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The Delaware Elections Disclosure Act (House Bill 300):
Vague, Overbroad and Unconstitutional

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House Bill 300, the Delaware Elections Disclosure Act ("the Act") recently passed the General Assembly and will soon be transmitted to the Governor for his possible signature.

The purpose of this bill appears to be mandating increased disclosure of sources sponsoring independent political advertisements. Upon closer inspection, however, the text of the Act covers a far broader range of communications. Disclosure requirements have often been upheld in Federal court, relying on *dicta* from Justice Kennedy's opinion in *Citizens United* indicating that such disclosure provisions pose few constitutional concerns. But, this broad legal safe harbor notwithstanding, statutes must still be reasonably clear and free from overreach in order to survive constitutional scrutiny.

As presently written, the Act fails that test, raising serious constitutional difficulties as outlined below.

1. Textual ambiguities and over-inclusive definitions cause House Bill 300 to sweep far more broadly than is constitutionally appropriate.

a.) Section 1(11) poses several vagueness concerns. Legislation cannot be worded so vaguely that its actual meaning is indeterminable. Such laws can only be enforced arbitrarily and do not put Delaware citizens on notice concerning what behavior is and is not prohibited.

b.) Section 1(11)a(2) defines an "electioneering communication" as a communication referring to a clearly identified candidate distributed within thirty days of a primary or special election or sixty days before a general election. Additionally, such communications must be distributed "to an audience *that includes* members of the electorate for the office sought by such candidate" (emphasis supplied).

The Act does not explain how many voters must be included, although it appears to require only two or more. Nor does the Act state whether the communication must specifically target those individuals. To use just one example, there may be members of the electorate who, while on a trip or vacation, find themselves in an out-of-state

audience. And, regardless of targeting, this definition would seem to apply to nearly all Internet communications. This uncertainty will pose significant challenges for speakers attempting to comply with the Act, and no doubt some speakers will simply choose not to speak.

Similarly, the definition of "electioneering communication" is extremely broad. It includes any reference to a candidate, regardless of context, publicly distributed within certain time frames by means of "communications media." But "communications media" includes nearly all forms of communication: "television, radio, newspaper or other periodical, sign, Internet, mail or telephone."

Electioneering communication provisions, such as those at the federal level, have been upheld in some circumstances, but generally only as applied to broadcast communications such as television and radio ads. The Act's extension of electioneering communication language to newspapers and periodicals without evidence that such print communications pose a risk of corruption puts Delaware on dangerous constitutional ground. Indeed, a similar provision in West Virginia was invalidated by a federal court. *See Ctr. for Individual Freedom v. Tennant*, Civ. No. 1:08-cv-00190, 2011 WL 2912735 (S.D.W.Va. July 18, 2011).

In short, nearly any mention of a candidate in any sort of communication may, under the Act, be regulated. This stunningly broad definition would appear to cover nonpartisan voter guides and listings of votes cast by lawmakers if distributed to the public by covered organizations during periods regulated by the Act. After all, the Act does not require that a communication include an appeal to vote before it can be subject to regulation and disclosure rules.

c.) Section 1(11)b(3) notes that communications appearing in the news media are not electioneering communications. But even this safe-harbor is described vaguely: it does not apply if a communication is "distributed via any communications media owned or controlled by *any* candidate, political committee or the person purchasing such communication" (emphasis supplied). The Act does not specify that the candidate who is mentioned in a communication must be the candidate who owns the communications media. Nor does it limit "communications media" to radio stations or similarly-scaled broadcast facilities. This broad provision could apply to genuine news coverage carried by a candidate-owned station and referring to *any* candidate – not merely the owner or his opponent. And it could apply to phone banks, printing facilities, or even photocopiers owned by a candidate. In short, it is too broad.

d.) Section 13(b), which defines "independent expenditure," prohibits any person from making such an expenditure if he has "advised or counseled the candidate or the candidate's agents on the candidate's plans, projects or needs relating to the candidate's pursuit of nomination or election, in the same election period, including any advice relating to the candidate's decision to seek office." This is, again, legally overbroad. For example, this provision appears to prohibit any individual who may have suggested to a legislator's staffer that their boss ought to run for higher office from then independently supporting the officeholder that the individual held in such high esteem. This level of

interaction cannot be "coordination" as that term has been used by the Supreme Court, and cannot defeat – as a legal matter – the independence of subsequent expenditures. Furthermore, an election period covers, in some cases, over three years. Such dated "coordination" cannot be of any use to a political campaign.

e.) Some sections of the Act are simply incoherent. Section 8 discusses third-party advertisements, which by the Act's definition includes both independent expenditures and electioneering communications. It also refers to "expenditures" made by and "contributions" made to such organizations.

But both "contribution" and "expenditure" are defined in Section 1. "Contribution" is explicitly stated not to include "independent expenditures," but Section 8 suggests individuals may "contribute" to independent expenditures. "Expenditures" are defined as payments made "by or on behalf of a candidate or political committee, or to assist in the election of any candidate or in connection with any election campaign." Yet Section 8 uses the term "expenditure" to refer to funds spent on electioneering communications – that is, communications that are *not* "made… to assist in the election of any candidate," but rather simply mention a candidate in the context of an issue ad.

Contributions and expenditures are legally distinct categories, and necessarily so. Indeed, a unanimous Supreme Court in *Buckley v. Valeo* noted that only contributions, and not expenditures, may be limited. Yet even the Act's definition of "contribution" includes the term "expenditure," further muddying already opaque waters.

Some provisions simply are not clear. To take only one example, subsection 8(a)2 includes the phrase "address of each person to whom any expenditure has been made by such person," which is simply unintelligible.

f.) Finally, Section 1(1) appears to define a candidate, as "a person who…has authorized the solicitation of any contribution or the making of any expenditure in that person's behalf." Crucial wording connecting the candidate to an actual candidacy seems to have been simply omitted.

And as a minor housekeeping matter, Section 3(1)e refers to the "Federal Elections Commission" instead of the "Federal Election Commission."

All this confusion is the result of poor drafting. As written, the Act does not give speakers clear guidance, as it is not even internally consistent. It is vague, overbroad and – if enforced – unconstitutional.

2. While its lack of clarity should be fatal, House Bill 300 also errs in requiring disclosure of immaterial information.

While states may require reasonable disclosure of independent political spending, the Act's reporting thresholds are strikingly low. A mere $500 in spending, even on communications that merely mention a candidate, would require registration with the State.

Third-party advertisers, including those who only engage in electioneering communications, would need to disclose any donor who gives a paltry $100. That these are aggregate contributions is one thing; but that they are aggregated over the course of an "election period" that can be as long as four years poses the unfortunate, and legally problematic, result that very small donations over a long period of time may trigger reporting requirements. For instance, monthly donations of less than three dollars might, under certain circumstances, need to be tracked over a period of years. The State cannot possibly have a legitimate interest in imposing such a burden. And as such small donors are, functionally, the membership list of an organization, there is reason to believe such low-level disclosure may violate the Supreme Court's rulings against involuntary disclosure of nonprofit membership lists, a principle articulated most famously in *NAACP v. Alabama*, 357 U.S. 449 (1958).

Clarifying disclosure rules and defining coordination vis-à-vis independent expenditures is a difficult process, one which the Federal Election Commission – a body with arguably greater expertise in this area – has been unable to complete with any consensus. But this legislation, regardless of intent, must be re-drafted for coherence. At present, it presents constitutional difficulties as its very unintelligibility will chill political speech, the protection of which is at the core of the First Amendment.

House Bill 300 should be vetoed to avoid infringing the rights of Delaware citizens under the First Amendment. If the General Assembly wishes to legislate on this subject, it should pass a new version of the Act that gives constitutionally adequate guidance to Delaware speakers.