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Pay-to-Play Deadline Nears

A step-by-step guide for businesses subject to the Sept. 28 reporting requirement

Businesses that received \$50,000 or more during calendar year 2006 from contracts with New Jersey public entities must file a statement setting forth all political contributions of more than \$300 made by the business and certain of the business's key personnel and affiliated entities. The statement — known as the Chapter 271 Business Entity Disclosure Statement (Form BE) — must be filed with the New Jersey Election Law Enforcement Commission (ELEC) no later than September 28.

Examples of businesses likely subject to the pay-to-play requirements include law firms, accountants, nonprofit organizations, medical professionals, hospitals, private schools and universities, investment management firms, banks, construction companies, engineering firms, real estate developers, and any other individual or organization that provides goods or services or otherwise engages in business with New Jersey governmental entities.

The following is a step-by-step guide for businesses subject to this reporting requirement.

“Pay-to-play” refers to the perception that government work is awarded on the basis of a business's political contributions, rather than merit. To combat that perception in New Jersey, a complex series of laws was enacted to regulate and monitor political contributions made by those companies doing business with New Jersey government at the state, county or local level.

In September 2004, then-Governor James McGreevey issued Executive Order 134, which was later codified as amended by legislation known as Chapter 51. L. 2005, ch. 51 (codified at N.J.S.A. 19:44A-20.13 to -20.25). Under Executive Order 134 and Chapter 51, a business that has contributed to the current governor, any candidate for governor, or any state or county political party committee is barred from entering contracts with state-level executive agencies for at least 18 months. N.J.S.A. 19:44A-20.14. Executive Order 134 and Chapter 51 also require such businesses to disclose contributions made to any political action committees (PACs) within the prior four years. N.J.S.A. 19:44A-20.18.

Another law, known as Chapter 19, restricts businesses that made certain political contributions from entering contracts with the executive and legislative branches of state government, as well as agencies, counties and municipalities. L. 2004, ch.

19 (codified at N.J.S.A. 19:44A-20.3 to -20.12).

Pay to play rules have also been enacted at the agency and local level. For example, the State Investment Council issued regulations setting forth disclosure and disqualification provisions applicable to investment management firms engaged by the New Jersey Division of Investment. N.J.A.C. 17:16-4. Additionally, more than eighty municipalities, independent authorities, and boards of education have enacted pay to play ordinances and resolutions.

Finally, on Jan. 5, 2006, Chapter 271, the most recent addition to New Jersey's pay to play laws, was enacted. L. 2005, ch. 271 (codified at N.J.S.A. 40A:11-51, 19:44A-20.26 to -20.27). Chapter 271 requires the disclosure of a business's political contributions made within the 12 months prior to the award of certain contracts. N.J.S.A. 19:44A-20.26. Additionally — and for the purposes of the upcoming September 28 deadline — Chapter 271 requires businesses that received \$50,000 or more from government contracts in 2006 to file an annual disclosure statement providing detailed contract and contribution information. N.J.S.A. 19:44A-20.27.

Who must file?

A Form BE must be filed by every business that received \$50,000 or more in aggregate payments from contracts with New Jersey public entities during calendar year 2006. Chapter 271's requirements apply to both for-profit and nonprofit organizations. N.J.A.C. 19:25-26.1.

In determining whether the \$50,000 threshold has been met, every contract with a New Jersey public entity must be

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included. In other words, there are no exceptions related to the method by which the contract was awarded or a minimum dollar amount per contract.

For contracts that span multiple years, only payments that the business received in 2006 are included in the \$50,000 calculation. However, this may well include contracts entered prior to 2006 from which the business received payments in 2006. Furthermore, under Chapter 271, most grants from public entities are considered government "contracts" and must be included in threshold calculation as well.

Whose contributions are relevant?

Once a business determines that it received payments of \$50,000 or more from government contracts in calendar year 2006, the business must determine which political contributions, if any, should be disclosed on the Form BE.

Under Chapter 271, contributions are attributed to the business if made by any of the business's high-level personnel and affiliated entities, including: (1) any "principal"; (2) any "partner"; (3) any "officer"; (4) any "director" or "trustee"; (5) the spouse of any principal, partner, officer, director, or trustee; (6) any "subsidiary directly or indirectly controlled by the business"; (7) any "continuing political committee [i.e., PAC] directly or indirectly controlled" by the business; and (8) if the business is a natural person (i.e., a sole proprietorship), that person's spouse or any child residing with the person. N.J.S.A. 19:44A-20.26.b; N.J.A.C. 19:25-26.6.

As only those contributions made during calendar year 2006 are relevant, the business need only focus on those persons and entities associated with the business in 2006.

Which contributions must be disclosed?

Once the relevant persons and entities have been identified, the business must assess whether any reportable contributions were made by those persons or entities. Whether a given contribution is reportable is driven by two key considerations: 1) the recipient of the contribution; and 2) the amount of the contribution.

Contributions to the following list of recipients must be disclosed:

1. governor;
2. state senator;
3. member of general assembly;
4. county executive;

5. county freeholder;
6. county sheriff;
7. county clerk;
8. county registrar of deeds;
9. county surrogate;
10. mayor;
11. member of municipal council;
12. member of school board;
13. fire commissioner;
14. member of charter study commission;
15. ballot question committee (including gubernatorial inaugural event committee);
16. state political party committee;
17. county political party committee;
18. municipal political party committee;
19. legislative leadership committee; and
20. PAC.

Only contributions to New Jersey candidates and organizations need to be considered. Contributions to federal candidates or federal political organizations do not implicate Chapter 271 or other pay to play laws.

Under Chapter 271, a contribution is reportable only if it exceeds \$300. Contributions made in an election cycle or calendar year, however, must be considered in the aggregate. For example, if a business contributed \$200 to a municipal political party committee in February 2006 and made a second \$200 contribution to the same committee in November 2006, those contributions must be disclosed because together they exceed \$300 in a calendar year. Similarly, if a business contributed \$200 to a candidate for a general election and later contributed another \$200 to the same candidate for the same general election, the business must disclose both \$200 contributions because, in the aggregate, they total more than \$300 in one election cycle.

All types of contributions must be included, whether in the form of a check, cash ("currency"), loan or "in-kind" contribution. In-kind contributions include free "goods or services" provided to a candidate or committee, but do not include services provided by individuals volunteering their own time to support the candidate or committee. ■

How to file the Form BE.

For each reportable contribution, the Form BE requires disclosure of the contributor's name, address and "type" (i.e., sole proprietor, "other business entity," principal, partner, officer, director, spouse, child, subsidiary or PAC). The Form BE also requires the business to identify the recipient's name, political office or committee type, contribution type, contribution date and amount.

Every business that received \$50,000 from government contracts in 2006 must file a Form BE even if the business had no reportable contributions in 2006. However, those businesses with no reportable contributions are relieved of the obligation of providing detailed contract information.

If the business made at least one reportable contribution in 2006, it must provide detailed information regarding the government contracts from which it received payments during 2006. The Form BE requires the disclosure of the name of the contracting public entity; the contract date; the contract identification number; the public entity type; the public entity's address; a description of the goods, services, or equipment provided or the property sold; and the amount received from the public entity in 2006.

The 2006 Form BE is available on ELEC's Web site (<https://wwwnet1.state.nj.us/lpd/elec/ptp/p2p.html>), and the completed form must be uploaded to the Web site by September 28. The filing of future Form BEs will be required no later than March 30 of each year. Businesses that fail to file a Form BE are subject to fines and potentially other sanctions.

Chapter 271 and New Jersey's other pay-to-play laws have become a necessary consideration when doing business with state, county or local government. Compliance with the complex statutory and regulatory scheme frequently involves significant information-gathering efforts, coupled with highly fact-sensitive analysis. Furthermore, in New Jersey's ever-changing legal and political landscape, up-to-date knowledge of the pay to play laws is essential. Accordingly, businesses that perform government work in New Jersey must give careful consideration to numerous issues, including the development of appropriate policies and protocols and the appointment of internal personnel with oversight responsibility. ■