

AUTHORS

Lawrence H. Norton
Jeffrey S. Tenenbaum
Alexandra Megaris

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Nonprofits Operating in New York Must Disclose Donors, Itemize Spending for Election Advocacy and Issue Ads

Nonprofit groups raising money in New York are required by new rules to report nationwide spending on communications that support or oppose candidates and ballot initiatives, or that simply refer to candidates within certain periods before an election. When a group spends more than \$10,000 on such communications in regard to New York state or local elections, it must also itemize these expenditures and disclose donors of \$1,000 or more.

The new disclosure obligations apply to nonprofits that raise funds from New York residents and thus were already required to register and file annual reports with the New York Attorney General's Charities Bureau. According to New York Attorney General Eric Schneiderman, the rules principally target 501(c)(4) organizations that use so-called "dark money," a term that describes political spending that is not publicly disclosed under federal or state election laws, or federal tax laws.

Section 501(c)(3) organizations are exempt from the new disclosure requirements even if otherwise required to register and file annual reports. Membership organizations that only solicit their own members are exempt from the annual reporting requirements, and therefore are also exempt from the new disclosure obligations.

These new rules pose significant fundraising and compliance challenges for nonprofits because of their nationwide reach, applicability to grassroots lobbying communications, and requirements for donor disclosure.

I. Types of Paid Communications Covered by the New York Rules

Nonprofit organizations that raise money in New York, except for Section 501(c)(3) organizations, must now submit additional information in the annual reports they are obligated to file with the New York Attorney General's Charities Bureau. The new information must detail the organization's "election-related expenditures," defined as paid communications for either (1) *express election advocacy* or (2) *election-targeted issue advocacy*. Communications made through a wide range of media – television, radio, the Internet, print, and telephone – are subject to disclosure.

A. Express Election Advocacy

The first type of communication subject to disclosure, called express election advocacy, includes any communication:

1. calling for the nomination, election, or defeat of a clearly identified candidate or political party in any election, or
2. calling for the passage or defeat of a proposition, constitutional amendment, referenda, or other question submitted to voters in any election.

A further requirement is that the communication must contain express words of advocacy, such as "support," "elect," or "defeat," or be susceptible to no reasonable interpretation other than a call for the nomination, election or defeat of a candidate, political party, or ballot measure. This standard closely tracks the federal definitions for independent expenditures and express advocacy.

B. Election-Targeted Issue Advocacy

The second type of communication covered by the new rules, called election-targeted issue advocacy, is a communication made within *45 days before any primary election or 90 days before any general election* that:

1. refers to a clearly identified candidate *in that election*,
2. depicts the image, name, or likeness of a candidate *in that election*, or
3. refers to any political party or proposition *in that election*.

This definition expressly *excludes* issue advocacy directed to the members of a covered organization. (Note, however, that the membership exception does not apply to “express election advocacy,” as described in the previous section.) Communications to promote or host candidate debates also are exempt from the definition of election-targeted issue advocacy.

Many grassroots lobbying communications will be swept up by these rules merely because an officeholder is mentioned and the legislation at issue is pending in the period prior to an election. The rules also will require disclosure of communications about federal candidates that do not have to be reported to the Federal Election Commission as electioneering communications because the federal rules apply only to broadcast communications and the applicable time frames are shorter (30 days before a primary, 60 days before a general election) than the New York rules.

II. Reporting Expenditures and Information about Donors

Organizations subject to the new rules must file an Electioneering Disclosure Schedule (“EDS”) with their annual financial report filed with the New York Charities Bureau. The EDS must contain the following information:

A. Expenditure Disclosure

A covered organization must report the aggregate amount spent on “election-related expenditures,” as well as the percentage such expenditures represent of the organization’s annual spending. This reporting requirement is not limited to expenditures made in connection with New York state or local elections, but includes *all election-related expenditures anywhere in the country – federal, state, and local*. In addition, if a covered organization spends more than \$10,000 in election-related expenditures during the reporting period in connection with *New York state or local elections*, the organization must itemize each expense over \$50.

An organization need not itemize expenditures when such information is already disclosed to another government agency that makes the information available to the public. Thus, for example, no separate disclosure is required for independent expenditures disclosed to the Federal Election Commission or information contained in itemized reports filed with the New York State Board of Elections.

B. Donor Disclosure

A group that has made over \$10,000 in election-related expenditures in connection with *New York state or local elections* must identify each individual who made donations of \$1,000 or more during the reporting period, along with date and amount of the donation, and the donor’s employer.

A “covered donation” is *any* contribution or thing of value made to the group that is *available to be used* for a New York election-related expenditure. Accordingly, the donation does not actually have to be used or intended for election-related expenditures in order to be subject to disclosure.

However, if an organization maintains a separate bank account containing funds used solely for New York election-related expenditures, and makes all of its New York election-related expenditures from that account, it only has to disclose donations deposited into such account. That way, the group may keep certain donors confidential. Alternatively, if information about donors has been disclosed to, and made public by, another government agency, it need not be included in the New York filing.

III. Approaching Compliance

The new rules pose significant compliance challenges, and can be burdensome and confusing. They require tracking and reporting entirely new categories of information, not only in relation to New York elections, but to any election, including *federal, state, and local* races across the country. Moreover, the rules apply to expenditures that will not always be treated as election-related under applicable federal and state election laws.

Donor disclosure poses both accounting and fundraising challenges. Groups spending over \$10,000 in connection with *New York state or local elections* must disclose their donors unless they use a segregated bank account solely for that purpose. In that case, groups are only required to disclose contributions that are deposited into that segregated account.

A. Complying with Expenditure Disclosure Requirements

To ensure compliance with the new requirements, organizations registered with the New York Charities Bureau (other than 501(c)(3) organizations) will have to maintain careful records and implement processes and procedures to capture reportable expenditures.

An organization will need to evaluate its activity *nationwide* against New York's definition of election-related expenditure. Expenditures made in connection with New York state or local elections, or merely in the months prior to an election, will require special attention.

Reporting organizations will need a system for flagging all relevant contracts and disbursements and maintaining records in case of an audit. The rules do not specify whether reports must account for overhead or employee costs associated with covered communications. However, we anticipate further guidance on this and other issues from the New York Attorney General's office.

B. Managing and Complying with Donor Disclosure Requirement

The new rules compel groups that make more than \$10,000 in relation to New York elections to disclose *all* donors *unless* the organization maintains a separate bank account for funds to be used exclusively for New York election-related expenditures.

An organization undertaking a communications campaign that refers to New York state or local officials may want to tailor its fundraising appeals to help manage disclosure. For instance, donors concerned about confidentiality could be assured that their funds will be deposited in an account where donor information need not be publicly disclosed. Conversely, donors could be asked to earmark donations for New York electoral or grassroots activity, and be informed that their donations will result in disclosure of their identity, employer, and amount of donation.

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*For more information, please contact **Larry Norton** at lnorton@Venable.com, **Jeff Tenenbaum** at jstenenbaum@Venable.com, or **Alex Megaris** at amegaris@Venable.com. Also, check out our blog, www.PoliticalLawBriefing.com, for developments in this area.*

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