

**Maryland General Assembly
Department of Legislative Services**

**Reproposed Regulations
Board of Elections
(DLS Control No. 16-015)**

Overview and Legal and Fiscal Impact

The regulations alter the requirements regarding the disclosure of contributions and donations by persons doing public business.

The regulations present no legal issues of concern. However, additional comments have been included in the *Technical Corrections and Special Notes* section below for the consideration of the Joint Committee on Administrative, Executive, and Legislative Review.

There is no fiscal impact on State or local agencies.

Regulations of COMAR Affected

Board of Elections:

Disclosure by Persons doing Public Business: Definitions: COMAR 33.20.01.01
Statement of Contributions Requirements: COMAR 33.20.02.02, .03
Affidavit of Limited Applicable Contribution: COMAR 33.20.04.02
Contributions: COMAR 33.20.06.01, .02
Waivers: COMAR 33.20.07.02
Penalties: COMAR 33.20.08.01
Retention: COMAR 33.20.09.01

Legal Analysis

Background

Title 14 of the Election Law Article requires businesses holding contracts with the State or local governments to file semi-annual statements disclosing campaign contributions of \$500 or more made by the business and certain individuals affiliated with the business. Reporting requirements apply to businesses that have a single contract of \$200,000 or more with a governmental entity. Chapter 454 of 2015 made several technical and administrative changes to Title 14. These changes include (1) requiring businesses to disclose independent expenditures; (2) allowing a business that did not make contributions of \$500 or more during a reporting period to file a simplified statement; and (3) exempting a person who receives approval of the State Board of Elections from being required to file an initial statement under certain circumstances.

Summary of Regulations

The regulations alter the requirements regarding the disclosure of contributions and donations by persons doing public business.

Definitions

COMAR 33.20.01.01 alters the definition of “award” as it applies to disclosures by persons doing public business to specify that it means the written notification by a governmental entity announcing that the governmental entity intends to enter into a contract for a procurement.

Statement of Contribution Requirements

COMAR 33.20.02.02 alters the time from 1 business day to 15 business days within which a registration statement must be filed with the State board after the award of a contract by a governmental entity. The regulation requires that a registration statement include the base amount of the consideration to be received by the person doing public business from the governmental entity for the contract. Additionally, the regulation provides that a registration statement may omit (1) contract information if the State board has approved the person’s request to waive the requirement to disclose the contract; and (2) the base amount of the consideration to be received if the person doing public business files, for the entire period of performance of the contract, an affidavit of limited applicable contributions.

COMAR 33.20.02.03 clarifies that a statement of contributions must include the name of the candidate who benefited from the applicable contribution, as well as the name of the independent expenditure entity that received the applicable contribution. The regulation also clarifies that the information included in the statement must relate to applicable contributions, rather than any contributions. The regulation clarifies that the aggregate amount or value of applicable contributions made to or for the benefit of each candidate required to be reported is the aggregate amount to date. Finally, the regulation provides that certain information regarding the contract must be included unless it was already provided on the registration statement or is exempt from disclosure under COMAR 33.20.07.

Affidavit of Limited Applicable Contributions

COMAR 33.20.04.02 requires that an affidavit of limited applicable contributions include the name of the governmental entity with which the business entity does public business.

Contributions

COMAR 33.20.06 is added to govern contributions. Regulation .01 requires that any contribution or donation, regardless of the amount, that is made to a political committee or an independent expenditure entity by an officer, director, or partner of a business entity doing public business be attributed to the business entity for reporting purposes. Furthermore, any contribution or donation, regardless of the amount, that is made at the suggestion or direction of the business entity or an officer, director, or partner of the business entity by an employee, agent, or other

affiliated person of the business entity must be attributed to the business entity as well. Additionally, the regulation requires that any contribution or donation made by a subsidiary of the filer, or by an officer, a director, or a partner of a subsidiary, be attributed to the filer. Any contribution or donation made by an employee, agent, or other affiliated person of a subsidiary, regardless of the amount, is attributed to the filer if made at the suggestion of the filer, a subsidiary of the filer, or the officer, director, or partner of a subsidiary. The regulation also specifies that contributions made by a newly acquired, merged, or newly owned or controlled business entity will not be attributed to the filer if the contributions were made prior to the acquisition or merger of the two business entities. However, any contributions made during the reporting period by the acquired, merged, or newly owned or controlled business entity will be attributed to and reported by the filer. For the purposes of determining whether a contribution or donation is made at the suggestion or direction of a director, partner, or officer of a business entity, the regulation provides that an act or communication by the director, partner, or officer to an employee, agent, or other affiliated person of the business entity that a reasonable person would understand to be a solicitation or request for the contribution or donation will be considered a suggestion. The regulation also provides that an officer, director, or partner of a business entity doing public business who initiates or forwards to an employee, agent, or other affiliated person of the business entity, an email solicitation or similar request for a contribution or donation is considered to have made a suggestion for a contribution or donation and requires that any contribution or donation that results from the suggestion be reported by the filer. Finally, the regulation provides that acts or communications by officers, directors, or partners of a business entity that endorse a candidate, display public support for a candidacy, or express public support through social media are not, by themselves, suggestions for contributions or donations that are attributable to the business entity.

Regulation .02 requires the chief executive officer, or a designee of the chief executive officer, of a business entity doing public business to notify persons covered under the chapter that contributions and donations made from the persons must be reported to the chief executive officer or the designated individual no later than 5 business days after the last day of the reporting period. A business entity that requires covered persons to preclear their contributions through a legal or compliance department is deemed to satisfy the notice requirement if the preclearance policy is in writing and annually reviewed by the covered employees. The regulation requires the covered persons to report to the chief executive officer, or the designated individual, any contributions and donations made during the reporting period. The chief executive officer, or the designated individual, is not required to notify officers, directors, partners, or employees of a subsidiary that does not itself do public business if the business entity has a well-publicized policy prohibiting the individuals from making contributions or donations for State elections. The policy must be in writing and annually reviewed by the covered employees. Also, the business entity must provide the State board with a copy of the policy, the subsidiaries to which the policy applies, a description of how the policy is delivered to the covered employees, and a statement that the business entity is not aware of any violations of the policy. Finally, the regulation requires that the policy be submitted to the State board annually, no later than the due date for the first semi-annual statement of contributions filing of that year by the person doing public business.

Waivers

COMAR 33.30.07.02 provides that a person doing public business is not required to file an initial statement of contributions if the person has previously filed statements of contributions covering the transaction period of the initial statement for that level of government. The person must update the registration statement with any new contracts within 30 business days of the date of the award for that contract.

Penalties

COMAR 33.20.08.01 provides that an officer or partner of a business entity doing public business who knowingly and willfully fails to retain records of contracts that cause the business entity to be doing public business and applicable contribution made by or attributed to the business entity is subject to a fine not exceeding \$1,000 or imprisonment not exceeding one year or both.

Retention

COMAR 33.20.09.01 requires the person doing public business who has filed a registration statement to maintain detailed and accurate records of (1) all contracts awarded by governmental entities to the person or attributed to the person that caused the person to be doing public business; (2) applicable contributions made by or attributed to the person, including related notifications and policy documents; and (3) all statements of contributions filed by the person. The regulation requires that the records be retained until the earlier of 10 years after the creation of the record or 4 years after performance is completed on the last contract that causes the person to be doing public business. The State board, at its discretion, may audit the records retained.

Legal Issues

The regulations present no legal issues of concern.

Statutory Authority and Legislative Intent

The State board cites §§ 2-102(b)(4), 14-104, 14-105, 14-107, and 14-109 of the Election Law Article as statutory authority for the regulations. Section 2-102(b)(4) requires the State board to adopt regulations to implement its powers and duties. Section 14-104 governs statements of contributions. Section 14-105 governs attributable contributions. Section 14-107 establishes penalties for violations of the provisions of law governing disclosures by persons doing public business. Finally, § 14-109 authorizes the State Board to adopt regulations to implement the provisions of law governing disclosures by persons doing public business.

This authority is correct and complete. The regulations comply with the legislative intent of the law.

Technical Corrections and Special Notes

The Department of Legislative Services contacted the State board regarding several issues with the regulations that the State board will be correcting before the regulations are published or in future regulations. First, the Statement of Purpose does not include a description of or does not

accurately describe several changes made by the regulations. The State board will be correcting this before publication. Second, the legal authority stated before the Notice of Proposed Action does not include § 14-105 of the Election Law Article; however, the section is included in the authority stated in the applicable parts of the regulations themselves. The State board will be correcting this before publication. Third, § 14-105 of the Election Law Article provides that, except under certain circumstances, applicable contributions made by individuals who serve as trustees or members of the board of directors or as officers of a not-for-profit organization doing public business are not attributable to the organization and the individuals are not required to report the contributions to the chief executive officer of the organization. This provision is not reflected in the regulations; however, the exemption would apply notwithstanding. The State board stated that this was an oversight and will be addressed in the next round of regulations the State Board submits. Finally, the regulations provide that an officer or partner of a business entity doing public business who knowingly and willfully fails to retain records of contracts that cause the business entity to be doing public business and applicable contribution made by the business entity or attributed to the business entity may be subject to a fine not exceeding \$1,000 or imprisonment not exceeding one year or both. However, the applicable statutory provision provides that the officer or partner is subject to the fine or imprisonment or both. The State board will correct this before publication, and the change is reflected in this analysis.

The department also raised a possible issue with the State board regarding the attribution of applicable contributions made by subsidiaries of business entities to the business entities. The regulations attribute all applicable contributions of all subsidiaries to the business entity, whether or not the subsidiary itself is doing public business. Section 14-105(e)(1) of the Election Law Article provides that business done with a governmental entity by a subsidiary of a business entity must be attributed to the business entity if 30% or more of the equity of the subsidiary is owned or controlled by the business entity. Section 14-105(e)(2) of the Election Law Article further requires that applicable contributions made by or attributed to “a subsidiary described in paragraph (1) of this subsection” must be attributed to the business entity. It is somewhat unclear whether the reference to “a subsidiary described in paragraph (1)” refers to a subsidiary of which 30% or more of the equity is owned or controlled by the business, a subsidiary that does business with a governmental entity, or a subsidiary of which 30% or more of the equity is owned or controlled by the business entity and that also does business with a governmental entity. When asked about this issue, the State board stated that the Office of the Attorney General has historically interpreted the provision to require that all contributions of a subsidiary of which 30% or more of the equity is owned or controlled by a business entity be attributed to the business entity, whether or not the subsidiary itself is doing business with a governmental entity.

Due to the various plausible readings of the current provision, the department considered the legislative history of the provision. Former Article 33, § 30-3(d) contained two provisions. The first provision required that business done with the State (or a political subdivision) by a subsidiary business entity be attributed to the parent and be included in the statement filed by the parent. The second provision required that contributions made by, caused to be made by, or attributed to a subsidiary be attributed to the parent and included in the statement filed by the parent. This provision does not reference a subsidiary who does business with the State (or a political subdivision), rather just “a subsidiary.” Former Article 33, § 30-1(i) defined “subsidiary” as a firm or corporation of which a parent firm or corporation owns or controls 30% or more of

the equity. In light of the definition, the second provision in former Article 33, § 30-3(d) applied to all subsidiaries of which a business entity owns or controls 30% or more of the equity, not only those doing public business with the State (or a political subdivision).

Since the current statutory language was derived without substantive change from the Article 33 provision through a nonsubstantive code revision bill, and in light of the historical interpretation of the provision by the Office of the Attorney General, the department determined that the proper reading of the current provision requires that applicable contributions of all subsidiaries of which a business entity owns or controls 30% of the equity, not just subsidiaries that do public business themselves, must be attributed to the business entity. This interpretation is further supported by § 14-108 of the Election Law Article which requires that the provisions of law governing disclosures by public business be liberally construed to require full disclosure.

During its 2016 regular session, the General Assembly passed House Bill 112 which addresses any ambiguity in the current provision. The bill repeals the reference to “if 30% or more of the equity of the subsidiary is owned or controlled by the business entity” in § 14-105(e)(1) of the Election Law Article and, instead, defines “subsidiary” as a business entity that is 30% or more owned or controlled by another business entity. The bill also excludes from the definition subsidiaries of bank holding companies. Furthermore, the bill repeals the reference to “described in paragraph (1) of this subsection” in § 14-105(e)(2) of the Election Law Article. These changes would make it clear that all applicable contributions made by or attributed to a subsidiary, with the exception of a subsidiary of a bank holding company, are attributable to the business entity. The State board advises that the regulations will be amended to exclude subsidiaries of bank holding companies if the bill is signed into law.

Fiscal Analysis

There is no fiscal impact on State or local agencies.

Agency Estimate of Projected Fiscal Impact

The State Board of Elections advises that the regulations have no impact on State or local governments. The Department of Legislative Services concurs. The regulations in part implement Chapter 454 of 2015. The fiscal and policy note for House Bill 769 of 2015 (enacted as Chapter 454) indicated that the bill’s changes could be implemented with existing resources, and these regulations should not have any independent fiscal impact.

Impact on Budget

There is no impact on the State operating or capital budget.

Agency Estimate of Projected Small Business Impact

The State Board of Elections advises that the regulations have minimal or no economic impact on small businesses in the State. The Department of Legislative Services concurs.

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