SCARINCI & HOLLENBECK, LLC
Attorneys at Law

1100 VALLEY BROOK AVENUE
P. O. BOX 790
LYNDHURST, NEW JERSEY 07071-0790
(201) 896-4100 / (201) 896-8660 FAX

60 EAST MAIN STREET
FREEHOLD, NJ 07728
(732) 780-5590 / (732) 462-0385 FAX

6 WATER STREET, SUITE 401
NEW YORK, NEW YORK 10004
(212) 546-9255 / (212) 483-0876 FAX

www.njlegalink.com

DONALD SCARINCI*■
KENNETH J. HOLLENBECK
ROBERT E. LEVY■○□
VICTOR E. KINON●
PATRICK J. MCNAMARA■
ANDREW L. INDECK*
JOHN M. SCAGNELLI*
JOEL R. GLUCKSMAN*
JOSEPH A. FERRIERO□*
MATTHEW J. GIACOBBE*
JOSEPH M. DONEGAN*■◆
FRED D. ZEMEL*
THEODORE A. SCHWARTZ
THOMAS J. CAFFERTY
MARTIN R. PACHMAN

RICHARD M. SALSBERG (1945-2005)

Of Counsel
NOMI IRENE LOWY
MICHAEL R. WASSERMAN*
ALEXANDER F. MCGIMPSEY JR□*

Counsel
SANDRA T. AYRES
MARK S. TABENKIN
JOHN P. LIBRETTI III*◆
SHERI K. SIEGELBAUM
MARK K. FOLLENDER
ROBIN T. MCMAHON
WILLIAM C. SULLIVAN JR.
MITCHELL B. JACOBS
MARC L. POTOLSKY
MITCHELL L. PASCUAL■*
SEAN D. DIAS*
KATHLEEN J. DEVLIN*
MICHAEL A. CIFELLI
RENEE A. RUBINO
WILLIAM T. ROGERS III*

Associates
JACQUELIN P. GIOIOSO
PAUL B. HIRSCH
KEVIN M. SULLIVAN
JOSEPH R. MORANO*
WILLIAM A. BAKER

FRANK P. KAPUSINSKI
ANTHONY P. SEIJAS
CHRISTINE M. VANEK*
PARTHENOPY A. BARDIS*
BRUCE W. PADULA
MICHAEL K. CHONG
ALYSE BERGER HEILPERN*
STEVEN W. KLEINMAN*
PETER C. HUMBLIAS●
MITCHELL H. LEVINE*
MICHAL L. RADOVICI*
NINA VI J

● ADMITTED IN MASSACHUSETTS
* ADMITTED IN NEW YORK
■ ADMITTED IN PENNSYLVANIA
◆ ADMITTED IN U.S. TAX COURT
□ CERTIFIED CIVIL TRIAL ATTORNEY
○ CERTIFIED CRIMINAL TRIAL ATTORNEY

PLEASE REPLY TO:
LYNDHURST

April 4, 2006

John O'Brien, Executive Director
New Jersey Press Association
840 Bear Tavern Road, Ste. 305
W. Trenton, New Jersey 08628

Re: Impact of "Pay to Play" Legislation on Newspapers
Our File No.: 9970.3200

Dear John:

As I recently reported to the Government Affairs Committee, there have been some important developments in the area of "Pay-to-Play" with respect to official advertising in newspapers. I offer the following as guidance in connection therewith:

THE IMPACT OF "PAY TO PLAY" LEGISLATION ON NEWSPAPERs RECEIVING OFFICIAL ADVERTISING FROM PUBLIC ENTITIES

A. THE APPLICABLE LEGAL PROVISIONS

In 2004 the Legislature enacted P.L. 2004, c.19, later amended by P.L. 2005, c.51 and codified at N.J.S.A. 19:44A-20.4 to 20.12. This law is commonly known as the "Local Unit Pay-to-Play Law," or "LUPP". There is also a related law, based largely upon an Executive Order promulgated by former Governor Jim McGreevey, which affects contracts with the State of New Jersey as well as its agencies and instrumentalities ("the Executive Order"). Finally, on January 5,

2006, then-Governor Codey, signed into law P.L. 2005, c.271 ("the Law"), which provides that existing local ordinances, resolutions and regulations and those adopted in the future regulating the practice of "Pay to Play" will remain valid and enforceable notwithstanding adoption of the "LUPP."

The Law also contains two other provisions that greatly increase public disclosure requirements for politically active businesses that do work on any level of New Jersey government. One provision provides that except when a public contract is required by law to be advertised for bids, a prospective vendor is required to disclose certain information regarding its political contributions to the public entity offering the contract, along with its bid or price quote. The other provision provides that business entities that hold significant contracts with public entities and make reportable political contributions must file annual disclosure reports with the New Jersey Election Law Enforcement Commission ("ELEC").

The Law was enacted primarily in response to concerns over the issue of pre-emption. Prior to the effective date of the "LUPP" on January 1, 2006, over 50 New Jersey municipalities and counties had already adopted ordinances, resolutions or regulations with respect to "pay-to-play," and numerous others were considering doing so. Almost universally, such ordinances, resolutions or regulations differ from State law in significant respects. Without the Law, these local ordinances, resolutions or regulations likely would have been pre-empted or superseded and therefore not legally enforceable. Now, as a result of the Law, these ordinances, resolutions or regulations remain valid and enforceable, although they must be filed with the Secretary of State.

Accordingly, if a local public entity does not have its own "Pay to Play policy", the LUPP will continue to apply to that local public entity. If the local public entity has such a policy, then that public entity's requirements will apply instead. However, New Jersey's Department of

Community Affairs ("DCA"), in its Local Finance Notice 2006-1, has advised that a local public entity's "Pay to Play" requirements may differ from the LUPP only insofar as there is no conflict with the "disclosure themes" established in the State law. For example, DCA has advised that a local public entity could permit political contributions of up to $500 from a business entity seeking a no-bid contract (instead of the State law's $300 limit) without violating the "disclosure themes," but allowing a contribution of $2,600 (the legal limit for any contribution to an individual candidate committee) would not similarly be permissible.

B. Prospective vendors for contracts with any level of New Jersey government will have to disclose many of their political contributions as part of their proposal.

Another provision of the Law states that for any non-emergency public contract, on any level of New Jersey government (including fire districts and boards of education) anticipated to be in excess of $17,500, except those contracts "required by law to be publicly advertised for bids," a business entity must disclose to the public entity certain reportable political contributions along with its bid or price quote. Although the quoted language of the statute might suggest otherwise, DCA has advised that disclosure is not required when the contract is awarded pursuant to a "fair and open" process as defined by the LUPP. The required disclosure must be made at least 10 days prior to entering into the contract.

C. What is a "fair and open" contract, and how does it differ from other types of contracts?

There are three primary aspects to a "fair and open process:"

1. **The contract must be publicly advertised in newspapers or the Internet website maintained by the public entity in sufficient time to give notice in advance of the contract.**

DCA has stated that 10 days in advance is sufficient notice, since that is the amount of time required for advertising for public bids under the Local Public Contracts Law LPCL. Obviously,

the advertisement must provide enough information to allow a reasonable person to understand the nature of the contract and the requirements for submitting a proposal, and if on a website, easily accessible to potential contractors.

2. **The contract must be awarded under a process that provides for public solicitation of proposals or qualifications and awarded and disclosed under criteria established in writing for the public entity prior to the solicitation of proposals or qualifications.**

This provision requires that the criteria for the contract be established prior to seeking proposals, and by implication available to anyone seeking to submit a bid on a particular contract. It permits the public entity to broadly determine whatever criteria it deems appropriate in awarding the contract, and the public entity is not required to choose the lowest bidder. Of course, any such criteria may not unfairly or illegally discriminate against or exclude otherwise capable vendors.

3. **The bids must be publicly opened and announced when awarded.**

DCA has advised that a proposal may be opened in any public venue, so long as the time and place has been previously established and is open to the public. The contract may be awarded at a separate time by resolution of the public entity. Importantly, DCA has further advised that all awards of "fair and open process" contracts must be made by the governing body of the public entity, even if otherwise such contracts could be awarded by the purchasing agent because they are under the entity's bid threshold, but in excess of $17,500. Furthermore, it is recommended that the awarding resolution set forth whether the contract is awarded via a "fair and open process" or not.

IMPORTANTLY, LUPP provides that "the decision of a public entity as to what constitutes a fair and open process shall be final," so long as it meets the minimum requirements of LUPP. However, LUPP does not supercede the LCPL in any way, so if the public entity is required to or chooses to utilize public bidding or competitive contracting procedures, it must still abide with the procedures established in the LCPL. Since the required steps for a "fair and open process" are already established in both the public bidding and competitive contracting provisions of the LCPL, awarding a contract under either procedure satisfies the terms of LUPP. However, these steps are not required for a public entity to award contracts under a "fair and open process."

D. Reportable Contributions

1) a contract is not required to be advertised for bids, **as is the case of official advertising**, 2) the anticipated value of the contract exceeds $17,500; and 3) the contract was not awarded via a "fair and open process" then a business entity must make certain disclosures with respect to its political contributions.

The required disclosure of reportable contributions covers the previous 12-month period, and must include the date and amount of the contribution and the name of the recipient.

For contracts with the State of New Jersey, the business entity must disclose all applicable:

1. contributions to a State, county or municipal political party committee;
2. contributions to a legislative leadership committee;
3. contributions to the candidate committee of a candidate or holder of any State elective office;
4. any continuing political committee ("CPC").

For contracts with any other level of government, the business entity must disclose all applicable:

1. contributions to a State, county or municipal political party committee;
2. contributions to a legislative leadership committee;
3. contributions to the candidate committee of a candidate or holder of an elective office of that particular public entity;
4. contributions to any candidate committee of a candidate or holder of an elective office of the county where that particular public entity is located;
5. contributions to any candidate committee of a candidate or holder of an elective office of another public entity in the county where that particular public entity is located;
6. contributions to any candidate committee of a candidate or holder of an elective office of another public entity in the legislative district where that particular public entity is located;
7. when the contracting public entity is a county, contributions to any candidate committee of a candidate or holder of an elective office of another public entity in any legislative district encompassing any part of that county;
8. any CPC.

The Law further states that when the business entity is a natural person (i.e. a sole proprietorship), a contribution by the person's resident spouse or child is considered to be a contribution from the business entity. However, when the business entity is other than a natural person, a contribution from anyone with an interest (meaning 10% or greater ownership or control of the business entity) is also considered to be a contribution from the business entity. The Law also requires disclosure of contributions by all principals, partners, officers or directors of the business entity, regardless of their level of ownership, **and** their spouses. The term "interest" also includes any subsidiaries and/or any so-called "527" political organizations (such as CPC's) other than a candidate committee, election fund or political party committee, directly or indirectly controlled by the business entity.

A violation of this provision subjects the violator to a fine imposed by ELEC, which is determined based upon the severity of the violation.

E. Business entities with public entity contracts will now have mandatory disclosure requirements with ELEC.

The third provision of the Law requires business entities with an aggregate of $50,000 or more of public business from any level of New Jersey government, and which have made or pledged almost any political contribution, to file an annual disclosure statement with ELEC setting forth all such political contributions during the previous 12 month period. These reports will be made publicly available on the Internet.

The specific forms and procedures for this disclosure will be determined by ELEC, and the same rules regarding when contributions are deemed to be from the business entity discussed in the previous paragraph apply to this provision as well.

Violations of this provision subject the violator to a fine imposed by ELEC, which is determined based upon the severity of the violation.

F. Applicability to Official Advertising

DCA recently issued a "Guide to the New Jersey Local Government 'Pay to Play' Law." In relevant part, the Guide provides:

> **SPECIAL CIRCUMSTANCES: Banks, Utilities and Insurers**
>
> There are several circumstances where the application of the Law creates anomalies with other statues and where the public is served by exempting contractors from the application of Chapter 19. Certain conflicts arise due to the nature of the business relationship and laws regulating political contributions. In these cases, agencies can issue purchase orders and pay vouchers without regard to non-fair and open contracting procedures. The following services are affected by this circumstance:
>
> 1. Services whose rates are regulated through tariffs approved by the Board of public Utilities. This includes, but is not limited to: water and sewer services, transmission of electricity and natural gas, basic electricity and natural gas services, and local telephone services. Providers of these services are statutorily barred from making reportable contributions.
>
>   This exemption **does not include** contracts with non-tarriffed vendors (including unregulated subsidiaries of regulated companies) providing generated electricity, natural gas supplies, long-distance telephone services, and alternate intra-LATA telephone services must be procured either through public bidding or competitive contracting (if authorized). A fair and open process must be used when the contract is a window contract (over ($17,500 but less than the agency's bid threshold).
>
> 2. Banking services. Banks are appointed by resolution of the governing body and banking services are rarely reflected in contracts. Banks are prohibited from making reportable contributions.
>
> 3. Contracts with insurance companies (the state-regulated company that is the actual insurer, not an agency or agent representing the company). While insurers are prohibited from making reportable contributions, the purchase of insurance continues to be subject to contracting laws directing the procurement method, i.e., exempt from bidding, but subject to extraordinary unspecifiable services procedures.
>
> **This exemption does not extend to other areas that may be similar in part. For example, rates for government "legal" advertising in "official newspapers" may be set in statute and the choice of newspapers restricted (N.J.S.A. 35:1-1 *et seq.*). Under "Pay to Play," however, because there is often a choice of vendor and newspaper owners are not legally restricted from making contributions this service is subject to "Pay to Play" procedures. [Emphasis Added]**

Consequently, it would appear that in the case of legal advertising by public entities where (i) the anticipated value of the contract(s) exceeds $17,500 in any year (ii) which is awarded without public advertising for bids and (iii) is not awarded via a "fair and open process," the newspaper will be required to comply with the disclosure requirements set forth above.[1]

Should you have any questions and/or comments please feel free to communicate with me.

Very truly yours,
SCARINCI & HOLLENBECK, LLC

THOMAS J. CAFFERTY

TJC/yim

STEVEN W. KLEINMAN

[1] The DCA in its Guide identifies several circumstances where it opines the public entity may award contracts by exempting contractors from N.J.S.A. 19:44A-20.4 *et seq.* The DCA then further opines that the exemptions outlined in its Guide for services whose rates are regulated through tariffs approved by the Board of Public Utilities, banking services and contracts with insurance companies are inapplicable to other areas similar in part citing, as an example, newspapers carrying official advertising, the rates for which are fixed by statute and the choice of which paper to utilize restricted. The DCA explains that newspapers differ from banks, insurance companies and suppliers of services whose rates are regulated by the BPU because there is often available to a public entity a choice of which newspaper it will designate to carry official advertising – there often being more than one such newspaper legally eligible for such designation. Assuming, for the sake of argument, that the presence of such a choice does serve to differentiate newspapers from the entities that the DCA opines should be exempt, a proposition of dubious legal validity in light of the fact that the newspaper has no choice as to the rate it will charge and no choice as to the services it will provide (the statute fixes type size), nonetheless, the DCA fails to address those instances where there is no choice of newspaper, there being only one paper available which satisfies the statutory requirement. At a minimum, in that circumstance, it would seem, under the logic of the DCA, the newspaper would be like the other exempt entities, and should also be exempt from the application of N.J.S.A. 19:44A-20.6 *et seq.*