

SUMMARY ASSESSMENT OF PUBLIC COMMENT

A Notice of Proposed Rule Making was published in the State Register on December 26, 2012. The Department of Law convened four hearings on the regulations throughout the state, heard oral testimony from over 20 witnesses, and received thousands of written comments. The Department of Law reviewed and evaluated all comments that it received. The vast majority of written comments received by the Department of Law expressed support for the regulations as proposed with no changes. Some witnesses also expressed support for the regulations as written, including members of the State Assembly and State Senate, as well as local elected officials. Some witnesses suggested changes to the regulations.

While the Department of Law addressed many of the stated concerns in the proposed revisions, some comments were determined to be contrary to the goals of the proposed rulemaking. Among these were comments objecting to the underlying concept of the regulations, or portions thereof, stating that the proposed regulations or portions thereof were unconstitutional. The Department of Law rejected these comments because the regulations, as both originally proposed and as herein revised, fully comport with federal and state law.

Relatedly, some comments urged the removal from the rule of "election targeted issue advocacy" in its entirety. They argued that only communications "susceptible of no reasonable interpretation other than as a call for the nomination, election or defeat" should trigger the rule's disclosure requirements. In addition, comments suggested that disclosure of coordinated election related expenditures by the rule would more narrowly tailor the rule and still achieve its purposes. These comments were rejected as neither constitutionally required nor sufficient to advance the legitimate goals of the rule.

Most comments were generally supportive of the regulations while suggesting that the Department of Law narrow their scope to reduce administrative or disclosure burdens on covered organizations and donors. For instance, organizations expressed concern that the scope of "election targeted issue advocacy" was too broad and would capture communications that did not advance the regulations' goals. In particular, they argued that: (a) the 180-day window was too long, (b) any communications between a covered organization and its members should be exempt, (c) communications from bona fide media outlets should be exempt, and

(d) communications regarding candidate fora, debates and town hall meetings should be exempt. In response, the Department of Law accepted these suggestions where doing so did not compromise the goals of the regulations. Accordingly, the Department of Law has: shortened the election targeted issue advocacy window to 90 days before a general election and 45 days before a primary election; exempted communications (other than express advocacy) directed by an organization to its members; and exempted some communications (other than express advocacy) promoting candidate fora, debates, and town hall meetings. However, the Department of Law rejected the comments seeking a “media exception” as it appeared prone to potential abuse and as neither any witness nor the Department of Law could identify a covered organization that would qualify as bona fide media outlet.

Another set of comments sought to change the various dollar amounts that relate to the rule's requirements for covered organizations to disclose or itemize certain information. These included: (a) increasing the \$10,000 election related expenditure threshold in section 91.6(b)(2); (b) creating in section 91.6(b)(2) a separate dollar threshold for a covered organization's federal, state, and local expenditures, such that each expenditure category would have its own dollar threshold triggering itemized disclosure requirements; (c) exempting from itemization under section 91.6(b)(2) de minimis election related expenditures; (d) raising the annual threshold of \$100 in covered donations to trigger itemized donor disclosure under section 91.6(c)(1); (e) linking the annual threshold for covered donations to a percentage of overall expenditures of the covered organization. The Department of Law accepted those comments that would reduce burdens on covered organizations without compromising the regulations' legitimate goals or creating unnecessary complexity in the regulatory regime. For these reasons, the proposed revisions the Department of Law: did not increase the threshold for requiring itemized disclosure of election related expenditures; did not create separate thresholds for federal, state and local election related expenditures; exempted election related expenditures below \$50 from having to be itemized; raised the annual threshold to \$1000 in covered donations, but did not link this amount to the expenditures of the covered organization.

Some comments sought clarifications of certain provisions of the regulations. For instance, comments sought to clarify the requirement that donor employer information be disclosed when “reasonably available” to

the organization. In response, the Department of Law has revised paragraph (c)(1) to require the disclosure of individual employer information only if such information is known to the covered organization. Comments also sought clarification regarding the meaning and purpose of section (g)(1), exempting from public disclosure information "exempt from disclosure pursuant to any state or federal law." The revised rule no longer contains that provision. Comments also sought to clarify that mailings under section 91.6(a)(8)(v) include only those communications "sent through the United States Postal Service or similar private mail carriers." The Department of Law adopted this suggestion.

Several comments expressed concerns over the standard of proof applied to applicants seeking a waiver from disclosure of donor information where disclosure would cause harm, harassment, or reprisal. These comments stated that the original "clear and convincing" evidence standard was too severe to allow adequate protection of such applicants. The Department of Law accepts this comment and has revised the proposed standard in paragraph (h)(1) of the rule so that a donor or a covered organization only has to demonstrate that its primary activities involve areas of public concern that create a "substantial likelihood" that disclosure will cause undue harm, threats, harassment or reprisals to any person or organization.

Some comments suggested expansion of the proposed regulations' scope, specifically that the Department of Law apply the rule's requirement to disclose and itemize election related expenditures and donation information based on a covered organizations' election advocacy in state or local elections in other states. The Department of Law rejected revising the rule in this manner, because it would produce a rule too expansive in scope and too burdensome on covered organizations in relation to the benefits sought by the rule.

Other comments suggested revising the rule to require covered organizations to produce election related disclosures based on the dates of elections rather than on annual reporting cycles. These comments were rejected as conflicting with state law.

Finally, some comments requested extending the effective date of the regulations to allow organizations time to implement compliance measures. Because of the extensive comment period for the proposed rule and the additional time for comment for the proposed revisions, no extended effective date is required. In addition, the Department of Law added a new paragraph (i) to the rule, which precludes the

granting of extensions to file the Election Disclosure Schedule. Allowing extensions would reduce the benefits of the rule by making information on covered organizations' election related activities available up to ten and a half months after the close of the fiscal year.

The full Assessment of Comments is available on the Attorney General's website at www.ag.ny.gov.