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NYS "Ethics Reform" Legislation Imposes New Requirements on Political Consultants, State Independent Expenditure Committees, PACs, and other Political Committees

In the final hours of the 2016 New York State legislative session, legislation 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 political committees, political consultants, advocacy groups, public relations firms, and other entities that seek to influence New York State policy or elections. This Alert focuses on the key provisions of the legislation that pertain to political activity. A separate Alert addresses the key changes that affect individuals and entities engaged in lobbying or other issue advocacy efforts.

Independent Expenditure Committees, Political Action Committees, & Coordination

In 2014, the Election Law was amended to create a new section entitled "Independent expenditure reporting," which relates to entities that do not coordinate with any candidate, but nevertheless seek to influence the election or defeat of a candidate. That law clarified what types of communications are treated as independent expenditures, triggering registration and disclosure obligations. Those amendments were enacted to address the proliferation of political committees engaging in expenditures in the State. This was at least partially due to the United States Supreme Court case of *Citizens United v. Federal Election Commission* which, in part, held that there is a First Amendment right for all persons and entities to be able to spend in an unlimited fashion to influence elections, provided that there is no coordination with candidates. The Governor and the Legislative Leaders have observed, however, that the question of what activities rise to the level of coordination, instead of an independent expenditure, has been difficult to determine. As a result, the legislation agreed to and passed at the end of session defines, for the first time, "independent expenditure committee" ("IEC") and "political action committee" ("PAC"). Moreover, the legislation reiterated that expenditures cannot be deemed independent if the expenditures are "payments or expenditures where coordination occurs in the creation, formation, or operation of the [IEC] making the payment or expenditure." Coordinated expenditures are not

independent, and are, therefore, subject to the State's contribution limitations. The law will also clarify that payments or expenditures by a party or constituted committee will not be treated as an independent expenditure.

Effective thirty days after the Governor approves the bill, the Election Law will include a list of activities that shall, by operation of law, be deemed "coordination." An IEC and a candidate will be deemed to have coordinated if:

a. within two years of a relevant election:

   i. the candidate who will benefit from the IECs efforts, that candidate's committee, or an agent thereof (collectively "the Candidate"), participated in the creation or formation of the IEC;

   ii. the Candidate appears at any fundraising event hosted by an IEC that will benefit that candidate;

   iii. an individual who holds a (1) policymaking, non-administrative position in the office of the candidate's elected office, (2) position with the candidate's authorized committee, or (3) position with an agent of the candidate, leaves that position, and then is employed or retained by an IEC that will be making payments or expenditures to benefit that individual's former employer;

   iv. the IEC or its agent (collectively "the IEC") participates in "strategic discussions" with the Candidate;
      i. "Strategic discussions" are defined as "information about the candidate's or opponent's ***electoral campaign plans, projects, or activities*** that is not obtained from a publicly available source . . . conveyed to the" IEC, so long as the discussions occur *after* the IEC has been formed or *after* one week following the candidate being certified for that election, whichever occurs first.

   v. the IEC and the Candidate knowingly retain the same consultant to provide professional campaign services and that consultant discloses strategic information related to one client, to the other. In this instance, "strategic information" includes details related to either the Candidate's or the IEC's "plans, projects, or activities that are not obtained from a publicly available source;"
      i. The legislation clarifies, however, that this would not prevent the Candidate from retaining the same consultant as the IEC, as long as the consultant enters into confidentiality agreements that expressly provide that strategic information will not be shared with either the Candidate or the IEC.

   vi. the IEC uses non-public strategic information or data that is not otherwise available through a subscription, obtained from someone previously compensated, reimbursed or retained by the candidate as a consultant, political, media or fundraising advisor, vendor or contractor.

b. the IEC, is a member of the benefiting candidate's immediate family or is otherwise formed, controlled, directed, or managed by a member of the Candidate's immediate family;

c. the IEC republishes, disseminates, or distributes, in whole or in part, any video, audio, written, or other campaign-related material that was prepared by the Candidate and is not available from a public source; or

d. the Candidate shares or rents space for a campaign-related purpose with or from the IEC.

Notwithstanding the foregoing, the Election Law will exclude from the definition of coordination:

a. statements by a candidate, a party, or a constituted committee in response to questions regarding that individual or entity's position on legislative or policy matters; or

b. advertisements that identify a candidate, but only in that individual's capacity as owner or operator of a business that existed prior to the individual's candidacy, provided that the communication (i) medium, timing, content, and

geographic distribution is consistent with communications made prior to the candidacy; and (ii) does not promote, support, attack, or oppose that candidate or any other candidate seeking the same office as the candidate who is the business owner or operator.

The legislation also clarifies certain disclosure and reporting requirements. All communications that cost $1,000 or more will be required to clearly identify the name of the person who paid for or otherwise disseminated the communication. Similarly, additional information must be disclosed to the State Board of Elections ("SBOE" or "the Board") when the IEC registers with the Board, and such information must be amended with the Board within 24 hours of any change in control of the IEC. If the registrant is an individual, that person will be required to disclose his or her name, address, occupation, and employer. If it is an entity, the entity will be required to identify the names and employers of any individuals who control or make managerial decisions on behalf of the IEC, as well as the names of any individuals who will be employed and salaried by the IEC. To the extent that any such individuals identified on the registration form, during the two years prior to the formation of the IEC, was employed or retained as a political, media, or fundraising consultant or adviser for a candidate, committee, or party, that must be disclosed, as well as the name of the former employer. The registration will also require disclosure if any of the named individuals are related to a candidate.

IECs will be required to file electronic disclosure statements to the SBOE every Monday, if during the week prior the IEC received any contribution of $1,000 or more, or made expenditures in excess of $5,000 during the reporting period. Within 30 days of a primary, general, or special election, the IEC is required to notify the Board, within 24 hours of receiving any contribution of $1,000 or more. The disclosure filing will require reporting of personal details pertaining to the contributor and/or vendor paid.

Knowing and willful violations of any of the IEC reporting obligations may result in criminal penalties. A knowing and willful violation may also be subject to a civil penalty of the greater of $5,000 or the cost of the communication, but may only be assessed pursuant to a special proceeding or civil action commenced by the SBOE.

The new law will expressly prohibit IECs from making any contributions to candidate or other political -- including party -- committees. In contrast, PACs, which have been long understood to be entities that raise money for the sole purpose of making contributions, will be expressly barred from making expenditures "other than in the form of contributions, including in-kind contributions, to candidates, candidate's authorized committees, party committees, constituted committees, *or* independent expenditure committees." A PAC, however, may not make contributions to an IEC, if "(i) the same individual or individuals exercise actual and strategic control over" both the PAC and the IEC, or "(ii) employees of the [PAC] and the [IEC] engage in communications related to the strategic operations of either committee." Like IECs, PACs are subject to new disclosure requirements when registering with the SBOE. In addition to the standard information collected on the registration forms, PACs will now be required to "disclose the name and employer for any individual who exerts operational control over the [PAC] as well as any salaried employee of the [PAC]." Similarly, candidates, authorized candidate committees, party committees, and constituted committees are all barred from contributing to an IEC that benefits the candidate or a candidate supported by that party or constituted committee. Persons acting on behalf of an IEC or PAC, who knowingly and willfully violate any of these contribution restrictions, shall be subject to a civil penalty of the greater of $1,000 or the cost of the contribution.

Ghost Candidate Committees

Good-government groups have repeatedly lamented that certain politicians and elected officials continue to maintain active candidate committees, long after the individual has opted not to run again, or has even passed away. In 2015, one reporter identified as many as 55 committees still active with the SBOE were related to candidates who were either no longer in office or no longer campaigning. Instead, these candidate committees are used as PACs, making contributions to other candidates and committees. The legislation expected to be approved by the Governor will, effective July 1, 2017, make several changes to the Election Law to limit the continuation of some of these so-called "ghost committees."

First, the provision of the Election Law pertaining to candidate committees will be amended to enable candidates, when filing registration documents, to select a committee of three or more people that would be empowered to "appoint and remove the treasurer of any authorized committee of the candidate." This committee may take action without any

approval by the candidate, provided, however, the candidate may revoke the authorization for the committee, at any time.

Moreover, to the extent that a candidate, former candidate, or elected official dies before the relevant candidate committee is terminated, the new legislation establishes a process for disposing of any remaining campaign funds. The law will require that within two years of the death of the individual who initially authorized the candidate committee, the committee shall:

- contribute or transfer the remaining funds to a candidate, party, constituted or other political committee, subject to any applicable limitations;
- refund, on a pro rata basis, all of the unspent funds to each contributor to the committee; or
- donate the funds to
  - one or more 501(c)(3) charitable organizations;
  - the State University of New York or the City University of New York; or
  - the State's general fund.

Should the relevant candidate committee fail to make the required distributions within the 2 year time frame, the Board's chief enforcement counsel is authorized to commence a special proceeding to compel all funds be deposited into the State's general fund.

Housekeeping Accounts

The Election Law permits party and constituted committees to raise funds for the specific purpose of "maintain[ing] permanent headquarters and staff, and to carry on ordinary activities that are not for the express purpose of promoting the candidacy of specific candidates." Such funds, which are referred to as "housekeeping contributions," are not subject to contribution limits. Effective immediately upon the Governor's approval of this legislation however, any committee qualified to maintain a housekeeping account, must deposit housekeeping funds in a segregated account.

Political Consultants

In addition to creating new restrictions and disclosure obligations for various types of political committees, the legislation will establish, for the first time, a registration and disclosure obligation for select political consultants engaged in "political consulting services."

The new legislation amends the Executive Law to define "political consulting services" as services provided to or on behalf of an elected public official in New York, or a candidate for elected office in this State, in order to: (i) assist with the individuals nomination for or election to public office through services such as fundraising, voter outreach, preparing and disseminating political literature; or (ii) provide political advice to those individuals. Notwithstanding the foregoing, attorneys will not be considered to be engaged in political consulting services by conducting "bona fide legal work directly related to litigation or legal advice with regard to securing a place on the ballot, the petition process, the conduct of an election, or which involves the election law."

Individuals who meet the new definition of "political consultant" will be required to register with the Secretary of State if that consultant is retained by another client or clients to work on "matters before any state or local government agency, authority or official," involving services, advice or consultation pertaining to:

- any State or local government contract for real property, goods or services;
- an appearance in a ratemaking proceeding;
- an appearance in a regulatory matter; or
- otherwise appearing in any legislative matter, other than responding to a request for information or comments.

Political consultants who also engage in such regulatory or lobbying services – regardless of whether such activity also triggers an obligation to register with JCOPE as a lobbyist – will be required to publicly identify: (i) personal contact

information; (ii) information regarding their political consulting clients, including a description of the services provided to those clients; and (iii) information regarding the clients who retain the consultant to engage in the covered regulatory or lobbying services. This information must be disclosed every six months, and will be posted to the Department of State's ("DOS") website within 30 days of the close of every six month period. DOS is tasked with promulgating regulations pertaining to "the degree and extent of political consulting services necessary to require [this] reporting." The legislation did not establish any minimum compensation or activity threshold. Nor does the legislation address whether individuals who qualify as political consultants will be obligated to report services or activities that occurred prior to the effective date of this new statute, or are otherwise conducted pursuant to an existing agreement. The potentially regulated community will need to stay apprised of any regulatory proposals advanced by DOS regarding this disclosure requirement.

These requirements for covered political consultants take effect on the 60th day after the Governor approves the legislation. Failure to comply with the registration obligation is punishable by a civil penalty of up to $750.

Conclusion

Although not yet signed into law, this legislation is expected to be promptly approved by the Governor. Once the law takes effect, PACs, IECs, candidate committees, and party committees will all be subject to new guidelines on what contributions or expenditures may be made, as well as new disclosure requirements. Additionally, many political consultants will be subject to new registration requirements. 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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