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Memorandum

To: The Honorable Robert A. Brady, Chairman
The Honorable Daniel E. Lungren, Ranking Minority Member
Committee on House Administration, U.S. House of Representatives
From: Monica Youn and Ciara Torres-Spelliscy
Brennan Center for Justice at NYU School of Law
Re: H.R. 1826: Response to Questions to Arn Pearson, dated August 13, 2009
Question Number 7
Date: September 11, 2009

Question 7:

"Aside from public financing, could pay-to-play laws and bans on contributions from lobbyists and federal contractors as some states have done help to reduce perceived corruption of House members? Would such bans be constitutional on a federal level?"

Brennan Center Response:

In advancing FENA's goal of combating corruption and the appearance of corruption among House members, pay-to-play laws could be considered a complement to, but not a substitute for, Congressional public financing. While the nomenclature varies, contribution restrictions that apply to lobbyists, government contractors or highly regulated industries are often known as "pay-to-play" restrictions. They are referred to as "pay-to-play" regulations because they seek to prevent deals whereby contributors "pay" an official for the opportunity to "play" with government business or in a government-regulated arena. Contributions from government contractors and highly regulated industries, who seek lucrative contracts, licenses and other beneficial treatment from the government, often raise the appearance of corruption. Similarly, contributions made by lobbyists, who meet directly with public officials about legislation or administrative action affecting the lobbyists' clients at the same time they are delivering checks to candidates, raise at least the appearance of corruption. Accordingly, many states have enacted regulations or bans on contributions by state contractors, by lobbyists and their clients, and by highly regulated industries.[1] Courts throughout the nation have upheld such pay-to-play regulations, recognizing that political

[1] *See* CRAIG HOLMAN, PUBLIC CITIZEN, "PAY TO PLAY" RESTRICTIONS ON CAMPAIGN CONTRIBUTIONS FROM GOVERNMENT CONTRACTORS 2008 – 2009 (2009), http://www.cleanupwashington.org/documents/paytoplay2009.pdf (listing nine states with contractor pay-to-play laws).

contributions by government contractors, by lobbyists and their clients, and by highly regulated industries pose severe risks of corruption.

However, pay-to-play laws cannot be considered a substitute for public financing systems. Although pay-to-play laws may lessen the potential for corruption by specified groups, such as lobbyists, state contractors, and highly regulated industries, pay-to-play laws do nothing to combat elected officials' dependence on large sums of private money, and on the corruption and appearance of corruption inherent in such a "dialing for dollars" system.

Pay-to-Play Laws Are Usually Held Constitutional

The Supreme Court recognized over fifty years ago that lobbyists can be subject to special regulations because of their influence on the legislative process. *U.S. v. Harriss*, 347 U.S. 612 (1954) (upholding disclosure requirements for federal lobbyists). The Court described modern legislative process in the following way:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. *Otherwise the voices of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.* This is the evil the [federal] Lobbying Act was designed to prevent.

U.S. v. Harriss, 347 U.S. 612, 625 (1954) (emphasis added). The Court concluded that Congress could require disclosures from federal lobbyists in part because Congress had the "power of self-protection." *Id.* State contractors and highly regulated industries can also be subject to special restrictions because of the conflicts of interest presented when they seek lucrative contracts or concessions from the very politicians that they have helped to elect. *Earle Asphalt Co.*, A-37-08 (NJ 2009) (upholding NJ's state contractor pay-to-play laws); *Ognibene v. Parkes*, No. 08 Civ. 1335 (S.D.N.Y. 2009) (upholding NYC's city contractor pay-to-play laws); *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008) (upholding CT's state contractor pay-to-play laws); *Casino Ass'n of La. v. State*, 820 So. 2d 494, 509 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos to all candidates and all PACs that support or oppose a candidate); *Soto v. State*, 565 A.2d 1088, 1098 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees to any candidate or political committee); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 67-68 (Ill. 1976) (upholding ban on contributions from members of liquor industry to any candidate or political party). Since the livelihood of both lobbyists, government contractors, and highly regulated industries depends in large part on their ability to successfully influence governmental officials, governmental efforts to curb both the perception and reality of undue influence can appropriately be focused on these groups.

Whether a court will uphold a particular "pay-to-play" ban or regulation as constitutional depends upon the reach of the law and the grounds for imposing it. While narrow pay-to-play regulations are generally upheld, *see, e.g., Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations prohibiting municipal finance underwriters from making campaign contributions over $250 to officials who award government underwriting contracts), court decisions on broader pay-to-play regulations have been mixed, depending on the courts' judgments

about whether the broader restrictions were necessary to address the potential for corruption.[2] Accordingly, pay-to-play laws, which address only a subset of private donors, do not fundamentally alter the incentives that cause elected officials to become beholden to private donors.

Play-to-Play Laws Are Not a Substitute for Public Financing

Public financing addresses corruption in a different way by giving candidates an alternative to the private campaign financing system. In most public financing systems, private fund raising is diminished or nearly eliminated. Thus, candidates do not face the "dialing for dollars" pressures that cause them to become obligated to major donors. On the other hand, pay-to-play restrictions typically encourage candidates to seek funding from other sources with fewer direct conflicts of interest; but the candidates still rely on private funds.

Pay-to-play restrictions and public financing can be complementary because on the one hand, the pay-to-play restrictions eliminate some of the most potentially corrupting money from politics, meanwhile public financing can help fill the candidate's funding gap with clean public money. Thus, pay-to-play rules can incentivize candidates to participate in the public financing system. For example, the State of Connecticut, in the wake of multiple corruption scandals involving the governor and other elected officials, enacted a comprehensive campaign finance reform act that encompassed both pay-to-play bans on state contractors, lobbyists, and their clients, as well as a full public financing system for state elected officials. A federal court upheld the pay-to-play bans

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[2] *See N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (upholding sessional ban on lobbyist's contributions as constitutional); *Blount v. Sec. Exch. Comm'n*, 61 F.3d 938, 946-47 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions over $250 to officeholders who award government underwriting contracts); *Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) (upholding City charter provision prohibiting contributions by City employees to City council elections); *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008) (upholding lobbyists' and state contractors' contribution and solicitation bans); *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1192 (E.D. Cal. 2001) (upholding ban on contributions from lobbyists to offices lobbied); *Casino Ass'n of La. v. State*, 820 So. 2d 494, 509 (La. 2002) (upholding ban on contributions from riverboat and land-based casinos to all candidates and all PACs that support or oppose a candidate); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619-20 (Ala. 1999) (upholding a restriction on lobbyists' giving contributions to candidates outside of their own district); *Kimbell v. Hooper*, 164 Vt. 80, 665 A.2d 44, 48 (1995) (upholding sessional ban on lobbyist's contributions); *Gwinn v. State Ethics Comm'n*, 426 S.E.2d 890, 893 (Ga. 1993) (upholding ban on contributions by insurance companies to candidates for Commissioner of Insurance); *Soto v. State*, 565 A.2d 1088, 1098 (N.J. Super. Ct. App. Div. 1989) (upholding ban on political contributions from casino employees to any candidate or political committee); *Schiller Park Colonial Inn, Inc. v. Berz*, 349 N.E.2d 61, 67-68 (Ill. 1976) (upholding ban on contributions from members of liquor industry to any candidate or political party). *But see Dallman v. Ritter*, No. 09CV1188 (D. Colo. July 17, 2009) (enjoining law which prohibited holders of state contracts over $100,000 that were not competitively bid from making contributions to candidates for any elected office in the state or in connection with any ballot issue); *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009) (finding that complete ban on political contributions by individuals affiliated with licensed gaming violated the Pennsylvania Constitution's protection of freedom of expression and association); *Ark. Right to Life State Political Action Comm. v. Butler*, 29 F. Supp. 2d 540, 553 (E.D. Ark. 1998) (invalidating ban on fundraising during any legislative session as well as thirty days before and after regular sessions); *Shrink Mo. Gov't PAC v. Maupin,* 922 F. Supp. 1413, 1419 (E.D. Mo. 1996) (*Maupin II*) (invalidating a session ban that lasted 4 ½ months, because cutting off funds for 1/3 of an election year prevented candidates from amassing the resources necessary for effective advocacy); *State v. Dodd*, 561 So. 2d 263, 264 (Fla. 1990) (invalidating a session ban that applied to both regular and special sessions, which may be called at any time, because it imposed a "potentially . . . limitless" period of time during which money could not be raised); *Fair Political Practices Comm'n v. Superior Ct.*, 25 Cal. 3d 33, 45 (1979) (noting the importance of ridding the political system of corruption but nonetheless striking down as overbroad a state law that banned all contributions from lobbyists).

against constitutional challenge, *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008). Although the court struck down the public financing system because it considered the Act's treatment of minor party candidates and its triggered matching funds to be constitutionally infirm, the court went out of its way to explain that it did not mean to cast doubt upon the constitutionality of public financing systems in general, nor on the motives of the State of Connecticut in enacting broad prophylactic reforms.

Conclusion

The Brennan Center suggests that adopting narrowly tailored pay-to-play restrictions for Congressional lobbyists and federal contractors would be constitutional and could function as a complement to the public financing system contemplated by H.R. 1826. However, pay-to-play reforms should not be considered to be an adequate substitute for the capacity of public financing to lessen corruption and the appearance of corruption.