

Large In-Kind Donations to, and Speech by, Certain 501(c)(4)'s May Trigger Obligation to Report to New York Department of State

The Department of State has started accepting filings from 501(c)(3) charities that make large in-kind donations to certain 501(c)(4) organizations, and from 501(c)(4) organizations that engage in certain types of speech. The filing requirements were established by a 2020 law. It is likely that they will affect a very small number of 501(c)(3)'s and many 501(c)(4)'s. This legal alert explains who may be affected, what they would need to file, and why a court ruling may make it hard for the state to enforce these requirements.

1. Which 501(c)(3)'s could be affected by the filing requirements?

A 501(c)(3) organization could have a filing obligation if it makes one or more in-kind donations worth \$10,000 or more to a certain type of 501(c)(4) organization (described below). The in-kind donation will trigger this disclosure requirement only if all three of the following are true with respect to the recipient:

- the recipient is a 501(c)(4) organization,
- the recipient spends \$15,000 or more in a 12-month period on lobbying New York State or county or local governments within the state, and
- the recipient's NY lobbying expenditures constitute at least 3% of the recipient's total revenues.¹

2. How is an "in kind donation" defined?

An in kind donation could include a donation of staff, staff time, personnel or any other human resources, offices or office supplies.

However, there is an exception for in kind donations such as pro bono legal assistance and other kinds of technical assistance, where the donation: 1) is made in the course of an activity that is substantially related to accomplishing the donor's tax exempt purposes, and 2) is received by wholly unaffiliated individuals, corporations or groups for no charge or substantially less than fair market value.²

3. What will covered 501(c)(3) organizations need to file?

A covered 501(c)(3) organization must file with the Department of State:

- a Funding Disclosure Report disclosing the identity of the recipient 501(c)(4), the people who exert managerial control over the 501(c)(3), the date and amount of contributions to the 501(c)(4), and any restrictions that the 501(c)(3) has placed on the contributions;³

¹ Exec. Law 172-e.

² Exec. Law 172-e(1)(b).

³ Exec. Law 172-e.

- certain information regarding the 501(c)(3)'s tax exempt mission and activities;⁴ and
- if the 501(c)(3) organization is registered with the Charities Bureau to solicit charitable funds, it must provide a copy of its CHAR500 and all attachments to the Department of State. The filing must include an unredacted IRS 990 Schedule B, containing information regarding major donors, even if the organization does not file that form or information with the IRS or Charities Bureau.⁵

4. Which 501(c)(4) organizations may have to file with the Department of State?

A 501(c)(4) organization must file a report with the Department of State if it spends more than \$10,000 in a calendar year on one or more written communications, conveyed to 500 or more people, that:

refers to and advocates for or against a clearly identified elected official, executive or administrative body or legislative body relating to the sponsorship, support, opposition or outcome of any proposed legislation, pending legislation, rule, regulation, hearing or decision, or advocates for or against action by any elected official, executive or administrative body or legislative body.⁶

This can potentially cover a wide range of activity. For instance, it is possible that the reporting requirement extends to a 501(c)(4) organization that conducts all of its advocacy activity outside of New York.

There are exceptions for lobbying communications covered by New York State lobbying or elections laws; communications with professional journalists or with certain of the 501(c)(4)'s members or donors; and communications in connection with certain candidate forums.

5. What do covered 501(c)(4) organizations have to file?

Covered 501(c)(4) organizations must file with the Department of State:

- A Financial Disclosure Report disclosing the names of everyone exerting operational control over the organization, a description of the covered communications, the amount of money paid for the communication and who received the payment, and the identity of people or entities contributing funding to support the covered communication;
- Certain information regarding the 501(c)(4)'s tax exempt mission and activities;⁷ and
- If the 501(c)(4) organization is registered with the Charities Bureau to solicit charitable funds, it must provide a copy of its CHAR500 and all attachments to the Department of State. The filing must include an unredacted IRS 990 Schedule B, containing information regarding major donors, even though 501(c)(4) organizations do not file that form or information with the IRS or Charities Bureau.⁸

6. What are the potential penalties if a covered organization fails to file?

⁴ 19 NYCRR 146.4, available at <https://dos.ny.gov/financial-reports-be-filed-certain-charitable-organizations>

⁵ Exec. Law 172-b(9); Exec. Law 172-e(4).

⁶ Exec. Law 172-f.

⁷ 19 NYCRR 146.5.

⁸ Exec. Law 172-b(9); Exec. Law 172-f(4).

If the Charities Bureau of the NY Attorney General’s Office finds that a covered organization has failed to comply with its filing obligations, it may revoke the organization’s Charities Bureau registration (if that organization is registered), order the organization to stop soliciting charitable funds in New York, and issue a civil penalty of up to \$1,000, plus \$100/day while the violation continues.⁹ The Charities Bureau must provide notice and an opportunity to appear at a hearing before imposing any of these penalties; before imposing a financial penalty the Bureau must also provide the covered organization with an opportunity to submit the required filing.¹⁰

The Charities Bureau can also ask a court to grant various types of relief, such as an injunction prohibiting a covered organization from soliciting charitable contributions in New York State, imposing financial penalties, removing a director or other responsible person, or dissolving the corporation.¹¹

7. What is the status of the court order blocking enforcement of the law?

In 2019, a federal court ruled that prior versions of Executive Law 172-e and 172-f violate the First Amendment.¹² The court issued a permanent injunction against their enforcement. It is possible that this injunction will prohibit the state from enforcing the new versions of these laws. There has not yet been a court ruling on this issue. An organization that believes it may be required to file with the Department of State under section 172-e or 172-f should consult with legal counsel about whether it may be protected by the existing injunction and whether the law is constitutional as applied to that organization.

8. Where can I find information about how and when to file?

For information about filing deadlines and how to file, go to <https://dos.ny.gov/financial-reports-be-filed-certain-not-profit-organizations>

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Senior Policy Counsel Laura Abel at label@lawyersalliance.org or visit our website at www.lawyersalliance.org for further information. To become a client, visit www.lawyersalliance.org/becoming-a-client.

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⁹ Exec. Law 177; 13 NYCRR Part 97.

¹⁰ Id.

¹¹ Exec. Law 175.

¹² Citizens Union v. Attorney Gen., 408 F. Supp.3d 478 (SDNY 2019), available at <https://casetext.com/case/citizens-union-v-attorney-gen>.