

Under Cover of Darkness and Crisis, Apparent Attempt to Revive Unconstitutional New York 501(c)(3) and 501(c)(4) Reporting Laws

May 2020

Amidst the throes of the COVID-19 pandemic, a little-noticed and opaque provision was slipped at the last minute into New York State's recently passed massive omnibus budget bill. The legislation, which was signed into law at the beginning of April, may breathe new life into onerous and complex reporting requirements for certain Section 501(c)(3) and 501(c)(4) entities operating in the state. Late last year, a federal court had struck down broader requirements as being unconstitutional.

As *Election Law News* has reported on previously, at issue are two reporting requirements that were first enacted in the wee hours of the morning in June 2016. First, Section 501(c)(4) entities that spend more than \$10,000 in a calendar year on certain issue advocacy "covered communications" were subject to new reporting requirements. The reports were required to publicly identify any donors who gave \$1,000 or more to the entity.

Second, if a Section 501(c)(4) entity triggers a requirement to identify its donors on New York State lobbying reports (which are separate from the "covered communication" reports), then Section 501(c)(3) entities that provide certain "in-kind" support to the Section 501(c)(4) entity were required to file new reports of their own. Such reports were required to publicly identify the Section 501(c)(3)'s own donors.

As *Election Law News* reported last November, a federal district court struck down both of these provisions for being unconstitutionally overbroad and invasive to donor privacy. With respect to the reporting requirement for Section 501(c)(4) entities, the court took

Practice Areas

Election Law & Government Ethics

issue with the law's broad regulation of "pure issue advocacy." The court held that prior cases upholding campaign finance and lobbying reporting laws could not justify New York's more sweeping reporting requirements. With respect to the reporting requirement for Section 501(c)(3) entities, the court held that any interest the state had in requiring a Section 501(c)(4) entity to identify its donors on lobbying reports was too attenuated to also extend to a Section 501(c)(3) entity providing in-kind support to the 501(c)(4) entity.

The omnibus budget bill, which, like the 2016 law, was also passed in the wee hours of the morning, amends the "covered communications" definition for Section 501(c)(4) entities. Under the amended definition, communications will no longer be regulated if they discuss issues that could be the subject of "potential legislation" – a provision the court had found particularly broad and objectionable. However, communications that "advocate[] for or against" any "elected official, executive or administrative or legislative body relating to ... any proposed legislation, pending legislation, rule, regulation, hearing or decision" would still be regulated.

Moreover, instead of requiring Section 501(c)(4) entities to broadly report their donors, the amended reporting requirement only requires identification of donors who "restrict[]" their funds "in whole or in part for the support of the covered communication." It is not entirely clear whether the donor information will be made public by the Department of State, with whom reports are to be filed.

While some language in the bill text suggests donor information on "covered communication" reports will categorically not be made public, other language suggests the agency may withhold donor information only if an exemption is granted based on the likelihood of "harm, threats, harassment, or reprisals" to donors. The bill contemplates implementing regulations to be issued for the donor reporting requirement, and this ambiguity may be clarified by a rulemaking.

With respect to the reporting requirements for Section 501(c)(3) entities that provide in-kind support to Section 501(c)(4) entities, the budget bill eliminates the requirement for the Section 501(c)(3) entity to publicly report its own donors. The bill also slightly broadens the type of in-kind donations provided by a Section 501(c)(3) entity that would trigger reporting. At the same time, the bill increases the threshold at which the value of a Section 501(c)(3) entity's in-kind support triggers reporting from \$2,500 to \$10,000.

The budget bill also requires Section 501(c)(3) and (c)(4) entities subject to the reporting requirements described above to submit copies of their IRS Form 990 Schedule B donor lists to the New York Department of State – purportedly on a confidential basis. This is in addition to the New York Attorney General's office's preexisting requirement for all Section 501(c)(3) and (c)(4) entities registered for charitable solicitations in the state to file copies of their Schedule B with that office – a requirement that was upheld by the U.S. Court of Appeals for the Second Circuit.

The budget bill further requires the Department of State to examine the reports of in-kind donations by Section 501(c)(3) entities and "covered communications" by Section 501(c)(4) entities for evidence of whether such activities are "inconsistent with the[ir] charitable purposes." The department is required to provide annual reports to the General Assembly and governor on this matter.

Oddly, the bill also appears to require the department to publish on its website the reports of in-kind support and “covered communications” filed by any entity the department determines has acted inconsistently with its “charitable purposes.” However, it is unclear what this measure is intended to accomplish, since all such reports are otherwise required to be published on the department’s website anyway.

The budget bill’s amendments to these reporting requirements recently held to be unconstitutional appear to be an attempt to revive the provisions. It remains to be seen whether the groups that challenged the original law will launch a new challenge, and if so, whether the amendments will survive judicial review this time. Wiley’s Election Law Practice will be carefully monitoring any litigation developments as well as agency interpretive guidance and rulemakings that are issued regarding these provisions.