

Articles

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New York Attorney General Proposes New Rules Requiring Nonprofits Funding Political Communications to Disclose Donors

Related Topic Area(s): Antitrust and Trade Regulation, Lobbying and Political Activity

On December 11, 2012, the New York Attorney General's Office proposed rules that would require nonprofit organizations doing business in New York to disclose their spending on a wide range of activities, including those unrelated to New York elections or candidates. The rules also would require groups that spend more than \$10,000 to identify donors giving \$100 or more.

Under the proposed rules, nonprofit, tax-exempt organizations registered—or required to be registered—under New York's charitable registration law must include in their annual financial report the amount and percentage of total expenses spent on all "election related expenditures" during the reporting period. The term "election related expenditures" is defined so broadly that it would require organizations to track and report on spending *nationwide*, and could sweep up grassroots lobbying and other issue advocacy. In addition, a group making public communications in New York during the six months prior to a state or local election may have to publicly disclose all of its individual donors.

The rules would apply only to non-501(c)(3) organizations (such as 501(c)(4) and 501(c)(6) entities). 501(c)(3) organizations are expressly exempt, as they are prohibited under the Internal Revenue Code from intervention in political campaigns.

Communications Subject to Proposed Rules: Defining "Election Related Expenditures"

"Election related expenditures" include two categories of communications: express election advocacy and election targeted issue advocacy. The term "communication" covers paid broadcast advertisements, placement of content on the Internet, print advertisements, telephone contacts, mailings, and other print materials.

As is explained below, it is important to understand that election related expenditures cover not only state and local election activities in New York (governor, state assembly, state senate, etc.) but *any* election, including *federal*, *state*, and *local* races in other jurisdictions across the country. As a result, the proposed rules, as currently drafted, would require many nonprofit groups to track and report entirely new categories of information.

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

- . Calling for the nomination, election, or defeat of a clearly identified candidate or political party in any election; or
- . Calling for the passage or defeat of a proposition, constitutional amendment, referenda, or other question submitted to voters in any election ("proposition").

Under the proposed regulations, there are two types of express election advocacy. The communication either must:

- . Contain express words, such as "vote," "oppose," "support," "elect," "defeat," or "reject;" or
- . Otherwise refer to or depict a clearly identified candidate, political party, or proposition "in a manner that is susceptible of no reasonable interpretation other than as a call for the nomination, election or defeat of such candidates, political parties or [proposition]."

This standard closely tracks the federal definitions of "independent expenditure" and "expressly

AUTHORS

Alexandra Megaris
Lawrence H. Norton
Ronald M. Jacobs

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advocating.”

Election Targeted Issue Advocacy: The second type of communication covered by the proposed rule, called election targeted issue advocacy, includes communications made within *180 days of any election* that:

- . Refer to a clearly identified candidate in that election;
- . Depict the image, name, or likeness of a candidate in that election; or
- . Refer to any political party or proposition in that election.

While this rule is modeled on the federal rule for electioneering communications, the federal rule applies much smaller windows (30 days before a primary, 60 days before a general election).

Disclosure Requirements

The proposal would impose two disclosure requirements on organizations covered by the rule.

Donor Disclosure: Of particular concern to nonprofits, especially 501(c)(4) groups, is the prospect of having to publicly disclose individual donors. Under the proposed rules, a group that has made over \$10,000 in New York election related expenditures (i.e., election related expenditures *made in connection with New York state or local elections only*) must disclose the following information about each “covered donation” received within the reporting period:

- . The name and address of each donor who made donations of \$100 or more (in the aggregate);
- . The donor’s employer; and
- . The date and amount of each donation.

A “covered donation” is any contribution or thing of value made to a nonprofit group covered by the rule *that is available* to be used for a New York election related expenditure (i.e., election related expenditures *made in connection with New York state or local elections only*). In other words, the donation does not actually have to be used or intended for election related expenditures, just be available to be used, in order to be subject to disclosure.

Expenditure Disclosure: A covered nonprofit also would have to report the amount and percentage of total expenses spent on election related expenditures during the reporting period. This reporting requirement is not limited to expenditures made in connection with New York state or local elections, but includes all election related expenditures (recall that the definition covers *any* election, including *federal, state, and local* races in other jurisdictions across the country).

Moreover, if an organization spends more than \$10,000 in election related expenditures in connection with *New York state or local elections*, the organization must itemize these expenses, and provide the following information for each:

- . The amount of the expenditure;
- . The date such funds were provided;
- . The name and address of the recipients of the expenditure; and
- . A description of the expenditure and its purpose.

Exemptions and Waivers

The proposed rules provide several exemptions. First, an organization that earmarks donations for purposes other than election related expenditures may keep those donors confidential by depositing such funds in a separate account.

In addition, information already disclosed to another government agency that makes such information available to the public would not have to be disclosed on the annual financial report. For instance, information relating to independent expenditures disclosed to Federal Election Commission would not have to be reported again to New York.

The proposal also includes a process by which a group can seek a waiver from having to disclose its expenditures and donors *if* it can show, by clear and convincing evidence, that public disclosure of a contribution or donor’s identity could cause undue harm, threats, harassment, or reprisals.

Implications and Next Steps

The proposed rules would impose new and burdensome tracking and reporting requirements on nonprofit groups subject to the disclosure requirements. This is because the definition of election related expenditures broadly reaches communications that are not otherwise subject to disclosure to other government entities (including the Federal Election Commission) and that may be intended to influence issues or legislation.

For instance, an advertisement run in Maine that says, "Contact Congressman Smith and tell him to vote for Bill 1," would constitute "election targeted issue advocacy" if Congressman Smith was up for reelection within the next six months. Although the ad only would have to be reported under the federal rules if run in Congressman Smith's district within 60 days of his next election, a covered organization would have to account for the cost of the ad in its annual New York filing. If a 501(c)(4) entity ran an ad in New York seeking disaster relief donations, that ad would trigger donor disclosure if it included even a fleeting image of a New York state officeholder who was up for reelection in the next six months.

Under federal law, so long as a 501(c)(4) organization does not solicit contributions to fund specific political communications, it will not have to disclose its donors. Since Citizens United, however, state legislatures and regulators increasingly are seeking ways to compel advocacy groups to disclose the identities of their donors. For instance, last spring, California began requiring organizations to disclose individual donors when they spend money to influence California elections, including ballot initiatives. When an Arizona-based nonprofit refused to disclose its donors, the state's campaign finance watchdog filed a lawsuit to force the organization to comply with the rule. Led by California and now New York, other states may follow suit.

Written comments on the proposed rules may be submitted until March 6, 2013, with final rules expected to be in place in time for the 2013 local elections.

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For more information, please contact [Alexandra Megaris](mailto:amegaris@Venable.com) at 212.370.6210 and amegaris@Venable.com, [Lawrence H. Norton](mailto:lnorton@Venable.com) at 202.344.4541 and lnorton@Venable.com, or [Ronald M. Jacobs](mailto:rmjacobs@Venable.com) at 202.344.8215 and rmjacobs@Venable.com.

*Alexandra Megaris is an associate in Venable's **Political Law Practice** in Venable's New York office. Lawrence H. Norton and Ronald M. Jacobs are partners and co-chairs of Venable's Political Law Practice in Venable's Washington, D.C. office.*

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