A GUIDE TO NEW JERSEY CORPORATE POLITICAL ACTION COMMITTEES AFTER THE 2004 CAMPAIGN FINANCE LEGISLATION AND EXECUTIVE ORDER

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I. Introduction

This Article provides a guide to successfully navigate the shoals of four sometimes conflicting areas of law that govern the formation and operation of a New Jersey corporate political action committee ("PAC"): New Jersey campaign finance law, federal campaign finance law, federal securities law, and the Internal Revenue Code. This Article (a) considers the advantages and disadvantages of using a corporation's federal PAC to serve as its New Jersey PAC versus forming a separate New Jersey PAC; (b) describes the types of corporations that are prohibited from making campaign contributions; (c) analyzes the effect of the 2004 campaign finance legislation and the 2004 Executive Order on the ability of corporations to make contributions; (d) analyzes when a corporation can pay the PAC's administrative expenses and the limitations on this payment; (e) analyzes the permissible scope of indemnification by the corporation and PAC for a corporate officer's service to a PAC; (f) sets forth the contribution limits on corporations and PACs, the New Jersey reporting requirements for PACs, and the penalties for violation of New Jersey campaign finance law; and (g) describes the IRS reporting and disclosure obligations.

II. Federal PAC or Separate New Jersey PAC

Corporations use two principal methods to participate in campaigns for public office. First, the corporation makes contributions from its treasury to candidates to the extent permitted by law.[1] Second, the corporation forms its own PAC composed of corporate officers, who are appointed to the PAC by the corporation's board of directors.[2] The PAC solicits and collects contributions from employees, and decides the candidates and committees to which the PAC will contribute, and the amounts of the contributions, to the extent permitted by law.[3] On June

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[1] *See* Chip Nielsen & Jason D. Kaune, *State Campaign Finance Laws, in* CORPORATE POLITICAL ACTIVITIES 581, 589 (PLI Corp. Law & Practice, Course Handbook Series No. B-1444, 2004).

[2] *Id.* at 597-601.

[3] Kenneth A. Gross & Kip P. Hong, REGULATION OF CORPORATE POLITICAL ACTIVITY, A-9 (CPS Portfolio No. 16-5th (BNA), 2003). The factors that influence a PAC's decisions

16, 2004, Governor James E. McGreevey[4] signed into law amendments to the New Jersey Campaign Contributions and Expenditures Reporting Act (the "Act"),[5] which affect how corporations and their PACs participate in campaigns (the "2004 Amendments").[6] Shortly thereafter, on September 22, 2004 Governor McGreevey issued Executive Order

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on contributions are whether the candidate will be sufficiently grateful for the contribution so that he or she will give appropriate consideration to the PAC's positions on issues of concern to it, whether the race is close, and the predictability of long serving incumbents on how they handle the issues of concern to the PAC. Note, *The Ass Atop the Castle: Competing Strategies For Using Campaign Contributions to Influence Lawmaking*, 116 HARV. L. REV. 2610, 2622-24 (June 2003) [hereinafter *The Ass Atop the Castle*]. *See also* Jeanne Cummings, *Closing the Spigot: In New Law's Wake, Companies Slash Their Political Donations*, WALL ST. J., Sept. 3, 2004, at A1, A4:

> Fannie Mae, a government-sponsored home-mortgage financier, was counted among the titans of political largesse, giving more than $1.8 million in unregulated donations in 2002. Once the campaign-finance law [Bipartisan Campaign Reform Act of 2002] passed, Fannie Mae decided to focus on its PAC instead of giving the money to 527 groups. The company quickly discovered that its PAC accounts were empty. Employees hadn't been asked to donate for more than a decade. Fannie Mae's top brass sent out a call for contributions in January. Since then, 600 employees have contributed nearly $600,000. Rather than mailing off a few big checks to party committees, Fannie Mae deposited 40 smaller checks into the campaign coffers of every member – Democrat and Republican – of the House Financial Services Committee, the panel that oversees the heart of the mortgage giant's business. Total spent in donations to that one committee: $67,000.

Id.

[4] On August 12, 2004, Governor McGreevey announced his resignation for unrelated reasons effective November 15, 2004. James E. McGreevey, Announcement of Resignation, *in* THE STAR LEDGER (N.J.), Aug. 12, 2004, at 12.

[5] N.J. STAT. ANN § 19:44A-1 to -47 (West 1999 & 2004 N.J. Sess. Law Serv. 72-143 (West)).

[6] N.J. STAT. ANN. §§ 19:44A-7.2; 19:44A-11; 19:44-11.3; 19:44A-11.8; 19:44A-19.2; 19:44A-20.2 to 20.12; and 19:44A-22 (West 2004).

In 2003, the legislature enacted pay-to-play legislation for licensed electric power suppliers, licensed gas suppliers, and appliance repair service providers. N.J. STAT. ANN. § 48:3-93.3 (West Supp. 2004). The legislation prohibits the award of contracts to suppliers and providers that have solicited or made contributions to candidates or holders of the public office responsible for the award of the contract, or to any State, county or municipal party committee, or legislative leadership committee within one calendar year preceding the commencement of contract negotiations. N.J. STAT. ANN. § 48:93.3a (West Supp. 2004). The legislation also provides that any supplier or provider that enters into negotiations for, or agrees to a contract with, a municipal or county aggregator cannot knowingly solicit or make contributions to the foregoing persons and entities between the commencement of negotiations and the later of the termination of negotiations and completion of the contract. N.J. STAT. ANN. § 48:3-93.3b (West Supp. 2004).

Number 134, which affects, in a much more powerful way than the 2004 Amendments, how corporations and their PACs participate in campaigns.[7]

PACs in New Jersey are also known as continuing political committees ("CPCs"). The Act defines a CPC as any person or entity that in a calendar year contributes or expects to contribute at least $4,300 to assist any candidate, and that has been determined by ELEC to be a CPC.[8] Thus, there is no required form of legal entity for a New Jersey CPC.[9]

A corporation that wants to use a PAC to make contributions to New Jersey candidates must decide whether to use its federal PAC[10] as its New Jersey CPC, or to form a separate New Jersey CPC.[11] Under FEC regulations, when a PAC's funds are kept in one account that

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[7] Exec. Order No. 134, 36 N.J.R. 4562(b) (Oct. 18, 2004) [hereinafter "Executive Order"].

[8] N.J. STAT. ANN §19:44A-3n (West 1999); N.J. ADMIN. CODE tit. 19, § 25-1.7 (2004).

[9] *See generally* JAN WITOLD BARAN, THE ELECTION LAW PRIMER FOR CORPORATIONS §2.3 (4th ed. 2004).

[10] Under the Federal Election Campaign Act of 1971, as amended ("FECA"), a corporation establishes a federal PAC when: (a) the board of directors of the corporation adopts a resolution establishing the PAC; (b) the corporation appoints persons to direct the PAC's operations; or (c) the corporation begins to pay the PAC's administrative expenses. 2 U.S.C.A. § 441b(b)(2)(c) (West Supp. 2004); 11 C.F.R. § 102.1(c) (2003). A PAC must file a Statement of Organization on FEC Form 1 with the Federal Election Commission ("FEC") within ten days after its establishment. 2 U.S.C.A. § 433(a) (West 1997); 2 U.S.C.A. § 441b(b) (West 1997 & Supp. 2004); 11 C.F.R. § 102.2 (2003). Since the enactment of the Bipartisan Campaign Reform Act of 2002, which under 2 U.S.C. § 44(1)(i) prohibits unlimited corporate contributions to national political party committees and their building funds, federal PACs are playing a greater role in federal campaigns. *See* Cummings, *supra* note 3. Cummings states:

> One remedy has been to revive companies' political action committees, or PACs, groups that solicit contributions from employees. Up to $5,000 can be given to a candidate each election. PACs have been around since the 1970s but were superseded by the rise of unregulated donations in the 1990s. Companies are rediscovering that they're an easy way to get credit for helping a specific candidate. PACs also help identify employees who want to volunteer to support certain political causes. Companies aren't allowed to coerce employees into donating to their PAC, or punish those who decline. There are now 201 corporate PACs, according to Political Money Line, an increase of more than 30% over the past four years. The amount of money collected by corporate PACs in 2003 totaled $111 million, nearly $20 million more than was reported in the entire 2001-2002 political cycle. That doesn't include money raised in 2004, which hasn't yet been tallied.

Id. See also Annys Shin, *Cutting Into the Checks*, WASH. POST, Sept. 13, 2004, at E1.

[11] Nielsen & Kaune, *supra* note 1, at 597-601.

supports both federal and state candidates, all funds received by that account are subject to the contribution limits, prohibitions, and solicitation restrictions of the Federal Election Campaign Act of 1971, as amended ("FECA").[12] A disadvantage of using a federal PAC as a New Jersey CPC is that when the FECA rules are more restrictive than the New Jersey rules, the federal PAC cannot take advantage of the less restrictive New Jersey rules. For example, under FECA a corporation cannot make a contribution to a PAC,[13] but under New Jersey law a corporation can contribute up to $7,200 per year to a CPC.[14] As another example, under FECA an individual can contribute up to $5,000 per year to a PAC,[15] and under New Jersey law an individual can contribute up to $7,200 per year to a CPC.[16] A separate New Jersey CPC avoids the more restrictive FECA rules. In addition, a federal PAC that serves as a New Jersey CPC must include all contributions to federal candidates and New Jersey candidates in its New Jersey reports,[17] and all contributions to New Jersey candidates in its federal reports.[18]

Furthermore, when the federal and New Jersey rules conflict, a federal PAC that serves as a New Jersey CPC must always follow the more restrictive rule. For example, under FECA a corporation's payment of a PAC's administrative expenses is not a contribution,[19] but under New Jersey law this payment is a contribution.[20] In this situation,

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[12] 11 C.F.R. § 102.5(a)(1)(ii) and (2) (2003); Rev. Rul. 2003-49, Q&A-7, 2003-1 C.B. 903, 903-04.

[13] 2 U.S.C.A. § 441b(a) (West 1997).

[14] N.J. STAT. ANN § 19:44A-11.5c (West 1999).

[15] 2 U.S.C.A. § 441a(a)(1)(C) (West Supp. 2004).

[16] N.J. STAT. ANN § 19:44A-11.5c (West 1999); N.J. ADMIN. CODE tit. 19, §25-11.2 (2004).

[17] N.J. STAT. ANN § 19:44A-8b(2) (West 1999); ELEC Advisory Opinion No. 02-2003 (Feb. 24, 2003); *see also* N.Y. State Board of Elections 1989 Opinion No. 2 (corporation formed a federal PAC and a state PAC; state PAC would act as the collecting agent for both PACs, and would remit a predetermined percentage of contributions to federal PAC; state PAC "would have to report all contributions received by it even if it only retains a portion of those receipts. The New York Election Law [Sections 14-118(1) and 14-102(1)] makes it mandatory that any political action committee which contributes to New York candidates or political committees must report all contributions and all expenditures").

[18] 2 U.S.C.A. § 434(b) (West 1997 & Supp. 2004); 11 C.F.R. § 104.3 (2003).

[19] 2 U.S.C.A. § 441b(b)(2)(C) (West 2004); 11 C.F.R. §§ 114.1(a)(2)(iii) and (b) and 114.5(b)(2003).

[20] *See* N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979) (statute prohibiting political contributions by banks, N.J. STAT. ANN § 19:34-45, was not intended to prohibit banks from establishing a separate political fund contributed to voluntarily by members of a political action committee; bank's funds could not be used to establish, administer, or solicit

the corporation can pay the CPC's administrative expenses only up to the maximum contribution that a corporation can make to a CPC under New Jersey law.

For many corporations the requirements of New Jersey law that a CPC maintain its bank account in a bank authorized by law to transact business in New Jersey and that maintains a branch office in New Jersey,[21] or to file a consent to service of legal process if the bank does not meet these requirements at an address in New Jersey,[22] often makes it impractical for the corporation's federal PAC to serve as its New Jersey CPC.[23] Finally, although a separate New Jersey CPC avoids the tight reins of most of FECA, it does not entirely escape FECA's sprawling net, nor does it escape the tortuous minefield of the detailed and unrelenting reporting and disclosure obligations imposed on state PACs by the Internal Revenue Code of 1986, as amended (the "Code").[24]

III. Prohibitions Under the 2004 Amendments on Corporations That Can Make Contributions

The 2004 Amendments seek to limit the ability of corporations and

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contributions for the political fund).

[21] N.J. STAT. ANN § 19:44A-10 (West 1999); N.J. ADMIN. CODE tit. 19, §25-5.2(a) (2004).

[22] N.J. ADMIN. CODE tit. 19, § 25-5.2(c) (2004).

[23] Nielsen & Kaune, *supra* note 1, at 601.

[24] *See infra* notes 431 to 492 and the accompanying text. Notwithstanding the detailed disclosure obligations for contributions to and expenditures by a CPC, a corporation's disclosure obligations for its political contributions are more limited. 17 C.F.R. § 210.5-03 (2004). In a letter dated August 25, 2004, Philip Angelides, the Treasurer of the State of California, requested William Donaldson, the Chairman of the Securities & Exchange Commission, to adopt rules requiring disclosure by publicly-traded companies of their political contributions. Letter from Philip Angelides, Treasurer of St. of Cal., to William Donaldson, Chairman of the SEC (Aug. 25, 2004), *available at* http://www.treasurer.ca.gov./news/releases/2004/082504_sec.pdf. The letter was also signed by the Treasurers and Comptrollers of Connecticut, Iowa, Kentucky, Maine, New York, City of New York, North Carolina, Oregon, and Vermont, and a member of the CalPERS Board of Administration. *Id.*

The Executive Order partially addresses the issue of reporting corporate contributions. *See* Exec. Order, § 5, 36 N.J.R. at 4563. Section 5 provides that prior to awarding any state contract, the state shall require the business entity to report all contributions it made to any political organization organized under Code Section 527 that is also a CPC under New Jersey law. *Id.* If the State Treasurer determines that any such contribution would constitute a breach of contract, or poses a conflict of interest in the awarding of any contract, the State Treasurer shall disqualify the business entity from bidding on or being awarded the contract. *Id.*

their significant shareholders to use campaign contributions to obtain business from government agencies, a practice known as "pay-to-play."[25] The pay-to-play provisions become effective on January 1, 2006,[26] and do not affect a corporation's eligibility to be awarded a contract because it made a contribution prior to January 1, 2006.[27]

The 2004 Amendments prohibit a State agency in the Executive Branch[28] from entering into a contract having an anticipated value greater than $17,500 with a business entity if, during the preceding one-year, that entity contributed "to the State committee of the political party of which the Governor, serving when the contract is awarded, is a member, or to any candidate committee of the Governor."[29] A business entity that enters into a state contract cannot contribute during the contract's term to the State committee of the political party of the Governor" in office when the contract is awarded, or to the Governor's candidate committee."[30] Such a committee cannot accept a contribution during the contract's term.[31]

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[25] The Senate Statement accompanying S2 provides:

> The purpose of this bill is to reduce the risk of actual or perceived corruption which may result when public contracts are awarded to business entities that have contributed to elected officials having control, or apparent control, over the awarding of those contracts, or to political party committees at various levels of government that may have influence over the officials responsible for awarding such contracts, a practice commonly referred to as 'pay-to-play.'

Senate Statement to Senate Bill S2 (2004 N.J. Sess. Law Service 72, 76). The Assembly Statement accompanying A2 contains the identical language. Assembly Statement to Assembly Bill A2 (2004). *See also* Blount v. Securities & Exchange Commission, 61 F.3d 938, 943 (D.C. Cir. 1995) *cert. denied,* 517 U.S. 1119 (1996) ("In every case where a quid in the electoral process is being exchanged for a quo in a particular market where the government deals, the corruption in the market is simply the flipside of the electoral corruption.").

The controversy over pay-to-play was part of the cauldron of public debate following Governor McGreevey's resignation. *See, e.g.,* John J. Farmer Jr., *Diluting Power Could Also Dilute Courage*, N.Y. TIMES, Aug. 29, 2004, at 14 NJ1, 7. This controversy culminated in the issuance of the Executive Order.

[26] *See* N.J. STAT. ANN § 19:44A-20.2 (2004 N.J. Sess. Law. Serv. 72, 76 (West)).

[27] *Id.*

[28] N.J. STAT. ANN § 19:44A-20.7 (2004 N.J. Sess. Law Serv. 72, 72 (West)). "A State agency in the Executive Branch means any of the principal departments in the Executive Branch of State Government, and any division, board, bureau, office, commission or other instrumentality within or created by such department and any independent State authority, board, commission, instrumentality, or agency." *Id.*

[29] N.J. STAT. ANN § 19:44A-20.2 (2004 N.J. Sess. Law Serv. 72, 72 (West)).

[30] *Id.*

[31] *Id.*

The 2004 Amendments further prohibit a State agency in the Legislative Branch[32] from entering into a contract having an anticipated value greater than $17,500 and that requires approval by a presiding officer of either or both the Assembly and Senate with a business entity if, during the preceding one-year, that entity contributed "to the State committee of the political party of which the presiding officer, serving when the contract is awarded, is a member or to a legislative leadership committee or any candidate committee established by the presiding officer."[33] A business entity that enters into a contract cannot contribute during the contract's term "to the State committee of the political party of which the presiding officer is a member, or to a legislative leadership committee or any candidate committee established by the presiding officer."[34] Such a committee cannot accept a contribution during the contract's term.[35]

The 2004 Amendments further prohibit a county from entering into a contract having an anticipated value greater than $17,500 with a business entity if, during the preceding one-year, that entity contributed "to any county committee of a political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded, or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded."[36] A business entity that enters into a contract cannot contribute during the contract's term "to any county committee of any political party in that county if a member of that political party is serving in an elective public office of that county when the contract is awarded, or to any candidate committee of any person serving in an elective public office of that county when the contract is awarded."[37] Such a committee cannot accept a contribution during the contract's term.[38]

Finally, the 2004 Amendments prohibit a municipality from entering into a contract having an anticipated value greater than $17,500

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[32] *See* N.J. STAT. ANN §19:44A-20.7 (2004 N.J. Sess. Law Serv. 72, 74 (West)). "A State agency in the Legislative Branch means the Legislature of the State and any office, board, bureau, or commission within or created by the Legislative Branch." *Id.*

[33] N.J. STAT. ANN § 19:44A-20.3 (2004 N.J. Sess. Law Serv. 72, 72 (West)).

[34] *Id.*

[35] *Id.*

[36] N.J. STAT. ANN § 19:44A-20.4 (2004 N.J. Sess. Law Serv. 72, 72 (West)).

[37] *Id.*

[38] *Id.*

with a business entity if, during the preceding one-year, that entity contributed "to any municipal committee of a political party in that municipality if a member of that political party is serving in an elective public office of that municipality when the contract is awarded, or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded."[39] A business entity that enters into a contract cannot contribute during the contract's term "to any municipal committee of a political party if a member of that political party is serving in an elective public office of that municipality when the contract is awarded, or to any candidate committee of any person serving in an elective public office of that municipality when the contract is awarded."[40] Such a committee cannot accept a contribution during the contract's term[41]

The contributions prohibited are those contributions of greater than $300 reportable by the recipient to the Election Law Enforcement Commission ("ELEC") under New Jersey Statute section 19:44A-8 or 19:44A-16.[42] For the $17,500 floor on the anticipated value of the contract, the government agency must determine in advance of its award and certify whether the contract has an anticipated value greater than $17,500.[43] In addition, the business entity must provide certify that it has not made a contribution that would preclude awarding the contract to it.[44]

The 2004 Amendments define "business entity" as "any natural or legal person, business corporation, professional services corporation, limited liability company, partnership, limited partnership, business trust, association or any other legal commercial entity."[45] When a business entity is an individual, a contribution by his or her spouse, or child who resides with him or her, is attributed to the individual.[46] For all other entities, a contribution by any person or other business entity that holds an interest therein is attributed to the entity.[47] "Interest" means "the ownership or control of more than ten percent of the profits

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39 N.J. STAT. ANN § 19:44A-20.5 (2004 N.J. Sess. Law Serv. 72, 73 (West)).

40 *Id.*

41 *Id.*

42 N.J. STAT. ANN § 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

43 *Id.*

44 N.J. STAT. ANN § 19:44A-20.8a (2004 N.J. Sess. Law Serv. 72, 74 (West)).

45 N.J. STAT. ANN § 19:44A-20.7 (2004 N.J. Sess. Law Serv. 72, 73 (West)).

46 N.J. STAT. ANN § 19:44A-20.6 (2004 N.J. Sess. Law Serv. 72, 73 (West)).

47 *Id.*

or assets of a business entity, or ten percent of the stock of a corporation for profit."[48]

A stock interest should include ownership or control of ten percent of the stock by value, whether voting or nonvoting.[49] It should also include ownership or control of ten percent of the stock by vote, regardless of whether the stock's value is less than ten percent of the value of the corporation's outstanding stock.[50] Value should determine a ten percent interest because the value of stock is enhanced by a profitable public contract.[51] Vote should also determine a ten percent interest because holders of voting stock elect the directors who determine which contributions the corporation makes, and appoint the corporate officers to administer the corporation's CPC.[52]

Conversely, an interest that does not confer ownership or control of stock should not count in determining a ten percent stock interest.[53] For example, the following interests, all of which are common equity compensation techniques, should not count: unexercised vested

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[48] N.J. STAT. ANN § 19:44A:20.7 (2004 N.J. Sess. Law Serv. 72, 73 (West)).

[49] ELEC and the courts are likely to look to similar law under FECA for guidance in construing New Jersey law; N.J. Att'y Gen. Op. No. 4-1983 (1983); N.J. Att'y Gen. Op. No. 14-1979 (1979). Under FECA, a corporation and its PAC can solicit stockholders, executive and administrative personnel, and their families as often as the corporation or PAC wishes. 2 U.S.C. § 441b(b)(4)(A)(i) (West 1997); 11 C.F.R. §114.5(g)(l) (2003). A stockholder means a person who has a vested beneficial interest in stock, has the power to direct how that stock is voted if the stock is voting stock, and has the right to receive dividends. 11 C.F.R. § 114.1(h) (2003). The execution of an irrevocable proxy that delegates the right to vote for the election or removal of directors does not result in the loss of stockholder status. FEC Advisory Opinion 1980-118. Employees who own stock traded four times a year on an internal market, which is subject to repurchase at its current valuation by the employer on termination of employment, or to a right of first refusal if the employee wishes to sell outside the internal market, or if the employer does not exercise the right of first refusal to employer approval of the sale, are stockholders. FEC Advisory Op. 1994-36. Participants in a 401(k) plan who invest in an employer stock fund and who are fully vested, can vote their stock by giving instructions to the plan trustee, and can receive dividends through the right to withdraw at least one share of stock at least once a year without any suspension in plan participation, are stockholders. FEC Advisory Ops. 1998-12 and 1994-27. If a participant has already withdrawn stock from the plan, and continues to hold the stock, he or she is a stockholder. FEC Advisory Ops. 1998-12, 1996-10, 1994-36, 1988-36, and 1984-5. Finally, participants in an ESOP who can withdraw stock allocated to their accounts are stockholders. FEC Advisory Ops. 1994-36 and 1983-17.

[50] *Cf.* 11 C.F.R. §114.1(h) (2003).

[51] *Id.*

[52] *Id.*

[53] *Id.*

options;[54] nonvested options;[55] nonvested restricted stock;[56] and phantom stock or stock appreciation rights.[57]

It is also important to note that in determining stock ownership, there are no family attribution rules. Stock owned by a spouse, child, or sibling is not attributed to family members.[58] For example, the president of a corporation whose spouse owns the entire stock is free to make a contribution without adversely affecting the corporation's ability to enter into a public contract as long as the president does not have control over his or her spouse's stock ownership.[59]

The pay-to-play prohibitions do not apply to contracts awarded pursuant to a fair and open process.[60] This process means, at a

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[54] John L. Utz, *Nonstatutory Stock Options*, TAX MGMT. PORTFOLIO 383-3rd (BNA), at A-1 (2001). A stock option is the grant by an employer to an employee of the right to purchase the employer's stock as compensation for services rendered, or to be rendered to the employer by the employee. *Id.* The federal income tax treatment of nonqualified options is governed by Code Sections 83 and 409A. *Id.* at A-3. A nonqualified option is an option that does not, for anyone of a number of reasons, satisfy the requirements of Code Sections 421 and 422 for incentive stock options. *Id.* at A-1 to A-3. The tax treatment of incentive stock options is governed by Code Sections 421 and 422. *Id.*

[55] Neal A. Mancoff & David M. Weiner, NONQUALIFIED DEFERRED COMPENSATION AGREEMENTS, § 4:48 (2004). An option "may include forfeiture [vesting] provisions pursuant to which a grant of a stock option, or the stock received pursuant to the exercise of such a grant, is forfeited by the employee in certain situations (e.g., the employee's failure to meet performance goals, his termination of employment for cause or his violation of a noncompete provision during or after employment)." *Id.*

[56] *Id.* at § 9:01. Restricted stock is an arrangement under which an employer permits an employee to purchase stock of an employer subject to restrictions that make the stock nonvested, or forfeitable, for purposes of federal income taxation. *Id.* The federal income tax treatment of restricted stock is governed by Code Section 83. *Id.* at §§ 9:03, 9:17.

[57] *Id.* at § 5:01. With phantom stock, "an employee is awarded units whose value is related to the value of the employer's common stock. However, the units do not represent actual stock of the employer and distributions under the plan may be made in cash. This type of arrangement is also often referred to as performance units or stock appreciation rights." *Id.* The federal income tax treatment of phantom stock is governed by IRC §§ 61, 409A, and 451. *Id.* at §§ 5:04-5:05.

[58] N.J. STAT. ANN. § 19:44A-20.6 (2004 N.J. Sess. Law Serv. 72, 73 (West)). The statute and regulations for the gubernatorial primary and general elections specifically provide for no spousal attribution. N.J. STAT. ANN. § 19:44A-29c (West 2004); N.J. ADMIN. CODE tit. 19 § 25-15.3 (2004) (definition of person); N.J. ADMIN. CODE tit. 19 § 25-16.3 (2004) (definition of person).

[59] N.J. ADMIN. CODE tit. 19, § 25-10.15(a)1 (2004). When the president and his or her spouse maintain a joint checking account, the contributor is the individual signing the check and beneficially owning the funds. *Id.* Accordingly, the president in the example must sign the contribution check drawn on a joint account. *Id.*

[60] N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

minimum, that the contract is (1) advertised in newspapers or on the public entity's website to give sufficient prior notice of the contract; (2) awarded pursuant to public solicitation of proposals or qualifications under criteria disclosed in writing prior to the solicitation; and (3) the proposals or qualifications are publicly opened and announced when the contract is awarded.[61] The public entity's decision as to what is a fair and open process is final.[62] There is no requirement to award the contract to the lowest responsible bidder.[63] In addition, the 2004 Amendments do not prohibit awarding a contract when the State Treasurer determines that public exigency necessitates the immediate delivery of goods or services.[64]

Finally, a business entity has a continuing duty to report to ELEC any contributions made during a contract's term that violate the Act.[65] If a business entity makes a contribution that would preclude it from being awarded a contract or, in the case of a contribution made during a contract's term, that would violate the Act, the business entity may request, in writing, within sixty days of making the contribution, that the recipient repay it.[66] If the business entity receives repayment within the sixty days, it is again eligible to be awarded contracts, or is no

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61 N.J. STAT. ANN. § 19:44A-20.7 (2004 N.J. Sess. Law Serv. 72, 73-74 (West)). *See generally* Jon B. Jordan, *The Regulation of 'Pay-to-Play' and the Influence of Political Contributions in the Municipal Securities Industry*, 1999 COLUM. BUS. L. REV. 489, 494-95; Gretchen Morgenson, *An "Oops" At the Bank of "Wow,"* N.Y. TIMES, Aug. 1, 2004, §3, at 1, 8.

62 N.J. STAT. ANN. § 19:44A-20.7 (2004 N.J. Sess. Law Serv. 72, 73-74 (West)). The Minority Statement to A2 of the Assembly State Government Committee, submitted by Assemblyman Michael Patrick Carroll, criticizes the exception for contracts awarded pursuant to a fair and open process:

> The bill also effectively allows a public entity to exempt itself from pay-to-play reform by declaring itself to have a "fair and open" process for the awarding of contracts, and that declaration is considered final under the terms of the bill. Furthermore, the entity's contracting process need not require the selection of the lowest bidding responsible bidder in order to be declared "fair and open." The bill also fails to address the potential influence of a political contribution on decisions regarding contracts already awarded, such as change orders, which can have lucrative implications for contractors.

Minority Statement to Assembly Bill A2, Assemblyman Michael Patrick Carroll, Assembly State Government Committee, 2004.

63 N.J. STAT. ANN. § 19:44A-20.7 (2004 N.J. Sess. Law Serv. 72, 73-74 (West)).

64 N.J. STAT. ANN. § 19:44A-20.12 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

65 N.J. STAT. ANN. § 19:44A-20.8b (2004 N.J. Sess. Law Serv. 72, 74 (West)).

66 N.J. STAT. ANN. § 19:44A-20.9 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

longer in violation of the Act.[67]

There are several penalties for violation of the pay-to-play provisions. A business entity determined by ELEC to have willfully and intentionally made a contribution, or failed to disclose a contribution, may be liable to a penalty of up to the value of its contract.[68] In addition, the State Treasurer may debar the entity from public contracting for up to five years.[69] Any person or entity determined by ELEC to have willfully and intentionally accepted a prohibited contribution shall be liable to a penalty for each violation in accordance with the following schedule:[70]

(a) up to $10,000 if the cumulative contributions are less than or equal to $5,000;

(b) up to $150,000 if the cumulative contributions are greater than $5,000 but less than $75,000; and

(c) up to $200,000 if the cumulative contributions are equal to or greater than $75,000.[71]

The pay-to-play provisions also provide that between January 1 and June 30 of each year, a county committee of a political party cannot contribute to any other county committee, nor can a county committee accept a contribution from another county committee.[72] A county committee that willfully and intentionally violates this prohibition, or willfully and intentionally contributes "to any candidate or committee with the intent, condition, understanding or belief that the candidate or committee has made or shall make a contribution to another county committee, shall be liable to a penalty equal to four times the amount of the contribution."[73] This anti-wheeling provision, which applies only when primary elections are held, has been criticized as allowing evasion of the pay-to-play provisions.[74] For example, the Minority Statement to

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67 *Id.*

68 N.J. STAT. ANN. § 19:44A-20.10 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

69 *Id.*

70 N.J. STAT. ANN. § 19:44A-20.11 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

71 N.J. STAT. ANN. § 19:44A-22e (2004 N.J. Sess. Law Serv. 72, 75-76 (West)).

72 N.J. STAT. ANN. § 19:44A-11.3a (2004 N.J. Sess. Law Serv. 72, 74-75 (West)).

73 *Id.*

74 *See* Robert Schwaneberg, *Governor Signs Reforms on 'Pay-to-Play' Lobbying*, THE STAR LEDGER (N.J.), June 17, 2004, at 33. Furthermore, critics have voiced concern that the 2004 Amendments may preempt tougher pay-to-play ordinances at the municipal level. *See* Robert Schwaneberg, *"Pay-to-Play" Limit To Be Signed, Then Tweaked - McGreevey Resists Call To Close Loophole First*, THE STAR LEDGER (N.J.), June 16, 2004, at 13.

A2 of the Assembly State Government Committee, submitted by Assemblyman Michael Patrick Carroll, states that the bill permits wheeling during general elections, and that coordination between municipal, county, and state committees can enable a contractor to make contributions at one level of government that influence the award of a contract at another level of government.[75]

The other prohibition dealing with transfers of contributions, New Jersey Statute section 19:44A-22a(2), which was in effect prior to the passage of the 2004 Amendments, provides that no person shall willfully and intentionally agree with another person to make a contribution to a broad range of candidates and committees "with the intent, or upon the condition, understanding or belief, that the recipient candidate or committee shall make or have made a contribution to another such candidate or committee." A finding of violation requires clear and convincing evidence.[76] Although this prohibition does not bar a county or municipal committee of a political party from making contributions to the same broad range of candidates and committees,[77] the anti-wheeling provisions of the 2004 Amendments bar county committees from making contributions to other county committees during primary elections.[78] Under the 2004 amendments, violators of section 19:44A-22a(2) are subject to a penalty of four times the amount of the contribution that the violator agreed to make to the recipient candidate or committee.[79] ELEC may reduce the penalty in whole or in part conditioned on the prompt correction of the violation.[80]

The prohibition of section 19:44A-22a(2) was construed in *Markwardt v. New Beginnings*.[81] The court held that the statute prohibited contributors from designating the recipient of their contributions.[82] Furthermore, to satisfy First Amendment concerns, the statute did not prohibit contributions to a CPC with the belief, expectation, or understanding by the contributor that the CPC would

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[75] Minority Statement to Assembly Bill A2, Assemblyman Michael Patrick Carroll, Assembly State Government Committee, 2004.

[76] N.J. STAT. ANN. § 19:44A-22a(2) (2004 N.J. Sess. Law Serv. 72, 75 (West)).

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] N.J. STAT. ANN. § 19:44A-22c (West 1999).

[81] 701 A.2d 706 (N.J. App. Div. 1997).

[82] *Id.* at 713.

then contribute to a particular candidate or committee.[83] Most importantly, the court held that the statute bars:

> a business or individual from entering into an agreement that requires, as one of its essential terms, that the donor's contribution will be funneled by the continuing political committee to a predetermined recipient. To be unlawful, the parties must agree either expressly or implicitly that the donor's contribution will ultimately be funneled by the continuing political committee to a designated recipient. We recognize that such an agreement may be proved by circumstantial evidence alone, because rarely will there be direct evidence.[84]

IV. Other Corporations Prohibited From Making Contributions

Prior to passage of the 2004 Amendments, New Jersey already had legislation prohibiting corporations in certain highly regulated industries from making campaign contributions.[85] Under New Jersey Statute section 19:34-32, an insurance corporation or association doing business in New Jersey cannot contribute to any candidate or committee, or reimburse or indemnify "any person for money or property so used."[86] Under section 19:34-45,

> no corporation carrying on the business of a bank, savings bank, co-operative bank, trust, trustee, savings indemnity, safe deposit, insurance, railroad, street railway, telephone, telegraph, gas, electric light, heat or power, canal or aqueduct company, or having the right to condemn land, or to exercise franchises in public ways granted by the state or any county or municipality, and no corporation, person, trustee or trustees, owning or holding the majority of stock in any such corporation," can contribute to any candidate or committee.[87]

Additionally, under section 19:34-45, corporations that are granted the right to condemn land cannot contribute. Thus, pipeline companies,[88]

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[83] *Id.* at 715-16.

[84] *Id.* at 716. *See also* Brian C. Buescher, *ABA Model Rule 7.6: The ABA Pleases the SEC, But Does Not Solve Pay to Play*, 14 GEO. J. LEGAL ETHICS 139, 152-53 (2000). The "ABA Task Force on Model Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges noted that Model Rule 7.2(c), which prohibits a lawyer from giving anything of value to another for recommending the lawyer's services, requires a prior understanding between the contributor and recipient." *Id.*

[85] N.J. STAT. ANN. §§ 5:12-138; 19:34-32; and 19:34-45 (West 1999).

[86] N.J. STAT. ANN. § 19:34-32 (West 1999).

[87] N.J. STAT. ANN. § 19:34-45 (West 1999).

[88] N.J. STAT. ANN. §§ 48:10-1 and 10-1.1 (West 1998).

and water and canal utilities,[89] cannot contribute. In addition, since cable television companies must obtain a certificate of approval from the municipality in which facilities are to be located,[90] they exercise franchises in public ways and cannot contribute.

The prohibitions of section 19:34-45 do not apply to any corporation that operates a co-generation facility under New Jersey Statute section 54:15B-2.2, or to any corporate retail seller that extends credit pursuant to the Retail Installment Sales Act of 1960, or to "any corporation, person, trustee or trustees, owning or holding the majority of stock in either such corporation."[91]

In addition, under New Jersey Statute section 5:12-138, applicants and holders of casino licenses, and their officers, directors, and key employees, and holding, intermediary, and subsidiary companies, are prohibited from making contributions.[92] The constitutionality of the prohibition on contributions by casino key employees was upheld against First Amendment attack in *Soto v. State.*[93] The court acknowledged that the right to make contributions is protected by the First Amendment,[94] but also stated that this right is a symbolic expression of support for a candidate, and limitations on this right do not infringe on the contributor's right to discuss candidates and issues.[95]

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89 N.J. STAT. ANN. § 48:19-15.1 (West 1998).

90 N.J. STAT. ANN. § 48:5A-22 (West 1998).

91 N.J. STAT. ANN. § 19:34-45 (West 1999). *See generally* Paul P. Josephson & Rebecca A. Moll, *Pervasively Regulated Industries Can Participate Politically*, 167 N.J. L.J. 28, Jan. 7, 2002.

92 N.J. STAT. ANN. § 5:12-138 (West 1996). See N.J. ADMIN. CODE tit. 19, § 7.1 to -7.4 for the regulations implementing this prohibition.

93 565 A.2d 1088 (N.J. App. Div. 1989), *cert. denied*, 583 A.2d 310 (N.J. 1990), *cert. denied*, 496 U.S. 937 (1990).

94 The Senate Statement accompanying S2 provides:

> At the same time, the bill seeks to respect campaign contributors' rights, guaranteed by the First Amendment, to freedom of speech and freedom of association. Thus, although the limitations imposed under the bill on the ability of government contractors to contribute to candidates, political party committees, and legislative leadership committees may arguably infringe upon First Amendment freedoms, this infringement is justified by the strong State interest in preventing corruption or its appearance. In addition, the means used in this bill to address the "pay-to-play" problem are tailored to avoid unnecessary abridgement of First Amendment rights.

Senate Statement to Bill S2 (2004) (2004 N.J. Sess. Law Serv. 72, 76 (West)). The Assembly Statement accompanying A2 contains the identical language. Assembly Statement to Assembly Bill A2 (2004).

95 *Soto*, 565 A.2d at 1096. *See also* Buckley v. Valeo, 424 U.S. 1, 21 (1976). In

The test of the prohibition's constitutionality is whether "there is a compelling state interest to justify the infringement on" a First Amendment right, and if so, "whether the legislative restriction is sufficiently narrow and rationally related to this interest."[96] The court found that the government interest in preventing corruption, or the appearance of corruption arising from efforts to buy political influence, is a compelling state interest.[97] The court then held that in light of "the vulnerability of the casino industry to organized crime," the prohibition passed constitutional muster.[98]

V. Aggregation of Related Corporations

In determining which corporations are prohibited from making contributions or are subject to the limitations on the amounts that corporations can contribute, it is necessary to apply statutory and administrative aggregation rules that treat a group of related corporations as one corporation subject to the same prohibition or same limitation.

The 2004 Amendments' statutory aggregation rule provides that a contribution by any person or business entity that holds an interest in another business entity is attributed to the other business entity[99] The other statutory aggregation rules provide that the majority shareholders of banks, insurance companies, and utilities are prohibited from making

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Buckley, the Court stated:

> A contribution serves as a general expression of support for the candidate and his views, but does not communicate the underlying basis for the support. The quantity of communication by the contributor does not increase perceptibly with the size of the contribution, since the expression rests solely on the undifferentiated, symbolic act of contributing. At most, the size of the contribution provides a very rough index of the intensity of the contributor's support for the candidate. A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues. While contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.

Id. (footnote omitted) (cited with approval in McConnell v. Federal Election Commission, 540 U.S. 93, 135 (2003)).

96 *Soto*, 565 A.2d at 1095.

97 *Id.* at 1096-97.

98 *Id.* at 1098.

99 N.J. STAT. ANN. § 19:44A-20.6 (2004 N.J. Sess. Law Serv. 72, 73 (West)).

contributions,[100] and the holding, intermediary, and subsidiary corporations of a corporate casino licensee or applicant are prohibited from making contributions.[101]

The genesis of ELEC administratively providing for aggregation is New Jersey Attorney General Formal Opinion No. 4-1983 (March 18, 1983). The Attorney General opined that the statutory prohibition on contributions by a corporation holding a majority interest in an insurance company extends to all the non-insurance subsidiary corporations in which the holding corporation has a controlling interest.[102] First, the prohibition on contributions by holding corporations under New Jersey Statute section 19:34-45 is absolute and unambiguous.[103] Second, the FECA counterpart to the New Jersey statute, 2 U.S.C. §441b, was enacted three years before the New Jersey statute, and was intended to address the same evil of corporate influence over government officials.[104] Third, the New Jersey Legislature wanted to protect officeholders from the influence of industries strongly affected with a public interest.[105] Fourth, the "holding company is capable of materially influencing every operation of its subsidiary corporations, including its political expenditures."[106] Finally, political contributions, whether paid by the holding corporation or by its subsidiaries, could create a political debt.[107] The repayment of this debt could result in unduly favorable treatment of the regulated corporation.[108]

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100 N.J. STAT. ANN. § 19:34-45 (West 1999).

101 N.J. STAT. ANN. § 5:12-138 (West 1996).

102 N.J. Att'y Gen. Op. No. 4-1983 (Mar. 18, 1983).

103 *Id.*

104 *Id.*

105 *Id.*

106 *Id.*

107 *Id.*

108 N.J. Att'y Gen. Op. No. 4-1983 (Mar. 18, 1983). New York has rejected administrative aggregation of related corporations. N.Y. State Bd. of Elections 1977 Opinion No. 11. Section 14-116.2 of the New York Election Law provides that "any corporation or an organization financially supported, in whole or in part, by such corporation may make expenditures, including contributions, not otherwise prohibited by law, for political purposes, in an amount not to exceed five thousand dollars in the aggregate in any calendar year." *See id.* The New York State Board of Elections construed this statutory provision in 1977 Opinion No. 11 as not to require aggregation of related corporations. *Id.* The Board found that each corporation is a separate legal entity subject to its own contribution limitation for using its own funds to make contributions. *Id.*; *see generally* Clifford J. Levy, *Parties and Contributors Exploit Many Loopholes*, N.Y. TIMES,

Furthermore, ELEC regulations provide for aggregation of related or affiliated corporations for purposes of the contribution limitations.[109] Whether a corporation is related or affiliated depends on the circumstances at the time of the contribution, such as the "degree of control or common ownership with related or affiliated corporations, the source and control of funds used" for the contribution, and "the degree to which the decisions of whether to contribute, to what candidate, and in what amount are independent decisions."[110] Two or more corporations are automatically aggregated if: (a) any person or entity owns more than a thirty percent interest in each of the corporations; or (b) one corporation owns more than a thirty percent interest in the other corporation.[111]

VI. Permissibility of Corporations Subject to Contribution Prohibition to Form CPCS

The prohibition on certain corporations and their related or affiliated corporations from making contributions raises the issue of whether these corporations can form CPCs funded exclusively by employee contributions.[112] The New Jersey Attorney General has opined that while New Jersey Statute section 19:34-45 prohibits banks from making contributions, it does not prohibit the bank from establishing a PAC.[113] However, the bank cannot use its treasury funds

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May 6, 1998, at B7.

[109] N.J. ADMIN. CODE tit. 19, § 25-11.9(a)-(b) (2004); N.J. ADMIN. CODE tit. 19, § 25-15.12(d)-(e) (2004); N.J. ADMIN. CODE tit.19, § 25-16.10(d)-(e) (2004).

[110] N.J. ADMIN. CODE tit.19, § 25-11.9(a) (2004);N.J. ADMIN. CODE tit. 19, §25-15.12(d) (2004); N.J. ADMIN. CODE tit.19, § 25-16.10(d) (2004).

[111] N.J. ADMIN. CODE tit. 19, § 25-11.9(b) (2004); N.J. ADMIN. CODE tit. 19, § 25-15.12(e) (2004); N.J. ADMIN. CODE tit. 19, § 25-16.10(e) (2004).

[112] N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979). Corporations that are exempt from federal income taxation under Code Section 501(c)(3), such as private universities, hospitals, and churches, are prohibited by this same Code section from both making political contributions and forming PACs. *Id.* A Section 501(c)(3) organization is defined in pertinent part as an organization "no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation except as provided in subsection [501](h), and which does not participate in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." I.R.C. § 501(c)(3) (West 2004). There is no insubstantiality exception to the Code's prohibition on political intervention. Association of the Bar of the City of New York v. Commissioner, 858 F.2d 876 (2d Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989); United States v. Dykema, 666 F.2d 1096, 1101 (7th Cir. 1981).

[113] N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979).

to establish and administer the PAC, or solicit contributions from employees.[114] In reaching this conclusion, the Attorney General relied on the history of the FECA prohibition on corporate contributions.[115] Under 2 U.S.C. § 441b, which was originally enacted in 1907, a corporation is prohibited from contributing.[116] The statute was amended in 1971 to exclude from the definitions of contribution and expenditure the use of corporate treasury funds to pay for the establishment, administration, and solicitation of contributions to a corporate PAC.[117] The United States Supreme Court examined 2 U.S.C. § 441(b) in *Pipefitters Local Union No. 562 v. United States*,[118] and held that the statute as originally enacted was never intended to prohibit a corporation from making, through a PAC organized by it, contributions or expenditures so long as the monies expended were volunteered by those solicited.[119] The 1971 amendment generally codified existing law, and also showed that prior to 1971 the corporation could not use corporate treasury funds to pay the expenses of PAC administration.[120] The Attorney General then found that since section 19:34-45 sought to achieve the same objectives as the federal statute, a bank could maintain a PAC funded by the PAC's members, but could not use bank funds to administer the PAC.[121]

Thus, a corporation's payment of CPC administrative expenses is treated as a contribution.[122] If the corporation cannot contribute under New Jersey law, it cannot pay CPC administrative expenses.[123] If the corporation can contribute under New Jersey law, it can pay CPC administrative expenses in an amount up to the corporation's maximum permissible contribution to a CPC.[124]

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114 *Id.*

115 *Id.* For a brief history of federal campaign finance legislation, see The Campaign Legal Center, The Campaign Finance Guide, at 4-15 & 7 (July 2004), *available at* http://www.campaignfinanceguide.org; Gross & Hong, *supra* note 3, at A-1 to A-7.

116 N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979).

117 *Id.*

118 407 U.S. 385 (1972).

119 N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979).

120 *Id.*

121 N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979).

122 *Id. See also* Josephson & Moll, *supra* note 91, at 28.

123 N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979). *See also* Josephson & Moll, *supra* note 91, at 28.

124 N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979). *See also* Josephson & Moll, *supra* note 91, at 28.

When a corporation is prohibited from making contributions, it cannot allow the CPC to use corporate facilities and services, such as offices and conference rooms, photocopiers, and computer and e-mail systems, unless the costs resulting from the CPC's use are reasonably ascertainable, and the CPC immediately reimburses the corporation for these costs.[125] The corporation should not use payroll deductions to collect contributions to the CPC.[126] Furthermore, when the corporation pays the administrative expenses of its federal PAC, the federal PAC cannot transfer its funds to a separate New Jersey CPC.[127] In addition, the corporation cannot register its federal PAC with ELEC as its New Jersey CPC unless the CPC reimburses the corporation for all administrative expenses allocable to New Jersey campaign activity that the corporation pays after the CPC registers with ELEC.[128]

The 2004 Amendments do not prohibit corporate contributions to a CPC, nor do they prohibit CPC contributions to any candidate or committee.[129] Nevertheless, if the corporation or an interest holder contributes to the corporation's CPC, and the CPC then contributes to a candidate or committee, ELEC may take the position that as a matter of economic substance, the corporation or interest holder made the contribution to the candidate or committee. As a result, the pay-to-play provisions of the 2004 Amendments would apply. ELEC will argue that this result is necessary to prevent unwarranted evasion of the these provisions, and will rely on the Attorney General's reasoning in Formal Opinion No. 4-1983: "To permit the 'sister' subsidiary to make these political contributions would allow the holding company to do indirectly that which it is forbidden to do directly. A statute should not be interpreted to reach an unreasonable or anomalous result inconsistent with the salutary legislative goal."[130]

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125 Josephson & Moll, *supra* note 91, at 28.

126 *Id.*

127 *Id.*

128 *Id.*

129 N.J. STAT. ANN. § 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

130 N.J. Att'y Gen. Op. No. 4-1983 (Mar. 18, 1983). *See also* Municipal Securities Rulemaking Board, Rule G-37 Qs & As, Q & A III.4 (Aug. 6, 1996); N.J. Dept. of the Treas., Division of Purchase and Property, Executive Order 134 Q&A, Question #11 (2004) *available at* http://www.nj.gov/treasury/purchase/execorder134.htm (an individual's contribution to a PAC does not disqualify the individual from contracting with the state unless the individual controls the PAC and the PAC makes a disqualifying contribution).

VII. The Executive Order

The Executive Order imposes greater limitations on pay-to-play practices than the 2004 Amendments. Sections 1 and 2 of the Executive Order provide:

> 1. The State or any of its purchasing agents or agencies or those of its independent authorities, as the case may be, shall not enter into an agreement or otherwise contract to procure from any business entity services or any material, supplies or equipment, or to acquire, sell, or lease any land or building, where the value of the transaction exceeds $17,500, if that business entity has solicited or made any contribution of money, or pledge of contribution, including in-kind contributions to a candidate committee and/or election fund of any candidate or holder of the public office of Governor, or to any State or county political party committee: (i) within eighteen months immediately preceding the commencement of negotiations for the contract or agreement; (ii) during the term of office of a Governor, in the case of contributions to a candidate committee and/or election fund of the holder of that office, or to any State or county political party committee of a political party nominating such Governor in the last gubernatorial election preceding the commencement of such term; or (iii) within the eighteen months immediately preceding the last day of the term of office of Governor, in which case such prohibition shall continue through the end of the next immediately following term of the office of Governor, in the case of contributions to a candidate committee and/or election fund of the holder of that office, or to any State or county political party committee of a political party nominating such Governor in the last gubernatorial election preceding the commencement of the latter term.
>
> 2. No business entity which agrees to any contract or agreement with the State or any department or agency thereof or its independent authorities either for the rendition of services or furnishing of any material, supplies or equipment or for the acquisition, sale, or lease of any land or building, if the value of the transaction exceeds $17,500, shall knowingly solicit or make any contribution of money, or pledge of a contribution, including in-kind contributions, to a candidate committee and/or election fund of any candidate or holder of the public office of Governor or to any State or county political party committee prior to the completion of the contract or

agreement.[131]

It is important to note the following points. First, the Executive Order applies only to contacts at the state level, and not at the county and municipal levels.[132] Second, the initial measuring period for determining the applicable contributions begins not with the award of the contract, as with the 2004 Amendments,[133] but with the commencement of negotiations for the contract.[134] Third, the applicable contributions during the initial measuring period are not only those to the Governor's candidate committee and the state committee of the Governor's party, as with the 2004 Amendments,[135] but also to the candidate committee of an unsuccessful gubernatorial candidate, the state committee of the party of which the Governor is not a member, and any county party committee.[136] Contributions to legislative leadership committees, municipal party committees, candidates for state legislative office, candidates for county public office, and candidates for municipal public office do not trigger the prohibition.[137] Fourth, the measuring period is eighteen months,[138] rather than one year as with the 2004 Amendments.[139] Fifth, the Executive Order has two additional measuring periods for determining applicable contributions not contained in the 2004 Amendments.[140] The first additional measuring period is the Governor's entire term, and the applicable contributions are those to the Governor's candidate committee, and the state and county committees of the same party as the Governor.[141] The second additional measuring period is the final eighteen months of the Governor's term, and for applicable contributions during these months the prohibition on state contracts applies for the entire next term of the

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131 Exec. Order §§ 1 and 2, 36 N.J.R. at 4563.

132 Exec. Order § 1, 36 N.J.R. at 4563.

133 N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

134 Exec. Order § 1, 36 N.J.R. at 4563.

135 N.J. STAT. ANN. § 19:44A-20.2 (2004 N.J. Sess. Law Serv. 72, 72 (West)).

136 Exec. Order § 1, 35 N.J.R. at 4563.

137 *Id.*

138 *Id.*

139 N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

140 Exec. Order § 1, 36 N.J.R. at 4563; N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

141 *Id.*

Governor's office.[142] The applicable contributions are those to the candidate's committee of the Governor for the next term, and the state and county party committees of the same party as the Governor for the next term.[143] Sixth, the Executive Order applies not only to contributions, as with the 2004 Amendments,[144] but also to solicitations of contributions.[145]

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142 *Id.*

143 *Id.*

144 N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

145 Exec. Order § 1, 36 N.J.R. at 4563. Neither the Executive Order nor the Act defines "solicitation." *Id.* The FEC has construed "solicitation" in its regulations and Advisory Opinions. 11 C.F.R. § 100.57(a). Under 11 C.F. R. §100.57(a), 69 F.R. 68,056, 68,066 (Nov. 23, 2004), the FEC defines a contribution to a person making a communication "if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." 69 F.R. at 68,066. The Preamble to the regulation states that the regulation "does not encompass implied meanings or understandings," nor does it "depend on reference to external events, such as the timing or targeting of a solicitation." 69 F.R. at 68,057.

Under 11 C.F.R. § 300.2(m) (2003) the FEC defines solicit as:

> to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly or through a conduit or intermediary. A solicitation does not include merely providing information or guidance as to the requirement of particular law.

11 C.F.R. § 300.2(m) (2003).

The court in Shays v. Federal Election Commission, 337 F. Supp. 2d 28 (D. D.C. 2004) declared the regulation invalid:

> The purpose of Title I of BCRA is to divorce national political parties, as well as candidates for federal office and federal officeholders, from the nonfederal money business. To permit such individuals and entities to funnel nonfederal money into different organizations by simply not "asking" the donors to do so, but using more nuanced forms of solicitation, would permit conduct that would render the statute largely meaningless.

337 F. Supp. 2d at 79. *See also* FEC Advisory Opinion 1979-13 (informing persons of fundraising activity, or any action that could fairly be considered a request for a contribution, is a solicitation; article in corporate newsletter that stated the amount of money raised and spent by corporate PAC, the methods used by PAC in determining to whom it should contribute, the number of corporate employees who participated in PAC's activities in 1978, and praise by PAC's chairman of employees who participated, would be a solicitation); FEC Advisory Opinion 1976-66 (newsletter and magazine of general contractor trade association that published information on amounts contributed to PAC, number of persons who contributed, number of authorizations to solicit association members for contributions, and amounts contributed to candidates by PAC, did not solicit contributions; "The notice as set forth does not encourage its readers to support AGC-PAC activities nor does it provide readers with information on how they can contribute to AGC-PAC").

The Municipal Securities Rulemaking Board defines "solicitation" of municipal

The Executive Order's prohibition in section 2 on the making and soliciting of contributions during the contract's term differs from the 2004 Amendments. First, the Executive Order's prohibition, unlike the 2004 Amendments,[146] applies to solicitations.[147] Second, the Executive Order prohibits a business entity from knowingly soliciting or making contributions,[148] whereas the 2004 Amendments do not require a business entity to act knowingly.[149] Third, the Executive Order's prohibition applies to contributions to the candidate committee of any unsuccessful or successful candidate for Governor, and any state or county committee.[150] The 2004 Amendments apply only to the candidate committee of the holder of elective office, and the party committee of the same party as the officeholder and only at the same level of government.[151]

The definition of "business entity" in section 4 of the Executive Order includes the same provisions as the 2004 Amendments,[152] and also adds "any subsidiaries directly or indirectly controlled by the business entity," and "any political organization organized under Section 527 of the Internal Revenue Code that is directly or indirectly controlled by the business entity, other than a candidate committee, election fund, or

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securities business to include engaging in "activities calculated to appeal to issuer officials for municipal securities business or which effectively do so." MSRB Rule G-37 Qs & As, Q & A IV.10 (Dec. 7, 1994). In MSRB Notice 2005-17, the Municipal Securities Rulemaking Board proposed a new Rule G-38(b)(i), which defines "solicitation" as "a direct or indirect communication by any person with an issuer for the purpose of obtaining or retaining municipal securities business." MSRB Notice 2005-16 (Mar. 15, 2005), Proposed Amendments to Rule G-38 Relating to Solicitation of Municipal Securities Business to be Filed with the Securities and Exchange Commission, *available at* http://www.msrb.org/msrb1/whatsnew/2005-16.asp.

Finally, the New Jersey Department of the Treasury has taken the position that when a more than ten percent owner of a corporation's stock serves on the host committee for a gubernatorial fundraising event, that person solicits contributions. N.J. Dept. of the Treas., Division of Purchase and Property, Exec. Order 134 Q&A, Question #53 (2005), *available at* http://www.nj.gov/treasury/purchase/execorder134.htm (last visited Apr. 15, 2005).

146 N.J. STAT. ANN. §§ 19:44A-20.2 to -20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

147 Exec. Order § 2, 36 N.J.R. at 4563.

148 *Id.*

149 N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5.

150 Exec. Order § 2, 36 N.J.R. at 4563.

151 N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5.

152 N.J. STAT. ANN. §§ 19:44A-20.6 and 20.7 (2004 N.J. Sess. Law Serv. 72, 73 (West)).

political party committee."[153] Although the 2004 Amendments do not specifically provide for inclusion of subsidiaries in the definition of business entity,[154] corporate subsidiaries are subject to administrative aggregation under the ELEC regulations.[155]

Code Section 527 defines a political organization as a "party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function."[156] Code Section 527 defines exempt function as "the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed."[157] Since a PAC or CPC is a classic Section 527 organization,[158] the Executive Order, unlike the 2004 Amendments, covers contributions made by a business entity's PAC or CPC.[159]

The Executive Order also provides in Section 5 that prior to awarding any contract, the state "shall require, as part of the procurement process, the business entity to report all contributions the business entity made during the preceding four years to any political organization organized under" Code Section 527 that also is a CPC.[160] If the State Treasurer determines that any contribution would be a breach of contract under the Executive Order or pose a conflict of interest, the

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153 Exec. Order § 4, 36 N.J.R. at 4563. For holders of interests in a business entity, the Executive Order applies only to direct owners one generation up from the entity. N.J. Dept. of the Treas., Division of Purchase and Property, Exec. Order 134 Q&A, Questions #32 and 44 (2005) *available at* http://www.nj.gov/treasury/purchase/execorder 134.htm (last visited Apr. 15, 2005). For CPCs, the Executive Order covers the CPC of the ultimate parent several generations up from the business entity. *Id.* at Question #44.

154 N.J. STAT. ANN. §§ 19:44A-20.6 and 20.7.

155 N.J. ADMIN. CODE tit. 19, § 25-11.9(a) (2004); N.J. ADMIN. CODE tit.19, § 25-15.12(d)-(e) (2004); N.J. ADMIN. CODE tit. 19, § 25-16.10(d)-(e) (2004). The obligation to comply with the Executive Order is imposed on the business entity that contracts with the state, and not to the business entity's subcontractors. N.J. Dept. of the Treas., Division of Purchase and Property, Exec. Order 134 Q&A, Question #19 (2004) *available at* http://www.nj.gov/treasury/purchase/execorder134.htm (last visited Apr. 15, 2005).

156 I.R.C. § 527(e)(1) (West 2002).

157 I.R.C. § 527(e)(2) (West 2002).

158 Gross & Hong, *supra* note 3, at A-15 to A-16.

159 Exec. Order § 4, 36 N.J.R. at 4563.

160 Exec. Order § 5, 36 N.J.R. at 4563.

State Treasurer shall disqualify the business entity from bidding on or being awarded the contract.[161] The 2004 Amendments do not contain a similar provision.[162]

Section 6 of the Executive Order provides that "prior to awarding any contract . . . the state shall require the business entity to provide a written certification that it has not made a contribution that would bar the award of the contract."[163] A "business entity has a continuing duty to report any contribution it makes during the term of the contract, and if the State Treasurer determines that a contribution poses a conflict of interest, the contribution is a material breach of the contract."[164] The 2004 Amendments contain a similar provision, but limit the continuing duty to report to those contributions that violate the Act.[165]

Section 7 of the Executive Order provides that if a business entity inadvertently makes a contribution subject to the Executive Order, it may request reimbursement from the recipient. If the business entity receives reimbursement within thirty days after making the contribution, it is not subject to the Executive Order's prohibitions and penalties.[166] Contributions made within sixty days of a gubernatorial primary or general election are presumed not to be made inadvertently.[167] The 2004 Amendments take a different approach, and provide that the business entity may request that the recipient return the contribution, and if the business entity receives the returned contribution within sixty days of making the contribution, it is not subject to the Act's prohibitions and penalties."[168]

Section 8 of the Executive Order provides that a business entity breaches its contract when it violates the Executive Order, and when it makes or solicits a contribution on the condition that the contribution will then be remitted to the campaign committee of the governor or any gubernatorial candidate, or to any state or county party committee.[169]

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161 *Id.*

162 N.J. STAT. ANN. § 19:44A-20.8 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

163 Exec. Order § 6, 36 N.J.R. at 4563.

164 *Id.*

165 N.J. STAT. ANN. § 19:44A-20.8 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

166 Exec. Order § 7, 36 N.J.R. at 4563.

167 *Id.*

168 N.J. STAT. ANN. § 19:44A-20.9 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

169 Exec. Order § 8, 36 N.J.R. at 4563-64. The full text of Section 8 of the Executive Order provides:

8. It shall be a breach of the terms of the government contract for a business

The 2004 Amendments are subject to the Act's anti-abuse rules.[170]

Section 9 of the Executive Order provides that the Executive Order does not prohibit the awarding of a contract when the State Treasurer determines that public exigency necessitates the immediate delivery of goods or services.[171] The 2004 Amendments contain a similar provision.[172] It is also important to note that the Executive Order does not contain an exemption for competitively bid contracts,[173] but the 2004 Amendments do.[174] Finally, section 13 provides that the Executive

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> entity to: (i) make or solicit a contribution in violation of this Order; (ii) knowingly conceal or misrepresent a contribution given or received; (iii) make or solicit contributions through intermediaries for the purpose of concealing or misrepresenting the source of the contribution; (iv) make or solicit any contribution on the condition or with the agreement that it will be contributed to a campaign committee of any candidate or holder of the public office of Governor, or to any State or county party committee; (v) engage or employ a lobbyist or consultant with the intent or understanding that such lobbyist or consultant would make or solicit any contribution, which if made or solicited by the business entity itself, would subject that entity to the restrictions of this Order; (vi) fund contributions made by third parties, including consultants, attorneys, family members, and employees; (vii) engage in any exchange of contributions to circumvent the intent of this Order; or (viii) directly or indirectly, through or by any other person or means, do any act which would subject that entity to the restrictions of this Order.

Exec. Order § 8, 36 N.J.R. at 4563-64. The provisions of subsection (v) prohibiting a business entity to engage or employ a lobbyist or consultant with the intent or understanding to make or solicit a contribution raises serious First Amendment concerns. In Markwardt v. New Beginnings, 701 A.2d 706 (N.J. App. Div. 1997), the court construed N.J. STAT. ANN. § 19:44A-22a(2), and to satisfy First Amendment concerns, the court held that the statute did not bar a business or individual from making a contribution to a CPC with the belief, expectation, or understanding that the CPC will make a contribution to a particular recipient. *Markwardt*, 701 A.2d at 715-16. Rather, the statute required that the parties must agree either expressly or implicitly that the donor's contribution will ultimately be funneled by the CPC to a designated recipient. *Id.*

[170] N.J. STAT. ANN. § 19:44A-20 prohibits contributions made anonymously, in a fictitious name, or in the name of another. N.J. STAT. ANN. § 19:44A-20 (West 1999). It also prohibits any person from contributing funds that do not actually belong to him or her, or which have been furnished by another person for the purpose of making a contribution. *Id. See also* N.J. STAT. ANN. § 19:44A-20.1a; N.J. STAT. ANN. § 19:44A-20.1b; N.J. STAT. ANN. § 19:44A-21a (any person, who purposely and with the intent to conceal or misrepresent contributions given or received or expenditures made or incurred, makes or accepts any contributions or makes or incurs any expenditure in violation of N.J. STAT. ANN. § 19:44A-20, commits a fourth degree crime); *and* N.J. STAT. ANN. 19:44A-22a(2).

[171] Exec. Order § 9, 36 N.J.R. at 4564.

[172] N.J. STAT. ANN. § 19:44A-20.12 (2004 N.J. Sess. Law Serv. 72, 74 (West)).

[173] Exec. Order § 9, 36 N.J.R. at 4564.

[174] N.J. STAT. ANN. §§ 19:44A-20.2 to 20.5 (2004 N.J. Sess. Law Serv. 72, 72-73 (West)).

Order is effective prospectively on October 15, 2004, and does not apply to contributions made or solicited prior to that date.[175] The 2004 Amendments are effective prospectively on January 1, 2006, and do not apply to contributions made prior to that date.[176]

The Executive Order raises the issue of whether it unlawfully restricts the First Amendment right to make contributions. In *Blount v. Securities & Exchange Commission*,[177] the court upheld a prohibition of the Municipal Securities Rulemaking Board on the award of negotiated municipal underwriting business to persons and entities that made contributions to candidates for the public offices responsible for the award of business.[178] The government had to show that the prohibition effectively advanced a compelling government interest, and that less restrictive alternatives were unavailable.[179] The court held that the prohibition satisfied these tests, finding that "Rule G-37 constrains relations only between the two potential parties to a quid pro quo: the underwriters and their municipal finance employees on the one hand, and officials who might influence the award of negotiated municipal bond underwriting contracts on the other."[180]

Under the United States Supreme Court's most recent campaign finance decision, *McConnell v. Federal Election Commission*,[181] the test of the constitutionality of a contribution limitation is whether the limitation is "closely drawn to match a sufficiently important government interest."[182] It is no longer necessary to show a compelling government interest, nor is it necessary to show that less restrictive alternatives are unavailable.[183]

Unlike *Blount*, the Executive Order's prohibition extends beyond the two potential parties to a quid pro quo, the recipient of a state

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175 Exec. Order § 13, 36 N.J.R. at 4564. The Executive Order applies to those contributions reportable by the recipient under the Act, which are contributions of more than $300. Exec. Order § 3, 36 N.J.R. at 4563; N.J. STAT. ANN. §§ 19:44A-8 and 19:44A-16 (2004 N.J. Sess. Law Serv. 113, 118-22 (West)).

176 N.J. STAT. ANN. § 19:44A-20.2 (2004 N.J. Sess. Law Serv. 72, 76 (West)).

177 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996).

178 *Id.*

179 *Id.* at 944.

180 *Id.* at 947.

181 540 U.S. 93 (2003).

182 *Id.* at 136.

183 Richard L. Hasen, Buckley *is Dead, Long Live* Buckley*: The New Campaign Finance Incoherence of* McConnell v. Federal Election Commission, 153 U. PA. L. REV. 31, 61-63 (Nov. 2004).

contract and the state officials who might influence awarding that contract, to county committees whose candidates are not responsible for awarding state contracts.[184] Furthermore, in the preamble to the Executive Order, Governor McGreevey states, "Whereas, in the procurement process, our public policy grants the State broad discretion, taking into consideration all factors, to award a contract to a bidder whose proposal will be most advantageous to the State."[185] The discretion granted is that to the State, the entity responsible for awarding the contract, and not to any county.[186] Nevertheless, as long as the Governor shows a sufficient linkage between the award of state contracts and contributions to county committees,[187] a court is likely to find that the limitation is closely drawn to match the sufficiently important government interest of upholding the integrity of the state contracting process.[188]

In terms of the methods available to advance this interest, the government can either bar the award of state contracts to contributors to county committees, as the Governor did in the Executive Order,[189] or prohibit county committees from transferring funds to state committees and candidates for state office, as do the 2004 Amendments.[190] The Court in *McConnell* recognized that the legislature has the expertise to choose the methods to uphold the integrity of the political process.[191] The Court observed that its test of the constitutionality of contribution limitations "shows proper deference to Congress' ability to weigh competing constitutional interests in an area in which it enjoys particular expertise. It also provides Congress with sufficient room to anticipate and respond to concerns about circumvention of regulations designed to protect the integrity of the political process."[192]

If the Governor argues that he had to bar the award of state contracts to contributors to county committees because he lacked the authority to prohibit the transfer of funds between political committees, this position substantially weakens his argument that the Executive

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184 Exec. Order § 1, 35 N.J.R. at 4563.

185 Preamble to Exec. Order 36 N.J.R. at 4563.

186 *Id.*

187 *Cf.* Hasen, *supra* note 183, at 64-65.

188 *See McConnell*, 540 U.S. at 136.

189 Exec. Order § 1, 36 N.J.R. at 4563.

190 *See* N.J. STAT. ANN. § 19:44A-11.3a (2004 N.J. Sess. Law Serv. 72, 74-75 (West)).

191 540 U.S. at 137.

192 *Id.*

Order was within his administrative authority over the award of state contracts and was not an impermissible usurpation of the legislature's lawmaking function.[193]

The Governor's use of an Executive Order to make far-reaching changes to the state's campaign finance laws raises the issue of whether the Executive Order violates the separation of powers mandated by the New Jersey Constitution.[194] The New Jersey Constitution provides in Article III, Section 1, "[t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution."[195] Although the Constitution does not provide guidance for determining whether a power properly belongs to a particular branch of government, looking at the executive's basic function can provide the necessary guidance.[196] The New Jersey Constitution provides in Article V, Section 1, Paragraph 11, that the Governor must faithfully execute the laws.[197] When the legislature has enacted laws, the executive does not faithfully execute the laws if he does so in a manner inconsistent with their provisions.[198] Moreover, the statute on which the Governor relied in issuing the Executive Order, New Jersey Statute section 52:34-13, provides that the State Treasurer "shall determine the terms and conditions of the various types of agreements or contracts . . . not inconsistent with any applicable law . . . ."[199]

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193 *See* Last Chance Development Partnership v. Kean, 575 A.2d 427 (N.J. 1990).

194 *See* Michael S. Herman, *Gubernatorial Executive Orders*, 30 RUTGERS L. J. 987 (1999); Jack M. Sabatino, *Assertion and Self-Restraint: The Exercise of Governmental Powers Distributed Under the 1997 Constitution*, 29 RUTGERS L. J. 799 (1998).

195 N.J. CONST., art. III, § 1.

196 Communications Workers of America, AFL-CIO v. Florio, 617 A.2d 223 (N.J. 1992).

197 N.J. CONST. art. V, § 1, para. 11. This section also provides that the Governor "shall have power, by appropriate action or proceeding in the courts brought in the name of the State, to enforce compliance with any constitutional or legislative mandate or to restrain violation of any constitutional or legislative power or duty by any officer, department or agency of the State." *Id.*

198 *See Last Chance Development Partnership*, 575 A.2d at 427; Herman, *supra* note 194, at 990 ("So long as the Governor is acting within her authority, she may issue or repeal an executive order without the procedural or other safeguards that other types of law require.").

199 N.J. STAT. ANN. § 52:34-13 (West 2001). The other statute on which the Governor relied, N.J. STAT. ANN. § 52:34-12, grants the State Treasurer the discretion to reject any or

It ultimately falls to the legislature to enact laws with the appropriate specificity so that the courts can intelligently determine the scope of the executive's authority, and whether this authority unlawfully impinges on the legislature's lawmaking function.[200] One commentator has stated the test for resolving a conflict between the executive's and legislature's exercise of lawmaking functions as follows:[201] the New Jersey Supreme Court "will not strike down shared authority that offers no 'substantial' potential for interference with the essential integrity or exclusive functions of another branch. This forgiving standard leaves considerable room for all three branches to have a hand in some of the primary workings of the other branches."[202] This test was applied in *Communications Workers of America, AFL-CIO v. Florio*.[203] The Court addressed the constitutionality of a legislative enactment specifying employees who could not be laid off in a reduction in force, and providing that reduction of personnel must be made first by "managerial and other exempt personnel outside the collective negotiations units in the unclassified service, [and then . . .] by the reduction of managerial and other exempt personnel outside the collective negotiations units in the career service."[204] The Court held that under the separation of powers, the legislature unlawfully encroached on the executive's power to administer the executive branch and use its expertise in making staffing decisions.[205]

The legislature, in enacting the 2004 Amendments, has determined how far it will go in addressing the pay-to-play aspects of the campaign finance laws. Thus, there is a strong argument that the Executive Order, which goes much farther than and is inconsistent with the 2004

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all bids when the State Treasurer "determines that it is in the public interest to do so." N.J. STAT. ANN. § 52:34-12 (West 2001). In addition, the State Treasurer may adopt, in accordance with the Administrative Procedure Act, rules and regulations to implement the statutory provisions for advertising for bids. *Id.* Finally, the case on which the Governor relied, Commercial Cleaning Corp. v. Sullivan, 222 A.2d 4 (N.J. 1966), held that the State Treasurer and Director of the Division of Purchase and Property have broad discretion under N.J. STAT. ANN. § 52:34-12 to "determine who is the 'responsible bidder,' [and] which bid will be most advantageous to the State, 'price and other factors considered.'" *Commercial Cleaning Corp.*, 222 A.2d at 8.

200 Herman, *supra* note 194, at 1022-23.

201 Sabatino, *supra* note 194, at 822 (citing *Communications Workers of America*, 617 A.2d at 234).

202 *Id.* (footnote omitted).

203 617 A.2d 223 (N.J. 1992).

204 *Id.* at 226.

205 *Id.* at 234.

Amendments, has the substantial potential for interference with the essential integrity of the legislature's lawmaking function.[206] As the United States Supreme Court has recognized, the legislature has the expertise to choose the methods to uphold the integrity of the political process.[207] Once the legislature enacted the 2004 Amendments, the executive lacked the constitutional authority to administer state contracts in a manner inconsistent with the 2004 Amendments.[208] Moreover, the 2004 Amendments deal with campaign finance laws, the laws that go to the heart of our democracy.[209] It is deeply ironic that a Governor, who resigned under less than auspicious circumstances and who no longer had a meaningful stake in the democratic process, used the undemocratic method of an executive order to seek to change the campaign finance laws that undergird our democracy.

The pay-to-play saga did not end with the Executive Order. The Federal Highway Administration claimed that the Executive Order imposed an undue restraint on competitive bidding under 23 U.S.C. §112, which requires that contracts "be awarded on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility."[210] The Federal Highway Administration withheld $251 million in federal funding for highway projects in New Jersey.[211] In response, the State of New Jersey filed suit in federal district court, but the Honorable Stanley R. Chesler denied the State's motion for a temporary restraining order to prohibit the Federal Highway Administration from withholding transportation funds.[212] Acting Governor Codey then issued Executive Order No. 18, which provides that the Executive Order "shall not apply to DOT contracts that are funded, in whole or in part, by the FHWA."[213]

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206 Sabatino, *supra* note 194, at 822; Letter from Albert Porroni, Legislative Counsel, New Jersey Office of Legislative Services, to Honorable Joseph J. Roberts, Jr., Majority Leader, New Jersey General Assembly (Oct. 15, 2004), *available at* http://www.politicsnj.com/ols_EO_paytoplay.htm.

207 *McConnell*, 540 U.S. at 137.

208 *Cf.* Bullet Hole, Inc. v. Dunbar, 763 A.2d 295, 303 (N.J. App. Div. 2000) (when "Governor acts consistently with express or implied authority from the Legislature, she exercises" both her own powers and the powers delegated by the legislature).

209 Buckley v. Valeo, 424 U.S. 1 (1976).

210 23 U.S.C. § 112(b)(1) (West 2002).

211 Joe Donohue & Joe Malinconico, *Feds Freeze State Highway Funds,* nj.com Everything Jersey, Jan. 14, 2005, *available at* http://www.nj.com.

212 State of New Jersey v. Mineta, Civil No. 05-228 (D. N.J. Jan. 21, 2005).

213 Exec. Order No. 18, 37 N.J.R. 693 (Mar. 7, 2005).

On February 28, 2005, the New Jersey Senate passed Bill No. A1500, which was previously passed by the New Jersey Assembly on October 25, 2004.[214] This bill statutorily enacts the provisions of the Executive Order.[215] Thus, the passage of A1500 resolves the issue of whether the Executive Order unconstitutionally violates the separation of powers under the New Jersey Constitution. On March 7, 2005, Acting Governor Codey conditionally vetoed the bill, and requested that the Legislature amend the bill so that it would not "apply in circumstances when it is determined by the federal government or a court of competent jurisdiction that its application would violate federal law or regulation."[216] He also requested that the bill be amended not to prevent the State from complying with the Eminent Domain Act of 1971.[217] The Assembly passed the amended bill on March 14, 2005, and the Senate passed the amended bill on March 21, 2005.[218] Acting Governor Codey signed it into law on March 22, 2005.[219] Finally, the federal highway and transit bill, H.R. 3, contains a provision amending 23 U.S.C. §112, which states that federal contracting law and regulations shall not "prohibit a state from enacting a law or issuing an order that limits the amount of money an individual, who is doing business with a state agency for a Federal-aid highway project, may contribute to a political campaign."[220]

VIII. Corporation's Payment of CPC Administrative Expenses and Indemnification of CPC Officers

When a corporation can contribute to a CPC, the amounts that the corporation spends on CPC administration, such as the percentage of officers' salaries allocable to CPC administration, count toward the $7,200 annual corporate contribution limitation.[221] As another example,

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214 A1500, 211th Legis. (N.J. 2005) *available at* http://www.njleg.state.nj.us/bills/BillView.asp.

215 *Id.*

216 Conditional Veto to A1500 of Acting Governor Richard J. Codey, Mar. 7, 2005, *available at* http://www.njleg.state.nj.us/bills/BillView.asp.

217 *Id.*

218 A1500, 211th Legis. (N.J. 2005), *available at* http://www.njleg.state.nj.us/bills/BillView.asp.

219 *Id.*

220 H.R. 3, 109th Cong., 1st Sess., §1109 (2005).

221 N.J. Att'y Gen. Op. No. 14-1979 (July 31, 1979). *See also* Arizona State Democratic Party v. State, 98 P.3d 214 (Ariz. Ct. App. 2004) (Arizona statute prohibited corporate contributions for the purpose of "influencing any election;" court held that prohibition

if a corporation uses an outside accounting firm to prepare the IRS and New Jersey filings or consults with outside counsel on how to handle a suspect contribution,[222] the professional fees can exceed $8,200. In this situation, the CPC would be responsible for payment of the fees over $7,200. Accordingly, the corporation and CPC should prepare an annual budget, and in determining the funds available for contributions to candidates, take into account reasonably anticipated administrative expenses to be paid by the corporation and CPC, and a reserve for unanticipated expenses to be paid by the CPC.

The corporation's payment of CPC administrative expenses is disallowed as a deduction by the corporation for federal income tax purposes.[223] The percentage of corporate officers' and employees' salaries allocable to CPC administration is also disallowed as a

barred contributions to Arizona Democratic Party to pay Party's operating expenses); KY Att'y Gen. Op. No. 91-80 (May 29, 1991) (since Kentucky prohibits contributions by corporations, corporation cannot pay PAC administration expenses); N.Y. State Board of Elections 1978 Op. No. 1 (PAC was composed of senior and middle management officers of bank; participation in PAC was a function of officer position; bank must allocate the percentage of officers' salary attributable to PAC administration as a corporate contribution to the PAC); Tenn. Att'y Gen. Op. No. 90-97 (Oct. 12, 1990) (since Tennessee prohibits contributions by corporations, corporation cannot pay PAC administration expenses).

222 Josephson & Moll, *supra* note 91, at 28. For example, under N.J. ADMIN. CODE tit. 19, § 25-11.8(a) (2004), a CPC or a CPC treasurer who receives a contribution in excess of any contribution limit under the Act must refund that portion of the contribution that exceeds the limit to the contributor within forty-eight hours of receipt, and maintain written records of the refund. *Id.* As another example, if a CPC receives a contribution it believes may be from a foreign national prohibited under FECA from making contributions, the CPC must, within ten days of the treasurer's receipt, either return the contribution to the contributor without depositing it, or deposit the contribution and use best efforts to determine its legality. 11 C.F.R. § 103.3(b)(1) (2003). The treasurer must make at least one written or oral request for evidence of the contributions legality. *See id.* Acceptable evidence includes, but is not limited to, a written statement from the contributor explaining why the contribution is legal, or a written statement by the treasurer memorializing an oral communication explaining why the contribution is legal. *Id.* If the CPC deposits the contribution, the treasurer must make sure the funds are not spent because they may have to be refunded. *Id.* at § 103.3(b)(4). In addition, the treasurer must maintain a written record explaining why the contribution may be prohibited. *Id.* at § 103.3(b)(5). Within thirty days of receipt, the treasurer must either confirm the contribution's legality, or issue a refund. *Id.* at § 103.3(b)(1). Furthermore, if a CPC deposits a contribution that appears to be legal, but later discovers that based on new evidence it is a prohibited contribution from a foreign national, the CPC must refund the contribution within thirty days of making the discovery. *Id.* at § 103.3(b)(2). If the CPC lacks sufficient funds to make the refund, it must use the next funds it receives. *Id.* For a discussion of the FECA prohibition on foreign nationals from making contributions, see *infra* notes 337 to 365 and the accompanying text.

223 I.R.C. § 162(e)(1)(B)-(C) (West 2002).

deduction.[224] These disallowances also apply to the New Jersey Corporation Business Tax, which imposes tax on a corporation's entire net income.[225] Entire net income is deemed prima facie to be equal to the taxable income that the corporation is required to report to the United States Treasury Department for the purpose of computing its federal income tax.[226]

The treatment of the corporation's payment of CPC administrative expenses as a contribution raises the issues of whether indemnification payments by the corporation to corporate officers for claims arising from or related to an officer's service to the CPC, and payment by the corporation of premiums for liability insurance covering corporate officers for these claims, are contributions under New Jersey law. Since the Federal Election Commission ("FEC") treats these payments as administrative expenses,[227] New Jersey also is likely to provide this treatment.

Accordingly, corporate officers should bargain for the contractual obligation, in either the bylaws of the corporation and CPC, or an employment agreement, that the corporation and CPC shall jointly and severally indemnify the officers to the fullest extent permitted by the mandatory and permissive indemnification provisions of the governing state corporation and campaign finance statutes.[228] As part of this

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224 Technical Assistance Memorandum 8202019 (Sept. 30, 1981).

225 N.J. STAT. ANN § 54:10A-5(c) (West 2002).

226 N.J. STAT. ANN § 54:10A-4(k) (West 2002).

227 FEC Advisory Opinion 1991-35 (corporation's indemnification is an administrative expense not subject to FECA prohibition on corporate contributions); FEC Advisory Opinion 1980-135 (same); FEC Advisory Opinion 1979-42 (corporation's payment of insurance premiums for PAC's officers is an administrative expense not subject to FECA prohibition on corporate contributions).

228 *See* Lois F. Herzeca, *Key Issues for Director and Officer Indemnification*, N.Y.L.J., Aug. 23, 2004, at 4. Furthermore, indemnification by a CPC of its officers and members should be a proper CPC expenditure. *Id. Cf.* ELEC Advisory Opinion No. 05-1998 (June 24, 1998). In this Advisory Opinion, ELEC construed N.J. STAT. ANN § 19:44A-11.2a(1), which permits a candidate to use contributions for the payment of campaign expenses. Campaign expenses mean any expense incurred or expenditure made for the purpose of paying for or leasing items or services used in connection with an election campaign, other than those items or services which may reasonably be considered to be for the personal use of the candidate or any person associated with the candidate. N.J. STAT. ANN § 19:44A-11.2a (flush language) (West 1999); N.J. ADMIN. CODE tit. 19, § 25-6.5(b) (2004). ELEC regulations define personal use as any use of contributions to pay or fulfill a commitment, obligation, or expense of any person that would arise or exist irrespective of the candidate's campaign or irrespective of the candidate's ordinary and necessary expense of holding public office. N.J. ADMIN. CODE tit. 19, § 25-6.5(c) (2004). ELEC opined that under these

obligation, the corporation and CPC shall advance all indemnified expenses with the officer's agreement to repay the advances if he or she is subsequently found not to be entitled to indemnification.[229] The governing state corporation statute often limits the corporation's contractual ability to indemnify an officer for penalties, especially criminal ones.[230] Nevertheless, a contractual agreement to indemnify is

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provisions a candidate committee can pay the costs of damage to a rental vehicle not covered by insurance. ELEC Advisory Opinion No. 05-1998 (June 24, 1998). The damage resulted from an accident while the campaign manager driving the vehicle was en route to a campaign event. *Id.* Similarly, indemnification of the liability for civil damages arising from an officer's service to a CPC should be a permissible CPC expense. *Id.*

In addition, under the ELEC regulations, contributions received by a candidate "may be used for reasonable fees and expenses of legal representation, the need for which arises directly from and is related to the campaign for public office or from the duties of holding public office." N.J. ADMIN. CODE tit. 19, § 25-6.10(a) (2004). A permissible use is the defense of an action or proceeding alleging a violation of the Act and naming as a respondent or defendant the candidate or officeholder whose campaign funds are to be used to pay these expenses. N.J. ADMIN. CODE tit. 19, § 25-6.10(a)3 (2004). Finally, the permissible use of contributions does not include payment of legal fees and expenses incurred in connection with the candidate or officeholder's personal or business affairs, or which would otherwise qualify as personal use under N.J. ADMIN. CODE tit. 19, § 25-6.5(c) (2004). N.J. ADMIN. CODE tit. 19, § 25-6.10(b) (2004). Similarly, the legal fees and expenses that a CPC officer incurs in defending against claims arising from his or her service to the CPC should be a permissible CPC expense.

229 Herzeca, *supra* note 228, at 4. *See* Senior Tour Players 207 Management Co. LLC v. Golftown 207 Holding Co. LLC, 2004 WL 550743, at *2 (Del. Ch. 2004) (operating agreement provided that the "Company shall advance such Indemnified Person's related expenses, as such expenses are incurred, to the full extent permitted by law;" court held that the "right to advancement is not ordinarily dependent upon a determination that the party in question will ultimately be entitled to be indemnified"). In the absence of a contractual agreement to advance expenses, state corporate law is likely to limit an officer's right to advancement of expenses. *See, e.g.*, DEL. GEN. CORP. LAW § 145(e) (corporation may advance expenses upon a director's or officer's agreement to repay if it is ultimately determined that he or she is not entitled to indemnification); N.J. STAT. ANN. § 14A:3-5(6) (West 2003) (corporation may advance expenses when authorized by board of directors upon corporate agent's agreement to repay if it is ultimately determined that he or she is not entitled to indemnification); Gentile v. Singlepoint Financial, Inc., 788 A.2d 111, 113 (Del. 2001) (when corporation's bylaws required advancement of expenses only if a director is named as a defendant, advancement not required when the director is a plaintiff in litigation against the corporation); Advanced Mining Systems, Inc. v. Fricke, 623 A.2d 82, 84 (Del. Ch. 1992) (provision in bylaws for corporation to indemnify directors to the extent permitted by Delaware law does not entitle directors to advances); *see also* Sean T. Carnathan, *Will the Company Cover an Ex-Officer's Legal Costs?*, 13 BUSINESS LAW TODAY 33 (Sept./Oct. 2003) (discusses whether publicly-traded corporation's advancement of legal expenses violates Sarbanes-Oxley Act of 2002 prohibition against corporation's extension of personal credit to directors and officers).

230 N.J. STAT. ANN. § 14A:3-5(8) (West 2003) (contractual indemnification prohibited when final adjudication establishes corporate agent's breach of duty of loyalty, lack of good

important for an officer to counter any argument that the mandatory indemnification under the state corporation statute does not apply to the officer's service to a CPC.[231] Furthermore, corporation statutes often contain a non-exclusivity clause providing that the statutory indemnification provisions are not exclusive of indemnification rights under bylaws or an agreement.[232] Finally, although the CPC's indemnification is not subject to the $7,200 annual limitation on payment of administrative expenses, as the corporation's indemnification is, since the CPC is funded primarily from employee contributions, it is unlikely to have the same economic wherewithal as the corporation to satisfy its indemnification obligation.[233]

In addition, since the corporation's and the CPC's indemnification payments are income taxable to the officer,[234] and the officer does not have an offsetting deduction for payment of a penalty,[235] a full

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faith, knowing violation of law, or receipt of an improper personal benefit); Owens Corning v. National Union Fire Insurance Co., 257 F.3d 484, 494 (6th Cir. 2001) (requirement of directors' good faith may not be waived in expanding indemnification beyond that provided by Delaware statute); Waltuch v. Conticommodity Services, Inc., 88 F.3d 87, 95 (2d Cir. 1996) (indemnification requires that director or officer acted in good faith and "reasonably believed to be in or not opposed to the best interests of the corporation," and with respect to criminal proceedings, had no reason to believe his or her conduct was unlawful; or he or she was successful in litigation). *See generally* Norwood P. Beveridge, *Does the Corporate Director Have a Duty Always to Obey the Law?*, 45 DEPAUL L. REV. 729, 747-48 (1998); Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279 (1991); Joseph E. Irenas & Theodore D. Moskowitz, *Indemnification of Corporate Officers, Agents, and Directors: Statutory Mandates and Policy Limitations*, 7 SETON HALL LEGIS. J. 117 (1984); Kurt A. Mayr, *Indemnification of Directors and Officers: The "Double Whammy" of Mandatory Indemnification Under Delaware Law in Waltuch v. Conticommodity Services, Inc.*, 42 VILL. L. REV. 223 (1997).

231 Herzeca, *supra* note 228, at 4. *See* A.D.M. Corp. v. Thompson, 707 F.2d 25 (1st Cir. 1983) (when corporate documents are silent, statutory indemnification provisions apply), *cert. denied*, 464 U.S. 938 (1983); Mooney v. Willys-Overland Motors, Inc., 204 F.2d 888, 896 (3d Cir. 1953) (to obtain indemnification outside of Delaware statute, "an independent legal ground for such claims must be shown in every case").

232 DEL. GEN. CORP. LAW § 145(f); N.J. STAT. ANN. § 14A:3-5(8) (West 2003).

233 Gross & Hong, *supra* note 3, at A-12, A-19 to A-22.

234 Huff v. Commissioner, 80 T.C. 804 (1983) (corporation's payment of civil penalty for violation of California Business and Professions Code imposed on corporate officers who were severally liable for the penalty was includable in their gross income).

235 I.R.C. § 162(f) (West 2002) (payment of penalty paid to a government for violation of law not deductible); Treas. Reg. § 1.162-21(b)(1) (1975) (a fine or similar penalty includes an amount paid pursuant to a conviction or a plea of nolo contendere for a felony or misdemeanor in a criminal proceeding; paid as a civil penalty imposed by federal, state, or local law; or paid in settlement of actual or potential liability for a civil or criminal

indemnification must include a gross-up.[236] With a gross-up, once the officer pays the federal, state, and local employment, income, and payroll taxes on the grossed-up indemnification, the officer has sufficient cash remaining to pay the penalty.[237]

In light of the restrictions on corporate indemnification and the likelihood of the CPC having insufficient funds to satisfy its indemnification obligation, directors' and officers' insurance plays an important role in limiting an officer's personal exposure for service to a CPC.[238] State corporation statutes often permit the purchase of insurance to cover liabilities for which indemnification is prohibited. For example, the New Jersey statute provides that a corporation can purchase insurance for liabilities a person incurs as a corporate agent regardless of the corporation's ability to indemnify under New Jersey statute.[239] The Delaware statute contains a similar provision.[240]

With respect to whether the corporation's payment of premiums for directors' and officers' insurance is a contribution under New Jersey law, if the insurance policy covers the officer for service to the CPC for no additional premium, and the officer would have been covered by the policy regardless of his or her service to the CPC, the corporation and its officers can reasonably take the position that there is no contribution.[241] If there is an additional premium, in light of the risk that the corporation's payment of the additional premium is a contribution,

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penalty); Treas. Reg. § 1.162-21(b)(2) (1975) ("the amount of a fine or penalty does not include legal fees and related expenses paid or incurred in the defense of a prosecution or civil action arising from a violation of the law imposing the fine or civil penalty").

236 *Cf.* Bill C. Wilson & Diane M. McGowan, *Golden Parachutes*, Tax Mgmt. Portfolio 396 (BNA), at A-39 (2004) ("A full gross-up will reimburse the employee for the excise tax on excess parachute payments [under Code Sections 280G and 4999] and the taxes on the gross-up [including excise tax on the gross-up as it too is a parachute payment]. The employee will be in the same economic position as if an excise tax did not exist").

237 *Id.*

238 *See* Gross & Hong, *supra* note 3, at A-12 ("Many PACs obtain directors' and officers' insurance for the PAC").

239 N.J. STAT. ANN. § 14A:3-5(9) (West 2003).

240 DEL. GEN. CORP. LAW § 145(g).

241 N.J. ADMIN. CODE tit. 19, § 25-6.5(b)-(c) (2004) (candidate cannot use contributions to pay items or services which may reasonably be considered to be for the candidate's personal use. Personal use means a commitment, obligation, or expense of any person that would arise or exist is irrespective of the candidate's campaign or irrespective of the candidate's ordinary and necessary expense of holding office); *cf.* 11 C.F.R. §113.1(g)(6) (2003) (under FECA, payments to a candidate are contributions "unless the payment would have been made irrespective of the candidacy").

the CPC or officer may wish to pay it.[242] Since a person can make a contribution only in his or her name,[243] the officer should issue a check payable to the insurer, rather than reimburse the corporation or CPC for its payment.

IX. Prohibition on Municipal Securities Business for Underwriters and Their PACS

The use of a PAC to escape the prohibition on corporate contributions has been curtailed in the municipal securities business through the issuance of Rules G-37 and G-38 by the Municipal Securities Rulemaking Board ("MSRB").[244] Rule G-37(b)(i) provides that a broker, dealer or municipal securities dealer shall not engage in municipal securities business[245] with an issuer within two years after any contribution[246] to an official of that issuer[247] made by: (a) the broker,

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[242] *Cf.* Steven H. Sholk, *A Guide to New York Corporate Political Action Committees,* 42 EXEMPT ORG. TAX REV. 67, 71-72 (Oct. 2003).

[243] N.J. STAT. ANN. § 19:44A-20 (West 1999); N.J. ADMIN. CODE tit. 19, § 25-10.8 (2004).

[244] The MSRB derives its rulemaking authority from Section 15B(a)(1) of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C.A. §78o-3B(a)(1) (West 1997). *See generally* Kevin Opp, *Ending Pay-to Plan in the Municipal Securities Business; MSRB Rule G-37 Ten Years Later,* 76 U. COLO. L. REV. 243 (2005).

[245] MSRB Rule G-37(g)(vii) (2004). Municipal securities business means: (a) "the purchase of a primary offering . . . of municipal securities from the issuer on other than a competitive bid basis (e.g., a negotiated underwriting);" (b) "the offer or sale of a primary offering of municipal securities on behalf of any issuer (e.g., a private placement);" (c) "the provision of financial advisory or consultant services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide these services on other than a competitive bid basis;" or (d) "the provision of remarketing agent services to or on behalf of an issuer with respect to a primary offering of municipal securities in which the dealer was chosen to provide these services on other than a competitive bid basis." *Id.*

[246] MSRB Rule G-37(g)(i) (2004). MSRB Rule G-37(g)(i) defines contribution as "any gift, subscription, loan, advance, or deposit or anything of value made: (A) for the purpose of influencing any election for federal, state or local office;" (B) for payment of debt incurred in connection with any such election; or (C) for transition or inaugural expenses incurred by the successful candidate for state or local office. *Id.* Under Rule G-37 Qs & As, Q & A II.18 (May 24, 1994), a municipal finance professional can perform personal volunteer work, but soliciting and bundling of contributions triggers the two-year prohibition on municipal securities business. Rule G-37 Qs & As, Q & A II.18 (May 24, 1994). In addition, "if the municipal finance professional uses the dealer's resources (e.g., a political position paper prepared by dealer personnel) or incurs expenses in the conduct of volunteer work (e.g., hosting a reception), then the value of the resources and expenses would constitute a contribution. Personal expenses incurred by the municipal finance professional in the conduct of such volunteer work, which expenses are purely incidental to

such work and unreimbursed by the dealer (e.g., cab fares and personal meals) would not constitute a contribution." *Id.*

When a municipal finance professional signs a check, regardless of whether it is drawn on a joint account, the municipal finance professional is deemed to have made the full contribution. Rule G-37 Qs & As, Q & A II.20 (Feb. 16, 1996). If both a municipal finance professional and another person sign a check drawn on their joint account, then each person is deemed to have made half of the contribution, regardless of any writing accompanying the check that provides or directs otherwise. Rule G-37 Qs & As, Q & A II.21 (Feb. 16, 1996). The New Jersey ELEC regulations provide for a similar rule, but permit a separate writing to provide for other than a pro-rata allocation:

> 1. If an individual who is solely or jointly a beneficial owner of the funds in the account on which the check is drawn signs the check, the contributor is the individual signing the check and beneficially owning the funds.
> 2. If the check is signed by more than one individual and each of them jointly is a beneficial owner of the funds in the account on which the check is drawn, each of the individuals signing the check and beneficially owning the funds is a contributor. The amount of the contribution of each individual signatory is the sum of the check divided equally among them, unless written instructions signed by each joint beneficial owner provide for a different percentage allocation of the check amount.

N.J. ADMIN. CODE. tit. 19, § 25-10.15(a)1-2 (2004). *See also* N.J. ADMIN. CODE. tit. 19, § 25-15.15(a) (2004) (similar rule for gubernatorial general election); N.J. ADMIN. CODE. tit. 19, § 25-16.13(a) (2004) (similar rule for gubernatorial primary election).

[247] MSRB Rule G-38(g)(vi) (2004). Official of an issuer means any person, including any election committee for that person,

> who was, at the time of the contribution, an incumbent, candidate or successful candidate: (a) for elective office of the issuer which office is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by the issuer; or (b) for any elective office of a state or any political subdivision, which office has authority to appoint any person who is directly or indirectly responsible for, or can influence the outcome of, the hiring of a broker, dealer or municipal securities dealer for municipal securities business by an issuer.

MSRB Rule G-38(g)(vi). For example, when a dealer makes contributions to the governor, who appoints the members of the board of a state agency, the two year prohibition on municipal securities business applies. MSRB Rule G-37 Qs & As, Q & A II.5 (May 24, 1994, revised Oct. 30, 2003). An official of an issuer excludes national, state, and local political parties, and consultants and lawyers. MSRB Rule G-37 Qs & As, Q & A III.3 (May 24, 1994); MSRB Rule G-37 Qs & As, Q & A IV.9 (May 24, 1994). The MSRB has proposed to amend Rule G-37(c) to prohibit solicitation of any person or political action committee to make or coordinate any payments "to a political party of a state or locality where the broker, dealer or municipal securities dealer is engaging or is seeking to engage in municipal securities business." MSRB Notice 2005-11 (Feb. 15, 2005), Rule G-37: Request for Comments on Draft Amendments to Prohibiting Solicitation and Coordination of Payments to Political Parties, and Draft Question and Answer Guidance Concerning Indirect Rule Violations *available at* http://www.msrb.org/msrb1/whatsnew/2005-11.asp. Furthermore, Rule G-37 applies to unsuccessful candidates. MSRB Rule G-37 Qs & As, Q & A II.22 (Feb. 16, 1996).

Unlike Rule G-37, the 2004 Amendments and Executive Order apply to law firms. Since a law firm is a business entity, N.J. STAT. ANN. § 19:44A-20.7, it is subject to the pay-to-

dealer or municipal securities dealer; (b) any municipal finance professional[248] associated[249] with that broker, dealer or municipal

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play rules. In addition, lawyers must determine how the applicable state legal ethics rules affect their ability to make political contributions. Buescher, *supra* note 84, at 140. On February 14, 2000, the American Bar Association House of Delegates amended the ABA Model Rules of Professional Conduct by adopting Rule 7.6 Political Contributions to Obtain Government Legal Engagements or Appointments by Judges. Rule 7.6 provides, "A lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment." Comment 5 provides that contributions satisfy this purpose:

> [I]f, but for the desire to be considered for the legal engagement or appointment, the lawyer or law firm would not have made or solicited the contributions. The purpose may be determined by an examination of the circumstances in which the contributions occur. For example, one or more contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement, absent other factors that weigh against existence of the proscribed purpose. Those factors may include among others that the contribution or solicitation was made to further a political, social, or economic interest or because of an existing personal, family, or professional relationship with a candidate.

MODEL RULES OF PROF'L CONDUCT R. 7.6 cmt. 5 (2000).

Furthermore, Comment 4 provides that the "term 'lawyer or law firm' includes a political action committee or other entity owned or controlled by a lawyer or law firm." *Id.* at cmt. 4. Finally, Comment 3(b)-(c) provides that Rule 7.6 does not apply to "engagements or appointments made on the basis of experience, expertise, professional qualifications and cost following a request for proposal or other process that is free from influence based upon political contributions," nor does it apply to "engagements or appointments made on a rotational basis from a list compiled without regard to political contributions." *Id.* at cmt. 5. Model Rule 7.6 has not been adopted by New Jersey, and has been adopted by Delaware, DEL. RULES OF PROF'L CONDUCT R. 7.6, and Idaho, IDAHO RULES OF PROFESSIONAL CONDUCT R. 7.6.

[248] Municipal finance professional means: "(a) any associated person primarily engaged in municipal securities representative activities;" "(b) any associated person who solicits municipal securities business;" "(c) any associated person who is both (i) a municipal securities principal or municipal securities sales principal, and (ii) a supervisor of any persons described in subparagraphs (a) or (b); (d) any associated person who is a supervisor of any person described in subparagraph (c) up through and including, in the case of a broker, dealer or municipal securities dealer other than a bank dealer, the Chief Executive Officer or similarly situated official and, in the case of a bank dealer, the officer or officers designated by the board of directors of the bank as responsible for the day-to-day conduct of the bank's municipal securities dealer activities;" or "(e) any associated person who is a member of the broker, dealer (or municipal securities dealer (or, in the case of a bank dealer, the separately identifiable department or division of the bank, as defined in Rule G-1) executive or management committee, or similarly situated officials."[248] MSRB Rule G-

securities dealer; or (c) any political action committee controlled by that broker, dealer, or municipal securities dealer, or by any municipal finance professional.[250] This prohibition does not apply if the only contributions "were made by municipal finance professionals to officials of an issuer for whom the municipal finance professionals were entitled to vote and which contributions, in total, did not exceed $250 by any municipal finance professional to each official of that issuer per election."[251]

Rule G-37(c) prohibits the solicitation and coordination of contributions to officials of issuers with which the broker, dealer, or municipal securities dealer is doing business or seeks to do business.[252]

Rule G-37(d) contains an anti-abuse rule, which provides that "no broker, dealer or municipal securities dealer, or any municipal finance professional shall, directly or indirectly, through or by any other person

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37(g)(iv) (2004).

Rule G-37 provides, "For an individual designated as a municipal finance professional solely pursuant to subparagraph (b)," the prohibition applies to contributions "to officials of an issuer prior to becoming a municipal finance professional only if" that individual solicits municipal securities business from the issuer. MSRB Rule G-37(b)(ii)(2004). The Rule also provides, "For an individual designated as a municipal finance professional solely pursuant to subparagraphs (C), (D), or (E)," the prohibition applies "only to contributions made during the six months prior to the individual becoming a municipal finance professional." MSRB Rule G-37(b)(iii)(2004). A municipal finance professional does not include a person's spouse. MSRB Rule G-37 Qs&As, Q&A III.1 (May 24, 1994).

249 MSRB Rule G-37 Qs & As, Q & A IV.6 (May 24, 1994, revised Oct. 30, 2003). For a dealer other than a bank dealer, Section 3(a)(18) of the Exchange Act defines associated, and for a bank dealer, Section 3(a)(32) of the Exchange Act defines associated. *Id.* Under Section 3(a)(18) of the Exchange Act,

> [an] associated person of a broker or dealer means any partner, officer, director, or branch manager (or any person occupying a similar status or performing similar functions); any person directly or indirectly controlling, controlled by, or under common control with the dealer; or any employee of such broker or dealer, except those whose functions are solely clerical or ministerial.

Id.

Under Section 3(a)(32) of the Exchange Act,

> [a] person associated with a municipal securities dealer with respect to a bank means any person directly engaged in the management, direction, supervision, or performance of any of the municipal securities dealer's activities with respect to municipal securities; and any person directly or indirectly controlling such activities or controlled by the municipal securities dealer in connection with such activities.

Id.

250 MSRB Rule G-37 Qs & As, Q & A IV.24 (May 24, 1994).

251 MSRB Rule G-37(b)(i) (2004).

252 MSRB Rule G-37(c) (2004).

or means, do any act"[253] that would violate Rule G-37(b) or Rule G-37(c).[254] Finally, Rule G-37(e) requires quarterly reporting of contributions to the MSRB,[255] Rule G-37(i) contains a procedure for applying for an exemption from the prohibition of Rule G-37(b),[256] and Rule G-37(j) contains an automatic exemption.[257]

The constitutionality of Rule G-37 was upheld against First Amendment attack in *Blount v. Securities & Exchange Commission*.[258] The court acknowledged that a campaign contribution is a form of speech protected by the First Amendment, a "symbolic act that serves as a general expression of support" for a candidate and his or her views.[259] The court assumed that Rule G-37 was content-based and not content-neutral,[260] and stated the test for Rule G-37's constitutionality to be whether the prohibition is narrowly tailored to serve a compelling government interest.[261] This test has three prongs: (a) whether the government interests in support of the prohibition are compelling; (b) whether the rule effectively advances those interests, i.e., whether the problems that the rule addresses exist, and whether the rule will materially reduce them; and (c) whether the rule is narrowly tailored to advance the compelling government interest, i.e., whether less restrictive alternatives would accomplish the government's goals as well.[262]

For the first prong, the court found two compelling interests: "protecting investors in municipal bonds from fraud, and protecting underwriters of municipal bonds from unfair, corrupt market practices."[263]

Under the second prong, the court found that the ills existed

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253 MSRB Rule G-37(d) (2004).

254 *Id.*

255 MSRB Rule G-37(e) (2004).

256 MSRB Rule G-37(i) (2004).

257 MSRB Rule G-37(j) (2004).

258 61 F.3d 938 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1119 (1996).

259 *Id.* at 941.

260 *Id.* at 943.

261 *Id.*

262 *Id.* at 944. Under *McConnell*, the test of the constitutionality of a contribution limitation is whether the limitation is closely drawn to match a sufficiently important government interest. It is no longer necessary to show a compelling government interest, nor is it necessary to show that less restrictive alternatives are available. *McConnell*, 540 U.S. at 135-137; Hasen, *supra* note 183, at 61-63.

263 *Id.*

because underwriters' campaign contributions "self-evidently create a conflict of interest in state or local officials who have power over municipal securities contracts and a risk that they will award the contracts on the basis of benefit to their campaign chests rather than to the governmental entity."[264] The court then expressed doubt that the prohibitions protected investors because an underwriter had two reasons to exercise due diligence in investigating municipal issuers so as to protect investors: the underwriter's interest in avoiding liability for fraud, and protecting its reputation in the marketplace."[265] The underwriter would still want to protect these interests even when engaging in pay-to-play practices.[266]

The court then found that the ability of Rule G-37 to protect against unfair, corrupt market practices is self-evident.[267] Pay-to-play practices create "artificial barriers to competition for those firms that either cannot afford, or decide not to make political contributions."[268] In addition, when pay-to-play "is the determining factor in the selection of an underwriting syndicate, an official may not necessarily hire the most qualified underwriter."[269]

Finally, for the third prong, Rule G-37 was sufficiently narrowly tailored because it constrained relations only between the parties to the quid pro quo: the underwriter and the government officials responsible for underwriting municipal bonds.[270] The rule did not apply to the sale of bonds on a competitive basis.[271] Furthermore, "[an] underwriter is barred from engaging in business with the particular issuer for only two years after it makes a contribution, and is barred from soliciting contributions only during the time that it is engaged in or seeking business with the issuer associated with" the recipient of the contribution.[272] In addition, "a municipal finance professional may contribute up to $250 per election to each official for whom he or she is entitled to vote."[273] Moreover, as the Securities & Exchange

264 *Blount*, 61 F.3d at 944-45.
265 *Id.* at 945.
266 *Id.*
267 *Id.*
268 *Id.*
269 *Id.*
270 *Blount*, 61 F.3d at 947.
271 *Id.* at 947 n.5.
272 *Id.* at 947.
273 *Id.* at 947-48.

Commission ("SEC") interprets the Rule, municipal finance professionals could expend their own funds to express their positions on issues, solicit votes, and attend fundraising events[274]

Finally, the court, for two reasons, rejected a Fifth Amendment due process vagueness challenge to Rule G-37(d)'s anti-abuse provisions.[275] First, the SEC interpreted this provision as requiring a showing of culpable intent, or a demonstration that the conduct was undertaken to circumvent the requirements of Rule G-37(b) and (c).[276] Second, the SEC substantially reduced any remaining uncertainty about the Rule's potential application by providing for informal advance rulings from SEC staff on any proposed course of conduct.[277]

After Rule G-37 became law, public finance consultants to securities firms proliferated, along with the concern that securities firms were circumventing Rule G-37 by using consultants to funnel political contributions that otherwise would trigger the prohibition of Rule G-37.[278] The SEC responded with the adoption of Rule G-38, which requires brokers, dealers and municipal securities dealers to enter into written agreements with consultants,[279] and to disclose the agreements to issuers and the MSRB.[280] The written agreement must contain the

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274 *Id.* at 948; SEC Release No. 34-33868, at 19 (Apr. 17, 1994).

275 *Blount,* 61 F.3d at 948.

276 *Id.*; SEC Release No. 34-33868, at 19 (Apr. 17, 1994).

277 *Blount,* 61 F.3d at 948; 17 C.F.R. §§ 202.1(d) and 202.2 (2004).

278 Jordan, *supra* note 61, at 528-29.

279 MSRB Rule G-38(b) (2004). Consultant means:

> any person used by a broker, dealer or municipal securities dealer to obtain or retain municipal securities business through direct or indirect communication by such person with an issuer on behalf of such broker, dealer or municipal securities dealer where the communication is undertaken by such person in exchange for, or with the understanding of receiving, payment from the broker, dealer or municipal securities dealer or any other person.

MSRB Rule G-38(a)(i) (2004). The following persons are not consultants:

> (A) a municipal finance professional of the broker, dealer or municipal securities dealer; and (B) any person whose sole basis of compensation from the broker, dealer or municipal securities dealer is the actual provision of legal, accounting, or engineering advice, services or assistance in connection with the municipal securities business that the broker, dealer or municipal securities dealer is seeking to obtain or retain.

Id.

280 MSRB Rule G-38(d) (2004). In Executive Order No. 9, Acting Governor Richard J. Codey ordered that state agencies must deal only with the principals of bond underwriting firms or their registered lobbyists, and not with any third-party consultant. Exec. Order No. 9, § 1, 37 N.J.R. 4 (Jan. 3, 2005). In addition, any bond underwriting firm seeking to

compensation arrangement with the consultant.[281] It must also contain the consultant's obligation to provide the broker, dealer and municipal securities dealer with quarterly written reports of reportable political contributions[282] and reportable political party payments[283] made by: "(A) the consultant; (B) if the consultant is not an individual, any partner, director, officer, or employee of the consultant who communicates with a municipal issuer to obtain municipal securities business for the broker, dealer or municipal securities dealer" ((A) and (B) collectively, the "Consultant Group"); and "(C) any political action committee controlled by the consultant or any partner, director, officer, or employee of the consultant who communicates with an issuer to obtain municipal securities business on behalf of the broker, dealer or municipal securities dealer" ((A), (B), and (C), collectively, the "Greater Consultant Group").[284]

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provide underwriting services must provide a certification that it has not employed a consultant "who will be paid on a contingency basis if the State engages the firm to provide such underwriting services." Exec. Order No. 9, § 2, 37 N.J.R. 4.

281 MSRB Rule G-38(b)(i) (2004).

282 MSRB Rule G-38(a)(vi)(B) (2004). "Reportable political contribution" means:

> if the consultant has had direct or indirect communication with an issuer on behalf of the broker, dealer or municipal securities dealer to obtain or retain municipal securities business for such broker, dealer or municipal securities dealer, a political contribution to an official(s) of such issuer made by any contributor referred to in paragraph (b)(i) during the period beginning six months prior to such communication and ending six months after such communication.

Id.

The term "does not include those political contributions to official(s) of an issuer made by any individual" who is part of the Consultant Group and "is entitled to vote for such official if the contributions made by such individual, in total, do not exceed $250 to any official of such issuer, per election." *Id.*

283 MSRB Rule G-38(a)(vii)(A) (2004). Reportable political party payment [means]:

> if a political party of a state or political subdivision operates within the geographic area of an issuer with which the consultant has had direct or indirect communication to obtain or retain municipal securities business on behalf of the broker, dealer or municipal securities dealer, a payment to such party made by any contributor [who is part of the Greater Consultant Group] during the period beginning six months prior to such communication and ending six months after such communication.

Id.

The term "does not include those payments to political parties of a state or political subdivision made by any individual" who is part of the Consultant Group and "is entitled to vote in such state or political subdivision if the payments made by such individual, in total, do not exceed $250 per political party, per year." *Id.*

284 MSRB Rule G-38(b)(i) (2004).

Each broker, dealer, and municipal securities dealer must submit in writing to each issuer with which it is doing or seeking to do business, information on its consulting arrangement, including the terms of the consultant's compensation.[285]

The SEC has the exclusive authority to bring enforcement proceedings for violations of Rules G-37 and G-38 against municipal securities dealers other than banks.[286] Both the SEC and the appropriate regulatory authority for a bank have the ability to bring enforcement proceedings against a bank or a department of a bank.[287] The appropriate regulatory authority for a bank is the Comptroller of the Currency for national banks; the Board of Governors of the Federal Reserve System for state banks that are members of this system; and the Federal Deposit Insurance Corporation for state banks that are not part of the Federal Reserve System, but are members of the Federal Deposit Insurance Corporation.[288] For willful violations of MSRB rules, the SEC can censure, place limitations on activities, functions, or operations, suspend for a period not exceeding twelve months, or revoke the registration of any broker, dealer, or municipal securities dealer.[289] The SEC can also impose a civil monetary penalty for willful violations.[290] The monetary penalties are classified into three tiers. The

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285 MSRB Rule G-38(d) (2004). The broker, dealer and municipal securities dealer must submit this information either "prior to the selection of any broker, dealer or municipal securities dealer in connection with the particular municipal securities business being sought," or "at or prior to the consultant's first direct or indirect communication with the issuer for any municipal securities business." MSRB Rule G-38(d)(i)-(ii) (2004). Furthermore, each broker, dealer and municipal securities dealer must file with the MSRB reports of all consultants used by the firm during each calendar quarter. MSRB Rule G-38(e) (2004).

The MSRB has proposed the repeal of current Rule G-38, and replacing it with a new rule. MSRB Notice 2005-16 (Mar. 15, 2005), Proposed Amendments to Rule G-38 Relating to Solicitation of Municipal Securities Business to be Filed with the Securities and Exchange Commission *available at* http://www.msrb.org/msrb1/whatsnew/2005-16.asp. The proposed rule prohibits brokers, dealers, and municipal securities dealers from making payments to any person who is not an affiliated person for the solicitation of municipal securities business. *Id.* An affiliated person is "a partner, director, officer or employee of the broker, dealer, or municipal securities dealer," or of an affiliated company. *Id.*

286 Section 15(b)(4)(D) of the Exchange Act, 15 U.S.C. § 78o(b)(4)(D) (West 1997).

287 Section 15B(c) of the Exchange Act, 15 U.S.C. § 78o-3b(c) (West 1997).

288 Section 12(i) of the Exchange Act, 15 U.S.C. § 78l(i) (West 1997); Section 15B(c)(5) of the Exchange Act, 15 U.S.C. § 78o-3b(c)(5) (West 1997).

289 Section 15(b)(4)(D) of the Exchange Act, 15 U.S.C. §78o(b)(4)(D); Section 15B(c)(1)-(4) of the Exchange Act, 15 U.S.C. § 78o-3b(c)(1)-(4) (West 1997).

290 Section 21B(a)(1) of the Exchange Act, 15 U.S.C. § 78u-2(a)(1) (West 1997).

first tier penalty for each act or omission is $5,000 for a natural person, and $50,000 for any other person, and is a residual category for lesser violations.[291] The second tier penalty for each act or omission is $50,000 for a natural person and $250,000 for any other person.[292] To impose the second tier penalty, the act or omission must involve fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.[293] The third tier penalty for each act or omission is $100,000 for a natural person, and $500,000 for any other person.[294] The conduct justifying a third tier penalty is the same wrongful conduct as the second tier, and in addition must result in substantial losses, or a significant risk of substantial losses, to other persons, or in substantial pecuniary gain to the violator.[295] The SEC, in addition to imposing the monetary penalty, can order the violator to furnish an accounting, and disgorge his or her profits and pay reasonable interest thereon.[296]

X. *Limitations on Amounts of Contributions to and by a CPC*

The Act provides for the following adjusted contribution limits beginning in 2005 for non-gubernatorial candidates and committees:[297]

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291 Section 21B(b)(1) of the Exchange Act, 15 U.S.C. § 78u-2(b)(1) (West 1997).

292 Section 21B(b)(2) of the Exchange Act, 15 U.S.C. § 78u-2(b)(2) (West 1997).

293 *Id.*

294 Section 21B(b)(3) of the Exchange Act, 15 U.S.C. § 78u-2(b)(3) (West 1997).

295 Section 21B(b)(3)(A)-(B) of the Exchange Act, 15 U.S.C. § 78u-2(b)(3)(A)-(B) (West 1997).

296 Section 21B(e) of the Exchange Act, 15 U.S.C. § 78u-2(e) (West 1997).

297 N.J. STAT. ANN. §§ 19:44A-7.2b-c; 19:44A-11.3a; 19:44A-11.4a-c; 19:44A-11.5c (West 1999 and 2004 N.J. Sess. Law Serv. 864, 864-73 (West)); N.J. ADMIN. CODE tit. 19, § 25-11.2 (2005). When contribution limits lower the amount spent on campaigns, each contribution becomes more valuable to the candidate. Furthermore, if contribution limits force candidates to seek contributions from those who would not otherwise contribute in a no-limit system, candidates, to obtain contributions, may make promises that they would not otherwise make and contributors may seek to exploit the candidate's need for cash. *See The Ass Atop the Castle, supra* note 3, at 2626-27; *see also* Donald Scarinci, *New Jersey's Experiment With Campaign Finance Reform*, 208 N.J. LAWYER 26, (Apr. 2001). Scarinci states:

> New Jersey's campaign finance law has only served to strengthen party leaders and usher in the era of the political fundraising czars. Contribution limits mean that those people who have access to many potential givers, such as lawyers and accountants, could use their access to become strong fundraisers. The declining influence of the individual giver gives rise to the increasing influence of the big fundraiser.

Id. at 31.

CONTRIBUTORS	RECIPIENTS						
	Candidate Committee	Political Committee	Continuing Political Committee	Legislative Leadership Committee	State Political Party Committee	County Political Party Committee	Municipal Political Party Committee
Individual to:	$2,600 per election	$7,200 per election	$7,200 per year	$25,000 per year	$25,000 per year	$37,000 per year	$7,200 per year
Corporation to:	$2,600 per election	$7,200 per election	$7,200 per year	$25,000 per year	$25,000 per year	$37,000 per year	$7,200 per year
Continuing Political Committee to:	$8,200 per election	$7,200 per election	$7,200 per year	$25,000 per year	$25,000 per year	$37,000 per year	$7,200 per year

For the 2005 gubernatorial election, an individual can contribute up to $3,000 to a gubernatorial candidate in the primary election,[298] and up to $3,000 in the general election.[299] An individual can contribute up to $3,000 to a State committee of a political party for a gubernatorial candidate in the general election.[300] A corporation and a CPC both have the same limitations.[301]

XI. Employee Contributions to Corporate CPC

Employees can contribute in two ways to their employer's CPC.

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[298] N.J. STAT. ANN. §§ 19:44A-7.1c(1) and 19:44A-29a (West 1999); N.J. ADMIN. CODE tit. 19, § 25-16.6(a); N.J. ADMIN. CODE tit. 19, § 25-16.10(a) (2005).

[299] N.J. STAT. ANN. §§ 19:44A-7.1c(1) and 19:44A-29(a)-(e) (West 1999); N.J. ADMIN. CODE tit. 19, § 25-15.6(a); N.J. ADMIN. CODE tit. 19, § 25-15.12(a) (2005).

[300] N.J. STAT. ANN. §§ 19:44A-7.1c(1) and 19:44A-29(a), (c)-(d) (West 1999); N.J. ADMIN. CODE tit. 19, § 25-15.6(b) (2005).

[301] N.J. STAT. ANN. §§ 19:44A-7.1c(1) and 19:44A-29(a), (c)-(d) (West 1999); N.J. ADMIN. CODE tit. 19, §25-15.3; N.J. ADMIN. CODE tit. 19, § 25-15.6(a)-(b); N.J. ADMIN. CODE tit. 19, § 25-15.12(a) and (d)-(e) (2004); N.J. ADMIN. CODE tit. 19, § 25-16.3; N.J. ADMIN. CODE tit. 19, § 25-16.6(a); N.J. ADMIN. CODE tit. 19, § 25-16.10(a), (d)-(e) (2005).

First, an employee can contribute by payroll deduction.[302] Second, an employee can contribute by issuing a check payable to the CPC or by authorizing an electronic transfer of funds, including transfers by credit card and via the Internet.[303] Contributions to a CPC by payroll deduction require an employee's written authorization that contains the following statement:

> I recognize that my/any contribution through payroll deduction is completely voluntary and in compliance with State law. It shall be unlawful for any person soliciting an employee for contributions to such a fund to fail to inform such employee of his or her right to refuse to contribute without reprisal.
>
> Any questions relative to compliance with election law may be directed to the Election Law Enforcement Commission, 28 West State Street, 13th Floor, Trenton, New Jersey 08625-0185, (609)

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302 N.J. STAT. ANN. § 34:11-4.4b(9) (West 1999).

303 N.J. STAT. ANN. § 19:44A-11.7 (West 1999); N.J. ADMIN. CODE tit. 19, § 25-10.6 (2004) (contributions in currency); N.J. ADMIN. CODE tit. 19, § 25-10.15 (2004) (contributions by check); N.J. ADMIN. CODE tit. 19, § 25-10.16 (2004) (contributions by electronic transfers of funds). In ELEC Advisory Opinion No. 04-2001, ELEC authorized a gubernatorial candidate committee to accept contributions via the Internet, and imposed a series of requirements for employee contributions to a CPC. ELEC Advisory Opinion No. 04-2001 (Apr. 19, 2001). First, if a contribution is held in a merchant account during the Internet contribution process for any period of time prior to its deposit in the New Jersey candidate's depository account, that merchant account must be established as a separate escrow account for the New Jersey candidate in the name of the New Jersey candidate. *Id.* The New Jersey candidate must file a Single Candidate Committee-Certificate of Organization and Designation of Campaign Treasurer and Depository (Form D-1) for the account. *Id.* The merchant account must be insulated from creditors of the Internet contribution service provider, and therefore funds must be held in escrow for the New Jersey candidate. *Id.* Second, the amount of a contribution received via an electronic transfer of funds over the Internet is the full amount of the contribution authorized by the contributor, and that amount is not reduced for any fees that may be deducted by the Internet service provider, credit or debit card company, or merchant bank for its services. N.J. ADMIN. CODE tit. 19, § 25-10.16(a)2 (2004). Third, any fees or costs imposed upon a candidate committee by an Internet service provider or financial institution for receipt or processing of Internet contributions must be itemized and timely reported by the candidate and treasurer on election cycle and quarterly reports as an expenditure to the Internet service provider or financial institution. *See* N.J. ADMIN. CODE tit. 19, § 25-12 (2004) (requirements for reporting of expenditures). Finally, N.J. ADMIN. CODE tit. 19, § 25-7.1(a) requires that a campaign treasurer maintain a record of the name of the account on which a contribution check is drawn. N.J. ADMIN. CODE tit. 19, § 25-10.16(a)3 requires that when a contribution is made by means of a credit or debit card, that is by an electronic transfer of funds, the account to which the contribution is charged must be owned by the individual or entity making the contribution. *Id.* For each contribution received via the Internet the campaign treasurer must maintain a record of the name of the account to which the contribution is charged or debited to insure that these two requirements are met. *Id.*

292-8700.[304]

The CPC must provide space on the authorization form to permit the employee to direct his or her contributions to designated candidates.[305] An employee can elect to contribute no more than $5 per week by payroll deduction, and can have wages withheld for only one PAC or CPC.[306] The CPC cannot solicit employees on the job or at the workplace.[307] The CPC must provide each employee contributor with the CPC's annual financial statement showing the CPC's expenditures, including administrative charges.[308] Finally, the administrative expenses incurred by the employer in making payroll deductions may, at the employer's option, be borne by the CPC.[309]

The requirement that the CPC provide space on the authorization form to permit the employee to direct contributions to designated candidates conflicts with the prohibition of N.J. STAT. ANN. § 19:44-22a(2), which was construed in *Markwardt v. New Beginnings*[310] to bar contributors from designating the ultimate recipient of their contributions. One approach to resolving this conflict is by applying the principle of statutory construction of reading statutes *in pari materia*.[311] The designation of candidates is permissible when an employee elects to contribute by payroll deduction, but impermissible with any other contribution method.[312]

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304 N.J. STAT. ANN. § 34:11-4.4a(a) (West 2000).

305 N.J. STAT. ANN. § 34:11-4.4a(c) (West 2000).

306 N.J. STAT. ANN. § 34:11-4.4a(d) (West 2000).

307 N.J. STAT. ANN. § 34:11-4.4a(e) (West 2000).

308 N.J. STAT. ANN. § 34:11-4.4a(f) (West 2000).

309 N.J. STAT. ANN. § 34-11-4.4(b)(9) (West 2000).

310 701 A.2d 706 (N.J. App. Div. 1997).

311 Lewis v. Bd. of Trs. Pub. Employees' Ret. Sys., 841 A.2d 483, 487 (N.J. App. Div. 2004) ("[W]hen separate provisions are *in pari materia* the more specific provision should control.").

312 2 U.S.C. § 441a(a)(8) (West 1997); 11 C.F.R. §110.6(d)(1) (2003). Under FECA, a PAC may allow contributors who contribute by check to designate their contributions to a particular candidate or political party as long as the PAC does not exercise control over the choice of the recipient. *Id.* In this situation, the contribution is treated as from the contributor to the particular recipient, rather than to the PAC, for purposes of determining whether the contributor has reached his or her contribution limitation. *Id.* This rule also applies to contributions made by payroll deduction if the PAC is bound by the contributor's choice of recipients, does not limit the selection of candidates, and allows the contributors to revoke the designation at any time. FEC Advisory Opinion 1981-57. PACs usually do not allow contributors to designate recipients so that they can avoid the embarrassment of forwarding a contribution designated for a candidate that the PAC does not support, or who is running against a candidate that the PAC supports. Gross & Hong, *supra* note 3, at A-28.

The requirement that an employee have wages withheld for only one PAC or CPC raises the issue of whether a corporation that has a federal PAC and a separate New Jersey CPC can collect contributions by payroll deduction for both the federal PAC and New Jersey CPC. Under FECA, a corporation can collect contributions by payroll deduction only from stockholders, executive and administrative personnel, and their families.[313] Furthermore, FECA preempts state laws on the use of payroll deductions for contributions to federal candidates.[314] Thus, a corporation can reasonably take the position that since FECA preempts the New Jersey payroll deduction statute for employee contributions to its federal PAC, the New Jersey CPC is the only PAC to which an employee contributes for purposes of the New Jersey payroll deduction statute.

An employer that knowingly and willfully violates the wage withholding statute commits a disorderly persons offense subject to a fine of between $100 to 1,000.[315] Each day that a violation occurs is a separate offense.[316] As an alternative to, or in addition to, this fine, the Commissioner of Labor can assess administrative penalties.[317] The penalty for the first violation is a fine of up to $250, and for subsequent violations, a fine of between $25 and $500.[318] The Commissioner can also supervise the payment of amounts due employees, and require the employer to make the payments to the Commissioner.[319]

The Act also provides that no corporation shall provide any director, officer, employee, attorney, or agent any additional compensation that the corporation intends to be used to make

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313 11 C.F.R. §§ 114.5(k)(1) and 114.6(e)(1) (2003).

314 FEC Advisory Opinions 1982-29 and 1981-18.

315 N.J. STAT. ANN. § 34:11-4.10 (West 2000); N.J. ADMIN. CODE tit. 12, § 55-1.4 (2004).

316 N.J. STAT. ANN. § 34:11-4.10 (West 2000); N.J. ADMIN. CODE tit. 12, § 55-1.4 (2004).

317 N.J. STAT. ANN. § 34:11-4.10 (West 2000); N. J. ADMIN. CODE tit. 12, § 55-1.4 (2004).

318 N.J. STAT. ANN. § 34:11-4.10 (West 2000); N.J. ADMIN. CODE tit. 12, § 55-1.6(a) (2004).

319 N.J. STAT. ANN. § 34:11-4.9e (West 2000); N.J. ADMIN. CODE tit. 12, § 55-1.3(e) (2004). The employer must also pay the Commissioner an administrative fee on all payments made to the Commissioner in accordance with the following schedule: (a) for the first violation, ten percent of the amount due the employee; (b) for the second violation, eighteen percent of the amount due the employee; and (c) for the third and subsequent violations, twenty-five percent of the amount due the employee. N.J. STAT. ANN. § 34:11-4.9e (West 2000); N.J. ADMIN. CODE tit. 12, § 12:55-1.5(a)-(b) (2004).

contributions.[320] Under the 2004 Amendments, any corporation that violates this prohibition shall, in addition to any other penalty provided by law, be liable to a penalty of up to $6,000 for the first offense, and up to $12,000 for each subsequent offense.[321] Any director, officer, employee, attorney, or agent of a corporation that provides an employee additional compensation to make contributions commits a fourth degree crime.[322] The sentence for a fourth degree crime is a fine, restitution, or both. . The fine cannot exceed the greater of $10,000,[323] and an amount equal to twice the offender's pecuniary gain or the victim's loss. [324] In addition, the offender may be sentenced to imprisonment of up to eighteen months.[325]

A director, officer, employee, attorney, or agent of a corporation cannot use any additional compensation that is intended by the corporation as a corporate contribution to make such a contribution.[326] Violation of this prohibition is a fourth degree crime.[327]

Under these provisions, culpability turns on whether the payment to the employee is bona fide compensation for services performed for the corporation, or a subterfuge for funneling unlawful corporate contributions to candidates. In making this determination, a court or ELEC is likely to look to the criteria used by the FEC to determine whether a corporation's payment of employment-related compensation to a candidate is a prohibited contribution or bona fide compensation: (a) whether "the compensation results from bona fide employment that is genuinely independent of the candidacy;" (b) whether "the compensation is exclusively in consideration of services provided by the employee as part of this employment;" and (c) whether the compensation "exceeds the amount of compensation that would be paid

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320 N.J. STAT. ANN. § 19:44A-20.1a (West 1999).

321 N.J. STAT. ANN. § 19:44A-20.1a (2004 N.J. Sess. Law Serv. 72, 130 (West)); N.J. ADMIN. CODE tit. 19, § 25-17.3(b) (2004). The penalty amounts are indexed for cost-of-living adjustments. N.J. STAT. ANN. § 19:44A-7.2b(8) (West 1999). They are effective on January 1, 2005. N.J. STAT. ANN. § 19:44A-22 (2004 N.J. Sess. Law Serv. 72, 131 (West 1999)).

322 N.J. STAT. ANN. § 19:44A-20.1a (West 1999).

323 N.J. STAT. ANN. § 2C:43-3b(2) (West Supp. 2004).

324 N.J. STAT. ANN. § 2C:43-3e (West 1995).

325 N.J. STAT. ANN. § 2C:43-6a(4) (West 1995).

326 N.J. STAT. ANN. § 19:44A-20.1b (West 1999). *See also* 11 C.F.R. § 114.5(b)(1) (2003) (under FECA, a corporation cannot reimburse a contributor to a PAC through a bonus, expense account, or any other form of compensation).

327 N.J. STAT. ANN. § 19:44A-20.1b (West 1999).

to any other similarly qualified person for the same work over the same period of time."[328]

XII. *Statement as to Nondeductibility of Contributions for Federal Income Tax Purposes*

Whether a corporation uses its federal PAC as its New Jersey CPC or forms a separate New Jersey CPC, the CPC must place on each solicitation a statement "in a conspicuous and easily recognizable format that contributions [to the CPC] are not deductible as charitable contributions for federal income tax purposes."[329] This requirement applies to solicitations for contributions, as well as for attendance at testimonials and other fundraising events.[330] In IRS Notice 88-120,[331] the IRS provided a safe harbor statement, which for solicitations by mail, leaflet, or advertisement in a print medium, must satisfy the following requirements:

> (a) The solicitation includes whichever of the following statements the CPC chooses: "Contributions or gifts to [name of CPC] are not deductible as charitable contributions for Federal income tax purposes," "Contributions or gifts to [name of CPC] are not tax deductible," or "Contributions or gifts to [name of CPC] are not tax deductible as charitable contributions;"
>
> (b) The statement is in at least the same size type as the primary message;
>
> (c) The statement is included on the message side of any card or tear-off section that the employee returns with the contribution; and
>
> (d) The statement is either the first sentence in a paragraph, or is itself a paragraph.

If a CPC does not include this statement, it is subject to a penalty of $1,000 for each day on which the failure occurs, subject to a $10,000 annual cap.[332] The cap does not apply to intentional violations, which are subject to a penalty of the greater of the $1,000 penalty, and fifty percent of the cost of the solicitations made on the day the failure

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328 11 C.F.R. § 113.1(g)(6)(iii)(A) to (C) (2003); FEC Advisory Opinions 2004-8 and 2001-1.

329 I.R.C. § 6113(a) (West 2002). CPCs whose annual gross receipts do not normally exceed $100,000 are exempt. *Id.* at § 6113(b)(2)(A).

330 I.R.S. Notice 88-120, 1988-2 C.B. 454.

331 1988-2 C.B. 454.

332 I.R.C. § 6710(a) (West 2002).

occurred.[333] No penalty is imposed if the failure is due to reasonable cause.[334] Each day on which a failure occurs means the day that a solicitation is distributed.[335] For example, if a CPC mails five hundred noncomplying solicitations on March 30, and fifty noncomplying solicitations on April 5, as long as the violation is not intentional, the penalty is $1,000 each day for two days for a total of $2,000.[336]

XIII. FECA Prohibitions on Contributions by Foreign Nationals

Under FECA, and FEC regulations effective January 1, 2003, a PAC cannot knowingly solicit or accept contributions from a foreign national in connection with any federal, state, or local election.[337] Under the FEC regulations, a foreign national cannot direct, control, or participate in the decision making process of any person, such as a corporation or PAC, regarding that person's federal or nonfederal election-related activities.[338] This prohibition covers a PAC's decisions regarding the contributions it receives and makes.[339] FECA defines a foreign national as a foreign principal under 22 U.S.C. §611(b), or an individual who is not a citizen of the United States and who is not lawfully admitted for permanent residence.[340] Thus, foreign citizens who are present in the United States on non-immigrant visas, such as B-1 business visitors,[341] H-1B workers in specialty occupations,[342] and L-1A executives or managers of multinational corporations,[343] cannot contribute to a PAC nor participate in its decision making process.[344] Foreign citizens who are lawfully admitted for permanent residence, otherwise known as green card holders, can contribute.[345] The

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333 I.R.C. § 6710(c) (West 2002).

334 I.R.C. § 6710(b) (West 2002).

335 I.R.C. § 6710(d) (West 2002).

336 I.R.S. Notice 88-120, 1988-2 C.B. 454.

337 2 U.S.C. § 441e (West 2004); 11 C.F.R. §110.20(g) (West 2003).

338 11 C.F.R. § 110.20(i) (2003); FEC Advisory Opinion 2004-26.

339 BARAN, *supra* note 9, at § 6.2.

340 2 U.S.C. § 441e (West 2004); 11 C.F.R. § 110.20(a)(3) (West 2003).

341 INA § 101(a)(15)(B), as amended, 8 U.S.C. §1101(a)(15)(B) (West 1999); 8 C.F.R. §214.2(b) (2004).

342 INA §§ 101(a)(15)(H) and 214(i), 8 U.S.C. §§ 1101(a)(15)(H) and 1184(i) (West 2004); 8 C.F.R. § 214.2(h) (2004).

343 INA § 101(a)(15)(L), 8 U.S.C. § 1101(a)(15)(L) (West 2004); 8 C.F.R. § 214.2(1) (2004).

344 BARAN, *supra* note 9, at § 6.1.

345 FEC Advisory Opinion 1976-4.

permanent resident should be present in the United States when he or she makes the contribution because under 22 U.S.C. §611(b)(2) persons "outside the United States," unless they are United States citizens, are foreign principals.[346]

FECA also defines a foreign national as "a partnership, association, corporation, organization or other combination of persons organized under the laws of or having its principal place of business in a foreign country."[347] Thus, a foreign corporation cannot form a PAC.[348] A United States subsidiary of a foreign parent can form a PAC as long as the PAC does not solicit foreign nationals, and a foreign national does not participate in the PAC's decision-making process.[349] In addition, a United States subsidiary of a foreign parent can make contributions in nonfederal elections.[350] The foreign parent cannot provide the funds or reimburse the United States subsidiary for contributions.[351] A United States subsidiary of a foreign parent must be able to show through reasonable accounting methods that it has sufficient United States profits to fund its contributions.[352] A joint-venture formed in the United States in which a foreign corporation holds an interest can form a PAC,[353] and a United States incorporated trade association with foreign corporate members can form a PAC.[354] The foreign subsidiary of a United States parent can pay for the administration of a payroll deduction system for United States citizen employees of the foreign subsidiary to make contributions to the PAC of the United States parent.[355]

Under the FEC regulations, for purposes of the prohibition on knowingly soliciting or accepting contributions from foreign nationals, "knowingly means that a person must" (a) "have actual knowledge that the source of funds solicited, accepted or received is a foreign national;" (b) "be aware of facts that would lead a reasonable person to conclude that there is a substantial probability that the source of funds solicited,

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346 BARAN, *supra* note 9, at § 6.1 n.14.

347 22 U.S.C. § 611(b)(2) (West 2004).

348 FEC Advisory Opinion 1977-53.

349 FEC Advisory Opinions 2000-17; 1999-28; 1995-15; 1990-8; 1989-29; and 1985-3.

350 FEC Advisory Opinions 1992-16; 1982-10; and 1980-100.

351 FEC Advisory Opinion 1989-20.

352 FEC Advisory Opinion 1992-16.

353 FEC Advisory Opinion 1983-18.

354 FEC Advisory Opinion 1980-111.

355 FEC Advisory Opinion 1982-34.

accepted or received is a foreign national;" or (c) "be aware of facts that would lead a reasonable person to inquire whether the source of funds solicited, accepted, or received is a foreign national, but the person failed to conduct a reasonable inquiry."[356] Pertinent facts include (d) the contributor "uses a foreign passport or passport number for identification;" (e) the contributor uses a foreign address; (f) the contributor makes a contribution by check drawn on a foreign bank, or by wire transfer from a foreign bank; or (g) the contributor resides abroad.[357] Under a safe harbor, reasonable inquiry is established if a person seeks and obtains copies of current and valid U.S. passport papers for U.S. citizens who are contributors described in the preceding sentence.[358] A person cannot use the safe harbor if he or she knows that the source of funds is a foreign national.[359]

A violation of FECA is subject to a civil penalty of up to greater of $5,500, or an amount equal to the impermissible contribution.[360] If the FEC or a court determines that there is clear and convincing proof that a knowing and willful violation occurred, the civil penalty cannot exceed the greater of $11,000, or an amount equal to 200% of the impermissible contribution.[361] Under the Bipartisan Campaign Reform Act of 2002, a knowing and willful criminal violation of making, receiving, or reporting contributions aggregating $25,000 or more during a calendar year is subject to felony prosecution and imprisonment of up to five years, a fine, or both.[362] A knowing and willful criminal violation of contributions aggregating $2,000 but less than $25,000 during a calendar year is subject to misdemeanor prosecution and imprisonment of up to one year, a fine, or both.[363] The felony fine is up to $250,000 for individuals, and $500,000 for entities.[364] The misdemeanor fine is up to $100,000 for individuals, and

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356 11 C.F.R. § 110.20(a)(4) (2003).

357 11 C.F.R. § 110.20(a)(5) (2003).

358 11 C.F.R. § 110.20(a)(7) (2003).

359 *Id.*

360 2 U.S.C. § 437g(a)(5)(A) and (a)(6)(A)-(B) (West 1997); 11 C.F.R. § 111.24(a)(1) (2003).

361 2 U.S.C. § 437g(a)(5)(B) and (a)(6)(C) (West 1997); 11 C.F.R. § 111.24(a)(2) (2003). The $5,500 and $11,000 penalties are subject to cost-of-living adjustments under the Federal Civil Penalties Adjustment Act of 1990, 28 U.S.C. § 2461 (West 1994). They were last adjusted on March 12, 1997. 62 F.R. 11316 (Mar. 12, 1997).

362 2 U.S.C. § 437g(d)(1)(A)(i) (West 2004).

363 2 U.S.C. § 437g(d)(1)(A)(ii) (West 2004).

364 18 U.S.C. § 3571(b)(3) and (c)(3) (West 2000).

$200,000 for entities.[365]

XIV. New Jersey Registration Report

A CPC that in any calendar year contributes or expects to contribute at least $4,300 to New Jersey candidates becomes eligible to be certified by ELEC when it satisfies two requirements.[366] First, the CPC appoints a treasurer by the date it first receives any contribution or makes any expenditure, that when combined with other contributions received or expenditures made in the calendar year, totals at least $4,300.[367] Second, the CPC designates a depository by this same date.[368] Within ten days after a CPC becomes eligible to be certified, it must file with ELEC a registration statement and designation of organizational depository on Form D-4.[369] The CPC's chairperson and treasurer must

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365 18 U.S.C. § 3571(b)(5) and (c)(5) (West 2000).

366 N.J. STAT. ANN. § 19:44A-3n (West 1999); N.J. STAT. ANN. § 19:44A-8.1a (West 1999); N.J. ADMIN. CODE tit. 19, § 25-4.5(a) (West 2004).

367 N.J. STAT. ANN. § 19:44A-10 (West 1999); N.J. ADMIN. CODE tit. 19, § 25-4.5(a) (2004).

368 N.J. STAT. ANN. § 19:44A-10 (West 1999); N.J. ADMIN. CODE tit. 19, § 25-4.5(a)(2004).

369 N.J. STAT. ANN. §§ 19:44A-8.1a; 19:44A-10 (West 1999); N.J. Admin. Code tit. 19, § 25-4.5(b) (2004). It is an unresolved issue whether a corporate officer who serves as the CPC's chairperson or treasurer must register and file quarterly reports as a professional campaign fund raiser under N.J. STAT. ANN. § 19:44A-19.2, which was enacted as part of the 2004 Amendments and is effective on August 15, 2004. N.J. STAT. ANN. §19:44A-19.2 (2004 N.J. Sess. Law Serv. 72, 125 (West)). The Act defines a professional campaign fund raiser as "a person who is employed, retained or engaged for monetary compensation of at least $5,000 per year in the aggregate to perform for any candidate or committee, or both, any service directly related to the solicitation of contributions for that candidate or committee." N.J. STAT. ANN. § 19:44A-19.2a (2004 N.J. Sess. Law Serv. 72, 124 (West)). The Act then provides:

> Whenever a professional campaign fundraiser plans or organizes or is involved in the planning or organizing of, or attends, at least, three events within a three-month period at which contributions are raised by that person for a candidate or committee by whom he or she has been employed, retained or engaged, or that person raises money or other thing of value at least equivalent to the maximum amount of contributions permitted to be made by an individual to a candidate for public office pursuant to [N.J. STAT. ANN. § 19:44A-11.3] in the aggregate in contributions for such a candidate or committee prior to a primary election or prior to a general election, that person shall register with the Election Law Enforcement Commission.

N.J. STAT. ANN. § 19:44A-19.2b (2004 N.J. Sess. Law Serv. 72, 124 (West)).

There are two issues for a corporate officer who serves as the CPC's chairperson or treasurer. First, did the legislature intend for the registration and reporting requirements to apply to those persons covered by a CPC's registration report and quarterly disclosure reports? Second, the statute speaks in terms a "committee by whom [the person] has been

certify the information on Form D-4 as true and correct, and must also certify that no candidate has established or participated in the management of the CPC, and no candidate shall be permitted to do so during its existence.[370] In addition, no person serving as the chairperson of a political party committee or a legislative leadership committee can serve as the CPC's chairperson, treasurer, or deputy treasurer.[371]

The CPC may designate "any bank authorized by law to transact business in and maintaining a branch or office in" New Jersey as its depository.[372] Solely for investing CPC funds, a CPC may designate "a recognized investment institution authorized by law to transact business in" New Jersey as an additional depository as long as "the invested funds are not used for the benefit of any person or enterprise in which" a CPC official has an economic interest.[373] A CPC "may designate a bank or investment institution located outside" New Jersey as a depository as long as "the bank or investment institution files a consent to service of legal process at an address within [New Jersey] prior to

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employed, retained or engaged." If the CPC does not pay the chairperson or treasurer $5,000 per year, has the chairperson or treasurer been "employed, retained or engaged" by the CPC? For example, if a corporate officer earns $200,000 in annual salary from the corporation, and spends five percent of his or her time on CPC administration, the officer is paid $10,000 for his or her CPC work. If the corporation treats $7,200 of the officer's salary as a corporate contribution in the form of payment of CPC administrative expenses, and the CPC reimburses the corporation for $2,800 of the officer's salary, has the CPC paid the officer at least $5,000?

The preamble to ELEC's proposed regulations on professional fundraisers does not provide meaningful guidance. 37 N.J.R. 754 (Mar. 7, 2005). According to ELEC, the use of term "professional" shows an intent that the statute "apply only to those persons who have experience in fund raising or who are hired because they hold themselves out as having expertise in fund raising techniques or tactics." *Id.* at 755. Does this mean that a CPC chairperson or treasurer who has expertise in fund raising is covered by the statute, but a CPC chairperson or treasurer who does not have this expertise, but performs the same functions as a person who does, is not covered by the statute?

370 N.J. STAT. ANN. § 19:44A-9h(l) (West 1999); N.J. ADMIN. CODE tit. 19, § 25-4.5(c) (2004). *See also* ELEC Advisory Opinion No. 06-1998 (July 28, 1998) (under N.J. STAT. ANN. § 19:44A-9, a candidate can work for a CPC as a volunteer who distributes literature and obtains signatures on a petition; CPC cannot place the candidate's name on its letterhead, use the candidate's name as the CPC's "honorary chair," nor use the candidate's signature on the CPC's fundraising communications; to the extent that being the CPC's principal spokesperson implies that the candidate is engaging in direct or indirect control or management of the CPC, such conduct is prohibited).

371 N.J. STAT. ANN. §§ 19:44A-8b(1); 19:44A-10 (West 1999); N.J. ADMIN. CODE tit. 19, § 25-5.1(c) (2004).

372 N.J. ADMIN. CODE tit. 19, § 25-5.2(a) (2004).

373 N.J. ADMIN. CODE tit. 19, § 25-5.2(b) (2004).

accepting or receiving" any CPC funds.[374]

Furthermore, a CPC must apply to ELEC for approval to use an abbreviation or acronym of its official name on reports filed with ELEC.[375] ELEC must verify "that the abbreviation or acronym has not been approved for use by another committee."[376]

Whether a corporation's federal PAC has an obligation to register with ELEC as a New Jersey CPC was addressed in ELEC Advisory Opinion No. 02-2003.[377] The obligation turns on three factors. First, does the PAC's financial activity show that it has as a major purpose to assist New Jersey candidates?[378] Second, does the PAC solicit contributions specifically for New Jersey candidates?[379] Third, does the PAC file reports with the FEC?[380]

ELEC applied these factors to the facts before it as follows. The PAC, Continental Airlines, Inc. Employee Fund for a Better America ("CEFBA"), was a federal PAC registered with the FEC and organized for the purposes of promoting the business of Continental Airlines, Inc. ("Continental").[381] Contributions came exclusively from Continental employees, and most contributions were made by Texas residents because Continental's headquarters was in Houston.[382] Only five of the 174 Continental employees making contributions were New Jersey residents.[383] Furthermore, less than two percent of the total funds received by CEFBA, $4,500 of $229,152.02, came from New Jersey residents in 2002, and CEFBA contributions to New Jersey candidates, $1,650, represented less than one percent of the total amount of its contributions of $193,929 to all candidates in 2002.[384] Therefore, CEFBA's financial activity showed that it did not have a major purpose to assist New Jersey candidates.[385]

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374 N.J. ADMIN. CODE tit. 19, § 25-5.2(c) (2004).

375 N.J. STAT. ANN. § 19:44A-8.1d (West 1999); N.J. ADMIN. CODE tit. 19, § 25-4.8 (2004).

376 N.J. STAT. ANN. § 19:44A-8.1d (West 1999); N.J. ADMIN. CODE tit. 19, § 25-4.8 (2004).

377 ELEC Advisory Opinion No. 02-2003 (Feb. 24, 2003).

378 *Id.*

379 *Id.*

380 *Id.*

381 *Id.*

382 *Id.*

383 ELEC Advisory Opinion No. 02-2003.

384 *Id.*

385 *Id.*

As to the second factor, Continental employees contributed without knowing which candidates would be supported or the issues that would be endorsed by CEFBA.[386] Furthermore, solicitations to Continental employees contained no reference to New Jersey candidates.[387] Therefore, CEFBA's method of soliciting contributions provided no evidence that its major purpose was to assist New Jersey candidates.[388]

As to the third factor, since CEFBA registered with the FEC as a federal PAC, it filed reports with the FEC of its contributions and expenditures, which were subject to public inspection.[389] If CEFBA were required to file with ELEC, its reports would contain information largely duplicative of its FEC reports and irrelevant to New Jersey campaign activity.[390] Accordingly, CEFPA did not have to register as a New Jersey CPC.[391]

XV. New Jersey Disclosure Reports

A CPC must file quarterly reports[392] with ELEC on Form R-3 of all contributions and expenditures.[393] The first quarterly report is due on April 15."[394] This report must include all transactions "beginning with the first transaction occurring on or after January 1, [and] ending with the last transaction occurring on March 31."[395] The second quarterly report is due on July 15, and must include all transactions "beginning with the first transaction occurring on or after April 1, [and] ending with the last transaction occurring on June 30."[396] The third quarterly report is due for filing on October 15, and must include all transactions "beginning with the first transaction occurring on or after July 1, [and] ending with the last transaction occurring on September 30."[397] The fourth quarterly report is due on January 15, and must include all transactions "beginning with the first transaction occurring on or after

386 *Id.*
387 *Id.*
388 *Id.*
389 ELEC Advisory Opinion No. 02-2003.
390 *Id.*
391 *Id.*
392 N.J. STAT. ANN. § 19:44A-8b(2) (West 1999).
393 N.J. ADMIN. CODE tit. 19, § 25-9.1(a) (2004).
394 N.J. ADMIN. CODE tit. 19, § 25-9.1(a)1 (2004).
395 *Id.*
396 N.J. ADMIN. CODE tit. 19, § 25-9.1(a)2 (2004).
397 N.J. ADMIN. CODE tit. 19, § 25-9.1(a)3 (2004).

October 1 of the calendar year preceding the calendar year of the filing date, and ending with the last transaction occurring on December 31."[398]

In addition, the CPC's treasurer must file with ELEC a report on Form C-3 of any contribution greater than $1,000, or any aggregate contributions from a contributor that are greater than $1,000, received after the closing date of its most recently quarterly report and on or before the date of an election" [399] This report must be filed within forty-eight hours of receipt of a contribution greater than $1,000, or within forty-eight hours of receipt of aggregate contributions from a contributor that are greater than $1,000, except that the contributions received prior to the thirteenth day preceding the election may be reported together on a report by the eleventh day before the election.[400] A contribution or aggregate contributions from a contributor that are greater than $1,000 received on or after the thirteenth day before the election must be reported within forty-eight hours of receipt.[401] ELEC permits the use of facsimile transmission to file the report.[402]

Furthermore, the CPC's treasurer must file a report on Form E-3 of an expenditure of money or other thing of value greater than $1,000, or aggregate expenditures that are greater than $1,000, made in a primary or general election, which expenditure is, or aggregate expenditures are made after March 31 and on or before the date of the primary election, or after September 30 and on or before the date of the general election.[403] The report must be filed within forty-eight hours of making the expenditure, or aggregate expenditures, except that all expenditures and aggregate expenditures made before the thirteenth day preceding the date of a primary or general election may be reported together on a report to be filed no later than the eleventh day before that election.[404] A report of an expenditure or aggregate expenditures greater than $1,000 made on or after the thirteenth day preceding the date of a primary or general election must be filed within forty-eight hours of receipt.[405]

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398 N.J. ADMIN. CODE tit. 19, § 25-9.1(a)4 (2004).

399 N.J. STAT. ANN. § 19:44A-8b(2) (West 1999); N.J. ADMIN. CODE tit. 19, § 25-9.3(a) (2004).

400 N.J. ADMIN. CODE tit. 19, § 25-9.3(b) (2004).

401 *Id.*

402 N.J. ADMIN. CODE tit. 19, § 25-9.3(d) (2004).

403 N.J. ADMIN. CODE tit. 19, § 25-9.4(a) (2004).

404 N.J. ADMIN. CODE tit. 19, § 25-9.4(b) (2004).

405 *Id.*

ELEC permits the use of facsimile transmission to file the report.[406]

An original and two copies of all reports must be received at ELEC's offices no later than 5 P.M. on the date the report is due.[407] A report submitted by United States mail post-marked on or before a filing date but not received until after 5 P.M. of the date the report is due will not be treated as timely filed.[408] A CPC must retain an exact copy of each report filed with ELEC for at least four years after the date of the election to which they apply, or at least four years after the transaction to which they apply occurred, whichever is longer.[409]

ELEC recently permitted electronic filing.[410] ELEC will accept a report in an electronic medium only if it has been prepared using the computer software supplied to the CPC.[411] The CPC must maintain as part of its records an exact copy of each report filed electronically.[412]

XVI. Penalties for Violations of the Act

Except as provided in N.J. STAT. ANN. § 19:44A-22(e), any CPC treasurer or CPC charged with the responsibility for the preparation, certification, filing, or retention of any reports, records, notices, or other documents (the "Required Documents"), who does not timely prepare, certify, file, or retain any Required Document or who omits or incorrectly provides any of required information shall, in addition to any other penalty provided by law, be liable to a penalty of up to $6,000 for the first offense, and up to $12,000 for each subsequent offense.[413]

Any person who willfully and intentionally makes or accepts any contribution in violation of the applicable limits shall be liable to a penalty in accordance with the following schedule:

(a) up to $10,000 if the cumulative contributions are less than or equal to $5,000;

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406 *Id.*

407 N.J. ADMIN. CODE tit. 19, § 25-9.6(a) (2004).

408 *Id.*

409 N.J. ADMIN. CODE tit. 19, § 25-7:3 (2004); N.J. ADMIN. CODE tit. 19, § 25-9.6(b) (2004).

410 34 N.J.R. 3418(a) (July 19, 2004).

411 N.J. ADMIN. CODE tit. 19, § 25-3.2(a) (2004).

412 N.J. ADMIN. CODE tit. 19, § 25-3.2(e) (2004).

413 N.J. STAT. ANN. § 19:44A-22(a) (2004 N.J. Sess. Law Serv. 72, 129 (West)). N.J. ADMIN. CODE tit. 19, § 25-17.3(a) (2004). These penalty amounts are indexed for cost-of-living adjustments. N.J. STAT. ANN. § 19:44A-7.2b(7) (West 1999) They are effective on January 1, 2005. N.J. STAT. ANN. § 19:44A-22 (2004 N.J. Sess. Law Serv. 72, 131 (West)).

(b) up to $150,000 if the cumulative contributions are greater than $5,000, but less than $75,000; and

(c) up to $200,000 if the cumulative, contributions are equal to or greater than $75,000.[414]

In assessing any penalty, ELEC may reduce all or part of the penalty conditioned on prompt correction of the violation.[415]

In determining the penalty for the failure to file a report or a reporting transaction,[416] ELEC treats this offense as more egregious than late filing.[417] In determining the penalty for failure to file Form R-3, when the total dollar amount of all contribution and expenditure reporting transactions is less than or equal to the $6,000 or $12,000 maximum penalty, ELEC imposes the maximum penalty for each report not filed.[418] When the total dollar amount of all contribution and expenditure reporting transactions is greater than the maximum penalty, the failure to report each transaction is a separate offense.[419] ELEC imposes a penalty for each separate offense not less than the dollar amount of the unreported contribution or expenditure reporting transaction, up to the $6,000 or $12,000 maximum penalty for each unreported transaction.[420]

In determining the penalty for failure to file Form C-3 or Form E-3, the failure to report each contribution reporting transaction and each expenditure reporting transaction is a separate offense.[421] ELEC imposes a penalty for each, and each penalty cannot be less than the dollar amount of the unreported transaction, up to the $6,000 or $12,000

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414 N.J. STAT. ANN. § 19:44A-22e (2004 N.J. Sess. Law Serv. 72, 130 (West)). These penalty amounts are indexed for cost-of-living adjustments. N.J. STAT. ANN. § 19:44A-7.2b(7) (West 1999). They are effective on January 1, 2005. N.J. STAT. ANN. 19:44A-22 note (2004 N.J. Sess. Law Serv. 72, 131 (West)).

415 N.J. STAT. ANN. § 19:44A-22c (West 1999).

416 N.J. ADMIN. CODE tit. 19, § 25-17.2(a) (2004). A reporting transaction means "the receipt of a contribution, the making of an expenditure, or the occurrence of any other event that is subject to the reporting requirements" of the Act or ELEC regulations. *Id.* Each reporting transaction "that is not reported in the manner or not filed on the date established for reporting or filing is an offense subject to the penalties provided in N.J. STAT. ANN. § 19:44A-22." N.J. ADMIN. CODE tit. 19, § 25-17.2(c) (2004).

417 N.J. ADMIN. CODE tit. 19, § 25-17.3A(a) (2004).

418 N.J. ADMIN. CODE tit. 19, § 25-17.3A(c) (2004).

419 N.J. ADMIN. CODE tit. 19, § 25-17.3A(d) (2004).

420 *Id.*

421 N.J. ADMIN. CODE tit. 19, § 25-17.3A(e) (2004).

maximum penalty for each unreported transaction.[422]

"In determining the penalty for failure to report a contribution reporting transaction or an expenditure reporting transaction on a filed report, [ELEC imposes] a penalty in an amount that is not less than the dollar amount of each unreported transaction," up to the $6,000 or $12,000 maximum penalty for each unreported transaction.[423]

In determining the penalty for failure to file a CPC Registration Statement and Designation of Organizational Depository on Form D-4, ELEC imposes a penalty of not less than twenty-five percent of the $6,000 or $12,000 maximum penalty.[424]

In determining the penalty for failure to make and maintain a record keeping transaction,[425] ELEC imposes a penalty that is not less than the dollar amount of the record keeping transaction, up to the $6,000 or $12,000 maximum penalty for each transaction, but when an affidavit for missing records is filed under New Jersey Administrative Code title 19 section 25-7.4, ELEC imposes a penalty of not more than fifty percent of the dollar amount of the transaction, up to the $6,000 or $12,000 maximum penalty.[426]

ELEC "shall consider the late filing of a report or reporting transaction a less egregious offense than the failure to file."[427] In determining the penalty for the late filing of Form R-3 or Form C-3, ELEC imposes a penalty that is a proportion of the amount of each transaction that was reported late.[428] ELEC determines the proportion based on the "failure to make pre-election reporting or disclosure; the number of days late; and the dollar amount reported late."[429] In determining the penalty for the late filing of Form C-3 or Form E-3, when the report is filed after the date of the election, ELEC treats the

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422 *Id.*

423 N.J. ADMIN. CODE tit. 19, § 25-17.3A(f) (2004).

424 N.J. ADMIN. CODE tit. 19, § 25-17.3A(g) (2004).

425 N.J. ADMIN. CODE tit. 19, § 25-17.2(b) (2004). A record keeping transaction "means the receipt of a contribution, the making of an expenditure, or the occurrence of any other event that is subject to the record keeping requirements of the act or regulations." *Id.* The record keeping requirements are set forth in N.J. ADMIN. CODE tit. 19, § 25-7.1 to 7.4 (2004). Each record keeping transaction that is not made or maintained in the manner prescribed by the Act or the regulations is an offense subject to the penalties provided in N.J. STAT. ANN. § 19:44A-22. N.J. ADMIN. CODE tit. 19, § 19:25-17.2(d) (2004).

426 N.J. ADMIN. CODE tit. 19, § 25-17.3A(h) (2004).

427 N.J. ADMIN. CODE tit. 19, § 25-17.3B(a) (2004).

428 N.J. ADMIN. CODE tit. 19, § 25-17.3B(c) (2004).

429 *Id.*

failure to file the report on or prior to the date of the election as a failure to file.[430]

XVII. IRS Reporting and Disclosure Obligations

The IRS reporting and disclosure obligations for a New Jersey CPC are found in I.R.C. §§ 527, 6012, and 6033. In Rev. Rul. 2003-49,[431] the IRS discussed a state PAC's reporting and disclosure obligations as reflected in the amendments to Section 527 in Public Law 107-276.[432] These amendments were signed into law by President Bush on November 2, 2002.[433]

Within twenty-four hours after its formation, a CPC must file IRS Form 8871, Political Organization Notice of Section 527 Status, electronically at the Political Organization Filing Center at www.irs.gov/polorgs.[434] Prior to filing Form 8871, the CPC must obtain an employer identification by filing IRS Form SS-4, which it can do on-line at www.irs.gov, or by telephone at 1-800-829-4933.[435] The filed Form 8871 is available for public inspection at the Political Organization Disclosure Page at www.irs.gov/polorgs.[436] For Forms 8871 due on or after June 30, 2003, the IRS must post the filed forms on its website within forty-eight hours of filing.[437] When a corporation uses its federal PAC registered with the FEC as its New Jersey CPC, the Form 8871 filing requirement does not apply.[438]

In addition, the CPC must make its filed Form 8871 available for public inspection in the same manner as Section 501(c)(3) organizations make their applications for exemption available.[439] The CPC is subject to a penalty of $20 for each day during which it does not make the form available for public inspection.[440] A Section 501(c)(3) organization must

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430 N.J. ADMIN. CODE tit. 19, § 25-17.3B(d) (2004).

431 2003-1 C.B. 903.

432 Rev. Rul. 2003-49, 2003-1 C.B. 903.

433 *Id.*

434 I.R.C. § 527(i)(1)(A) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-10, 2003-1 C.B. 903, 904.

435 Rev. Rul. 2003-49, Q&A-11, 2003-1 C.B. 903, 904. Instructions for IRS Form 8871 (Rev. July 2003), Specific Instructions, Part I.

436 I.R.C. § 6104(a) (West 2002).

437 I.R.C. § 527(k)(1) (West Supp. 2004).

438 I.R.C. § 527(i)(6) (West Supp. 2004).

439 I.R.C. §§ 527(k)(1) and 6104(d)(7) (West 2004); Treas. Reg. § 301.6104(d)-1(a)-(d) (as amended in 2003).

440 I.R.C. § 6652(c)(1)(d) (West 2002); Rev. Rul. 2003-49, Q&A-25, 2003-1 C.B. 903,

make its application available for public inspection without charge at its principal, regional, and district offices during regular business hours.[441] In addition, a Section 501(c)(3) organization must provide a copy, without charge other than a reasonable fee for reproduction and postage costs, of its application to any individual who requests a copy in person or in writing.[442] A Section 501(c)(3) organization does not have to comply with this request if the organization makes the requested document widely available by posting it on its Website, or as part of a database of similar documents of other tax-exempt organizations on a World Wide Web page maintained by another entity.[443]

A CPC must file an amended Form 8871 within thirty days after any material change.[444] The Code does not define material change, but a sponsor of the Section 527 amendments, Representative Kevin Brady, Republican from Texas, stated that a change of address is an example of a material change.[445] No amended Form 8871 is required for changes prior to November 2, 2002.[446]

An exemption from filing Form 8871 applies to any CPC that reasonably anticipates that its annual gross receipts will always be less than $25,000.[447] A newly formed CPC does not have to file Form 8871 if it reasonably anticipates that its annual gross receipts will be less than $25,000 for its first six taxable years.[448] Once the CPC has annual receipts of $25,000 or more for any taxable year, it must file Form 8871 within thirty days of receiving $25,000 in a single taxable year.[449]

If a CPC does not timely file Form 8871, the CPC's political organization taxable income for the period the form is delinquent includes its exempt function income of contributions and fundraising receipts, less any deductions directly connected with the production of this income.[450] If a CPC does not timely file an amended Form 8871, the income inclusion applies beginning on the date on which the material

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441 Treas. Reg. § 301.6104(d)-1(a) (as amended in 2003).

442 *Id.*

443 Treas. Reg. § 301.6104(d)-2(a)-(b) (as amended in 2003).

444 I.R.C. § 527(i)(1)-(2) (West Supp. 2004).

445 148 CONG. REC. H8011 (daily ed. Oct. 16, 2002).

446 Pub. L. 107-276 § 6(h)(6).

447 I.R.C. § 527(i)(5)(b) (West Supp. 2004).

448 Rev. Rul. 2003-49, Q&A-5, 2003-1 C.B. 903, 903.

449 *Id.*

450 I.R.C. § 527(i)(4) (West Supp. 2004).

change occurs and ending on the date on which the amended Form 8871 is filed.[451] In these situations, the CPC cannot deduct its exempt function expenditures against exempt function income because Code Section 162(e) disallows a deduction for campaign expenditures.[452] The CPC determines its tax by multiplying its taxable income, which is generally the sum of its exempt function income and net investment income, by the highest corporate tax rate.[453] The CPC files IRS Form 1120-POL to report the income and pay the tax.[454] If the CPC can show that the failure to file Form 8871 was due to reasonable cause and not willful neglect, the IRS may waive all or any portion of the tax.[455] Finally, contributions to a CPC that does not timely file Form 8871 remain exempt from federal gift tax.[456]

The CPC must provide on Form 8871:

> [I]ts name and address (including any business address, if different) and electronic mailing address; its purpose; the names and addresses of its officers, any highly compensated employees, contact person, custodian of records, and members of its board of directors, if any; the name and address of, and relationship to, any related entities under I.R.C. §168(h)(4); and whether the CPC claims an exemption from filing IRS Form 8872 as a qualified state or local political organization.[457]

Status as a qualified state or local political organization is crucial because it gives the CPC an exemption from filing IRS Form 8872, Political Organization Report of Contributions and Expenditures.[458] Form 8872 requires political organizations to disclose the identity of their contributors, and the amount of the contributions.[459] This exemption is important because the failure to file a required Form 8872 subjects any unreported contributions or expenditures to tax at the

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451 *Id.*

452 Rev. Rul. 2003-49, Q&A-20, 2003-1 C.B. 903, 905.

453 I.R.C. §§ 11(b) and 527(b)(1) (West 2002 and Supp. 2004).

454 Rev. Rul. 2003-49, Q&A-20, 2003-1 C.B. 903, 905.

455 I.R.C. § 527(1)(1)-(2) (West Supp. 2004).

456 I.R.C. § 2501(a)(5) (West 2002); Rev. Rul. 2003-49, Q&A-23, 2003-1 C.B. 903, 905.

457 I.R.C. § 527(i)(3) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-12, 2003-1 C.B. 903, 904.

458 I.R.C. § 527(e)(5) and (j)(5)(C) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-29(b), 2003-1 C.B. 903, 906. In addition, when a corporation uses its federal PAC as its New Jersey CPC, the Form 8872 filing requirement does not apply. I.R.C. § 527(j)(5)(A) (West Supp. 2004).

459 I.R.C. § 527(j)(3)(B) (West Supp. 2004).

highest corporate rate.[460] A qualified state or local political organization is a political organization that satisfies the following requirements:

(a) the organization limits its exempt functions to "influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any state or local public office, or office in a state or local political organization."[461] A corporation can satisfy this requirement by limiting the CPC's purposes in the CPC's bylaws to these functions, and should avoid the catch-all purpose of "all lawful activities;"

(b) the organization pursuant to state law reports to a state agency the information that would be reported on IRS Form 8872.[462] The organization will satisfy this requirement even if state law does not require entirely the same information as Form 8872, as long as state law requires the following two items, and the organization in fact reports them.[463] First, the name and address of each contributor of $500 or more to the organization in a calendar year, and the amount of each contribution.[464] Second, the name and address of each person to whom the organization expends $800 or more in a calendar year, and the amount of each expenditure.[465] If state law requires the reporting of additional information, the organization must satisfy this requirement.[466] Since the Act requires CPCs to file detailed statements of campaign receipts, contributions, and expenditures,[467] the reporting requirement is satisfied;

(c) the state agency makes the reports publicly available.[468] Since

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460 I.R.C. §§ 11(b) and 527(b)(1) and (j)(1) (West 2002 and Supp. 2004); Rev. Rul. 2003-49, Q&A-43, 2003-1 C.B. 903, 907.

461 I.R.C. § 527(e)(5)(A)(i) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

462 I.R.C. § 527(e)(5)(A)(ii) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

463 I.R.C. § 527(e)(5)(B) (West Supp. 2004); Rev. Rul. 2003-49, 2003-1 C.B. 903, 904-05.

464 I.R.C. § 527(e)(5)(B)(i) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

465 I.R.C. § 527(e)(5)(B)(i) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

466 I.R.C. § 527(e)(5)(A)(ii) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

467 N.J. STAT. ANN. § 19:44A-8b(2) and 8d (West 1999).

468 I.R.C. § 527(e)(5)(A)(iii)(I) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

N.J. STAT. ANN. §19:44A-6b(4)-(5) provides for the public inspection and copying of reports, this requirement is satisfied. ELEC makes the reports available on-line;[469]

(d) the organization makes the reports publicly available;[470] and

(e) a federal candidate or officeholder does not "control or materially participate in the organization's direction, solicit contributions for it, or direct any of the organization's disbursements."[471]

A CPC has two other IRS filing obligations. First, if the CPC has more than $100 in political organization taxable income, which is generally its net investment income and excludes its exempt function income of contributions and fundraising receipts, it must file an annual income tax return on IRS Form 1120-POL.[472] The form is due on or before the fifteenth day of the third month after the close of the CPC's taxable year.[473] For a calendar year CPC, the form is due on or before March 15. A CPC can obtain an automatic six month extension by filing IRS Form 7004 by the initial due date.[474] A CPC that does not timely file Form 1120-POL is subject to a penalty of five percent of the tax due for each month or partial month that the failure continues, with a maximum penalty of twenty-five percent of the tax due.[475] In addition, the CPC is subject to a penalty for failure to pay when due any amount

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469 ELECTION LAW ENFORCEMENT COMM'N *at* http://www.elec.state.nj.us. Senate Bill S9 and Assembly Bill A9, enacted as N.J. STAT. ANN. sec. Temporary and Executed, requires ELEC to review and evaluate its Internet site within 120 days of June 16, 2004, and to submit a report to the Governor and Legislature within 180 days of June 16, 2004. The report shall contain a detailed discussion of ELEC's efforts to revise the format and content of its Internet site, and recommendations for legislation and appropriation. N.J. STAT. ANN. sec. Temporary and Executed (2004 N.J. Sess. Law Serv. 72, 128 (West)). The report was published on November 16, 2004, and is *available at* http://www.elec.state.nj.us/pdffiles/ELEC_Computer_Report.pdf. N.J. Election Law Enforcement Commission, *Road to the Future: Improving the Convenience and Usefulness of ELEC's Internet Site* (Nov. 2004).

470 I.R.C. § 527(e)(5)(A)(iii)(II) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

471 I.R.C. § 527(e)(5)(D) (West Supp. 2004); Rev. Rul. 2003-49, Q&A-16, 2003-1 C.B. 903, 904-05.

472 I.R.C. § 6012(a)(6) (West 2002); Rev. Rul. 2003-49, Q&A-46, 2003-1 C.B. 903, 907-08. Under FECA, a PAC's tax liability is not an administrative expense. FEC Advisory Opinion 1977-19. Accordingly, the corporation cannot pay the tax without making a corporate contribution prohibited by FECA. New Jersey is also likely to provide that the corporation's payment of tax is a contribution.

473 I.R.C. § 6072(b) (West 2002).

474 Rev. Rul. 2003-49, Q&A-47, 2003-1 C.B. 903, 908.

475 I.R.C. § 6651(a)(1) (West 2002).

shown on the return as tax owed equal to 0.5% of the amount of the unpaid tax for each month or partial month during which the failure continues, with a maximum penalty of twenty-five percent of the unpaid tax.[476] The penalties for failure to file and failure to pay are subject to abatement if the CPC shows that the failure was due to reasonable cause and not willful neglect.[477] Finally, effective retroactively for taxable years beginning after June 30, 2000, Form 1120-POL is not available for public inspection at the IRS or the CPC.[478]

Second, a qualified state or local political organization must file an information return on IRS Form 990 if it has annual gross receipts of $100,000 or more.[479] Tax-exempt organizations with gross receipts of less than $100,000 and assets of less than $250,000 file IRS Form 990-EZ.[480] Tax-exempt organizations with gross receipts of less than $25,000 do not file Form 990 or Form 990-EZ.[481] The form is due by the fifteenth day of the fifth month following the end of the CPC's taxable year.[482] For a calendar year CPC, the form is due on or before May 15. A CPC can obtain an automatic three month extension by filing IRS Form 8868 by the initial due date.[483] A CPC that does not timely file Form 990 or Form 990-EZ is subject to a penalty of $20 per day for each day that the failure continues, with a maximum penalty of the lesser of $10,000, and five percent of the CPC's gross receipts for the year.[484] For CPCs with gross receipts exceeding $1 million for any year, the penalty increases to $100 per day, with a maximum penalty of $50,000.[485]

If the IRS makes a written demand of a reasonable future date by which the CPC must file Form 990 or Form 990-EZ and an organization manager does not comply, the manager is subject to a penalty of $10 for each day during which the failure continues after this date.[486] The maximum penalty imposed on all managers for any one return is

476 I.R.C. § 6651(a)(2) (West 2002).
477 I.R.C. § 6651(a)(1) and (2) (West 2002).
478 I.R.C. § 6104(b) and (d)(1)(A) (West 2002).
479 I.R.C. § 6033(g)(1) (West 2002).
480 Rev. Rul. 2003-49, Q&A-50, 2003-1 C.B. 903, 908.
481 *Id.*
482 I.R.C. § 6072(e) (West 2002); Rev. Rul. 2003-49, Q&A-52, 2003-1 C.B. 903, 908.
483 Rev. Rul. 2003-49, Q&A-52, 2003-1 C.B. 903, 908.
484 I.R.C. § 6652(c)(1)(A) (West 2002).
485 *Id.*
486 I.R.C. § 6652(c)(1)(B) (West 2002).

$10,000.[487] The failure to file penalties imposed on the CPC and an organization manager are subject to abatement if the failure was due to reasonable cause.[488]

Form 990 or Form 990-EZ for taxable years beginning after June 30, 2000, including the Schedule B contributor information, is available for public inspection beginning on July 1, 2003 at the Political Organization Disclosure Page. www.irs.gov/polorgs.[489] In addition, the CPC must make the filed forms available for public inspection at its principal place of business during regular business hours for three years beginning on the last day for filing the form including extensions.[490] The CPC must provide copies of the form for a reasonable reproduction charge unless the form is widely available, such as on the Internet, and the CPC provides the Internet address to the person requesting the form.[491] The CPC is subject to a penalty of $20 per day, with a cap of $10,000, for each failure to satisfy the public inspection requirement.[492]

XVIII. Conclusion

Corporate PACs in New Jersey provide corporations and their officers with an important, and in a highly charged political environment, precious, opportunity to participate in political campaigns. To make sure this opportunity does not sink a corporation and its officers into a morass of campaign finance violations, with the accompanying agita-producing risk of adverse media publicity, the corporation and its PAC must successfully navigate the shoals of four complex areas of law. Hopefully, this Article has provided the appropriate guide to achieve this success.

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[487] *Id.*

[488] I.R.C. § 6652(c)(3) (West 2002).

[489] I.R.C. § 6104(b) and (d)(3)(A) (West 2002); Rev. Rul. 2003-49, Q&A-54, 2003-1 C.B. 903, 908. The Political Organization Disclosure Page is located at www.irs.gov/polorgs.

[490] I.R.C. § 6104(d)(1) and (3)(A) (West 2002); Rev. Rul. 2003-49, Q&A-54, 2003-1 C.B. 903, 908.

[491] I.R.C. § 6104(b) and (d)(1)-(4) (West 2002); Treas. Reg. §§ 301.6104(d)-1(d)(3) and 301.6104(d)-2 (as amended in 2003).

[492] I.R.C. § 6652(c)(1)(C) (West 2002).