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Comments of Laurence E. Gold on Behalf of SEIU Local 32BJ Regarding the New York City Campaign Finance Board Proposed Independent Expenditure Rules

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Introduction

SEIU Local 32BJ appreciates the opportunity to submit these comments to the New York City Campaign Finance Board ("CFB") 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. Proposed Chapter 13 of Title 52 of the Rules of the City of New York ("the Proposed Rules") would impose substantial new requirements on unions, business corporations, other private groups, political committees and individuals with respect to their efforts independent of candidates to persuade City voters.

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.

In considering the 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 Proposed Rules would effectuate that goal, we support them and believe that it carries out the purposes of the Charter Amendment. But the Proposed Rules in significant respects markedly, unnecessarily and, we would submit, in some instances would unlawfully stray from imposing that kind of disclosure regime.

We explain those concerns in these comments. They 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, different aspects of the Proposed Rules fail to serve those goals. And, as we explain below, the *combined effect* of multiple aspects of the Proposed Rules on a particular organization severely compound the proposal's inappropriateness and, we submit, its legal vulnerability.

The 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.).

As explained more fully below, we recommend that the CFB make the following principal changes to the Proposed Rules in its final regulations:

1. Clarify the definition of "public communications" so it specifically applies to clearly identified and appropriate media.
2. Revise the definition of "express advocacy communications" so it more clearly applies to express advocacy and its functional equivalent.
3. Eliminate coverage of any form of so-called "electioneering communications."
4. Exempt union and other organizational membership communications in their entirety.
5. Relieve unions and other "independent spenders" from a requirement to register with the CFB.
6. Require incoming "contributions" to be disclosed if they are either earmarked or solicited for independent expenditures; eschew comprehensive "receipts" reporting.
7. Eschew requiring advance disclosure of potential public communications.
8. Simplify reporting of spending on public communications.
9. Avoid subjecting political committees to duplicative registration and reporting requirements.
10. Omit audits as an enforcement option against unions and other groups that are not registered political committees.

I. Scope of "Public Communications" That Are "Independent Expenditures"

The Proposed Rules require certain disclosures by the sources of "public communications" that are "independent expenditures." We believe the CFB should revise the definitions of both of these key terms in the final rule.

A. "Public Communications"

The Charter Amendment does not address the scope of communications outlets to which its requirements apply. The Proposed Rule covers any "public communication," defined 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." Proposed Rule 13-01(l). The 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." See CFB, "Guide to the Proposed Independent Expenditure Rules for New York City Elections" at 3 (Sept. 22, 2011) ("CFB Guide"). We suggest that the rule itself should be more explicit about what it does and does not cover.

First, we recommend adoption of the Federal Election Commission's ("FEC") careful and self-described "restrained regulatory approach" to the Internet in determining its own definition of "public communication," which does "not include communications over the Internet, except

for communications placed for a fee on another person's Web site." 11 C.F.R. § 100.26. The FEC has emphasized the Internet's low cost, accessibility, minimal barriers to entry and dynamic nature as considerations that have guided it here. See FEC, Final Rule, "Internet Communications," 72 Fed. Reg. 18589 (April 12, 2006). Those features have become even more pronounced in the five years since that rulemaking, and that "restrained" rule has served the public well. Disclosures about emails and one's own website content, at least for groups other than CFB-registered registered political committees, should be exempt from CFB disclosure rules, and without odd exceptions for "attachments" and the like. We note here that the "[m]edia exemption" at Proposed Rule 13-02(b) would exempt "covering or carrying a news story, commentary or editorial by any...website...or other periodical publication, including any Internet or electronic publication...." The recent history of electronic and other media demonstrates how difficult it is to set and maintain classifications of regular speakers on the Internet, such as distinguishing the "media" from bloggers and unions and other groups whose websites are tremendous sources of fresh or aggregated information. The best approach to the Internet here is a hands-off approach, and the final rule itself should make this plain.

Second, while Proposed Rule 13-01(n) defines "telephone communications" to include 500 identical or substantially similar calls within 30 days, no definition of a "mass mailing" is included. We recommend a similar formulation of 500 identical or substantially similar mail pieces within 30 days.

Third, the proposal refers to "other printed material" in addition to "mass mailings" but the proposal is silent about its actual and threshold degree of distribution for the rule to attach. Surely an itemization instead is preferable, such as leaflets and flyers, and a minimum distribution of at least 500 within 30 days also should be specified.

Fourth, the rule should explicitly exempt meetings of any kind to the extent that they do not involve the distribution of printed material. Individuals and groups should not have to account for the costs of their oral communications or wonder where the disclosure line is drawn when they gather, or find themselves gathered. The accompanying CFB Guide's description of door-to-door canvassing suggests the drawing of a disclosure trigger by the distribution of printed material; we agree and the rule itself should say so with respect to canvassing and all in-person oral messaging.

Fifth, the rule should make clear that all communications content that is subject to the proposed "[m]edia exemption" and involves no access fee paid by an individual or group that is exposed in that media, is likewise exempt from reporting by the communicator. This means holding a press conference, placing an op-ed piece or appearing for a broadcast interview would be exempt, even if the group incurred some related cost to organize the press conference, write the op-ed piece or prepare or travel for the interview. In contrast, of course, a *paid* advertisement in covered public media should be reportable.

The rule should be explicit about these matters because, as now drafted, all of them are in question. The fact that the costs associated with a particular communication, such as an email or an op-ed piece, are small does not itself make them exempt under the Proposed Rules, because the Charter's key monetary thresholds of $1,000 and $5,000 are each cumulative and, once reached, compel disclosure of all additional spending regardless of amount. Charter § 1052(a)(15)(b). In order to make clear what the rule covers, we recommend that the inclusions and exclusions be specified as described above, and that the final rule omit the catch-all phrase "any other form of communication to the general public."

B. "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 proposal. As the CFB aptly recognizes in its Proposed Rules, this content standard is narrower than one that would simply (if clearly) cover any "reference" to a candidate (or proposal). But the Proposed Rules substantially depart from the Charter's limited mandate by reaching speech content that does not or may not seek to persuade voters as to how to cast their ballots. And, some of the language in the proposed rules is unnecessarily confusing and unduly vague. Proposed Rules 13-01(e), (g) and (i) and 13-02(a) define the key phrase "in support of or in opposition to a candidate" in two parts, and we address each in turn.

1. "Express Advocacy Communications"

The first part is an "express advocacy communication." See Proposed Rule 13-01(g). We endorse this definition in principle because "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). And, as discussed in the next section, the phrase "in support of or in opposition to" must be construed to reach only express advocacy or its "functional equivalent" in order to cure what would otherwise be its unconstitutional vagueness.

The CFB's proposed express-advocacy definition here closely 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. Insofar as Proposed Rule 13-01(g)(i) tracks the "magic words"

portion of 11 C.F.R. § 100.22(a), it should be retained because it provides a bright-line rule and has gained broad acceptance due to its precision and adherence to *Buckley*'s own description of the concept, see 424 U.S. at 44 n. 52.

We also support retention of the phrase in Proposed Rule 13-01(g)(i) "or a campaign slogan or words that in context...can have no reasonable meaning other than to advocate the passage or defeat of a ballot proposal or the election or defeat of one or more clearly identified candidates." We do so 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 express-advocacy 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 proposed express-advocacy definition is more problematic insofar as it uses the phrase "with limited reference to external events, such as the proximity to the primary or election" in Proposed Rules 13-01(g)(i) and Rule 13-01(g)(ii)(2). In its explication of the "functional equivalent of express advocacy," the Supreme Court specifically rejected numerous considerations of external circumstances, including the speaker's other activities, timing in relation to a legislative session, and the content of a website referenced in the message. See *id.* at 471-73. The Court approved of consideration of "basic background information that may be necessary to put an ad in context – such as "whether an ad describes a legislative issue that is either currently the subject of legislative scrutiny or likely to be the subject of scrutiny in the near future...." *Id.* at 474 (interior quotation marks omitted). And, it warned that the focus should be "objective, focusing on the substance of the communication rather than amorphous considerations of intent and effect," and "must eschew the open-ended rough-and-tumble of factors...." *Id.* at 469 (interior quotation marks omitted). We suggest that this part of the proposed rule list the sole "background" factors that may be considered in order to lay any doubt at rest about whether a communication is the functional equivalent of express advocacy, namely, proximity to an election[1] and the legislative-issue example mentioned by the Court.

Proposed Rule 13-01(g)(ii) itself closely tracks 11 C.F.R. § 100.22(b). That provision has had a checkered history in the courts. Before the Court's *WRTL* decision it was repeatedly invalidated as unconstitutionally vague, *see, e.g., Virginia Society for Human Life v. Federal Election Commission*, 263 F. 3d 379 (4th Cir. 2001); *Maine Right to Life Committee v. Federal Election Commission*, 914 F. Supp. 8, 12-13 (D. Me. 1995), *aff'd per curiam*, 98 F. 3d 1 (1st Cir. 1996), *cert. denied*, 522 U.S. 810 (1997), or beyond the scope of the FECA term "express

[1] The Court did reject as *determinative* of this status an ad's proximity to an election, but only because such proximity was one of the definitional features of the FECA provision that it was considering, namely, an "electioneering communication." See *WRTL,* 551 U.S. at 472.

advocacy" as construed by the Supreme Court because this portion of the regulation fails to include explicit words of advocacy about the election or defeat of a candidate. *See, e.g., Right to Life of Dutchess County, Inc. v. Federal Election Commission*, 6 F. Supp. 2d 248, 253-54 (S.D.N.Y. 1998). Following *WRTL* and *Citizens United*, the constitutionality of this regulation is being litigated anew. *See, e.g., The Real Truth About Obama, Inc. v. Federal Election Commission*, 575 F. 3d 342 (4th Cir. 2009), *cert. granted, vacated and remanded*, 130 S. Ct. 2371 (2010), *on remand*, 607 F.3d 355 (4th Cir. 2010), *on remand*, 2010 U.S. Dist. LEXIS 14325 (E.D. Va. June 16, 2011), *appeal pending* (4th Cir.).

There is no sound reason for the CFB to enter this morass. Instead, it should adopt a definition of express advocacy that reflects 11 C.F.R. § 100.22(a), as proposed rule 13-01(g)(i) does in part as described above, and that simplifies the verbose and repetitive language now contained in part of Proposed Rule 13-01(g)(i) and all of Proposed Rule 13-01(g)(ii) so that it requires explicit words of advocacy that are the functional equivalent of express advocacy itself, and, accordingly, will pass muster without depending on the constitutionality of the FEC's § 100.22(b) formulation.

We recognize in this connection that the CFB proposes a process through which a would-be speaker "may seek pre-clearance from the Board regarding whether [a] communication will be subject" to the rule. See Proposed Rule 13-07. But the Supreme Court has specifically rejected such a procedure as a constitutionally sufficient substitute for clarity in the rule itself. "The First Amendment does not permit laws that force speakers to retain a campaign finance attorney...or seek declaratory rulings before discussing the most salient political issues of our day." *Citizens United*, 130 S. Ct. at 889. Where the applicability of a regulation turn on a "complex" definition of political speech, "a speaker who wants to avoid threats of criminal liability and the heavy costs of defending against [government] enforcement must ask a governmental agency for prior permission to speak," thereby creating "the equivalent of prior restraint by giving the [CFB] power analogous to licensing laws implemented in 16th- and 17th-century England, laws and government practices of the sort that the First Amendment was drawn to prohibit." *Id.* at 895-96, and cases cited therein. Again, the fact that the CFB would be marking where *disclosure* must occur is no less potent than marking a line of *prohibition*, for speaking without complying with the Proposed Rule's exacting disclosure requirements could subject the speaker to a heavy penalty so that the disclosure requirement itself deters speech. And, the CFB itself should not wish to exercise arbitrary neo-censorial power like this, with groups that fear liability for guessing wrong at the mercy of a CFB employee's subjective evaluation of their proposed speech.

The reality of Local 32BJ's and other groups' electoral and legislative work further makes clear the practical unacceptability of an inadequately clear definition of reportable speech and the proposed pre-clearance alternative. Legislative and political events happen suddenly, and responses and campaigns must be devised on a moment's notice. Often, an urgent response

is necessary, particularly when, say, City Council or mayoral action is imminent. Groups have no time to wait for the CFB's opinion, whether provided within "7 days" or "24 hours," particularly given that "the Board's pre-clearance determination only applies to the communication exactly as submitted, and disseminated exactly as described to the Board," see Proposed Rule 13-07, both features that may have to change frequently until final dissemination. It is for these reasons that a cardinal principle of First Amendment law is that "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

2. <u>"Electioneering Communications"</u>

The CFB's proposed second-part definition of "independent expenditure," a so-called "electioneering communication," see Proposed Rule 13-01(e), stands on different footing and should not be adopted in any form. This definition would subject to disclosure any public communication that is "disseminated within 90 days of a covered election that clearly identifies a candidate and (1) refers to the personal qualities, character or fitness of the candidate; (2) supports or condemns that candidate's position or stance on issues; or (3) supports or condemns that candidate's public record." The CFB's only illustration of this definition reveals its broad non-electoral scope: a message that says "'Tell Candidate X that her position on budget cuts is wrong.'" CFB Guide at 1. Leaving aside that the undefined term "condemn" evidently would be applied so elastically as to reach even polite disagreement, Proposed Rule 13-01(e) would apply to speech that is explicitly non-electoral, explicitly legislative or both. Indeed, the proposed definition does not require that the candidate be referred to *as a candidate* or that there be any reference to the election itself. The speech 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).

The CFB has no authority to adopt its proposed version of "electioneering communication" or any other version that extends beyond express advocacy or its functional equivalent. Again, the operative Charter phrase is "in support of, or in opposition to" a candidate in a covered election. In *Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F, 3d 376, 389-91 (2d Cir. 2000), the Second Circuit stated that a Vermont campaign finance disclosure statute statute could pass constitutional muster, despite vagueness concerns, only if the statutory phrase "supporting or opposing one or more candidates" was confined to express advocacy. To our knowledge, in other judicial challenges based on vagueness and overbreadth grounds, the Charter phrase (or its substantively identical formulations from the root words "support" and "oppose") in campaign finance statutes and regulations have been saved through construction only in reliance on 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, 923 (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 ("AO) 01-2011, at 2 (interpreting phrase "support or defeat" in New Jersey campaign finance statute to mean express advocacy as defined in *Buckley*). The word "support" itself is one of the words that *Buckley* specified as language of express advocacy. *See* 424 U.S. at 44 n. 52. And, 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).

Plainly, and certainly in light of the CFB's illustration of an "electioneering communication," that speech category is *not* confined to express advocacy, or even its functional equivalent. In innumerable situations, a communication would satisfy the definition yet be "susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate." In fact, when the FEC promulgated its regulation to provide specific definition and guidance regarding the *WRTL* Court's explication of functional equivalence, the FEC made plain that *none* of the three prongs of the CFB's proposed definition would meet that standard. See 11 C.F.R. § 114.5; FEC, Final Rule, "Electioneering Communications," 72 Fed. Reg. 72899 (Dec. 26, 2007); http://www.fec.gov/pages/bcra/rulemakings/ECs_WRTL_Exemption_Examples.shtml (see second Example 1 (Ganske ad)).

A construction of the Charter language that explicitly reflects its electoral nature is necessary also because it could otherwise threaten to reach non-electoral speech. "'[T]he distinction between discussion of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application.'" *WRTL*, 551 U.S. at 474 (footnote omitted), quoting *Buckley v. Valeo*, 424 U.S. at 42. And, "[d]iscussion of issues cannot be suppressed simply because the issues may be pertinent in an election. Where the First Amendment is implicated, the tie goes to the speaker, not the censor." *WRTL, supra* (footnote omitted).

The constitutional imperative of construing a vague regulatory phrase so it is sufficiently precise to be understood and followed in practice applies fully to electoral disclosure requirements. *Buckley v. Valeo*, 424 U.S. at 79-80. And, as explained below, the structure of the proposed rule is such that its definition of covered communications not only delineates the scope of disclosure but also the scope of communications that are converted into limited or prohibited "in-kind contributions" if they are coordinated with a candidate.

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 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 chose *not* to adopt the mere "reference" standard that is a feature of the FECA "electioneering communication" disclosure requirements at issue in *Citizens United.* The amendment instead predicated reporting on a communication's inclusion of explicit electoral advocacy – a statement "in support of or in opposition to" a candidate's election or defeat. And, there are other differences: although this FECA "content" standard for reporting non-express-advocacy speech is broader than the Charter's, it only applies to broadcasts within 30 days of a primary and 60 days before a general election; in contrast, the Proposed Rule would capture "any...form of communication to the general public" and encompass a 90-day period before each election.

Proposed Rule 13-01(g)(ii) is particularly inappropriate because the CFB's definition of an "independent expenditure" 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"), and Proposed Rule 13-06 repeats that formulation in cross-referencing Rule 1-08(f) and stating that absent independence the candidate and not the entity would report the spending – that is, as an in-kind contribution.[2] And, the CFA's 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(f).

Here are two examples of activities that Local 32BJ has engaged in that could be affected by the proposed second-part definition of an "independent expenditure."

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 of importance 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 90 days of a primary or a general election,

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[2] The final rule should also clarify that the only coordination that triggers an in-kind contribution is coordination of a covered communication with a candidate who is either "support[ed] or...oppos[ed]" or whose opponent is supported or opposed in the communication. The rule should not entangle situations where a "candidate" (who will often be an incumbent official acting in that capacity) engages with a group about a communication concerning *another* "candidate" (also often an incumbent official) in a different race and does so independently of any candidate in that other race.

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.

Inclusion of non-electoral communications in this definition, and covering a period of up to 180 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 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 lobbying, and legislative and other issue advocacy. If the proposed Rule erroneously classifies such activity as "independent expenditures," however, the union must either subject itself to the onerous disclosure 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.

The Proposed Rule's coverage of non-electoral communications also would impose the perverse and unconstitutional requirement that a union official declare, in a "verifi[ed]" public filing, see proposed Rule 13-04(d), that its public communication was an "*electioneering* communication" that was "in support of or in opposition to a candidate" that the union names in its disclosure statement. See Proposed Rules 13-04(a), (b)(1). Requiring a union and its officials to make such a characterization is form of compelled speech in violation of the First Amendment. *See generally Buckley v. American Constitutional Law Foundation*, 525 U.S. 182,

197-2000 (1999); *Gralike v. Cook*, 191 F. 3d 911, 917 (8th Cir. 1999), and cases cited therein, *aff'd*, 531 U.S. 510 (2001).

The CFB should have no interest in forcing a group to mischaracterize the nature of its public advocacy. The result would be directly contrary to the disclosure scheme that the Charter Amendment created; the Commission sought to "provide critical information and context to members of the public and help them evaluate advertising messages *aimed at influencing their votes*," see "Final Report of the 2010 New York City Charter Revision Commission" ("Commission Final Report") at 13 (Aug. 23, 2010) (emphasis added), not force *non*-persuaders to swear that this was their purpose. For the same reason, it is no solution for a union to spend from its City-registered political committee for "electioneering communications" that are not, in fact, electoral, for that would cast the spending as unequivocally electoral in nature.

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 Proposed Rules were in effect, then those communications would be "electoral communications" that would have to signify Local 32BJ's "support" for two competing mayoral candidates, neither of whom the Local had at that time endorsed.

Although we oppose the inclusion of any formulation of "electioneering communication" content in the final rule, it must be emphasized that the proposed 90-day pre-election periods could yield an especially large amount of irrelevant and misleading reports, all greatly burdensome to those who must file them. These lengthy periods, of course, compound the likelihood that groups will avoid contact with public officials who happen to be candidates because of the onerous coordination rules. The CFB has not suggested any rationale for these periods, which are much longer than the corresponding federal periods — 60 days before a general election and 30 days before a primary – and which, in contrast, are confined to broadcast media. See 2 U.S.C. § 434(f)(3)(A)(i). If such a provision were to be adopted, and even if it could survive a legal challenge, it should be confined to no more than 30 days before a primary or general election.

We finally 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*., particularly because

coordinated electioneering communications would be subject to contribution limits and thus effectively prohibited. (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 ("NLRB") 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 by 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 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

Proposed Rule 13-02(c) sets forth a "[m]ember/[s]tockholder exemption"[3] to proposed Chapter 13, and Proposed Rule 13-01(j) defines the term "[m]ember" for this purpose.[4] The proposed exemption states:

> An expenditure by an entity for a routine newsletter or periodical, or telephone calls, or communications relating to the internal deliberations of the entity's endorsements, directed solely to an entity's own members or shareholders, as defined in Rule 13-01(k) and (m) respectively, shall not be required to be reported.

The Proposed Rule does not define any of its key terms, including "routine newsletter or periodical" and "communications relating to the internal deliberations of the entity's endorsements." (This lack of clarity is compounded by the imprecision of the Proposed Rule's definition of "public communications," discussed above.)

The CFB's materials accompanying the Proposed Rule offer some elaboration. However, none of it is reflected in the text of the exemption itself, and these informal interpretations do not

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[3] We do not comment on this proposal insofar as it applies to corporate communications with "stockholders" or defines that term at 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.

[4] The proposed definition of "member" at Proposed Rule 13-01(k) appears to be reasonable and well suited to labor and other organizations, so long as its first and second sentences are intended to be alternative independently sufficient formulations of a "member" definition.

appear to have any legal force except insofar as they might guide the CFB in exercising enforcement discretion, or as they might influence, but not bind, a reviewing court in either a challenge to the Proposed Rule or its application in enforcement litigation. The CFB explains:

> 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 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 explains 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 at 2. And, the CFB provides a table that distinguishes between some reportable and nondisclosed membership communications. Exempted are membership meetings; "[m]ember activation activities such as "[r]ecruitment mailing or calls for campaign event"; "[i]nternal deliberations among members" such as the "[p]roduction of statements advocating for an endorsement"; the "[d]issemination of statements from elected officials, such as "[c]ontract negotiation update or mobilization" or a "Labor day statement." *Id.* But the Proposed Rule would reach "[e]xpress advocacy or electioneering material, regardless of delivery method" unless it is included with a "routine newsletter or periodical."

We appreciate that this Proposed Rule in part takes into consideration concerns that we expressed at the Board's initial hearing last March. But we urge the Board to exempt all membership communications from the rule, for several reasons.

First, 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 New York City Campaign Finance Act ("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 CFB taken a formal position that internal communications may be regulated, in an advisory opinion 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.

Nor does the Charter Amendment provide such authority. Like the CFA and the Board's Rules, it nowhere clearly applies 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.

Nor, in the proceedings that led to the proposal of the Charter Amendment, did the CFB or the Charter Revision Commission ("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 Letter from Amy M. Loprest to Matthew Goldstein at 1-2 (May 4, 2010); Letter from Amy M. Loprest to Lorna Goodman at 4 (May 24, 2010). And, the Commission itself plainly focused solely on public communications as well. In its final report, the Commission made no reference to internal communications. 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, 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 Commission 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).

Finally, 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. The text of the portion of 2010 ballot Question 2 that pertained to this proposal stated: "Disclosure of Independent Campaign Spending Require public disclosure of expenditures made by entities and individuals independent from candidates to influence the outcome of a city election or referendum." The CFB's "Plain Language Summary" of the amendment in its official voter guide compared the fact that candidates must report the "complete details" of the money they raise and spend "to run their campaigns and communicate with voters" but "[w]hen other people or groups (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'....[that is] not reported to the CFB." Here the CFB provided two examples, each plainly a general public communication: "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, Charter Revision 2010, NYC Campaign Finance Board Voter Guide ("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 last November believed that they were approving 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 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. And, that is especially the case when membership communications do not raise the public policy concerns that animate the Charter Amendment itself or any common understanding of the need for public disclosure about independent expenditures.

Second, the special status of membership communications, discussed more fully below, is recognized by the overwhelming consensus of states that either formally exempt membership communications from coverage under campaign finance laws,[5] or (as in New York) in my

[5] *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

experience do so informally by exercising administrative discretion not to apply general statutes to those communications for various reasons, including deference to the absence of a governmental interest in doing so as well as First Amendment concerns.[6]

Third, 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.

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

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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 (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).

[6] 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.

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 non-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 during the initial phase of this process in urging a total membership communications exception, "union members who opt in to pay for their union dues to go towards political expenditures are in essence paying to have this information sent to them." Supplemental Statement, Common Cause/New York at 1 (undated), available at http://www.nyccfb.info/press/news/testimony/before_board.htm#2011.

Fourth, while we understand that it might be argued that the general public has an interest in knowing about an organization's internal communications about City elections that is sufficiently great to justify the considerable reporting burden that the Proposed Rule would impose on groups that engage their membership in elections, we agree again with Common Cause/New York, which has advised the Board that "the sheer number of individuals who receive a message does not automatically require[s] that the communication be reported"; rather, "a true democratic process actively encourages and welcomes the political participation of constituents and individuals," and "the member recipients of the communications can judge for themselves how reliable and persuasive they are." *Id.* at 2. See also March 10 Tr. at 22 ("disclosure disclaimer rules should be robust and should apply to independent expenditures that target the voters at large, but we don't think that they should apply to member to member communications within an association") (testimony of Mark Ladov, Brennan Center).

Fifth, inclusion of member communications increases the likelihood that a union itself rather than its sponsored PAC will become subject to the new reporting rules. That is because unions traditionally have spent their regular general-fund accounts on internal communications, both because all applicable law permits; doing so minimizes intrusive disclosures about such internal matters; and it is administratively easier to do so. At the same time, unions have a strong incentive to use only a legally distinct political fund for their political communications to the general public, because that is the only way a union avoid paying an onerous 35% federal tax on that spending that applies 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). For that reason, Local 32BJ always uses its legally separate political committees for general public electoral communications, including what the Proposed Rule defines as "express advocacy." And, those committees already are registered with and report with the New York State Board of Elections and, if they contribute in City elections, they are already registered with the CFB. And, any such

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[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).

committee that undertakes covered independent expenditures will comply with the proposed Rule. But that is a far cry from the *union itself* having to do so, merely because the CFB wishes to capture membership communications.

Sixth, a complete exemption for membership communications from the definition of as "public communications" under the Proposed Rule is advisable because, as explained above, otherwise they would 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.

Seventh, it is 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. 556, 565-66 (1978); *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.

The earlier example about Mayor Bloomberg and Speaker Miller also points up the folly of extending the Proposed Rules to membership communications. 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 Proposed Rules were in effect, then those flyers (if not the meeting or phone calls) would be subject to the contribution limits to "candidate" Miller. No sound purpose is served by forcing a union to navigate around such barriers.

Indeeed, 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 themselves to associate with the candidate and the rights of the organizations' members to associate with the candidate and each other. The CFB should resist creating unnecessary disincentives to candidate participation in the public financing system.

Ninth, the proposal implicates 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 (which covers unions, business corporations and non-profit incorporated membership organizations) 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 the Federal Election Campaign Act (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 (emphasis added) (quoting Rep. Hansen, 117 Cong. Rec. 43381.)[8] Notably, Congress has

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[8] 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,

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).[9] 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 are implicated by subjecting unions to potential CFB investigations and audits – as Proposed Rule 13-09 would – on the basis of membership communications and associations with candidates about them. Such an enforcement proceeding, like a comparable Federal Election Commission ("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). And,

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> 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).

[9] The CFB has often looked to FECA for guidance on the proper approach to issues arising under the CFA. *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).

We note that FECA requires public reporting only of a narrow subset of internal union communications: those that predominately include express advocacy, exceed an aggregate monetary threshold and only insofar as the union incurs special, non-overhead costs. See 2 U.S.C. § 431(9)(B)(iii); 11 C.F.R. § 104.6. And, 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 supported or opposed) than what the Proposed Rule would require. See *id.*; FEC Form 7, available at http://www.fec.gov/pdf/forms/fecform7.pdf. Moreover, because FECA exempts membership communications from its definitions of "contribution" and "expenditure," no in-kind contribution results from their inclusion in FECA's separate reporting provision for them. That is exactly the opposite of what the CFB proposes here. There is simply no sound 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.

as the Supreme Court has recognized, "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 v. Federal Election Commission*, 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.

We do recognize that the CFB, in proposing a partial exemption for membership communications, recognizes that they are qualitatively different from other kinds of electoral speech that influences City elections. But the lines it draws between what is and is not subject to mandatory disclosure lack coherence, and comprise an arbitrary prescription for confusion that will deter civic participation. Under the proposal, a persuasion message in a mail piece would be subject to disclosure unless it were enclosed with or a page of a "routine newsletter or periodical." The same message would not be reportable if conveyed via a telephone bank, or by an email, unless the material was in an "attachment." A door-to-door canvass of members would be reportable only with respect to a "flyer" that was distributed, but not for a scripted oral message to members. These distinctions, gleaned from Proposed Rule 13-02(c) and the CFB's Guide, at 2-3, do not distinguish "communications that are otherwise similar to typical campaign material" from other membership communications, see *id.* at 2, and, as we have shown, that is an inappropriate line to draw anyway within a membership organization. Again, 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. The far better course is not to eliminate the membership exemption but to extend it to all such communications 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.

It is notable that the Proposed Rules also include one other source exemption – unlike the member/stockholder exemption, an unqualified one – for the "[m]edia," which is very broadly defined to include broadcast, print and electronic outlets so long as they are not "owned or controlled by a political party, political committee, or candidate." Proposed Rule 13-02(b).[10]

[10] The Charter Amendment itself includes three explicit exceptions from the term "independent expenditure" for various aspects of individual "volunteer" activity and, somewhat tautologically, for any kind of "contribution" to a candidate under the Charter, a CFB rule or other City law. See Charter § 1052(a)(15)(a)(1). We agree with the

We do not quarrel with that exemption; it is sound and mindful of constitutional concerns, even though media enterprises in the City are powerful corporate players and public influencers of the votes of City residents; they lobby both the executive and legislative branches of City government in pursuit of their institutional and commercial interests; and those interests vest them with a huge stake in the outcomes of City elections. But the CFB explains only that the 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 with respect to union and other group disclosures about their membership communications.

Finally, we suggest two modest but necessary adjustments, based on established practice and practicality, to the scope of the audience that is exempted by Proposed Rule 13-02(c). The proposal applies to communications that are "directed solely to an entity's own members or shareholders...." First, we recommend that the membership/stockholder exemption extend to 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 administrability of the Proposed 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.

Second, we 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. <u>Registration of "Independent Spenders"</u>

Proposed Rule 13-03(b) (i) requires "[a]ll independent spenders [to] register online prior to submitting the first applicable disclosure statement." The registration statement must disclose a host of identifying information about the spender and its communication plans, all of which must be updated "no later than the next disclosure statement filing date, or 30 days, whichever

CFB's implicit interpretation that the CFB has discretion under the Charter Amendment to identify additional exemptions that are consistent with that amendment's purposes. *See generally* Charter § 1052(a)(15)(e).

comes first." See *id.* For two reasons, this registration requirement should be eliminated for groups other than political committees, and, instead, any legitimately required information should be reportable on the first disclosure statement itself.

First, the CFB has no authority to require a union or any other entity other than a political committee to "register" with it. The Charter Amendment requires no such registration, only the "disclos[ure]" of particular information about independent expenditures and their financiers. See Charter § 1052(a)(15)(b). The authority conferred upon the CFB to implement the amendment includes only devising the "form and manner in which independent expenditures are to be reported and disclosed," the "information" about them and the "periods during which reports must be filed…." Charter § 1052(a)(15)(e). A "registration" that is the precondition to such a report is simply not authorized; and when the CFA requires registration, it says so explicitly. See NYC Admin. Code § 3-703(1)(k); CFB Rule 1-04(d). In that respect the CFA is consistent with other campaign finance disclosure systems, which routinely make a distinction between registration and reporting and confine registration to political committees.

Second, even if the CFB had discretion here, it would abuse that discretion by adding such a gratuitous layer of bureaucracy to any "entity" that might undertake independent expenditures. For a union or other organization that is not a political committee, registration is wholly improper because the entity is simply not primarily engaged in political activities that come within the purview of the CFA or the CFB. The distinction between organizations with and without a primary electoral purpose has been a fundamental and constitutionally critical distinction as to who may be compelled to make disclosures and to what degree since *Buckley*, see 424 U.S. at 78-80. For a union, a registration prerequisite to speech is a form of licensing that the First Amendment does not abide. *See Thomas v. Collins*, 323 U.S. 516, 539 (1945).

The CFB can avoid this error. All of the information that the CFB would require in a registration could be required instead in the first disclosure statement, which, as we suggest below, should be triggered by the actual dissemination of a covered public communication. A reporting entity could then be required to include any "material change" in that information in a subsequent disclosure statement, *if there is one*; if there isn't, then the public independent-expenditure record will reveal about that spender all that is relevant to that expenditure, that is, the information about that spender that pertained *at the time of its effort to persuade the public how to cast its ballots*. In contrast, a registration requirement with an ongoing mandate to update it burdens a one-time or infrequent independent spender with an apparently indefinite obligation to account for itself to the CFB, even to report a change in the identity of a board member or officer. See Proposed Rule 13-03(b).

Finally, the CFB itself would be unduly burdened by administering and enforcing an entirely gratuitous registration requirement, let alone litigating its authority to have imposed it in the first place. Plainly, this requirement should be omitted from the final rule.

IV. "Contributions" Received

Proposed Rules 13-01(c), 13-03(a) and 13-04(c) purport to implement the requirements of the Charter Amendment, codified at Charter § 1052((a)(15)(b), that any entity that, within 12 months of election makes at least $5,000 in independent expenditures regarding a candidate, must disclose the "identity of any entity" that "contributed" to the spender, as well as the "identity of...any individual" who within 12 months before the election "contributed" at least $1,000 to the spender. We acknowledge that the Board has some discretion in interpreting and implementing this requirement, see generally Charter § 1052(a)(15)(e), but we believe the Proposed Rule abuses that discretion in key respects and should be modified in its final form. That is especially the case with respect to unions, which are already subject to federal restrictions on income sources and obligations to disclose their receipts that apply to no other kind of organization and so particularly warrant the CFB staying its hand at imposing obligations that are not only irrelevant to the purposes of the Charter Amendment but also substantially duplicative of other requirements.

The Charter Amendment does not define the term "contributed". But the term "contribution" already appear elsewhere in Charter § 1052 – specifically, §§1052(8), (9), (12) and (13) – and the CFA explicitly defines the term to mean a payment "in connection with the nomination for election, or election, of any candidate." See NYC Admin. Code § 3-702(8). Given that the amendment was drafted with that definition applicable throughout the CFA, it must be concluded that the amendment incorporates that definition. And, that is especially the case in light of the fact that the term "contribution" is ordinarily defined in campaign finance statutes with an explicit electoral component. *See, e.g.*, 2 U.S.C. § 431(8)A)(i) (...for the purpose of influencing any election for Federal office...."). But Proposed Rule 13-01(c) defines the identical term without regard to any electoral connection whatsoever as "any monetary gift, advance or deposit of money."[11] And, Proposed Rule 13-03(a)(ii)(1) requires disclosure of all such "contributions" received "during the covered election," which the Board says means "retroactively to the start of the election cycle," see CFB Guide at 3. Moreover, the proposed disclosure requirements about an entity's receipts simply bear no relationship whatsoever to what the Charter Amendment actually authorizes: disclosure of "the identity" of an entity or individual who "contributed" at certain thresholds. Charter § 1052(a)(15)(b).

The proposal therefore requires a reporting entity that reaches the $5,000 independent expenditure spending threshold essentially to open its books going back as much as almost four years (and, subsequently, from the previous reporting period, see Proposed Rule 13-03(d)(ii)) and itemize all of its receipts, from the first penny, from any institutional source, including name, address, type of entity, amount, date and "[s]uch other similar information as the Board may

[11] Proposed Rule 13-04(c)(3) requires a report of "[t]he date of receipt and amount of each such contribution *or other receipt* " (emphasis added). We do not understand the reason for the italicized phrase, which appears only here, and suggest that it is erroneous and should not appear in the final rule.

require," regardless of their nature or relatedness to the spender's independent expenditure spending. Proposed Rule 13-04(c)(1). And, the disproportion of the amounts of incoming "contributions" to the amount amounts of funds actually used for independent expenditures could be staggeringly different. Local 32BJ, for example, receives approximately $5.8 million in entity "income" every year, all from transactions that have nothing to do with whether or not Local 32BJ will undertake independent expenditures (however defined) or any other political activity, so if it first reaches the $5,000 spending threshold in, say, September 2013 it might have to disclose nearly $30 million in "contributions." And, Proposed Rule 13-03(a)(iii) appears to require the independent spender to report all further "contributions" that it receives until the end of the election cycle *even if it makes no additional independent expenditures*, apparently in order to capture the possibility that the actual funder of them is yet to pay.

Only one exception is offered from this startling and virtually unprecedented disclosure requirement for entities that are not political committees. Proposed Rule 13-04(c)(ii) would exempt a "contribution" that is "earmarked for either an election that is not a covered election, or an explicitly stated non-political purpose."[12] It is plain that this exemption provides no real relief. According to the CFB, this exception would apply only where "the contributor designated such contribution to be used for a specifically stated non-political purpose, such as a contribution grant to fund a particular non-political project," CFB Notice at 4, or the "[c]ontribution[is] restricted from being spent on elections covered by the CFB…." CFB Guide at 3. Thus, the focus is on the availability of the funds to the independent spender; if it *could* be used for the independent expenditure – and without regard to any principle of accounting that traces the actual flow of funds through an organization – then it must be disclosed to the CFB. And,, during 28 days every election year, the disclosure would be due within 24 hours. See Proposed Rule 13-03(c)(4).

For example – if any is necessary to illustrate the absurdity of this proposal – a union would have to report all of its investment income, tenant rental income, incidental receipts from groups that rent its space or purchase its spare furniture, and other miscellaneous receipts. A vendor invoice that states that a payment was made in order to rent a union's meeting room would not suffice; rather, the renter would have to affirmatively preclude the union from using that fee for independent expenditures. And, a business corporation, which is another covered "entity," see Charter § 1052(a)(15)(a)(ii), would have to report every receipt from every commercial transaction that it engaged in with any other entity.

But that is not all. As noted above, an entity's reaching the $5,000 spending threshold would also trigger its obligation to report every "contribution" of at least $1,000 in the aggregate

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[12] The phrase "non-political purpose" is unique to this provision in the 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; *Lecci v. Cohn*, 360 F. Supp. 1159, 1168 (E.D.N.Y. 1968), *vacated as moot*, 493 F. 2d 826 (2d Cir. 1974).

from any individual during the year preceding the election, which under Proposed Rule 13-04(c) would entail listing the individual's name, address, occupation, employer and business address; and the date and amount of his or her contributions, as well as, again, "[s]uch other similar information as the Board may require." Again, the disclosure requirement would apply even if an individual pays an entity for goods or services that have no connection with an election, let alone with any future independent expenditures. And, in the case of a union, the effect would be to reveal the names of at least some of its members, and only because their dues happen to reach the monetary threshold. In its so-called "White Paper" preceding its initial March 11, 2011 hearing, the CFB acknowledged that it might be appropriate to exempt membership dues, see CFB, "Disclosure of Independent Expenditures Public Hearing – March 10, 2011" at 3, but the Proposed Rule inexplicably does not include that worthy exemption.

The extreme disconnect here between what would be reportable and what would be relevant to the independent expenditures of the reporting entity has been repeatedly rejected where it was adopted or considered elsewhere. Most recently, in *Center for Individual Freedom, Inc v. Tennant*, 2011 U.S. Dist. LEXIS 78514 **72-74, 163-69 (S.D.W. Va. July 18, 2011), the district court invalidated on First Amendment grounds West Virginia's requirement that a group disclose all contributors over $1,000 since the previous year if the group made any "electioneering communications" (broadcast or print references to a candidate made within 30 days of a primary or 60 days before a general election). The court reasoned that the rule could "be quite burdensome on those entities and may discourage general treasury contributors from associating with and giving to the entity as a consequence," and "[t]he practical effect of requiring such expansive disclosure is not only to compel a flood of information, but a flood of information that is not necessarily relevant to the purpose the regulation purportedly serves: to provide the electorate with information as to who is speaking." *Id.* at 166, 167. The court upheld the requirement only insofar as it pertained to "contributions that are either (1) received by the organization or corporation in response to a solicitation specifically requesting funds to pay for an electioneering communication or (2) specifically designated for electioneering communications by the contributor…." *Id.* at 169. *See also American Civil Liberties Union v. New Jersey Election Law Enforcement Commission*, 509 F. Supp. 1123, 1129-30 (D.N.J. 1981); *Fair Political Practices Commission v. Superior Court*, 25 Cal. 3d 33, 48-49, 599 P. 2d 46, 54-55 (1979), *cert. denied*, 444 U.S. 1049 (1980). And, it was precisely these concerns about burden, informational relevance and reporting accuracy that prompted the FEC in 2007 to interpret FECA's electioneering communications disclosure provision to require disclosure only of donations to unions and corporations that were given "for the purpose" of funding such communications. See FEC, Final Rule, "Electioneering Communications," 72 Fed. Reg. 72899, 72911 (Dec. 26, 2007); 11 C.F.R. § 104.20(c)(9).

We recommend that the final rule comply with the scope of the Charter Amendment and take a common sense approach to disclosure. The Board can do so by heeding the Commission's explanation of its proposed amendment. Its report speaks only in terms of identifying the

spender itself and those who funded that spender for electoral purposes; it states that the amendment "would require any entity making independent expenditures in the amount of $5,000 or more to support or oppose a candidate to disclose the sources of the funds *used to make* such expenditures, *preventing independent actors from circumventing the disclosure requirements through masking their identities by creating or contributing to other entities*." Final Report at 15 (footnote omitted) (emphasis added).

Accordingly, the spender should be required to reveal those who "contributed" to it "for the purpose" of enabling the entity to spend in the City election itself, as well as those who were expressly solicited for the purpose of funding that spending by the soliciting group. And, there must be some temporal back limit on the receipt that is shorter than the end of the last election, both so that purpose determination is reasonable and so an organization is less likely to have to disclose contributions that are utterly disproportionate to what it actually spends on independent expenditures. The Charter Amendment is silent about the look-back period for an "entity" contribution, so the CFB has some discretion here, see Charter § 1052(a)(15)(e), which it should exercise judiciously.

All other incoming receipts of a union or other group that occur for other purposes, including membership dues and payments that are transactional, commercial or contractual in nature, should not be subject to disclosure under the rule. Proposed Rule 13-04(b)(i) may be trying to capture this meaningfully in requiring an independent spender's report of an "expenditure" to include "[t]he name of the individuals or entities paying for the expenditure, if not the independent spender." Requiring a union to disclose only what is truly "contributed" to it in the City electoral sense carries out the Charter Amendment by disclosing to the public the sources of funds that are intended to be used to persuade them how to vote. But requiring a union to disclose any other kind of receipt would be extremely burdensome to the union and its members, and utterly misleading and confusing to the public.

This sort of receipt reporting is particularly inappropriate for unions for several additional reasons. Unions (and other established membership and other nonprofit organizations) are far more likely to be known quantities with public profiles and agendas, and broad disclosure of their internal finances – other than of their contributors who deliberately use them as vehicles for independent expenditure activity – is unwarranted. As the CFB has noted, disclosure is particularly required with respect to "groups whose identities may not be obvious to the public (i.e. 'New Yorkers for Apple Pie')…." White Paper at 3. We recognize that organizations could seek to conceal what the Commission aimed to disclose by structuring their incoming contributions as "dues" or engaging in a wide variety of activities. But unions simply do not do what the Charter Amendment means to capture. Dues to unions, in whatever amount, have been approved within the particular union (by law, fixed pursuant to democratic processes, see 29 U.S.C. § 411(a)(3)) and are the regular, required payments of individual membership that, in all cases, primarily pay for the union's ordinary expenses of representation and bargaining.

Moreover, unions simply do not solicit or receive "donations" or 'contributions" from non-members or other entities. In fact, a distinct federal statute, the Labor Management Relations Act, 29 U.S.C. § 186, uniquely constrains unions, with limited exceptions for particular non-electoral purposes, from soliciting or receiving any "thing of value" whatsoever from most "employers," regardless of their corporate or non-corporate form. This is a criminal provision, the violation of which is a felony, see 29 U.S.C. § 186(d), and it specifically prohibits a union or a union's officer, employee or other representative from either:

(a) Requesting, demanding or agreeing to receive or accept a payment to the union, or

(b) Requesting or demanding a payment to a third party that can be construed somehow as standing in the shoes of the union, or

(c) Receiving or accepting a payment to the union,

from either:

(a) An employer of employees whom the union represents; *or*

(b) An employer that the union is either trying to organize or whose employees the union "would admit" into membership.

See generally United States v. Novak, 443 F. 3d 150, 154-56 (2d Cir.), *cert. denied,* 549 U.S. 997 (2006); *United States v. Georgopoulos*, 149 F. 3d 169 (2d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *United States v. Cody*, 722 F. 2d 1052, 1057 (2d Cir. 1983), *cert. denied*, 467 U.S. 226 (1984). No other kind of organization operates with such constraints, and no other kind of tax-exempt membership organization does not also solicit and rely upon non-dues donations. The CFB's final rule should treat unions accordingly.

Unions legally differ from other groups that are subject to the Charter Amendment in another highly pertinent respect. The federal Labor-Management Reporting and Disclosure Act ("LMRDA") requires unions to file detailed annual financial reports with the United States Department of Labor ("USDOL"). See 29 U.S.C. § 431. On these reports a union must itemize each source of income and each recipient of payments at a $5,000 annual aggregate threshold, along with the "purpose" of the payments, as well as a host of other structural and financial information. See USDOL Form LM-2, available at http://www.dol.gov/olms/regs/compliance/lm2_blankForm.pdf. USDOL posts all of these reports in a searchable format on its website. See http://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm. Accordingly, the CFB will have a ready resource to monitor the impact of the coverage of unions that we advocate for the final rule. And, the CFB proposal's $1,000 threshold for disclosing any receipt from any individual would force some unions to disclose portions of their membership lists, information that is

irrelevant to the Charter Amendment's purposes and that, even with their broader disclosure context, the LMRDA regulations eschew with their higher itemization threshold.

V. Advance Disclosures of Potential Public Communications

The Charter Amendment defines an "independent expenditure" as "a monetary or in-kind expenditure made, or liability incurred, in support or in opposition to a candidate" without coordination with a candidate. Charter § 1052(a)(15)(a)(i). The Charter Amendment authorizes the CFB to establish by rulemaking many of the details of disclosure, including the timing of reports in relation to the independent expenditures. In two respects, the Proposed Rule abuses the CFB's discretion by requiring an independent spender to provide *advance* notice of communications that have not yet been, and may never be, actually disseminated.

First, Proposed Rule 13-03(b) requires an independent spender to register prior to submitting its first disclosure report, and to provide various information, including "the names of any candidates and/or ballot proposals for which they *will be* reporting independent expenditures" (emphasis added), as well as "other similar information that may be required by the Board." Second, that registration must be amended to report "any material change to the required registration information" upon the earlier occurring of either 30 days later or "the next disclosure statement filing date." Proposed Rule 13-03(b)(4). And third, the timing of reports due is keyed to the occurrence of an "independent expenditure," as defined above to mean only a payment made or an obligation of payment incurred. See Proposed Rule 13-03(c).

The problem with these proposals is that it compels a *prospective* independent spender to disclose to the CFB and both favored and disfavored candidates what it plans to do in the future, if the mere payment or commitment to pay triggers a report before the communication at issue is disseminated, if it ever is. That sort of advance notice requirement chills the speaker, to whom it may be critically important not to signal its intent, which may include revealing its candidate preference for the first time, before making its communication. And, the City and voters have no commensurate interest in learning what a speaker has or plans to spend on persuasion messages that may never even occur. In fact, the filing of such reports could be unnecessarily confusing to voters and others who are monitoring the campaign. Meanwhile, City candidates themselves do not (and should not) bear comparable obligations to disclose particular communications in advance of making them. Indeed, imposing such a requirement on an independent speaker is rightly seen as fostering both incumbent and candidate protection at the quite literal expense of independent speakers.

The burdensomeness and unfairness of this advance disclosure regime are underscored by the details that would have to be disclosed: identification of the candidate or ballot proposal "for which the expenditure is in support of or opposition to"; the name of the vendor; the "purpose" of the expenditure; the names of other "individuals or entities paying for the expenditure"; and

the open-ended (and discomfiting) "[s]uch other similar information as the Board may require." See Proposed Rule 13-04(b)(i).

The CFB could fix this easily in its final rule. First, if there is a registration requirement, the registrant should not be required to disclose anything about its actual communications plans.[13] Second, the obligation to file a disclosure statement about an independent expenditure should be triggered not by any payment or commitment to pay for one, but by the *actual public dissemination* of the communication itself. At that point, the "monetary or in-kind expenditure made, or liability incurred" for that communication becomes relevant public information as to which the CFB should exercise its Charter-assigned discretion to require disclosure. Selecting dissemination as the trigger would also harmonize and simplify reporting because the spender would include on the same disclosure statement all of the information relevant to a particular public communication, rather than, as proposed, separately reporting "expenditures" about "public communications," see Proposed Rule 13-04(b), and the "public communications" themselves (including filing a copy of the communication itself), see Proposed Rule 13-04(a), each of which might occur during a different reporting period if, as is almost always the case, the "expenditure" or "liability incurred" precedes the dissemination of the "public communication" itself.

These changes would not only be fairer and simpler, they would also bring the rule into accord with the standard methods used by other jurisdictions to trigger reporting of independent expenditures. For example, that is exactly how the FEC requires reports of both independent expenditures, see 11 C.F.R. § 104.4, and electioneering communications, 11 C.F.R. § 104.20 (as these terms are defined in FECA).

VI. Spending for Public Communications

In addition to the points above about the proposed requirements for reporting incoming "contributions," the compelled-speech aspect of mischaracterizing "electioneering communications," and the redundancy of a registration requirement, the final rule should change other aspects of the proposal concerning the content and timing of reports about public communications.

First, Proposed Rules 13-04(a) and (b) should be combined as a result of making the dissemination date the trigger for a disclosure statement. That will simplify reporting, as explained above, and dispense with the duplicative requirements of these two subsections, such as the twice naming of a candidate that is the subject of the communication.

[13] We recognize that New York State Board of Elections ("NYS BOE") Form CF-03, for "authorized" and" unauthorized" political committees requires the latter to identify candidates as to whom the committee "is aiding or taking part" in the election other than by contributions, but that report does not by its terms require advance disclosure and no judicial authority has enforced a contrary interpretation.

Second, Proposed Rule 13-04(a) requires redundant disclosure of both the "type" and "[a] description" of a public communication. We assume that "type" means the medium, such as a newspaper advertisement, which is a sound requirement. But the term "description" is vague and redundant to a report that includes other basic information as well as a copy of the communication itself.

Third, Proposed Rule 13-04(b)(i)'s requirement of disclosure of "[a]ll expenditures directly related to the design, production, and distribution of a public communication" is unclear. The final rule should clarify that only costs that are specially incurred and directly attributable to the public communication need be disclosed, not the use of regular staff and facilities that are more properly treated as organizational overhead. The CFB Guide, at 3, states that "[r]ent and other overhead expenses" need not be reported, but the rule itself should say that and should clarify what "overhead" means. Requiring an accounting of ordinary costs that would have been incurred otherwise is both highly burdensome to calculate and misleading, and, inevitably, different organizations would calculate them differently, making for apples-and-oranges comparison of "expenditures." The CFB Guide, *id.*, also states that "[s]upervisory staff who spend a portion of their time managing reportable activity" need not be reported. We agree, but the same should be true regarding *non*-supervisory regular staff who engage in such activity, because they too are part of organizational overhead and their costs would have been incurred anyway. Again, the rule itself should spell out reasonable distinctions.

Fourth, the requirement in Proposed Rule 13-04(b)(i) that a report include "[a]n invoice detailing the expenditure" should be dropped. An invoice is redundant to other required information, including the identification of the payee vendor; it may not even be available on the strict deadlines of the proposal, especially during the 14 days preceding an election; and it is less given to the electronic form required of reports by Proposed Rule 13-03(a)(iv). Moreover, Proposed Rule 13-08, "Document Retention," plainly requires the retention of invoices for a three-year period, which ought to suffice to support the accuracy of a disclosure statement if its expenditure information is later questioned.

Fifth, the similar requirement in Proposed Rule 13-04(a) that every disclosure statement include copies of the public communications that are the subject of the report is both redundant and onerous. Such copies are duplicative of information that will already be disclosed, and the 24-hour reporting deadlines make this an especially onerous requirement. Proposed Rule 13-08 reasonably requires their retention for three years as well. Notably, the NYEL requires the submission of such materials to the NYS BOE, but only once in 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.

VII. Registration and Reporting By Political Committees

The proposed registration requirement discussed above also should be dropped with respect to political committees that are already registered with the CFB because they contribute to City candidates. See NYC Admin. Code § 3-707(2). The Proposed Rule plainly requires such an empty and wasteful act, for it applies to "[a]ll independent spenders," Proposed Rule 13-03(b)(i), that term includes "an individual or entity that makes, or registers to make, an independent expenditure," Proposed Rule 13-01(i), and an "entity" includes a "political committee," Charter § 1052(a)(15)(a)(ii). For example, Local 32BJ already registers its political committee, the SEIU Local 32BJ New York/New Jersey American Dream Fund with the CFB, and that committee should not have to re-register simply because it will also make independent expenditures.

As for an existing or new "unauthorized committee" within the definitions used by the New York State Board of Elections that undertakes independent public advocacy but not contributions[14], such as the Local 32BJ Empire State American Dream Fund, it would be gratuitous to require that committee to register also with the CFB upon the making of independent expenditures in City elections, particularly because that committee in any case will report those expenditures to both the NYS BOE in the normal course and, now, to the CFB under the Charter Amendment. But if a duplicative registration is required, it should not require advance disclosure of the content of communications, as explained above.

The Charter Amendment introduces in City law for the first time a requirement that political committees report their post-registration activities with the City; until now, these committees were, and still are, required to register and file periodic reports with the NYS BOE under the NYEL, which include information about both contributions received, expenditures made and other financial information. The Proposed Rules plainly model their reporting periods on those required by the NYEL itself. Compare Proposed Rule s 13-03(c) and (d) with N.Y. Elec. Law § 14-108. But this means a political committee will have to file distinct reports with the NYS BOE and the CFB about the same activities on the same date. We urge the CFB to tailor its reporting requirement in order to minimize duplication of and differences from the reports filed with the NYS BOE. We submit that the CFB could easily link to state-filed reports by City-registered committees as part of a system that harmonizes the two reporting schemes.

[14] We note that the SBE's distinction between "political action committees" and "unauthorized committees" is unsupported by the New York Election Law ("NYEL")and its regulations, and the SBE recently acknowledged that this was simply an "interpretation" of Section 14-118 of the Election Law that it devised some time ago. See Transcript of Order to Show Cause Proceeding, *Voice of Teacher Education/COPE v. New York State Board of Elections*, No. 10-CV-961 at p.17 (N.D.N.Y. August 19, 2010). The CFB should not rest new regulatory distinctions on such a weak foundation.

VIII. Other Proposed Requirements

We finally wish to comment on a few other aspects of the rule that we specifically support in whole or in part.

First, we believe that Proposed Rule 13-05 sets forth a clear and reasonable disclaimer requirement that faithfully carries out the Charter Amendment. See Charter § 1052(a)(15)(c).

Second, as noted above, we believe that Proposed Rule 13-08 sets forth a reasonable document retention standard (leaving aside the question of whether or not such a requirement is authorized by the Charter Amendment).

Third, we believe the enforcement process at Proposed Rule 13-09 is clear and reasonable, with two important exceptions.

First, an entity other than a political committee should not be subject to "desk and field audits" as Proposed Rule 13-09(a)(vi) would provide. A union or other group does not submit itself to a complete financial and records examination by the CFB merely by engaging in some independent expenditure activity, any more than it does so by making contributions as under the CFA to date. Nothing in the Charter Amendment confers such audit authority on the CFB, and it would be an abuse of discretion to interpret Charter § 1052(a)(15)(e) as doing so merely because it authorizes the CFB to "promulgate...rules as it deems necessary to...enforce" the amendment's requirements. That is simply not a blank check. We do not quarrel with the CFB having authority to investigate compliance, subject to adequate privacy and due process protections, but audits are a distinct matter, and this aspect of the proposal should be omitted from the final rule.

Second, Proposed Rule 13-09(b)(2) sets too rigid a standard for deadlines for "the opportunity to submit information and documentation." While we believe that both complainants and respondents ought to adhere to specified time limitations, we suggest that the rule here state that the Board "may" permit a late submission "for good cause"; although this would be a limitation on the Board's "discretion" as the rule is now drafted, we believe this would make its implementation more reasoned and more likely would lead the Board to provide relief where it is justified by equitable considerations.

Conclusion

The 2010 Charter Amendment imposes important new requirements for participation in City elections by organizations and individuals. We believe the CFB's Proposed rules to implement that amendment require substantial revision in any final rule, in order to carry out the

amendment faithfully, sensibly and in accordance with other law. We appreciate the opportunity to provide our views on these matters. Thank you for your consideration of these comments.

Respectfully submitted,

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