

WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

Committee Substitute

for

House Bill 4747

BY DELEGATES HOWELL AND C. MARTIN

(BY REQUEST OF THE SECRETARY OF STATE)

[Originating in the Committee on Government

Organization; February 14, 2020.]

1 A BILL to amend and reenact §29-19-2, §29-19-5, §29-19-6, and §29-19-9 of the Code of West
2 Virginia, 1931, as amended; to amend and reenact §39-4A-2 of said code; and to amend
3 and reenact §47-2-1 and §47-2-3, all relating generally to extending current laws allowing
4 electronic submission of applications and forms to the Secretary of State's Office relating
5 to licensure or regulation charities, nonprofit organizations, out-of-state commissioners,
6 and trademarks; providing new definitions for the term "sign" and "signature" relating to
7 applications or forms in the foregoing regulated industries; providing for more efficient
8 application processes in the foregoing regulated industries; and technical typographical
9 changes to distinguish the Secretary of State from an entity's secretary or administrative
10 assistant.

Be it enacted by the Legislature of West Virginia:

CHAPTER 29. MISCELLANEOUS BOARDS AND OFFICERS.

ARTICLE 19. SOLICITATION OF CHARITABLE FUNDS ACT.

§29-19-2. Definitions.

1 As used in this article:

2 (1) "Audit" means the systematic examination of records and documents and the securing
3 of other evidence by confirmation, physical inspection, or otherwise, that includes a written
4 assurance that financial statements and reports are fairly presented in conformity with generally
5 accepted accounting principles issued by the American Institute of Certified Public Accountants.

6 (2) "Charitable organization" means a person who is or holds itself out to be a benevolent,
7 educational, philanthropic, humane, patriotic, religious or eleemosynary organization, or any
8 person who solicits or obtains contributions solicited from the public for charitable purposes, or
9 any person who in any manner employs any appeal for contributions which may be reasonably
10 interpreted to suggest that any part of those contributions will be used for charitable purposes. A
11 chapter, branch, area, office or similar affiliate or any person soliciting contributions within the

12 state for a charitable organization which has its principal place of business outside the state is a
13 charitable organization for the purposes of this article.

14 (3) "Contribution" means the promise or grant of any money or property of any kind or
15 value.

16 (4) "Financial review" means an examination of financial statements in accordance with
17 generally accepted accounting principles issued by the American Institute of Certified Public
18 Accountants, in which a certified public accountant has a reasonable basis for expressing limited
19 assurance that the reviewed statements are free of material misstatements or false or missing
20 information and are found to be accurate, complete and fairly presented to meet the requirements
21 of the generally accepted accounting principles.

22 (5) "Solicit" and "solicitation" means the request or appeal, directly or indirectly, for any
23 contribution on the plea or representation that the contribution will be used for a charitable
24 purpose, including, without limitation, the following methods of requesting a contribution:

25 (A) Any oral or written request;

26 (B) Any announcement to the press, over the radio or television, or by telephone,
27 electronic mail or messaging, electronic bulletin board, or Internet technology, concerning an
28 appeal or campaign to which the public is requested to make a contribution for any charitable
29 purpose connected therewith;

30 (C) The distribution, circulation, posting or publishing of any handbill, written
31 advertisement or other publication which directly or by implication seeks to obtain public support;
32 or

33 (D) The sale of, offer or attempt to sell, any advertisement, advertising space, subscription,
34 ticket or any service or tangible item in connection with which any appeal is made for any
35 charitable purpose or where the name of any charitable or civic organization is used or referred
36 to in an appeal as an inducement or reason for making the sale, or when or where in connection

37 with the sale, any statement is made that the whole, or any part of, the proceeds from the sale
38 will be donated to any charitable purpose.

39 "Solicitation", as defined herein, occurs when the request is made, at the place the request
40 is received, whether or not the person making the request actually receives any contribution.

41 (6) "Federated fund-raising organization" means a federation of independent charitable
42 organizations which have voluntarily joined together, including, but not limited to, a united fund or
43 community chest, for purposes of raising and distributing money for and among themselves and
44 where membership does not confer operating authority and control of the individual agencies
45 upon the federated group organization.

46 (7) "Parent organization" is that part of a charitable organization which coordinates,
47 supervises or exercises control over policy, fund raising and expenditures, or assists, receives
48 funds from or advises one or more chapters, branches or affiliates in the state.

49 (8) "Person" means any individual, organization, trust, foundation, group, association,
50 partnership, corporation, society or any combination of them.

51 (9) "Professional fund-raising counsel" means any person who for a flat fixed fee under a
52 written agreement plans, conducts, manages, carries on, advises or acts as a consultant, whether
53 directly or indirectly, in connection with soliciting contributions for, or on behalf of any charitable
54 organization but who actually solicits no contributions as a part of the services. A bona fide
55 salaried officer or employee of a charitable organization maintaining a permanent establishment
56 within the state is not a professional fund-raising counsel.

57 (10) "Professional solicitor" means any person who, for a financial or other consideration,
58 solicits contributions for, or on behalf of a charitable organization, whether the solicitation is
59 performed personally or through that person's agents, servants or employees specially employed
60 by, or for a charitable organization, who are engaged in the solicitation of contributions under the
61 direction of that person, or a person who plans, conducts, manages, carries on, advises or acts
62 as a consultant to a charitable organization in connection with the solicitation of contributions but

63 does not qualify as “professional fund-raising counsel” within the meaning of this article. A bona
64 fide salaried officer or employee of a charitable organization maintaining a permanent
65 establishment within the state is not a professional solicitor.

66 No attorney, investment counselor or banker, who advises any person to make a
67 contribution to a charitable organization, is considered, as the result of the advice, a professional
68 fund-raising counsel or a professional solicitor.

69 (11) “Sign” means the action of affixing a person’s signature to any document or record,
70 whether by manual, written, or approved electronic means.

71 (12) “Signature” means any mark, symbol, facsimile, or electronic mark or symbol, that
72 depicts a person’s name on any document or record, affixed to the document or record by the
73 person with the intent to authenticate, assert, certify, or agree to the matters, validity, information,
74 or attestation set forth in the document or record.

§29-19-5. Registration of charitable organizations; fee.

1 (a) Every charitable organization, except as provided in section six of this article, which
2 intends to solicit contributions, donations or grants within this state or to have funds solicited or
3 received on its behalf shall, prior to any solicitation, ~~file a registration statement~~ register with the
4 Secretary of State, in a manner or method authorized and upon forms prescribed by him or her
5 which shall be good for one full year and which shall be refiled in the next and each following year
6 in which the charitable organization is engaged in solicitation activities. If an organization
7 discontinues solicitation at any time after its last registration filing, then it shall file a registration
8 statement reflecting its activities during its last fiscal year in which solicitation in West Virginia took
9 place. The president, chairman, or principal officer of the charitable organization ~~sworn to~~ signed
10 by an authorized agent of the charitable organization shall file the statements required under this
11 article. The statements shall be sworn to and shall contain the following information:

12 (1) The name of the organization and the purpose for which it was organized;

13 (2) The principal address of the organization and the address of any offices in this state.
14 If the organization does not maintain an office, the name and address of the person having
15 custody of its financial records;

16 (3) The names and addresses of any chapters, branches or affiliates in this state;

17 (4) The place where and the date when the organization was legally established and the
18 form of its organization;

19 (5) The names and addresses of the officers, directors, trustees and the principal salaried
20 executive staff officer;

21 (6) A copy of a balance sheet and a statement or report of income and expenses for the
22 organization's immediately preceding fiscal year or a financial statement reporting information
23 showing the kind and amount of funds raised during the preceding fiscal year, the costs and
24 expenses incidental to the fundraising and showing how the funds were disbursed or allocated
25 for the same fiscal year: *Provided*, That in addition to the financial documents required by this
26 subdivision:

27 (A) Charitable organizations raising more than \$500,000 per year in contributions,
28 excluding grants from governmental agencies or private foundations, shall submit a report of an
29 audit by an independent certified public accountant; and

30 (B) Charitable organizations raising more than \$200,000 per year, but less than \$500,000
31 per year in contributions, excluding grants from governmental agencies or private foundations,
32 shall submit a statement of financial review by an independent certified public accountant;

33 (7) A copy of any determination of the organization's tax-exempt status under the
34 provisions of 26 U.S.C. §501(c)(3) and a copy of the last filed Internal Revenue Service Form 990
35 and Schedule A for every charitable organization and any parent organization;

36 (8) Whether the organization intends to solicit contributions, donations or grants from the
37 public directly or have other solicitation done on its behalf by others;

38 (9) Whether the organization is authorized by any other governmental authority to solicit
39 contributions, donations or grants and whether it is or has ever been enjoined by any court from
40 soliciting contributions;

41 (10) The general purpose or purposes for which the contributions to be solicited shall be
42 used;

43 (11) The name or names under which it intends to solicit contributions;

44 (12) The names of the individuals or officers of the organization who will have final
45 responsibility for the custody of the contributions;

46 (13) The names of the individuals or officers of the organization responsible for the final
47 distribution of the contributions;

48 (14) Copies of all contract documentation from professional fund-raising counsels and
49 professional solicitors as provided in subsection (d), section seven of this article; and

50 (15) The amount of money received in the state and the amount spent in the state for
51 charitable purposes.

52 (b) Each chapter, branch or affiliate, except an independent member agency of a
53 federated fundraising organization, may separately report the information required by this section
54 or report the information to its parent organization which shall then furnish the information
55 regarding its West Virginia affiliates, chapters and branches in a consolidated form to the
56 Secretary of State. An independent member agency of a federated fundraising organization, as
57 defined in section two of this article, shall comply with the provisions of this article independently.
58 Each organization shall file a separate registration form for each name under which funds will be
59 solicited.

60 (c) The registration forms and any other documents prescribed by the Secretary of State
61 shall be signed by an authorized agent, officer or by an independent public accountant and by the
62 chief fiscal officer of the charitable organization. ~~and shall be verified under oath~~

63 (d) Every charitable organization receiving less than \$1 million during any year which
64 submits an independent registration to the Secretary of State shall pay an annual registration fee
65 of \$15; every charitable organization collecting more than \$1 million during one year which
66 submits an independent registration to the Secretary of State shall pay an annual registration fee
67 of \$50; and a parent organization filing on behalf of one or more chapters, branches or affiliates
68 or a single organization filing under different names shall pay a single annual registration fee of
69 \$50 for itself and the chapters, branches or affiliates included in the registration statement. All
70 fees and moneys collected by the Secretary of State pursuant to the provisions of this article shall
71 be deposited by the Secretary of State as follows: One-half shall be deposited in the State General
72 Revenue Fund and one-half shall be deposited in the services fees and collections account
73 established by §59-1-2 of this code for the operation of the office of the Secretary of State. The
74 Secretary of State shall dedicate sufficient resources from that fund or other funds to provide the
75 services required in this article.

76 (e) For good cause shown, the Secretary of State may extend the due date for the annual
77 filing of a registration statement or report by a charitable organization or a professional fundraiser
78 for a period not to exceed 90 days. During that period, the previously filed registration statement
79 or report of the charitable organization which has been granted the extension remains in effect.

80 (f) In addition to the registration fee required by this section, a charitable organization or
81 professional fundraiser, or both, which fails to file a registration statement or report by the original
82 or extended due date for filing as required by this section shall, for each month or part of the
83 month thereafter in which the registration statement or report is not filed, pay an additional fee of
84 \$25: *Provided*, That the total amount of the additional fees for a registration statement or report
85 required to be filed in any one year may not exceed \$500. All fees and moneys collected by the
86 Secretary of State pursuant to the provisions of this article shall be deposited by the Secretary of
87 State as follows: One-half shall be deposited in the State General Revenue Fund and one-half
88 shall be deposited in the service fees and collections account established by §59-1-2 of this code

89 for the operation of the office of the Secretary of State. The Secretary of State shall dedicate
90 sufficient resources from that fund or other funds to provide the services required in this article.

§29-19-6. Certain persons and organizations exempt from registration.

1 The following charitable organizations are not required to file an annual registration
2 statement with the Secretary of State:

3 (1) Educational institutions, the curriculums of which, in whole or in part, are registered or
4 approved by the State Board of Education, either directly or by acceptance of accreditation by an
5 accrediting body recognized by the State Board of Education; and any auxiliary associations,
6 foundations and support groups which are directly responsible to the educational institutions;

7 (2) Persons requesting contributions for the relief of any individual specified by name at
8 the time of the solicitation when all of the contributions collected without any deductions
9 whatsoever are turned over to the named beneficiary for his or her use;

10 (3) Hospitals and licensed nursing homes which are nonprofit and charitable;

11 (4) Organizations which solicit only within the membership of the organization by the
12 members thereof: *Provided*, That the term "membership" does not include those persons who are
13 granted a membership upon making a contribution as the result of solicitation. For the purpose of
14 this section, "member" means a person having membership in a nonprofit corporation, or other
15 organization, in accordance with the provisions of its articles of incorporation, bylaws or other
16 instruments creating its form and organization; and having bona fide rights and privileges in the
17 organization, including the right to vote, to elect officers, directors and issues, to hold office or
18 otherwise as ordinarily conferred on members of the organizations;

19 (5) Churches, synagogues, associations or conventions of churches, religious orders or
20 religious organizations that are an integral part of a church which qualifies as tax exempt under
21 the provisions of 26 U.S.C. §501(c)(3) and which qualifies as being exempt from filing an annual
22 return under the provisions of 26 U.S.C. §6033;

23 (6) Any person, firm, corporation or organization that sponsors a single fundraising event
24 for the benefit of a named charitable organization where all or part of the funds collected are
25 donated to the named charitable organization: *Provided*, That the named charitable organization
26 receiving the funds is registered pursuant to this article, reports each of these donations
27 individually and certifies that no funds were withheld by the organization that solicited the funds;

28 (7) Any charitable organization that does not employ a professional solicitor or fundraiser
29 and does not intend to solicit and receive and does not actually raise or receive contributions,
30 donations or grants from the public in excess of ~~\$25,000~~ \$50,000 during a calendar year.

31 Charitable organizations which do not intend to solicit and receive contributions, donations
32 or grants in excess of ~~\$25,000~~ \$50,000, but do receive in excess of that amount from the public,
33 shall file the annual registration statement within 30 days after contributions are in excess of
34 ~~\$25,000~~ \$50,000.

**§29-19-9. Registration of professional fundraising counsel and professional solicitor;
bonds; records; books.**

1 (a) No person may act as a professional fundraising counsel or professional solicitor for a
2 charitable organization subject to the provisions of this article unless he or she has first registered
3 with the Secretary of State. ~~Applications for the~~ The registration application shall be submitted in
4 ~~writing under oath or affirmation in the form prescribed~~ a manner or method authorized by the
5 Secretary of State and contain the information he or she requires. The ~~application for~~ registration
6 application by professional fundraising counsel or professional solicitor shall be accompanied by
7 an annual fee in the sum of \$100. A partnership or corporation, which is a professional fundraising
8 counsel or professional solicitor, may register for and pay a single fee on behalf of all its members,
9 officers, agents and employees. However, the names and addresses of all officers, agents and
10 employees of professional fundraising counsel and all professional solicitors, their officers,
11 agents, servants or employees employed to work under the direction of a professional solicitor

12 shall be listed in the application. All fees and moneys collected by the Secretary of State pursuant
13 to the provisions of this article shall be deposited by the Secretary of State as follows: One-half
14 shall be deposited in the state General Revenue Fund and one-half shall be deposited in the
15 service fees and collections account established by §59-1-2 of this code for the operation of the
16 office of the Secretary of State. The Secretary of State shall dedicate sufficient resources from
17 that fund or other funds to provide the services required in this article.

18 (b) The applicant shall, at the time of the making of an application, file with and have
19 approved by the Secretary of State a bond in which the applicant shall be the principal obligor in
20 the sum of \$10,000 and which shall have one or more sureties satisfactory to the Secretary of
21 State whose liability in the aggregate as such sureties will at least equal the said sum and maintain
22 the bond in effect so long as a registration is in effect. The bond shall run to the state for the use
23 of the Secretary of State and any person who may have a cause of action against the obligor of
24 the bonds for any losses resulting from malfeasance, nonfeasance or misfeasance in the conduct
25 of solicitation activities. A partnership or corporation which is a professional fundraising counsel
26 or professional solicitor may file a consolidated bond on behalf of all its members, officers and
27 employees.

28 (c) Each registration is valid throughout the state for a period of one year and may be
29 renewed for additional one-year periods upon ~~written~~ application submitted to the Secretary of
30 State in a manner or method authorized and under oath in the form prescribed by the Secretary
31 of State and the payment of the fee prescribed in this section.

32 (d) The Secretary of State or his or her designee shall examine each application and if he
33 or she finds it to be in conformity with the requirements of this article and all relevant rules and
34 the registrant has complied with the requirements of this article and all relevant rules, he or she
35 shall approve the registration.

CHAPTER 39. RECORDS AND PAPERS.

ARTICLE 4A. OUT-OF-STATE COMMISSIONERS.

§39-4A-2. Powers of commissioners; official seals.

1 (a) Upon approval of a successful application, commissioners shall hold office for 10
2 years, unless removed by the Secretary of State under the grounds set forth in §39-4A-1(e) of
3 this code.

4 (b) When any oath may lawfully be administered, or affidavit or deposition taken, within
5 the state, territory or district for which any such commissioner is appointed, to be used in this
6 state, it may be done by the commissioner.

7 (c) Each commissioner shall have an official seal, which shall be a rubber stamp and shall
8 contain:

9 (1) The words "Official Seal";

10 (2) The words "Commissioner for West Virginia";

11 (3) The commissioner's name exactly as it is written as an official signature;

12 (4) The city and state of residence of the commissioner; and

13 (5) The words "My Commission Expires" and the date of expiration of the commission.

14 ~~(d) A stamped imprint of the seal, together with the official signature, shall be filed in the~~
15 ~~office of the Secretary of State~~

16 ~~(e)~~ (d) Commissioners may take, within or any place out of the State of West Virginia, the
17 acknowledgements of deeds and other writings to be admitted to the record in the State of West
18 Virginia, but each acknowledgement shall reflect where the acknowledgement was taken,
19 including, but not limited to, the state and county or territory.

20 ~~(f)~~ (e) Every certificate of the commissioner shall be authenticated by his or her signature
21 and official seal.

CHAPTER 47. REGULATION OF TRADE.

ARTICLE 2. TRADEMARKS IN GENERAL.

§47-2-1. Definitions.

1 As used in this article:

2 (1) The term “trademark” means any word, name, symbol or device or any combination
3 thereof used by a person to identify and distinguish the goods of such person, including a unique
4 product, from those manufactured and sold by others, and to indicate the source of the goods,
5 even if that source is unknown.

6 (2) The term “service mark” means any word, name, symbol or device or any combination
7 thereof used by a person to identify and distinguish the services of one person, including a unique
8 service, from the services of others, and to indicate the source of the services, even if that source
9 is unknown. Titles, character names used by a person, and other distinctive features of radio or
10 television programs may be registered as service marks notwithstanding that they, or the
11 programs, may advertise the goods of the sponsor.

12 (3) The term “mark” includes any trademark or service mark, entitled to registration under
13 this article whether registered or not.

14 (4) The term “trade name” means any name used by a person to identify a business or
15 vocation of such person.

16 (5) The term “person” and any other word or term used to designate the applicant or other
17 party entitled to a benefit or privilege or rendered liable under the provisions of this article includes
18 a juristic person as well as a natural person. The term “juristic person” includes a firm, partnership,
19 corporation, union, association or other organization capable of suing and being sued in a court
20 of law.

21 (6) The term “applicant” embraces the person filing an application for registration of a mark
22 under this article, and the legal representatives, successors or assigns of ~~such~~ that person.

23 (7) The term “registrant” as used herein embraces the person to whom the registration of
24 a mark under this article is issued, and the legal representatives, successors or assigns of ~~such~~
25 that person.

26 (8) The term “use” means the bona fide use of a mark in the ordinary course of trade, and
27 not made merely to reserve a right in a mark. For the purposes of this article, a mark ~~shall be~~
28 ~~deemed~~ is considered to be in use: (A) On goods when it is placed in any manner on the goods
29 or other containers or the displays associated therewith or on the tags or labels affixed thereto,
30 or if the nature of the goods makes such placement impracticable, then on documents associated
31 with the goods or their sale, and the goods are sold or transported in commerce in this state; and
32 (B) on services when it is used or displayed in the sale or advertising of services and the services
33 are rendered in this state.

34 (9) A mark ~~shall be deemed~~ is considered to be “abandoned” when either of the following
35 occurs:

36 (A) When its use has been discontinued with intent not to resume ~~such~~ that use. Intent not
37 to resume may be inferred from circumstances. Nonuse for two consecutive years shall constitute
38 *prima facie* evidence of abandonment.

39 (B) When any course of conduct of the owner, including acts of omission as well as
40 commission, causes the mark to lose its significance as a mark.

41 (10) The term “secretary” means the Secretary of State or the designee of the secretary
42 charged with the administration of this article.

43 (11) The term “dilution” means the lessening of the capacity of registrant’s mark to identify
44 and distinguish goods or services, regardless of the presence or absence of: (A) Competition
45 between the parties; or (B) likelihood of confusion, mistake or deception.

46 (12) “Retail value” means:

47 (A) For items that bear a counterfeit mark and are components of a finished product, the
48 regular selling price of the finished product in which the component would be utilized.

49 (B) For items that bear a counterfeit mark other than items described in paragraph (A) of
50 this subdivision and for services that are identified by a counterfeit mark, the regular selling price
51 of the item or service.

52 (13) "Sign" means the action of affixing a person's signature to any document or record,
53 whether by manual, written or approved electronic means.

54 (14) "Signature" means any mark, symbol, facsimile or electronic mark or symbol, that
55 depicts a person's name on any document or record, affixed to the document or record by the
56 person with the intent to authenticate, assert, certify or agree to the matters, validity, information
57 or attestation set forth in the document or record.

§47-2-3. Application for registration.

1 (a) Subject to the limitations set forth in this article, any person who uses a mark may file
2 in the office of the secretary, in a manner complying with the requirements of the secretary, an
3 application for registration of that mark setting forth, but not limited to, the following information:

4 (1) The name and business address of the person applying for such registration; and, if a
5 corporation, the state of incorporation, or if a partnership, the state in which the partnership is
6 organized and the names of the general partners, as specified by the secretary;

7 (2) The goods or services on or in connection with which the mark is used and the mode
8 or manner in which the mark is used on or in connection with such goods or services and the
9 class in which such goods or services fall;

10 (3) The date when the mark was first used anywhere and the date when it was first used
11 in this state by the applicant or a predecessor in interest; and

12 (4) A statement that the applicant is the owner of the mark, that the mark is in use, and
13 that, to the knowledge of the person verifying the application, no other person has registered,
14 either federally or in this state, or has the right to use such mark either in the identical form thereof
15 or in such near resemblance thereto as to be likely, when applied to the goods or services of such
16 other person, to cause confusion, or to cause mistake, or to deceive.

17 (b) The secretary may also require a statement as to whether an application to register
18 the mark, or portions or a composite thereof, has been filed by the applicant or a predecessor in
19 interest in the United States Patent and Trademark Office; and, if so, the applicant shall provide
20 full particulars with respect thereto including the filing date and serial number of each application,
21 the status thereof and, if any application was finally refused registration or has otherwise not
22 resulted in a registration, the reasons therefor.

23 (c) The secretary may also require that a drawing of the mark, complying with such
24 requirements as the secretary may specify, accompany the application.

25 (d) The application shall be signed ~~and verified before a notary public~~ manually in writing
26 or electronically by the applicant or by a member of the firm or an officer of the corporation or
27 association applying.

28 (e) The application shall be accompanied by three specimens showing the mark as
29 actually used.

30 (f) The application shall be accompanied by the application fee payable to the Secretary
31 of State.

NOTE: The purpose of this bill is to continue implementation of the provisions of W. Va. Code § 31D-1-131 by removing certain unnecessary or redundant requirements to allow for electronic submission of various applications and forms for nonprofit and charitable organizations, professionals and licensees. These changes are consistent with existing business and licensing electronic filing processes and capabilities now available through the Secretary of State's Office's One Stop Web Portal, which was created in the year 2017 and has been modernized to allow for full implementation of the law.

Strike-throughs indicate language that would be stricken from a heading or the present law, and underscoring indicates new language that would be added.