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

October 25, 2024

INTRODUCTION

SEIU Local 32BJ ("Local 32BJ") appreciates the opportunity to submit these comments to the New York City Campaign Finance Board ("CFB" or "Board") as it considers Rules proposed on August 28, 2024 that, in addition to rule amendments not addressed by these comments, significantly expand the factors the CFB will consider when determining if activity is coordinated or independent, as well as rules significantly broadening which communications are covered by the CFB's reporting and disclaimer requirements.

As an initial matter, the manner in which these amendments were proposed—with only thirty days to comment, during the height of state and federal elections, and without the prior notice or foreshadowing required by the Charter, either in the CFB's Regulatory Agenda or with advanced notice to the regulated constituency—is deeply concerning. As we stated in our letter on September 23, 2024, we again request the CFB extend the comment period until after the November 2024 election, to provide adequate opportunity for comment. These amendments have a significant impact, and the purpose of notice and comment rulemaking is to allow those who will have to adhere to these rules to provide crucial perspective on how they will work in practice. The CFB's process has left little space or time for this required input.

Substantively, while we appreciate the CFB's stated goals of ensuring "candidates and outside parties do not coordinate . . . as a means of circumventing the contribution and expenditure limit" and allowing "the CFB and independent spenders to adapt to evolving modes of technology," we are deeply concerned that the proposed amendments have a significantly broader impact than this. Specifically, the new factors the CFB has proposed for consideration would treat a wide range of independent activity as coordinated based on extremely tenuous connections, having a potentially chilling effect on protected speech. Likewise, the proposed amendments that redefine electioneering and express advocacy communications will expand

reporting and disclaimer requirements to previously exempt free internet communications in a manner that will be burdensome and potentially unworkable for large membership organizations like Local 32BJ, let alone private citizens, without contributing meaningfully to transparency.

Finally, whatever the final rules look like, the NYC CFB should only implement these rules in the following full election cycle, not the 2025 City election. Implementing them in 2025 will be potentially unconstitutional *ex post facto* regulation. The 2025 City election is only a year away, yet these rules explicitly analyze conduct based on election cycles, meaning the four-year period between elections. Thus, if these amendments are put into effect for the 2025 City election, spending that was considered not coordinated, and therefore not subject to contribution limits under the old rules, would be retroactively considered coordinated under the new rules. This in turn could reclassify lawful spending as illegal, over the limit contributions, after the spending occurred. To avoid such an unconstitutional application of the law, the NYC CFB should wait until the start of the next full election cycle to implement these changes.

For these reasons, we submit the following comments and respectfully request the CFB revise the proposed rules, taking these concerns into consideration.

SEIU Local 32BJ

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

Overview

In considering the CFB's proposed amendments, 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. Our concern is, rather, that the CFB's proposed

amendments, with regards specifically to amendments to the rules governing coordination and free internet communications, in several respects would markedly, unnecessarily and, we would submit, in some instances unlawfully stray from imposing that kind of disclosure regime.

Our comments are rooted in our belief and experience that disclosure laws must accommodate the legitimate First Amendment speech and associational rights and interests of individuals and groups that make independent expenditures, and must be mindful of the realities of private and public interactions and the nature of civic life. Because the courts have conclusively determined that independent expenditures have no capacity to corrupt candidates or ballot proposition elections, *see, e.g., Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010); *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), disclosure rules should not be so inappropriate or burdensome that they chill the very undertaking of that public expression itself. Disclosure rules also should focus on providing meaningful information to the public and should not prompt the cluttering the public record with data about insignificant or irrelevant spending or data that is unduly costly to ascertain and report. In significant respects, the expanded definitions of coordination, and the application of reporting and disclaimer requirements to free internet communications fail to serve those goals.

The amendments also must be considered in light of the potential penalties entailed by violating it. The Charter 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 contribution thresholds in the Charter 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.).

1. Request to Extend Comment Period Until After November 2024 Election

As Local 32BJ and at least thirteen other organizations noted in their September 23, 2024 letter requesting additional time to comment on these proposed amendments,[1] the timing and limited opportunity for public input is concerning. While we appreciate that the CFB extended time for *written* comments by thirty days, we reiterate our request that additional time be provided for comment, specifically extending the comment period to after the November 2024 election.

[1] *See* Appendix A, September 23, 2024 Multi-Organization Letter Requesting Extended Comment Period

The thirty days initially provided by the CFB for comment was the absolute minimum required by the Charter, and even with the additional thirty days, we believe that the additional time requested is more than prudent given the circumstances. The notice, comment and hearing process was initiated and will occur during the final phase of the New York State and national elections that will culminate on November 5, 2024. Many organizations within the CFB's constituency, as well as the general public, are focusing their resources and attention on these elections. With respect to all of the proposed amendments, the Notice cites no legal development or other external event prompting it to act on the eve of 2025. Thus, the CFB could have initiated this rulemaking affecting the City's 2025 election long before August, *and absolutely must delay the implementation of the rules until the full election cycle after the 2025 election*.

Nor was this rulemaking even foreshadowed in the CFB's 2024 Regulatory Agenda,[2] which Charter Section 1042 requires the CFB to publish every May for the ensuing fiscal year. The 2024 document only vaguely advised that rules "may include simplifying and streamlining disclosure, reporting, and recordkeeping requirements; safeguarding the disbursement of public matching funds; transition and inaugural activities; penalty assessments; contributions by individuals and entities; contributions by persons doing business with the City; ethical guidelines for Board members and Board staff; voter assistance; and the reporting of independent expenditures." Even this broad brush said nothing about redefining coordination, independent expenditures or electioneering communications, or changing disclaimer requirements for regulated communications. Further, Charter Section 1042(a)(5) requires the CFB to state "an approximate schedule for adopting the proposed rule," yet the agency stated only that a schedule was "[t]o be determined."

Beyond this potential failure to comply with charter requirements, the CFB's approach has had the effect—if perhaps not the intent—of undermining the central purpose of notice and comment rulemaking: allowing those who will be impacted by a rule, and those with the relevant experience and expertise, to provide valuable input on the rule. We therefore respectfully reiterate our request that the CFB extend the comment period until after the November 5, 2024 election.

2. The application of the rules to the 2025 election would be unconstitutional *ex post facto* regulation

The NYC CFB should only implement these rules in the following full election cycle, not the 2025 City election, or they will be unconstitutional *ex post facto* regulations. Under the United States constitution, laws may not criminalize conduct retroactively. *See* U.S. Const. art. I, § 10. Yet, if applied to the 2025 election cycle, given the criminal penalties that may be imposed for a violation of the proposed amendment, that is precisely what these amendments will do.

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[2] *See* CFB FY 2024 Regulator Agenda, *available at* https://rules.cityofnewyork.us/wp-content/uploads/2023/05/Regulatory-Agenda-FY2024-.pdf

The 2025 City election is only a year away. However, many of the proposed amendments, especially those that outline factors that could be considered coordination, explicitly analyze conduct based on election cycles, the four-year period between elections. For example, under proposed Section 6-04(a)(vii), an independent spender and candidate that used the same vendor within the same election cycle, even if years apart, could be found to have coordinated. If applied to the 2025 election, an independent spender that used a specific vendor in 2023, before the rules went into effect, could still be found to have coordinated if, in 2025, a candidate used that same vendor, because it was within the same election cycle. This would likely retroactively reclassify what were independent expenditures prior to the proposed amendments as contributions under the proposed amendments, potentially subjecting independent spenders to penalties for spending that was legal at the time, but became illegal under the new rules.

As discussed above in Part 1, this is made that much worse by the fact that the CFB gave no notice that they intended to propose these regulations (as required by the City Charter) in their 2024 Regulatory Agenda. Likewise, the CFB proposed these amendments with only an initial thirty-day period for comments, extended by an additional thirty days, only after fourteen members of the CFB's constituency raised concerns about the lack of notice and timing of the proposed amendments. Nothing justifies this sudden change. No new legal or factual developments, and no emergent issues that required a regulatory response justify applying these rules to 2025.

To avoid such an unconstitutional application of the law, the NYC CFB should wait until the start of the next full election cycle to implement these changes.

3. <u>The proposed amendments conflict with New York State Campaign finance law</u>

The proposed amendments will create significantly different standards for coordination and online communication in City law and New York State campaign finance law, despite both sets of laws continuing to apply to City elections. *See* NY Election Law § 14-100(11). For example, under State law, a candidate and an independent spender are explicitly permitted to use a shared campaign consultant so long as an agreement is in place that prohibits the shared consultant or vendor from disclosing strategic information. *See* NY Election Law § 14-107(1)(d)(vii). Under the proposed amendments, there is no such carveout for confidentiality agreements and firewalls. *See* CFB Proposed Rule § 14 (Proposed Section 6-04(a)(vii)). Similarly, under State law, conduct that can potentially lead to coordination is considered evidence of coordination if it happens within two years of the election, *see* NY Election Law § 14-107(1)(d)(iii), (vii), (viii), while under the proposed amendment, this time period is twice as long; the full four-year election cycle. *See* CFB Proposed Rule § 14 (Proposed Section 6-04(a)(viii)). Finally, the State has a comprehensive regime for the reporting and disclosure of internet communications that explicitly excludes requirements to report free internet communications like social media, many websites, and email communications. *See* 9 NYCRR §

6200.10(b)(1), (11). As discussed more fully in Part 4, *infra*, the proposed amendments differ markedly from this scheme, sweeping all forms of online communications into the City's reporting and disclosure rules, potentially imposing restrictions on content specifically and deliberately excluded from regulation by the State. *See infra* Part 5, CFB Proposed Rule § 23, 24.

This disconnect will create potential for significant confusion, which in turn could chill speech by organizations trying to navigate both legal regimes. Likewise, where the State law explicitly permits conduct that the City law prohibits, the City law may be subject to challenge under the State's preemption doctrine. The proposed amendments should be revised and harmonized with State campaign finance law.

4. <u>Proposed Amendments to Section 6-04 Expanding Factors Considered for Determining Whether an Independent Expenditure Is Actually a Contribution</u>

Independent expenditures are a vital avenue for unions like Local 32BJ to give their members a voice in local elections. In fact, it is a core First Amendment right. Yet, the CFB's revised rules will significantly limit Local 32BJ and other unions, non-profits, and political organizations ability to give their members a voice, by sweeping a wide range of independent election activity into the CFB's definition of a campaign contribution, placing limits on this conduct, and potentially setting traps for well intention organizations to accidently engage in prohibited conduct.

Section 1052(a)(15)(a)(i) of the New York City Charter defines an independent expenditure as "a monetary or in-kind expenditure made, or liability incurred, in support of or in opposition to a candidate in a covered election or municipal ballot proposal or referendum, *where no candidate, nor any agent or political committee authorized by a candidate, has authorized, requested, suggested, fostered or cooperated in any such activity."* (emphasis added). The CFB's current rules provide a non-exhaustive list of eight factors that the CFB considers when determining if an expenditure by a third party to support a candidate is, in fact, independent from that candidate's campaign. 52 RCNY § 6-04(a)(i)-(viii). The current factors the CFB considers are whether the supposedly independent spending was created, directed, or paid for by the campaign in different ways, *see* § 6-04(a)(i)-(iv), (vii) if the candidate and the spender knowingly shared information or resources, *see* § 6-04(a)(v), (viii), and whether the spender has fundraised for the candidate. *See* § 6-04(a)(vi). These factors are similar to those used by the NY State Board of Elections, *see* N.Y. Elec. Law § 14-107(d) and Federal Election Commission, *see* 11 CFR § 109.21, for determining coordination.

The CFB's proposed amendment to the CFB's definition of coordination adds six new factual situations the CFB will consider as potential evidence that an independent expenditure is coordinated and thus a campaign contribution. At least some of the proposed new factors are in-line with the charter, state, and federal definitions of coordination, and others could be amended to address the CFB's stated concerns without overreaching. However, as proposed, these amendments are a dramatic expansion of the already broad factors the CFB considers potential

evidence of coordination. They have the potential to restrict independent spenders' election spending in situations that are so highly attenuated from actual coordination that they verge on the absurd.

a. Proposed factors that will be considered when assessing coordination have the potential to restrict conduct without any evidence of actual coordination.

A fundamental problem with the proposed amendments to the CFB's coordination rules is that they have the potential to restrict conduct without any evidence of actual coordination. Unlike the Federal definitions of coordination, *see* 11 CFR § 109.21, nothing in the proposed amendments indicates that the CFB will look at whether the alleged conduct involved *actual* coordination between a campaign and an independent spender on an *actual* campaign communication. This flies in the face of the purpose of the coordination standard, and the Courts have rejected finding coordination based on an inference of coordination without actual evidence of coordination. *E.g. Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 619 (1996) (spending by a party committee could not be found coordinated with a candidate as a matter of inference, where no evidence of actual coordination existed). It suggests that the CFB will find coordination even where the alleged coordination did not lead to the independent spender actually issuing a coordinated communication or engaging in other coordinated campaign activity. For example, an independent spender could be found to have coordinated with a campaign if it received strategic information from the campaign, *even if that strategic information did not in any way inform any of the independent spender's spending*. This has the result of potentially chilling a vast amount of actually uncoordinated conduct, simply because an independent spender was afraid that, because of the factors the CFB will consider when assessing coordination, actually uncoordinated spending will be found to have been coordinated.

b. Proposed Section 6-04(a)(vii) makes it so candidates and independent spenders can be found to have coordinated if they use the same consultant, contractor, vendor, or advisor within the same four-year election cycle, with no safe-harbor provision.

Under the CFB's proposed amendment to Section 6-04(a)(vii), *see* CFB Proposed Rule § 14, the CFB would potentially find coordination where a candidate and an independent spender retained, at any point in the same election cycle, the same "consultant; political, media, or fundraising advisor, employee, vendor, or contractor." This rule would apply not just to a campaign and independent spender that uses the same consultant, or political, media, or fundraising advisor, or vendor at the same time, but to the use of the same consultant, employee,

advisor or vendor within the same four-year period between elections.[3] This proposed rule presents several potential pitfalls for good faith independent spenders trying to comply.

First, the amended rule provides no guidance—and in fact no mechanism at all—for a campaign and independent spender to use a shared outside consultant or vendor without being found to be in coordination, making a shared outside consultant or vendor *per se* coordination, even under circumstances where no actual coordination occurred. *See supra* Part 1.a. This would present an incredible hardship for campaigns and independent spenders, given the extremely limited number of vendors and consultants that operate in the campaign space, potentially foreclosing independent spenders or campaigns from using the best, or even the only, vendor that provides a particular service.

For example, certain campaign consultants are the go-to consultants for help with both drafting the content of, and actually delivering, messages to certain populations within Local 32BJ's constituency. These consultants are crucial for allowing Local 32BJ to develop culturally competent messaging of all kinds, including but not limited to elector messaging, including mailers and targeted digital ads. While Local 32BJ could certainly retain different firms that provide similar services—there are other consultants who can make mailers or digital ads—only certain consultants have the expertise for cultural competency. Likewise, certain vendors are crucial for providing specific types of technical services, like VAN for voter information and effective door-to-door canvasses or Hubdialer for effective phone banking. These vendors do not have clear substitutes. Under the CFB's proposed rules, Local 32BJ would be forced to forgo these tools or face an inference of coordination, effectively hobbling the political speech of its members.

If the CFB intends to adopt such a rule, they should also adopt clear instructions for independent spenders and candidates to share consultants or vendors while taking steps to avoid coordination. Federal and state laws on coordination and shared outside vendors and consultants are instructive. Both federal and state law consider the use of a shared independent contractor between campaigns and independent spenders as a potential avenue for coordination because such an arrangement could be a vehicle for sharing campaign information, which would facilitate coordination. *See* N.Y. Elec. Law § 14-107(d)(vii); 11 CFR § 109.2(d)(4).

However, they also provide clear steps that candidates and independent spenders can take to ensure that they do not, intentionally or unintentionally, share such information through a common consultant or vendor. In New York, candidates and independent spenders can enter confidentiality agreements with shared consultants or vendors, and there will be no coordination. *See* N.Y. Elec. Law § 14-107(d)(vii). At the federal level, the FEC allows a vendor or a

[3] "Election cycle means the period beginning on the first January 12 following the most recent general election for the specific office to which a candidate is seeking nomination or election and ending on the first January 11 following the next general election for that office." 52 RCNY § 1-02.

committee to put in place a firewall memo segregating independent and coordinated/candidate activity. 11 CFR § 109.2(d). These rules reflect the fact that with a shared vendor or consultant, the concern is shared information that leads to actual coordination, which, contrary to the implication of the CFB's proposed rule, can be avoided with simple precautions. In fact, given that the CFB's rules already allow the CFB to consider the use of a vendor or consultant to share information that would facilitate coordination, *see* § 6-04(a)(vii), (viii) the CFB has published guidance to consultants on situations that would be coordination, and safeguards, like a firewall memo, to avoid coordination. *See* POLITICAL CONSULTANTS WHO WORK FOR BOTH CANDIDATES AND INDEPENDENT SPENDERS, NYC CFB (June 20, 2020), *available at https://www.nyccfb.info/PDF/guidance/political_consultants.pdf.*

Given the existing prohibition on using a shared consultant or vendor to coordinate, and the accepted practice, even by the CFB, of using shared consultants or vendors with appropriate safeguards to prevent such coordination, the purpose of the CFB's proposed amendment to Section 6-04(a)(vii) is unclear. If it is merely a restatement of existing law, it will not provide new protections against coordination, but will create serious uncertainty as to what contracts with vendors and consultants are potential liabilities for independent spenders. If it creates new restrictions on shared consultants and vendors, it categorizes an enormous amount of uncoordinated activity as a contribution, effectively placing limits on conduct that is, in actuality, constitutionally protected independent spending.

Second, the scope of the CFB's proposed amendment to Section 604(a)(vii) is unclear. The amendment appears to identify a subset of shared advisors, contractors, employees—"political, media, or fundraising"—that would trigger this presumption of coordination. Without clear definitions of which shared contractors or employees are political, media, or fundraising, it would be difficult for an independent spender to comply. As just one example, Act Blue is a non-profit fundraising platform used by many entities engaging in politics, but essentially provides only a vehicle for organizations to receive online donations. Is Act Blue a fundraising vendor? Or is the scope specific to an entity that engages in more active recruiting of donors. A "political" vendor is even more vague, as any vendor that works in the campaign space could be described as political. If the amendment's intent is to narrow the types of vendors and contractors that would trigger coordination, clear definitions of political, media, and fundraising should be included. The FEC, for example, identifies a clear list of specific types of services provided by a vendor that could trigger an inference of coordination. *See* 11 CFR § 109.21(d)(4)(ii).

Third, because the CFB's proposed amendment to Section 604(a)(vii) applies to any shared contracting, not just simultaneous shared contracting, it has the potential to have independent expenditures retroactively characterized as contributions, without any possible coordinating. Because the proposed amendment applies to any shared contracting "during the same election cycle in which the expenditure is made," and an election cycle last from one general election to the next, 52 NYCR § 1-02, a genuine independent expenditure could, years later, be reclassified as a contribution, simply because an independent spender and candidate

made media buys or other one-off expenditures through the same consultant or vendor, even years apart. The FEC, for example, even with the firewall safe harbor, only looks at shared vendors used within a 120-day window. *See* 11 CFR § 109.21(d)(4)(ii).

To take this example to the extreme, it is totally possible that, during the February after a new Mayor was elected, 32BJ pays a media consultant to run an add telling voters to vote the Mayor out the next time they got a chance, or thanking the Mayor for supporting a City law favorable to Local 32BJ members. If that same firm, four years later, was hired to place an ad supporting or opposing the sitting Mayor or a different candidate for Mayor, 32BJ's four-year-old media buy would become a contribution, rather than an independent expenditure, even though the communication was actually independent. If the cost of that ad buy was over the limit for contributions, Local 32BJ could be fined or prosecuted for engaging in a constitutionally protected independent expenditure. Even if this is not how the CFB intends to consider this newly proposed factor, this is, on its face, what this factor calls for, and it could thus have a chilling effect on the speech rights of organizations like Local 32BJ. *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.).

c. Proposed amendment to Section 6-04(a)(viii) and addition of Section 6-04(a)(xiii) would prevent organizations like 32BJ from supporting union leaders who run for office or candidates with even an attenuated relationship to the union, even where acting independently.

The CFB's proposed amendment to Section 6-04(a)(viii) would make spending to support a candidate who was at any point during an election cycle a principle member, professional, or managerial employee of the spender potential coordination. Similarly, the proposed amendment to Section 6-04(a)(xiii) would make it potential coordination for an independent spender to support a candidate if any member of that candidate's extended family were an officer of the independent spender. *See* CFB Proposed Rule § 14. Taken together, this would prevent Local 32BJ and other unions from supporting union leaders, or any member of their extended family, who ran for office, even if they took steps to prevent coordination. Even if the leader stepped down to run, established a campaign team wholly separate from the union, and ensured no communication between the union and the campaign, the union would be prevented from spending independently to support this former leader, or current leader's extended family member. These leaders or their families, often from the same communities as our members, would be obvious potential champions for members of Local 32BJ and the issues they face. Yet for fear of being presumed to have coordinated, Local 32BJ would be unable to exercise their

First Amendment rights to support one of their own running for office, even if they took the appropriate precautions to do so independently.

A core strategy for the labor movement to have the voices of working-class people to have a say in government is to encourage union members and leaders to run for office. *See* AFL-CIO, Resolution 10: Encouraging Union Members to Run for Local Public Office (2017), *available at* https://aflcio.org/resolutions/resolution-10-encouraging-union-members-run-local-public-office. As just one very relevant example, Shirley Aldebol, a former executive board member for Local 32BJ, is running for New York City Council in 2025. She follows on the heels of a number of City electeds with ties to organized labor, like former City Council Member Anabelle Palma, and former City Council Speaker Melissa Mark-Viverito. Ms. Aldebol has resigned her position with Local 32BJ, and Local 32BJ is more than capable of putting in place internal firewalls to ensure that any support for Ms. Aldebol is uncoordinated with her campaign. Yet, under the proposed rules, her former role with Local 32BJ would be considered as potential evidence of coordination, and could prevent the Union from exercising its First Amendment right to advocate for her election.

d. Proposed Section 6-04(a)(xi) - coordination would potentially include use of undefined "strategic" information or data made public in a way that the candidate "knew or should have known would facilitate such utilization."

The CFB's proposed addition of Section 6-04(a)(xi) would make it so that an independent spender could be found to have coordinated if they used "strategic" information that was either not publicly available or was made publicly available in a manner that the candidate or entity making it public "knew or should have known would facilitate such utilization." While the passing of strategic information that is not publicly available from a candidate to an independent spender is already likely coordination under Section 6-04(a)(iii) and (viii), finding coordination based on the use of any publicly available information presents a significant potential trap for independent spenders.

First, strategic information is not defined. These will leave good faith independent spenders, presented with publicly available information, to guess at the CFB's understanding of strategic. On the one hand, any publicly available information that an independent spender might want to use regarding a candidate may be strategically valuable, or they would not want to use it. On the other hand, the CFB may mean information that would allow an independent spender to support a campaign in a more targeted way than it would be without that information, like specific polling data, canvas routes, or other such campaign-specific information. Without a definition of "strategic information" it is not clear.

Second, far more concerning, finding coordination based on whether the candidate "knew or should have known" publicly available information could be used by an independent spender is an incredibly vague standard. When presented with publicly available information, a good faith independent spender would need to make a subjective determination as to what a candidate knew or should have known, as well as what the CFB means by this phrase. As a practical matter, any information that a candidate makes publicly available is, by definition, information that the candidate knew or should have known could be utilized by an independent spender. Thus, the cautious independent spender would be prevented from using any publicly available information regarding a candidate made available by the candidate, because the very fact that the campaign made it available suggests that they knew or should have known it could be used.

To provide an alternative example, the FEC has developed rules specifically creating a safe harbor for the use of publicly available information. *See* 11 CFR 109.21. Under these rules, activity that could otherwise be indicative of coordination is not coordination if it involves only the use of publicly available information. *Id.*; *See Coordinated Communications,* 71 Fed Reg 33190-02 (June 8, 2006). The FEC issued these rules to effectuate the intent of congress that merely publicly sharing information, even a public request for campaign assistance, would not be coordination. *Coordinated Communications,* 71 Fed Reg 33190-02 (June 8, 2006). Likely, it was understood that merely sharing information publicly does not guarantee or direct any assistance, and in fact the decision of if and how to use of publicly available information is still entirely in the hands of the independent spender.

Third, if the CFB's proposed amendment would find independent spending to be coordinated, and therefore subject to contribution limits, based only on whether it includes publicly available information, this could be an unconstitutional content-based restriction on speech. *See Citizens United v. Fed. Election Comm'n,* 558 U.S. 310, 340 (2010) (citing *U.S. v. Playboy Entertainment Group, Inc.,* 529 U.S. 803, 813 (2000) for the notion that content-based restrictions on speech violated the First Amendment). The standard for coordination must generally be based on conduct, not content, *i.e.* did a candidate and a spender actually work together. *See supra* Part 2.a. However, here, because the independent spender would not need to be involved at all with how the information became public, the only basis for regulating the independent spender's speech would be whether it referenced certain information, *i.e.*, its content. If, in fact, this is how the CFB were to enforce this proposed rule, it would be vulnerable to legal challenge.

5. **Proposed Amendments to Section 14-01, 14-02, and14-04 Expanding the Definitions of Covered Communications to Cover Free Internet Communications Like Social Media Posts, Posts on Organizations' Websites, and Email**

Under the CFB's current rules, certain communications by independent spenders like Local 32BJ are subject to the CFB's reporting requirements and disclaimer requirements—requirements that money spent on these communications be reported to the CFB, and that the

spender identify themselves in certain ways on these communications. Routine communications over the internet, including posts to existing organizational websites, social media, and email, were exempt from these reporting and disclaimer requirements, while internet content placed for a fee and websites created specifically for campaign purposes, were covered. *See* 52 NYCR § 14-01.

The new rule would amend the definitions of covered communications to apply reporting and disclaimer requirements to online content shared publicly or sent individually to 500 or more people, regardless of amount or type of cost. *See* CFB Proposed Rule § 23. Thus, under Section 14-02, social media posts, emails, and websites, would all require an accounting of associated costs to see if they triggered reporting requirements. *Id.* Per the CFB's proposed amendment to Section 14-02, removing an exemption for calculating and reporting costs under $100 (unless paid to an outside vendor), would now count toward reportable meaning internal costs like staff time spent drafting an email or writing a social media post, would need to be closely monitored. *See* 52 NYCR 14-02(b)(i); CFB Proposed Rule § 24. Likewise, under 14-04, once an organization like Local 32BJ spent $1,000 or more on covered communications (including non-internet costs like ad buys or mailers), they would be required to place disclaimer language, including "paid for by," language, the name of organization's chief executive officer or equivalent, and the organization's top three donors. *See* 52 NYCR 14-04(a); CFB Proposed Rule § 25.

a. <u>Proposed rules are unduly burdensome and unworkable as they apply to free internet communications</u>

These proposed amendments reflect a significant departure from both state and federal treatment of internet communications, and present a number of complicated issues that the CFB's proposed rules do not appear to address. Both New York State and the FEC only require reporting and disclaimers on internet communications that, like other forms of traditional electioneering communications, are placed for a fee. *See* 11 CFR § 100.26; 9 NYCRR § 6200.10(b)(1), (11); This policy is grounded in the fundamental difference between traditional forms of communication and the internet. As the FEC noted, when it first adopted its rules regarding online communication:

> The Internet has a number of unique characteristics that distinguish it from traditional forms of mass communication. Unlike television, radio, newspapers, magazines, or even billboards, the Internet can hardly be considered a 'scarce' expressive commodity. It provides relatively unlimited, low-cost capacity for communication of all kinds. In response to the NPRM, one commenter noted that a ''computer and an Internet connection can turn anyone into a publisher who can speak to a mass audience.'' Additionally, because an Internet communication is not limited in duration and is not subject to the same time and space limitations as television and radio programming, the Internet provides a means to communicate

> with a large and geographically widespread audience, often at very little cost. Now that many public spaces such as libraries, schools, and coffee shops provide Internet access without charge, individuals can create their own political commentary and actively engage in political debate, rather than just read the views of others. In the words of one commenter, the Internet's ''near infinite capacity, diversity, and low cost of publication and access'' has ''democratized the mass distribution of information, especially in the political context.'' The result is the most accessible marketplace of ideas in history.

71 Fed. Reg. 18589, 18590. In short, with the exception of paid internet content, the FEC reasoned that internet communications were "analogous to a communication made from a soapbox in a public square." *Id.* at 18594.

The CFB's proposed rule does nothing to address these unique qualities of the internet. Rather, it applies the same regulatory regime applied to large-scale television advertisements to all forms of internet communications, all the way down to social media posts by volunteers and members. How, for example, would Local 32BJ calculate and account for the costs of hosting an express advocacy communication on its website? How would Local 32BJ account for the cost of members sharing social media posts produced by the Union? How would Local 32BJ account for the cost of a series of emails sent to potential voters using the Union's email? Would paid staff time making or sharing a social media post or drafting an email count? Would the cost of a member's home internet? Would the cost of hosting a website or email service? How would it be apportioned between other activities? The CFB leaves all of these questions unanswered, and without detailed guidance, any internet speech becomes a potential enormous liability for organizations like Local 32BJ, its members, and their communities.

Perhaps more importantly, even with such guidance, the nature of the internet would make tracking these costs a totally disproportionate burden on organizations like Local 32BJ. The internet involves near infinite short, enmeshed communications—comment threads on social media posts, for example. Even with appropriate guidelines on how to calculate costs, the sheer cost of monitoring organization-wide internet activity would create such a heavy burden for organizations and their members, that it would certainly chill their ability to speak.

b. Including internet communications in definition of electioneering communications compounds existing over breadth issues

Finally, as we have previously noted in comments to these rules,[4] the CFB's definition of "electioneering communication"—a communication that references a candidate within 60 days of an election—is overbroad, and serious implicates the Union's and members' First Amendment and NLRA rights. Expanding the definition of "electioneering communication" to include unpaid

[4]*See* Appendix B, Comments of SEIU Local 32BJ Regarding the New York City Campaign Finance Board Revised Proposed Independent Expenditure Disclosure Rules in New York City Municipal Elections (March 2, 2012)

internet communications only exacerbates these issues, as it subjects an even wider range of communications that are not, in fact, intended to influence an election to otherwise inapplicable regulation.

i. Unwarranted Conversion of Non-Electoral Speech into In-Kind Contributions

As we have previously noted, the definition of an "electioneering communication" already violates the First Amendment, because the definition of "electioneering communication" applies to any reference to a candidate, but does not require that a candidate be referred to *as a candidate* or that there be any reference to the election itself.[5] Thus, a union's "covered expenditure" could deal with official conduct by an incumbent officeholder (either of the office to which she then seeks reelection or an office that she holds while seeking election to another office) yet be treated as an independent expenditure, or more likely barred as an in-kind contribution, despite having nothing to do with the election.

This is already a significant issue where the Union has engaged in paid public advertising related to an elected official (for example thanking an elected official for lending their support to the union in an organizing drive, or pushing an elected to pass legislation supported by Local 32BJ). It becomes that much more acute where unpaid internet content, like social media posts or email announcements may reference an elected official supporting the union, and who may also be running for office. As just one example, the union recently held a rally in support of the "City of Yes" zoning proposals, and Mark Levine, the Manhattan Borough President, spoke. The union shared videos of the rally on Facebook. If this rally had occurred under the proposed rules, these Facebook videos, wholly unrelated to Mr. Levine's candidacy for office, would be deemed campaign contributions.

ii. Unwarranted Federal Tax Complications for Labor Organizations

By expanding the already overbroad definition of "electioneering communications" to include non-electoral, unpaid internet 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 routinely spend from their regular general-fund accounts on legislative and issue

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[5] The Supreme Court in *Buckley* identified the word "support" as language of express advocacy. *See* 424 U.S. at 44 n. 52. *See also Vermont Right to Life Committee, Inc. v. Sorrell*, 221 F. 3d 376, 389-91 (2d Cir. 2000) (striking down similar language as vague and overbroad); *North Carolina Right to Life, Inc. v. Leake*, 525 F. 3d 274, 280-86 (4th Cir. 2008); *National Right to Life Political Action Committee v. Conner,* 323 F.3d 684, 689 n.5, 694 (8th Cir. 2003); *Yamada v. Kuramoto*, 2010 U.S. Dist LEXIS 120795, *53-55 (D. Haw. 2010); *South Carolina Citizens For Life, Inc. v. Krawcheck,* 759 F. Supp. 2d 208, 725-28 (D.S.C. 2010); *Florida Right to Life, Inc. v. Mortham*, 1998 U.S. Dist. LEXIS 16694, *13-16 (M.D. Fla. 1998); *Doe v. Mortham*, 708 So. 2d 929, 932 (Fla. 1998). *Cf. Center for Individual Freedom v. Carmouche*, 449 F. 3d 655, 633-66 (5th Cir. 2006) (construing phrase "for the purpose of supporting, opposing or otherwise influencing" in Louisiana definition of "expenditure" to mean express advocacy in all applications of the state's disclosure requirements); New Jersey Election Law Enforcement Commission Advisory Opinion 01-2011, at 2 (interpreting phrase "support or defeat" in New Jersey campaign finance statute to mean express advocacy as defined in *Buckley*).

advocacy communications, both because the law permits this; it is administratively easier to do so; and, there is a severe tax risk if the union uses its legally distinct political account for these non-electoral efforts: any such spending from a union's separate segregated *political* account that is more than "insubstantial" could cause that account to lose its tax-exempt status for the entire tax year. See Treas. Reg § 1.527-2(b).

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

CONCLUSION

For the forgoing reasons, we respectfully request the CFB to provide additional time for comment, and revise its proposed amendments to Sections 6-04, 14-01, 14-02, and 14-04 in accordance with these comments. Specifically, the CFB should withdraw its proposal to have certain attenuated relationships be treated as potential evidence of coordination, even where no evidence of actual coordination exist, and at minimum adopt regulations on appropriate safe-harbors, like firewall or confidentiality agreements. The CFB should also continue to regulate only internet communications placed for a fee, or at minimum adopt regulations exempting certain attenuated or *di minimus* costs associated with internet communications, as well as a regulatory framework for calculating costs associated with otherwise unpaid internet communications.