

Memorandum

TO: The New Jersey Press Association

FROM: Thomas Cafferty and Steven Kleinman, Esq.

DATE: July 11, 2006

RE: "Pay to Play" and its effect on newspapers

As most of New Jersey's newspaper industry is aware, in recent years New Jersey has enacted laws designed to curb the influence of political campaign contributions on the award of public contracts, a practice termed "pay-to-play." Many of those in our industry, however, do not realize that these laws may have a significant impact on a newspaper's ability to accept advertising from local governmental entities.

According to the "New Jersey Local Unit Pay-to-Play Law," ("Law"), now codified at N.J.S.A. 19:44A-20.4 to 20.12, a local government, or an agency or instrumentality of that local government, may not award a contract valued above a threshold amount to a business entity if that entity, or anyone holding an "interest" in the entity (as defined by the Law) has made certain political contributions. The only exception is if the contract was awarded pursuant to a "fair and open" process as established by the Law. The Law took effect on January 1, 2006, but does not implicate any contribution made before that date.

Notwithstanding that State law limits the ability of a local government to select an official newspaper, and also regulates the rates an official newspaper may charge for printing legal advertisements, the New Jersey Department of Community Affairs (DCA) has advised that the selection of an official newspaper still falls under the terms of the Law. The DCA, in a March 2006 Local Finance Notice, states that the Law is applicable to newspaper advertising because "there is often competition for the service in a given territory." Accordingly, if a local governmental entity names an official newspaper, and the entity is likely to spend at least \$17,500 per year in legal advertising, the Law will apply.

Importantly, the \$17,500 amount is not aggregated simply because two or more particular local governmental entities represent the same county or municipality. The DCA provides the example of a municipal planning and zoning board, each with

statutory authority to enter into contracts, that spend \$10,000 yearly on legal advertising. Simply because both boards serve the same municipality is not sufficient to implicate the Law. If one or both of these boards spent \$20,000 on yearly legal advertising, however, the Law would be applicable.

While presumably, most newspapers themselves do not make political contributions, sometimes, those who own an “interest” in a newspaper business may want to make such contributions. The Law defines an “interest” as anyone with a 10% or greater ownership or controlling interest in a business entity. Accordingly, if anyone with such a level of ownership in a newspaper business makes a “reportable” (in excess of \$300 per election or per year, depending on the recipient) political contribution to a candidate, elected official, or local political party organization in the particular county or municipality where a local governmental entity wishes to name an official newspaper, the newspaper may not serve as the official newspaper, for a 12-month period, for that county or municipality unless awarded this position via a “fair and open process.” Furthermore, the newspaper business will have to disclose all of its 10% or greater owners as part of the enforcement process.

The law does not appear to make a distinction even if only one newspaper can meet the statutory requirements for being named the official newspaper of a particular local governmental entity. If such a newspaper or its owners have made a disqualifying political contribution, it is possible that the local governmental entity could apply to the State for a waiver from the Law, but the State has discretion in granting the waiver.

The Fair and Open Process

If the local governmental entity utilizes a “fair and open process,” however, then the political activity of a newspaper business or its owners will be irrelevant. This process has three requirements: (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; (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; and (3) the bids must be publicly opened and announced when awarded. While there are there additional details with respect to this process, the important thing to understand is that if the “fair and open process” is used, effectively, the Law will not apply.

Local Pay-to-Play Policies and Additional Political Contribution Disclosures.

Another law dealing with “pay-to-play,” P.L. 2005, c. 271, also may have an impact on New Jersey’s newspaper industry. It can be presumed that since the Law applies to newspapers, P.L. 2005, c. 271 also applies even though DCA has not expressly said so.

P.L. 2005, c. 271 has three key components. First, it expressly permits a local governmental entity to adopt its own local pay-to-play policy, which may differ from the Law in significant respects. Newspapers may need to inquire with each applicable local governmental entity as to the implications if such a policy has been adopted. Additionally, if a newspaper has been designated as an official newspaper by other than a “fair and open process,” a separate additional disclosure of reportable political contributions will be required, and must be submitted at least 10 days prior to being named as the official newspaper. The c. 271 Disclosure is significantly broader than the disclosure required by the Law. The c. 271 Disclosure will require the disclosure of many political contributions from the newspaper business itself; all principals, partners, officers, and/or directors of the newspaper business and their spouses (regardless of ownership); any subsidiaries directly or indirectly controlled by the newspaper business; and any continuing political committees (a.k.a. PAC’s) directly or indirectly controlled by the newspaper business. While each local governmental entity is supposed to set forth the particular contributions that must be reported, it will at a minimum include a broad swath of contributions to political candidates, officeholders and organizations throughout New Jersey. Finally, c. 271 requires businesses with more than \$50,000 in public business in a calendar year to file a report of political contributions with the New Jersey Election Law Enforcement Commission (ELEC). The details of this mandatory report are still being worked out by ELEC, and no report needs to be filed at this point.

Obviously, it is important to pay attention to these new “pay-to-play” laws, since failure to do so could mean an adverse impact on your bottom line. We will continue to monitor the implementation of these laws and update you as events warrant.

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