



PRESIDENT  
NAN ARON

CHAIR  
ANNE HELEN HESS

March 6, 2013

Attorney General Eric Schneiderman  
120 Broadway  
New York, New York 10271

Dear Attorney General Schneiderman:

Alliance for Justice is a national association of over 100 organizations, representing a broad array of groups committed to progressive values and the creation of an equitable, just, and free society. AFJ works to ensure that the federal judiciary advances core constitutional values, preserves human rights and unfettered access to the courts, and adheres to the even-handed administration of justice for all Americans. It is the leading expert on the legal framework for nonprofit advocacy efforts, providing definitive information, resources, and technical assistance that encourages organizations and their funding partners to fully exercise their right to be active participants in the democratic process.

These comments are based on discussions the Alliance and its affiliated section 501(c)(4) organization, Alliance for Justice Action Campaign, have had over the past year with a number of publicly supported, politically active organizations tax exempt under section 501(c)(4) of the Internal Revenue Code (“IRC”) concerning the issues raised for nonprofit advocacy organizations by the Supreme Court’s decision in *Citizens United v. FEC* --particularly, disclosure of political activity. We recognize that the Court has consistently upheld required disclosure against challenges under the First Amendment, including in *Citizens United* itself, and we support increased public disclosure of funding of political activity and are willing to bear some of the new administrative burdens that will result. At the same time, we wish to ensure that unnecessarily burdensome disclosure requirements do not impede legitimate and important political advocacy. If the regulations are implemented as is, we worry that many IRC § 501(c)(4) organizations will limit their advocacy and refrain from speaking out on environmental, economic, social justice, violence prevention, and other important issues that protect and strengthen the public good.

### GENERAL COMMENTS

We appreciate your action to shed light on “dark money” groups and to force “sham nonprofits” to disclose information. However, the draft regulations as written do not distinguish between such “sham” groups and legitimate, well-established IRC § 501(c)(4)s. Social welfare organizations, exempt from taxation under IRC § 501(c)(4), provide one of the most important vehicles in the political landscape through which ordinary citizens may band together to participate in the political process. Unlike charitable and educational organizations exempt under IRC § 501(c)(3), which may undertake only limited lobbying activities and no political campaign activity at all, IRC § 501(c)(4) organizations are permitted to use all of their funds to promote issues of public importance, including through legislative and administrative lobbying, and may also engage in some political campaign activity, as long as they are primarily engaged in promoting the common good and general welfare of the people of the community and do not benefit private interests. *See* Treas. Reg. § 1.501(c)(4)-1. Political action committees, parties and other political organizations that are exempt from taxation under IRC § 527, in contrast, have as their sole purpose supporting candidates for public office.

Many discussions of the role of IRC § 501(c)(4) organizations in recent elections not only fail to appreciate the important role of such organizations in promoting democratic participation by all citizens, they also improperly lump together all types of IRC § 501(c)(4) organizations without regard to how they are organized or from whom they receive their support. Thus, publicly supported organizations such as Sierra Club, Human Rights Campaign, the NRA and AARP, with thousands or even millions of individual members and supporters, are frequently regarded as presenting the same opportunities for abuse as the post-*Citizens United* vintage of IRC § 501(c)(4) organizations that are supported by only a small number of very large individual and corporate donors. These discussions also ignore the extent to which small, local, grassroots organizations are organized under IRC § 501(c)(4). The Alliance strongly believes that proposals for the regulation of IRC § 501(c)(4) organizations should distinguish between privately funded organizations, which present a much greater opportunity for abuse, than publicly funded organizations with the same tax status, for which the public interest in disclosure is far less apparent.<sup>1</sup>

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<sup>1</sup> One of the tests used in classifying IRC § 501(c)(3) organizations as public charities, which are subject to lesser regulation than IRC § 501(c)(3) private foundations, looks at the extent to which an organization is supported by a

### **SPECIFIC COMMENTS ON THE PROPOSAL**

Under the proposed rules, if an IRC § 501(c)(4) organization spends more than \$10,000 on NY election related expenditures, then it must disclose all donors who gave more than \$100 and whose contribution is available to be used for a NY election related expenditure. The term “election related expenditure” includes express advocacy—communications that clearly support or oppose candidates for public office—but also include “election targeted issue advocacy”—non-express advocacy made within 180 days of an election that (1) refers to one or more clearly identified candidates in that election; (2) depicts the name, image, likeness or voice of one or more clearly identified candidates in that election; or (3) refers to any political party, constitutional amendment, proposition, referendum or other question submitted to the voters in that election.”

#### Definition of “Election Related Expenditures”

We believe including issue advocacy, as described above, in the definition of “election related expenditures” is misleading and creates traps for the unwary. It is overly broad because it reaches legitimate issue advocacy having no election-influencing purpose. The Supreme Court recognized this over breadth when it narrowed FECA’s prohibition on corporate and union electioneering communications to reach only communications that include the functional equivalent of express advocacy. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

No one disputes that express advocacy is campaign-related and focused on campaigns. By defining “election related expenditures” to include much issue advocacy, however, the bill assumes communications within 180 days of an election that reference an elected official are intended to influence their reelection and that there are no legitimate advertising campaigns aimed at influencing an elected official’s position on an issue or legislation.<sup>2</sup> To be clear, this rule applies when an elected official is merely mentioned in the advertisement even if their candidacy or an

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broad range of donors rather than a few large donors. This approach has much to commend it in distinguishing between publicly and privately supported IRC § 501(c)(4) organizations for purposes of political disclosure.

<sup>2</sup> We recognize and acknowledge that the proposed regulations seeks to avoid duplicative reporting by not requiring disclosure of information already required to be reported to a government agency that makes the information available to the public. Proposed Regulation § 91.6 (d). While intended to prevent reporting grassroots lobbying that is currently disclosed on the lobbying disclosure forms, the information currently required on the [New York State Lobbyist Bi-Monthly Report](#) does not require donor information. Therefore, it seems like such information would still be required under the proposed regulations.

election is not. The fact that the official is up for reelection is sufficient to meet the standard for electioneering communication.

Typically, the New York State legislature is in session from January-December. The legislature and executive branch agencies are considering important policy issues year-round. Consequently, many IRC § 501(c)(4)s will be lobbying and talking about policies year-round, including urging legislators and executive branch officials to support or oppose specific policies. Under the proposed regulations, any communication that refers to a ballot measure or a clearly identified candidate within 180 days of an election will be treated as an “election related expenditure.” Many sitting legislators and executive branch officials run for re-election and are therefore considered “candidates.” Consequently, many communications urging a sitting public official to take action on a pending bill or regulation, for instance, will be deemed to be “election related.”

Some IRC § 501(c)(4)s engage in no partisan election related activities and would not realize their activities fall within the scope of campaign finance rules. If activities beyond express advocacy are to be regulated, we encourage you to carve out from the definition those communications made in response to a current legislative, executive branch or other non-political external event, such as pending legislation or proposed regulations. One possibility is to exempt from the definition of “election targeted issue advocacy” those communications that meet a safe harbor—see the Appendix for several versions.

#### Donor Disclosure

The proposed regulations require the disclosure of donors of “covered donations” available to be used for a New York election related expenditure. As we understand, the purpose of donor disclosure is to publicly reveal who is behind an organization. There is little or no public interest in disclosure of donors of \$100 because their contributions are so small that they could not have had any significant influence over the organization’s decision-making with respect to its political activities. Therefore, we recommend raising the threshold from \$100 to at least \$500, if not higher.

Moreover, the Alliance believes that the size of a donor’s contributions should not be the only factor considered when determining whether disclosure is required. A contribution of, say, \$500 is more significant when made to an organization which spends only \$100,000 on political

activities than it would be to an organization that spends \$1 million, or \$10 million. Thus, it makes sense to increase the safe harbor level as the size of the organization increases.

Likewise, it is excessive to require the disclosure of all donors who gave during the reporting period. While a reasonable nexus can be made between a donation and a communication made within two months of the expenditure, for instance, such connection lessens over time, and may in fact lead to misleading conclusions.

In addition, to avoid creating a trap for the unwary and imposing an unreasonable burden on smaller groups, we recommend increasing the threshold when IRC § 501(c)(4)s are subject to these disclosure rules from \$10,000 to at least \$50,000. This is particularly true if the threshold applies to express election advocacy and election targeted issue advocacy. As described above, these regulations may require increased disclosure of those IRC § 501(c)(4)s who engage in no express election advocacy or even ballot measure advocacy.

Once an IRC § 501(c)(4) is subject to the disclosure requirements of Proposed Regulation § 91.6(b)(2), it must file an itemized schedule listing “each New York election related expenditure.” There should be an expenditure floor, below which expenses are considered *de minimis*. Again, we seek a balance between reporting arguably meaningful information and every pen purchased.

The proposed regulations require including on the annual financial report “the employer of each such individual donor, *if reasonably available*.” (emphasis added). It is not clear what that means. For instance, under federal election law there is a [detailed process](#) political committees must follow to make “best efforts” to learn the name of a donor’s employer. Such a complex and onerous process is inappropriate for social welfare organizations which, unlike political committees, do not have election activity as their primary purpose.

#### Covered Donations

A covered donation is defined in the proposed regulations as “any contribution, gift, loan, advance, or deposit of money or anything of value made to a covered organization that is available to be used for a New York election related expenditure.” As written, this includes dues payments, and would thus require an organization whose dues exceed \$100 to disclose members. We encourage an exception for membership dues up to a reasonable amount to protect the sanctity of members, as described below.

Moreover, as is included in the [DISCLOSE 2013 Act](#), we suggest an exception for “amounts received by the covered organization in the ordinary course of any trade or business conducted by the covered organization or in the form of investments in the covered organization.”

Finally, the proposed regulations allow covered organizations to disclose only certain donors by keeping “one or more segregated bank accounts” from which it may make New York election related expenditures. We want to clarify that this proposal does not require an organization to establish a separate segregated fund.

#### Communication

The proposed regulations define a “communication” as either a paid communication or mailings or printed materials exceeding 5000 copies. Subsection (ii) refers to “paid placement of content on the Internet or other electronic communication networks.” We ask that it be clarified that “paid” modifies both Internet communications and other electronic communication networks.

#### Membership Communication Exception

We urge you to recognize the special relationship between IRC § 501(c)(4)s and their members. Federal election law has long distinguished between communications with an organization’s members versus those with the general public. For instance, member communications may be coordinated with a campaign, and the expenses are not treated as “expenditures” or “contributions” and are not subject to the political expenditures tax under IRC § 527. In fact, the U.S. Supreme Court believed a law that prohibited corporations and unions from advising their members “of danger or advantage to their interests from the adoption of measures, or the election to office of men espousing such measures” faced “the gravest doubt...as to its constitutionality.” *U.S. v. Congress of Indus. Orgs.*, 335 U.S. 106, 121 (1948).

#### Duplication of Disclosure

The proposed regulations will require every IRC § 501(c)(4) organization that is registered with the New York Attorney General’s office to include on its annual financial report the amount and the percentage of total expenses during the reporting period that are election related expenditures. This applies to even those organizations that engage in no “election related” activities in New York. Organizations already need to report their lobbying and political campaign activities of [Schedule C of IRS Form 990](#), a publicly available document. Rather than having to track expenditures according to New York State’s very broad definition of “election related

expenditures,” requiring the creation of a separate tracking system, organizations should be able to provide data from their Form 990.

#### Reporting Period

The proposed regulations repeatedly refer to the “reporting period.” It is our understanding that the reporting period is the organization’s fiscal year, the period for which the Form CHAR 500 is filed. As a result, comparing the election activities of organizations will be challenging, since, depending on an organization’s fiscal year, an election may fall within one reporting period or may span two. Thus, an IRC § 501(c)(4) that makes election related expenditures for the November election whose fiscal year ends in June would split its expenditures and donations over two reporting periods, where an IRC § 501(c)(4) with a fiscal year ending in December would report all expenditures and donations in one reporting period. This has the potential of producing misleading information.

#### Exemption from Public Disclosure

We greatly appreciate the inclusion of an exemption from public disclosure for harassment. However, the “clear and convincing” standard is too high. Instead, we recommend a “reasonable probability” standard that a donor or organization will face undue harm, threats, harassment, or reprisals. In addition, the Attorney General should have a short turnaround time—no more than 10 days—to provide notification whether the exemption has been granted or denied.

#### Effective Date

We ask that the regulations not take effect immediately. It will take time for IRC § 501(c)(4) organizations to evaluate their strategies, notify donors, create new accounts, and come into full compliance with the rules.

We hope you find these comments helpful as you finalize the regulations. We look forward to working with you throughout the process.

Sincerely,

Abby Levine  
Legal Director of Advocacy Programs

Appendix: Issue Advocacy Safe Harbors

FEC regulations, 11 CFR 114.15(b):

A communication is exempt from the definition of “electioneering communication” if it:

- (1) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public;
- (2) Does not take a position on any candidate’s or officeholder’s character, qualifications, or fitness for office; and
- (3) Either:
  - (i) Focuses on a legislative, executive or judicial matter or issue; and
    - A. Urges a candidate to take a particular position or action with respect to the matter or issue, or
    - B. Urges the public to adopt a particular position and to contact the candidate with respect to the matter or issue; or
  - (ii) Proposes a commercial transaction, such as a purchase of a book, video, or other product or service, or such as attendance (for a fee) at a film exhibition or other event.

Colorado, (recently upheld by the Colorado District Court in [Colorado Ethics Watch v. Gessler](#))

An electioneering communication must be the “functional equivalent of express advocacy.”  
“When determining whether a communication is the functional equivalent of express advocacy:

1.7.1 A communication is the functional equivalent of express advocacy only if it is subject to no reasonable interpretation other than an appeal to vote for or against a specific candidate.

1.7.2 In determining whether a communication is the functional equivalent of express advocacy, it shall be judged by its plain language, not by an ‘intent and effect’ test, or other contextual factors.

1.7.3 A Communication is not the functional equivalent of express advocacy if it:

- (a) Does not mention any election, candidacy, political party, opposing candidate, or voting by the general public,
- (b) Does not take a position on any candidate’s or officeholder’s character, qualifications, or fitness for office, and
- (c) Merely urges a candidate to take a position with respect to an issue or urges the public to adopt a position and contact a candidate with respect to an issue.”