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ELEC Passes Regulations Implementing "Pay-to-Play" Disclosure Requirements

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ELEC Adopts Regulations Implementing "Pay-to-Play" Disclosure Requirements

Regulation impacts non-profits

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On March 6, 2007, the New Jersey Election Law Enforcement Commission ("ELEC") approved proposed regulations implementing Chapter 271, N.J.S.A. 19:44A-20.26. With the exception of an amendment narrowing the definition of "officer," ELEC adopted the rules as proposed.¹

Chapter 271

Chapter 271 requires disclosure by a business entity and certain persons and entities associated with that business entity at two junctures: (1) on a pre-contract basis; and (2) as part of an annual disclosure.

The first disclosure obligation requires a business entity receiving a "non-fair and open" government contract worth more than \$17,500 at the state, county or municipal level to file, not later than ten (10) days before entering the contract, a disclosure statement with the contracting government entity.

The second disclosure obligation requires a business entity that has received \$50,000 or more in the aggregate during a calendar year through contracts with New Jersey government entities to file an annual disclosure with ELEC. ELEC announced at its March 6, 2007 meeting that the first annual disclosure will be due on **September 28, 2007**.

Coverage of Non-Profit Organizations

Pursuant to ELEC's newly passed regulation N.J.A.C. 19:25-26.1, the definition of "business entity" encompasses

¹ See January 29, 2007 GBV Update for a related article [available at](http://www.gbvlaw.com/Download.srv/GBV%20Update%2011%20Jan%20%2029%202007%20_3_.pdf) http://www.gbvlaw.com/Download.srv/GBV%20Update%2011%20Jan%20%2029%202007%20_3_.pdf.

a natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity organized under the laws of this State or of any other state or foreign jurisdiction. The term 'business entity' shall include for-profit and nonprofit entities. (Emphasis added).

Thus, ELEC has included non-profits in the definition of "business entity" despite the fact that such entities are not expressly listed within the statutory definition of a "business entity" set forth in Chapter 271. Indeed, during the commentary period, many non-profit organizations protested their proposed inclusion in the definition of "business entity."

Some non-profit corporations qualify as a charitable organizations under section 501(c)(3) of the Internal Revenue Code. The Internal Revenue Code prohibits 501(c)(3) organizations from directly or indirectly participating in, or intervening in, any political campaign on behalf (or in opposition to) any candidate for elective public office. According to the IRS, "political campaign intervention" includes any and all activities that favor or oppose one or more candidates for public office, including, contributions to political campaign funds made by or on behalf of an organization. Violation of this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes.

Because a 501(c)(3) charitable organization may lose its tax-exempt status if that organization or its leaders improperly engage in political activity, additional concerns have been expressed about the application of the Commission's Chapter 271 regulation to nonprofit organizations. For example, under the final rules, 501(c)(3) and other non-profit organizations must disclose reportable contributions by officers and directors, and their spouses, as discussed below. Given the IRS restrictions, these disclosures could create a misleading and potentially damaging impression that the individual political contributions of volunteer board members are in some way related to and/or should be attributed to the non-profit organization.

In any event, non-profit organizations that engage in public contracting should put into place a strategy to determine who is covered by the Chapter 271 disclosure law and to track contributions made by those individuals on an ongoing basis.

Disclosure of "Officer" and "Director" Contributions

Based on the definitions of "officer" and "director" contained in the regulations, a business entity which may have been required to disclose reportable contributions to New Jersey political recipients by only several individuals associated with the business entity

under P.L. 2004, c. 19 and/or P.L. 2005, c. 51 may now be required to disclose reportable contributions by many additional individuals.

ELEC's proposed regulations defined an "officer" as a president, vice president, secretary, treasurer, chief executive officer, or chief financial officer of a corporation, including a nonprofit corporation, or any person routinely performing such functions for a corporation. At its March 6, 2007 meeting, ELEC announced that the definition was narrowed with respect to vice-presidents to include only those vice-presidents who have at least some responsibility for public contracts. Thus, if you are a large corporation with hundreds of people with the title of "vice president," you will have to identify those who deal with public contracts, survey those people on a regular basis, and disclose all reportable contributions made by those "vice presidents" and their spouses as part of both your pre-contract and annual disclosure obligations.

Additionally, the definition of "director" includes any member of the governing board of a corporation, including a nonprofit corporation, whether designated as a director, trustee, manager, governor or by any other title. Accordingly, if you are a for-profit or not-for-profit organization with a large governing board, the new regulations require you to survey that board's members on a regular basis and to disclose all reportable contributions by those members and their spouses as part of both your pre-contract and annual disclosure obligations.

The Corporate Political Activity Law Group at Genova, Burns & Vernoia

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