GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Attorney General

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Legal Counsel Division

~~PRIVILEGED AND CONFIDENTIAL~~
~~ATTORNEY-CLIENT COMMUNICATION~~

TO: James Pittman
Legislative Director
Office of the Attorney General

FROM: Janet M. Robins
Deputy Attorney General
Legal Counsel Division

DATE: November 6, 2015

RE: Legal Analysis – Applying Pay-to-Play Restrictions to PACs (AL-15-717)

You asked whether it would be constitutional to make contributors to political action committees in the District ("PACs") ineligible for District contracts valued at $100,000 or more. In our view, this is constitutional, as long as there is an exception for contributions to a PAC account that is not used to make campaign contributions.

I. District Law[1]

The District is one of many jurisdictions to limit contributions by those receiving certain government funding, a limit commonly referred to as a "play-to-play" measure because it is designed to break any link between making a political contribution and receiving a government benefit. Federal and state measures to restrict the political contributions of government contractors date back to at least 1940. That year, following a "national scandal involving a pay-to-play scheme for federal contracts,"[2] Congress forbade federal contractors from making political contributions. Such contributions, one senator argued, "may be considered in some instances as bribery in order to secure government contracts for themselves."[3] The ban's purpose was to "prevent corruption and ensure the merit-based administration of the national

[1] All citations to the D.C. Official Code will be to the 2015 Supplement to the 2012 Replacement Edition.

[2] *See Wagner v. FEC*, 793 F.3d 1, 14 (D.C. Cir. 2015) (*en banc*) (describing the history of the federal contractor contribution ban).

[3] *Id.* at 12 (quoting Senator Harry Byrd's remarks in 86 CONG. REC. 2982 (1940)).

government."[4] Many states have followed suit; "[a]t least seventeen states now limit or prohibit campaign contributions from some or all state contractors or licensees."[5]

The District's pay-to-play laws apply to District grants valued at $100,000 or more.[6] A person is ineligible for these large grants if he or she has recently[7] contributed or solicited contributions to certain people connected to any District official or candidate who is or could be involved in influencing and approving the grant:

- The candidate or official;
- A political committee affiliated with the candidate or official;
- A constituent-service program operated or managed by the candidate or official or by someone the candidate or official supervises;
- A political party; or
- An entity or organization that the candidate or official, or the candidate's or official's family member, either controls or has a 10% or greater ownership interest in.[8]

The Council has also considered legislation that would apply similar restrictions to recipients of District contracts.[9]

The District's pay-to-play restrictions deal with direct or indirect contributions to candidates, but they do not address contributions to PACs. A PAC is a group of individuals that is "[o]rganized for the primary purpose of promoting or opposing" a political party, a person's nomination or election to public office, or an initiative, referendum, or recall.[10] Like independent expenditure

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[4] *Id.* at 14.

[5] *Id.* at 16.

[6] *See* Grant Administration Act of 2013, § 1096(c), effective December 24, 2013 (D.C. Law 20-61; D.C. Official Code § 1-328.15(c)). This provision, along with related pay-to-play provisions, was added by the Grant Administration Amendment Act of 2015, effective October 22, 2015 (D.C. Law 21-36; 62 DCR 10919). For reasons that are not clear, the Lexis version of the Code does not, as of this date, include this new language.

[7] Under section 1096(d) of the Grant Administration Act of 2013 (D.C. Official Code § 1-328.15(d)), contributions to the candidate, official, or an affiliated political committee lead to a one-year eligibility ban. Contributions to a controlled constituent-service program, a political party, or an entity or organization controlled by the candidate, official, or the candidate's or official's family members lead to an eighteen-month eligibility ban.

[8] *See id.* §§ 1096(c) (restriction reaches contributions to "covered recipients") and 1092(3) (defining a "covered recipient") (D.C. Official Code §§ 1-328.15(c) and 1-328.11 (2012 Repl. and 2015 Supp.)).

Giving money to a private organization that is not organized to support or oppose a candidate, public official , political party, or political committee is ordinarily not a "contribution." *See* D.C. Official Code § 1-1161.01(10) (definition of "contribution"). Therefore, although donations to an organizations controlled by officials, candidates, or their families appear to *operate* as contributions for the purpose of these pay-to-play revisions, it may be beneficial for any amendatory legislation to make that explicit.

[9] *See, e.g.,* Contractor Pay-to-Play Elimination Amendment Act of 2015, as introduced on January 6, 2015 (D.C. Bill 21-22); Contractor Pay-to-Play Elimination Amendment Act of 2014, as introduced on January 23, 2014 (D.C. Bill 20-649); Comprehensive Campaign Finance Reform Amendment Act of 2013, as introduced on January 4, 2013 (D.C. Bill 20-3).

[10] Board of Ethics and Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011, § 101(43A) (A), effective April 27, 2012 (D.C. Law 19-124; D.C. Official Code § 1-1161.01(43A) (A)).

committees, PACs are "[n]ot controlled by or coordinated with" a "public official or candidate," or by anyone acting on a public official's or candidate's behalf.[11] *Unlike* independent expenditure committees, however, PACS are permitted to contribute to candidates, political committees, and other PACs.[12]

II. Legal Analysis

The First Amendment guarantees the freedom of speech, and that guarantee "has its fullest and most urgent application to the conduct of campaigns for political office."[13] This protection applies to political contributions (such as donating money to a political campaign or political party) and to political expenditures (such as paying for an advertisement or billboard). Limits on political contributions must be closely drawn to promote a sufficiently important state interest,[14] and limits on political expenditures must be narrowly tailored to promote a *compelling* state interest.[15]

Prohibiting government contractors from contributing to politicians who could influence their contracts is consistent with the First Amendment. Earlier this year, the *en banc* D.C. Circuit unanimously held in *Wagner v. FEC*[16] that the 1940 ban on federal contractor contributions served two compelling interests: it protected "against *quid pro quo* corruption and its appearance," and it guarded against "interference with merit-based public administration."[17] Congress quite reasonably "fear[ed] that political contributions by government contractors can corrupt and interfere with merit-based administration."[18] As the court's heavily-researched opinion explained:

> There is nothing novel or implausible about the notion that contractors may make political contributions as a quid pro quo for government contracts, that officials may steer government contracts in return for such contributions, and that the making of contributions and the awarding of contracts to contributors fosters the appearance of such quid pro quo corruption. Nor is there anything novel or implausible about the idea that contractors may be coerced to make contributions to play in that game, or that more qualified contractors may decline to play at all if the game is rigged. To the contrary, the empirical record is more than sufficient

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[11] *Id.* § 101(43A) (B) (D.C. Official Code § 1-1161.01(43A) (B) (2012 Repl. and 2015 Supp.)).

[12] *See id.* § 101(28B) (C) (D.C. Official Code § 1-1161.01(28B) (C) (2012 Repl. and 2015 Supp.)) (an independent expenditure "[m]akes no transfer or contributions of funds to" political committees, PACs, or candidates).

[13] *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971).

[14] *Buckley v. Valeo*, 424 U.S. 1, 25 (1976).

[15] *See, e.g., FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238, 251, 256 (1986) ("Independent expenditures constitute expression at the core of our electoral process and of the First Amendment freedoms," and a regulation that would burden them must "be justified by a compelling state interest").

[16] *See* n.2, *supra*, for full cite.

[17] *Wagner*, 793 F.3d at 8.

[18] *Id.* at 21.

> to satisfy the heightened judicial scrutiny appropriate for the review of the legislative judgments that support [the federal ban].[19]

The court further held that the ban was closely drawn to the state's compelling interest in combating corruption and preserving merit-based administration because it "strikes at the dangers Congress most feared while preserving contractors' freedom to engage in many other forms of political expression."[20]

In our view, forbidding large contractors from contributing to political campaigns is constitutional under *Wagner*. The First Amendment does not, however, authorize the District to categorically ban these contractors from contributing to *PACs*. The main justification for extending pay-to-play restrictions to PACs would be that they can be used to channel contributions to political campaigns. This reasoning falls short, however, because a PAC might use some of its donated funds for political contributions and some for political expenditures. A one-size-fits-all ban on PAC contributions from large contractors would restrict the sources from which a PAC may receive donations even if a large number of those donations are used for political expenditures rather than for contributions. That would contravene the D.C. Circuit's holding in *EMILY's List v. FEC*.[21] EMILY's List, like many other non-profit organizations, "makes expenditures *and* makes contributions to candidates or parties."[22] The court held that while it is constitutional to require such an organization to make its contributions out of an "account subject to source and amount limitations," the organization has a right to make *expenditures* "out of a soft-money or treasury account that is *not* subject to source and amount limits."[23]

The same reasoning applies here. Because a PAC may be used as a vehicle to channel contributions to a political campaign, each PAC may be required to make contributions out of an account subject to a source limitation. At the same time, however, each PAC has a right to make *expenditures* out of an account that has *no* source limit. Accordingly, any restriction on contractor contributions to a PAC – indeed, *any* similar contribution restriction – must contain an exception for contributions to a PAC account that is not used for contributions.

If you have any questions, please contact Josh Turner, Assistant Attorney General, at 442-9834, or me at 724-5524.

JMR/jat

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[19] *Id.*

[20] *Id.* at 26.

[21] 581 F.3d 1 (D.C. Cir. 2009).

[22] *Id.* at 12.

[23] *Id. See Citizens United v. FEC*, 558 U.S. 310, 357 (2010) ("independent expenditures, including those made by corporations, do not give rise to corruption or the appearance of corruption")