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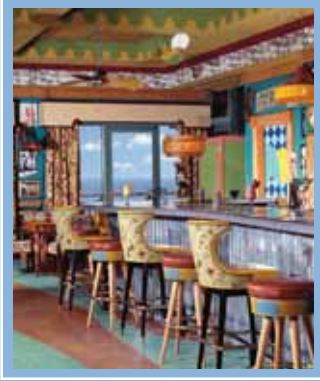
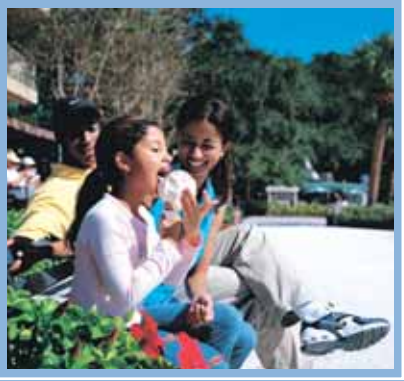
2006 Annual Meeting





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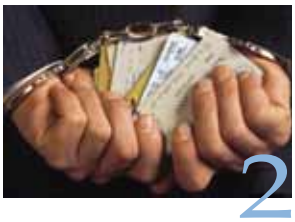

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Georgia's New Ethics Laws

A Summary of the Changes Relevant to Candidates, Campaigns and Contributors

by J. Randolph Evans and Douglas Chalmers Jr.

In the 2005 legislative session, the General Assembly passed, and Gov. Sonny Perdue signed, a comprehensive ethics reform package that resulted in significant changes to Georgia's ethics laws, including the Ethics in Government Act (the "Act").[1] The changes to the Act, which went into effect on Jan. 9, 2006, will be seen and felt by everyone involved.

In its December 2005 edition, the *Georgia Bar Journal* published an article that summarized changes to the Act that are relevant to lobbyists and legislators.[2] This article reviews the changes to Georgia's ethics laws that will affect candidates, campaigns and contributors during the 2006 campaigns and elections.

Limits on Campaign Contributions

The new law adds some important regulations and restrictions concerning campaign contributions.

Affiliated Business Entities

The Legislature has reinserted into the law a provision that was eliminated in 2000. Before the 2000 amendments went into effect on Jan. 1, 2001, the Act required that contributions from all "affiliated corporations" be aggregated when calculating whether a given corporation had exceeded the contribution limits. Corporations were deemed to be affiliated if they were: (a) under common ownership and control, (b) in a parent-subsidiary relationship, (c) sister corporations, or (d) in a relationship where one corporation exercised control over another.[3] The contributions of affiliated corporations were aggregated for purposes of the contribution limits. The provision of the Act which accomplished this stated in part as follows:

> No corporation shall during the course of any election year . . . make contributions to any candidate . . .

> which in the aggregate for that calendar year, *together with any contributions to the same candidate in the same year by any affiliated corporations*, exceed [the contribution limits].[4]

The highlighted language was removed when the Act was amended in 2000.

Confusion has nonetheless continued to exist in this area because, while the Legislature removed this operative provision, it retained the definition of an "affiliated corporation" in the Act.[5] In other words, although the Act continued to define the phrase "affiliated corporation," the term itself was not actually used anywhere in the Act.

Recognizing the incongruity posed by this fact, in July 2001 the State Ethics Commission (the Commission) adopted a rule which attempted to put back into the law the language that the Legislature had removed.[6] The language in the rule is virtually identical to the language that was repealed from the Act in 2000. The Commission's stated position on this issue

"This provision was designed to level the playing field and to make it more difficult for wealthy candidates to loan their campaigns large amounts of money with the expectation that the funds will be repaid with campaign contributions received after the (presumably successful) election."

has been that, because of the adoption of the rule, the law has always required aggregation of contributions by affiliated corporations. In light of the fact that the Legislature removed this requirement when it amended the Act in 2000, however, the Commission's rule has been vulnerable to challenge on the ground that it exceeds the scope of the Commission's authority.[7]

The rule was, nonetheless, good policy. In recognition of this fact, the 2005 revisions to the Act state that "[n]o business entity shall make any election contributions to any candidate which when aggregated with contributions to the same candidate for the same election from any affiliated corporations exceed the per election maximum allowable contribution limits for such candidate as specified in subsection (a) of this Code section."[8]

Importantly, this new provision is broader than the previous version of the statute. Like the previous statute, the new statute requires the aggregation of contributions from "affiliated corporations." Unlike the old statute, however, the new law defines the term "affiliated corporations" to include affiliated "business entities."[9] Because the term "business entity" has always been defined to include businesses other than just corporations, this change expands the scope of the definition of "affiliated corporations." In addition, the definition of the term "business entity" itself has been expanded to include additional types of businesses.[10]

The net effect of these changes is that the aggregation requirements are significantly broader. Going forward, all affiliated businesses, regardless of the legal form of the business (i.e., partnership, corporation, etc.), are subject to one aggregated contribution limit. This change will limit the ability of any one contributor to give multiple large contributions through various different businesses.

Affiliated Committees

The recent amendments to the Act did not, however, make comparable changes with respect to contributions from "affiliated committees." The Act continues to define the term "affiliated committees" to mean "any two more political committees (including a separate segregated fund) established, financed, maintained, or controlled by the same business entity, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department or local unit thereof."[11] As was the case with affiliated corporations, however, although the Act defines the term, it does not actually use it. As such, the Act does not expressly require that the contributions of affiliated committees be aggregated for purposes of the contribution limits.

As it did with affiliated corporations, the Commission previously adopted a rule that attempts to address this issue by requiring the aggregation of contributions from affiliated committees.[12] Unlike the case with "affiliated corporations," however, the Legislature did not revise the Act during the 2005 session to address this issue. Accordingly, absent legislative action, the Commission's rule may be subject to challenge for the reasons set forth above.

Contributions from Family Members

The new law also restricts the scope of an exception that had allowed unlimited contributions to be made to a candidate from members of the candidate's family. The Act has provided that the contribution limits under the Act do not apply to contributions made to the candidate's campaign from the candidate or members of his or her "immediate family." In a 1995 advisory opinion, the Attorney General interpreted the phrase "immediate family" to mean "spouse and children."[13] In the new version of the Act, the phrase "immediate family" has been replaced with a new term, "member of the family," which has been defined to mean a spouse and "dependent" children.[14] As a practical matter, this means that the exception to the contribution limits no longer applies to a candidate's adult, non-dependent children. Under the new law, children of the candidate who are not dependents of the candidate are subject to the same contribution limits that apply to others.

Permissible Use of Campaign Contributions

The law has also been revised to clarify certain permissible and prohibited uses of campaign funds.

Contributions to Nonprofit Organizations

The Act has been revised to confirm that candidates may use campaign funds for the purpose of

making "contributions to nonprofit organizations."[15] Prior to Jan. 9, 2006, a candidate could only make contributions to these organizations if he or she had "excess" funds.[16] Because the law did not clearly define what constituted "excess" funds, however, this resulted in ambiguity. The Act now clearly provides that such contributions are considered "ordinary and necessary" expenditures.

Millionaire's Amendment

Another change, commonly referred to as the "Millionaire's Amendment," provides that a candidate who loans money to his or her campaign will not be able to use campaign funds to repay that loan after an election to the extent that the loan exceeds $250,000.[17] This provision was designed to level the playing field and to make it more difficult for wealthy candidates to loan their campaigns large amounts of money with the expectation that the funds will be repaid with campaign contributions received after the (presumably successful) election.

Campaign Contribution Disclosure Reports–Information Disclosed

The new law also revises in a number of respects the information that must be disclosed by candidates and public officials on campaign contribution disclosure reports (CCDRs).

Occupation/ Employer Information

First, the new law clarifies the reporting of occupation and employer information. The law now clearly states that this information is only required to be disclosed for contributors, or recipients of expenditures, who are individual, natural persons (as opposed to business contributors or payees).[18] In addition, the law now requires that candidates disclose both occupation and employer information for individuals who receive payments of campaign funds, whereas prior to this change the Act required campaigns to report only either occupation or employer information for payees.[19]

Last-Minute Reporting

Second, two changes have been made to the so-called "48-hour" reporting obligation. The Act previously provided that, "[d]uring the period of time between the last report due prior to the date of any state-wide primary or state-wide election for which the candidate is qualified and the date of such primary or election, all contributions of $1,000 or more must be reported within 48 hours of receipt."[20] The purpose of this provision has been to ensure that large contributions made in the period shortly before an election, and that otherwise would not be reported until after the election, are disclosed quickly.

It has not been clear from the existing language in the Act whether a candidate who has qualified to run for an office that is not elected statewide must file 48-hour reports if there are other elections on the same ballot which will be conducted on a statewide basis. In an attempt to resolve this issue, the Commission issued an advisory opinion that held that any candidate on the ballot in an election being conducted statewide must file the 48-hour reports, regardless of whether that candidate is running for an office that is elected on a statewide basis.[21] The Commission based its conclusion in part on "the massive loss of disclosure which would be occasioned by a more restrictive application of the 48-hour report requirements."[22]

In order to review any ambiguity on the issue, the new law removes the phrase "state-wide primary or state-wide" from the text.[23] The effect of this change is to broaden this disclosure obligation even beyond that suggested by the Commission's advisory opinion. These reports must now be filed by all candidates who qualify for any election, whether or not the election is being conducted on a statewide basis.

The second change made to the law in this area is that the 48-hour reporting requirement has been changed to a "two business days" reporting requirement. In other words, large contributions received shortly before an election must be reported within two business days, as opposed to within 48 hours.[24]

Required Filings by Contributors

The third significant change the new law makes to CCDR disclosures is that it eases the largely duplicative reporting requirements on businesses and individuals who make campaign contributions in Georgia. Under the prior law, businesses that contributed more than $5,000 in a calendar year and that made contributions to more than one candidate were required to register with the secretary of state

and also file disclosure reports.[25] The same requirement has applied to individuals who contributed more than $25,000 to more than one candidate in a calendar year. Disclosure reports filed by contributors have also been required to be filed at the same time and in the same locations as the reports filed by the candidates who received the contributions.

As a practical matter, many of the contributions from individual and corporate contributors are given to candidates for the General Assembly. Those candidates have been required to file their disclosure reports both with the secretary of state and also with the election superintendents in their home counties. Because contributors who give to these candidates in excess of the relevant thresholds must file disclosure reports at the same times and in the same locations as the candidates, these contributors have also been required to file reports with county election superintendents. In the past two years, the Commission has imposed significant fines on a number of corporate contributors that have not filed the required reports.

The new law reduces the reporting obligations of these contributors. First, businesses that make contributions are now required to register and file disclosure reports only if they contribute more than $25,000 to candidates in a calendar year.[26] The increase from $5,000 to $25,000 in the reporting threshold will eliminate the separate reporting requirements for many businesses. Second, corporate and other contributors are no longer required to file disclosure reports with county or municipal election superintendents when making contributions to candidates for the General Assembly.[27]

There are those who may argue that these changes reduce the level of disclosure of campaign contributions. Because of the advent of electronic filing of disclosure reports, however, any such statement would be incorrect. All contributions made to candidates, parties or political action committees by corporate or other contributors will still appear on the disclosure reports filed by those entities. As such, these changes to the law will not reduce the level of disclosure of corporate and other business contributions to candidates in Georgia.

Election Designations

The Act has long provided that "[c]andidates and campaign committees shall designate on their disclosure reports the election for which a contribution has been accepted."[28] This language appears to confirm that it is up to the candidate, rather than the contributor, to designate the election for which a given campaign contribution has been accepted. In other words, the candidate has the right to choose whether to designate the contribution to the contributor's limits for the primary or the general election.

The issue is important because candidates have an interest in designating contributions in a manner that will allow them to accept the maximum legal contributions from any one contributor.

In spite of the fact that the law has appeared to give candidates and their campaigns the right to designate the election for which contributions are accepted, the Commission has at times suggested that the controlling factor on such issues is the intent of the contributor. The revised version of the Act now states that:

"A candidate who accepts contributions for more than one election at a time may allocate contributions received from a single contributor to any election in the election cycle, provided that the contributions shall not violate maximum allowable contribution limits for any election; provided, however, that in order to allocate contributions to a past election, the candidate shall have outstanding campaign debt from the previous election."[29]

The revised statute confirms that the election designation decision is one made by the candidate.

Filing of Disclosure Reports–Procedural Changes

In addition, the new law makes a number of significant changes in (a) the procedures used to file disclosure reports and other campaign filings; (b) the handling of complaints by the Commission; and (c) the maintenance of campaign financial records.

Filings

The new law changes the manner in which most disclosure reports and campaign registration materials are filed, as well as the location where such reports are filed.[30]

Campaign Registration Materials. Before accepting campaign contributions, candidates must file (i) a notice of intent to accept campaign contributions and (ii) a campaign committee registration form. Previously, those forms were filed with the secretary of state. Under the new law, those forms will be filed with the Commission.[31]

Campaign Contribution Disclosure Reports and Personal Financial Disclosure Statement. Under the previous law, candidates for statewide office and the General Assembly filed their CCDRs and personal financial disclosure statements with the secretary of state. Going forward, those reports will be filed with the Commission.[32]

In addition, the manner in which these forms will be filed has been revised. Under the previous law, candidates filed both electronic and hard copies of their CCDRs with the secretary of state. Beginning with the March 31, 2006, report, candidates will file with the Commission (a) an electronic report, and (b) a notarized affidavit confirming that the electronic filing

is correct.[33] No hard copy of the report will be filed.[34] The electronic report must be filed by midnight on the day of the deadline; the notarized affidavit must be mailed and postmarked by the date of the deadline. For members of the General Assembly, a copy of the report must still be filed with the county election superintendent in the county of residence.

Similarly, going forward candidates will not file a hard copy of their personal financial disclosure statements. Such reports will be filed electronically with the Commission.[35] In addition, the candidate or public official will be required to file a notarized affidavit confirming that the electronic filing is correct.[36] No hard copy of the report will be filed.

Under the new law, the Commission is required to maintain copies of CCDRs, make them available for public inspection and copying; and prepare regular reports listing candidates who have not filed reports in a timely manner.[37] The Commission is also now required to ensure that personal financial disclosure reports are in compliance with the law.[38] It is also required to prepare a report, within 10 days after the date financial disclosure statements are due, listing all candidates and public officers who have not filed the required financial disclosure statements.[39] These functions were previously performed by the secretary of state.

Option to Choose Separate Accounting. The Act permits candidates to account separately for contributions for different elections or, in other words, to accept contributions before a primary election for both the upcoming primary and general elections. The method by which one chooses to implement separate accounting is to file a "Choosing Option of Separate Accounting" form with the secretary of state.[40] It has long been unclear whether a separate such form must be filed for each election cycle. In order to address this ambiguity, the Act has been revised to clarify that "a candidate shall only be required to file one such form which shall be utilized for all subsequent elections to the same elective office."[41]

Processing and Resolution of Complaints

The revised law also contains a number of important provisions concerning the processing and resolution of complaints that are filed with the Commission. Such complaints may be filed against candidates or public officials by any private citizen or by the Commission itself.

Statute of Limitations. First, the Legislature has added an express statute of limitations to the Act.[42] Candidates may be held accountable for violations that occurred in their most recent previous election, but candidates cannot now be forced to account for errors that occurred outside the limitations period. This provision inserts a significant element of fairness into the Act, because it will prevent candidates and public officials from being forced to defend untimely and stale allegations related to reports filed many years earlier.

Technical Defects. The new law also has a revised provision that addresses complaints alleging that a disclosure report contains "technical defects," or, in other words, relatively minor infractions.[43] This new provision makes a number of changes to the law.

First, the definition of "technical defects" has been expanded to include "accounting errors."[44] It remains to be seen how the Commission will interpret this phrase, which is not defined in the Act. For example, it is not clear whether a failure to report the proper amount for a contribution or expenditure will be deemed an "accounting error." Similarly, it is not clear if an error on the summary pages is an "accounting error."

Second, the time period in which candidates may amend disclosure reports to correct technical defects without facing a penalty or fine has been expanded from 10 days to 30 days.[45]

Third, the new law provides that "[w]hen the commission determines in its discretion that best efforts have been made to complete a required filing, said filing shall be considered in compliance with this Code section and any complaint relative to said filing shall be dismissed."[46] The phrase "best efforts" is not defined in the Act. It remains to be seen how the Commission will interpret this phrase. The phrase has a defined meaning under federal law,[47] and it may be that the Commission will turn to federal law for guidance in interpreting the phrase in the Act.

Fourth, as was the case with the provision imposing new, higher penalties for violations of the Act, the new technical defects provision states that the "same error or inaccurate entry" shall be considered a single violation if it appears multiple times on one report or causes further errors on subsequent reports. This provision does not say that the same "type" of error is one violation. As such, an uncorrected failure to disclose address information for two separate contributors should be two separate violations, each subject to a maximum $50 fine.[48]

Availability of Information

The new law also imposes requirements on the Commission to disclose information concerning Commission rulings and advisory opinions.

Advisory Opinions

The new statute requires the Commission to issue a written advisory opinion within 60 days of its receipt of a request for the opinion.[49] The imposition of the 60-day deadline will help candidates obtain timely guidance to issues arising under the Act. In addition, the requirement that the advisory opinion be in writing will help ensure consistency in interpretation and application of the Act.

The same statute also now requires that all advisory opinions be posted on the Commission's website.[50] The posting of all previous and future advisory opinions should help ensure that candidates and public officials receive consistent information concerning the law's requirements, which will help enable them to comply with their obligations under the Act. In addition, the same law also now contains a safe harbor provision which confirms that no liability may be imposed for a violation if a respondent has acted in conformity with a written advisory opinion from the Commission.[51]

Commission Orders

As was the case with advisory opinions, the new law mandates that the Commission post all future orders from contested cases on its website.[52] With respect to orders issued prior to Jan. 9, 2006, the new statute requires that only "advisory orders" be posted on the Commission's website. The phrase "advisory orders" is not defined, and is not immediately clear how the Commission will distinguish between an "order" and an "advisory order." Presumably, the addition of the "advisory" qualifier was intended to limit the number of previously-entered orders that must be posted by the Commission. A reasonable interpretation of this phrase is that the Commission need not post all previous orders on its website, but only those that provide guidance concerning the Commission's positions on an issue. The statute appears to leave to the Commission the discretion to determine what is and is not an "advisory" opinion. It remains to be seen what orders will and will not be posted.

Commission Reports

The new Act also imposes a number of additional reporting obligations on the Commission. On a quarterly basis, the Commission must prepare, update, publish and post on its website a report listing the name of each filer who has not filed the most recent CCDR or financial disclosure statement.[53] The commission must also now publish overall lobbyist spending by category, including gifts, meals, entertainment, office supplies, lodging, equipment, advertising, travel, and postage.[54]

Conclusion

These changes represent the most comprehensive strengthening of Georgia's ethics laws since the Ethics in Government Act was first adopted. The rules governing contributions from affiliated business entities have been tightened. A "Millionaire's Amendment" has been adopted to level the playing field for candidates for office. The mechanics of filing disclosure reports have been streamlined for the Internet age, thereby easing unnecessary administrative burdens on candidates, public officials and contributors. A statute of limitations has been adopted, thereby inserting an important measure of fairness in the Act's enforcement scheme.

Significant new requirements have been imposed on the Ethics Commission to disclose information concerning advisory opinions and orders related to the Act. Finally, the Commission is also now required to prepare and post regular reports concerning compliance with the Act, which should enhance compliance with and enforcement of the Act.

J. Randolph Evans is a member of the State Elections Board and a partner at the law firm of McKenna, Long & Aldridge LLP.

Douglas Chalmers Jr. is of counsel at the law firm of McKenna, Long & Aldridge LLP. He advises clients on government ethics, campaign finance and election law.

Endnotes

1. O.C.G.A. § 21-5-1 *et seq.* (2005).
2. *Georgia's New Ethics Laws: A Summary of the Changes Relevant to Lobbyists and Legislators*, GA. BAR J. (Dec. 2005).
3. O.C.G.A. § 21-5-40(2).
4. *Id.* § 21-5-42(a) (emphasis added) (repealed in 2000).
5. *Id.* § 21-5-40(2).
6. Ga. State Ethics Comm'n Rule 189-6-.03.
7. *See, e.g.*, Trans. Ins. Co. v. El Chico Restaurants, Inc., 524 S.E.2d 486, 488 (Ga. 1999) ("The rules of statutory interpretation demand that we attach significance to the Legislature's action in removing the emphasized, limiting language. . . . We must presume that the Legislature's failure to include the limiting language was a matter of considered choice.") (citations omitted); North Fulton Med. Ctr. v. Stephenson, 501 S.E.2d 798, 801 (Ga. 1998) ("It is well established that administrative agencies . . . are not authorized to enlarge the scope of, or supply omissions in, a properly-enacted statute."); Dept. of Human Resources v. Siggers, 463 S.E.2d 544, 546 (Ga. App. 1995) ("[A]n administrative rule which exceeds the scope of or is inconsistent with the authority of the statute upon which it is predicated is invalid.").
8. O.C.G.A. § 21-5-41(c)
9. *Id.* § 21-5-40(2).
10. *Id.* § 21-5-3(1).
11. *Id.* § 21-5-40(1).
12. Ga. State Ethics Comm'n Rule 189-6-.04.
13. Op. Att'y Gen. 95-42 (Oct. 26, 1995).
14. O.C.G.A. § 21-5-3(17).
15. *Id.* § 21-5-3(18).
16. *Id.* § 21-5-33(b)(1)(A) (stating that candidates may make such contributions only from funds that are "in excess of those necessary to defray [ordinary and necessary] expenses").
17. O.C.G.A. § 21-5-41(h).
18. *Id.* § 21-5-34(b)(1)(A), -34(b)(1)(B).
19. *Id.* § 21-5-34(b)(1)(B).
20. *Id.* § 21-5-34(c)(2)(C).
21. Ga. State Ethics Comm'n Advisory Opinion 02-33 (June 14, 2002), available at http://ethics.georgia.gov/00/article/0,2086,26886019_50896963_27360920,00.html.
22. *Id.*
23. The statute now requires the filing of these reports "[d]uring the period of time between the last report due prior to the date of any election for which the candidate is qualified and the date of such election." O.C.G.A. § 21-5-34(c)(2).
24. *Id.* § 21-5-34(c)(2).
25. *Id.* § 21-5-34(e).
26. Importantly, the Commission has taken the position that contributions to political parties and to political action committees are ultimately contributions designed to benefit "candidates," so such contributions must be included when calculating the relevant threshold (*i.e.*, $5,000 until Jan. 9, 2006, and $25,000 thereafter).
27. O.C.G.A. § 21-5-34(e).
28. *Id.* § 21-5-41(d).
29. *Id.* § 21-5-43(a)(3).
30. This article focuses on the filing requirements applicable to statewide candidates and candidates for the General Assembly, and the discussion of the filing requirements herein is directed at the requirements applicable to those candidates. Candidates for county and municipal offices file their disclosure reports in different locations. Such candidates should closely consult the revised Act with respect to these issues.
31. O.C.G.A. § 21-5-30(b), -30(g).
32. *Id.* § 21-5-34(a)(1)(A) (campaign contribution disclosure reports); *Id.* § 21-5-50(a)(1) (personal financial disclosure statements).
33. *Id.* § 21-5-34.1(e).
34. *Id.* § 21-5-34.1(f).
35. *Id.* § 21-5-50(d).
36. *Id.* § 21-5-50(e).
37. *Id.* § 21-5-36.
38. *Id.* § 21-5-50(a)(4).
39. *Id.* § 21-5-53.
40. Ga. State Ethics Comm'n Rule 189-5-.02.
41. O.C.G.A. § 21-5-43(a)(2).
42. *Id.* § 21-5-13.
43. *Id.* § 21-5-7.1.
44. *Id.* § 21-5-7.1(1).
45. *Id.* § 21-5-7.1(2).
46. *Id.* § 21-5-7.1(4).
47. *See* 11 C.F.R. § 104.7 (2005).
48. O.C.G.A. § 21-5-7.1(2).
49. *Id.* § 21-5-6(b)(13).
50. *Id.*
51. *Id.*
52. O.C.G.A. § 21-5-6(b)(14).
53. *Id.* § 21-5-6(b)(19).
54. *Id.* § 21-5-6(b)(20).