



# NABPAC Pay-to-Play Laws

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# Overview

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# Meaning of “Pay-to-Play”

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- “Pay-to-Play” is the name given to laws designed to prevent persons from making political contributions (*i.e.*, “paying”) in order to influence the award of a contract, grant, loan, etc. from a government entity (*i.e.*, “playing”).
- These bans are prophylactic in that they go beyond bans on *quid pro quo* activity.
- The conduct prohibited also is in addition to campaign finance restrictions often applied to lobbyists and lobbyist employers.

# Meaning of “Pay-to-Play”

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- The conduct prohibited by these types of laws extends, in some cases, to
  - Candidate, party, and PAC contributions,
  - Inaugural contributions,
  - Transition contributions, and
  - Solicitation activity.
    - Covered solicitation activity can include hosting a fundraiser, allowing one’s name to appear on an fundraiser invitation, and asking for contributions.

# Penalties for Pay-to-Play Violations

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- Loss of current contract with the jurisdiction
  - Preclusion from future contracts with the jurisdiction
  - Civil penalties
  - Criminal penalties
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- Nationwide and long-lasting implications given look-back periods of up to 4 years

# Brief History of Pay-to-Play Laws

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- Pay-to-play laws almost always arise in the wake of scandal – efforts to prohibit what egregious activity had previously transpired in the jurisdiction.
- In 1972, Congress enacted a provision in the Federal Election Campaign Act (FECA) that prohibited federal contractors from making federal political contributions, although the limitation did not extend to employees or PACs.
- Since 1994, the Municipal Securities Rulemaking Board (MSRB) has used Rule G-37 to prohibit broker/dealers and their employees (municipal finance professionals) from engaging in pay-to-play activities with respect to the municipal bond business.

# Additional Federal Pay-to-Play Rules

- In addition to MSRB's Rule G-37 and the ban in the FECA, the following federal pay-to-play rules exist or have been proposed:
  - The SEC has instituted a pay-to-play rule (operational as of March 14, 2011) for investment advisors providing advice to state and municipal pension funds, 529 plans, etc.
  - The MSRB has proposed a new pay-to-play rule (Rule G-42) to apply to the class of persons called "municipal advisors" created in the Dodd-Frank Act.
  - The CFTC has proposed a new pay-to-play rule for certain swap dealers and participants.
  - **BUT, state and local pay-to-play laws are not limited to the financial services industry.**

# Wide-ranging State and Local Laws

- 22 states have pay-to-play laws of one kind or another
  - Some state laws reach activities in the localities as well – as far down as school districts
- Many major localities have pay-to-play laws, including
  - New York City
  - San Francisco
  - Chicago
  - Cook County, Ill.
- Many jurisdictions are currently considering new or stronger pay-to-play laws, including
  - Los Angeles – on the ballot in March
  - New York State – part of the Governor’s plan to “Clean Up Albany”
  - Prince George’s County, Md.
  - Texas

# Nonfederal Laws Encompass Everyone

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- Terms “contract” and “agreement” either not defined or defined in the broadest sense of the terms
  - Can include both sales to the jurisdiction and purchases from the jurisdiction
- Application of the pay-to-play rules is not limited to no-bid contracts
- Some jurisdictions merely reference receipts from the government, regardless of the type of contract or agreement employed (even purchase orders and invoices)

# Nonfederal Rules Take Various Forms

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- Time Periods Covered
  - Before contracting
  - During the procurement process
  - During the term of the contract
    - AND/OR
  - After the contract is terminated
- Activity Covered
  - Candidate contributions
  - Party and PAC contributions
    - AND/OR
  - Solicitation activities

# Application of Nonfederal Rules

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- Corporate, LLC, or other business entity
- Connected PACs, including federal PACs
- Large owners (5%, 10%, 20%) and partners
- Board of Directors
- Officers
- Contract-specific employees
- All employees
  - AND/OR
- The spouse, civil union partner, or minor children of any of the natural persons listed above

# Ability to Undo or Cure a Violation

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- Some jurisdictions do permit entities that have violated the rules to receive a refund from the campaign in order to “cure” the violation.
- Such cure provisions are very specific in the time period in which the contribution refund must be requested and in which the refund must be received.
  - *In re Earle Asphalt* – NJ – prospective contractor did not receive the refund of a \$1,500 party contribution in time and was precluded from the \$6.2 million contract to repair roads
- Some jurisdictions limit the number of times a cure may be employed, preclude cures of contributions made immediately before an election, or preclude cures altogether

# Corporate Bans and Limits

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- Corporate contributions in the following jurisdictions are specifically affected by pay-to-play rules:
  - California, Florida, Hawaii
  - Illinois, Indiana, Louisiana
  - Missouri, Nebraska, New Jersey
  - New Mexico, New York, South Carolina
  - Vermont, Virginia
  - Chicago, Cook County, Los Angeles County
  - Oakland, San Francisco
  
  - Note: *Many other jurisdictions ban campaign contributions by corporations generally.*

# PAC Bans and Limits

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- PAC contributions in the following jurisdictions are specifically affected by pay-to-play rules:
  - California, Connecticut, Illinois
  - Indiana, Nebraska, New Jersey
  - New York, Vermont
  - Chicago, Oakland, Philadelphia
  - San Francisco

# Individual Bans and Limits

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- Contributions from individuals associated with a contractor or prospective contractor (such as directors, officers, and other employees) are specifically affected by pay-to-play rules in the following jurisdictions:
  - California, Connecticut, Florida
  - Illinois, Indiana, Kentucky
  - Louisiana, Missouri, Nebraska
  - New Jersey, New Mexico, New York
  - Pennsylvania, South Carolina, Vermont, Virginia
  - Chicago, Dallas, Houston
  - Los Angeles County, NYC, Philadelphia
  - San Antonio, San Francisco

# Reporting of Corporate Contributions

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- The pay-to-play rules in the following jurisdictions specifically require corporations to report contributions, either periodically or during the procurement process:
  - California, Illinois, Maryland
  - New Jersey, New Mexico, New York
  - Los Angeles, San Diego County
  
  - *Note: Many other jurisdictions ban campaign contributions by corporations generally.*

# Reporting of PAC Contributions

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- The pay-to-play rules in the following jurisdictions specifically require that a PAC report contributions, either periodically or during the procurement process:
  - California, Connecticut, Illinois
  - Maryland, New Jersey, New York
  - Texas
  - Philadelphia
  - San Antonio

# Reporting of Individual Contributions

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- The pay-to-play rules in the following jurisdictions specifically require contractors or prospective contractors to report contributions made by associated individuals, either periodically or during the procurement process:
  - California, Connecticut, Illinois
  - Maryland, Missouri, New Jersey
  - New Mexico, New York, Pennsylvania
  - Rhode Island, Texas
  - Denver, Los Angeles, Philadelphia
  - San Antonio, San Diego County

# Recent Court Analysis

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- U.S. Court of Appeals for the Second Circuit
  - *Green Party v. Garfield* (July 13, 2010)
  - Upheld Connecticut’s ban on contributions made by contractors and prospective contractors, which extends to the entity’s directors, officers, and other employees.
  - But, struck down ban on the solicitation of contributions by contractors and prospective contractors as an affront to free speech.
  - Also struck down ban on lobbyists’ making or soliciting contributions.
- Note: the Connecticut legislature responded with new, more “narrowly-tailored” solicitation and lobbyist restrictions.