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New York Governor Signs New Ethics Law; JCOPE Issues Emergency Regulations Changing Disclosure Obligations, Guidance for Architects and Engineers

As we advised in our previous *GT Alert* issued in late June, at the close of the regularly scheduled session, the New York State Legislature enacted a bill (the Ethics Reform Legislation) making substantial changes to disclosure obligations imposed on entities that lobby, are clients of lobbyists, or are affiliated with an entity that is a lobbyist or client of a lobbyist. This included revisions to "source of funding" (SoF) requirements of the Lobbying Act, and establishing similar disclosure obligations for certain tax exempt organizations pursuant to section 501(c)(3) of the Internal Revenue Code. The legislation also provided for expanded due process protections during investigations by the Joint Commission on Public Ethics (JCOPE or the Commission), required that political consultants providing services to elected officials register with the Secretary of State, and significantly revised the Election Law provisions regarding independent expenditure committees. In his approval message upon signing the bill on Aug. 24, Governor Cuomo stated that "the legislation will implement various measures to shed light on the dark money that runs rampant through our political process." Whether the ethics reform legislation will accomplish this lofty purpose or not remains to be seen. In the view of some, however, the changes wrought by this legislation will chill free speech by requiring 501(c)(3) organizations, for the first time, to disclose their donors. The JCOPE emergency regulations took effect upon the filing with the Department of State (DOS) on Aug. 29 and have a retroactive application. Comments regarding the permanent JCOPE regulation will be accepted until Oct. 29, 2016. In addition, more regulatory changes are expected to be released by JCOPE in the coming weeks, as the Commission announced at its Sept. 27 meeting that completely new Lobbying Act Regulations are being drafted, and are likely to be posted on the JCOPE website in order to engage the regulated community in a robust discussion before the close of the calendar year. In the meanwhile, JCOPE also released guidance to clarify whether certain activities by architects and engineers are considered lobbying.

This *GT Alert* will highlight some of the most significant provisions of the new law, review the emergency implementing regulations adopted by JCOPE, and briefly highlight the new guidance document that JCOPE issued on Sept. 27.

I. Source of Funding

A. Background

Under the prior SoF law and regulations, clients of lobbyists and entities that lobbied on their own (collectively Client Filers) behalf were required to semi-annually file a SoF report with JCOPE if that entity: (i) spent in excess of $50,000 for lobbying compensation and expenses in New York State "during the Expenditure Threshold Period" and (ii) devoted at least 3% of its "Total Expenditures" toward that lobbying activity. If the entity exceeded these thresholds, it is required to 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).

The Ethics Reform Legislation makes substantial changes to these requirements, reducing the threshold for: (i) filing the SoF disclosure obligation from $50,000 to $15,000 and, (ii) reporting of each source that contributes to Client Filers from the previous $5,000 to $2,500. Notwithstanding the foregoing expansion of the disclosure obligation, however, the new law creates a new exception of sorts, providing 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." As we noted in our prior *GT Alert*, inasmuch as dues, fees, and assessments constitute a significant portion of the amounts reported under the SoF requirement, it appeared that the new law might actually require fewer entities to file reports. As interpreted by JCOPE in its emergency regulations, however, significantly more organizations will be required to file reports, with many, if not most, of these reports simply showing zero dollars in reportable amounts.

B. The JCOPE Regulations

The emergency regulations promulgated by JCOPE implement the statutory changes to the SoF threshold requirements discussed above. Of particular note is how the Commission's rules interpret the provisions of the Ethics Reform Legislation providing 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 enable an individual or entity to be a member of the reporting entity." The Commission has taken a literal reading of the statute, holding that Client Filers that otherwise meet the SoF test must file such reports, even if the only source of funds are from membership dues. In that scenario, the Client Filer must disclose key information about the members of the organization, but not report any amounts of funds from those entities. Guidance issued by JCOPE to accompany the emergency regulations explains that to the extent that the membership dues only make up a portion of the funds received from that source, then the Client Filer must again consider the SoF formula to determine how much to disclose from that source. Namely, the filer would: (i) "[s]ubtract the amount of a Source's Contribution relating to membership dues, fees or assessments from the Contribution amount; [(ii) f]or any Contribution not specifically designated for Lobbying in NYS, multiply the remaining dollar amount of the Contribution by the Reportable Compensation and Expenses and divide such figure by Total Expenditures; and [(iii) a]dd any Contribution amount specifically designated for Lobbying in NYS to the figure yielded by such formula."

Due to this change in the threshold, JCOPE has explained that for this first filing period, potential reporters need to conduct two different analyses to determine if a SoF report is required. The Client Filer must first review its lobbying expenditures for the complete calendar year; it would be required to file a SoF report if it met the "$50,000 – 3%" threshold during those 12 months. If the Client Filer did not meet that threshold, it must still review the lobbying expenditures for just the period of July 1, 2016, through Dec. 31, 2016, to determine if it is required to file a report in January 2017. If the entity met the new "$15,000 – 3%" threshold during just those six months, it would be required to file the report. Moreover, even if the Client Filer meets this second threshold, but not the first, JCOPE has explained that the regulation requires this new filer to disclose all Sources of Funding who either made contributions over the course of the: (i) 12 month period which, in the aggregate, exceeds $5,000; or (ii) 6 month period which, in the aggregate, exceeds $2,500.

The use of JCOPE's emergency rulemaking powers to implement this change has led to some controversy. The new regulations became effective immediately upon adoption by JCOPE and filing with the DOS. As noted above, regardless of how the membership dues exclusion is interpreted, the law and regulations are going to capture new SoF filers due to the lowered thresholds. Perhaps of most concern, however, those Client Filers who were never before required to file SoF reports will be required to disclose contributions received prior to July 1, 2016 if the filer received contributions in excess of $2,500 from a source in the second half of 2016. This is true *despite the fact that the prior contributions were received before* the legislation that lowered the SoF threshold was first introduced.

JCOPE is currently accepting comments on these regulations and the comment period continues through October 2016. It is likely that commenters may object to the retroactive disclosure obligation, and the interpretation of how membership dues are treated. That said, it is unlikely that the JCOPE SoF regulation will be further revised.

C. Unintended Consequences

The enacted Ethics Reform Legislation also revised the prior exceptions to the SoF disclosure requirement. Since the creation of the original SoF disclosure obligation, 501(c)(3) entities were simply excluded, even if they were engaged in significant lobbying activity. The new law, however, provides that 501(c)(3) entities 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 any 501(c)(4) exempt corporation "that is required to file a source of funding report with [JCOPE]." In the scenario where the 501(c)(4) is a Client Filer that meets the SoF test, and receives supports in excess of $2,500 from a 501(c)(3), both organizations would be required to file information regarding its donor base. The (c)(4) will continue to be required to file a SoF report with JCOPE, and now the supporting (c)(3) will be required to file reports with the New York State Attorney General (AG). The report to the AG must disclose the "identity of the donor" of any donation exceeding $2,500. The AG is required to transmit the reports to JCOPE within 30 days of receipt. JCOPE is then mandated to post the reports on its website. The AG is empowered to determine that the disclosure of donations should not be posted publicly, but only upon a finding, "based on a review of the relevant facts" that the disclosure "may cause harm, threats, harassment or reprisals to the source of the donation or to individuals or property affiliated with the source of the donation." If the Attorney General fails to grant an exemption from disclosure, the source of the donation may appeal to a hearing officer to be appointed by the Attorney General. This process does not provide any assurance to a donor that his or her contribution to the 501(c)(3) organization will be confidential. Of even greater concern is that because JCOPE's rule has a retroactive application and requires a look-back to Jan. 1, 2016, contributions made by donors to covered 501(c)(3) organizations may be made public, even though the donor had an expectation of privacy at the time the donation was made. Similarly, due to the JCOPE regulation that even where an organization's sole revenue stream is membership dues, the Client Filer may be required to submit a SoF report, there will likely be 501(c)(3) organizations that are affiliated with (c)(4) membership organizations that will now be subject to the AG disclosure requirement.

Whether the Attorney General will seek to protect against such disclosures pursuant to the rule-making process granted by the statute, or on a case-by-case basis, is unknown at this time. The JCOPE comment period is now open, and the AG is also expected to release implementing regulations. Organizations subject to potential disclosures, and others, may wish to submit comments to JCOPE, as well as the AG, regarding this new requirement.

II. Architects and Engineers

Earlier this year, JCOPE announced that it was going to follow the lead of the New York City Clerk and offer a lobbyist registration amnesty program. During the open period, several questions were raised as to whether the activities of engineers and architects working in the land use space are engaged in lobbying activity that could trigger registration requirements. JCOPE has now released a Frequently Asked Questions document regarding "Land Use and Lobbying for Engineers and Architects." The FAQ document does not appear to announce any significant shift in policy by JCOPE.

The FAQs start with reiterating the New York State statutory definition of "Lobbying Activity" -- essentially, any attempt to influence: (i) state legislation or resolutions; (ii) gubernatorial executive orders; (iii) state agency rules or regulations; (iv) governmental procurements; (v) local laws, ordinance, resolutions, or regulations by any municipality (of more than 5,000 people) or subdivision thereof; (vi) executive orders issued by the chief executive officer of a municipality; or (vii) rules, regulations, or resolutions having the force and effect of a local law, ordinance, resolution, or regulation. JCOPE clarified that to the extent that the architect or engineer (E/A) is not engaging in one of those activities, the E/A cannot be considered a lobbyist. JCOPE then proceeded to give examples of what would be lobbying (*e.g.*, advocating for a change or amendment to local zoning laws) and what would not be considered lobbying (*e.g.*, seeking a variance, code determination, or special permit). It is notable that JCOPE has taken the position in this FAQ that attempts to influence revocable consents are not lobbying activity.

The most important take away from the FAQ document, however, might be the Commission's determination about A/E who play a very limited role at a meeting regarding land use issues. JCOPE notes that when "[a]n architect or engineer who attends a meeting to **PRESENT TECHNICAL DESIGN INFORMATION OR ANSWER TECHNICAL QUESTIONS *is not*** lobbying." (Emphasis in original.) Thus, to the extent that a lobbyist or lawyer brings an A/E to a meeting not for advocacy purposes, but to be available for questions or to explain the project, the A/E may be exempt from the registration requirement. Similarly, according to the FAQ, that individual is not lobbying when the A/E participates in an adjudicatory proceeding, participates as a witness at a public proceeding, or otherwise limits involvement to responding to a request for information or comments.

III. More to Come

Although the aforementioned FAQs are just JCOPE guidance, and earlier this year the Commission made some notable policy decisions through issuing advisory opinions, JCOPE is expected to release substantive regulations regarding the Lobbying Act. At the Commission's Sept. 27 meeting, the Executive Director noted that staff has prepared over 50 pages of regulations that will inform the regulated community on how to comply with the States lobbying laws. The Commission intends to informally release the regulations as a draft document on its website in the coming months, and then hold one or more hearings to solicit feedback from lobbyists, clients, and government officials, all before formally proposing the regulations as part of the State Administrative Procedure Act process. The Executive Director noted that he hopes that this process can be completed in advance of the 2017 Legislative Session, in order to afford JCOPE the opportunity to receive comments and consider whether any legislative changes would also be necessary in order to advance the new regulations.

CONCLUSION

Between the statutory change, and the subsequent regulatory proposals, the rules affecting the lobbying community are again changing. Moreover, entities that historically have been unaware of their potential regulation obligations are now on notice of JCOPE's interpretation of how the laws affect engineers and architects working in the land use field. 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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