WEST VIRGINIA LEGISLATURE

2020 REGULAR SESSION

ENROLLED

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Committee Substitute

for

House Bill 4747

BY DELEGATES HOWELL AND C. MARTIN

(By Request of the Secretary of State)

[Passed March 7, 2020; in effect ninety days from passage.]

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

As used in this article:

- (1) "Audit" means the systematic examination of records and documents and the securing of other evidence by confirmation, physical inspection, or otherwise, that includes a written assurance that financial statements and reports are fairly presented in conformity with generally accepted accounting principles issued by the American Institute of Certified Public Accountants.
- (2) "Charitable organization" means a person who is or holds itself out to be a benevolent, educational, philanthropic, humane, patriotic, religious or eleemosynary organization, or any person who solicits or obtains contributions solicited from the public for charitable purposes, or any person who in any manner employs any appeal for contributions which may be reasonably interpreted to suggest that any part of those contributions will be used for charitable purposes. A chapter, branch, area, office or similar affiliate or any person soliciting contributions within the

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

- (3) "Contribution" means the promise or grant of any money or property of any kind or value.
- (4) "Financial review" means an examination of financial statements in accordance with generally accepted accounting principles issued by the American Institute of Certified Public Accountants, in which a certified public accountant has a reasonable basis for expressing limited assurance that the reviewed statements are free of material misstatements or false or missing information and are found to be accurate, complete and fairly presented to meet the requirements of the generally accepted accounting principles.
- (5) "Solicit" and "solicitation" means the request or appeal, directly or indirectly, for any contribution on the plea or representation that the contribution will be used for a charitable purpose, including, without limitation, the following methods of requesting a contribution:
 - (A) Any oral or written request:
- (B) Any announcement to the press, over the radio or television, or by telephone, electronic mail or messaging, electronic bulletin board, or Internet technology, concerning an appeal or campaign to which the public is requested to make a contribution for any charitable purpose connected therewith;
- (C) The distribution, circulation, posting or publishing of any handbill, written advertisement or other publication which directly or by implication seeks to obtain public support; or
- (D) The sale of, offer or attempt to sell, any advertisement, advertising space, subscription, ticket or any service or tangible item in connection with which any appeal is made for any charitable purpose or where the name of any charitable or civic organization is used or referred to in an appeal as an inducement or reason for making the sale, or when or where in connection

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

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

- (6) "Federated fund-raising organization" means a federation of independent charitable organizations which have voluntarily joined together, including, but not limited to, a united fund or community chest, for purposes of raising and distributing money for and among themselves and where membership does not confer operating authority and control of the individual agencies upon the federated group organization.
- (7) "Parent organization" is that part of a charitable organization which coordinates, supervises or exercises control over policy, fund raising and expenditures, or assists, receives funds from or advises one or more chapters, branches or affiliates in the state.
- (8) "Person" means any individual, organization, trust, foundation, group, association, partnership, corporation, society or any combination of them.
- (9) "Professional fund-raising counsel" means any person who for a flat fixed fee under a written agreement plans, conducts, manages, carries on, advises or acts as a consultant, whether directly or indirectly, in connection with soliciting contributions for, or on behalf of any charitable organization but who actually solicits no contributions as a part of the services. A bona fide salaried officer or employee of a charitable organization maintaining a permanent establishment within the state is not a professional fund-raising counsel.
- (10) "Professional solicitor" means any person who, for a financial or other consideration, solicits contributions for, or on behalf of a charitable organization, whether the solicitation is performed personally or through that person's agents, servants or employees specially employed by, or for a charitable organization, who are engaged in the solicitation of contributions under the direction of that person, or a person who plans, conducts, manages, carries on, advises or acts as a consultant to a charitable organization in connection with the solicitation of contributions but

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

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

- (11) "Sign" means the action of affixing a person's signature to any document or record, whether by manual, written, or approved electronic means.
- (12) "Signature" means any mark, symbol, facsimile, or electronic mark or symbol, that depicts a person's name on any document or record, affixed to the document or record by the person with the intent to authenticate, assert, certify, or agree to the matters, validity, information, or attestation set forth in the document or record.

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

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

- (2) The principal address of the organization and the address of any offices in this state.
 If the organization does not maintain an office, the name and address of the person having custody of its financial records;
 - (3) The names and addresses of any chapters, branches or affiliates in this state;
- (4) The place where and the date when the organization was legally established and the form of its organization;
- (5) The names and addresses of the officers, directors, trustees and the principal salaried executive staff officer;
- (6) A copy of a balance sheet and a statement or report of income and expenses for the organization's immediately preceding fiscal year or a financial statement reporting information showing the kind and amount of funds raised during the preceding fiscal year, the costs and expenses incidental to the fundraising and showing how the funds were disbursed or allocated for the same fiscal year: *Provided*, That in addition to the financial documents required by this subdivision:
- (A) Charitable organizations raising more than \$500,000 per year in contributions, excluding grants from governmental agencies or private foundations, shall submit a report of an audit by an independent certified public accountant; and
- (B) Charitable organizations raising more than \$200,000 per year, but less than \$500,000 per year in contributions, excluding grants from governmental agencies or private foundations, shall submit a statement of financial review by an independent certified public accountant;
- (7) A copy of any determination of the organization's tax-exempt status under the provisions of 26 U.S.C. §501(c)(3) and a copy of the last filed Internal Revenue Service Form 990 and Schedule A for every charitable organization and any parent organization;
- (8) Whether the organization intends to solicit contributions, donations or grants from the public directly or have other solicitation done on its behalf by others;

- (9) Whether the organization is authorized by any other governmental authority to solicit contributions, donations or grants and whether it is or has ever been enjoined by any court from soliciting contributions;
- (10) The general purpose or purposes for which the contributions to be solicited shall be used;
 - (11) The name or names under which it intends to solicit contributions;
 - (12) The names of the individuals or officers of the organization who will have final responsibility for the custody of the contributions;
 - (13) The names of the individuals or officers of the organization responsible for the final distribution of the contributions;
 - (14) Copies of all contract documentation from professional fund-raising counsels and professional solicitors as provided in subsection (d), section seven of this article; and
 - (15) The amount of money received in the state and the amount spent in the state for charitable purposes.
 - (b) Each chapter, branch or affiliate, except an independent member agency of a federated fundraising organization, may separately report the information required by this section or report the information to its parent organization which shall then furnish the information regarding its West Virginia affiliates, chapters and branches in a consolidated form to the Secretary of State. An independent member agency of a federated fundraising organization, as defined in section two of this article, shall comply with the provisions of this article independently. Each organization shall file a separate registration form for each name under which funds will be solicited.
 - (c) The registration forms and any other documents prescribed by the Secretary of State shall be signed by an authorized agent, officer or by an independent public accountant and by the chief fiscal officer of the charitable organization.

- (d) Every charitable organization receiving less than \$1 million during any year which submits an independent registration to the Secretary of State shall pay an annual registration fee of \$15; every charitable organization collecting more than \$1 million during one year which submits an independent registration to the Secretary of State shall pay an annual registration fee of \$50; and a parent organization filing on behalf of one or more chapters, branches or affiliates or a single organization filing under different names shall pay a single annual registration fee of \$50 for itself and the chapters, branches or affiliates included in the registration statement. All fees and moneys collected by the Secretary of State pursuant to the provisions of this article shall be deposited by the Secretary of State as follows: One-half shall be deposited in the State General Revenue Fund and one-half shall be deposited in the services fees and collections account established by \$59-1-2 of this code for the operation of the office of the Secretary of State. The Secretary of State shall dedicate sufficient resources from that fund or other funds to provide the services required in this article.
- (e) For good cause shown, the Secretary of State may extend the due date for the annual filing of a registration statement or report by a charitable organization or a professional fundraiser for a period not to exceed 90 days. During that period, the previously filed registration statement or report of the charitable organization which has been granted the extension remains in effect.
- (f) In addition to the registration fee required by this section, a charitable organization or professional fundraiser, or both, which fails to file a registration statement or report by the original or extended due date for filing as required by this section shall, for each month or part of the month thereafter in which the registration statement or report is not filed, pay an additional fee of \$25: *Provided*, That the total amount of the additional fees for a registration statement or report required to be filed in any one year may not exceed \$500. All fees and moneys collected by the Secretary of State pursuant to the provisions of this article shall be deposited by the Secretary of State as follows: One-half shall be deposited in the State General Revenue Fund and one-half shall be deposited in the service fees and collections account established by §59-1-2 of this code

for the operation of the office of the Secretary of State. The Secretary of State shall dedicate 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.

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

- (1) Educational institutions, the curriculums of which, in whole or in part, are registered or approved by the State Board of Education, either directly or by acceptance of accreditation by an accrediting body recognized by the State Board of Education; and any auxiliary associations, foundations and support groups which are directly responsible to the educational institutions;
- (2) Persons requesting contributions for the relief of any individual specified by name at the time of the solicitation when all of the contributions collected without any deductions whatsoever are turned over to the named beneficiary for his or her use;
 - (3) Hospitals and licensed nursing homes which are nonprofit and charitable;
- (4) Organizations which solicit only within the membership of the organization by the members thereof: *Provided*, That the term "membership" does not include those persons who are granted a membership upon making a contribution as the result of solicitation. For the purpose of this section, "member" means a person having membership in a nonprofit corporation, or other organization, in accordance with the provisions of its articles of incorporation, bylaws or other instruments creating its form and organization; and having bona fide rights and privileges in the organization, including the right to vote, to elect officers, directors and issues, to hold office or otherwise as ordinarily conferred on members of the organizations;
- (5) Churches, synagogues, associations or conventions of churches, religious orders or religious organizations that are an integral part of a church which qualifies as tax exempt under the provisions of 26 U.S.C. §501(c)(3) and which qualifies as being exempt from filing an annual return under the provisions of 26 U.S.C. §6033;
- (6) Any person, firm, corporation or organization that sponsors a single fundraising event for the benefit of a named charitable organization where all or part of the funds collected are

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donated to the named charitable organization: *Provided*, That the named charitable organization receiving the funds is registered pursuant to this article, reports each of these donations individually and certifies that no funds were withheld by the organization that solicited the funds;

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

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

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

(a) No person may act as a professional fundraising counsel or professional solicitor for a charitable organization subject to the provisions of this article unless he or she has first registered with the Secretary of State. The registration application shall be submitted in a manner or method authorized by the Secretary of State and contain the information he or she requires. The registration application by professional fundraising counsel or professional solicitor shall be accompanied by an annual fee in the sum of \$100. A partnership or corporation, which is a professional fundraising counsel or professional solicitor, may register for and pay a single fee on behalf of all its members, officers, agents and employees. However, the names and addresses of all officers, agents and employees of professional fundraising counsel and all professional solicitors, their officers, agents, servants or employees employed to work under the direction of a professional solicitor shall be listed in the application. All fees and moneys collected by the Secretary of State pursuant to the provisions of this article shall be deposited by the Secretary of State as follows: One-half shall be deposited in the state General Revenue Fund and one-half shall be deposited in the service fees and collections account established by §59-1-2 of this code for the operation of the office of the Secretary of State. The Secretary of State shall dedicate sufficient resources from that fund or other funds to provide the services required in this article.

- (b) The applicant shall, at the time of the making of an application, file with and have approved by the Secretary of State a bond in which the applicant shall be the principal obligor in the sum of \$10,000 and which shall have one or more sureties satisfactory to the Secretary of State whose liability in the aggregate as such sureties will at least equal the said sum and maintain the bond in effect so long as a registration is in effect. The bond shall run to the state for the use of the Secretary of State and any person who may have a cause of action against the obligor of the bonds for any losses resulting from malfeasance, nonfeasance or misfeasance in the conduct of solicitation activities. A partnership or corporation which is a professional fundraising counsel or professional solicitor may file a consolidated bond on behalf of all its members, officers and employees.
- (c) Each registration is valid throughout the state for a period of one year and may be renewed for additional one-year periods upon application submitted to the Secretary of State in a manner or method authorized and in the form prescribed by the Secretary of State and the payment of the fee prescribed in this section.
- (d) The Secretary of State or his or her designee shall examine each application and if he or she finds it to be in conformity with the requirements of this article and all relevant rules and the registrant has complied with the requirements of this article and all relevant rules, he or she shall approve the registration.

CHAPTER 39. RECORDS AND PAPERS.

ARTICLE 4A. OUT-OF-STATE COMMISSIONERS.

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

- (a) Upon approval of a successful application, commissioners shall hold office for 10 years, unless removed by the Secretary of State under the grounds set forth in §39-4A-1(e) of this code.
 - (b) When any oath may lawfully be administered, or affidavit or deposition taken, within the state, territory or district for which any such commissioner is appointed, to be used in this state, it may be done by the commissioner.

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

service, from the services of others, and to indicate the source of the services, even if that source

is unknown. Titles, character names used by a person, and other distinctive features of radio or

television programs may be registered as service marks notwithstanding that they, or the programs, may advertise the goods of the sponsor.

- (3) The term "mark" includes any trademark or service mark, entitled to registration under this article whether registered or not.
- (4) The term "trade name" means any name used by a person to identify a business or vocation of such person.
- (5) The term "person" and any other word or term used to designate the applicant or other party entitled to a benefit or privilege or rendered liable under the provisions of this article includes a juristic person as well as a natural person. The term "juristic person" includes a firm, partnership, corporation, union, association or other organization capable of suing and being sued in a court of law.
- (6) The term "applicant" embraces the person filing an application for registration of a mark under this article, and the legal representatives, successors or assigns of that person.
- (7) The term "registrant" as used herein embraces the person to whom the registration of a mark under this article is issued, and the legal representatives, successors or assigns of that person.
- (8) The term "use" means the bona fide use of a mark in the ordinary course of trade, and not made merely to reserve a right in a mark. For the purposes of this article, a mark is considered to be in use: (A) On goods when it is placed in any manner on the goods or other containers or the displays associated therewith or on the tags or labels affixed thereto, or if the nature of the goods makes such placement impracticable, then on documents associated with the goods or their sale, and the goods are sold or transported in commerce in this state; and (B) on services when it is used or displayed in the sale or advertising of services and the services are rendered in this state.
 - (9) A mark is considered to be "abandoned" when either of the following occurs:

- (A) When its use has been discontinued with intent not to resume that use. Intent not to resume may be inferred from circumstances. Nonuse for two consecutive years shall constitute *prima facie* evidence of abandonment.
- (B) When any course of conduct of the owner, including acts of omission as well as commission, causes the mark to lose its significance as a mark.
- (10) The term "secretary" means the Secretary of State or the designee of the secretary charged with the administration of this article.
- (11) The term "dilution" means the lessening of the capacity of registrant's mark to identify and distinguish goods or services, regardless of the presence or absence of: (A) Competition between the parties; or (B) likelihood of confusion, mistake or deception.
 - (12) "Retail value" means:
- (A) For items that bear a counterfeit mark and are components of a finished product, the regular selling price of the finished product in which the component would be utilized.
- (B) For items that bear a counterfeit mark other than items described in paragraph (A) of this subdivision and for services that are identified by a counterfeit mark, the regular selling price of the item or service.
- (13) "Sign" means the action of affixing a person's signature to any document or record, whether by manual, written or approved electronic means.
- (14) "Signature" means any mark, symbol, facsimile or electronic mark or symbol, that depicts a person's name on any document or record, affixed to the document or record by the person with the intent to authenticate, assert, certify or agree to the matters, validity, information or attestation set forth in the document or record.

§47-2-3. Application for registration.

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

- (1) The name and business address of the person applying for such registration; and, if a corporation, the state of incorporation, or if a partnership, the state in which the partnership is organized and the names of the general partners, as specified by the secretary;
 - (2) The goods or services on or in connection with which the mark is used and the mode or manner in which the mark is used on or in connection with such goods or services and the class in which such goods or services fall;
 - (3) The date when the mark was first used anywhere and the date when it was first used in this state by the applicant or a predecessor in interest; and
 - (4) A statement that the applicant is the owner of the mark, that the mark is in use, and that, to the knowledge of the person verifying the application, no other person has registered, either federally or in this state, or has the right to use such mark either in the identical form thereof or in such near resemblance thereto as to be likely, when applied to the goods or services of such other person, to cause confusion, or to cause mistake, or to deceive.
 - (b) The secretary may also require a statement as to whether an application to register the mark, or portions or a composite thereof, has been filed by the applicant or a predecessor in interest in the United States Patent and Trademark Office; and, if so, the applicant shall provide full particulars with respect thereto including the filing date and serial number of each application, the status thereof and, if any application was finally refused registration or has otherwise not resulted in a registration, the reasons therefor.
 - (c) The secretary may also require that a drawing of the mark, complying with such requirements as the secretary may specify, accompany the application.
 - (d) The application shall be signed manually in writing or electronically by the applicant or by a member of the firm or an officer of the corporation or association applying.
- (e) The application shall be accompanied by three specimens showing the mark as actually used.

Enr. CS for HB 4747

29 (f) The application shall be accompanied by the application fee payable to the Secretary

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The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.					
Chairman, House Committee Chairman, Sonate Committee		2070			
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