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Federal Court Strikes Down as Facially Unconstitutional Portions of NYS 'Ethics Reform' Legislation Requiring Certain 501(c)(3) and 501(c)(4) Disclosures

Greenberg Traurig previously issued a series of Alerts regarding New York's 2016 Ethics Reform Legislation. At the time, we highlighted provisions that would create new disclosure obligations for certain not-for-profit organizations that engaged in lobbying activity. This GT Alert, however, summarizes the recent federal court decision concluding that certain portions of the Ethics Reform law "result in interference with the rights to freely associate and speak," and thus, as written, are unconstitutional.

Touted as a "first-in-the-nation" piece of legislation aimed at "curb[ing] the power of independent campaign expenditures . . . [following] the 2010 United States Supreme Court ruling in *Citizens United v. FEC*," and limiting so-called "dark money" in advocacy and politics, the Ethics Reform Legislation was signed by Gov. Cuomo in August 2016 and made substantial changes to disclosure obligations imposed on entities that lobby, clients of lobbyists, and those affiliated with lobbying entities. As relevant here, the 2016 Ethics Reform Legislation also created new "source of funding" (SoF) disclosure requirements for tax-exempt organizations pursuant to sections 501(c)(3) and 501(c)(4) of the Internal Revenue Code, that make expenditures in furtherance of lobbying activity, as defined by the New York Legislative Law.

Shortly after Gov. Cuomo signed the legislative package into law, a federal lawsuit was filed by several advocacy groups claiming portions of the newly enacted legislation burden the First Amendment. Thereafter, the state agreed to delay enforcement of the law pending a decision by the federal court on the constitutionality of the challenged provisions. On Sept. 30, 2019, Hon. Denise Cote, United States District Judge of the Southern District of New York, ruled that portions of New York's 2016 Ethics Reform Legislation — Executive Law Sections 172-e and 172-f — are facially unconstitutional because the breadth of the newly enacted laws burden First Amendment rights to free speech and free association.

Section 172-e of the Executive Law, as written, required a **501(c)(3)** that donates greater than $2,500 to a 501(c)(4) engaged in New York lobbying, to disclose a list of its own donors that have contributed over $2,500 to the 501(c)(3). The 501(c)(3)'s disclosure of its own donors was mandated irrespective of whether the 501(c)(3)'s in-kind donation to the 501(c)(4) is intended to support the 501(c)(4)'s lobbying efforts, and regardless of whether the 501(c)(3) had any discretion over the allocation of the donation once given to the 501(c)(4). Pursuant to 172-e, all required disclosures would be made to the New York Attorney General.

Section 172-f of the Executive Law required a **501(c)(4)** spending more than $10,000 in a calendar year on communications made to at least 500 members of the public concerning *political or legislative issues* to disclose a list of its donors who contribute more than $1,000 to the 501(c)(4). All mandatory disclosure by 501(c)(4) entities would be made to the New York State Joint Commission on Public Ethics (JCOPE).

In examining the two disclosure laws in *Citizens Union of the City of New York v. Attorney General of the State of New York*, the court made a clear distinction between: (1) donors who contribute to an elected official or a candidate's campaign; and (2) donors who contribute to a general cause or issue. The court acknowledged at the outset, "[t]here is no question that public disclosure of donor identities burdens the First Amendment rights to free speech and free association." "The Supreme Court[, however,] has recognized [that] . . . certain governmental interests justify donor disclosure in the context of election campaigns despite their burden on First Amendment rights."

In arguing in support of the disclosure law, the state asserted that there is an important government interest in publicly disclosing the identities of donors of a tax-exempt entity because such disclosure would: provide the government with information; deter corruption; and assist the government in detecting violations of campaign finance laws. The court, however, found that because the disclosure laws applied to potential donors who supported certain beliefs and associated around *issues* rather than a political candidate, the law, as written, had the effect of chilling speech around the advocacy of issues, and burdened donors' rights to free association and privacy. The court emphasized that in the limited circumstances in which disclosure laws have been upheld as constitutional, such laws were drawn more narrowly than Section 172-e and concerned disclosure of either: (1) contributions to candidates; (2) donations to campaigns supporting identifiable candidates; or (3) direct lobbying to elected officials and their staff.

The court ruled that Section 172-f suffered from a similar flaw. Because Section 172-f, as written, required disclosure of its donors any time a 501(c)(4) engaged in pure advocacy around an issue, rather than a specific candidate, Section 172-f was found to burden donors' First Amendment right to association and the right to express opinions anonymously. The court emphasized the long history of the First Amendment right to publicly discuss and advocate on issues of public interest, as well as the right to do so anonymously, including the well-recognized right to vote by secret ballot during elections, allowing one to vote his or her conscience or advocate for issues without fear of retaliation. "The First Amendment rights to publicly discuss and advocate on issues of public interest, *and to do so anonymously*, have long been recognized." Again, because Section 172-f was not limited to disclosure when an entity engages in direct

lobbying of elected officials but was all consuming, capturing instances where a 501(c)(4) may advocate on general issues, the Southern District found the state's reasoning of the need for donor information in order to monitor and detect campaign finance law violations and deter corruption insufficient to save the statutory provision.

Conclusion

The state is evaluating whether to appeal this decision to the United States Second Circuit Court of Appeals. In the meantime, the extra disclosure obligations the state sought to impose on certain nonprofit organizations will remain unenforceable. It is worth noting that the court's decision will have little practical effect on existing filers because, at the outset of litigation, the state agreed to stay implementation of the new disclosure requirements until after the matter was resolved. Regardless, to the extent the Second Circuit hears any appeal in regard to this matter, the 2020 Legislative Session will be well underway, providing the state with an opportunity to seek a legislative cure to the facially invalid law. It should also be noted that, to the extent that the State's current Source of Funding requirements require donors to lobbying entities to disclose contributions made to the entity that are restricted from use for lobbying purposes, the court's opinion may open up new avenues for challenge.

Greenberg Traurig's Political Law & Compliance Practice will continue to track the progress of a potential appeal as well as monitor any relevant legislative developments. As always, GT attorneys are available to assist with questions regarding New York state's lobbying, ethics, and election laws.

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