

**Maryland Political Contribution Loopholes:
History, Discussion & Options to tackle the LLC &
“Other Business Entity” Ambiguities**

A commentary

by

Jeremy D. Tunis
University of Maryland School of Law
Election Law Seminar
Professor Larry Gibson
January 9, 2007

I. Introduction

This commentary sets out to define major legislative and legal developments culminating in Maryland's current and flawed election code,¹ with particular emphasis, analysis and discussion of the increasing volume of political contributions made by business entities to Maryland political committees. Primary focus centers on the historical emergence of a significant and deleterious loophole in the current campaign finance statutory framework. This loophole currently allows owners and partners of non-corporate business entities such as limited liability companies (hereafter LLCs), partnerships, limited liability partnerships (hereafter LLPs) real estate trusts and other similar entities to effectively bypass all political contribution limits while donating large and repeated contributions from legally separate but closely affiliated entities often under identical or very similar ownership and control.²

Under current Maryland campaign finance law³, political donors can each give up to \$4,000 to an individual candidate or committee and \$10,000 to all candidates or committees over a four-year election cycle.⁴ All business accounts and LLCs are subject to the same limitations per entity. Therefore, non corporate business or LLC owners can give up to \$10,000 over a four-year election cycle in their own names, plus another \$10,000 in their company's name. For example, a developer who owns and controls separate LLCs or LLPs can individually contribute \$10,000 in denominations up to \$4,000 to any number of political campaigns, then can give

¹ MD CODE ANN, Art. 33, Election Law Section (2002)

² MD.CODE ANN. Art. 33 Sec §101 defines a contribution as the gift or transfer, or promise of gift or transfer, of money or other thing of value to a campaign finance entity to promote or assist in the promotion of the success or defeat of a candidate, political party or question.

³ MD. CODE.ANN Election Law Article §13-225-226 (2002) "No contributor may directly or indirectly contribute more than \$4,000 to a candidate in any four-year election cycle. Total contributions for a single contributor may not exceed \$10,000 in any four-year election cycle. Although no specific definition of "contributor" is provided, the Revisor's Note states: "this section is new language derived without substantive change from the former Art. 33 §13-212(b) defining a contributor as any individual, association, unincorporated association, corporation or other entity.

⁴ MD. CODE.ANN Election Law Article §13-226 (2002).

another \$10,000 through his first LLC and not have it count against his aggregate or individual limits. Moreover, the developer could repeat this process with her second LLC, third and so on.

This comment will first address the legislative history and regulation of political campaign contributions in Maryland, including identifying the business entity loophole in the context of the emergence of new forms of business entities such as LLCs. This comment then addresses the growing role of business entity contributions in Maryland, particularly the use by business owners of multiple related entities to contribute large sums of money to candidates and committees. Discussion will next focus on recent and unsuccessful legislative attempts to address the loophole and well as identifying potential procedural and enforcement problems of this proposed legislation. Finally, alternative reform options are offered to solve the business entity loophole while also striving to generally improve Maryland's campaign finance law in order to instill continued public confidence and fundamental fairness into the system.

II. Early History of Campaign Finance Regulation in Maryland

Article I, of the Maryland Constitution enjoins the General Assembly to "pass Laws necessary for the preservation of the purity of Elections."⁵ Following many other states, the Maryland General Assembly passed the Corrupt Practices Act of 1908 to limit the expenditure of money by candidates for public office, and to minimize the corrupt use of money in politics.⁶ While setting no specific individual limits on contributions, the legislation delineated the structure of political campaign entities and barred all corporate contributions.⁷

The Fair Elections Practices Act of 1957⁸ formally replaced the Corrupt Practices Act. The FEPA generally applied to all State, County, and Baltimore City elections. In general, the

⁵ MD. CONST. art. I, §7.

⁶ Enacted by Chapter 22, §172, Laws of Maryland 1908, MD Session Laws, Volume 483, Page 1523.

⁷ *Id.*

⁸ Maryland Fair Elections Practices Act of 1957, 1957 Md. Laws 739.

law required the appointment of treasurers through a written filing with the appropriate board, imposed recordkeeping and financial reporting duties, limited aggregate political contributions and transfers, prohibited certain solicitations and uses of campaign funds and required identification and retention of campaign materials.⁹ Specifically, the law created an aggregate contribution limit of \$2,500 per individual, association, unincorporated association, corporation or other entity per election year.¹⁰ A review of the legislative history reveals that the former \$1,000 limit that one entity could contribute to each committee was established in 1974.¹¹ The \$1,000 per entity, \$2,500 per cycle contribution limit remained in force until 1991.

III. Governor's Commission to Review the Election Laws & H.B 1047

In December 1985, then Maryland Governor Harry Hughes appointed an independent blue ribbon Commission to Review the Election Laws (the "Nilson Commission"); charged with the responsibility of re-examining Maryland's election and campaign finance law and for making reform recommendations to the 1987 Maryland General Assembly.¹² The commission consisted of legislators, party officials, citizen activists and business representatives.¹³ It focused its review on Maryland's entire campaign finance regulatory apparatus making numerous recommendations for revising and reforming the State's campaign finance laws.¹⁴

⁹ *Id.*

¹⁰ *Id.*

¹¹ 1974 Md. Laws ch. 290, § 2. Although not stated specifically in the legislative history, this enactment was likely a statutory response to enactment of the Federal Election Campaign Act Amendments of 1974 that, among other things, formally established a \$1,000 per person contribution limit. See Federal Election Campaign Act Amendments of 1974 Pub. L. No 93-443, 88 Stat 1263 (1974)

¹² REPORT OF THE GOVERNOR'S COMMISSION TO REVIEW THE ELECTION LAWS (Jan. 15, 1987) [hereinafter GOVERNOR'S COMMISSION REPORT]. Available at Maryland State Law Library, Md. Y3. E1 38:2/N/987: Nilson, George A.

¹³ 1991 Session Review of the General Assembly of Maryland, Department of Legislative Reference, April 9, 1991.

¹⁴ GOVERNOR'S COMMISSION REPORT

Included in its recommendations were proposals to increase individual contribution limits from \$1,000-\$,4000, impose limits on transfers between political committees¹⁵, place limits on campaign fundraising by lobbyists, and on fundraising during the legislative session and to improve the general enforcement of election law. The Commission's report provided the basis for comprehensive campaign finance reform legislation first introduced in 1987.¹⁶ While the General Assembly considered and debated numerous bills designed to enact many of the Nilson Commission's recommendations during the 1987, 1988, 1989 and 1990 legislative sessions, none of the proposals successfully passed.

During the 1991 Legislative Session however, the Maryland General Assembly finally enacted major updates to Maryland's campaign finance law, following several of the Commission's recommendations. The updated law was largely embodied in the omnibus House Bill 1047.¹⁷ Major provisions of the legislation included establishing the current four-year cycle for the application of contribution limits and transfers, increasing the contribution¹⁸ limits from \$1,000 per candidate per election and \$2,500 to all candidates in each election to \$4,000 per candidate or committee per election cycle and \$10,000 to all candidates per cycle.¹⁹ Furthermore, the bill established a limit of \$6,000 on the amount of transfers between political committees²⁰ and delineated rules for the treatment of loans. Finally, the measure required that

¹⁵ Under current law, a transfer is defined as a monetary contribution that is made by one finance entity to another finance entity, other than one made by or to a local political club, See MD.CODE ANN. Art. 33 Sec §101. Under the previous law, any political committee could transfer unlimited contributions to other political committees.

¹⁶ The 1987 legislation consisted of five bills: H.B. 831, 832, 834, 1117, 1118, Md. Gen. Assembly, 393d Sess. (1987).

¹⁷ H.B 1047, Md. Gen. Assembly, 397th Sess. (Md. 1991).

¹⁸ See *Id.*

¹⁹ Floor Report of H.B. 1047, Senate Economic Affairs Committee compiled by the Maryland Department of Legislative Reference (now Department of Legislative Services) (on microfiche)

²⁰ *Id.* The original H.B. 1047 adopted an \$8,000 transfer limit between political committees, but this limit was reduced to \$6,000 in the Conference Committee Report. Moreover, the Conference Committee provided for exemptions from the \$6,000 transfer limitations between a slate and a member of the slate, transfers between and among state party committees and candidates from the same party.

the names of political committees must reveal the nature of the committee and not be deceptive.²¹

Particularly relevant to this discussion, H.B. 1047 was the first bill to formally establish a statutory framework for how contribution limits should be applied to corporate contributions. The Nilson Commission recommended that a parent corporation and any subsidiary should be considered as one contributor subject to the new contribution limits.²² This provision, embodied at 26-9(g) of the amended Maryland Code of 1957, Article 33 stated:

Maximum contribution by a corporation: Except as otherwise provided by law, an individual, association, unincorporated association, corporation, or other entity may make contributions in accordance with the limitations on contributions set forth in this section, provided that, for the purpose of determining the maximum amount that a corporation may contribute, a contribution by a corporation and any wholly owned subsidiary of the corporation or 2 or more corporations owned by the same stockholders shall be considered as being made by 1 contributor.”²³

While the history of the language of H.B. 1047 that would eventually become sub-section §26-9(g) is limited, a few clues into possible legislative intentions are apparent by examining committee testimony and communications of particular interested corporations and elected officials.²⁴

A) Positions on H.B. 1047 & Outside Commentary

Baltimore Gas & Electric Company contacted the Chairperson of the House Constitutional & Administrative Law Committee on February 27, 1991 to express its opposition

²¹ *Id.*

²² GOVERNOR'S COMMISSION REPORT at 62

²³ Code 1957, Art. 33, § 26-9 *Amended* by ch. 617, Acts 1991 §26-9(g). This sub-section, substantively unchanged from the 1991 Acts, was derived in former Article 33 §13-212 and henceforth re-codified under § 13-226 (e) of the Election Law Article re-codified by ch. 291, Acts of 2002 §4. The original statutory language of §26-9 regarding contribution limits stated: it is unlawful for any individual, association, unincorporated association, corporation, or any other entity either directly or indirectly, to contribute any money or thing of value greater than \$4,000 to any candidate or political committee or to contribute money in excess of \$100 except by check in any 4-year election cycle. Total contributions by a contributor under this subsection shall not exceed \$10,000 in any 4-year election cycle.

²⁴ Legislative Bill File of H.B. 1047 of 1991 on file with the Maryland Department of Legislative Services, Annapolis Maryland.

to the proposed affiliated corporation provision. BG&E argued that the measure disregarded the political and business differences that exist between subsidiary and parent corporations. The company argued that it should be able to contribute to candidates and committees that support its views, which could differ from the parent organization.²⁵ Likewise, the Maryland Chamber of Commerce submitted similar testimony, but argued more generally that the proposed statutory language would unfairly discriminate against corporations, while allowing other organizations such as labor unions, unincorporated non-profit groups and other non-corporate entities to contribute from affiliates and subsidiaries.²⁶ Besides the two communications just discussed, no other evidence exists that any other interest group or legislator submitted material on the record regarding this particular provision.

However, in light of the available correspondence, it appears the Maryland General Assembly was fully aware of the potentially limiting effect of the provisions on the ability of corporations to contribute. Additionally, commentary in response to the Nilson Commission's recommendations on corporate contributions discussed how the relationship between the diversification of subsidiary or commonly owned corporations could create concern for potential circumvention of legislatively authorized contribution limits but also opined that limiting subsidiary and common ownership aggregation rules solely to corporations would likely allow other non-corporate entities to diversify and circumvent contribution limits.²⁷

For instance, in Maryland Campaign Finance Law: A Proposal for Reform,²⁸ Collins argues that the Commission's original aggregation proposal (years later embodied in H.B. 1047) did not adequately recognize the diversified interests of subsidiary corporations and was too

²⁵ *Id.*

²⁶ *Id.*

²⁷ Carville B. Collins, Case Comment, *Maryland Campaign Finance Law: A Proposal for Reform*, 47 Md. L. Rev. 524 (1988).

²⁸ *Id.* at 552-553

limited in scope to corporations.²⁹ The comment further contends that an array of other organizations, including labor unions, trade and professional associations, political committees, and a myriad of other interest groups and organizations would be free to diversify therefore creating additional contributing or transferring opportunities outside the legal contribution limits.³⁰

Collins concluded by providing an “improved proposal”: that two or more commonly owned, managed, organized, or administered entities should not enjoy separate, individual limits and the state should subject it to the individual contribution limits applied to all other entities and individuals.³¹ Collins would have delegated to the State Administrative Board of Elections (now known as the State Board of Elections) the responsibility to make determinations of common ownership, management, organization, or administration of entities for purposes of the rule.³² As will be discussed later, Collins’ seventeen-year-old commentary is rather prophetic.

IV. Early Recognition & Identification of the Non-Corporate Entity Loophole

With the exception of Collin’s 1988 law review comment identifying the potential shortcomings of §26-9(g)’s corporate aggregation formula,³³ no discernable legislative action took place to study the aggregation loopholes in the immediate aftermath of H.B. 1047. However, in 1993, a Maryland State Senator was apparently curious enough about §26-9(g)’s statutory language to write a letter to the Office of the Attorney General.³⁴ Senator Janice Piccinini asked for clarification regarding whether 1) the proviso in §26-9(g) applies to the

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 47 Md. L. Rev. 524 at 553

³³ *Id.*

³⁴ See Letter of Advice dated October 11, 1993, from Jack Schwartz, Chief Counsel, Opinions & Advice, to the Honorable Janice Piccinini, State Senator, Department of Legislative Services, Bill File of H.B. 814 of 1997

contributions of partnerships or limited partnerships³⁵ and 2) whether corporations with slightly different in ownership (overlapping stockholders) were to be treated as one corporation for purposes of contribution limits.³⁶

Responding to the Senator's correspondence, the Chief Counsel for Opinions & Advice³⁷ commented that the aggregation language in §26-9(g) was applicable only to corporations and not to partnerships or limited partnerships³⁸ regardless of whether they compromised the same partners.³⁹ In supporting this interpretation, the Counsel stated in reference to §26-9(g):

“The General Assembly recognized that not only corporations, but other “entities” such as individuals, associations, unincorporated associates, contribute to political campaigns. However, in the proviso at issue, the General Assembly required aggregation of contributions made by corporations only. Accordingly, the proviso does not apply to entities other than corporations.”⁴⁰

However, in a footnote, the letter emphasized that any business entity (including partnerships, associations, etc) must be created for a bona fide business reason unrelated to political contributions. Therefore, any attempt to evade contribution limits by creating entities for the sole purpose of contributing would violate §26-9(d)(1).⁴¹ The Letter of Advice additionally held that similarly owned corporations, even those with significant shareholder overlap, did not trigger the aggregation requirement of the proviso because they were not owned by the exact same stockholders.

³⁵ The reader must remember that Maryland Limited Liability Company Act of 1993, Title 4A of Corporations and Associations, MD CODE. ANN (1993) was very recent and therefore, very few LLCs existed in the state.

³⁶ See Letter of Advice dated October 11 at 1

³⁷ Letters of Advice do not constitute an opinion of the Maryland Attorney General.

³⁸ And by legal extension, Maryland LLCs which are statutorily defined as an unincorporated entity

³⁹ Letter of Advice dated October 11, 1993 at 1.

⁴⁰ *Id.*

⁴¹ 26-9(d)(1) stated in part that “it is unlawful for any individual, association, unincorporated association, corporation or any other entity to **directly or indirectly contribute** any money or thing of value greater than \$4,000 to any candidate or committee. “ The Letter of Advice likely considers creation of entities solely for the purpose to contribute would violate the proviso’s prohibition on indirect contributions. MD. CODE. 1957 Art 33 S 26-9(1991) re-codified at Art. 33 §13-212(b)(1991), now embodied in Election Law Article 33, §13-225-226 (2002)).

Although the Letter of Advice was not an official opinion, it constituted the first of only two known Attorney General Interpretations of 26-9(g) and its presently codified progeny. Several years later, the Letter of Advice letter would emerge in the debate surrounding the General Assembly's attempts to close the loophole. A second Letter of Advice, relying largely on the interpretations of the first, came in 1997. Discussion and analysis of this letter will proceed later. However, a full analysis of legislative reform attempts is not complete without first discussing the enactment of the Maryland Limited Liability Company Act of 1993, the rise of LLC filings in Maryland, and the growing effects of LLCs on contribution activity in Maryland.

V. The Emergence of Limited Liability Companies in Maryland

In late 1992, after several years of study and drafting, the General Assembly adopted the Maryland Limited Liability Company Act.⁴² Under the Act, an LLC is an unincorporated form of business entity similar to a general or limited partnership, but possessing a limited liability "shield" protecting owners from liability to the same extent that stockholders of a corporation are insulated. If properly structured, the LLC will be treated as a partnership, not a corporation, for federal, and in Maryland, state income tax purposes.⁴³ In Maryland, an LLC is formed by filing Articles of Organization with the State Department of Assessments & Taxation.⁴⁴ The articles must state the name of the entity, its principal address and the purpose for which it was formed.⁴⁵ However, the statute does not require disclosure of any of the LLCs' owners or managers, only stipulating that the entity must list the address of a "resident agent," who may often have little or

⁴² Chapter 536, Laws of Maryland 1992 codified at ANN.CODE. MD Corporations & Associations Article ("CA"), §4A-101 et seq.

⁴³ *Id.*

⁴⁴ ANN .CODE. MD Corporations & Associations Article §4A-204

⁴⁵ §4A-204 does not require any particular specificity in naming the LLC's purpose. For example, many entities answer this question simply by stating that the purpose of the LLC is "to engage in such lawful activities permitted to limited liability companies by the applicable laws and statutes for such entities of the State of Maryland." Articles of organization of Northern Technology, LLC, Maryland Department of Assessments and Taxation, 12/05/2005

no connection with the LLC, its operations or ownership. Moreover, the LLCs' formal name is not required to offer any indication of who controls or owns it.⁴⁶ Therefore, since Maryland law substantively treats LLCs as unincorporated business entities, and taxes them as partnerships, a reasonable legal application of the 1993 Attorney General's Letter of Advice would very likely conclude that LLCs do not constitute corporations for purposes of the 26-9(g) corporate contribution aggregation requirements.⁴⁷

Maryland LLC experts such as prominent attorneys Stuart Levine and Marshall B. Paul (original drafters of the original Maryland LLC Act) have recently stated that Maryland's LLC Act is "among the most opaque in the nation with respect to the identities of the LLC's owners, as there is no requirement that there be a public record of the names of either the owners or actual operators of an LLC."⁴⁸ Levine further states that the policy of not requiring public disclosure of LLC owners or operators is identical for stockholders of Maryland corporations and is primarily intended to promote privacy in business dealings.⁴⁹ "However, there is nothing in the statute that blocks ownership disclosure where compelling reason exists, for example, discovery in the course of litigation can be used to compel disclosure of an LLC's ownership structure."⁵⁰ Theoretically, the state could compel LLC ownership disclosure concerning campaign finance contribution disclosures through reformation of the Election Law Article without requiring any substantive changes to Maryland's laws on corporations and LLCs a change that could discourage business expansion and stimulate business privacy concerns.⁵¹

⁴⁶ See Jeff Horseman, "Developers use loophole in campaign donation law" The Capital, September 10, 2006.

⁴⁷ MD. CODE. 1957 Art 33 S 26-9(1991) re-codified at Art. 33 §13-212(b)(1991), now embodied in Election Law Article 33, §13-225-226 (2002)

⁴⁸ See Stuart Levine, "Tax & Business Law Commentary" <http://taxbiz.blogspot.com/2006/09/what-have-i-wrought.html>, September 14, 2006.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

It is important to note that many LLCs are legally created for a plethora of perfectly legitimate business, tax, financial and organizational motivations, most of which are clearly outside the relevant scope of this comment. However, in Maryland, LLCs often represent individual real estate holdings used by investors/developers to manage portfolios of new and existing properties. It is often common for the same group of individuals, or a small variation of the same group, to own and manage numerous LLCs to manage these investments.⁵² Thus, politically contributing through an LLC or partnership provides the individual business owner with a substantial degree of legally sanctioned anonymity and contributing power.⁵³

Under current law, LLC owners and managers can contribute the maximum \$4,000 per entity from each separate LLC or partnership even if the entities are owned, managed, operated and coordinated by the same or substantially similar owners. Furthermore, according to the State Department of Assessments and Taxation, the number of new filings for limited liability companies in Maryland doubled from fiscal year 1999-2004.⁵⁴ No scientifically valid evidence exists that this substantial rise in Maryland LLC filings is directly related to anything other than sound tax or business strategy or general economic expansion in the state. However, there is little rational doubt that political contributions from LLCs/LLPs; many operated and managed by the same or similar owners, now constitute a very significant source of fundraising to candidates running for state office in Maryland.⁵⁵

⁵² See Stuart Levine, "Tax & Business Law Commentary" September 14, 2006.

⁵³ Gregory M. Duhl, Assistant Professor of Law, Univ. of Tulsa School of Law, *How LLCs Are Being Used To Take Advantage Of Loopholes In Campaign Finance Election Laws*, Unincorporated Business Law Prof Blog (September 16, 2006) located at http://lawprofessors.typepad.com/unincorporated_business/2006/09/how_llcs_are_be.html

⁵⁴ Fiscal & Policy Note for Maryland Senate Bill 140/H.B. 585 of 2006, Department of Legislative Services, Maryland General Assembly.

⁵⁵ See for example, Common Cause Maryland, *The Six Million Dollar Loophole: How Money Moves in Maryland Campaigns Through Limited Liability Companies*, (February 16, 2006) available at www.commoncause.org and The Department of Legislative Services Bill File of SB 140, *see also* Neighbors for a Better Montgomery, *Paying for Montgomery County Elections. A White Paper describing the extremes of financial influence and negative behavior that characterized the 2002 elections in Montgomery County, MD* (August, 30, 2003), available at

VI. Contributions by LLCs and Partnerships in Recent Maryland Elections

The Maryland State Board of Elections, nor any other state government agency specifically reports or tracks political contributions of affiliated or commonly owned LLCs or partnerships. However, all Maryland political committees must report contributions from LLCs in the same manner as they report contributions from individuals, corporations, associations, labor unions or other entities.⁵⁶ Committees file contribution reports with the State Board of Elections and these reports are available for public inspection, both at the Board's headquarters as well as online.⁵⁷ In addition, statements of organization of LLCs and partnerships are available for public viewing at the Maryland Department of Assessments and Taxation. While the details of the filings vary widely depending on the particular entity, all filings include the entity's principal address, filing date and copies of the LLC or partnership's statement of organization.⁵⁸

In an attempt to illustrate the increased use of affiliated or related LLCs and partnerships to make large contributions in Maryland; several public interest organizations undertook detailed studies of LLC campaign contributions.⁵⁹ After completing initial examinations of contribution reports, the organizations proceeded to research the LLC's filings with the State Department of Assessments & Taxation in order to identify common ownership interest and "bundling"

www.neighborspac.org, See also Legislative Bill File for H.B. 660/S.B. 132 of 2003, H.B. 931/S.B. 165 of 2004, & H.B. 566/S.B. 461 of 2005, Department of Legislative Services.

⁵⁶ Election Law Article 33, §13-309 (2002)

⁵⁷ See University of Maryland, Baltimore County, *National Center for the Study of Elections*, http://mdelections.umbc.edu/campaign_finance/

⁵⁸ See, Maryland Department of Assessments and Taxation database, http://sdatcert3.resiusa.org/ucc-charter/CharterSearch_f.asp

⁵⁹ Common Cause Maryland, (February 16, 2006) available at www.commoncause.org and, Neighbors for a Better Montgomery, available at www.neighborspac.org, See also Legislative Bill File for H.B. 660/S.B. 132 of 2003, H.B. 931/S.B. 165 of 2004, & H.B. 566/S.B. 461 of 2005, Department of Legislative Services.

activity.⁶⁰ While admittedly unscientific and occasionally based on circumstantial evidence, these studies expose a number of disturbing contribution patterns likely exemplifying how large contributors use LLCs and partnerships to aggregate large contributions.

According to Common Cause Maryland, LLCs and partnerships, often controlled by the same individuals or families, contributed over six million dollars to state candidates during the 2003-2006 election cycle.⁶¹ An example of this “bundling” practice is illustrated by examining the political contribution activity of a high profile businessman and attorney. In January of 2005, his wife and son received state approval to buy Rosecroft Raceway⁶² and were influential backers of Maryland Governor Bob Ehrlich’s unsuccessful plan to allow slot machine gambling at Maryland racetracks. Common Cause identified 11 separate business entities; all sharing their principle address⁶³ with the donor’s law firm gave a total of \$141,725 to candidates and committees since 1999. This sum is in addition to the more than \$46,000 in individual contributions given to Ehrlich by the businessman and members of his extended family.⁶⁴

This type of “bundling” contribution activity is by no means limited to Governor Ehrlich or to members of any one political party. For instance, on January 11, 2006, Baltimore Mayor and current Governor Elect Martin O’Malley received \$21,000 from six separate LLCs all controlled by a prominent Baltimore area real estate developer. A detailed search of Department of Assessments & Taxations filings database revealed that each LLC that contributed to O’Malley at the January 11 event shared an address with the developer’s headquarters in

⁶⁰ “Bundling” is a colloquial term to describe the practices of wealthy political donors using related non-corporate business entities such as LLCs to make large contributions to a candidate or committee.

⁶¹ Common Cause Maryland, *The Six Million Dollar Loophole: How Money Moves in Maryland Campaigns Through Limited Liability Companies* (February 16, 2006).

⁶² At the time Rosecroft Raceway was a potential site for slot machine development. However, legislation authorizing slot machines at racetracks, or anywhere else in the state, failed to pass the General Assembly.

⁶³ Gleaned from filings on record at the Maryland State Department of Assessments & Taxation

⁶⁴ See also, Washington Post Editorial, *Bundling’ for Dollars in Maryland’*, February 14, 2005.

Baltimore or alternatively, its Articles of Organization were personally signed by the developer himself or a member of his immediate family.⁶⁵

Aggregations of LLC and partnership contributions are also prevalent in local races, particularly those for county executive. For example, on September 9, 2003, Montgomery County Executive Doug Duncan raised approximately \$62,000 on one occasion from at least 11 business entities directly controlled by a major Montgomery County real estate developer.⁶⁶ Similarly, on one date in 2005, three Baltimore developers, , partners in a variety of real estate related LLCs, contributed nearly \$13,000 to Baltimore County Executive James T. Smith through approximately five LLCs and one limited partnership.⁶⁷

While these statistics are compelling, the challenges of tracking the use of non-corporate entities to make large aggregate contributions to Maryland campaigns is often quite difficult due to the fact that many LLCs, while under the control of the same individuals, may legally have different addresses, resident agents and filing dates, making it difficult to uncover clear affiliations. Therefore, the use of the bundling technique may be even more widespread than currently reported. Moreover, assuming that the owner created each partnership or LLC for a legitimate business purpose under the Maryland LLC Act, all contribution practices described in this section are completely legal under the current statutory framework.

⁶⁵Common Cause Maryland, *The Six Million Dollar Loophole: How Money Moves in Maryland Campaigns Through Limited Liability Companies* (February 16, 2006) & author's independent research conducted on the Maryland Department of Assessments & Taxation online database, <http://sdatcert3.resiusa.org/ucc-charter/default.asp>

⁶⁶Neighbors for a Better Montgomery, *Paying for Montgomery County Elections*, (August, 30, 2003),

⁶⁷Common Cause Maryland, *The Six Million Dollar Loophole: How Money Moves in Maryland Campaigns Through Limited Liability Companies* (February 16, 2006)

VII. Early Legislative Attempts to Close the Non-Corporate Loophole

Since 1997, the Maryland General Assembly considered and ultimately failed to adopt at least eight different⁶⁸ though similarly themed legislative proposals to modify the corporate aggregation provisions originally codified at 26-9(g) of Article 33 and currently codified at §13-226(e) of the Election Law Article.⁶⁹ The first series of measures proposed treating non-corporate business entities such as LLCs, partnerships and real estate trusts as corporations for purposes of the aggregation requirements of §13-226(e).

These initial proposals, embodied primarily in H.B. 814 of 1997 and H.B. 1144 of 1998, attempted to attribute all campaign contributions made by specified associated entities to a single contributor for purposes of determining the maximum amount of contributions that the entities could donate. Specifically, instead of limiting the aggregation restrictions solely to corporations under 13-226(e), the legislation strived to encapsulate partnerships consisting of the same partners, LLCs consisting of the same members and real estate investment trusts owned by the same shareholders into the aggregation requirements when two or more of these entities make campaign contributions.⁷⁰

Both H.B. 814 of 1997 and the identically worded H.B. 1144 of 1998 passed the House of Delegates nearly unanimously.⁷¹ However, in both instances, the legislation failed to advance after initial submission to the Senate Economic and Environmental Affairs Committee.⁷² Many of the same interest groups that submitted testimony during the major 1991 campaign finance

⁶⁸ See, H.B. 814 (1997, 403rd Sess.), H.B. 1144 (1998, 404th Sess.), H.B. 950(1999, 404th Sess.), H.B. 660/S.B. 132 (2003, 408th Sess.), H.B. 931/S.B. 165 (2004, 409th Sess.), H.B. 566/S.B. 461 (2005, 410th Sess.), H.B. 585/S.B.140 (2006, 409th Sess.).

⁶⁹ Code 1957, Art. 33, § 26-9 *Amended* by ch. 617, Acts 1991 §26-9(g). This sub-section, substantively unchanged and derived in former Article 33 §13-212 and henceforth re-codified under § 13-226 (e) of Chapter 13 Election Law Article(2002)

⁷⁰ Legislative Bill File & Fiscal Notes of H.B. 814 of 1997 and H.B. 1144 of 1998, Maryland Department of Legislative Services, available online at <http://mlis.state.md.us/>.

⁷¹ H.B. 814 of 1991 passed the House by a vote of 137-0 and H.B. 1144 passed by a similarly overwhelming 124-1.

⁷² Legislative Bill File & Fiscal Notes of H.B. 814 of 1997 and H.B. 1144 of 1998.

revisions strongly supported the proposed legislation.⁷³ The bill's supporters argued that the current law's language, by virtue of its specificity to corporations, clearly excluded many other important and frequently utilized business entities such as partnerships, LLCs, and real estate trusts. The groups argued that this exclusion's practical effect largely nullifies the General Assembly's original intent of contribution limits by allowing individuals to make unlimited contributions through individual, albeit often commonly owned or managed entities. As is common for most proposed campaign finance bills, the State Board of Elections took no official position on the legislation.⁷⁴

Opponents of the measure included the Maryland Chamber of Commerce and a lone Howard County Council member.⁷⁵ The Chamber argued that the proposed bill would be overly cumbersome to administer because state officials would be required to identify entities with overlapping ownership among the many millions of businesses across the entire country. Secondly, it contended that the bill unfairly restricted business owners' political participation options and placed businesses at an unfair disadvantage relative to other organizations such as labor unions and non-profit groups.⁷⁶ Another opponent of the measure, then Howard County Council Member Vernon Gray, sent a letter to Senator Blount in January of 1998 expressing his serious concern that passage of the measure would greatly hinder his ability to raise campaign funds. Gray continued, attributing that his electoral success "had been due in large measure to partnerships, LLCs, etc financially supporting my candidacy."⁷⁷ It is unclear whether Gray was

⁷³ These groups included, among others, Common Cause of Maryland, League of Women Voters of Maryland, Americans for Democratic Action and the Civic Federation of America.

⁷⁴ Maryland State Administrative Board of Elections(SABEL) Commentary on H.B. 814, March 11, 1998, available at the Maryland Department of Legislative Services.

⁷⁵ The list of opponents is gleaned from written testimony properly submitted to the committee and encased in the legislative bill files. It is possible that other individuals and groups presented oral testimony, however this testimony was not available to the author.

⁷⁶ See Legislative Bill File for H.B. 814, H.B. 1144 and S.B. 140, Department of Legislative Services

⁷⁷ See Legislative Bill File for H.B. 1144.

aware that the measure would not prohibit LLC or partnership contributions, but rather would change the aggregation rules for them. In any event, the Maryland General Assembly did not enact H.B. 814, H.B. 1144 nor other similar measures.

VIII. Further Attorney General Guidance: Affirmation of the LLC Loophole

The 1993 Attorney General Letter of Advice written to former Senator Piccinini⁷⁸ first interpreted the types of entities presumably covered by the former §26-9(g) corporate aggregation rules. In 1997, the Attorney General office provided additional guidance on the issue in the form of a Letter of Advice to a State Senator employed as an attorney at the Law Offices of Peter G. Angelos.⁷⁹ This letter is important because the Assistant Attorney General wrote it after enactment of the Maryland Limited Liability Company Act and specifically addressed the proviso in the context of LLCs. Specifically, the letter addressed two primary questions, both related to the definition of LLCs and partnerships for purposes of contribution attribution and aggregation:

- 1) If a limited liability company has the same ownership as a separate corporation, are the two treated as one entity or two entities, each with the ability to make a \$10,000 aggregate contribution?
- 2) If the same individual owns three limited partnerships (each with separate legal identities and different purposes), should each partnership use its own account when contributing or may the partner use funds from his own account and allocate the contribution to the individual partnership?

Regarding the first question, while also referencing the earlier Letter of Advice, Assistant Attorney General Lunden opined that §26-9(g) did not apply and that a corporation and LLC are to be treated as separate entities for purposes of political contribution aggregation. She suggested, “while the Legislature certainly intended to tighten contribution limits by aggregating

⁷⁸ Letter of Advice dated October 11, 1993, from Jack Schwartz, Chief Counsel, Opinions & Advice, to the Honorable Janice Piccinini, State Senator, Department of Legislative Services, Bill File of H.B. 814 of 1997

⁷⁹ See Letter of Advice dated June 9, 1997 from Mary O. Lunden, Assistant Attorney General, Opinions & Advice, to the Honorable John A. Pica, Esquire. A copy of the letter is on file with the author.

contributions of certain entities, the statute makes clear that the aggregation requirement is applicable only to corporations.”⁸⁰ In support, Lunden suggested that since LLCs were fairly new entities, statutory created after the original enactment of §26-9(g), the General Assembly could not have envisioned its aggregation provisions to apply to an entity that didn’t yet exist nor one created and treated as a separate legal entity.⁸¹ According to the Letter, House Bill 814 of 1997 (discussed *supra*) bolstered this conclusion because it specifically addressed LLCs as business entities separate and distinct from corporations for purposes of contributions. As discussed earlier, that bill failed to pass the General Assembly. Finally, referencing the 1993 Letter of Advice, Lunden cautioned that any legal business entity must be created for a bona fide business purpose unrelated to political contribution limits, and owners may not create new entities for purposes of evading contribution rules.⁸²

In response to the second question, the Letter first opined that limited partnerships were also exempt from §26-9(g)’s aggregation requirements. Lunden next dealt with the issue of whether limited partnerships must use its own account when contributing or whether it is permissible for a partner to use his own funds then allocate the contribution to the partnership. She suggested that in order to follow other provisos regulating the flow of funds into committees, the most prudent course of action would be for each limited partnership to execute contributions from separate and distinct accounts.⁸³ This interpretation likely bolstered the ability of the State Prosecutor’s office to pursue civil and criminal prosecutions against donors who do not properly source contributions, an example of which is provided in the next section.⁸⁴ In sum, while the

⁸⁰ *Id.* at 2.

⁸¹ *Id.*

⁸² *Id.*

⁸³ See Letter of Advice dated June 9, 1997 from Mary O. Lunden at 2.

⁸⁴ See State v. Manekin, LLC District Court of Maryland For Anne Arundel County - Civil System, tracking number: 6Z34023107, Civil penalty issued 08/02/2005

Letter was not an official opinion of the Attorney General, it does appear to conclusively hold that LLCs, partnerships, limited partnerships and other similar non-corporate business entities are exempt from the current law's corporate aggregation requirements.

IX. Subsequent Legislative Reform Attempts: Encapsulate Other Business Entities & Change Aggregation Formula

The second and more recent legislative proposals include many similar themes of the first series of attempted reforms, but also mandate that businesses controlled by at least 80% of the same individuals should be treated as a single contribution.⁸⁵ Beginning in 2003, Maryland lawmakers once again attempted to solve the corporate aggregation loophole. This legislation, most recently embodied in H.B. 585 & S.B. 140 of 2006,⁸⁶ adopted the earlier measures' goals to encapsulate non-corporate entities into §13-226(e)'s definition of corporations for contribution aggregation purposes. The measures attempted to redefine the attribution requirements by including the 80% aggregation rule introduced above. This component served to recognize that many business entities, typically owned by the same or similar groups of people often have small and inconsequential differences in ownership.

Under current law, commonly owned or managed business entities (including corporations defined under §13-226) can make repeated contributions as long as the ownership or partnership structure differed slightly.⁸⁷ The proposed legislation, if properly enforced, could effectively prohibit a large portion of the "bundling practices" described earlier in this commentary. With the exception of the 2005 House version⁸⁸ which passed the House of Delegates but later failed in committee in the Senate, no version has survived past the committee stage. Moreover, the written testimony submitted for this series of bills was nearly identical to

⁸⁵ See Legislative Bill File for S.B. 140 (2006, 409th Maryland General Assembly Session)

⁸⁶ See also H.B. 660/S.B. 132 of 2003, H.B. 931/S.B. 165 of 2004, & H.B. 566/S.B. 461 of 2005.

⁸⁷ Fiscal Note of S.B. 140 of 2006, Maryland Department of Legislative Services

⁸⁸ Legislative Bill file of H.B. 566 of 2005, <http://mlis.state.md.us/2005rs/billfile/hb0566.htm>

the material submitted to by the various opponent business interest and supportive community organizations during similar legislative debate occurring during the late 1990s.⁸⁹ In likely response to a number of media reports highlighting instances of bundling, many of the bill's sponsors promised to proposal the measure during the 2007 legislative session.⁹⁰

X. Procedural Shortcomings & Enforcement Gaps of Current & Proposed Legislation

This section discusses possible procedural and enforcement shortcomings of the recently proposed campaign finance legislation, most recently embodied in H.B. 585 & S.B. 140.⁹¹ As discussed *supra*, the most recent attempt to amend the current election law failed to advance from committee during 2006 General Assembly session, however an identical measure passed the House in 2005. The Senate Education, Health and Environmental Affairs Committee has never positively reported any bill attempting to change the corporate aggregation limits stipulated in §13-226(e) and its progeny. Although the legislative record is devoid of specific detail, several members of the committee and the State Prosecutor have expressed grave doubts regarding the ability of the state to enforce current contribution limits.

The sponsors of the recent campaign finance legislation recently pledged to re-introduce the measure during the 2007 legislative session.⁹² The proposed legislation attempts to close current loopholes by formally including partnerships and LLCs in §13-226(e)'s aggregation formula and adding the 80% common business entity ownership requirement. However, the legislation fails to establish any specific procedural or enforcement framework to address a number of very serious gaps that currently plague the campaign contribution laws.

⁸⁹ See Legislative Bill file of H.B. 566, H.B./S.B. 140 et al, Department of Legislative Services.

⁹⁰ see Jeff Horseman, "Developers use loophole in campaign donation law" The Capital, September 10, 2006,

⁹¹ H.B. 585/S.B.140 (2006, 409th Sess.).

⁹² WBAL TV, I-Team: "Candidates Skirt Campaign Finance Laws" November 2, 2006, <http://www.thewbalchannel.com/politics/10228067/detail.html>

A) Problem 1: Addressing Ownership v. Control

The Maryland State Prosecutor recently stated that while §13-226(e) currently attempts to address the issue of affiliated corporations by referring to the “owners” of stock, ownership does not necessarily equate to control. Therefore, the legislature’s “failure to properly address control versus ownership results in a gap in the existing law making it virtually impossible, to effectively enforce the legislative intent of campaign contribution limits.”⁹³

According to the State Prosecutor, a prime example of this situation occurred in State v. Manekin, LLC, filed by that office in 2006.⁹⁴ Manekin LLC was essentially controlled by a single person, Richard Alter, who oversaw seven legally separate but similarly controlled LLCs all residing at the same location. Although Alter was the principal partner and manager of each entity, the precise partnership makeup was often substantially different.⁹⁵ Alter directed several large political contributions to one campaign from Manekin LLC’s bank account and informed the campaign that its reports should attribute the donations to the various other Manekin controlled LLCs even though the name ‘Manekin LLC’ appeared on each check.⁹⁶

The State Prosecutor attempted to charge Alter for criminally violating campaign finance laws, but due to the lack of clarity in the current statute, the office could not proceed and Manekin was instead fined the maximum civil penalty of \$5,000.⁹⁷ The Prosecutor added that unlike Manekin, many other affiliated LLCs maintain and contribute through separate bank accounts. In those situations, the current statute permits the maximum contribution by each LLC, notwithstanding all of the LLCs may be effectively controlled by the same individuals. However,

⁹³ Robert A. Rohrbaugh, REPORT OF THE MARYLAND STATE PROSECUTOR: FISCAL YEAR 2005, Office of the State Prosecutor (July 1, 2004 – June 30, 2005) <http://www.ospmd.org/2005%20annual%20report.htm>

⁹⁴ See District Court of Maryland For Anne Arundel County - Civil System, tracking number: 6Z34023107, <http://casesearch.courts.state.md.us/inquiry/inquiryDetail.jis?caseId=6Z34023107&loc=27&detailLoc=CP> issued 08/02/2005

⁹⁵ Robert A. Rohrbaugh, REPORT OF THE MARYLAND STATE PROSECUTOR: FISCAL YEAR 2005

⁹⁶ *Id.*

⁹⁷ *Id.*

H.B. 585 & S.B. 140 appeared to address the State Prosecutor’s concerns in the second part, stating that campaign contributions from two or more business entities will be attributed as a single contribution if the entities are “owned or controlled by at least 80% of the same individuals.” Nonetheless, the proposal’s drafters failed to outline any specific criteria to be used by the State Board of Elections or any other agency to properly define the term “controlled by.” The lack of clear definitions and distinctions would likely weaken the ability of the State to enforce these proposals.

B) Problem 2: Determining ‘Affiliated’ Entities & Enforcing the 80% Ownership Formula

The most recent proposed legislation sets an 80% common ownership/partnership threshold for purposes of aggregating contributions from multiple business entities.⁹⁸ However, for a wide variety of tax and businesses strategy purposes, many entities are centrally controlled or managed by one person, but feature any number of different stockholder or partnership compositions that often vary by the individual business. The legislation solely refers to common stockholders but appears to completely ignore the concept of centralized control or management and fails to account for the fact that the ownership/partnership compositions of business entities frequently change. The legislation provides no guidelines regarding whether the proposed aggregation and common ownership restrictions applies at the time of the entity’s contribution, during the entire election cycle, or when the contribution is processed by the campaign.

More importantly, the reform proposals do not appear to contemplate how Maryland’s current regulatory and enforcement mechanisms will contend with any the proposed changes. As mentioned *supra*, Maryland’s LLC, Limited Partnership and Corporations statutes do not require business entities to disclose stockholder or partner names when filing Articles of Incorporation

⁹⁸ H.B. 585/S.B.140 (2006, 409th Sess.)

or Statements of Organization.⁹⁹ While Common Cause and similar groups have been able to glean limited information regarding possibly affiliated or commonly owned entities, many legal filings contain only name of a resident agent and principle address, often providing no discernable information regarding the entity's ownership or partnership makeup.¹⁰⁰

Nonetheless, current law does not specifically block legal ownership or partnership disclosures where compelling reasons exist.¹⁰¹ For instance, discovery in the course of litigation can be used to compel full disclosure of an entity's ownership structure.¹⁰² However, the proposals do not create any specific legal mechanisms for the Maryland State Board of Elections, State Prosecutor's Office or any other governmental agency to mandate ownership disclosure for purposes of enforcing the proposed aggregation and ownership limits. Without such a procedural mandate, the State lacks any reasonable ability to enforce the provisions, short of commencing separate lawsuits and compelling discovery against suspect contributors, a most unlikely, costly and logistically difficult scenario.

Even if future reform legislation properly incorporates processes and procedures to compel business entities to disclose ownership for contribution and aggregation purposes, full enforcement would likely still be difficult to administer due to the myriad of corporate and LLC statutes throughout the country, many differing substantially from Maryland's statutes.¹⁰³ Any successful attempt to enforce the aggregation and ownership provisions would require increased

⁹⁹ Author's telephone interview with Stuart Levine of Fisher and Winner, LLP in Baltimore, MD November 8, 2006. Mr. Levine was a co-author of Maryland's Limited Liability Company Act of 1993 and is a recognized and published expert in Maryland corporate, partnership and limited liability company law.

¹⁰⁰ *Id.*

¹⁰¹ Stuart Levine, "Tax & Business Law Commentary" <http://taxbiz.blogspot.com/2006/09/what-have-i-wrought.html>, September 14, 2006.

¹⁰² *Id.*

¹⁰³ For example, the Nevada LLC Act allows courts, under certain circumstances, to ignore subpoenas ordering ownership disclosures of Nevada LLC entities.

financial and staffing resources, a definitive challenge given increasingly tight state budgets and the probable lack of tenable political upside.

XI. Additional Options to address the Business Entity Loophole

A) Ban all contributions from LLCs and Partnerships as Separate Entities & adopt a modified New Jersey Campaign Finance Scheme.

The State of New Jersey has enacted a comprehensive campaign finance statutory scheme, several features of which may provide Maryland with some workable options for closing its problematic LLC and contribution attribution loopholes.¹⁰⁴ In brief, New Jersey's law prohibits all non-corporate business entities such as LLCs from making any political contributions in the name of the business entity.¹⁰⁵ Instead, any contribution received from a non-corporate entity is attributed to the individual who signed the check. A second and related aspect of the plan outlines very strict statutory criteria for corporate entity affiliation and aggregation relating to ownership as well as to control.¹⁰⁶ As will be discussed, exact adoption of New Jersey's law is probably not ideal due to the presence of several confusing elements. However, examining the specific parameters of the law and crafting a modified solution could prove very successful.

Regarding contributions from LLCs and partnerships, New Jersey prohibits direct campaign contributions by limited liability companies, limited liability partnerships or joint ventures of any kind.¹⁰⁷ If a check is received from a LLC or partnership, the contribution is

¹⁰⁴ *See* N.J. Admin. Code (hereafter NJAC) tit. 19, § 25-11.9, "Contributions from affiliated corporations, associations or labor organizations" Amended by R.2004 d.280, effective July 19, 2004, *see also* NJAC §19:25-11.10 "Partnership contributions prohibited" Amended by R.2000 d.472, effective November 20, 2000 (operative January 1, 2001).

¹⁰⁵ NJAC 19:25-11.10

¹⁰⁶ NJAC 19:25-11.9(c)

¹⁰⁷ NJAC 19:25-11.10.

automatically attributed to the individual member or partner who signs the contribution check.¹⁰⁸ This contribution fully applies against an individuals' contribution and aggregate limits. When a contribution drawn on a LLC account and is signed by an individual other than a member, or if the contributor intends that any portion of a contribution is to be attributed or allocated to a member who has not signed the check, the statute requires the campaign to collect and maintain additional written information. In sum, this information must include 1) written instructions concerning the allocation of the contribution amount to a contributing member, or among members; 2) signed acknowledgment of the contribution from each contributing member who has not signed the contribution check or other written instrument; and 3) contributor information for each contributing member.¹⁰⁹ In the absence of these specific and strict reporting and aggregation procedures, New Jersey prohibits all contributions from LLCs, partnerships and other non-corporate entities.

On the subject of corporations, associations and labor unions, New Jersey's scheme mandates extraordinarily specific requirements and definitions for purposes of aggregating contributions from affiliated organizations and subsidiaries. New Jersey conclusively prohibits all campaign contributions from related or affiliated corporations which have a 30% common ownership or when the corporation owns, directly or indirectly more than a 30% interest in the other such corporation. Corporations meeting this criterion are automatically considered affiliates. However, even when corporations do not qualify for the conclusive 30% affiliation rule, the statute provides additional affiliation criteria for the relevant administrative agency to examine when deciding whether a corporation is affiliated for purposes of aggregating campaign contributions:

¹⁰⁸ *Id.*

¹⁰⁹ NJAC 19:25-11.10(c)

[Whether] such corporation, association or labor organization is related or affiliated shall depend on the circumstances existing at the time of such contribution, including, but not by way of limitation, the degree of control or common ownership with related or affiliated corporations, associations or labor organizations, the source and control of funds used for such contribution and the degree to which the decisions whether to contribute, to what candidate and in what amount are independent decisions.¹¹⁰

These provisos apply to all state political candidates in New Jersey. The Election Law Enforcement Commission (ELEC) is responsible for administering the New Jersey Campaign Contributions and Expenditures Reporting Act.¹¹¹ ELEC is a separate organization apart from New Jersey Division of Elections, which is statutorily under the control of the Attorney General's office. However, ELEC Commissioners are appointed by the state's Governor.

The New Jersey framework offers significant potential to help close the two most glaring loopholes in Maryland's campaign finance law, the exemption of LLCs and other non-corporate entities from corporate aggregation rules and the relatively lax statutory definition of affiliated corporations in general. Unlike Maryland's system, New Jersey prohibits LLCs and partnerships from contributing as separate entities and more importantly, mandates direct personal aggregation to individuals who own the entities. As discussed earlier, many LLCs and partnerships contributing large sums to Maryland candidates are often closely held entities composed of relatively few owners.¹¹²

¹¹⁰ NJAC § 19:25-11.9(a) & (b)

¹¹¹ The New Jersey Election Law Enforcement Commission (ELEC) <http://www.elec.state.nj.us/publicinformation.htm>, monitors the campaign financing of all elections in New Jersey. "Whether the election is for Governor or Mayor, member of the Legislature or a City Council, candidates and campaign organizations are required to file with the Commission contribution and expenditure reports." The Commission also administers the law requiring candidates for the Governorship and Legislature to make public their personal finances prior to election day. Commissioners are appointed by the Governor of New Jersey. The ELEC is an independent department from the New Jersey Division of Elections, under the direction of the New Jersey Attorney General.

¹¹² Common Cause Maryland, *The Six Million Dollar Loophole: How Money Moves in Maryland Campaigns Through Limited Liability Companies*,

Therefore, if such a law were enacted in Maryland, it is possible that partners and members of closely held non-corporate entities would quickly reach the maximum aggregate contribution limit of \$10,000. This effect would bar such individuals from contributing repeatedly through a variety of related business entities. However, under the New Jersey's system, non-corporate entities composed of large numbers of owners or partners could still attribute numerous contributions through all members of the entity. While these donations would be attributed to the particular individual's contribution limits, such a system would undoubtedly allow the owners to use the entity's vast resources (albeit attributed to an owner or partner) to contribute repeatedly. Although such a system would be an improvement over Maryland's current framework, it would still allow creative individuals to bundle large contributions from entities under their control.

An improved reform proposal would ignore New Jersey's total prohibition and somewhat confusing attribution rules for non-corporate entity contribution. Under the modified framework, all LLCs, partnerships and other similar non-corporate entities would be required to meet the fairly exacting standards elucidated in New Jersey's corporate attribution and affiliation rules as referenced in NJAC § 19:25-11.9(b). This plan would direct the Maryland State Board of Elections to enforce highly fact specific statutory guidelines for judging affiliations, using the New Jersey statutory language.

Granted, in order for the potential new system to function properly, the General Assembly must dedicate additional resources to ensure proper ownership disclosure for all business entities as well as compliance from the political committees. Assuming this occurs; the new statutory language would require examination of degrees of control and ownership, sources and control of funds, and finally whether the contributing decision was independent. Applying

this standard would likely significantly curtail the bundling of large numbers of contributions from legally separate but undoubtedly related entities. Based on research discussed herein, it appears a near certainty that a substantial number of LLCs, partnership and corporate entities would not sufficiently pass the new and more exacting standards of scrutiny for judging potentially affiliated and related entities for purposes of attribution.

As discussed earlier, many contributing entities share common addresses, significant owner/partners overlap and highly centralized non-independent political decision-making. Moreover, New Jersey's default 30% ownership and affiliation rule would likely ensnare significant numbers of affiliated entities without the need for any closer scrutiny. Enactment of the proposed measures could likely be effectuated without any overhaul to Maryland's corporate, LLC or partnership statute because ownership disclosure is already allowed where a compelling reason exists such as discovery in the course of litigation.

Consequently, the General Assembly could amend the current election code and formally mandate entity ownership disclosure for purposes of complying with the new campaign finance aggregation provisions. Furthermore, any entity that refuses to disclose ownership when requested by the State Board of Elections would be barred from making political contributions. In essence, under the proposed reform, a business entity contributing to a Maryland political committee, by virtue of making said contribution, would automatically consent to disclose its ownership if requested by the SBE, regardless of where the entity registered its articles of incorporation or organization.

B) Adopt language of Current Maryland Election Law regarding Affiliated Transferors by applying it to the affiliated corporations language containing the Loophole

If the General Assembly prefers not to look to other states for solutions to the current contribution loophole, an alternative reform would involve simply adapting similar statutory

guidelines from a “nearby” proviso of the current Election Law Article. In particular, §13-227(d) defines affiliation standards for transfers between campaign finance entities.¹¹³ The relevant portions of the statute states:

- (1) All affiliated campaign finance entities are treated as a single entity in determining:
 - (i) the amount of transfers made by a campaign finance entity; and
 - (ii) the amount of transfers received by a campaign finance entity.
- (2) Campaign finance entities are deemed to be affiliated if they:
 - (i) are organized and operated in coordination and cooperation with each other; or
 - (ii) otherwise conduct their operations and make their decisions relating to transfers or other contributions under the control of the same individual or entity.¹¹⁴

A fairly straightforward legislative remedy would adapt the above language to a newly revised §13-226(e) (governing affiliated corporations) by substituting the word “transfer” with the term “contribution” then changing “campaign finance entity” to “corporation, partnership, limited liability company, labor union, association, unincorporated association or other similar business entity.” Other small adaptations are also made due to the obvious differences between transfers and contributions. Below is the amended version §13-226(e):

- (1) All affiliated corporations, non-profit corporations, partnerships, limited liability companies, labor unions, associations, unincorporated associations or other similar entities are treated as a single entity in determining:***
- (i) the \$4,000 per committee and \$10,000 aggregate contribution limits made by the entity***
- (2) Any corporation, partnership, limited liability company, labor union, associations, unincorporated association or other similar entity are deemed to be affiliated if they:***
- (i) are organized and operated in coordination and cooperation with each other; or***

¹¹³ See Election law Article §13-227. The Election Code defines a transfer as a contribution made by one campaign finance entity to another. A transfer is always money, not in-kind. Campaign finance entities include candidate committees, personal treasurer accounts, political action committees, slates, state or local central committees and Political Action Committees.-

¹¹⁴ Election Law Article §13-227(d)

(ii) otherwise conduct their operations and make their decisions relating to contributions under the control of the same individual or entity.

This new option includes labor union and non-profits in the aggregation requirements primarily to assuage past concerns from some groups that new campaign finance reform proposals unfairly target the greater business community while providing an unfair advantage to non-profits and labor unions.¹¹⁵ Including all relevant groups into the new statutory language would attempt to place such entities in the relatively same power position as individual donors, who are not able to bundle large contributions in the same manner as corporate and non-corporate entities and labor unions. Amending §13-226(d) with the more stringent requirements currently governing transfers would be likely to significantly curtail the loophole without having to adopt the more verbose language of the New Jersey framework. However, any new proposal must specifically empower the State Board of Elections and if necessary, the State Prosecutor's Office to closely enforce the provisions through increased monitoring of disclosure reports.

However, the proposed language is not without some minor shortcomings. Unlike the New Jersey scheme, the amended language, while arguably restrictive and clear does not provide a specific list of factors for the State Board of Elections to examine. To remedy any concerns, the General Assembly could adopt a list of factors suggested nearly twenty years ago by Collins, who first identified many of the problems still inherent in the current system in *Maryland Campaign Finance Law: A Proposal for Reform*:

Reform legislation should outline specific criteria to be used by the [SBE] in determining whether a diversified or branch entity shall be deemed "separate" for purposes of applicability of contribution or transfer limits. Such criteria should include: (1) the nature of the activity conducted by each entity; (2) the geographic location of the activity conducted by each entity; (3) the regulatory scheme, if

¹¹⁵ See, for example, submitted testimony from the Maryland Chamber of Commerce Legislative Bill File for H.B. 814, H.B. 1144 and S.B. 140, Department of Legislative Services

any, that controls each entity's activity; and (4) all other evidence of differing political, economic, or social interests among the entities.¹¹⁶

Collins' list of factors, while arguably not as detailed as those elucidated in the New Jersey statute, would provide the SBE as well as political donors a relatively straightforward approach to follow when deciding the appropriateness of political contributions from affiliated entities. In sum, this proposal addresses the "control v. ownership" problem while introducing other factors to measure relatedness.

C) Ensure Contributing Entities Are Created for Bona Fide Business Reason Unrelated to Political Contributions

Many of the previously discussed studies examining contribution patterns of LLCs and related entities uncovered circumstantial evidence that individuals create entities in order to evade Maryland's campaign contribution limits.¹¹⁷ In several instances, numerous newly formed entities contributed to fundraising events for high-ranking political offices including Governor.¹¹⁸ In some cases, an entity first filed its Articles of Organization just ten days before making a large political contribution.¹¹⁹ Purposefully creating entities to avoid contribution limits was first prohibited by the original wording of §26-9(d) (1) and is still in force today.¹²⁰ However, Maryland's current LLC and corporate statutes do not require any particular specificity in defining an entity's purpose. For example, many entities state its purpose as

¹¹⁶ Carville B. Collins, Case Comment, *Maryland Campaign Finance Law: A Proposal for Reform*, 47 Md. L. Rev 524 (1988).

¹¹⁷ See Common Cause Maryland, *The Six Million Dollar Loophole: How Money Moves in Maryland Campaigns Through Limited Liability Companies* (February 16, 2006), see also Neighbors for a Better Montgomery, *Paying for Montgomery County Elections, A White Paper describing the extremes of financial influence and negative behavior that characterized the 2002 elections in Montgomery County, MD* (August, 30, 2003), available at www.neighborspac.org

¹¹⁸ Common Cause Maryland, *The Six Million Dollar Loophole*

¹¹⁹ *Id.*

¹²⁰ 26-9(d)(1) stated "it is unlawful for any individual, association, unincorporated association, corporation or any other entity to **directly or indirectly contribute** any money or thing of value greater than \$4,000 to any candidate or committee. " Attorney General considers creation of entities solely for the purpose to contribute would violate the proviso's prohibition on indirect contributions. MD. CODE. 1957 Art 33 S 26-9(1991) re-codified at Art. 33 §13-212(b) (1991), now embodied in Election Law Article 33, §13-225-226 (2002)).

follows: “to engage in such lawful activities permitted to limited liability companies by the applicable laws and statutes for such entities of the State of Maryland.”¹²¹

Naturally, one solution is to require far greater specificity when business entities state its purpose. However, this option would require major changes to the largely successful business statutes, a costly and time-consuming endeavor that could risk harming Maryland’s business reputation as well as evoking privacy concerns. In addition, the rule would continue to be very difficult to enforce. Finally, the General Assembly would have no ability to mandate changes to other states’ business statutes. Therefore, this proposal would not be practical.

A preferred alternative would mandate a “waiting period” for new entities before allowing them to make political contributions. For example, a rule could be fashioned stating that in order to contribute to a Maryland campaign, a business entity must have filed a valid tax return with the IRS or similar state taxation authority. Under such a rule, it would be highly unlikely that an individual would take the time, not to mention the risk of filing a tax return for a fraudulently created entity. In all likelihood, rectifying the problem of creating potentially sham entities for purposes of contributing would be likely unnecessary if the General Assembly first adopted either of the first two options mentioned in sub part b) & c) discussed above.

D) Ban All Direct Corporate Entity Contributions in Maryland

The U.S. Supreme Court has repeatedly ruled that within certain widely defined parameters, states have significant discretion to enact far-reaching restrictions on political contribution limits for defined non-federal electoral offices.¹²² Many states restrict corporations

¹²¹ Articles of organization of Northern Technology, LLC, Maryland Department of Assessments and Taxation, 12/05/2005

¹²² See Buckley v. Valeo, 424 U.S. 1 (1976) Upholding federal limits on campaign contributions while stating that spending money to influence elections is a form of constitutionally protected free speech. See also Nixon v. Shrink Missouri PAC, 528 U.S. 377 (2000), extending Buckley to state government regulation of campaign finance. In an opinion written by Justice Souter, and joined by five other Justices, the Court reaffirmed that limits on contributions are constitutional, and therefore does not constitute an unconstitutional restriction on speech. In upholding an

and labor union political contributions. In fact, twenty-two states completely prohibit corporations and labor union from contributing directly from their general treasuries.¹²³ In most of these states, corporations are still permitted to sponsor and solicit funds for a political action committee or similarly named device but may neither contribute treasury funds directly to the PAC, require contributions from any officers or employees, nor increase any employee or officer salaries in order to promote contributions to the PAC.¹²⁴ While the U.S. Supreme Court has generally upheld states' attempts to regulate contribution limits, federal courts have invalidated statutes that ban all corporate political activity including the formation of PACs as an unconstitutional deprivation of free speech.¹²⁵

Under this option, the General Assembly would ban all corporations, labor unions LLCs and similar entities from contributing directly from their treasuries. In conformity with majority of states with similar provisions, all entities could still make political contributions through a properly registered PAC. The business would also be free to continue to collect voluntary contributions from their officers, employees, agents and contractors in compliance with the current Election Law Article, and donations would be scrutinized for compliance with contribution limits and the current and relatively strict affiliation rules governing transfers between political committees.

individual contribution limit of \$1050 under Missouri law, Justice Souter wrote, "[T]here is little reason to doubt that sometimes large contributions will work actual corruption of our political system, and no reason to question the existence of a corresponding suspicion among voters."

¹²³ Information derived from the National Conference of State Legislatures campaign finance information web site <http://www.ncsl.org/programs/legman/about/ContribLimits.htm> (January 9, 2007). A partial list of states that prohibit direct political contributions from corporate and union treasuries include Colorado, Michigan, Arizona, Iowa, Massachusetts, Montana, Texas & Connecticut.

¹²⁴ National Conference of State Legislatures web site.

¹²⁵ See *Kennedy v. Gardner*, 1999 WL 814273 (D.N.H.) holding that a state law prohibiting all political contributions by (or on behalf of) corporations was so rigid that "the question becomes whether an outright statutory ban on political contributions by corporate entities . . . can withstand constitutional scrutiny." The court held that the ban was unconstitutional and particularly criticized that corporations would be technically violating the even by establishing political action committees.

This plan would likely curtail the vast majority of bundling activity because all businesses and labor union entities could no longer contribute directly from their treasuries. Instead, they would have to rely on the contributions of employees, officers and contractors, which in turn would be subject to the \$4,000 and \$10,000 contribution limits as well as the affiliation rules governing transfers. In a closely held business entity with few members, stockholders or employees, it is quite likely that the principals would reach their maximum allowable contribution limit in a relatively short time period, effectively barring the ability to make repeated contributions.

E) Eliminate All Contribution Limits in Maryland

A more radical and unlikely reform to Maryland's campaign finance laws would involve a complete repeal of any limits on political contributions. Just five states, Illinois, New Mexico, Oregon, Utah and Virginia place no limits on contributions, instead favoring a system of highly regulated and timely disclosure.¹²⁶ Unlike the current Maryland law, such a plan would guarantee completely equal legal treatment of all political contributors rather than differentiating different contribution rules between various legal concepts such as corporations and LLCs and individuals. As a result, under the current Maryland scheme, corporations and other business entities have far more political power than individual donors, creating a serious issue of fairness and political power. Therefore, until the General Assembly closes the campaign finance loopholes currently causing this imbalance, the limits should be exculpated to provide individual donors the same political contributing opportunities as their business entity brethren.

While this conceptual framework would very likely be strenuously opposed by the General Assembly, some scholars suggest the reasonableness of the view that the current system

¹²⁶ For example, see Code of Virginia (hereafter CV) 24.2-901 mandating strict parameters to guarantee timely disclosure of all campaign contributions.

presents equal protection and fundamental fairness questions because business entities now have far more opportunities to express their political views than do individual donors.¹²⁷ Additionally, in a 2002 survey sponsored by the University of Maryland Center for American Politics and Citizenship, over fifty percent of respondents approved of a theoretical plan to eliminate all contribution limits.¹²⁸ While this option is fairly compelling and appears to have some public support, only a tiny minority of states allow donors complete freedom from contribution limits and it's unlikely that Maryland would take any great pains to join them.

XI. Conclusion

This comment strived to analyze the major legislative developments culminating in Maryland's current campaign finance law, with particular focus on the historical and legal emergence of significant and harmful loopholes in the current campaign finance law. During the past 100 years, the General Assembly has occasionally amended its laws regarding political campaign contribution regulations in response to constituent concerns and more generally, to reflect the changing political and societal landscape. The most recent significant overhaul of campaign contribution laws, embodied in H.B 1047 of 1991, occurred nearly fifteen years ago. In passing H.B. 1047, the General Assembly adopted several of the Nilson Commission's recommendations originally proposed in 1987, nearly twenty years ago.

Encased within the 1991 overhaul and part of the original Nilson Commission recommendations was §26-9(g).¹²⁹ This important proviso for the first time outlined specific criteria governing attribution of corporate contributions. The legislative rationale for passing

¹²⁷ See for example, Author's interview with Professor Kathleen Dachele, University of Maryland School of Law, November 14, 2006

¹²⁸ *"Marylanders' Opinions of Campaign Finance and Campaign Finance Reform"* Center for American Politics and Citizenship and University of Maryland, College Park, MD. The telephone survey was conducted between December 9 and December 14, 2002 by Survey Sampling, Inc. of Fairfield, Conn. The survey produced a representative sample of 804 Maryland residents.

¹²⁹ The current statute is now embodied at §13-226(e) of the Election Law Article.

§26-9(g) appears to be a clear intent to tighten contribution limits by aggregating contributions of corporations, which at the time were the only prominent form of business enterprise in Maryland. The enactment of laws creating new forms of business entities such as LLCs and LLPs and the subsequent large-scale adoption of these devices has significantly changed the way business entities are structured in Maryland and throughout the country. Because the Maryland State Senate has repeatedly failed to adopt any of the numerous proposals attempting to address the significant use and correspondingly increased political power of these new business forms, the result is an unbalanced and non-transparent campaign finance system.

It is reasonable to conclude that Maryland's current campaign contribution limits unfairly hinder the ability of individual donors to equally participate in the political process. In contrast, the current law effectively allows owners of LLCs and other similar business entities to conduct their political contribution activities largely free of any meaningful contribution limits or regulatory controls originally established to bind political system participants. Therefore, the current system unfairly hinders an individual donor's freedom to financial support candidates and causes, while at the same fully allows business entities such as LLCs, partnerships, corporations and labor unions and by extension the powerful and wealthy individuals who control them nearly unlimited opportunities to affect public policy by contributing huge sums to political candidates and causes. The natural extension of this rationale is that under the current Maryland scheme, corporations, LLCs and other business entities have far more political power than individuals. This unfair imbalance could serve to ultimately weaken public confidence in the entire political system.

Although there will undoubtedly be very few immediate political incentives for those legislators who continue to bravely take the lead by proposing fundamental changes to close the

current loophole, the long-term benefit of positive action will strengthen the overall institutional integrity of Maryland's elected offices and instill increased public confidence in the state's political system. Most loophole closing proposals will have the likely effect of hindering the ability of lawmakers to raise large contributions from a relatively few powerful donors. Naturally, this reality will likely frighten some lawmakers, particularly those that currently benefit from the loophole because it allows them to fund their campaigns without needing to reach out to large numbers of donors. However, this comment urges all Maryland General Assembly members to put personal fundraising efficiency aside and work together during the 2007 legislative session to close the non-corporate business entity loophole once and for all.