

February 25, 2005

The Hon. Don Young (R-Alaska)
Chairman, House Transportation and Infrastructure Comm.
2111 Rayburn House Office Bldg.
Washington, D.C. 20515

The Hon. James Oberstar (D-Minn.)
Ranking Member, Transportation and Infrastructure Comm.
2365 Rayburn House Office Bldg.
Washington, D.C. 20515

RE: Protecting states' pay-to-play policies over contracting procedures

Dear Chairman and Ranking Member:

As the House Transportation and Infrastructure Committee works out the details of H.R. 3, authorizing funds for federal highways, Common Cause, Public Campaign and the Center for Civic Responsibility urge the committee to include a provision respecting states' rights to address the pernicious problem of corruption in government contracting procedures.

Known as "pay-to-play," many state and local governments are being burdened by the all-too-common practice of a business entity making campaign contributions to a public official with the hope of gaining a lucrative government contract. Pay-to-play practices have the potential for corrupting, or at least creating the appearance of corrupting, the government contracting process by influencing the awarding of contracts based on campaign contributions rather than merit.

Several state and local governments have suffered a crisis in public confidence recently as pay-to-play scandals continue to wind up on front page news and, sometimes, in the courts. New Jersey, Connecticut, Los Angeles, Chicago and Philadelphia are just beginning to emerge from the devastating political and legal consequences of pay-to-play scandals, with some government officials at least in Connecticut and Philadelphia facing criminal prosecutions.

Unfortunately, the Federal Highway Administration (FHWA) has decided to make it difficult, if not impossible, for states to address this serious problem. For example, the FWHA has decided to punish New Jersey for reforming its contracting system by withholding federal highway funds from this state. We believe you will agree with us that this federal intervention is unjustified and counterproductive. That is why we urge you to support language that makes clear that states have the right to ensure that their contracting procedures conform to the highest ethical standards and offer the best value for taxpayers.

New Jersey has been embroiled in pay-to-play scandals for several years now and has decided to address the problem head-on. Last year, the state of New Jersey joined four other states and several local and non-governmental jurisdictions in prohibiting government contractors from making campaign contributions to those ultimately responsible for the awarding of government contracts (Executive Order #134).¹ New Jersey followed the lead of Securities and Exchange Commission (SEC) chair Arthur Leavitt and adopted a pay-to-play policy similar to that of SEC's Rule G-37, which has worked admirably in the bond trading sector since its implementation in 1994 and which has been upheld by the courts as "narrowly tailored to effectively advance [a] genuinely substantial governmental interest."²

However, in a stunning setback to the three-year effort to clean up New Jersey's contracting procedures, Dennis Merida, Division Administrator of the Federal Highway Administration, decided that the federal government will intervene in the state's contracting law. According to FHWA, New Jersey's pay-to-play policy of divorcing campaign money from government contracts is neither "cost effective" nor an "emergency circumstance" and thus, the FHWA contends, fails to conform to federal contracting standards.³ As a result, Division Administrator Merida this year withheld federal highway funds from the state of New Jersey.⁴

New Jersey Gov. Richard Codey reluctantly suspended the state's pay-to-play rules for competitive bid contracts pending the outcome of a court challenge to the FHWA decision. [New Jersey v. Mineta] "This is a temporary measure forced on us by the federal government," Codey said. "I am not happy about it. In making this necessary, the federal government is dead wrong, but I cannot jeopardize nearly \$1 billion in federal transportation funds."⁵

The FHWA has placed itself in the odd position of imposing its preference for a disclosure-only regime on states and localities that have decided a stronger pay-to-play policy is necessary to address their problems of corruption in government contracting. As the FHWA memorandum

¹ The four other states besides New Jersey with pay-to-play restrictions beyond disclosure requirements are Kentucky, Ohio, South Carolina and West Virginia. Connecticut is in the process of developing its own pay-to-play policy following the contracting scandals involving former Governor John Rowland. The federal government also has a pay-to-play restriction against government contractors making campaign contributions to federal candidates. [2 USC 441c] The Securities and Exchange Commission has a comprehensive pay-to-play restriction against bond dealers making campaign contributions to local or state candidates responsible for the issuance of bonds [Rule G-37], and the American Bar Association has a less sweeping pay-to-play regulation governing the legal profession [Rule 7.6]. Several local jurisdictions in California and New Jersey also have pay-to-play restrictions. These include: Los Angeles, San Francisco, Oakland, California's Metropolitan Transit Authority, Culver City and Malibu [California]; and Washington, Hoboken, West Windsor, Hamilton, Montgomery, Holmdel, Freehold, Ocean, Springlake Heights, Fairview, Ramsey and Bradley Beach [New Jersey]. Chicago's Mayor Richard Daley has announced that he will implement a pay-to-play policy through an executive order following a series of contracting scandals in that city. [Mayor's Office, "Daley Announces New Steps to Protect the Integrity of Government," Press release (Feb. 8, 2005)]

² Blount v. Sec. and Exch. Comm'n, 61 F.3d 938, 941 (D.C. Cir. 1995) *cert. denied* 517 U.S. 1119 (1996).

³ Federal Highway Administration, Memorandum: "New Jersey E.O. #134" (Nov. 18, 2004). [hereafter "Memorandum"]

⁴ Dennis Merida, Letter to John Lettiere, Commissioner of New Jersey's Department of Transportation (January 6, 2005).

⁵ Tom Hester, "Governor eases pay to play rules," *Trenton Times* (Jan. 27, 2005) at 1.

opines: "...the disclosure of lobbying and political contribution efforts for the year preceding a contract bid is a reasonable means to meet the DOT's Common Rule requirement that the city assure that its contract award system performs without conflict of interest. This is distinct from a provision that actually excludes those making otherwise legal contributions from competing for a contract."⁶

Many state, local and non-governmental jurisdictions strongly disagree with the FHWA: *disclosure has not proven sufficient to end actual or apparent corruption in government contracting*. Instead, New Jersey and more than a dozen other jurisdictions have opted for a narrowly-tailored system of contribution restrictions on government contractors, in addition to disclosure requirements, as a more effective means to curtail pay-to-play abuses.

When a very specific problem of potential corruption arises with a regulated industry, states have addressed this problem with narrowly-tailored restrictions – and the courts have generally upheld these restrictions. Louisiana has recently joined seven other states in restricting campaign contributions from gambling interests, where the potential for corruption is highly feared, an action supported by the courts.⁷ Four states prohibit campaign contributions from the insurance industry to their elected insurance commissioners.⁸ Georgia prohibits campaign contributions from a regulated industry to an officeholder who is responsible for regulating that industry.⁹

The business of government contracting in many state and local jurisdictions similarly has become the focal point of actual and perceived corruption. The unseemly transaction of money exchanging hands between business interests seeking government contracts and officeholders responsible for awarding those contracts has placed the regulation of the government contracting process on the same par as the regulation of the gambling industry.

⁶ Memorandum, at 4.

⁷ Louisiana's ban on contributions from the gaming industry has been upheld in the courts. *Casino Association of Louisiana Inc. v. Louisiana*, 537 U.S. 1226, cert. denied by the U.S. Supreme Court. Indiana, Ind. Stats. 4-33-10-2.1 (Prohibits contributions from any officer or person who holds an interest in a gaming entity.), Iowa, Iowa Stats. 99F.6(4)(a) (Prohibits contributions from riverboat gambling corporations.), Kentucky, Rev. Stats. 154(a).160 (Prohibits contributions from persons owning lottery contracts.), Michigan, Mich. Stats. 7(b)(4)-(5) (Prohibits contributions from any licensee or person who has an interest in a gaming entity.), Nebraska, Neb. Stats. 49-1469.01 (Prohibits contributions from lottery contractors for duration of contract and three years after.), New Jersey §5:12-138 (Prohibits contributions from casino officers or key employees.), Virginia, §59.1-375, 376 (Prohibits contributions from pari-mutual corporations, executives and their spouses and families.) New Jersey courts have upheld the constitutionality of such a ban. In Michigan, the Attorney General has opined as to the constitutionality of that state's ban on gaming contributions. Michigan AG Opinion 7002 (Dec. 17, 1998).

⁸ Delaware, Florida, Montana, and Washington prohibit insurers from making contributions to candidates for the Office of Insurance Commissioner. Delaware Code 18 §2304(6), Florida Statutes Title XXXVII §627.0623, Montana Code Ann. 33-18-305, and Washington RCW 48 -30.110.

⁹ Georgia law prohibits any regulated entity from contributing to any candidate for the office that regulates that entity. Official Code of Georgia Ann. 21-5 30.1. In Georgia, public utilities are also prohibited from contributing to any political campaign. Official Code of Georgia Ann. 21-5-30(f). The State of Florida also prohibits licensed food outlets and convenience stores from contributing to Commissioner of Agriculture candidates. Florida Statutes Title IX §106.082.

The House Transportation and Infrastructure Committee has the opportunity to put a halt to what is likely to be costly and protracted – and wholly unnecessary – litigation. In an effort to rationalize its action, the FHWA suggests that it is merely applying the requirements of federal law. Even if this rationalization were the case, which it is not, we strongly recommend that the House Transportation and Infrastructure Committee draw this unfortunate case to a close by adding a provision to H.R. 3 explicitly authorizing the right of states to clean up their government contracting procedures through reasonable pay-to-play policies.

Reps. Bill Pascrell and Robert Menendez, both from New Jersey, have introduced the “Pay to Play Reform Protection Act” (H.R. 439), which provides the basis of such a provision in a single sentence: “Nothing in this section may be construed to prohibit a state from enacting a law or issuing an order that limits the amount of money an individual, who is doing business with a state agency for a federal-aid highway project, may contribute to a political campaign.”

Pay-to-play restrictions are far from draconian measures. They are a narrow remedy that focus exclusively on a specific problem. Pay-to-play restrictions are easy for the business community to live with – the SEC’s Rule G-37 has *not* resulted in draining the pool of bond bidders – and pay-to-play restrictions are limited in scope and constitutional.

The Federal Highway Administration may believe it knows better than the states how to address their problems of actual and perceived corruption in government contracting, but the FHWA has not yet had to suffer the consequences of corruption scandals that the states have had to face. The House Transportation and Infrastructure Committee should include a provision in H.R. 3 to allow the states the authority to assure their citizens that contracts are awarded on merit rather than on campaign contributions.

Respectfully Submitted,

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President
Common Cause

Nick Nyhart
Executive Director
Public Campaign

Harry Pozycki
Chairman of the Board
Center for Civic Responsibility