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NYS "Ethics Reform" Legislation Overturns Ethics Commission's Definition of Grassroots Lobbying; Changes Standards for Disclosure of Sources Funding to Lobbying and Advocacy Groups; Adjusts Commission Procedures and Penalties

In the final hours of the 2016 New York State legislative session, a bill summarized by the Governor and Legislative Leaders as a "5 Point Ethics Reform Plan," was introduced at the request of the Governor. This legislation that passed at the end of the Legislative Session and is expected to be signed by the Governor, will affect advocacy groups, public relations firms, political consulting firms, and entities that seek to influence New York State policy or elections. Ironically, some of the most notable lobbying law changes may result in reduced disclosure obligations for certain entities and organizations. This Alert focuses on the key provisions of the legislation that will have an impact on individuals and entities that engage in New York advocacy activities. A separate Alert addresses the campaign finance and election related changes.

Grassroots Lobbying to Exclude Communications with the Press

On Jan. 26, 2016, the New York State Joint Commission on Public Ethics ("JCOPE" or "the Commission") formally adopted an Advisory Opinion establishing a three point test to determine whether a grassroots communication constitutes lobbying activity. Namely, does the communication:

1. Reference, suggest, or otherwise implicate an activity covered by [the] Lobbying Act [definition of "lobbying" or "lobbying activities," e.g., attempting to influence legislation, regulation, etc.];

2. Take a clear position on the issue in question; and

3. Attempt to influence a public official through a call to action, i.e., solicits or exhorts the public, or a segment of the public, to contact (a) public official(s).

In applying this test, the Commission concluded that public relations consultants who seek to influence editorial boards on covered issues would be deemed to be engaged in registerable lobbying activity. This resulted in significant push back from the public relations, media, and press community, including the commencement of a federal lawsuit against JCOPE.

The legislation that passed on June 17 narrows the application of JCOPE's interpretation of grassroots lobbying, by amending the Lobbying Act definition of "lobbying activity" to exclude "[c]ommunications with a professional journalist, or newscaster, including an editorial board or editorial writer of a newspaper, magazine, news agency, press association or wire service, relating to news . . . and communications relating to confidential and non-confidential news . . . and communications made pursuant to community outreach efforts for broadcast stations required by federal law." This legislation incorporates New York's Civil Rights Law definition of "news," which includes "written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national or worldwide events or other matters of public concern or public interest or affecting the public welfare." This change will take effect immediately upon approval by the Governor. **As a result, public relations firms that communicate with the press, but do not otherwise attempt to influence public officials or members of the public, will likely not be required to register as lobbyists. It is important to stress, however, that consultants engaged in direct or indirect efforts to influence public officials, or to influence members of the public to contact those officials, through means other than communications with the press or editorial boards, may still be obligated to register with JCOPE.**

Source of Funding Disclosures

Beginning with the Client Semi-Annual Report that was due on Jan. 15, 2013, many clients of lobbyists -- whether the lobbyist is an in-house employee or an outside consultant retained to lobby -- have been required to disclose information regarding payments received by the client for its operations. A lobbying client was required to file a "source of funding" ("SoF") report with JCOPE if that client: (i) "spends in excess of $50,000" for lobbying compensation and expenses in New York State "during the Expenditure Threshold Period" and (ii) devotes at least 3% of its "Total Expenditures" towards that lobbying activity. Once subject to this SoF disclosure obligation, the client must publicly disclose, for each contributor of more than $5,000: the name, the business address, the date the contribution(s) was received, and the amount of the contribution(s) (which was ultimately defined as the dollar amount of the contribution provided by the source, multiplied by the percentage of the entity's overall budget that is devoted to lobbying). Pursuant to JCOPE regulations, these reports must be filed with each Client Semi-Annual Report.

The ethics reform legislation makes some notable changes to who is required to file a source of funding report, and what must be disclosed. Effective thirty days after the Governor approves the legislation, the threshold of how much must be spent on lobbying in order to qualify as a filer subject to this SoF disclosure obligation is lowered from $50,000 to $15,000. Moreover, those entities subject to the disclosure obligation will be required to report about "each source that has contributed over" $2,500 (as opposed to those who contribute more than $5,000). Presumably, this would mean that entities previously not subject to the law because the entity either did not reach the expenditure threshold, or receive contributions that reached the $5,000 threshold, would not be required to comply. Notably, however, **the legislation provides that "amounts received from each identified source of funding shall not be required to be disclosed if such amounts constitute membership dues, fees, or assessments charged by the reporting entity to be a member of the reporting entity." Inasmuch as such dues, fees, and assessments constitute a significant portion of the amounts reported under the SoF requirement, this appears to be a major shift that could result in fewer membership organizations being required to disclose information about their donors.**

The bill also revises the prior exceptions to the SoF disclosure requirement. Since the creation of this disclosure obligation, 501(c)(3) entities were simply excluded, even if they were engaged in significant lobbying activity. The new legislation, however, provides that organizations exempt from taxation under the Internal Revenue Code section 501(c)(3) will be subject to a modified disclosure obligation if it makes in-kind contributions of more than $2,500 in the form of

"staff, staff time, personnel, offices, office supplies, financial support . . . or any other resources" to a 501(c)(4) exempt corporation. 501(c)(3) entities that make relevant in-kind contributions, and the recipient 501(c)(4), will be required to file reports with the New York State Attorney General. Notably, these disclosures will be required regardless of whether the (c)(3) or (c)(4) engages in lobbying activity. The information disclosed, however, will be similar to the information disclosed in SoF reports (including information about the organization, and individuals who make donations in excess of $2,500 to the organization), is required to be completed on a semi-annual basis, and made publicly available on JCOPE's website. Notwithstanding the foregoing, a recipient 501(c)(4) will only be required to file a disclosure report if it makes more than $10,000 worth of communications that neither trigger registration as a lobbyist nor registration as a political committee, but nonetheless "refers to and advocates for or against a clearly identified elected official or the position of any elected official or administrative or legislative body relating to the outcome of any vote or substance of any" pending or yet to be proposed legislation, "rule, regulation, hearing, or decision by a legislative, executive or administrative body." The covered communications do not include messages conveyed to the press, communications directed to the organization's members or financials supporters, or communications regarding a non-partisan debate or public forum.

These changes will take effect on the thirtieth day after the Governor approves the legislation, and will likely result in the Commission, as well as the Department of Law, promulgating new and revised regulations to implement these updated requirements.

Prohibition Against Contingency Fees – Civil Penalty Added

The Lobbying Act has long prohibited lobbyists from entering into agreements or retainers that provide for "compensation in whole or part [that] is contingent or dependent upon" the outcome of certain government action. Entering into such an agreement was historically considered a misdemeanor. This legislation adds a civil penalty equal to the greater of $10,000 or the value of the contingent fee. The new penalty will take effect immediately upon approval by the Governor.

JCOPE Investigations

JCOPE's investigation notification procedures are adjusted in this legislation providing subjects of investigations with additional due process protections. JCOPE was already obligated to provide a "fifteen day notice" to a potential subject when JCOPE is aware of a possible violation. Effective immediately upon the Governor's approval of the legislation, JCOPE will be required to include in that notice, a description of allegations against the subject and, importantly, the evidence supporting the allegations. JCOPE will also be required, as part of any notice of a substantial basis investigation, to provide the subject with any additional evidence not included in the fifteen day letter, as well as the factual basis for the allegations, including "sufficient detail to enable the individual to respond at least seven days before [a] hearing." Finally, JCOPE will be required to notify a subject within 15 days of the Commission's determination to close an investigation.

Conclusion

Although not yet signed into law, this legislation is expected to be promptly approved by the Governor. Once the law takes effect, some disclosure obligations may be reduced, while other organizations and entities may be subject to new administrative burdens, or faced with questions on how to limit such obligations. Greenberg Traurig's Government Law Compliance Practice is available to assist with questions regarding New York State's lobbying, ethics, and election laws, including regarding implementation of these statutory changes. Greenberg Traurig has a broad range of experience in New York City and State, and provides advice to some of the world's leading corporations, lobbying firms, public officials, candidates, advocacy organizations, and others who seek to navigate New York's complex political law compliance requirements.

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