



Corporate Compliance Spotlight: Pay-to-Play

**Skadden, Arps, Slate, Meagher & Flom LLP
and Affiliates**

The Americas

Boston
Chicago
Houston
Los Angeles
New York
Palo Alto
São Paulo
Toronto
Washington, D.C.
Wilmington

Europe

Brussels
Frankfurt
London
Moscow
Munich
Paris

Asia Pacific

Beijing
Hong Kong
Seoul
Shanghai
Singapore
Tokyo



- Anti-corruption and linkage laws
 - Recent enforcement and prosecutorial focus
- Make sure that your consultants are properly vetted
- Comply with conflicts of interest laws applicable to employees holding government positions and hiring employees out of the government
- Be aware of strict liability pay-to-play laws (federal, state, and local)



- Former Ohio House Speaker Larry Householder and four associates were indicted in July 2020 in a federal racketeering conspiracy involving roughly \$60 million paid to a 501(c)(4) entity to pass a billion-dollar nuclear plant bailout
- The 501(c)(4) entity (Generation Now) also was charged
- The DOJ alleged that the enterprise, consisting of Householder, his associates and Generation Now, conspired to violate the racketeering statute through honest services wire fraud
- The company that made the payments (FirstEnergy) and its former subsidiary (now known as Energy Harbor) have been subpoenaed



- **Honest Services Fraud (18 U.S.C. § 1346)**
- *United States v. Stenger* (E.D. Mo. 2019)
 - Former St. Louis County Executive Steve Stenger pleaded guilty to honest services fraud, among other charges
 - At a dinner, he accepted a \$5,000 contribution from businessman John Rallo, who said he was tired of giving money to politicians and not getting anything in return. Stenger made statements to assure Rallo that, if elected, he would help him.
 - This one toxic conversation tainted a consulting contract Rallo obtained with the county's Port Authority and contracts he obtained to purchase property from the County Land Clearance for Redevelopment Authority
 - Problematic emails and texts also were uncovered
 - » Stenger: "John is there a way we would be able to get your 2500 for the quarter dated 3.31 in the next few days so we could count it for this quarter. We are trying to hit 300k for the quarter and it would be helpful"
 - » [Five texts later, same thread, same day:]
 - » Rallo: "Check is ready! Need 5 min call to go over a concern I have on the insurance RFP...are u avail later today?"
 - Stenger and Rallo both pleaded guilty and sentenced to prison



- There should be no relationship between a gift, entertainment, charitable donation, or political contribution and any official decision
 - Do not discuss fundraising in congressional offices or while lobbying
- Know who or what you are giving to
- Understand the rationale for the donation, contribution, or gift
- Be careful of timing



- Written communications can easily be misunderstood or taken out of context, so particular care is required before:
 - Putting justifications or reasons for contributions in writing
 - Sending transmittal letters
- If you have to use email, beware of making spontaneous statements that could erroneously imply legal violations or embarrass if it is produced in court or becomes public



- Contributing to charities and other nonprofits at the request of a public official
 - Gift law considerations in addition to linkage concerns
 - More important than ever to have policies regarding charitable contributions
- Unusual gifts, favors and special treatment
 - Former Baltimore Mayor Catherine Pugh
 - » Purchase of large quantities of her books coinciding with award of government contracts
 - » Pleaded guilty on November 21, 2019, to conspiracy to commit wire fraud, conspiracy to defraud the U.S. and two counts of tax evasion. Sentenced February 27, 2020, to three years imprisonment plus restitution
 - *Madigan* case: Utility admitted it offered no-work lobbyist jobs and subcontracts to speaker's allies
 - Internship requests
 - Letters of recommendation



- Compensation should be commensurate with consultant's services and industry standards
 - Make sure contingent fees/commissions are permitted
- Make sure consultant agreement is detailed and has proper representations and warranties
 - Good idea to make consultant regularly certify that it is complying with reps and warranties
 - Beware of reimbursement of expenses – especially those related to gifts and entertainment of public officials and political contributions
- Consultant relationship should be disclosed to government agency
 - May be specifically required under lobbying laws and procurement rules
- Know who you are hiring



- Conflict of interest laws can restrict the ability of public officials to be employed by or hold interests in companies that have interests before the government
- Types of conflict of interest restrictions:
 - Recusal requirement (most states)
 - Requirement that official not lobby his or her own agency on behalf of private employer (most states)
 - Requirement that official receive no benefit from a contract with the government
 - Prohibition on using public office for financial gain of employer
 - Prohibition on private employer doing business with the official's agency
- Conflict restrictions can apply to family members of public officials (e.g., Pennsylvania)
- Whose liability?



- Employment discussions before the official formally leaves office
 - Recusal
 - Disclosure
 - Linkage concerns
- Post-employment restrictions vary by jurisdiction and position
 - Permanent ban on switching sides on a particular matter
 - Restriction on appearing before former agency or government for a period of time
 - Restrictions on behind-the-scenes advising
 - Know the restrictions before hiring someone, make sure the employee is aware of the restrictions



- Pay-to-play laws prohibit a company from doing business with a governmental entity if the company or its covered employees or directors make covered political contributions
- Nearly half of U.S. states and dozens of localities have pay-to-play rules, either in the form of a ban on business, a ban on contributions, a reporting requirement, or a combination
 - In certain limited state jurisdictions, the restriction includes a gift or gratuity, not merely a political contribution.



- MSRB Rule G-37 (for broker-dealers that underwrite municipal securities and municipal advisors)
- SEC Rule 206(4)-5 (for registered investment advisers providing investment advisory services to state or local government entities)
- CFTC 23.451 (for swap dealers that engage in a commodities-based swap with a state or local governmental counterparty)
- FINRA Rule 2030 (for third-party and affiliated placement agents), effective August 20, 2017
- SEC Rule 15Fh-6 (for security-based swap dealers)



- Pay-to-play laws in the following jurisdictions:
 - California, Connecticut, D.C., Florida, Hawaii, Illinois, Kentucky, Michigan, Missouri, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, and West Virginia
 - Albuquerque (NM), Allentown (PA), Chicago (IL), Chicago Ridge (IL), Cook County (IL), Dallas (TX), Detroit (MI), Grand Rapids (MI), Holyoke (MA), Houston (TX), Jefferson Parish (LA), Lehigh County (PA), Miami Beach (FL), Miami Gardens (FL), New Orleans (LA), New York City (NY), Orange County (FL), Orange County Public Schools (FL), Orange County (NY), Philadelphia (PA), Plano (TX), Providence (RI), Salt Lake City (UT), Salt Lake County (UT), San Antonio (TX), Seattle (WA), South Miami (FL), Spokane (WA), and St. Louis County (MO)
 - In California: All California Counties, Costa Mesa, Culver City, Gardena, Glendale, Los Angeles City, L.A. County MTA, Malibu, Oakland, Pasadena, San Francisco, Santa Ana, Santa Monica, West Covina, Yorba Linda, and CalSTRS
 - In New Jersey: numerous localities
- We are aware of pay-to-play reporting-only requirements in Connecticut, Illinois, Maryland, Missouri, Montana, New Jersey, New Mexico, Ohio, Pennsylvania, Rhode Island, Deerfield Beach (FL), Denver (CO), Detroit (MI), DuPage County (IL), Kane County (IL), Laredo (TX), Los Angeles City (CA), Nassau County (NY), Providence (RI), Rockland County (NY), San Antonio (TX), San Diego County (CA), St. Paul (MN), and Travis County (TX), and for CalPERS and CalSTRS



- Covered donors vary depending on the law
 - Some only cover corporate or PAC contributions (e.g., Hawaii, South Carolina, L.A. County and Oakland)
 - Some cover partners, officers and/or directors (e.g., Connecticut, Illinois, New Jersey and New Mexico)
 - Some cover employees who are dealing with the agency on a contract (e.g., Connecticut and California)
 - Some cover all employees (e.g., L.A. MTA)
 - Some cover spouses and/or children (e.g., Connecticut, New Jersey, Denver, Illinois, Kentucky, Pennsylvania and Philadelphia)
 - Some cover outside consultants who solicit state contracts (e.g., New Jersey pension fund rule)
 - Some cover affiliates, employees and directors of affiliates, and shareholders



- More and more RFPs requiring certification no gifts have been provided (e.g., Georgia and Tennessee localities)
- Trend toward including gifts and entertainment in pay-to-play laws
 - New Jersey: debarment liability for violation of vendor ban EO
 - Philadelphia Executive Order gift ban contains a penalty of disqualification and/or debarment
 - Virginia: restriction on gifts during pendency of bid
 - CalSTRS adopted a policy that it may not do business with a company for two years if the company violates the \$500 per year gift limit
 - L.A. City limits gifts from an underwriting firm and its officers, public finance employees, and affiliates to \$49.99 combined during the year prior to and following selection for underwriting non-competitive bid revenue bonds
 - New Mexico has several gift provisions in its various pay-to-play laws
 - Pennsylvania has a gift restriction in its municipal pension system pay-to-play law
 - Pasadena prohibits gifts exceeding \$50 from the period beginning when the covered recipient approves the contract and (i) 1 year after covered recipient's term or departure from office; or (ii) 5 years after the approval, whichever is first



- Bring in all affected businesses/units before making PAC or corporate contributions
- Approving and tracking of PAC/corporate contributions for pay-to-play compliance purposes, including contributions by subsidiaries/affiliates, as well as contributions made by related PACs
- Emphasize in-kinds are covered
 - Is it a site visit or is it a campaign event?
- Controlling contributions to 527s (such as RGA/DGA)



- Individual contributions
- Pre-clear or prohibit?
 - Labor and employment law considerations
- Pre-clearing contributions
 - Who do you pre-clear?
 - What do you pre-clear?
- Procedures to address “hit by a bus problem”
- Steps when you discover a problematic contribution
 - Confirm covered donor, covered recipient, covered business, covered period and not within *de minimis*
 - Refund
 - Consider cure options
 - Consider counterparty disclosure

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