LATE TESTIMONY

TESTIMONY OF
THE DEPARTMENT OF THE ATTORNEY GENERAL
TWENTY-EIGHTH LEGISLATURE, 2015

ON THE FOLLOWING MEASURE:
S.B. NO. 1344, RELATING TO CAMPAIGN SPENDING.

BEFORE THE:

SENATE COMMITTEE ON JUDICIARY AND LABOR

DATE: Friday, February 6, 2015 **TIME:** 9:15 a.m.

LOCATION: State Capitol, Room 016

TESTIFIER(S): Russell A. Suzuki, Attorney General, or
Deirdre Marie-Iha or Valri Lei Kunimoto, Deputy Attorneys General

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Chair Keith-Agaran and Members of the Committee:

The Department of the Attorney General supports the intent of this measure, which adds an additional level of disclosure to several portions of Hawaii's campaign finance laws to further assist voters to "follow the money" and determine the individuals, organizations or businesses seeking to influence their vote. The Department raises a general concern regarding the bill's legislative history and makes several recommendations to improve the bill's chances of withstanding a constitutional challenge and achieving its intent. We urge the Committee to pass this bill, but only if these suggestions are incorporated.

We support the purpose of this bill, which is to make available to the electorate additional information about the funding source(s) of SuperPACs (noncandidate committees that make only independent expenditures) when they expend funds to influence the outcome of Hawaii's elections. Current law only requires SuperPACs to disclose the *names* of the organizations or individuals that have contributed money to them. This bill requires SuperPACs to disclose additional information to aid voters in determining the sources of funding behind those contributors to the SuperPACs.

This bill may be challenged as being unconstitutional under the First Amendment. Campaign finance disclosure laws are generally viewed as being constitutional under current federal law, if the government can show the necessity of such laws. *To aid in the defense of this bill, the Department strongly suggests that the debates and reports which will comprise the bill's legislative history include a discussion of the justification for this bill, similar to that already included in the bill's purpose section.* Inclusion of Hawaii's experience with SuperPAC money

during the 2012 and 2014 elections may be persuasive in supporting the need for additional disclosure required by the bill.

We note that the additional disclosure required by this bill is limited to noncandidate committees making only independent expenditures (SuperPACs), and that the purpose section focuses on the multi-million dollar SuperPACs (Page 2, lines 10-17.) In practice, however, SuperPACs differ significantly in size, and a constitutional challenge may become stronger when smaller SuperPACs are impacted. To strengthen the bill, therefore, we suggest a $10,000 contribution threshold level be added into the bill, meaning that the SuperPAC is only required to disclose the additional information when a contributor to the SuperPAC exceeds $10,000 in the aggregate in an election period. This threshold amount matches the threshold for additional disclosure requirements for SuperPACs in the "top contributor" provision (section 11-393, Hawaii Revised Statutes). This requirement would have to be added to the bill where the triggering contribution is described. (Page 5, line 15; page 6, line 21.)

The Department also makes four drafting suggestions to improve the bill's effectiveness.

First, the contributors that are excepted from the additional disclosure requirements should be limited to individuals, labor unions, or for-profit business entities (or something similar, describing a business that makes money in the marketplace). As currently drafted, the additional disclosure is required only if the "contribution is received from an entity *other than* an individual, partnership, corporation, business entity, or labor union[.]" Page 5, lines 15-17 (emphasis added). Allowing corporations to be excluded from the additional disclosure requirement may have the unintended effect of allowing those organizations where additional disclosure is most necessary, to escape the requirements of the bill. This is so because the bill does not distinguish between *for-profit* corporations that make money in the marketplace and *non-profit* corporations, some of which may operate as political organizations but are incorporated by law. This is especially true for non-profits organized under section 501(c)(4) of the Internal Revenue Code (social welfare organizations) or other tax-exempt political organizations typically called "527s". Rather than describing the legal status of the organization (corporation, partnership, etc.), we suggest that describing their *role* (for-profit, making money in the marketplace) would make the bill more effective. With this change, this language would read: "if a contribution is received from an entity other than an individual, [~~partnership,~~

~~corporation,~~] for-profit business entity, or labor union, then the report shall state . . ." The same change will have to be made in the corresponding provisions of the bill. (Page 7, lines 1-2; page 10, lines 14-16.)

Second, the phrase "concerning the contribution" should be replaced in the description of what "state or federal disclosure reporting requirements" the SuperPAC must disclose about its contributor. (Page 5, line 20.) Read literally, it may allow a SuperPAC to disclose only that information regarding its contributor that "concerns" the contribution itself. This is an invitation for circumvention. The provision can be rendered more functional by removing that phrase and replacing it with something more general, such as ". . . reporting requirements regarding the source of the contributing entity's funds . . . " With this change, the provision would read: ". . . the report shall state whether the contributing entity is subject to any state or federal disclosure reporting requirements [~~concerning the contribution~~] regarding the source of the contributing entity's funds and ..." This would make the requirement more general, and less subject to interpretations that are contrary to the bill's plain intent. The same change will have to be made in the corresponding provisions of the bill. (Page 7, line 6; page 10, line 19.)

Third, the alternative of listing $100 or more funders to the contributor needs to be made more specific. The bill as drafted allows the SuperPAC to either (1) identify where, on the internet, the contributor's own funding sources can be identified, or (2) identify the funders who have funded more than $100 to the contributor. Hawaii's campaign finance laws typically require that $100 be given in the aggregate during an election period (general election to general election). The same requirements should be included here. (Page 6, line 4-6; page 7, lines 10-13; page 8, lines 5-7; page 11, lines 1-3.)[1]

Fourth, the Department recommends that the bill be amended to reflect that some funding sources for SuperPACs may not be subject to any state or federal disclosure reporting. For example, social welfare organizations, organized under Internal Revenue Code section 501(c)(4), are not required to publicly disclose the source of their funding. Because this information may not be available to the SuperPAC operating in Hawaii, the bill should be amended to allow for a third option: the SuperPAC can disclose that their funding source is not subject to any state or

[1] The last three page and line cites given include the "aggregate" requirement but do not specify the election period. The first citation (page 6) lacks both the aggregate requirement and the election period requirement.

federal disclosure reporting requirements regarding the source of the contributing entity's funds. Social welfare organizations are required to make their tax returns public (Form 990), but they are not required to disclose the names of their funders.[2] Depending on how the SuperPAC's funders are organized, therefore, it is possible that there is no applicable law that would require the disclosure the bill is seeking. In the Department's view, however, requiring the SuperPAC to disclose that the source of its funds is essentially untraceable is *itself* a valuable form of disclosure. Federal case law regarding campaign finance disclosure requirements holds that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments. They may consider, in making their judgment, the source and credibility of the advocate." First Nat. Bank of Boston v. Bellotti, 435 U.S. 765, 791-92 (1978) (footnotes omitted). The decision to use funding that is not readily traceable to its source may fairly reflect on the credibility of the advocate.

To make this change, an additional option would have to be added to the current two options. This could be accomplished with language such as "(C) that the contributing entity is not subject to any state or federal disclosure reporting requirements regarding the source of the contributing entity's funds."[3] (Page 6, lines 1-6.) The same language would have to be added into the corresponding provisions of the bill. (Page 7, line 13; page 8, line 7; page 11, line 3.)

Finally, the Department notes that two amendments in the bill appear to require a SuperPAC to disclose other contributors when it is, itself, a contributor. (Page 7, line 20, page 11, line 3.) The Department is unclear what disclosure benefit would be served by this addition, as the SuperPAC giving the contribution may be unaware (or unable to ascertain) who the *other* contributors are. If the SuperPAC is giving to another noncandidate committee, that noncandidate committee is already required to disclose its own contributors by law, so the provisions added by the bill may be redundant. The intent of this addition should be clarified. The Department may have additional comments if more information is available about this provision. If no additional disclosure benefit can be identified for these provisions, they should be removed from the bill.

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[2] Non-profits called "527s" (political organizations) do disclose their contributors. This information is available on the IRS's website.

[3] The "or" that currently follows (A) would have to be moved to the end of (B). Page 6, line 3.

The Department supports the intent of this bill and urges the Committee to pass the bill but only if these changes, which are intended to strengthen the bill, are incorporated. Thank you for the opportunity to testify.