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THE LEAGUE OF WOMEN VOTERS of New York State

Testimony before the Office of the Attorney General on
Proposed Regulations Related to Disclosure Requirements for Nonprofits
Legislative Office Building
Roosevelt Hearing Room C, 2nd Floor
Albany, New York
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My name is Sally Robinson and I am the President of the League of Women Voters of New York State. The League is a nonpartisan organization whose mission is to encourage the active and informed participation in government, to increase the understanding of major public policy issues, and influence public policy through education and advocacy. We have both an Education Foundation 501(c)(3) and a 501(c)(4), but we do not endorse candidates or intervene in any manner in candidate campaigns.

Both in New York and at the national level, the League is deeply committed to reforming our campaign finance system to ensure the public's right to know who is funding the outside group election spending that has increased significantly in recent elections. The League believes that voters deserve to know the sources of funding for election advertising so they can make informed decisions and supported the 2012 DISCLOSE Act at the federal level. We commend Attorney General Schneiderman and his staff for taking this initiative to shed light on political spending and inform New Yorkers.

In the long term, we need a strategy to address the undisclosed money coming into our political process. In the short term, we recognize that these proposed regulations are an important step to provide transparency, protect New York donors, and help ensure integrity of New York elections, particularly given the current failure of the state's campaign finance system to provide adequate disclosure of independent expenditures.

We appreciate the scheduling of these four hearings throughout the state to accept public comments on this proposal, and we want to take this opportunity to make a few suggestions for your consideration.

The proposed regulations contain three different disclosure requirements for nonprofit organizations registered with the Attorney General:

1. Require an organization to include the amount and the percentage of total expenses that are election related expenditures in its annual financial report (which I will refer to as the "Percentage Disclosure")

2. Require a more detailed schedule of New York election expenditures for organizations that make New York election related expenditures over $10,000 (which I will refer to as the "New York Election Expenditures Disclosure")

3. Require disclosure of covered donations of $100 or more to organizations that meet the New York Election Expenditures Disclosure threshold (which I will refer to as the "Donor Disclosure").

The Percentage Disclosure requirement is intended to inform prospective donors to nonprofits of the amount of the organization's political spending and thereby help donors retain confidence that organizations to which they donate are fulfilling their non-political goal. While there is a $10,000 spending threshold for the detailed New York Election Expenditure Disclosure, there is no threshold on the level of individual federal, state, and local expenditures that need to be included in the Percentage Disclosure amount, or on the aggregate level of spending, or on the percentage of total expenses that trigger the Percentage Disclosure. I believe that you should consider adding reasonable thresholds to this reporting requirement to reduce the reporting burden on nonprofits that engage in a minimal level of political spending, avoid capturing the unwary, while retaining the usefulness to the public of these disclosures. Doing so would still inform New York donors about organizations that spend large amounts on political activities while balancing the interests of nonprofits that spend de minimis amounts on political activity in federal, state and local elections, or those for which this activity is a small percentage of their legitimate program activity expenses.

Furthermore, federal, state, and local election related expenditures, as defined in the proposed regulations may not necessarily be expenses that organizations would have to report or keep records of in other contexts. Even though the proposed regulations don't require an itemized listing of non-New

York expenses, calculating a total amount will still require keeping track of each expense. Therefore, the record-keeping burden on these organizations with respect to non-New York political spending should be considered.An alternative means of including non-New York spending in total political spending for purposes of the Percentage Disclosure would be to reference amounts that the organizations already report either to the IRS or under federal, state or local campaign finance laws, particularly with respect to testing whether an organization has met a reporting threshold.[1] IRS and federal campaign finance reports have been used to shine light on spending by nonprofit organizations. For example, an investigative report in ProPublica last summer examined political spending by 501(c)(4)'s by looking at political activity expenses as listed on the Form 990, Schedule C and compared those numbers to federal campaign filings. [2]

These numbers are not necessarily the same, since at this intersection of tax and campaign finance law, particularly regarding issue advocacy, terminology is not necessarily consistent. The IRS definition of when issue advocacy should be regarded as political activity and disclosed on Schedule C is a facts and circumstances test,[3] not as clearly defined as electioneering communications under federal campaign finance law. Political activities related to candidates and attempts to influence the appointment to public office are required to be disclosed as political activities on Schedule C, but activities related to ballot propositions are not. To the extent political expenses related to ballot propositions are required to be disclosed under state and local campaign finance laws, they would be picked up as part of those filings.

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[1] As a possible example, election related expenditures for the Percentage Disclosure could be calculated as any New York Election Expenditures plus the greater of (1) the amount of political activity expenses outside of New York that are required to be disclosed in the organization's Form 990, Schedule C, or (2) expenses outside of New York that the organization is required to report under federal law, or state and local laws in the jurisdiction in which they occur. Making this information easily accessible to New York donors could be informative even if it could be otherwise obtained through the Form 990 or by examining a variety of campaign finance filings.

[2] http://www.propublica.org/article/how-nonprofits-spend-millions-on-elections-and-call-it-public-welfare.

[3] Revenue Ruling 2004-6 provides a non-exhaustive list of factors the IRS considers in determining whether an expenditure for an issue advocacy communication is technically an "exempt function" under Section 527, and hence a political activity for purposes of Section 527(f) that imposes a tax on the lesser of (1) net income or (2) political activity expenses. Confusingly, there are three different tests for "political activity" under tax law: the test which deals with Section 527 expenses, the test for activities considered prohibited political campaign intervention under Section 501 (c)(3) and finally the primary purpose test for 501(c)(4) organizations. Although guidance from the determination under Section 501(c)(3) of when political activities become political campaign intervention has been used in the 501(c)(4) context, tax lawyers have debated over these distinctions for years. Unlike 501(c)(4) s, Section 527 political organizations must file detailed reports of their expenses and donors.

The proposed regulations do not specify what constitutes "total expenses" for purposes of the Percentage Disclosure. Instead of total expenses as listed on the Form 990, it might be more informative to compare political expenses as a percentage of the program service expenses line in Part III of the Form 990. This could give a clearer picture of how political expenses compare to the expenses of the organization that further its non-political primary purpose.[4]

Election Related Expenditures

1. The proposed regulations should clarify that legitimate news outlets, including non-traditional ones, are protected, given that "printed material exceeding five thousand copies" and "paid placement of content on the Internet or other electronic communication networks" are communications under the proposed regulations

2. **Nonpartisan** voter engagement efforts, including candidate forums should be exempted. There is a well-established body of tax law that defines when these activities are sufficiently nonpartisan so as not to be considered political intervention.[5]

3. The regulations should clarify how communications to an organization's members are treated.

Donor Disclosure

We recommend that you consider raising the $100 threshold for donor disclosure. Disclosure of donors to nonprofit organizations, whose primary purpose cannot be political, should not necessarily be at the same level as donors to political committees under the campaign finance law since a donor to a political committee presumably has a solely political purpose. The governmental interest in the identity of small donors to nonprofits is arguably less than for donors to political committees, and the burden more for organizations with large memberships and active program activity outside of the political arena.

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[4] See *Comments of the Individual Members of the ABA Exempt Organizations Committee's Task Force on Section 501©(4) and Politics* (May 25, 2004), at 35-37. Available at www.abanet.org/tax/pubpolicy/2004/040525exo.pdf, suggesting the IRS use a bright-line test to define if an organization's primary purpose is political.

[5] See Revenue Ruling 2007-41.

The proposed regulations allows donors who do not want their funds used for election expenses to avoid disclosure, and they allow donors or organizations the possibility of seeking an exemption from the Attorney General from disclosure if it will cause undue harm, threats, harassment or reprisals to any person or organization. As we said in our comments with respect to the proposed lobbying regulations under the Public Integrity Reform Act, these exceptions are warranted to protect the right of free association and donor privacy in appropriate circumstances.

Exemptions and Effective Date

The exemption from having to file information that the organization provides to another agency that makes it public should be clarified since in some instances only partial information might be disclosed to another agency. Also, in what was presumably a drafting error, the exemption under Section 91.6-g (1) for information exempt from disclosure pursuant to any state or federal law would omit disclosure of donors listed on Schedule B of the Form 990, as the disclosure of this information is prohibited under federal tax law.

With respect to donor disclosure, the proposed regulations provide that donations prior to the effective date will not be disclosed. However, it is not clear whether or not expenditures incurred before the effective date are required to be disclosed for the first filing after the adoption of the regulations. Requiring disclosure of expenses incurred before the regulations are finalized could create record keeping issues for covered organizations.

Conclusion

Finally, given the importance of making this information easily available to the public, the information on the Electioneering Disclosure Schedule should be accessible through the Attorney General's New York Open Government website. Thank you for giving us the opportunity today to comment on this proposal and we look forward to its successful implementation in the future.