

## Department of Law

### Assessment of Public Comments I.D. LAW-52-12-00013 - P

#### Proposed Rule to Require Certain Nonprofits To Disclose Information Regarding Election Advocacy To The Attorney General And The Public.

##### 1. Definitions

###### A. *“Covered Organization”*

**General Issue/Concern:** The rule should cover trade associations exempt from taxation pursuant to Internal Revenue Code section 501(c)(6).

**Response:** The rule as drafted applies to trade associations to the extent they are charities required to register with the Attorney General pursuant to New York law.

###### B. *“Election Targeted Issue Advocacy”*

**General Issue/Concern:** The definition of election targeted issue advocacy is too broad, and the “pre-election window” of 180 days should be shortened.

**Response:** The Department of Law accepts this comment and has revised section (a)(7) of the proposed rule to create a shortened window of 45 days before a primary election and 90 days before a general election, in order to capture electioneering activity while tailoring the rule to limit its application to other forms of political activity.

**General Issue/Concern:** Communications by covered organizations to “members” should not trigger disclosures.

**Response:** The Department of Law accepts this comment in part. The disclosure to regulators and the public of express election advocacy by a covered organization to its members is substantially related to the purposes of the rule and does not unduly interfere with the charitable purposes of a covered organization. However, the rule’s purposes are less clearly served by the disclosure by covered organizations of election targeted issue advocacy to members. As such, the Department has revised section (a)(7) of the proposed rule to exempt communications by covered organizations to their members from the definition of “election targeted issue advocacy.”

**General Issue/Concern:** Eliminate election targeted issue advocacy in its entirety from the rule, and only have communications “susceptible of no reasonable interpretation other than as a call for the nomination, election or defeat” trigger the rule’s disclosure requirements. These comments were rejected as neither constitutionally required nor sufficient to advance the legitimate goals of the rule.

**General Issue/Concern:** Some comments suggested that the rule should only require the disclosure of election related expenditures that are coordinated between covered organizations and a political campaign or a political committee. They argued that the resulting rule would be narrowly tailored and still achieve its

purposes. These comments were rejected as neither constitutionally required nor sufficient to advance the legitimate goals of the rule.

C. “Communications”

**General Issue/Concern:** The rule should more clearly exempt expenditures on e-mail communications from the types of expenditures that would trigger disclosures.

**Response:** The Department of Law accepts this comment and has amended the definition of “communication” in paragraph (a)(8) of the proposed rule to include only those mailings “sent through the United States Postal Service or similar private mail carriers.”

**General Issue/Concern:** The rule should create a “media exception” and exempt communications by *bona fide* media outlets.

**Response:** The Department of Law rejects this comment. No comment identified any covered organizations that would qualify as *bona fide* media organizations, nor could the Department identify one. Any potential benefits would therefore be outweighed by the potential for harm with respect to achieving the purposes of the rule.

**General Issue/Concern:** The rule should exempt nonpartisan candidate fora, debates and “town hall”-style meetings.

**Response:** The Department of Law accepts this comment and has revised paragraph (a)(7) of the proposed rule to exempt candidate fora, debates and town hall meetings to which at least two candidates or proponents of differing positions on referenda are invited as participants, and the structure of which does not promote one candidate or position over the other from the definition of “election targeted issue advocacy.”

D. “Covered Donation”

**General Issue/Concern:** The language limiting covered donations to donations that are “available to be used for a New York election related expenditure” should be clarified.

**Response:** The Department of Law accepts this comment and has amended the definition to limit covered donations to exclude donations that are deposited into an account the funds from which are not used for making New York election related expenditures. Under this definition, for example, donations that are deposited into an account that is used solely for making federal-election related expenditures, or for charitable purposes that are not election related at all, are not “covered donations.”

## **2. Disclosure of Election Related Expenditures**

**General Issue/Concern:** Separate thresholds for federal, state and local expenditures should be set before disclosure of the total amount and percentage of a covered organization’s spending on elections is required.

**Response:** The Department of Law rejects this comment. Setting multiple thresholds would increase the complexity of the proposed rule and the burdens of compliance. The potential adverse impact upon law enforcement functions and transparency in New York state and local elections, and the greater potential for fraud or other illegal conduct by covered organizations, further militate against setting multiple thresholds.

**General Issue/Concern:** The \$10,000 annual election related expenditure threshold for itemized disclosures should be raised.

**Response:** The Department of Law rejects this comment. The potential adverse impact upon law enforcement functions and transparency in New York state and local elections, and the greater potential for fraud or other illegal conduct by covered organizations when higher amounts are involved, militate against setting a higher threshold.

**General Issue/Concern:** Create a floor to exempt *de minimus* election related expenditures from itemized disclosure.

**Response:** The Department of Law accepts this comment and has amended paragraph (b)(2) to include a \$50 threshold before an individual expenditure must be disclosed. This is the same threshold set by Article 14 of New York's Election Law.

### **3. Disclosure of Donations Related to New York Elections**

**General Issue/Concern:** Raise the annual threshold of \$100 in covered donations to trigger itemized donor disclosure.

**Response:** The Department of Law accepts this comment. The value to regulators and the public of some of the information that would be provided at a \$100 level would be outweighed by the burdens on covered organizations. The Department has amended section (c)(1) of the proposed rule to raise the aggregate annual threshold to \$1,000 in covered donations, an amount consistent with the New York City Campaign Finance Board regulations and certain federal disclosure requirements.

**General Issue/Concern:** Set the threshold for itemized disclosure of donor information on a sliding scale corresponding to growth in a covered organization's overall annual expenditures.

**Response:** The Department of Law rejects this comment. Setting a sliding scale would increase the complexity of the rule and the burdens of compliance. The potential adverse impacts upon law enforcement functions and transparency in New York state and local elections further militate against setting multiple thresholds.

**General Issue/Concern:** Disclosing the names of the employers of contributors to organizations fails to advance the rule's asserted interests.

**Response:** The Department of Law rejects this comment as identification of common employment by donors will have benefits to donors, regulators and the public.

**General Issue/Concern:** Clarify the meaning of "reasonably available" in connection with employer information that covered organizations are required to disclose.

**Response:** The Department of Law accepts this comment and has revised paragraph (c)(1) of the proposed rule to require the disclosure of individual employer information if "known" to the covered organization.

#### **4. Public Disclosure**

**General Issue/Concern:** Remove the exception from public disclosure of information “exempt from disclosure pursuant to any state or federal law,” as it may have unintentionally exempted from disclosure certain information required to be reported on the Electioneering Disclosure Schedule.

**Response:** The Department of Law accepts this comment and has removed paragraph (g)(1) of the proposed rule to make clear that information reported on the Electioneering Disclosure Schedule may be made public by the Department.

**General Issue/Concern:** The Attorney General should make information collected via the Electioneering Disclosure Schedule available on its “New York Open Government” website.

**Response:** The Department of Law will take this comment under advisement.

#### **5. Exemption from Public Disclosure**

**General Issue/Concern:** The setting of the standard of proof for obtaining a waiver from disclosure of donor information as “clear and convincing evidence” that disclosure would cause harm, harassment or reprisal should be lowered.

**Response:** The Department of Law accepts this comment and has revised the proposed standard in paragraph (h)(1) of the rule to require showing only “substantial likelihood” of harm, threats, harassment or reprisals, so long as the group’s primary activities involve areas of public concern.

#### **6. General Comments**

**General Issue/Concern:** Apply the rule to covered organizations’ election related activities in other states.

**Response:** The Department of Law will study this issue and consider future revisions.

**General Issue/Concern:** Disclosure of expenditure and contribution information in connection with election speech cannot extend beyond express election advocacy speech and its functional equivalent

**Response:** The Department of Law rejects this comment. The Supreme Court has specifically rejected the contention that “disclosure requirements must be limited to speech that is the functional equivalent of express advocacy.” *Citizens United v. FEC*, 130 S. Ct. 876, 915 (2010).

**General Issue/Concern:** The rule must incorporate a “major purpose test.”

**Response:** The Department of Law rejects this comment. The “major purpose” test, insofar as it is relevant to disclosure, relates only to the legal requirements imposed on “political committees” (or “PACs”) under federal campaign finance law. It has no application to a one-time annual reporting requirement, such as that required by the proposed rule.

**General Issue/Concern:** The rule requires duplication of disclosures.

**Response:** Paragraph (d) of the rule seeks to minimize duplication by creating exceptions from disclosure of certain information required to be reported to other government agencies.

**General Issue/Concern:** Reporting periods do not correspond to election cycles, creating the possibility that it will be misleading to compare reports from organizations whose financial reporting periods differ.

**Response:** The Department of Law rejects this comment, as the Department would likely require legislative authorization to change reporting periods for covered organizations. See Article 7-A of the Executive Law; Section 8-1.4 of the Estates, Powers and Trusts Law.

**General Issue/Concern:** Extend the rule's effective date to allow organizations time to implement compliance measures.

**Response:** The Department of Law rejects this comment as the extensive comment periods for the proposed rule and revised proposed rule have allowed covered organizations ample time to prepare for compliance with the proposed rule.

## **7. Miscellaneous**

The Department of Law duly reviewed and considered all other comments.