideration. We remain ready and willing to work with CFB to accomplish this goal.