



# Corporate Compliance Spotlight: Pay-to-Play Laws

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

## **The Americas**

Boston  
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Los Angeles  
New York  
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São Paulo  
Toronto  
Washington, D.C.  
Wilmington

## **Europe**

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London  
Moscow  
Munich  
Paris

## **Asia Pacific**

Beijing  
Hong Kong  
Seoul  
Shanghai  
Singapore  
Tokyo



- Avoid linkage: when making contributions or donations (political or charitable) or providing gifts
- Make sure that your consultants are properly vetted
- Comply with specific conflicts of interest laws (dual hatted employees and post-employment rules)
- Be aware of strict liability pay-to-play laws (federal, state, and local)



- Honest Services Fraud: prosecutors and courts not requiring express agreement (18 U.S.C. 1346)
  - *U.S. v. Kevin Ring*: convicted and sentenced to 20 months prison plus 30 months supervised release
    - » D.C. Circuit upheld conviction (post-*Skilling*) on basis that:
      - > There can be an "implicit" quid-pro-quo (aka linkage)
      - > Violation can be one-sided
    - » All evidence came from e-mails
    - » Provided Congressman Doolittle and his aides meals, concerts and sporting events, campaign contributions, and hired his wife as consultant
    - » Provided meals, concerts and Redskins tickets to DOJ official who helped obtain grant for Ring's client
    - » One e-mail between Ring and his colleague stated that official "helped on [a matter] and was now looking for tickets"
      - > So he was charged on a gratuity violation as well – after-the-fact thank-you
  - Implications of Senator Menendez hung jury and aftermath
    - » Ohio: *U.S. v. Terry*



- Know who or what you are giving to.
  - March 2018 IRS “Dirty Dozen” list of tax scams includes fake charities. Suggests:
    - » Being wary of charities with names similar to familiar or nationally-known organizations.
    - » Using IRS Select Check tool
- There should be no relationship between a gift, entertainment, charitable donation, or political contribution and official decision on business. Do not discuss fundraising in congressional offices or while lobbying.
- Be careful of timing.





- It is generally a good idea not to:
  - put justifications or reasons for contributions in writing.
  - send transmittal letters.
- If you have to use e-mail, beware of making spontaneous statements that could erroneously imply legal violations or be embarrassing if it is produced or becomes public.
  - Appearance is sometimes as important as reality.
- Generally, e-mails should only contain language that you would feel comfortable putting in a formal memo to the General Counsel.



## Areas of heightened linkage risk:

- Employing or retaining official or someone else at the official's request.
  - *U.S. v. Weyhrauch*: Alaska state legislator voted on oil tax legislation while negotiating future employment with oil pipeline company VECO, which was lobbying that same tax.
    - » No explicit bribe, but convicted because voted with understanding of future employment and was required to disclose conflict
    - » On remand, Weyhrauch pled to a misdemeanor
- Contributing to charities and other non-profits at the request of a public official



- Avoid weird or potentially problematic gifts
  - Internship requests
  - Letters of recommendation
- It is becoming more important to have a policy on giving to charities and non-profits
  - Procedural approach
  - Substantive approach
- Industry-specific rules



- 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 (does consultant, or someone at consultant's firm, have a public or fiduciary position with government)
- Practical policies and procedures

# Employees Who Have Been Elected or Appointed to Office



- General Description – Conflict of interest laws restrict the ability of public officials to either have employment with, or interest in, a company that is trying to influence 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 (e.g., California, New York, Ohio, and Washington State).
  - Prohibition on using public office for financial gain of employer (e.g., Arizona and New York City).
  - Prohibition on private employer doing business with the official's agency (e.g., California, Florida, and Pennsylvania).

# Employees Who Have Been Elected or Appointed to Office



- Sometimes, these restrictions apply to family members of public officials (e.g., Pennsylvania).
- Post-Employment Restrictions (hiring a former public official)
- Liability – Most states impose liability only on the official. A minority of states (e.g., Pennsylvania) impose liability on both the official and the private employer. Regardless, there is always possibility of indirect liability (e.g., the loss of a contract).



- Pay-to-play laws can prohibit a company from doing business or entering into a contract with a governmental entity if the company or its affiliates, and their PACs, owners, employees, directors, outside consultants, or family members make or solicit political contributions in that jurisdiction to officeholders, candidates, political parties, or other political committees (e.g., PACs)
- Nearly all the strict liability pay-to-play laws deal with political contributions where donor has state or local business. In certain limited jurisdictions, the restriction includes a gift or gratuity, not merely a political contribution.
- Does *McCutcheon* affect these laws?
  - Creates further doubt that these are constitutional





- Federal pay-to-play lawsuits
  - On July 13, 2017, the Sixth Circuit dismissed challenges by the Tennessee, Georgia, and New York Republican parties of new pay-to-play rule for municipal advisors
    - » Dismissed for lack of standing
  - On April 26, 2018, the Eleventh Circuit dismissed a challenge by the Georgia Republican Party of FINRA pay-to-play rule for lack of standing, and transferred the Tennessee and New York parties' challenge to the D.C. Circuit due to improper venue
    - » Oral argument November 15, 2018



- 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)



- A political contribution by a covered donor (e.g., company, PAC, MFP, CA, MAP) to a covered recipient can result in a two-year ban on business or compensation
- Covered recipients include incumbents or candidates for an office that:
  - Directly or indirectly can influence selection
  - Has authority to appoint an official with such influence
- Covered individual donors include solicitors of government business, their direct and indirect supervisors, and executive officers
- Unique issues
  - Look-back
  - Indirect



- Pay-to-play laws in the following jurisdictions:
  - California, Connecticut, 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), Fort Wayne (IN), Grand Rapids (MI), 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 (NY), Philadelphia (PA), Providence (RI), Salt Lake City (UT), Salt Lake County (UT), San Antonio (TX), Seattle (WA), Spokane (WA)
  - In California: All California Counties, Culver City, Glendale, Los Angeles City, L.A. County MTA, Malibu, Oakland, Pasadena, San Francisco, Santa Ana, 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, Denver (CO), Detroit (MI), DuPage County (IL), Kane County (IL), Los Angeles City (CA), Nassau County (NY), Providence (RI), San Antonio (TX), St. Paul (MN), and for CalPERS and CalSTRS





- Covered donors vary depending on the law
  - Some cover spouses and/or children (e.g., Connecticut, New Jersey, Denver, Illinois, Kentucky, Pennsylvania, and Philadelphia)
  - 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 only cover corporate or PAC contributions (e.g., Hawaii, South Carolina, L.A. County, and Oakland)
  - Some cover all employees (e.g., L.A. MTA)
  - 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



- Approving and tracking of corporate contributions for pay-to-play compliance purposes, including contributions of key executives and subsidiaries, as well as contributions made by related PACs (e.g., PAS system)
- Who do you pre-clear?
- What do you pre-clear?
- Controlling contributions to 527s (such as RGA/DGA)
- Importance of avoiding willful blindness
  - Use a negligence standard for due diligence
  - Appearance concerns and legal liability

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