



August 8, 2014

**By E-mail to [regcomments@elections.ny.gov](mailto:regcomments@elections.ny.gov) and Regular Mail**

New York State Board of Elections  
40 North Pearl St., Suite 5  
Albany, N.Y. 12207-2729

Dear Sir or Madam:

Alliance for Justice and Alliance for Justice Action Campaign submit these comments in response to the Emergency Regulations issued by the Board of Elections on May 22, 2014 (and subsequently amended on July 9, 2014) to implement Subpart C of the 2014-2015 New York State Executive Budget, Ch. 55, Laws of 2014 (the "Budget Act"). This legislation established a new registration and reporting regime for persons who engage in "independent expenditures" as defined in the statute.

Alliance for Justice ("AFJ") is a national association of over 100 organizations committed to progressive values and the creation of an equitable, just and free society. Through its Bolder Advocacy initiative, AFJ is the leading resource for information on the legal framework for nonprofit advocacy, providing easily understood information, training, and technical assistance to encourage nonprofit organizations and their funding partners to exercise their legal right to participate actively in the democratic process. AFJ's 501(c)(4) arm, Alliance for Justice Action Campaign ("AFJAC"), provides resources, training and technical assistance to help nonprofit organizations and their donors advocate more effectively, including in connection with ballot measures.

AFJ and AFJAC are concerned that the Emergency Regulations, if made permanent, will impede important advocacy activities of nonprofit organizations by imposing onerous registration and reporting requirements on even the smallest of organizations. While our concerns extend to nonprofit organizations that engage in activities in connection with elections for public office, we are especially concerned about the impact of the Emergency Regulations on organizations that may seek to influence ballot proposals, including hundreds of charities exempt from federal tax under section 501(c)(3) of the Internal Revenue Code ("IRC") and social welfare groups exempt under IRC section 501(c)(4).

### The New Registration and Reporting Requirements

Under newly enacted EL 14-107, any person prior to making an independent expenditure in any amount shall first register with the SBOE as a political committee. Em Reg. § 6200.10(c)(1) provides that a person seeking to register an independent expenditure committee formed to support or oppose

unauthorized candidates must submit a Committee Registration Treasurer and Bank Information Form (Form CF-02), and a Committee Authorization Status Form (Form CF-02). A person seeking to register an independent expenditure committee formed to support or oppose a ballot proposal must submit Form CF-02, declaring itself as a Ballot Issue Committee - type 9B. While EL 14-407 states that the registration must be filed before *making* an independent expenditure, Em. Reg. § 6200.10(c)(2) states that before an independent expenditure committee may receive any receipt or contribution or make any expenditure or incur any liability, the treasurer of such committee must first register with the SBOE. As a result, many committees will be forced to register well before they actually make any independent expenditures.

In addition to registering with the SBOE, an independent expenditure committee is required “to comply with all disclosure obligations required for political committees by law.” To meet this obligation, the Emergency Regulations specify that such committees must file campaign financial disclosure statements pursuant to and in the manner set forth in EL 14-102, meaning that such committees must file three primary and 3 general/special statements as well as periodic reports due on January 15 and July 15 of each year. A registered independent expenditure committee must file such reports for each election thereafter unless the committee submits a fully completed Notice of Non-Participation in Elections (CF-20) for a particular election.

Finally, a registered independent expenditure committee must electronically file additional disclosures if its activity exceeds certain thresholds. Specifically, an independent expenditure committee must disclose to the SBOE once a week on Friday any contribution to such person over \$1,000 or expenditure by such person over \$5,000 made prior to 30 days before any primary, general, or special election, and within 24 hours any contribution over \$1,000 or expenditure over \$5,000 received or made within 30 days before any primary, general or special election. All contributions, loans or expenditures that are required to be disclosed on a weekly or 24-hour notice must also be disclosed on the next applicable financial disclosure statements.

The requirements of EL 14-107 apply generally to any “person,” including any individual, group of individuals, corporation, unincorporated business entity, labor organization or business, trade or professional association or organization, or political committee. *See* EL 14-107(c); Em. Reg. § 6200.10(b)(6).

### Comments

New York, like many other states, applies virtually the same legal requirements to committees that seek to influence ballot measures as it applies to committees that make contributions and expenditures to support or oppose candidates for public office. *See e.g.* EL 14-100(1) (defining “political committee” to include both candidate and ballot measure groups.) Under the Internal Revenue Code, however, these activities are treated very differently. In particular, charitable and educational organizations exempt from federal tax under IRC § 501(c)(3) may not intervene in any election in support of or opposition to any candidate for public office, but such organizations may make limited expenditures to influence ballot

measures.<sup>1</sup> 26 U.S.C. §§ 501(c)(3), 501(h), 4911; Treas. Reg. § 56.4911-2(d)(1) (defining “legislation” to include any action “by the public in a referendum, ballot initiative, constitutional amendment, or similar procedure.”). As a result, many nonprofit organizations that do not engage in candidate-related advocacy find themselves bogged down in a morass of unfamiliar and complicated state registration and reporting rules when they legitimately make expenditures in support of or opposition to ballot measures.

EL 14-107 will exacerbate this problem significantly because it creates a single registration and reporting regime for all independent expenditures without distinguishing between expenditures supporting (or opposing) candidates and those supporting (or opposing) ballot proposals. Consequently, many charities and educational organizations will be forced to register and file reports with SBOE for the first time once they spend relatively small amounts on efforts to influence ballot proposals. The SBOE should minimize the burdens on such organizations before making permanent the Emergency Regulations issued previously.

#### 1. Application to Organizations with Small Amounts of Activity

Most importantly, the regulations should eliminate the need for small nonprofit organizations to register as political committees when they engage in relatively small amounts of independent expenditures. Since, as discussed above, the Emergency Regulations include no threshold amount of contributions or expenditures that trigger registration, it is possible that a nonprofit organization that believes it may possibly spend even the smallest amounts on independent expenditures will have to register as a political committee, open a bank account, appoint a treasurer and begin filing reports with the SBOE.

Several courts have ruled that applying the administrative burdens applicable to political committees to organizations whose major purpose is not to engage in campaign or ballot measure activity violates the First Amendment rights of such organizations. *See e.g. Wisconsin Right to Life, Inc. v. Barland*, 2014 WL 1929619, slip op. at 71-80 (7<sup>th</sup> Cir. May 14, 2014); *New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 677-79 (10<sup>th</sup> Cir. 2010); *North Carolina Right to Life, Inc. v. Leake*, 525 F.3d 274, 288-89 (4<sup>th</sup> Cir. 2008). While the United States Court of Appeals for the Second Circuit recently upheld a Vermont law that required registration by non-major purpose groups, *see Vermont Right to Life Committee, Inc. v. Sorrell*, No. 12-2904-cv (2d Cir. July 2, 2014), the statute in question is distinguishable from EL 14-107 insofar as the Vermont law only applied to groups once they had accepted contributions of \$1,000 *and* made expenditures of \$1,000 or more in any two-year general election cycle for the purpose of supporting or opposing one or more candidates or public questions. *Id.* slip op. at 10, 57-59. Furthermore, in contrast to EL 14-107, the Vermont law provided a procedure by which committees could terminate their status and all of the administrative burdens that come with it. *See id.* at 60-61. *See also Iowa Right to Life Committee, Inc. v. Tooker*, 717 F.3d 576, 597 (8<sup>th</sup> Cir. 2013); *Minnesota Citizens*

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<sup>1</sup> Similarly, social welfare organizations exempt under IRC § 501(c)(4) may only support or oppose candidates if this is not their primary purpose, *see* Treas. Reg. § 1.501(c)(4)-1(a)(2)(ii); Rev. Rul. 81-95, 1981-1 C.B. 332, but they may spend unlimited amounts on seeking to influence the outcomes of ballot measures.

*Concerned for Life, Inc. v. Swanson*, 692 F.3d 864, 867-69, 872-73 (8<sup>th</sup> Cir. 2012).

Adoption of a major purpose test for organizations that advocate in connection with ballot proposals would avoid the unnecessary burdens imposed by EL 14-107 on small nonprofit organizations. However, even if the SBOE is unwilling to adopt a major purpose requirement for independent expenditure committees, it should at least adopt reasonable thresholds that exempt from registration persons that spend only small amounts on independent expenditures for ballot measures, and it should apply the registration requirement, like Vermont, only to organizations that make expenditures *and* accept contributions for this purpose. Such a rule would retain disclosure where it matters most- for large expenditures to influence ballot measures - while eliminating the administrative burden on smaller organizations and, we might add, on the SBOE itself.

## 2. Limits on Receiving Contributions and Making Expenditures.

Em. Reg. § 6200.10(c)(2) provides that an independent expenditure committee may not receive any “receipt or contribution” or make any expenditure or incur any liability until it has registered a treasurer with the SBOE. This requirement does not appear in EL 14-107 or any other provision of the Budget Act, but is based instead on EL 14-118, a pre-existing provision of the Election Law which was very clearly aimed at entities that are exclusively, or at least primarily, involved in elections. Application of this provision to nonprofit organizations that primarily engage in significant charitable, educational, and social welfare activities having nothing to do with candidate elections or ballot measures could cause significant confusion and disruption because they would be prohibited from accepting *any* receipt or contribution even if it is not intended to support those activities,<sup>2</sup> and they could not make expenditures for *any* non-electoral purpose until they have registered a treasurer in accordance with SBOE procedures. This provision should be revised to make clear that it only applies to contributions made to support independent expenditures and to expenditures that fall within the definition of independent expenditures, not all of the organizations’ contributions and expenditures for tax exempt purposes.

## 3. Definition of Ballot Proposal.

Under Em. Reg. § 6200.10(1)(a), a communication is an independent expenditure if it refers to and advocates for or against a ballot proposal on or after January 1 of the year in which the proposal shall appear on the ballot. The term “ballot proposal” is not defined in the Emergency Regulations and has no generally recognized meaning.<sup>3</sup> Most importantly, it is unclear whether a proposal to amend the state constitution constitutes a ballot proposal for purposes of EL 14-107 before it has been placed on the ballot

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<sup>2</sup> As noted *infra* note 4, under EL 14-100(9)(1) the term “contribution” is limited to donations made to promote the success or defeat of any ballot proposal. However, Em. Reg. § 6200.10(c)(2) more broadly prohibits “any receipt or contribution” and thus would include gifts made to the organization for any purpose as well as earnings from investments, etc.

<sup>3</sup> In contrast, EL 14-100(7) provides a detailed definition of when an individual becomes a “candidate.”

by vote of two successive legislatures. Urging the legislature to approve (or disapprove) such a proposal is understood to be lobbying and should not trigger the registration and reporting requirements for independent expenditure committees.

#### 4. Reporting of Ballot Measure Activity.

Em. Reg. § 6200.10(d)(1) states that committees making independent expenditures are obligated to file campaign financial disclosure statements pursuant to and in the manner set forth in EL 14-102. Under EL 14-124(4) committees “involved solely” in promoting the success or defeat of a ballot proposal are not required to file campaign financial disclosure statements required by EL 14-102 if at the close of a reporting period neither the aggregate receipts nor the aggregate expenditures to promote the success or defeat of such proposal exceed \$1,000 and the committee files a sworn notice to this effect. In addition, under EL 14-124(8), a committee formed “solely” to promote the success or defeat of any ballot proposal is exempt from filing statements “required by this article” until that committee has received or expended an amount in excess of \$100. Since both of these exceptions apply only where a committee is involved or formed “solely” to promote or oppose a ballot proposal, they do not apply expressly to the majority of nonprofit organizations that will be required to register as independent expenditure committees under EL 14-107 but engage in numerous activities having nothing to do with ballot proposals. It makes little sense, however, to exempt from filing financial statements committees that engage solely in work on ballot proposals, while requiring such statements from committees that engage in numerous other activities having nothing to do with ballot proposals, and it is doubtful that the legislature intended such a bizarre result. The SBOE can cure this drafting defect by amending Em. Reg. § 6200.10(d)(1)(a) to include similar thresholds for committees that engage in ballot measure activity and do not engage in candidate advocacy.<sup>4</sup>

#### 5. Contributions and Expenditures Triggering Weekly and 24-Hour Reports.

Em. Reg. §§ 6200.10(d)(2) and .10(d)(3) require electronic disclosures when an independent expenditure committee receives “any contribution” over \$1,000 during a specified period of time or makes “expenditures” over \$5,000. If these regulations are read literally, a weekly or 24-hour report could be triggered whenever an independent expenditure committee receives a \$1,000 contribution to support any of its organizational purposes<sup>5</sup> or makes expenditures of \$5,000 that do not qualify as independent

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<sup>4</sup> It is likely that the limitation in these provisions to committees that work “solely” on ballot measures was intended to clarify that the exceptions did not apply to committees that work both on candidate elections and ballot proposals. This purpose could still be served if the exceptions were applied by the SBOE to organizations which do not undertake independent expenditures supporting or opposing candidates.

<sup>5</sup> Under EL 14-100(9)(1), “contribution” includes any gift, subscription, outstanding loan ... advance, or deposit of money or any thing of value, “made to promote the success or defeat ... of any ballot proposal.” This is far broader than contributions made to a committee for the purpose of a specific independent expenditure, as set forth in EL 14-107(4)(c).

expenditures. Such broad reporting, however, is inconsistent with Em. Reg. §§ 6200.10(e)(1)(c) and (d) which provide that the only contributions that must be reported in a weekly or 24-hour report are those that are made to the committee “for the Independent Expenditure” and the only expenditures that must be reported are “the dollar amount paid for each independent expenditure.” There is no reason to believe that the legislature intended to require independent expenditure committees to file weekly or 24-hour reports based on broad definitions of contribution or expenditure that include activities that do not have to be reported to the SBOE. In order to reconcile these provisions, Em. Reg. §§ 6200.10(d)(2) and (3) should be revised to clarify that the contributions and expenditures that trigger committees’ obligations to submit weekly or 24-hour reports are only those contributions and expenditures that must be reported in such reports.<sup>6</sup>

6. Elections Triggering Twenty-Four Hour Reports for Activity Relating to Ballot Proposals.

Em. Reg. § 6200.10(d)(3) provides that any person who has registered as a political committee for the purposes of disclosing independent expenditures shall disclose to the SBOE electronically within 24 hours of receipt any contribution or loan to such person over \$1,000 or expenditure by such person over \$5,000 “made within thirty (30) days before any primary, general, or special election.” It makes little sense to require committees that work on ballot measures to make such reports with respect to elections on which no ballot measure appears, even where the committee may have received contributions or made expenditures within the 30-day period prior to such an election. For example, under the Emergency Regulation as written, an independent expenditure committee that is supporting or opposing a ballot proposal that is scheduled to appear on the general election ballot in November would still have to file 24-hour reports if they exceed the thresholds during the 30-day period prior to the primary election even though no ballot proposal is being considered at that election. This cannot be the intention of the legislature. The SBOE should amend Em. Reg. § 6200.10(d)(3) to make clear that the obligation to file 24-hour reports with respect to ballot proposal activity should apply only during the 30-day period prior to elections in which a ballot proposal is on the ballot.

7. Exception for Membership Organizations.

Em. Reg. § 6200.10(b)(1)(b) provides that independent expenditures do not include internal communications by members<sup>7</sup> to other members of a Membership Organization of not more than 500

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<sup>6</sup> It should be noted in this regard that under EL 14-102(2) where a political committee makes expenditures or incurs liabilities of less than \$5,000 for the purpose of aiding or promoting the success or defeat of one or more ballot proposals and these expenditures are less than 50% of all the expenditures made and liabilities incurred by such committee in such year, the committee need only report on its periodic financial disclosures those contributions “which are made to such committee exclusively for the purpose of aiding or promoting the success or defeat of such proposal or proposals.” The SBOE should make clear that this exception applies to independent expenditure committees.

<sup>7</sup> Although the statute and regulation are unclear on this point, we assume that the exception for internal communications applies to communications paid for by the membership organization itself, not

members for the purpose of supporting or opposing a candidate or candidates for elective office, subject to certain limitations. Em. Reg. § 6200.10(b)(5) defines Membership Organization for this purpose “as a group that has a recognized organizational structure and maintains a list of its members,” and “is not organized primarily for the purpose of influencing the nomination for election, or election, of any candidate for office” covered by the Election Law “or for any ballot proposal covered therein.” These provisions raise a number of difficulties.

First, the membership communication exception to the definition of independent expenditure only includes communications “supporting or opposing a candidate or candidates for elective office.” Presumably, the omission of communications concerning ballot proposals is simply an oversight, since the definition of Membership Organization includes organizations that engage in activities to promote or oppose ballot measures, as long as this is not their primary purpose. There is no valid reason for treating membership communications involving ballot measures differently from such communications involving elections for public office, and the SBOE should correct this omission in the permanent regulation.

Second, the Emergency Regulations’ definition of Membership Organization is unduly narrow and will exclude many bona fide nonprofit organizations. Among the factors listed in the regulation to be considered in determining whether a group is a Membership Organization is whether or not the organization is composed of members, some or all of whom are vested with the power or authority to administer the organization pursuant to membership by-laws, constitution or other formal organizational documents. Under the nonprofit corporation laws of most states, members do not “administer” organizations; they generally elect the organization’s officers and directors, who have authority to manage the organization’s affairs, and they may have a role in determining the overall policy direction of the organization. Moreover, even where the members do not elect the governing body or have some other role in the governance of the organization, they still may make significant financial contributions to the organization through regular dues, assessments and other support. Under federal election law, such payments are sufficient to cause individuals to be treated as members of an organization, *see* 11 C.F.R. § 114.1(e)(2), and there is no valid reason why this should not be the case under Article 14 of the Election Law.

Third, there is no reasonable basis for excluding organizations with more than 500 members from the exception for internal membership communications, since the Emergency Regulation elsewhere excludes from the definition of Independent Expenditure those communications made to a General Public Audience of more than 500 persons “solely composed of employees of a corporation, unincorporated business entity or members of a business, trade or professional association or organization.” Allowing business and trade groups to communicate internally regardless of their size, while requiring charities and social welfare groups with the same number of members to register as independent expenditure committees when they communicate with their own members is unfair in the extreme and likely violates the Equal Protection guarantee of the Fourteenth Amendment.

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just to communications paid for by individual members. Any other interpretation would raise significant constitutional issues. *See United States v. C.I.O.*, 335 U.S. 106 (1948).

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Fourth, whereas the definition of Membership Organization in the Emergency Regulations excludes any group that is “organized primarily” for the purpose of influencing the nomination or election of any candidate for public office or any ballot proposal, the regulation appears to suggest that an organization which carries out such purposes to even a limited extent may nevertheless be excluded from the exclusion for internal communications. See Em. Reg. § 6200.10(b)(5)(g) (omitting the word “primarily”.) This provision will cause confusion in the regulated community and leave many organizations without any guidance as to when they will qualify as a Membership Organization.

#### Conclusion

Before adopting permanent regulations, the Board of Elections should ensure that the provisions of EL 14-107 do not impose significant new burdens on nonprofit advocacy organizations that support or oppose ballot measures.

Sincerely,



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