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Advocacy Nonprofits Should Be Aware of Potential New Disclosure Obligations

In the last hours of the state legislature's spring 2016 session, the legislature passed a bill with implications for 501(c)(3) organizations that contribute money, goods, or services to 501(c)(4) organizations. The bill also has implications for 501(c)(4) organizations that engage in lobbying, make independent expenditures, or even praise or criticize government officials and government bodies. This bill, A.10742/S.8160, was drafted by the Governor's office, so he is highly likely to sign it.

Effects on 501(c)(3) organizations (Part F)

The bill applies to a 501(c)(3) organization that makes donations to a 501(c)(4) organization engaged in a significant amount of lobbying.

In particular, a 501(c)(3) may be affected by the bill if:

- in a 6-month period the 501(c)(3) makes a \$2,500+ financial or in-kind donation to a 501(c)(4), and
- in a calendar year (or in the previous 12 months) the 501(c)(4):
 - a) spends at least \$15,000 on lobbying, and
 - b) those lobbying expenditures constitute at least 3% of the 501(c)(4)'s total expenditures.

It is unclear whether a 501(c)(3) will be covered even if its donations to the 501(c)(4) are not used for lobbying.

A 501(c)(3) that meets these criteria will be required to report to the Attorney General's Charities Bureau regarding the identity of anyone donating over \$2,500 to the 501(c)(3) during that 6-month period. It will also have to report its donations to the 501(c)(4) and the name of anyone exerting operational or managerial control over the 501(c)(3). The Charities Bureau is required to make these reports publicly available, although it may withhold public disclosure if it finds that disclosure may harm the donor.

This part of the bill is supposed to take effect 90 days after enactment. However, in practice implementation may be delayed until the Charities Bureau issues regulations and sets up a system to receive these reports.

- **What should 501(c)(3)s do now?** A 501(c)(3) that makes financial or in-kind donations to a 501(c)(4) should ask whether the 501(c)(4) is likely to spend at least \$15,000 on state or local lobbying in a 12-month period. If the answer is yes, the 501(c)(3) should consult with legal counsel about whether it may have to report its contributors to the Charities Bureau.

Effects on 501(c)(4) organizations

I. Reform of independent expenditures (Part A)

Currently, 501(c)(4) organizations may spend money to publish statements to 500 or more people supporting or opposing a candidate so long as they do not coordinate this activity with the candidate or the candidate's campaign. This is called making an "independent expenditure," and it may trigger an obligation to provide certain notices and disclaimers and to register and report to the state Board of Elections as a political committee.

Under the new law:

- the reports to the Board of Elections must include information about anyone exerting control over the 501(c)(4), the 501(c)(4)'s salaried employees, and whether any of those people or their relatives worked for a candidate or candidate committee
- the definition of "coordination" is vastly expanded. It includes:
 - sharing space with the candidate or campaign,
 - hosting a fundraising event where the candidate appears,
 - employing or retaining someone who worked for the candidate or campaign (although there is an exception where the same political consultant is retained by both entities and each agrees that the consultant may not disclose strategic information about the other with them),
 - being established, managed, or directed by an immediate family member of the candidate,
 - using nonpublic campaign materials prepared by the candidate or campaign, engaging in strategic discussions with the candidate or campaign, or using nonpublic strategic information obtained from a political consultant who previously worked for the candidate or campaign.

As a result of the new law, if a 501(c)(4) makes independent expenditures, it may not make expenditures to support any candidate with which it is deemed to be coordinating. Alternatively, if the 501(c)(4) decides to support a candidate with which it is coordinating, it may not make independent expenditures for any other candidate, and it must abide by statutory contribution limits.

This part of the bill takes effect 30 days after enactment.

- **What should 501(c)(4)s do now?** A 501(c)(4) that makes independent expenditures in connection with state or local elections should evaluate whether it has a relationship with a candidate, candidate's landlord, or people who have worked for the candidate in the past. If so, it should consult legal counsel regarding whether this relationship constitutes "coordination" under the new law, and what legal obligations may follow as a result.

II. Reform of the lobbyist and client source of funding disclosure law (Part D)

Under current law, 501(c)(4) organizations that engage in a large amount of lobbying must file a special "source of funding" report with the state Joint Commission on Public Ethics ("JCOPE").

Under the new law:

- The obligation to file a “source of funding” report is triggered if in a calendar year (or in the 12-month period prior to its client or lobbyist report) the 501(c)(4) both:
 - a) spends over \$15,000 on lobbying (down from \$50,000 under current law), and
 - b) those lobbying expenditures constitute at least 3% of the 501(c)(4)’s total expenditures.
- On the report, the 501(c)(4) must disclose the name of everyone who contributes over \$2,500 that is used to fund lobbying (down from \$5,000 under current law).
- The 501(c)(4) must also notify any 501(c)(3) that makes over \$2,500 in financial or in-kind donations in a 6-month reporting period of the 501(c)(3)’s obligation to report donations to Charities Bureau.

This part of the bill is supposed to take effect 90 days after enactment. However, in practice implementation may be delayed until JCOPE issues regulations.

- **What should 501(c)(4)s do now?** A 501(c)(4) that spends over \$15,000 on lobbying in a 12-month period should consult with legal counsel about whether it is required to file a “source of funding” disclosure report.

III. Criticism or praise of government (Part G)

The bill imposes a new reporting requirement on 501(c)(4)s that praise or criticize government officials or actors. A 501(c)(4) will be covered if it “publishes” a communication to 500 or more people that “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 legislation, potential legislation, pending legislation, rule, regulation, hearing, or decision by any legislative, executive or administrative body.”

It is unclear precisely what sorts of communication are covered by this very broad definition. The bill does, however, contain some clear exceptions for communications that:

- must be reported under the lobbying or campaign finance law
- are with a professional reporter or newscaster
- are distributed only to people who affirmatively consent to be members, are voting members, or contribute funds
- are made in connection with a candidate debate or candidate forum

A 501(c)(4) that spends over \$10,000 on covered communications in a calendar year will be required to report to the Charities Bureau regarding the content and cost of the covered communications, people who exert control over the 501(c)(4), and people or entities donating \$1,000 or more to the 501(c)(4).

This part is supposed to take effect 30 days after enactment. However, in practice implementation is likely to be delayed until the Charities Bureau sets up a reporting and disclosure system.

- **What should 501(c)(4)s do now?** All 501(c)(4)s that engage in any policy or advocacy work should consult with legal counsel about how to comply with this new requirement.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert, please contact Laura Abel, Senior Policy Counsel, Lawyers Alliance for New York, (212) 219-1800 ext. 283, label@lawyersalliance.org.

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