

MEMORANDUM

TO: Utah Commission on Strengthening Democracy
FROM: Stefan P. Brutsch
DATE: March 2009
SUBJECT: "Pay-to-Play" Rules for Government Contractors and Bidders

The following law summary briefly analyses the various laws and alternatives relating to "pay-to-play" laws, which may impose campaign-contribution restrictions and/or disclosure requirements on government contractors, bidders, and their affiliates. This summary sets forth Utah's current law, other states' laws and approaches to the issue, and reviews some commentary regarding various alternatives' pros and cons. As an initial matter, it should be noted that pay-to-play restrictions are somewhat distinct from simple contribution bans because: (1) pay-to-play penalties often take the form of contract or bid suspension rather than straightforward administrative fines; and (2) pay-to-play regulations often apply to not only incorporated entities, but their subsidiaries, directors, officers, and other affiliates.

While Utah does not prohibit government contractors from making political contributions, Utah state vendors interested in the sale of any supplies, services, construction, real property, or insurance to the state of Utah or to any political subdivision may not give or offer to give any emolument, gratuity, loan, or reward to a procurement officer, or person who in any official capacity participates in the procurement of supplies, services, construction, real property, or insurance.¹ This summary only discusses limitations that states have placed upon political contributions.

I. Utah's Current Law

As detailed more extensively in the law summary relating to limits on campaign contributions, Utah Law imposes no restrictions on the amount of donations that individuals, political parties, PACs, and corporations may make to candidates. Likewise, Utah does not prohibit or limit the contributions of individuals or businesses holding or seeking government contracts.

¹ Utah Code Ann. § 63G-6-1002.

II. Statistics Concerning Utah's Approach and Alternative Approaches

Pay-to-play legislation's aim is to eliminate political quid pro quos—state contractors giving political contributions to state candidates in exchange for favorable treatment in awarding state contracts.

Nine states, Colorado, Connecticut, Hawaii, Illinois, Kentucky, New Jersey, Ohio, South Carolina, and West Virginia, have significant pay-to-play laws that are generally applicable to those seeking state contracts.² Seven additional states have pay-to-play laws focus on a particular industry:

- Alabama - Public Utilities;³
- California - Gaming Industry;⁴
- Delaware - Insurance Companies;⁵
- Louisiana - Gaming Industry;⁶
- Missouri - Financial Underwriters, Financial Advisors, certain Investment Advisors;⁷
- New Hampshire - Insurance Companies;⁸ and
- New Mexico - Contractors with the Public Employees Retirement Board.⁹

In addition, certain municipalities, such as New York City, have enacted their own pay-to-play laws.

III. Examples of Alternative Approaches

A. Restrictive Pay-to-Play Laws

1. Connecticut

Connecticut's pay-to-play law prohibits contributions to state candidates and state or local party committees from: (1) an entity attempting to acquire a contract; (2) that entity's directors, officers, managers, and individuals who hold at least 5% ownership interest, and (3) spouses and dependent children of directors, officers, managers, and those with 5-percent-or-

² The laws of all states other than Colorado and Illinois are summarized in Appendix 1, which can be found at <http://www.cleanupwashington.org/documents/paytoplay2008.pdf>. Colorado and Illinois passed their respective pay-to-play in 2008 and they have yet to be included in the chart.

³ Ala. Code §10-2A-70.1 - 70.2.

⁴ Cal. Bus. & Prof. Code §19981-82.

⁵ Del. Code Ann. tit. 18 §2304(6).

⁶ La. Rev. Stat. Ann. § 18:1505.2(L).

⁷ Mo. Rev. Stat. §409.107.

⁸ N.H. Rev. Stat. Ann. §402:43.

⁹ N.M. Stat. §10-11-130.1(B).

greater ownership interest.¹⁰ Connecticut's law also applies to PACs established or controlled by any of the aforementioned persons. The prohibition does not apply if the contract is worth less than \$50,000.¹¹ The contribution ban applies to both competitively bid and no-bid contracts, and remains in place from the time contract negotiation begins until December 31st of the year the contract ends.¹²

2. New Jersey

New Jersey's pay-to-play law is similar to Connecticut's law. It applies to state, county, and municipal-level government contractors, bidders, and affiliated persons (individuals with a 10-percent-or-greater ownership stake in the business entity, any subsidiary companies, and PACs owned or controlled by any of the foregoing).¹³ New Jersey prohibits a state government contractor from making a contribution of more than \$300 to a gubernatorial candidate or any state or county party committee if the contract at issue is worth more than \$17,500. Unlike Connecticut, New Jersey prohibits a business entity from contributing money in the 18 months preceding the commencement of negotiations for the contract.¹⁴

Business entities that receive more than \$50,000 through government contracts must file an annual disclosure statement that lists information about the contract and all contributions made during the previous year to state PACs and state, county, and local candidates and parties.¹⁵ Further, when awarded a contract, state contractors must complete both a certification verifying compliance with the pay-to-play restrictions and a report listing all contributions made during the preceding four years to a New Jersey continuing political committee, or PAC.¹⁶

3. Illinois

Illinois enacted two separate pay-to-play laws in 2008. The first was Executive Order 3, signed by former Governor Rod Blagojevich. The Executive Order is similar to the laws of New Jersey and Connecticut, but its provisions cover a greater number of persons. It applies to a business entity, and to the entity's affiliates, including any: (1) subsidiaries; (2) parents; (3) members of the "same unitary business group; (4) entities, PAC or 501(c) tax-exempt organizations "established or controlled by" the entity or any of its "affiliated persons"; (5) executive employee; (6) person who owns more than a 7.5-percent interest in the entity; (7) spouse or minor child of an executive employee or a greater-than-7.5-percent owner. It applies to contractors with more than \$50,000 in annual state contracts, and covers both competitively bid and no bid contracts. Executive order prohibits a contractor from making a contribution to a

¹⁰ Conn. Gen. Stat. § 9-612(g)(2).

¹¹ Conn. Gen. Stat. § 9-612(g)(1)(C).

¹² Conn. Gen. Stat. § 9-612(g)(1).

¹³ N.J. Stat. § 19:44A-20.17.

¹⁴ N.J. Stat. § 19:44A-20.14.

¹⁵ N.J. Reg. § 19:25-26.4 (2007).

¹⁶ N.J. Stat. Ann. § 19:44A-20.18 (2007).

state officer, candidate, or political party from the time bids are solicited until two years after the contract's completion.¹⁷

The second Illinois law passed in 2008, Public Act 095-0971, requires any business entity whose aggregate bids, proposals and/or contracts with the state total more than \$50,000 to electronically register with the Illinois State Board of Elections and submit a copy of its certificate of registration to the applicable chief procurement officer. On these registration forms, a business entity must disclose contact information for "affiliated" persons and entities.¹⁸

B. Limited Pay-to-Play Laws

1. South Carolina

One example of a state with a more limited pay-to-play law is South Carolina. South Carolina's restriction on contributions applies only to entities seeking no-bid contracts.¹⁹ In addition, South Carolina's law applies only to the contracting entity itself, not to individuals or PACs affiliated with the entity. Finally, South Carolina's prohibition applies only from the time a contract is awarded until the time it is terminated.²⁰

2. Colorado

In 2008, Colorado citizens passed a constitutional amendment requiring that all "sole source contracts" (no-bid contracts worth more than \$100,000 in a calendar year) contain a clause prohibiting the contract holder from making, causing, or inducing any contribution to any state or local candidate or political party for the term of the contract and two years thereafter. The constitutional amendment also prohibits an immediate family member of the contract holder from making a contribution.²¹ The amendment was conceived primarily as a cost-cutting measure, intended to discourage no-bid contracting and encourage competitive bidding, rather than prevent vendor contributions.²²

IV. Pros and Cons of Alternative Approaches

A. Pros

Pay-to-play laws have largely been passed to curb abuses after scandals have come to light. For example, New Jersey has had a long history of scandal involving the award of state contracts.²³ The theory behind pay-to-play reform is that it reduces the potential for corruption

¹⁷ Illinois Gov. Blagojevich, Executive Order 2008-3. *See also* 30 ILCS 500/50-37(b)-(c).

¹⁸ 30 ILCS 500/1-15.55.

¹⁹ S.C. Code Ann. § 8-13-1342.

²⁰ S.C. Code Ann. § 8-13-1342.

²² Stephanie Simon, *Colorado Fight Looms on Political Donor Law*, Wall St. J. Nov. 13, 2008, available at <http://online.wsj.com/article/SB122653510775122497-email.html>.

²³ *See generally*, Diana H. Jeffrey, *Pay-to-play: Big Money, Politics & the Vote*, 253 Aug. N.J. Law. 57 (2008).

and undue influence in the award of public contracts, and that it has the added bonus of reducing the appearance of corruption and the resulting public cynicism that comes when voters recognize the link between sizable campaign contributions and lucrative government contracts.²⁴ Courts in New Jersey²⁵ and Connecticut²⁶ have agreed that the state has a special interest in limiting corruption and the appearance of impropriety in awarding government contracts and may ban or severely limit state contractors' contributions. Whether or not pay-to-play laws achieve their goals is an open question; yet in New Jersey, the pay-to-play law dramatically reduced the amount of money given by state contractors to gubernatorial candidates and party committees.²⁷

B. Cons

Even with a ban on contributions from contractors to candidates and committees, there are ways around the limitations. For instance, in New Jersey, a practice known as “wheeling” is common, which enables elected officials and contractors to sidestep pay-to-play reform laws by redirecting the flow of campaign cash through certain political committees.²⁸ Opponents of pay-to-play laws have argued that such laws simply make it more difficult to follow the money.²⁹ Additionally, some commentators argue that laws with comprehensive restrictions on contractor contributions, such as Connecticut and New Jersey, place too many burdens on the right to free speech by including contributions that are highly unlikely to influence the award of a government contract.³⁰

V. Process to Amend Utah Law

To enact pay-to-play rules, the Utah Code would need to be amended.

²⁴ *Id.*

²⁵ *In re Earle Asphalt Co.*, 2009 WL 137165, -- A.2d --, (N.J. Jan. 15, 2008) (per curium) *affirming and adopting* 950 A.2d 918 (N.J. Super. A.D. 2008).

²⁶ *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008).

²⁷ *See generally*, Diana H. Jeffrey, *Pay-to-play: Big Money, Politics & the Vote*, 253 Aug. N.J. Law. 57 (2008).

²⁸ *Id.*

²⁹ In 2008, New Jersey's Governor placed additional Restrictions upon the ability of State government contractors to make large contributions to legislative leadership committees and municipal political party committees. Corzine Executive Order No. 117, September 24, 2008, 40 N.J. Reg. 6251(a). However, the loopholes that allow “wheeling” to take place remain open. <http://www.senatenj.com/index.php/otoole/senate-democrats-to-public-letting-felons-vote-and-state-songs-trump-real-reform/2179>.

³⁰ Melanie D. Reed, *Regulating Political Contributions By State Contractors: The First Amendment and State Pay-To-Play Legislation*, 34 Wm. Mitchell L. Rev. 635 (2008).

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Appendix 1



Auto Safety Group • Congress Watch • Energy Program • Global Trade Watch • Health Research Group • Litigation Group
Joan Claybrook, President

“Pay to Play” Restrictions on Campaign Contributions from Government Contractors 2007 - 2008

	SEC (MSRB Rule G-37)	CT	SC	OH	KY	WV	HI	NJ
What types of contracts are subject to “pay to play” limits?	Only no-bid contracts.	Both no-bid and competitive-bid contracts.	Only no-bid contracts.	Both no-bid and competitive-bid contracts.	Only no-bid contracts.	Both no-bid and competitive-bid contracts.	Both no-bid and competitive-bid contracts.	Both, except for highway contracts (<i>New Jersey v. Mineta</i>).
What is the minimum value of a government contract subject to “pay to play” limits?	No minimum value.	\$50,000.	No minimum value.	\$10,000.	No minimum value.	No minimum value.	No minimum value.	\$17,500.
Which officials are subject to “pay to play” limits?	Issuers of municipal securities.	State candidates and state and local party committees.	State and local candidates responsible for awarding the contract.	State and local officials ultimately responsible for awarding the contract or appointing administrators who award the contract	Gubernatorial candidates.	State and local candidates, parties, and committees.	State and local candidates, parties, and committees.	Gubernatorial candidates and state and county party committees.

	SEC (MSRB Rule G-37)	CT	SC	OH	KY	WV	HI	NJ
Which members of the contracting entity are subject to “pay to play” limits?	Brokers, dealers, and municipal securities dealers.	Board members, officers, managers, and individuals who hold at least 5% ownership interest, as well as their spouses and dependent children age 18 and older.	Just the contracting entity itself.	Business partners, shareholders, administrators, executors, trustees, and individuals with at least 20% ownership interest, as well as their spouses and children age 7-17. The limits also cover collective-bargaining labor organizations.	Individuals and their immediate families who hold at least 10% ownership interest, alone or after adding the shares of their immediate family members.	Just the contracting entity itself.	Just the contracting entity itself.	All principals with at least 10% ownership interest, as well as the spouses of individual contractors. The limits also cover subsidiaries and Section 527 organizations controlled by the business entity.
“Pay to Play” Limits for Individual Members of the Contracting Entity	\$250 per election to officials in the dealer’s district 2 years before to 1 year after the contract.	Covered individuals within the “contracting entity” may not make contributions during the contract period.	No.	\$1,000 within 2 years of the award, and \$1,000 within 1 year of the termination of the contract, but no more than \$2,000 aggregate.	Of individuals with a 10% ownership interest -- \$1,000/election for each individual and immediate family.	No.	No.	Covered individuals within the “contracting entity” \$300/election from 18 months prior to contract without disqualifying entity.
Aggregate “Pay to Play” Limits for the Contracting Entity	Same as for individuals, if permitted by state and local law.	\$0 from the negotiation to the December 31 st after the termination of the contract.	\$0 from the award to the termination of the contract, applies to individual contractors.	\$2,000 within 2 years of the award, and \$2,000 within 1 year of the termination of the contract.	\$5,000 per election <u>bundled</u> from all officers and employees of business entity for no-bid contracts.	\$0 from the negotiation to the termination of the contract.	\$0 from the award to the termination of the contract.	\$300 aggregate per election from entity 18 months or a full gubernatorial term before the award to the termination of the contract.
“Pay to Play” Limits for PACs affiliated with the Contracting Entity	\$250 per election to officials in the dealer’s district 2 years before to 1 year after the contract.	PACs fall within the aggregate limit for the business entity.	No.	PACs fall within the aggregate limit for the business entity, including electioneering communication expenditures.	PACs fall within the aggregate limit for the business entity.	No.	No.	PACs fall within the aggregate limit for the business entity.