



State of New Jersey

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September 11, 2007

Scott E. Rekant, Esq.
Sokol, Behot & Fiorenza
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433 Hackensack Avenue
Hackensack, New Jersey 07601

Advisory Opinion No. 04-2007

Dear Mr. Rekant:

The Commission considered your request for an advisory opinion at its meeting today and directed me to issue this response. Your request is made on behalf of Hartz Mountain Industries, Inc., a business entity that received \$50,000 or more in calendar year 2006 from contracts with New Jersey government entities (hereafter, Hartz). Your inquiry concerns application of recently-enacted pay-to-play annual disclosure requirements, N.J.S.A. 19:44A-20.27 and N.J.A.C. 19:25-26.4, 26.5, and 26.6, to Hartz and a continuing political committee, Developers Political Action Committee (hereafter, DPAC). An employee of Hartz is a member and director of DPAC.

Question Presented

You have asked whether or not Hartz is required to report on its business entity annual disclosure statement, filed pursuant to N.J.A.C. 19:25-26.4, 26.5, and 26.6, each contribution in excess of \$300.00 made in 2006 by DPAC, a continuing political committee (hereafter, CPC), to New Jersey candidates and committees. The Commission believes that the response to your second question, which asks whether or not DPAC contributions are “attributable” to Hartz, is addressed in the answer to your initial question.

Commission Response

N.J.S.A. 19:44A-20.27 and N.J.A.C. 19:25-26.6 require that if a “business entity,” as discussed further below, directly or indirectly controls a CPC, reportable contributions made by that CPC are deemed to be contributions made by the “business entity” and are required to be reported by the “business entity” on its annual disclosure statement. The Commission notes that the term “reportable contribution” means a contribution or contributions made by DPAC “in excess of \$300.00 in the aggregate per election . . . to . . . a candidate committee, joint candidates committee,

or political committee or per calendar year made to . . . a political party committee, legislative leadership committee, or continuing political committee”; see N.J.A.C. 19:25-26.1.

The Commission hereby advises you that participation by an employee of Hartz as a member and director of DPAC, under the specific circumstances described in your inquiry, is not sufficient to constitute direct or indirect control of DPAC. Hartz does not meet the criteria, established at N.J.A.C. 19:25-26.6(d), for direct or indirect control of a CPC. Therefore reportable contributions made by DPAC are not deemed, pursuant to N.J.S.A. 19:44A-20.27d and N.J.A.C. 19:25-26.6, to be contributions by Hartz and are not required to be reported by Hartz on its business entity annual disclosure statement, filed pursuant to N.J.S.A. 19:44A-20.27 and N.J.A.C. 19:25-26.4 and 26.5.

Submitted Facts

Your inquiry states that Hartz, a “developer of office, industrial, retail, and hotel properties,” and its subsidiaries have leases with the State of New Jersey, New Jersey Transit, and the State Department of Military and Veterans Affairs which resulted in payments in excess of \$50,000.00 in calendar year 2006. Further, Hartz is a member of the New Jersey chapter of the National Association of Industrial and Office Properties (NJ-NAIOP), and Allen Magrini, a Hartz vice president and officer, currently serves as President of NJ-NAIOP.

DPAC, a CPC, is comprised of members of NJ-NAIOP and is organized to “promote the needs and desires of the commercial and industrial real estate community through political action”; see DPAC Bylaws, Article IV. On the Continuing Political Committee-Registration Statement and Designation of Organizational Depository (Form D-4), filed June 9, 2006, DPAC is self-described as a “trade association” CPC whose interests are “the protection and support of the commercial real estate industry in NJ . . . and to contribute to the support of worthy candidates for state office who believe, and have demonstrated their beliefs in the principles to which the industry is dedicated.” The Commission notes that DPAC currently files quarterly reports with the Commission, the most recent of which was filed on July 12, 2007.

You have explained that DPAC currently has 22 members, each of whom is a member of NJ-NAIOP and has made the maximum contribution to DPAC “during the current or preceding calendar year,” as permitted pursuant to the New Jersey Campaign Contributions and Expenditures Reporting Act, N.J.S.A. 19:44A-1 et seq. (hereafter, the Campaign Reporting Act); see DPAC Bylaws, Article VII. Each DPAC member is also a director of DPAC, and the DPAC Chair and Treasurer are selected by majority vote of the directors. Currently, a Hartz employee is a DPAC member and director, but is not serving as Chair or Treasurer. The same was true in 2006. The NJ-NAIOP Executive Director is the Executive Director of DPAC, and DPAC pays NJ-NAIOP for the services of the Executive Director; see Bylaws, Article VIII, Sections 4 and 5. According to the Bylaws, the DPAC Executive Director, in consultation with the Chair and Treasurer, makes all decisions regarding contributions to candidates and committees; see Bylaws, Article XII, Section 2. In response to a question from Commission staff, you have clarified that neither the DPAC Chair nor Treasurer has the authority to overrule a contribution decision made by the DPAC Executive Director.

Discussion

Legislation enacted in 2004 and 2005 imposed restrictions on the award of contracts to businesses that make certain political contributions; see P.L.2004, c.19, P.L.2005, c.51, and N.J.S.A. 19:44A-

20.3-20.25. Additional contracting reform legislation in 2005 added a comprehensive disclosure component to the earlier contracting restrictions; see P.L.2005, c.271 and N.J.S.A. 19:44A-20.26 and 20.27. Together, these legislative provisions are frequently called “pay-to-play” reform. As a result of the disclosure legislation, if a business entity, such as Hartz, has received \$50,000 or more in a calendar year from its contracts with New Jersey government entities, N.J.S.A. 19:44A-20.27 requires that the business file with the Commission an annual report to disclose its contract activity and its political contributions; also see N.J.A.C. 19:25-26.4 and 26.5. Pursuant to N.J.A.C. 19:25-26.5(b), the first such annual report is due for filing on September 28, 2007.

As you have stated, Hartz, is a “business entity,” as that term is defined in the business entity disclosure provisions of the Campaign Reporting Act and Commission regulations; see N.J.S.A. 19:44A-20.27d and N.J.A.C. 19:25-26.1. Because Hartz received \$50,000.00 or more in the aggregate in 2006 as a result of its leases with New Jersey government entities, the Commission concludes that it is required by N.J.S.A. 19:44A-20.27 and N.J.A.C. 19:25-26.4 and 19:25-26.5 to file the business entity annual disclosure statement on or before September 28, 2007 to report 2006 activity.

N.J.S.A. 19:44A-20.27d requires that a business entity that is not a natural person, including a corporation such as Hartz, disclose on the annual statement contributions in excess of \$300 made not only from its business entity funds, but also contributions made by any CPC organized under Section 527 of the Internal Revenue Code that is directly or indirectly controlled by the business entity; see also N.J.A.C. 19:25-26.6. Such contributions by a controlled CPC are deemed to be contributions of the business entity. The Commission has confirmed that DPAC filed the Political Organization Notice of Section 527 Status (Form 8871) with the Internal Revenue Service. It is therefore necessary to determine whether or not Hartz directly or indirectly controlled DPAC in 2006 and must as a result report DPAC’s contributions made during 2006 on the firm’s annual disclosure statement.

N.J.A.C. 19:25-26.6(d) provides that:

the criteria to be applied to determine whether or not a business entity directly or indirectly controls a continuing political committee shall include, but not be limited to, whether or not the business entity participates as an organizer of the continuing political committee, participates in decision-making with regard to the specific activities of the continuing political committee, or participates in formation of the policies of the continuing political committee.

Applying the criteria in N.J.A.C. 19:25-26.6(d) to the facts submitted concerning the relationship between DPAC and Hartz, the Commission finds that while a Hartz employee served as a member and director of DPAC in 2006, Hartz did not sufficiently control the DPAC decision making process in 2006 to require that DPAC contributions be deemed to be contributions by Hartz. Specifically, the Commission finds persuasive that the Hartz employee did not participate in 2006 in DPAC decisions concerning political contributions. The Commission understands that the pay-to-play reform legislation was intended to require disclosure of those contributions which a business entity directed, or played a role in directing, through a CPC to candidates and committees. In the facts presented in your inquiry, Hartz appears to have had no control over DPAC contribution decisions,

and the Commission concludes that Hartz is not required to disclosure contributions made in 2006 by DPAC.

The Commission addressed a similar question in Advisory Opinion 02-2007 concerning the relationship between a business entity and a CPC and determined that the business entity did not directly or indirectly control the CPC. The Commission examined the composition of the CPC board of directors and the relative weight of the vote cast by the business entity's representative on the board. The CPC had approximately 50 persons on its board of directors, and the chief operating officer of the business entity served as Vice Chair on the CPC board of directors. A significant factor in the Commission opinion was that the vote of the business entity representative carried no greater weight than the vote of any other member of the CPC board.

In your inquiry concerning Hartz and DPAC, the DPAC board of directors is smaller than the CPC board in Advisory Opinion 02-2007, but the Hartz representative on the DPAC board had no part in making decisions in 2006 concerning contributions made to candidates and committees. Those decisions were made by the DPAC Executive Director, and the Hartz employee did not consult with the Executive Director concerning contributions because the employee was not the Chair or Treasurer of DPAC.

As it did in Advisory Opinion 02-2007, in concluding that Hartz does not directly or indirectly control DPAC, the Commission finds that subsection (c) of N.J.A.C. 19:25-26.6 serves as an additional measure for determining whether or not Hartz directly or indirectly controls DPAC. This provision establishes a standard for determining whether or not a business entity has direct or indirect control of a subsidiary and therefore must report the subsidiary's contributions as contributions of the business entity. N.J.A.C. 19:25-26.6(c) requires that:

where a corporation owns sufficient shares or voting interest in a second corporation to elect a majority of the directors or trustees of the second corporation, or where a business entity has sufficient control of a second business entity to direct the decision-making of the second business entity, the second corporation or second business entity shall be a subsidiary directly or indirectly controlled by a business entity. (emphasis added)

The rule requires an examination of whether or not a business entity elects a majority of the directors of the subsidiary or directs the decision-making of the subsidiary as ways to measure control of the subsidiary. Similarly, Hartz did not in 2006 represent a majority of the Board of Trustees of DPAC and therefore was not in a position to control the CPC's decision-making process, especially with regard to making CPC contributions. As in Advisory Opinion 02-2007, the Commission recognizes as an important factor that DPAC describes itself as a "trade association," and is therefore not organized to promote the interests of Hartz or any other single business entity.

The Commission does not reach any conclusion in this opinion concerning direct or indirect control of DPAC should a Hartz employee serve as Chair or Treasurer of DPAC. Further, you have advised that Allen Magrini, a Hartz vice president and officer, currently serves as President of NJ-NAIOP. The Commission has assumed for the purpose of this response that Mr. Magrini, in his role as NJ-NAIOP President, has no role in directing the decisions of the DPAC Executive Director, who also serves as NJ-NAIOP Executive Director.

The Commission wishes to thank you for your inquiry.

Very truly yours,

Election Law Enforcement Commission

By: _____
Nedda G. Massar, Esq.



Advisory Opinion Request For Lobbying

NEW JERSEY ELECTION LAW ENFORCEMENT COMMISSION
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AUG 30 2007

PLEASE PROVIDE THE INFORMATION REQUESTED BELOW

1. This request for an Advisory Opinion is being submitted on behalf of:

Full name of person, governmental affairs agent, or entity:

Hartz Mountain Industries, Inc.

Mailing Address:

400 Plaza Drive, PO Box 1515

*Day Telephone Number:

201-272-5303

Secaucus, NJ 07096

*Evening Telephone Number:

n / a

2. Indicate if the above named person, governmental affairs agent, or entity currently files reports with the Commission:

Yes

No

a. If yes, indicate in what capacity the person, governmental affairs agent, or entity is filing reports with the Commission:

Person

Governmental Affairs Agent, Registration Number:

Entity

b. If no, indicate if the above named person, governmental affairs agent, or entity has in the past filed reports with the Commission, giving calendar years, and identify filing capacity:

The entity will be filing a Business Entity report in September 2007.

c. If reports are or were filed under a different name than that appearing in Question #1 above, provide that name:

3. Please provide below a statement of the cognizable question of law arising under the "Legislative and Governmental Process Activities Disclosure Act" and/or the regulations promulgated thereunder. If possible, please include pertinent statutory and regulatory citations:

Is Hartz Mountain Industries (including its various subsidiaries and affiliates) ("Hartz") a business entity:

1. Required to report the contributions made by and the disclosures of the Developers

Political Action Committee ("DPAC") pursuant to N.J.A.C. 19:25-26.4 and 19:25-26.5; and

2. Are the political contributions made by DPAC attributable to Hartz as the holder of State Leases in excess of \$50,000.00 annually?

4. Please provide below a full and complete statement of all pertinent facts and contemplated activities that are the subject of the inquiry. Your statement must affirmatively state that the contemplated activities have not already been undertaken by the person, governmental affairs agent, or entity requesting the opinion, and that the person, governmental affairs agent, or entity has standing to seek the opinion (the opinion will affect the person's, governmental affairs agent's, or entity's reporting or other requirements under the "Legislative and Governmental Process Activities Disclosure Act"). Attach additional sheets if necessary.

Statement of Facts:

Hartz owns and leases office buildings (as well as industrial, hotel, and retail properties) in New Jersey and other states. Hartz, through affiliates or subsidiary companies, has leases for office space with the State of New Jersey including the State's Department of Military and Veterans Affairs, various other State Agencies and NJ Transit. A list of the current leases is attached to this submission as Exhibit A. The value of these leases significantly exceeds \$50,000.00 annually.

As a developer of office, industrial, retail, and hotel properties, Hartz is a dues paying member of the New Jersey chapter of the National Association of Industrial and Office Properties ("NJ-NAIOP"). Presently, Allen Magrini, a Vice President and Officer of Hartz, is the President of NJ-NAIOP.

Additionally, pursuant to the DPAC By-Laws, copy attached as Exhibit B, a Hartz employee represents Hartz as a Member and Director of DPAC but does not serve as either its Chair or Treasurer. In accordance with the By-Laws, the person or entity is a Member of the DPAC if it made the maximum legal contribution to DPAC the current year or the previous year. There are currently approximately 22 DPAC Members and all Members are Directors. Directors are selected by a majority vote of the Members of the DPAC. The Chair and Treasurer of the Board are selected by a majority vote of the Board of Directors.

The By-Laws further provide that all contributions to candidates or committees are made at the sole discretion of the Executive Director acting in consultation with the Chair and Treasurer. As a practical matter, the decisions of the Executive Director are presented to the Board for information and comment. A Hartz employee does not serve as either the Chair or Treasurer of the DPAC. (Note: An individual who owns or controls more than ten (10) percent of the profits, assets or stock of a business entity holding or seeking a state government contract or agreement as those terms are defined by N.J.S.A. 19:44A-20.14 and 20.17 is ineligible from being the Executive Director, Chair, or Treasurer). While a DPAC member may suggest that a contribution be made to a candidate or committee, the Executive Director acting in consultation with the Chair and Treasurer makes the final determination of the contributions to be made by DPAC.

5. Please provide below a statement of the result that the person, governmental affairs agent, or entity seeks, and a statement of the reasoning supporting that result:

1. Hartz and its related entities are not required to report the contributions by DPAC in Hartz' business entity annual disclosure statement, filed pursuant to N.J.S.A. 19:44A-20.27 and N.J.A.C. 19:25-26.4 and 26.5.

2. Additionally, because the Executive Director decides which candidates and committees receive contributions from the DPAC, even the Chair and Treasurer of the Board of Directors and their respected companies are not required to report the contributions by the DPAC in their annual business entity report, if they are required to file an annual report.

3. The political contributions made by DPAC are not attributable to Hartz as the holder of State Leases in excess of \$50,000.00 annually.

6. Person who is submitting this advisory opinion request on behalf of the person, governmental affairs agent, or entity listed in Question #1:

Full Name:
Allen J. Magrini, Esquire

Mailing Address:
400 Plaza Drive

*Day Telephone Number:
201-272-5303

PO Box 1515

*Evening Telephone Number:
n / a

Secaucus, NJ 07096-1515

Fax Number:
201-348-4221

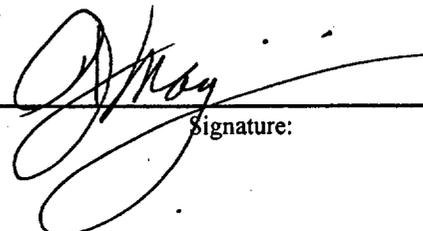
a. Official Capacity of Person Requesting Opinion:

- Governmental affairs agent
- Representative of entity
- New Jersey Attorney representing requesting person, governmental affairs agent, or entity
- Other (please describe): Vice President, Asst. Gen. Counsel

7. A request for an advisory opinion will not be considered filed until a fully completed and signed application is received by the Commission.

August 27, 2007

Dated:



Signature: