GBV Update

GENOVA, BURNS & VERNOIA ATTORNEYS AT LAW

January 29, 2007

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NY Appellate Division Rules that Candidates and Treasurers Are Not Personally Liable for Public Fund Repayment Claims

By Jisha S. Vachachira

GBV attorneys have once again successfully defended candidates and treasurers from Campaign Finance Board claims of personal liability for the repayment of public matching funds. Last month, the First Department of the New York State Appellate Division in Manhattan held that candidates and treasurers are not personally liable for public fund repayment claims under the NYC Campaign Finance Act. *New York City Campaign Finance Board v. Ortiz*, -- N.Y.S.2d --, 2006 WL 3718036 (App. Div. 1st Dep't 2006).

This latest decision stemmed from actions brought by the Campaign Finance Board against two unsuccessful 2001 City Council candidates, whose campaign committees failed to submit documentation for campaign expenditures before the completion of their post-election audits. The first candidate, Edwin O. Ortiz Jr., and his campaign treasurer, Kenneth T. Brennan, were ordered to repay $46,071. The second candidate, Richard Perez, was ordered to repay $63,756. In separate actions in the lower court, the Board's claim against Ortiz was affirmed, while the Board's claim against Perez was overturned. GBV represented the candidate Perez both in the lower court and in defense of the Board's appeal, and also represented the treasurer Brennan in his appeal. (Mr. Ortiz was not represented in the appeal.) The two actions were consolidated by the Appellate Division.

In a unanimous decision written by Justice Richard T. Andrias, the Appellate Division overturned the Campaign Finance Board in both matters and found that the plain language of the provision at issue applied only to the candidate's respective committees, and not to individual candidates and treasurers. Despite the great deference given to an agency's interpretation of the statutes it is responsible for administering, Justice Andrias found that "where, as here, the question is one of pure statutory construction, dependent only on accurate apprehension of legislative intent . . . there is little basis to rely upon any special competence or expertise of the administrative agency." Id. *4.

The Board had argued that it had given notice to candidates and their campaign treasurers that they would be held personally liable for repaying public funds through letters sent to them after the determinations were made. The Court disagreed, however, and found that the notice was deficient as the letters referred to the Committee, and not the candidates and treasurers. The Board also argued that the certifications signed by the candidates and treasurers acknowledging that they may be jointly and severally liable for the repayment of public funds served as an additional basis for personal liability. The Court struck down the argument, however, because the certification could not provide for liability beyond that which is provided by the law.

The Board had also sought the court to impose additional penalties against the parties for their refusal to repay the funds. The Appellate Division rejected the request finding that the Board is the body empowered to determine violations and to assess penalties, and could not ask the courts to impose additional penalties.

Pay-to-Play: Additional Disclosure Requirements on the Horizon [1]

By Rebecca Moll Freed

For nearly two and one-half years, persons and entities doing business with the New Jersey government have been subject to numerous statewide pay-to-play restrictions, prohibitions and disclosure requirements.

Since January 5, 2006, when Acting Governor Codey signed P.L. 2005, c. 271 ("Chapter 271") into law, persons and entities doing business with the New Jersey government have been subject to pre-contract disclosure requirements for all "non-fair and open" contracts worth more than $17,500 and have been anticipating being subject to an annual disclosure requirement for their government contracts worth $50,000 or more in the aggregate during a calendar year.

The New Jersey Election Law Enforcement Commission ("ELEC" or the "Commission") recently proposed regulations to implement Chapter 271. The Commission held a public hearing on November 21, 2006 and accepted written comments on its proposed Chapter 271 regulations up until January 5, 2007; exactly one-year after Chapter 271 was signed into law.

If ELEC's proposed Chapter 271 regulations are adopted, as proposed, persons and entities doing business with the New Jersey government will be filing their first Chapter 271 annual disclosure statement in June of 2007.

Disclosure Requirements

Chapter 271 contains broader disclosure requirements than either of the other statewide pay-to-play laws currently in effect (e.g., P.L. 2004, c. 19 and P.L. 2005, c. 51). In addition to requiring a business entity to disclose certain reportable contributions by the business entity itself, its principals, subsidiaries and political action committees, Chapter 271 also requires a business entity to disclose certain reportable contributions by its partners, officers and directors (regardless of interest) and their spouses. The purpose of Chapter 271 has been described as promoting transparency in the process of government contracting.

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. Presumably, business entities have been complying with this first disclosure requirement for the past year.

[1] Because this article is based upon the New Jersey Election Law Enforcement Commission's proposed regulations on P.L. 2005, c. 271, some of the information in this article may become obsolete once the New Jersey Election Law Enforcement Commission adopts its final regulations to implement P.L. 2005, c. 271.

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. The first annual disclosure is currently due on June 29, 2007.

Contributions Deemed to be Made by a Business Entity

Chapter 271 contains a broader definition of contributions deemed to be made by a business entity than either of the two other statewide pay-to-play laws currently in effect (e.g., P.L. 2004, c. 19 and P.L. 2005, c. 51). For example, pursuant to Chapter 271, a business entity that is not a natural person must not only disclose reportable contributions by the business entity itself, its principals, subsidiaries and/or political action committees, but a business entity must now also disclose reportable contributions by any partner, officer or director of the business entity (regardless of interest) and their spouses. Based on the proposed definitions of "officer" and "director," a business entity may now be required, pursuant to Chapter 271, to disclose reportable contributions by hundreds of individuals on its Chapter 271 disclosure forms.

Although the disclosure of reportable contributions by hundreds of individuals may seem like an exaggeration, the proposed definitions of "officer" and "director" cast a pretty wide net. For example, an "officer" means 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. Similarly, the proposed definition of "director" means 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.

So, based on the foregoing, if you are a for-profit or not-for-profit organization with a large governing board, based on the proposed regulations, you will have to survey that board on a regular basis and disclose all reportable contributions made to New Jersey political recipients by your board members and their spouses as part of both your pre-contract and annual disclosure obligations. Similarly, if you are a large corporation with hundreds of people with the title of "vice president," you will have to survey all of those people on a regular basis, even if it is across state or country lines, and disclose all reportable contributions made by those "vice presidents" and their spouses as part of both your pre-contract and annual disclosure obligations. Further, if your company has a multi-state operation, you will now have to survey all of your partners, officers and directors, regardless of whether they hold any interest in your company and disclose all reportable contributions made by those individuals and their spouses as part of both your pre-contract and annual disclosure obligations. Finally, once you gather this information someone within your organization will have to figure out which contributions need to be disclosed and will have to certify that the information contained in the disclosure is accurate.

Thus, a business entity which may have been required to disclose the reportable contributions 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 the reportable contributions by hundreds of individuals associated with the business entity. This may present a particular problem where a business operates in multiple states, where a governing board consists of a large number of individuals or where hundreds of individuals hold the same title, such as "vice president," but may not perform decision-making

functions on behalf of the corporation.

Participation in a PAC may Amount to "Direct or Indirect" Control over the PAC

In addition to requiring broader disclosure requirements than the requirements already in place, the proposed Chapter 271 regulations also contain an extremely broad definition of what it means to "directly or indirectly" control a political action committee ("PAC").

Pursuant to ELEC's proposed regulations the criteria for determining whether a business entity "directly or indirectly" controls a PAC and is required to disclose contributions by that PAC shall include, but not be limited to, whether the "business entity" participates: (1) as an organizer of the PAC; (2) in decision-making with regard to specific activities of the PAC; or (3) in the formation of the PAC's policies.

If applied literally, ELEC's proposed definition of "directly or indirectly" controlling a PAC would have a chilling affect on many PACs, particularly those of trade associations throughout the Garden State. If, for example, a trade association PAC has 20 members sitting on the PAC's Board and making decisions about the PAC's contributions, under ELEC's proposed regulations those members would technically have "direct or indirect" control over the PAC. Thus, a situation could theoretically result where each member would have to list reportable contributions made by the PAC on its business entity's Chapter 271 disclosure forms.

Compliance

Pay-to-play reform has become a headache for many. While ELEC may amend or re-propose its Chapter 271 regulations based upon testimony at the public hearing on November 21, 2006 and/or written testimony submitted by January 5, 2007, if your company, whether for-profit or not-for-profit, does business with government entities in New Jersey at any level, you will be obligated to make Chapter 271 disclosures. Thus, we recommend making the development, establishment and operation of a successful and workable Chapter 271 compliance program one of your key business initiatives for early 2007.

The 2006 Annual Lobbying Report

By Gregory E. Nagy

As a result of the expansion in 2006 of lobbying regulation in New Jersey to cover certain communications with State government agencies, many businesses that have not previously been required to file disclosure reports as "lobbyist organizations" will be required to file 2006 Annual Reports by **February 15, 2007** with the Election Law Enforcement Commission (i.e., "ELEC"). Those reports must disclose information such as lobbying-related in-house employees' salaries and reimbursements and/or lobbyist contractors' retainers and expenses.

The term "lobbyist" was expanded in 2006 to cover businesses and others making communications through employees or outside lobbying contractors that were intended to influence (whether successful or not) State government decisions such as the award of contracts, the issuance or denial of licenses and permits, grants or loans for financial assistance, or other actions pertinent to "governmental affairs" as that term is defined in the law. As a result, in the

first nine months of 2006 alone registration of agents jumped by nearly 50%, from 647 to 948. In short, many businesses that have in the past dealt with State agencies but have never previously been subject to lobbying reporting will be required to meet new filing requirements by ELEC's February 15, 2007 deadline.

New Jersey Filing

Calendar of 2007 ELEC Lobbying and "Pay-to-Play" Filing Dates:

February 1, 2007: Written notice to State legislator, official or staff receiving lobbying-related gift.

February 15, 2007: Annual Report of Lobbyist Organizations and Governmental Affairs Agents.

April 10, 2007: Governmental Affairs Agent 2007 1st Quarterly Report.

June 29, 2007 (proposed): Annual Disclosure Statement of Political Contributions by "pay-to-play" business entities holding State and/or local public contracts.

July 10, 2007: Governmental Affairs Agent 2007 2nd Quarterly Report.

October 10, 2007: Governmental Affairs Agent 2007 3rd Quarterly Report.

November 15, 2007: Due date of Governmental Affairs Agent annual fee ($425 in 2006).

January 10, 2008: Governmental Affairs Agent 2007 4th Quarterly Report

New York State Filing

Calendar of 2007 New York State Lobbying Disclosure Dates:

Bi-Monthly Reports (filed by registered lobbyists)

March 15, 2007 (Reporting period: January 1, 2007 - last day of February 2007)

May 15, 2007 (Reporting period: March 1, 2007 - April 30, 2007)

July 15, 2007 (Reporting period: May 1, 2007 - June 30, 2007)

September 15, 2007 (July 1, 2007 - August 31, 2007)

November 15, 2007 (September 1, 2007 - October 31, 2007)

January 15, 2008 (Reporting period: November 1, 2007 - December 31, 2007)

Semi-Annual Reports (filed by clients)

July 15, 2007 ($50 filing fee due with report)

January 15, 2008 ($50 filing fee due with report)

New York City Filing

Calendar of 2007 New York City Lobbying Disclosure Dates:

Periodic Reports (filed by registered lobbyists)

April 15, 2007 (Reporting period: January 1, 2007 to March 31, 2007)

June 15, 2007 (Reporting period: April 1, 2007 to May 31, 2007)

October 15, 2007 (Reporting period: June 1, 2007 to September 30, 2007)

January 15, 2008 (Reporting period: October 1, 2007 to December 31, 2007)*

*This last periodic report is also considered the Annual Report.

Annual Report (filed by clients)

January 15, 2008

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

The Corporate Political Activity Law Group is a unique group of attorneys and former regulators that practice exclusively in this field. This very specialized practice group is dedicated to the representation of corporations, trade associations and PACs in legal matters such as campaign finance, public procurement, government affairs compliance and corporate ethics.