REPORT OF INDEPENDENT COUNSEL

ON INVESTIGATION OF VIOLATIONS OF DELAWARE

CAMPAIGN FINANCE AND RELATED STATE LAWS

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I. INTRODUCTION AND EXECUTIVE SUMMARY

A. *Background*

This is the report of the Independent Counsel on the investigation of all aspects of potential violations of Delaware law arising out of circumstances originally uncovered in a federal investigation conducted by the Office of the United States Attorney for the District of Delaware.[1] This report discusses the various findings of the investigation and offers suggestions for legal and cultural reforms to address certain areas that seem to be particularly problematic.

The investigation began with a referral by federal investigators to Delaware authorities, as described below. In June 2011, Christopher J. Tigani entered a plea of guilty in the United States District Court for the District of Delaware to criminal charges of violations of certain federal campaign finance and tax laws; he was later sentenced to a two-year term of imprisonment.

The federal campaign-finance charges against Tigani related to his reimbursement of persons, primarily employees of N.K.S. Distributors, Inc. ("N.K.S."), the company of which Tigani was President and Chief Executive Officer, for contributions to candidates for election to federal offices. In the course of the federal investigation, the U.S. Attorney learned of evidence of potential violations of Delaware state law, including reimbursement by Tigani of persons who made contributions to candidates for election to certain state offices.[2]

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[1] The United States Attorney for the District of Delaware, Charles M. Oberly, III, recused himself from the federal investigation, which was conducted by the Acting United States Attorney, David C. Weiss, and Assistant United States Attorney, Robert F. Kravetz. In this report we use the term "U.S. Attorney" to refer to the office.

[2] There being no federal jurisdiction, prosecution for offenses of Delaware law would not be barred under Title 11, Section 209 of the Delaware Code.

On June 10, 2011, the *Wilmington News Journal* publicly revealed the federal investigation and prosecution of Tigani, reporting that the U.S. Attorney planned to turn over evidence relating to potential state law violations uncovered in the federal investigation to the Delaware Department of Justice ("Department"), headed by Delaware Attorney General Joseph R. ("Beau") Biden III. Before the U.S. Attorney provided the materials to the Department, however, Attorney General Biden recused himself from the investigation, citing the potential appearance of conflict. Accordingly, on June 23, 2011, he appointed E. Norman Veasey, former Chief Justice of the Delaware Supreme Court, as Independent Counsel and Special Deputy Attorney General to investigate state matters arising from the federal investigation. Federal authorities later turned over to Independent Counsel certain materials relating to the potential violations of Delaware law.

Veasey began his investigation by assembling an investigative team ("DE Team") consisting of Delaware State Police ("DSP") investigators as well as lawyers from Weil, Gotshal & Manges LLP ("Weil"), the law firm of which Veasey is a Senior Partner. The Independent Counsel decided early in the process that the depth and the breadth of the investigation required skilled and experienced investigative, as well as legal, talent. The options for investigative talent included employing an investigative agency, retired F.B.I. agents, or involving the DSP. The choice was clear. If Independent Counsel could obtain the services of DSP investigators, this was the desired path not only from the viewpoint of excellent capability but also from an economic perspective. Independent Counsel has been very fortunate, honored, and appreciative of the fact that former DSP Superintendent, Colonel Robert Coupe, and present Superintendent, Colonel Nathaniel McQueen, Jr., assigned very skilled, senior DSP investigative officers to carry the primary investigative load under the direction of Independent Counsel.

The mission of the investigation has been to (i) investigate evidence of possible violations of Delaware campaign finance laws; (ii) vindicate the compelling state interest in bringing to justice Tigani, N.K.S., and any others found to have violated those laws; (iii) determine if there is credible evidence that any candidate for state or local office in Delaware or the agents of any such candidates who received improper contributions had knowledge that such contributions were tainted, suggested reimbursement or other illegal schemes to contributors, or knowingly participated with Tigani, N.K.S., or any other person in an illegal scheme; (iv) determine if there were other violations of the state campaign finance or related laws that should be prosecuted, consistent with the State's compelling interest and proper prosecutorial discretion; and (v) make recommendations for legal and cultural reform.

The DE Team has engaged in a robust and wide-ranging[3] investigation in an effort to fulfill that mission. Investigators have collected and analyzed thousands of documents (some public, some voluntarily supplied, and some obtained through compulsory process) and interviewed sixty-three persons. In the process, DSP investigators have logged approximately 5600 hours and Weil lawyers and paralegals have logged approximately 2000 hours.

[3] We use the term "wide-ranging" to indicate thoroughness within the confines of the limited mandate delegated to the Independent Counsel by Delaware's Attorney General—namely "all aspects" of the state implications arising from the federal allegations. The authority vested in the Independent Counsel is not a roving commission to ferret out wrongdoing and seek cures to all the past or present perceived ills of the Delaware political landscape. For example, we have determined that the alleged 2004 Milford land transaction by the Minner Administration that benefitted Tigani and N.K.S. and any related land transactions shall not be a subject of prosecution by Independent Counsel. These events may or may not have been a proper subject for prosecutorial investigation and action. They are, however, beyond the bar of the applicable statutes of limitations.

B. *Summary of Findings and Conclusions*

1. The Tigani and N.K.S. Reimbursement Scheme

The heart of the Tigani-N.K.S. reimbursement scheme involved campaign contributions presented to campaigns as contributions by individuals, where the purported contributors were in fact reimbursed by Tigani or N.K.S. for those contributions. The investigation revealed that during his tenure as President and Chief Executive Officer of N.K.S., Tigani solicited numerous individuals, many of whom were N.K.S. employees, to make campaign contributions to specified candidates for Delaware elected office, with a promise that N.K.S. would reimburse the purported contributors. Tigani then caused N.K.S. to issue non-payroll checks to reimburse the individuals who made contributions at his behest. Tigani and N.K.S. engineered this reimbursement scheme to evade the maximum contribution limits imposed under Delaware law, which would have been exceeded had Tigani and N.K.S. made the contributions directly, and to disguise the fact that they were the true contributors.

For example, in a typical scenario, John Doe, an N.K.S. employee, at Tigani's behest and with the understanding that N.K.S. would reimburse Doe, would write a check to the candidate committee[4] of Candidate A for the maximum contribution amount applicable to the office for which the candidate was running. The check would be drawn on Doe's bank account and would bear Doe's name, address, and signature. Doe then would receive from N.K.S. and deposit in Doe's bank account a reimbursement check in an amount equal to the contribution amount. Thus, in truth and in fact, the funds that were provided to Candidate A's committee purportedly by Doe were not those of Doe but were, in fact, funds of N.K.S. Accordingly, Doe was a "straw

[4] In this report, the terms "candidate committee" and "campaign" are both used to refer to the organization that accepts contributions in support of a particular candidate's campaign for elected office. See Title 15, Section 8002 of the Delaware Code for the statutory definitions of various terms used in the statute, including "candidate," "candidate committee," "contribution," and "political committee."

donor" for Tigani and, under applicable Delaware law, the contribution and reimbursement scheme would constitute a felony.

In this typical scenario, Tigani would seek contributions from (and promise reimbursement to) multiple straw donors. Tigani or an N.K.S. employee would then often collect the straw donors' checks and present the collected checks, as a group, to the campaign—thereby ensuring that the campaign recognized Tigani's role in procuring the contributions—in order to curry favor with the candidates. "Bundling" of campaign contributions, in the sense of presenting a group of legal contributions to a campaign, appears to be a common practice, and is not illegal in the absence of reimbursement or some other violation of the law. When coupled with a reimbursement scheme or other illegal practices, however, bundling highlights concerns about the role of money in the electoral process.

Many of the contributions to state candidates that comprised the Tigani/N.K.S. reimbursement scheme were made in the maximum amount allowed by statute ($1,200 per contributor per election period for statewide office and $600 per contributor per election period for non-statewide office). Each reimbursement of a campaign contribution, whether or not it results in a violation of the contribution limits, constitutes a separate felony by the person or entity knowingly making or receiving the reimbursement, as well as by any candidate or person acting on behalf of any candidate or political committee who accepts such a contribution knowing that the contribution is subject to reimbursement. Section 8006(b) of Title 15 of the Delaware Code provides:

> No person shall make, and no candidate, treasurer or other person acting on behalf of a candidate or political committee shall knowingly accept a contribution made in a fictitious name or in the name of another person. No person shall make, and no candidate, treasurer or other person acting on behalf of a candidate or political committee shall knowingly accept a contribution whose donor's true name and address is not made known to the political committee that receives it.

Under Section 8043(d) of Title 15, a violation of Section 8006 is a class G felony.

A separate section of the statute, Section 8010 of Title 15, prohibits any person from making, and any candidate or person acting on behalf of any candidate from accepting, a contribution in excess of the maximum contribution amounts set forth in the statute (*e.g.*, $1,200 in a statewide election). Under Section 8043(b), any person who knowingly accepts or knowingly makes an unlawful contribution under Section 8010 is guilty of a class A misdemeanor.

The investigation revealed evidence beyond a reasonable doubt that Tigani and N.K.S., by reimbursing N.K.S. employees and others for their purported campaign contributions, made campaign contributions in the names of other persons without making known the donors' true names and addresses, in violation of Section 8006(b). As a result, the State indicted Tigani for violations of Section 8006.[5] Tigani pleaded guilty to three felony counts. The Superior Court sentenced Tigani to pay a fine of $108,800 plus costs, resulting in a judgment against Tigani of $128,665, probation, and to complete 500 hours of community service.

In addition to the charges against Tigani individually, Independent Counsel alleged that N.K.S., a Delaware corporation, violated state criminal statutes in connection with the same reimbursement scheme. In a non-prosecution agreement with Independent Counsel, N.K.S. agreed to pay to the State a penalty of $500,000 and institute corporate governance reforms in exchange for the State's agreement not to prosecute the company. The Superior Court approved that agreement on July 6, 2012, and N.K.S. promptly paid $500,000 to the State. It is to be noted

[5] For feasibility reasons and in an exercise of prosecutorial discretion, Independent Counsel determined to charge each group of reimbursed contributions as a single felony count rather than charging each reimbursement as a separate count. Moreover, Independent Counsel further determined that it was not necessary to charge Tigani or N.K.S. separately with violations of Section 8010 in light of the number of felonies charged and in light of the shorter statute of limitations applicable to class A misdemeanors.

that the indictment of a corporation or other business entity often sounds a death knell for the company.[6] The non-prosecution agreement with N.K.S enabled the State to obtain a substantial payment from N.K.S., with significant punitive and deterrent effects, while preserving many in-state jobs by avoiding an indictment that could potentially put N.K.S. out of business and lead to the unemployment of individuals who were not involved in the illegal scheme.

The portion of Section 8006(b) that bars any "contribution whose donor's true name and address is not made known to the political committee that receives it" also applies to the conduct of the straw donors. That is, the individuals, including the employees of N.K.S. and others, who wrote contribution checks to candidates at Tigani's behest and then received reimbursement from Tigani or N.K.S. violated Section 8006(b) by purporting to make contributions in their own names, knowing that such contributions were not theirs but were actually contributions of Tigani or N.K.S. because of the reimbursements.

The prosecution of Tigani and other persons or entities who initiated illegal campaign contribution reimbursement schemes,[7] caused the reimbursements to be made, and sought to curry political favor through such schemes serves the compelling State interests under the present circumstances. Although the conduct of the straw donors, including employees of N.K.S., also violated Section 8006(b), Independent Counsel, in the exercise of prosecutorial discretion, declined to prosecute the straw donors. Independent Counsel determined that prosecution of the straw donors would not be in the public interest, when such potential prosecutions were balanced against other considerations—including limited prosecutorial

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[6] *See, e.g.*, Francesco Guerrera, *Crossroad for Two Legacies*, WALL ST. J., Sept. 27, 2013, at C1 (noting that, in the Justice Department's negotiations with JP Morgan, the government's leverage included the fact that JP Morgan knew that "indictments have in the past sounded the death knell for companies").

[7] *See infra* Sections I.B.2 and V.A.2-3 for discussion of actions against Michael Zimmerman and Kemal Erkan/United Medical.

resources, diminishing remedial and deterrent returns, some straw donors' potential lack of familiarity with the campaign finance laws, and the fact that many of the straw donors are persons of modest means who may have acted out of concern for their job security and livelihood. The straw donors' cooperation with the investigation also weighed in favor of the decision not to charge. Moreover, the specter of criminal charges inherent in the public release of this report should be a deterrent to anyone who may in the future consider a reimbursement scheme, without the need to pursue criminal charges against those persons, including N.K.S. employees, who acceded to Tigani's (or others') entreaties to participate in reimbursement schemes. Particularly in light of the public attention given to this matter, potential future straw donors should be on notice that the circumstances considered in future exercises of prosecutorial discretion relating to campaign finance violations may not weigh against prosecution.

2. Other Reimbursement Schemes

After the investigation, prosecution, and sentencing of Tigani, Independent Counsel learned, in early 2013, of evidence of two other reimbursement schemes, albeit on a much smaller scale than the Tigani/N.K.S. scheme. One involved Kemal Erkan and his company, United Medical, LLC, and the other involved Michael Zimmerman.

Erkan and United Medical entered into a non-prosecution agreement, paid a penalty of $15,000 and undertook to implement relevant corporate governance reforms. Zimmerman pleaded guilty to one felony count under Section 8006(b) of Title 15 and was sentenced to a fine of $21,600 (which he has paid), probation, and community service. The details of those investigations are set forth in the body of this report.

Investigators for Independent Counsel have not found credible evidence of other reimbursement schemes, beyond those set forth above.[8] There may or may not have been such other schemes. But, despite the publicity attendant to this investigation, no one has come forward with further credible evidence to be pursued in the investigation, nor has the investigation uncovered evidence of other reimbursement schemes.[9] Moreover, the proliferation in recent years of Political Action Committees (PACs) has reduced the motivation for affluent donors to consider illegal reimbursement schemes or other means of violating or circumventing the campaign finance laws, such as the questionable use of entities[10] to circumvent the statutory campaign limits.[11] Essentially, donors may contribute huge sums to PACs that donors expect will support a cause or a candidate with policies consistent with the donor's wishes.

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[8] The reimbursement schemes detailed in this report are not unique to Delaware. For some recent examples, see Colbert I. King, *Would You Donate in Another's Name?*, WASH. POST, July 13, 2013, at A13 (relating to an ongoing federal investigation of reimbursement schemes using "straw donors" in the District of Columbia), and Christopher Baxter, *Indicted N.J. Engineering Firm Birdsall Services Group Pleads Guilty in Pay-to-Play Conspiracy*, NJ.com, June 21, 2013, at http://www.nj.com/politics/index.ssf/2013/06/indicted_birdsall_engineering_guilty.html (describing campaign finance reimbursement scheme in New Jersey).

[9] We note that new facts seemed continually to emerge as our investigation dug deeper and deeper. We had hoped to wrap up the entire investigation months ago. But new facts and new leads, some emerging as late as the fall of 2013, had to be diligently pursued and consequently extended the time it took to complete the investigation and report.

[10] One of the reforms we recommend is that contributions by corporations and other entities, such as limited partnerships and limited liability companies, be prohibited. *See infra* Section VII.B.2.

[11] *See McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 118 (2003) (noting the historical efforts of candidates to circumvent campaign finance limits and the legislative response to such efforts); *see also id.* at 146 ("[C]andidates and donors alike have in fact exploited the soft-money loophole, the former to increase their prospects of election and the latter to create debt on the part of officeholders, with the national parties serving as willing intermediaries."); *id.* at 148 n.47 (noting evidence "that national parties have actively exploited the belief that contributions purchase influence or protection to pressure donors into making contributions"); *id.* at 176-77 (explaining that stricter campaign finance laws increase incentives for political candidates and parties to use PACs and other conduits to circumvent campaign finance laws).

3. Knowledge of Candidates and Their Agents

Independent Counsel also thoroughly investigated whether or not any candidate or agent of a candidate had actual knowledge of any reimbursement scheme or had suggested reimbursement to candidates or their agents. If the investigation had yielded credible evidence that could prove beyond a reasonable doubt such knowledge or suggestion, then those individuals would be subject to criminal charges for (i) violating Section 8006(b) of Title 15, which, together with Section 8043(d), makes it a felony for a candidate or political committee to "knowingly accept" a contribution made by a person in the name of another person; (ii) conspiracy;[12] (iii) criminal liability for the conduct of another (accomplice liability);[13] and/or (iv) other crimes.[14]

But the key question with respect to the candidates and their agents is whether there is credible evidence that could prove beyond a reasonable doubt that any candidate or any person acting on behalf of a candidate had knowledge of any reimbursement scheme, suggested reimbursement to the candidates or their agents, or knowingly violated any other campaign finance law.[15] Independent Counsel and DSP investigators vigorously pursued these avenues of

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[12] Under Delaware law, a person is guilty of conspiracy in the second degree (a class G felony) when, intending to promote or facilitate the commission of a felony (*e.g.*, the reimbursement scheme), the person agrees to aid another person in the planning or commission of the felony. DEL. CODE ANN. tit. 11, § 512.

[13] Under Delaware law, a person is guilty of an offense committed by another person when, intending to promote or facilitate the commission of the offense, the person attempts to cause the other person to commit the crime; agrees or attempts to aid the other person in planning or committing it; or, having a legal duty to prevent the commission of the offense, fails to make a proper effort to do so. DEL. CODE ANN. tit. 11, § 271.

[14] Examples could include violations of Delaware's racketeering statute, DEL. CODE ANN. tit. 11, § 1501-11, or criminal liability for knowingly accepting a contribution in excess of the statutory limit, if applicable, DEL. CODE ANN. tit. 15, §§ 8010(a), 8043(b).

[15] *E.g.*, DEL. CODE ANN. tit. 15, § 8012(e) (governing contributions by entities; discussed *infra* Sections I.B.4, V.B., VII.B.2).

inquiry through voluminous document collection and review, coupled with extensive witness interviews, searching for credible, direct evidence of such intentional conduct. Investigators also assessed the circumstantial evidence of such knowledge by any candidates or their agents.

Delaware law provides that, for offenses that include a defendant's intent or knowledge as an element of the offense, such intent or knowledge may, if reasonable, be inferred from surrounding circumstances. Thus, a fact finder (judge or jury) may consider whether a reasonable person in the defendant's circumstances would have had or lacked the requisite intention or knowledge.[16] This does not, however, change the State's burden of proof of a criminal offense—all the elements of any crime, including the requisite intent or knowledge, must be proved beyond a reasonable doubt by admissible evidence.[17] That is a particularly heavy burden in a case based on circumstantial evidence. There must be credible, provable evidence of intent or knowledge, even if such evidence is circumstantial or certain conclusions with respect to a defendant's internal state of mind must be inferred from the circumstantial evidence.

Although some witnesses made vague references or speculated to the effect that candidates or their agents knew about or suggested reimbursements, investigators did not find credible evidence to support a charge. Given the lack of sufficient evidence on which to base an inference of knowledge, despite our thorough and searching investigation for such evidence, the investigation has revealed no basis to pursue charges against any candidate or any member of a

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[16] *See* DEL. CODE ANN. tit. 11, § 307(a) ("The defendant's . . . knowledge . . . may be inferred by the jury from the circumstances surrounding the act the defendant is alleged to have done. In making the inference permitted by this section, the jury may consider whether a reasonable person in the defendant's circumstances at the time of the offense would have had or lacked the requisite . . . knowledge . . . .").

[17] *See* DEL. CODE ANN. tit. 11, § 301(b) ("No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.").

candidate's staff or finance committee in connection with any reimbursement scheme.[18] Moreover, the candidates and their agents have vehemently denied any such knowledge.

4. Entity Contributions

Delaware law permits corporations and other business entities to contribute to political campaigns, subject to the same contribution limits that apply to contributions by individuals as set forth in Title 15, Section 8010 of the Delaware Code. Moreover, certain notice and attribution requirements apply to contributions by entities.

Specifically, Title 15, Section 8012(e) of the Delaware Code sets forth the law governing contributions by corporations, partnerships, and other entities. That statute requires that a contributing entity notify the recipient political committee, in writing, of the names and addresses of each person who owns 50% or more of the entity, "or that no such persons exist."[19] If a contributing entity does have a 50% or greater owner, a ratable portion of the contribution is deemed to be a contribution by that person, must be included within the statutory contribution limits with respect to contributions by that person, and must be attributed to that person in the political committee's campaign finance reports.

The investigation identified a number of contributions by various entities that were made without proper attribution to individuals who owned 50% or more of the contributing entities.

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[18] For reasons discussed at length later in the report, we have concluded that we should not bring charges against the campaigns that have donated tainted funds to charities rather than returning them to Tigani, N.K.S., or other perpetrators or alleged perpetrators of campaign finance violations. *See infra* Section V.C. (discussing DEL. CODE ANN. tit. 15, § 8043(h)).

[19] DEL. CODE ANN. tit. 15, § 8012(e). On August 15, 2012, the Governor signed a bill that amended Section 8012(e), among other sections of the campaign finance law, effective June 30, 2013. H.R. 300, 146th Gen. Assem. (Del. 2012). The discussion of Section 8012(e) in this report refers to the pre-amendment version of the statute, which would have applied to the conduct at issue in this investigation. Moreover, the amendments to Section 8012(e) do not appear to have materially changed the entity contribution issues discussed in this report.

Some of those contributions, if properly attributed to the business owners, also caused those individuals' contributions to exceed the contribution limits.

Investigators concluded that Delaware campaigns generally have not requested or received the notifications required by the statute when accepting contributions from entities. The investigation also revealed some evidence that at least one campaign accepted or retained certain entity contributions without proper attribution (and, in some instances, in excess of the contribution limits, upon appropriate attribution) while the candidate and members of the campaign staff were on notice that an individual or individuals held a 50% or greater interest in the contributing entities. Investigators followed up on such evidence, including by obtaining information through compulsory process, but were unable to confirm that the candidate or any member of the campaign staff knew that anyone held a 50% or greater interest in the entities. In any event, it does appear that campaigns in Delaware generally failed to make necessary inquiries regarding entity ownership to comply with the law governing entity contributions.

Even where the law governing entity contributions is followed, allowing contributions by entities raises serious concerns about circumvention of the spirit of the laws, as well as concerns about the "Delaware way" and the "pay to play" culture in Delaware. As discussed in greater detail below, permitting entity contributions allows individuals who have effective—but not majority—control over businesses with certain structures to exert greater potential influence in the political and electoral process than those who do not control such businesses, with little public transparency.

For example, a group of entities under the effective control of a single individual (who may own as much as 49.9% of each of the entities) may make contributions that far exceed, on a cumulative basis, the statutory contribution limits. The investigation identified contributions that

may fit this pattern. Although entity contributions do not per se violate the current campaign finance laws in Delaware, they raise serious public policy concerns. The problem is exacerbated by the fact that the statutory language setting forth the 50% ownership rule may be difficult for contributors, political committees, regulators, and law enforcement officers to interpret and apply, particularly in the context of alternative entity business structures. We therefore propose that the statute be amended to prohibit campaign contributions by entities.

C. *Legal and Cultural Reform*

We congratulate Governor Markell and the General Assembly on the recent enactment of certain statutory reforms in the campaign finance and lobbying-law areas. Senate Concurrent Resolution 20, which has passed both houses of the General Assembly, setting up an Election Law Task Force, is also a positive development. We also applaud the passage of a new statute making it a criminal offense to lie to a law enforcement officer, whether or not the lie is under oath.[20]

Yet we believe a need for further reforms remains. We have determined that there is a compelling need for legal and cultural reforms in the campaign finance and public integrity areas. Therefore, the final section of this report is dedicated to recommendations for additional statutory reforms.

There is also a compelling need to reform the "pay to play" culture out of which the conduct that led to this investigation may have grown. In addition to the reimbursement schemes, the investigation identified a widespread practice of gifts and political contributions to candidates and elected officials from which a reasonable person could infer that the gifts or contributions were intended to curry favor with elected officials. For example, after offering

[20] The various reforms are discussed *infra* Section VII.A.

"perks" to legislators, including gifts of alcohol and tickets to concerts and sporting events, Tigani successfully sought legislative action authorizing Sunday liquor sales, which would benefit N.K.S., and legislative inaction with respect to proposed increased excise taxes on alcohol sales, which would harm N.K.S. While not constituting proof of an explicit "quid pro quo" exchange of a gift for favorable government action that could constitute the crime of bribery,[21] these gifts may violate the public integrity laws if not properly reported. Unfortunately, gifts to elected officials may have been rationalized by some as consistent with a cynical perception of the "Delaware Way."

In our view, and undoubtedly in the view of many citizens of Delaware, the "Delaware Way" should stand for the good Delaware practice of seeking a "civilized, bipartisan approach for finding solutions to the State's business and political problems."[22] But cynical "pay to play" practices are *not* acceptable as part of the "Delaware Way," and these practices must end.

In a May 9, 2013 editorial, the *Wilmington News Journal* noted that the "Delaware Way" concept has been twisted into "an easy-going, but corrupt cronyism."[23] That is the current perception in many circles, and it is also a sad truth in some. In the context of reporting on Tigani's activities, the *News Journal* has published a continuing series of articles and editorials about the subject. One particularly comprehensive and striking article appeared on the front page of the *News Journal* on July 31, 2011. That article noted that Tigani gave gifts to elected

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[21] Under Delaware law, one form of the crime of bribery occurs when a "person offers, confers or agrees to confer a personal benefit upon a public servant upon an agreement or understanding that the public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced." DEL. CODE ANN. tit. 11, §1201(1).

[22] Sean O'Sullivan & Maureen Milford, *Tearful Tigani Gets Two Years*, WILM. NEWS J., Mar. 9, 2012, at A1.

[23] Op-Ed, *Delaware Cronyism Gets Some Official Push-Back*, WILM. NEWS J., May 9, 2013, at A14.

officials and got what he wanted: tax breaks, Sunday sales, "preservation of his liquor monopolies," "sweetheart deals on public land along Del. 1," and other benefits.[24]

Gifts received by public officers and not reported might be described as low-level or "soft" corruption. Regardless of the size or extent of gifts, the pay-to-play culture infects the political process and erodes public trust in government.[25]

It is clear that there is a compelling need for both legal and cultural reforms. The campaign-finance and public-integrity laws and practices are in need of further strengthening beyond the salutary reforms enacted in 2012. This report outlines some specific recommendations for law reform in these areas. The ultimate goal is to foster transparency and integrity in government, so that the public can have confidence that the "Delaware Way" indeed represents what it should—a "civilized, bipartisan approach to finding solutions to the State's business and political problems," rather than the perception of a culture of self-interested, backroom dealings.[26]

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[24] Maureen Milford & Jeff Montgomery, *Paying to Play: How Chris Tigani Seduced the Delaware Legislature*, WILM. NEWS J., July 31, 2011, at A1.

[25] *See id.* at A6 ("The hidden avenues of influence in Delaware government are what longtime observers describe as 'pay to play.' They say it's a system accustomed to big political contributions and other support from the banks, real estate developers and other businesses subject to government regulation.").

[26] O'Sullivan & Milford, *supra* note 22, at A1.

II. BACKGROUND AND INDEPENDENT COUNSEL APPOINTMENT

A. *The Tigani Story Breaks in June 2011*

On June 10, 2011, the *Wilmington News Journal* startled the Delaware community with a "blockbuster" story under the banner headline, "Records Link Tigani's Illegal Donations to Joe Biden '08 Run." The story publicly revealed that federal authorities had been investigating Tigani and others, an investigation that culminated in a guilty plea by Tigani in federal court. The federal charges to which Tigani pleaded guilty involved, among other federal crimes, a scheme of illegal campaign contributions to federal candidates, whereby Tigani and N.K.S. would cause straw donors to make purported campaign contributions, for which Tigani would cause N.K.S to reimburse them.

B. *Federal Investigation*

The U.S. Attorney, the Federal Bureau of Investigation, and the Internal Revenue Service investigated Tigani for violating federal campaign finance laws by making illegal corporate and conduit campaign contributions to a candidate running for election as President of the United States.[27] They also investigated Tigani for tax crimes in connection with Tigani's causing the N.K.S. controller to make false accounting entries in order to artificially increase the funds available to Tigani in his officer loan account, and depositing in his personal account third-party checks paid to satisfy obligations to N.K.S.[28]

On May 3, 2011, the United States charged Tigani with the following crimes: (i) during calendar year 2007, as an officer of N.K.S., making and causing N.K.S. to make illegal corporate

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[27] Press Release, Department of Justice, Delaware Businessman Pleads Guilty to Campaign Finance Violations and Tax Charges (June 9, 2011), http://www.justice.gov/usao/de/news_2011.html#jun.

[28] *Id.*

campaign contributions, in violation of Title 2, Sections 441b(a) and 437g(d)(1)(A) of the United States Code and Title 18, Section 2 of the United States Code; (ii) during calendar year 2007, making and causing campaign contributions to be made in the name of others, in violation of Title 2, Sections 441f and 437g(d)(1)(A) of the United States Code and Title 18, Section 2 of the United States Code; and (iii) making materially false statements on an income tax return (for 2005 and 2006), in violation of Title 26, Section 7206(1) of the United States Code.[29]

On June 9, 2011, Tigani pleaded guilty to the federal charges,[30] and on March 6, 2012, Chief Judge Sleet of the United States District Court for the District of Delaware sentenced Tigani to, among other things, twenty-four months in prison.[31] He began serving his sentence in federal prison in Brooklyn, New York on April 9, 2012. He was sent from federal prison to a federal halfway house in September 2013; in November 2013 he was moved to house arrest. He will be discharged to probation in January 2014.

C. *Reference from U.S. Attorney to Delaware Attorney General*

The U.S. Attorney acted under federal campaign finance laws and other federal laws. That action related to certain violations in connection with candidates running for federal office. In connection with the federal investigation, the U.S. Attorney also uncovered evidence relating to potential violations of Delaware law involving illegal campaign contributions to candidates for

[29] Information, *United States v. Tigani*, No. 1:11-cr-42-GMS (D. Del. filed May 3, 2011).

[30] Memorandum of Plea Agreement, *United States v. Tigani*, No. 1-11-cr-42-GMS (D. Del. filed June 9, 2011).

[31] Transcript of Sentencing Hearing, *United States v. Tigani*, No. 1-11-cr-42-GMS, at 73 (Mar. 6, 2012).

state office in Delaware.[32] The *News Journal* reported that information and evidence of the potential state law violations were to be turned over to the Delaware Department of Justice.

Before the U.S. Attorney turned over any materials to the Department, however, Attorney General Beau Biden recused himself from the investigation, citing the potential appearance of a conflict of interest. Accordingly, on June 23, 2011, he appointed E. Norman Veasey as Independent Counsel and Special Deputy Attorney General to investigate "all aspects" of the state law implications arising from the federal allegations.

III. INDEPENDENT COUNSEL'S INVESTIGATIVE TEAM

A. *Weil Lawyers and their Backgrounds*

1. E. Norman Veasey

Veasey is a member of the Delaware Bar and a Senior Partner in the international law firm Weil, Gotshal & Manges LLP ("Weil"). He has offices in Wilmington and New York. He served as Chief Justice of the Delaware Supreme Court from 1992-2004. Born in Wilmington, he graduated in 1954 from Dartmouth College and in 1957 from the University of Pennsylvania Law School, where he was Senior Editor of the University of Pennsylvania Law Review.

From 1957 until he became chief justice in 1992, Veasey practiced law with the Wilmington law firm Richards, Layton and Finger, where he concentrated on business law, corporate transactions, litigation, and counseling. He is a Fellow of the American College of Trial Lawyers. During 1961-63, he was deputy attorney general and chief deputy attorney general of Delaware, and prosecuted a wide variety of criminal cases. In 1982-83, he was president of the Delaware State Bar Association.

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[32] Press Release, *supra* note 27.

Veasey has served as president of the Conference of Chief Justices, chair of the Board of the National Center for State Courts, chair of the Section of Business Law of the American Bar Association ("ABA"), chair of the ABA Special Commission on Evaluation of the Rules of Professional Conduct (Ethics 2000), and chair of the Committee on Corporate Laws of the ABA Section of Business Law. He is a former member of the ABA Standing Committee on Ethics and Professional Responsibility. He was co-chair of the Governor's Committee for Revision of the Criminal Law in the 1960s and 1970s, a comprehensive project, which ultimately led to a complete revision of Delaware's Criminal Code, the structure of which continues to this day.

He has been credited with leading nationwide programs to restore professionalism to the practice of law and adopt best practices in the running of America's courts. He is co-author, with Christine T. Di Guglielmo, of a leading book on the current challenges of corporate general counsel, *Indispensable Counsel: The Chief Legal Officer in the New Reality* (Oxford University Press 2012).

He is a director of the Institute for Law and Economics at the University of Pennsylvania and a member of the American Law Institute, the International Advisory Board of the Centre for Corporate Law and Securities Regulation, and numerous other professional organizations. In 2004, the Governor of Delaware awarded him the Order of the First State, the highest honor a governor of Delaware can confer.

Veasey is currently an adjunct professor at New York University Law School, the University of Pennsylvania Law School, and Wake Forest University College of Law. He has also served as an adjunct professor at several other law schools. He is a frequent panelist and lecturer on corporate law and governance, ethics, and professionalism.

2. Christine Di Guglielmo

Christine Di Guglielmo is a member of the Delaware Bar and was appointed as a Delaware Special Deputy Attorney General in connection with this investigation. She is an associate in Weil's Wilmington office and a member of the Securities Litigation practice group. Di Guglielmo represents clients in corporate governance litigation, including stockholder derivative and class actions. She is instrumental with other lawyers at Weil in conducting investigations and providing counsel to clients on corporate governance and fiduciary duty issues. She is actively involved in pro bono client representation, public service, and Delaware Bar initiatives.

Di Guglielmo is a graduate of Brown University and graduated, *summa cum laude*, from the University of Pennsylvania Law School, where she was executive editor of the University of Pennsylvania Law Review. In 2003-2004, she served as a judicial clerk to Chief Justice Veasey. She and Veasey are co-authors of the book *Indispensable Counsel: The Chief Legal Officer in the New Reality* (Oxford University Press 2012) and several professional articles.

3. Steven Tyrrell

Steven Tyrrell is a partner at Weil and serves as co-chair of the firm's White Collar Defense and Investigations Group. He is currently the managing partner of Weil's Washington, DC office. From 2006 through 2009, Tyrrell served as chief of the Fraud Section of the U.S. Department of Justice. In that capacity, he led the investigation and prosecution of a broad range of sophisticated economic crime matters and the coordination of federal enforcement initiatives.

He also played a key role in advising the leadership of the U.S. Department of Justice on white collar crime-related legislation, crime prevention, public education, and the Department's Financial Fraud Enforcement Task Force. Before his appointment as chief of the Fraud Section,

Tyrrell served as deputy chief of the Counterterrorism Section of the Criminal Division, where he supervised a team of lawyers in connection with the investigation, prosecution, and coordination of a variety of international terrorism and terrorist financing matters.

Tyrrell served as an Assistant U.S. Attorney for more than fifteen years, during which time he investigated and prosecuted a variety of criminal cases, including cases involving white collar crimes, such as securities fraud, health care fraud, government contract fraud, bank fraud, tax fraud, FDA fraud, public corruption, and the government's pursuit of related money laundering charges and asset forfeitures. He was lead counsel for the United States in nearly forty criminal jury trials.

4. Lindsay Bourne

Lindsay Bourne was actively involved in this investigation from 2011 to 2013 when she was an associate at Weil and a member of the firm's International Arbitration and Trade groups. Her focus was on investor-state arbitration, trade compliance under U.S. export control laws, trade sanctions, investment restrictions, antiboycott regulations, the Federal Corrupt Practices Act, and white collar investigations. Before joining the firm, Bourne served as a legal fellow at the Center for Justice and Accountability. She is a graduate of Colgate University and graduated with honors from the George Washington University Law School, where she was a member of the Moot Court and Mock Trial Boards, co-chair and problem-writer for the Grenadier International Law Moot Court Competition, and represented the law school at the Philip C. Jessup International Law Moot Court Competition.

B. *DSP Investigators and Their Backgrounds*

1. Sergeant Susan L. Jones

Sergeant Susan Jones has been the lead investigator assigned to this investigation from the outset. She has had a distinguished career in the DSP, having been promoted through the ranks and proving herself as an effective leader and investigator in the Major Crimes unit and in joint investigations with the U.S. Attorney's Office in a large-scale securities-fraud and money-laundering conspiracy.

Sergeant Jones has excelled in investigating white collar crime and in statewide asset seizures and forfeitures. She has also served on the Special Operations Response Team and has been an instructor in the Firearms Training Unit.

2. Agent Raymond W. Hancock

Agent Raymond Hancock is, among other accomplishments, a Certified Fraud Examiner. He is a veteran of the DSP, having risen through the ranks at one time to the rank of Captain. He is a graduate of the University of Delaware, with a B.A. and an M.A. degree. He has worked on various investigations, including an investigation under the supervision of former Attorney General Gebelein into organized crime gambling operations. He has served with the FBI, DEA, and DSP in wiretap investigations and continues his work in drug investigations.

3. Detective Timothy Morris

Detective Timothy Morris was assigned to the Independent Counsel investigation for a few months in August 2011, but was reassigned to other responsibilities by DSP. He has had diverse important responsibilities in DSP since he joined the force in 1985. He has a B.S. degree and an M.S. degree from Johns Hopkins University. He made notable contributions to the

Independent Counsel Investigation during the few short months of his tenure with the investigation.

4. Sergeant Kevin Perna

Sergeant Kevin Perna, a twenty-two-year veteran of the DSP, is assigned as the Operations Commander for the Delaware State Police High Technology Crimes Unit and Delaware Internet Crimes Against Children Federal Taskforce. Sergeant Perna received his undergraduate degree and Master's degree in Business from Wilmington University. He holds several certifications in computer forensics. He is also an adjunct professor at Widener Law School. He performed invaluable, technological forensic service for the investigation.

C. *Deputy Attorneys General*

A prosecutorial team of deputy attorneys general from the Department aided Independent Counsel immeasurably. That team included then-Deputy Attorney General Paul R. Wallace. After Paul Wallace became a judge of the Superior Court, Deputy Attorney General Sean P. Lugg headed the Department's prosecutorial team, assisted by Deputy Attorney General Sonia Augusthy.

1. The Honorable Paul R. Wallace

Paul Wallace was the prosecutor originally assigned to the Tigani case until his investiture as a judge of the Delaware Superior Court early this year. He is a veteran trial and appeals lawyer, having spent many years in various leadership roles in the Delaware Department of Justice, including those of Chief Prosecutor and Chief of Appeals. He is a graduate of the University of Maryland and the Columbus School of Law of the Catholic University of America.

He has won numerous state and national awards for his achievements, including important recognitions of his advocacy skills.

2. Sean P. Lugg

Sean Lugg has been a Deputy Attorney General with the Department of Justice for the past seventeen years. He has maintained a heavy statewide caseload as a trial and appellate lawyer. He represents the State in appeals before all Delaware appellate courts and is also the Delaware Traffic Safety Resource Prosecutor, with statewide responsibility for vehicular homicide and assault cases. He is a regular presenter in police academies and has lectured before national, regional, and local audiences. He is a graduate of the University of Delaware and the Villanova University School of Law.

3. Sonia Augusthy

Sonia Augusthy is an outstanding prosecutor who has been assigned to prosecutorial duties and advice in connection with various aspects of the investigation. A graduate of Temple University (*magna cum laude)* and Widener University School of Law (*cum laude*), Augusthy was a member of the Widener Law Review and the Moot Court Honor Society where she earned recognition as Best Oralist for her advocacy. As Deputy Attorney General in the Department of Justice, she reviews evidence for felony indictments, coordinates with police agencies in investigations and prosecutions, and confers with experts regarding vital aspects of technical evidence being presented in courts.

D. *Methodology of the Investigation*

After reviewing the information and evidence relating to Tigani and N.K.S. that had been provided by the U.S. Attorney, the DE Team focused on its mission, described above, and

proceeded to make a thorough study of all relevant material reasonably available, including forensic analysis of electronically stored data. The team first collected and reviewed publicly available information from a variety of sources, such as campaign finance reports filed with the Delaware Department of Elections, business websites, social media, and certain databases, including followthemoney.org and opensecrets.org.[33]

Investigators also obtained voluminous information from non-public sources, including campaigns, banks, payroll providers, internet service providers, contributors and straw donors, database providers, and other sources. Documents (including emails and other electronic sources of information) were sought by way of voluntary production and by subpoena. The DE Team analyzed the information obtained to identify patterns of campaign contributions that might be consistent with illegal contribution activity, such as reimbursement schemes, and to identify and follow up on additional leads. As noted below, investigators conducted more than eighty interviews, with the same objectives.

E. *Time and Effort Devoted to This Matter*

The DSP investigative officers who served on the DE Team have logged approximately 5600 hours. In addition, approximately 2000 hours of Weil lawyer and paralegal services have

[33] Followthemoney.org is an online database of information collected and maintained by the National Institute on Money in State Politics. According to the Institute's website, the Institute "is the only nonpartisan, nonprofit organization revealing the influence of campaign money on state-level elections and public policy in all 50 states." *See* http://www.followthemoney.org/Institute/index.phtml (last visited Dec. 23, 2013). Opensecrets.org is an online database of information collected and maintained by the Center for Responsive Politics which, according to the Center's website, is "the nation's premier research group tracking money in U.S. politics and its effect on elections and public policy. Nonpartisan, independent and nonprofit, the organization aims to create a more educated voter, an involved citizenry and a more transparent and responsive government." *See* http://www.opensecrets.org/about/ (last visited Dec. 23, 2013).

been logged, of which many hours were provided pro bono to the State.[34] The Deputy Attorneys General who served the team primarily as prosecutors also spent a substantial amount of time on this matter. The services provided by the DE Team have included conducting interviews of sixty-three persons, both in Delaware and in other states; engaging in extensive document review and research of records comprising thousands of pages, including campaign records, bank records, and business and public records; researching and analyzing applicable law and other authorities; and conducting prosecutions and obtaining convictions and civil settlements.

IV. INVESTIGATIVE ISSUES AND STATE LAWS IMPLICATED

This report focuses on the Delaware state laws that are implicated by the actions described above. The laws most relevant to the investigation are the Delaware statutes governing campaign finance, related criminal laws, and laws related to the ethics and conduct of public officials. An overview of these statutes is provided below.

A. *Campaign Finance Statutes*

1. General Structure of Campaign Finance Laws

Delaware's campaign finance laws are structured to address two goals: first, to mandate appropriate disclosure of the sources of funds used in political campaigns and, second, to

[34] At the outset of this investigation, the Weil team provided, at no cost to the State, more than 145 hours of pro bono services, valued at nearly $150,000 at Weil's regular billing rates. In August 2011, Weil and the State entered into an engagement agreement whereby Weil undertook to provide its services at deep discounts of up to 44% on its future services in connection with the investigation. The total net cost to the State for Weil billing for discounted fees and expenses for the investigation is approximately $400,000, after deducting approximately $650,000 for recoveries and fines from N.K.S., Tigani, Erkan, United Medical, and Zimmerman (all of which have already been paid except the fine and judgment imposed on Tigani).

establish limits on the amounts of contributions.[35] The campaign finance statute also provides for enforcement, and certain violations of the campaign finance laws are subject to criminal penalties.

2. Reporting Requirements

Every candidate for election to a state office in Delaware (except for certain offices paying less than $1000, such as school boards) must file with the State Election Commissioner a report of his or her candidate committee's contributions and expenditures.[36] Under Section 8030(d) of Title 15, such reports must include, among other things, the following information: (1) the full name and mailing address of each person who has made aggregate contributions over $100 to the political committee (contributions include, *e.g.*, the purchase of tickets to luncheons or other fundraising events), (2) the total of all contributions from such persons during the election period, (3) the amount and date of all contributions from each such person during the reporting period; (4) all in-kind contributions the fair market value of which, less any amount paid by the candidate or political committee, exceeds $100; (5) the total amount of contributions not reported in the itemized manner described above; (6) the total proceeds from ticket sales for fundraising events, collections at fundraising events, and sales of campaign items such as pins or badges; (7) any contributions over $100 not otherwise reported; (8) the total receipts of the political candidate or candidate during the reporting period.[37]

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[35] *See* DEL. CODE ANN. tit. 15, § 8001 ("The purpose of this chapter is to protect the public interest by requiring full disclosure of the source of all funds used in political campaigns, providing reasonable limits on the amounts of contributions and providing a manner to enforce this law.").

[36] DEL. CODE ANN. tit. 15, § 8030(a).

[37] DEL. CODE ANN. tit. 15, § 8030(d).

Campaign finance reports filed in accordance with Section 8030 are public and are available for inspection and copying at the office of the Commissioner[38] or on the State of Delaware website. Any reporting party who knowingly files a false report or fails to file a report required under the statute is guilty of a class A misdemeanor.[39]

3. Contribution Limits

Delaware law limits contributions from individuals or entities to $1200 per election period for statewide offices, such as governor or attorney general, and to $600 per election period for non-statewide offices, such as state senator or representative.[40] Delaware further limits contributions to $20,000 per election period to political parties.[41] For the purpose of the limits on contributions to candidates, general and primary elections are separate election periods.[42] Any person who knowingly makes or accepts a contribution in violation of the contribution limits is guilty of a class A misdemeanor.[43]

The massive reimbursement scheme employed by Tigani and N.K.S. was designed to and did circumvent the contribution limits and conceal the extent of N.K.S. contributions from the public and governing agencies. The key provision setting forth the contribution limits is Title 15, Section 8010(a) of the Delaware Code, which provides:

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[38] DEL. CODE ANN. tit. 15, § 8032.

[39] DEL. CODE ANN. tit. 15, § 8043(c); *see also* DEL. CODE ANN. tit. 15, § 8043(e) (permitting reasonable reliance on information provided to the campaign).

[40] DEL. CODE ANN. tit. 15, § 8010(a).

[41] DEL. CODE ANN. tit. 15, § 8011.

[42] DEL. CODE ANN. tit. 15, § 8002(11)(a).

[43] DEL. CODE ANN. tit. 15, § 8043(b).

> No person (other than a political party) shall make, and no candidate, treasurer or anyone acting on behalf of any candidate or candidate committee shall accept, any contribution which will cause the total amount of such person's contributions to or in support of such candidate to exceed, with respect to a statewide election, $1,200 during an election period, or with respect to any election that is not statewide, $600 during an election period.

Current law permits contributions from corporations and other entities, subject to certain notice and attribution rules. Section 8012(e) of Title 15 provides:

> A corporation, partnership or other entity (other than a political committee) which makes a contribution to a political committee shall notify such political committee in writing of the names and addresses of all persons who, directly or otherwise, own a legal or equitable interest of 50 percent or greater (whether in the form of stock ownership, percentage of partnership interest, liability for the debts of the entity, entitlement to the profits from the other entity or other indicia of interest) in such corporation, partnership or other entity, or that no such persons exist. The political committee may rely on such notification, and should the notification provided by the representative of the entity be inaccurate or misleading, the person or persons responsible for the notification, and not the political committee which received the contribution, shall be liable therefor. A ratable portion of the contribution by the corporation, partnership or other entity shall be deemed to be a contribution under this chapter to the political committee by each such person who owns a 50 percent or greater interest in the entity, shall be included within the limit imposed by this section on individual contributions, and shall be so included in the reports filed by the candidate committee with the Commission under § 8030 of this title.[44]

4. Criminal Penalties Under Campaign Finance Laws

In addition to capping contributions and requiring the disclosure of the source of contributions, Delaware's campaign finance statute also prohibits conduct that circumvents the law's goals of enhancing transparency, limiting contributions, and supporting public trust in the electoral process. For example, Section 8006(a) of the statute prohibits contributions that are solicited, offered, or given in exchange for an official act of a public official. That provision reads: "No person shall, directly or through any other person, solicit or promise any contract,

[44] As noted *supra* note 19, Section 8012(e), among other provisions of the campaign finance law, was amended on August 15, 2012, effective June 30, 2013. The pre-amendment version of the statute is quoted here.

any vote, any employment or other service, or any official action or lack of action, in connection with any contribution."[45]

Another provision of the statute, Section 8006(b), prohibits contributions with respect to which the true identity of the donor is not given. This is the statute that prohibits reimbursement of campaign contributions and was the principal statute implicated by the conduct that resulted in the criminal charges and civil settlements arising out of this investigation. The statute reads:

> No person shall make, and no candidate, treasurer or other person acting on behalf of a candidate or political committee shall knowingly accept a contribution made in a fictitious name or in the name of another person. No person shall make, and no candidate, treasurer or other person acting on behalf of a candidate or political committee shall knowingly accept a contribution whose donor's true name and address is not made known to the political committee that receives it.[46]

The principal penalty provision in Title 15 is Section 8043, which provides in its entirety as follows:

> §8043. Violations; penalties; jurisdiction in Superior Court
>
> (a) Except as set forth in § 8044 of this title, any person who knowingly violates any provision of § 8003, § 8004 or § 8005 of this title shall be guilty of a class B misdemeanor.
>
> (b) Any person who knowingly accepts or knowingly makes an unlawful contribution or expenditure in violation of any provision of subchapter II or III of this title shall be guilty of a class A misdemeanor.
>
> (c) Any reporting party who knowingly files any report required under this chapter that is false in any material respect, or fails to file any such report, shall be guilty of a class A misdemeanor. For purposes of this subchapter, "reporting party" means any candidate, treasurer or other person required to file reports under this chapter.
>
> (d) Any person who knowingly violates any provision of § 8006 of this title shall be guilty of a class G felony.
>
> (e) A reporting party who reasonably relies upon information provided by another person which is inaccurate, false or misleading and who has no reason to know

[45] DEL. CODE ANN. tit. 15, § 8006(a).

[46] DEL. CODE ANN. tit. 15, § 8006(b).

that such information was inaccurate, false or misleading, shall not be liable for any report filed by such reporting party which is inaccurate, false or misleading as a result of such information, if such reporting party, within 30 days after learning that such information was inaccurate, false or misleading, files an amended report with the Commissioner that corrects the inaccurate, false or misleading aspects of the report. Where a reporting party files an amended report later than 30 days after learning that such information was inaccurate, false or misleading, the reporting party shall not be liable if the reporting party shows good cause for filing the amended report beyond the 30-day period.

(f) The Superior Court shall have jurisdiction over all offenses under this chapter.

(g) A reporting party shall report immediately to the Commissioner and the Attorney General any attempt to make a prohibited contribution, or to demand a prohibited expenditure, where such attempt is made with intent to violate this chapter.

(h) A reporting party who receives a prohibited contribution or makes a prohibited expenditure without any intention to violate this chapter, but who returns the contribution or reimburses the political committee or other person making expenditure within 7 days after learning that the contribution or expenditure was prohibited, shall not be liable for any violation of this chapter.

(i) A reporting party who violates §8021 of this title shall be assessed a fine by the Commissioner of $500 or 25% of the cost of the campaign advertisement subject thereto, whichever is greater.[47]

Under the key language of Sections 8006(b) and 8043(d), it is a class G felony to knowingly make a contribution in the name of another person or without making known to the recipient political committee the donor's true name and address.[48] A person convicted of a class G felony is subject to a potential sentence of imprisonment of up to two years and such fines and penalties as the court deems appropriate.[49] A five-year statute of limitations applies.[50]

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[47] DEL. CODE ANN. tit. 15, § 8043. This statute is quoted as amended on August 15, 2012. The amendments did not change the classification of violations of Section 8006, Section 8010, or other provisions implicated in this investigation.

[48] DEL. CODE ANN. tit. 15, § 8043(d).

[49] DEL. CODE ANN. tit. 11, § 4205(b)(7), (k).

[50] DEL. CODE ANN. tit. 11, § 205(b)(1).

A knowing violation of the campaign limits set forth in Title 15, Section 8010(a) of the Delaware Code is a class A misdemeanor. A campaign will not be liable for unintentionally accepting a contribution that exceeded the contribution limits (or otherwise constituted a prohibited contribution) if the campaign returns the contribution within seven days after learning that the contribution was prohibited.[51] A three-year statute of limitations applies to class A misdemeanors.[52]

B. *Other Criminal Provisions*

1. Group Conduct: Accomplice Liability, Organizational Liability, Conspiracy

The specific laws governing campaign contributions discussed above are the principal statutes applicable to the conduct under investigation. In addition, criminal law provisions in Title 11 further augment the contribution-specific prohibitions. Delaware law creates criminal liability for conduct committed by another person or through joint action. First, under Delaware's accomplice liability statute, a person who "attempts to cause another person to commit" a crime or "[a]ids, counsels or agrees or attempts to aid the other person in planning or committing" the crime can be held criminally responsible for the crime.[53] For example, accomplice liability might arise under this provision if a person (the accomplice) convinces a straw donor and a reimburser to engage in a campaign contribution reimbursement scheme, even if the accomplice does not make or receive a contribution or make or receive a reimbursement.

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[51] DEL. CODE ANN. tit. 15, § 8043(h). See *infra* Section V.C. for discussion of some campaigns' practice of donating tainted, reimbursed contributions to charities rather than "returning" them to the wrongdoers and suggestions for amendment of the statute in this regard.

[52] DEL. CODE ANN. tit. 11, § 205(b)(2). The penalty for a class A misdemeanor is up to one year of incarceration at level V and such fine up to $2,300, restitution, or other conditions as the court deems appropriate. DEL. CODE ANN. tit. 11, § 4206(a).

[53] DEL. CODE ANN. tit. 11, § 271(2).

Second, under Delaware law an organization may be criminally liable when the organization's conduct constituting the offense meets any of the following criteria: (1) the conduct consists of "an omission to discharge a specific duty of affirmative performance imposed on organizations by law;" (2) the conduct "is engaged in, authorized, solicited, requested, commanded or recklessly tolerated by the board of directors or by a high managerial agent acting within the scope of employment and in behalf of the organization;" or (3) the conduct "is engaged in by an agent of the organization while acting within the scope of employment and in behalf of the organization" and either (i) "[t]he offense is a misdemeanor or a violation" or (ii) "[t]he offense is one defined by a statute which clearly indicates a legislative intent to impose such criminal liability on an organization."[54] Accordingly, if an entity reimburses its employees for contributions, and this conduct is coordinated or knowingly tolerated by the entity's board or upper management, then that entity may be held liable for criminal violations of Delaware's campaign contribution laws.

Third, group conduct may also result in criminal liability under Delaware's conspiracy statute. Conspiracy occurs when a person, "intending to promote or facilitate the commission of a felony," either:

> (1) Agrees with another person or persons that they or 1 or more of them will engage in conduct constituting the felony or an attempt or solicitation to commit the felony; or
>
> (2) Agrees to aid another person or persons in the planning or commission of the felony or an attempt or solicitation to commit the felony; and the person or another person with whom the person conspired commits an overt act in pursuance of the conspiracy.[55]

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[54] DEL. CODE ANN. tit. 11, § 281.

[55] DEL. CODE ANN. tit. 11, § 512.

If a group of employees or officers of an entity (or any other group of people) agrees to circumvent campaign contribution limits or to engage in an illegal campaign contribution reimbursement scheme, they may be criminally liable under Delaware's conspiracy statute.

2. RICO

Delaware's racketeering statute (RICO) prohibits the use and exploitation of legal and illegal enterprises to further criminal activity through a pattern of racketeering.[56] The Delaware Attorney General can bring an action for damages, civil forfeiture, and a civil penalty of up to $100,000 for each incident of activity constituting a RICO violation.[57] Delaware's RICO statute provides that it is unlawful "for any person employed by, or associated with, any enterprise to conduct or participate in the conduct of the affairs of the enterprise through a pattern of racketeering activity" or "for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property or personal property, of any nature, including money."[58]

"Racketeering" activities include, among other things, "[a]ny activity constituting any felony which is chargeable under the Delaware Code."[59] Under Delaware law, a "pattern of racketeering" is comprised of "incidents of conduct" which, for civil RICO: (1) must constitute "racketeering activity;" (2) must be related to the affairs of the enterprise; (3) may not be so closely related to each other and connected in point of time and place that they constitute a single

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[56] DEL. CODE ANN. tit. 11, § 1501.

[57] DEL. CODE ANN. tit. 11, § 1505(b).

[58] DEL. CODE ANN. tit. 11, § 1503(a)-(b); *see also* DEL. CODE ANN. tit. 11, § 1503(c)-(d) (setting forth other RICO violations).

[59] DEL. CODE ANN. tit. 11, § 1502(9)(b).

event; and (4) occur within 10 years of one another.[60] Case law interpreting the RICO statute also requires the State, in order to show a pattern of racketeering, to prove that "'the racketeering predicates are related, and that they amount to or pose a threat of continued criminal activity.' The State may establish the threat of continued criminal activity by showing that 'the predicate acts themselves involve threats of long-term racketeering activity, or . . . [that] the predicate acts are part of an entity's regular way of doing business.'"[61]

Racketeering charges may apply to campaign finance schemes that are carried out through a business organization. A business that coordinates contributions prohibited under Title 15, Section 8006(b) in order to achieve legislative action or inaction that financially benefits the business may be criminally liable for racketeering under Title 11, Section 1503(b) because: (1) violation of Section 8006(b) is a felony[62] and may constitute the predicate act if repeated in a pattern of racketeering activity; and (2) if the business succeeds in obtaining such pecuniary gains for the business through favorable legislation, it has acquired an interest in those ill-gotten proceeds through a pattern racketeering activity, in violation of Section 1503(b).

C. *Other Legal Issues Explored by Independent Counsel's Team*

1. Bribery Laws

Delaware bribery laws provide, in relevant part, that a person is guilty of bribery when the person "offers, confers or agrees to confer a personal benefit upon a public servant upon an *agreement or understanding* that the public servant's vote, opinion, judgment, action, decision or

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[60] DEL. CODE ANN. tit. 11, § 1502(5)(a)-(b).

[61] *Kendall v. State*, 726 A.2d 1191, 1194 (Del. 1999) (quoting *Stroik v. State,* 671 A.2d 1335, 1342 (Del. 1996), and *United States. v. Pelullo,* 964 F.2d 193, 208 (3d Cir. 1992)).

[62] DEL. CODE ANN. tit. 15, § 8043(d).

exercise of discretion as a public servant will thereby be influenced."[63] A person is also guilty of bribery when "the person offers, confers or agrees to confer a personal benefit upon a public servant for having violated a duty as a public servant."[64] Bribery is a class E felony in Delaware. Prosecution for bribery requires proof of a quid pro quo element and that the perpetrator had the intent to corruptly influence an official in the discharge of duty (or, in the case of the official, to be corruptly influenced).[65]

It is often difficult to show that campaign contributions are bribes. For example, it is very difficult to prove what (if anything) a contributor may be seeking to "buy" with a contribution beyond seeking the public official's (or potential public official's) favor, audience, and time, rather than a specific vote or other official act. In the absence of such a quid pro quo, contributions fall into the category of "pay-to-play" practices. Such pay-to-play contributions, standing alone, may not constitute bribery, but they do represent a "soft corruption" culture. They have recently gained public attention and spurred some legal reform in other jurisdictions.[66]

2. Public Integrity

Delaware has a State Public Integrity Commission (PIC), the mission of which is to promote high standards of ethical conduct in state government.[67] The Commission consists of

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[63] DEL. CODE ANN. tit. 11, § 1201(1) (emphasis added).

[64] DEL. CODE ANN. tit. 11, § 1201(3).

[65] *See State v. Wallace*, 214 A.2d 886, 889 (Del. Super. Ct. 1963).

[66] *See, e.g.*, MSRB Rule G-37 (regulating broker dealers that underwrite municipal bonds); 17 C.F.R. § 275.206(4)-5 (regulating investment advisors); New Jersey Prohibition on Business Entity Contributions, N.J.S.A. 19:44A-20.3-.25 (contribution made prior to the award of a government contract may disqualify the business entity from receiving the contract). These reforms however, focus on pay-to-play payments from government contractors and other similarly situated persons who are particularly dependent on the discretion of public officials.

[67] DEL. CODE ANN. tit. 29, §§ 5803, 5808.

seven members appointed by the governor and confirmed by the Senate.[68] It has a Commission Counsel as its legal representative. The Commission Counsel investigates, among other things, information that the Commission receives relating to potential violations of the ethics laws that regulate the conduct of officers and employees of the state. Ethics rules that may spur an investigation include prohibitions on acting in an official capacity where the public official has a financial or personal interest[69] and requirements that public officers file accurate reports disclosing their financial interests, including the receipt of gifts in excess of $250.[70] After investigation, notice, and a hearing, the Commission act by resolution to recommend such disciplinary action for violations of these ethics rules as it deems appropriate.[71]

Any public officer who willfully fails to file a required report shall be guilty of a Class B misdemeanor, and a public officer who knowingly files a false report shall be guilty of a Class A misdemeanor. The PIC may refer any suspected violation to its Counsel or the Attorney General for investigation and prosecution.[72] The statutes of limitation for crimes within the PIC's purview are set forth below in Section IV.D. Although the statutes of limitations for Class A and Class B misdemeanors are three years and two years respectively,[73] the statute of limitations is extended such that prosecution of an incumbent public officer for these offenses may be commenced "at any time when the defendant is in public office or employment or within two

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[68] DEL. CODE ANN. tit. 29, § 5808(a).

[69] DEL. CODE ANN. tit. 29, § 5805(a).

[70] DEL. CODE ANN. tit. 29, § 5813(a)(4)(e). The definition of a "public officer" includes "any person elected to any state office." DEL. CODE ANN. tit. 29, § 5812(n)(1). Lobbyists are also required to file reports with the PIC. DEL. CODE ANN. tit. 29, §§ 5832, 5835.

[71] DEL. CODE ANN. tit. 29, § 5809(3).

[72] DEL. CODE ANN. tit. 29, § 5815.

[73] DEL. CODE ANN. tit. 11, § 205(b)(2)-(3).

years thereafter" but not more than three years beyond the time the statute would have expired without the incumbency extension.[74]

3. Lobbying

Delaware's lobbying laws in effect before January 1, 2013, required each lobbyist to register with the State Public Integrity Commission, providing his or her name, residence and business address, occupation, name and business address of the lobbyist's employer, the date on which the employment as a lobbyist commenced, the length of time the employment is to continue, and the subject matter of the legislation, regulation, or administrative action to which the employment relates at the time.[75] A lobbyist must file quarterly financial reports for each employer he or she represents, including expenditures, costs, or values (whichever is greater) of goods in the following categories provided to public officials: (1) food and refreshment; (2) entertainment, including the cost of maintaining a hospitality room; (3) lodging expenses away from home; (4) fair value of travel over 100 miles; (5) recreation expenses; and (6) gifts or contributions, excluding political contributions.[76]

Certain new lobbying laws became effective on January 1, 2013. In part, the new law modernizes the old (such as by providing for electronic filing). It also adds welcome transparency by providing a new restriction that lobbyists may not:

> promote, advocate, influence or oppose any bill or resolution pending before the General Assembly by direct communication with a member of the General Assembly, the Lieutenant Governor, or the Governor, or any proposed regulation pending before a state agency by direct communication with an employee or official of that state agency, unless the lobbyist reports to the Commission the

[74] DEL. CODE ANN. tit. 11, § 205(d).

[75] DEL. CODE ANN. tit. 29, § 5832.

[76] DEL. CODE ANN. tit. 29, § 5835.

> identity by number of each bill or resolution, and by number and/or title each regulation, in connection with which the lobbyist has made or intends to make such direct communication, and the name of the employer on whose behalf such direct communication occurred.[77]

These reports are to be posted on the internet by the Commission.[78]

Penalties for violations of the law remain largely unchanged: knowingly failing to register as a lobbyist is a misdemeanor; knowingly furnishing false information in any registration, authorization, or report is a misdemeanor; and failing to file a required report or authorization will cause the lobbyist to be deemed to have cancelled his or her registration. The Commission may refer any suspected violation of these laws to the Commission Counsel for investigation and may refer concerns to the Attorney General for investigation and prosecution.[79]

Disclosure of lobbyists' interests in particular legislation and disclosure of campaign contributions by lobbyists and PACs associated with such lobbyists is probably the best way to deal with the issue. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.[80] We trust that the new transparency in Delaware will lead to a positive policy outcome.

4. Hindering Prosecution and False Statements to Law Enforcement

Independent Counsel's team also had reason to consider Delaware laws relating to the obstruction of investigations. Delaware's law on hindering prosecution has been in effect for years. The statute provides as follows:

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[77] DEL. CODE ANN. tit. 29, § 5836(a) (effective Jan. 1, 2013).

[78] DEL. CODE ANN. tit. 29, § 5836(d).

[79] DEL. CODE ANN. tit. 29, § 5838.

[80] LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT ch. V (1914), *available at* http://www.law.louisville.edu/library/collections/brandeis/node/191.

> A person is guilty of hindering prosecution when, with intent to prevent, hinder or delay . . . the lodging of a criminal charge against[] a person whom the person accused of hindering prosecution knows has committed acts constituting a crime, or is being sought by law-enforcement officers for the commission of a crime, the person accused of hindering prosecution: . . . (4) Prevents or obstructs, by means of . . . deception, anyone from performing an act which might aid in the . . . lodging of a criminal charge against the person; or (5) Suppresses, by an act of concealment, alteration or destruction, any physical evidence which might aid in the . . . lodging of a criminal charge against the person.[81]

Hindering prosecution is a class G felony if the underlying crime is a felony; if the underlying crime is not a felony, then hindering prosecution is a misdemeanor.[82]

In 2012, the General Assembly passed, and the Governor signed into law, a new statute on Providing a False Statement to Law Enforcement. This law provides:

> A person is guilty of providing a false statement to law enforcement when, with intent to prevent, hinder or delay the investigation of any crime or offense by a law-enforcement officer or agency, the person knowingly provides any false written or oral statement to the law-enforcement officer or agency when such statement is material to the investigation.[83]

As above, where the underlying crime under investigation is a felony, a violation of this section is a class G felony; where the underlying crime under investigation is not a felony, a violation of this section is a misdemeanor.[84]

This is a very good and important new law. It compares favorably with federal law, at least with respect to false statements to law enforcement officers.[85] Both laws operate in such a way that witnesses and investigation targets are deterred from lying to or hiding information

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[81] DEL. CODE ANN. tit. 11, § 1244(a).

[82] DEL. CODE ANN. tit. 11, § 1244(b)-(c).

[83] DEL. CODE ANN. tit. 11, § 1245A(a).

[84] DEL. CODE ANN. tit. 11, § 1245A(c)-(d).

[85] The federal law is broader. *See* 18 U.S.C. § 1001(a) (prohibiting materially false statements or concealments in connection with "any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States").

from any law enforcement officer, including prosecutors (or the Independent Counsel's team), or otherwise impeding an investigation. A chart showing the comparison with federal law is below:

18 U.S.C. § 1001	**Del. Code Ann. tit. 11, § 1245A Providing a false statement to law enforcement; class G felony; class A misdemeanor**
(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully- (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statements or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both. (b) Subsection (a) does not apply to a party to a judicial proceeding, or that party's counsel, for statements, representations, writings or documents submitted by such party or counsel to a judge or magistrate in that proceeding. (c) With respect to any matter within the jurisdiction of the legislative branch, subsection (a) shall apply only to- (1) administrative matters, including a claim for payment, a matter related to the procurement of property or services, personnel or employment practices, or support services, or a document required by law, rule, or regulation to be submitted to the Congress or any office or officer within the legislative branch; or (2) any investigation or review, conducted pursuant to the authority of any committee, subcommittee, commission or office of the Congress, consistent with applicable rules of the House or Senate.	(a) A person is guilty of providing a false statement to law enforcement when, with intent to prevent, hinder or delay the investigation of any crime or offense by a law-enforcement officer or agency, the person knowingly provides any false written or oral statement to the law-enforcement officer or agency when such statement is material to the investigation. (b) As used in this section: (1) A "statement" is any oral or written assertion and includes, but is not limited to, any oral utterance, any written document or instrument, any computer-generated document or instrument, any police report, or any representation that a person makes under circumstances evidencing an intent that such be used or knowledge that a law-enforcement officer or agency may use such as an assertion of fact. (2) A statement is "false" when such statement contains untrue, incomplete or misleading information concerning any fact or thing material to the investigation of a crime or offense by a law-enforcement officer or agency. (3) A statement is "material" when, regardless of its eventual use or admissibility in an official proceeding, it could have affected the course or outcome of the investigation of a crime or offense by a law-enforcement officer or agency. (4) An "official proceeding" includes any action or proceeding conducted by or before a legally constituted judicial, administrative or other governmental agency or official, in which evidence or testimony of witnesses may properly be received. (c) Providing a false statement to law-enforcement is a class G felony if the crime or offense being investigated is a felony. (d) Providing a false statement to law-enforcement is a class A misdemeanor if the crime or offense being investigated is other than a felony.

D. *Statutes of Limitations*

Prosecutions under Title 15, Section 8006(b) for knowingly making a campaign contribution in the name of another—a class G felony—must occur within 5 years after the crime is committed.[86] A three-year statute of limitations applies to prosecutions for class A misdemeanors, such as making false reports or making illegal contributions over the statutory cap (including when such excessive contributions result from the attribution of entity contributions to an individual who holds a 50% or greater interest in the entity, under Section 8012(e) of Title 15).[87] Prosecutions for class B or C or unclassified misdemeanors must be commenced within two years after the offense is committed.[88]

The statute of limitations may be tolled, however, when the actor has concealed his crime or, more specifically, when "the accused's acts include or constitute forgery, fraud, breach of fiduciary duty or actively concealed theft or misapplication of property by an employee, pledgee, bailee or fiduciary."[89] In such circumstances, the prosecution must commence within two years after the discovery of the offense (or after the discovery of the offense should have been made), but the statute of limitations will not be extended more than three additional years.[90] Another tolling provision applies with respect to charges of official misconduct. Specifically, prosecution for any offense based upon an incumbent public officer's or employee's misconduct in office may be commenced at any time when the defendant is in public office or employment or within

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[86] DEL. CODE ANN. tit. 11, § 205(b)(1).

[87] DEL. CODE ANN. tit. 11, § 205(b)(2).

[88] DEL. CODE ANN. tit. 11, § 205(b), (c).

[89] DEL. CODE ANN. tit. 11, § 205(c).

[90] *Id.*

2 years thereafter.[91] As with tolling for fraud or concealment, this provision may not extend the statute of limitations more than three years beyond the original limitations period.[92]

For the purpose of these time limitations, "[a]n offense is committed either when every element [of the offense] occurs, or, if a legislative purpose to prohibit a continuing course of conduct plainly appears, at the time when the course of conduct or the defendant's complicity therein is terminated. Time starts to run on the day after the offense is committed."[93]

V. SUMMARY OF FINDINGS RELATING TO CAMPAIGN CONTRIBUTIONS

A. *Reimbursement Schemes*

1. N.K.S. and Christopher Tigani

The investigation revealed that from 2002 through 2008 N.K.S. made campaign contributions in violation of Delaware law totaling more than $200,000. Tigani directed N.K.S. employees, their relatives, and others to make such contributions to the political committees of candidates for state office[94] chosen by Tigani and caused N.K.S. to reimburse the contributors for those contributions, in violation of Title 15, Section 8006(b) of the Delaware Code. The reimbursements were recorded on a ledger account maintained on the company's books and records as the "contributions account." Tigani also caused N.K.S. to reimburse contributions

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[91] DEL. CODE ANN. tit. 11, § 205(d).

[92] *Id.*

[93] DEL. CODE ANN. tit. 11, § 205(f). The Delaware RICO statute contains a specific statute of limitations for civil RICO actions. It allows the civil action to be commenced within five years "after the conduct made unlawful under section 1504 of this title or when the cause of action otherwise accrues or within any longer statutory period that shall be applicable." DEL. CODE ANN. tit. 11, § 1505(f).

[94] Unless otherwise indicated, references to "candidates" are to candidates for election to state office in Delaware. In addition to contributions to candidate committees, N.K.S. also reimbursed contributions in the total amount of $50,000 made to political parties, in violation of Title 15, Section 8006(b) of the Delaware Code and the contribution limits imposed by Title 15, Section 8011 of the Delaware Code.

that he himself made to the candidate committees. These contributions and reimbursements were part of a scheme by Tigani to evade the campaign contribution limits imposed by Title 15, Section 8010, and were made for the purpose of gaining influence with political candidates with the expectation that benefits would accrue to N.K.S.

In a typical transaction, Tigani would direct an N.K.S. employee (the "straw donor") to write a check to a candidate's campaign in a specified amount, with the explicit or implicit understanding that N.K.S. would reimburse the straw donor. The check would be drawn on the straw donor's bank account and would bear the straw donor's name, address, and signature. N.K.S. would then provide the straw donor with an N.K.S. non-payroll check, which the straw donor would deposit in his or her bank account. Thus, in truth and in fact, the contribution to the campaign, which was represented to the campaign as a contribution by the straw donor, was in fact a contribution by N.K.S. Such contribution therefore violated Title 15, Section 8006(b), because it was made "in the name of another person" and the "donor's true name and address [were] not made known to the political committee that receive[d] it."[95]

Tigani frequently would direct contributions by (and promise reimbursement to) multiple straw donors; he would then collect (or cause to be collected) the straw donors' checks and present the collected checks, as a group, to the campaign—thereby ensuring that the campaign recognized Tigani's role in procuring the contributions, in order to curry favor with the candidates. "Bundling" of campaign contributions—in the sense of grouping legal contributions—is a common practice, and is not illegal in the absence of reimbursement or some other violation of the law. When coupled with a reimbursement scheme or other illegal

[95] DEL. CODE ANN. tit. 15, § 8006(b).

practices, however, bundling highlights concerns about the role of money in the electoral process.

Many of the contributions to state candidates that comprised the Tigani-N.K.S. reimbursement scheme were made in the maximum amount allowed by statute ($1,200 per contributor per election period for statewide office and $600 per contributor per election period for non-statewide office). When aggregated and appropriately understood as contributions by N.K.S. and not the straw donors, they further caused N.K.S. to exceed the contribution limits set forth in Section 8010(a) of Title 15.

The investigation confirmed that the Tigani-N.K.S. reimbursement scheme included reimbursed contributions to the candidate committees of at least the following candidates:

Joseph R. ("Beau") Biden, III
Colin Bonini
John Carney
Matthew Denn
Robert Gilligan
Valerie Longhurst
Jack Markell
Melanie George-Marshall
David McBride
Ruth Ann Minner
Joseph Miro
Hazel Plant
Roger Roy
Bryon Short
David Sokola
Liane Sorenson
John C. Still
Stephanie Ulbrich
Robert Walls

The investigation identified approximately forty-five individuals whose financial transactions were consistent with the reimbursement scheme. These individuals included N.K.S. employees, spouses and other family members of N.K.S. employees, and other individuals associated with Tigani or N.K.S. The employees who participated in the reimbursement scheme

held various positions in the company, from CEO/owner Christopher Tigani to sales and brand managers and administrative assistants. During the same period in which N.K.S. reimbursed campaign contributions, the employees received substantial bonuses, raises, no-interest loans, and payments for personal expenses.

Typically, but not always, N.K.S. reimbursed an employee within one day of an employee's issuing a check to a candidate committee. Many of the employees and other individuals interviewed reported to investigators that they could not have afforded to make contributions in the amounts directed without receiving reimbursement; indeed, some had insufficient funds in their accounts to cover the checks that they wrote to candidate committees until the reimbursement funds were received.

a. *Christopher Tigani Conviction*

On October 22, 2012, a Delaware grand jury indicted Christopher J. Tigani for eight felony counts of Fraudulent Campaign Contributions Made in a Fictitious Name or in the Name of Another Person, in violation of Title 15, Section 8006(b), and one felony count of Conspiracy Second Degree.[96] On May 7, 2013, Tigani appeared in the Delaware Superior Court and pleaded guilty to three counts of violating Title 15, Section 8006(b) (Contributions in a Fictitious Name or in the Name of Another Person). In accordance with a plea agreement between the State and Tigani, the State recommended that the court impose the following sentence:

- The imposition of three years at Supervision Level V to be suspended immediately for time-served and a probated sentence, the terms of which should include supervision levels and conditions consistent with that of the Defendant's

[96] DEL. CODE ANN. tit. 11, § 512.

federal sentence in Case No. 1:11-R-42-01 GMS so that those terms of supervision may run concurrently.

- A substantial fine of up to $250,000.
- Community service as a condition of probation.

The court sentenced Tigani to two years of Level III probation, 500 hours of community service, and a fine of $108,800 for the three felony counts plus costs (including the Victims' Compensation Fund), for a total of $128,665, for which the court entered a judgment against Tigani.

b. ***N.K.S. Civil Consent Order***

On July 2, 2012, Independent Counsel filed in the Superior Court of Delaware an Information, Non-Prosecution Agreement, and Civil Consent Order (the "N.K.S. Civil Consent Order"). In the Information and Non-Prosecution Agreement that led to the Civil Consent Order, the State asserted that N.K.S. violated criminal campaign finance laws through acts committed by its former president, Christopher J. Tigani. N.K.S. did not admit or deny the criminal allegations against the company.[97] In exchange for the State's entering into a non-prosecution agreement, N.K.S. agreed to pay $500,000 to the State by July 16th, 2012, subject to N.K.S.'s receipt of refinancing. N.K.S. also agreed to be bound for at least five years to certain corporate governance reforms, which Independent Counsel reviewed and approved.

[97] In the Non-Prosecution Agreement, N.K.S. did not admit or deny the charges in the Information relating to violations of Title 15, Sections 8006(b), 8010, and 8043, but did deny, and the State agreed not to prosecute, other criminal allegations that could be brought by the State, including charges of violations of the RICO statute (Title 11, § 1503). In exchange for the non-prosecution agreement by the State through Independent Counsel, N.K.S. agreed to the civil payment of $500,000 and corporate governance reforms.

The Superior Court approved the N.K.S. Civil Consent Order on July 5, 2012.[98] The State received payment of $500,000 from N.K.S. on or about July 13, 2012.

2. Michael Zimmerman

The investigation revealed that between October 16, 2008 and October 26, 2008, Michael Zimmerman directed at least five family members and acquaintances, each of whom was a Florida resident, to contribute $1,200 each to the Markell gubernatorial campaign. Zimmerman reimbursed the straw donors by writing personal checks in the amounts of the contributions. Zimmerman also contributed $1,200 personally to the Markell campaign during that period. The reimbursed contributions violated Title 15, Section 8006(b) of the Delaware Code and caused Zimmerman to exceed the campaign contribution limits imposed by Section 8010 of that title.

On August 5, 2013, a grand jury indicted Zimmerman for one count of violating Title 15, Section 8006(b) (Contributions in a Fictitious Name or in the Name of Another Person). On September 10, 2013, Zimmerman pleaded guilty to that charge. The Superior Court sentenced him to pay a fine of $21,600, one year of Level II probation, and fifty hours of community service.[99] Zimmerman has paid his fine in full.

3. United Medical and Kemal Erkan

The investigation revealed that between August 29, 2008 and September 15, 2008, Kemal Erkan, owner of 100% of United Medical, LLC, directed seven United Medical employees to contribute $250 each to the Markell gubernatorial campaign and caused United Medical to

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[98] Phil Milford, *Delaware Company to Pay $500,000 for Campaign Violations*, BLOOMBERG BUSINESSWEEK, July 5, 2012, http://www.businessweek.com/news/2012-07-05/delaware-company-to-pay-500-000-for-campaign-violations.

[99] Contributions made by Zimmerman-related business entities in violation of Title 15, Section 8012(e) are discussed *infra* Section V.B.3.a.-b.

reimburse the straw donors in the form of purported payroll "bonuses" paid to each straw donor. Moreover, Erkan and United Medical each contributed $1200 to the Markell gubernatorial campaign on or about November 28, 2007. The reimbursed contributions violated Title 15, Section 8006(b) of the Delaware Code and caused Erkan[100] to exceed the campaign contribution limits imposed by Section 8010 of that title.

On September 3, 2013, a Civil Complaint, Non-Prosecution Agreement, Civil Consent Order, and Confession of Judgment was entered in the Delaware Superior Court (the "Erkan Civil Consent Order"). In the Erkan Civil Consent Order, the State asserted that Erkan and United Medical violated Section 8006(b) of the Delaware campaign finance statute through the reimbursement scheme described above. Erkan and United Medical did not admit or deny the allegations. In exchange for the State's entering into a non-prosecution agreement, Erkan and United Medical agreed to pay $7,500 each to the State and to abide by certain corporate governance reforms for five years, and Erkan agreed to perform 100 hours of community service within two years of the entry of the order.

The Superior Court approved the Erkan Civil Consent Order, and the State received payment of $15,000 from Erkan on or about September 9, 2013.

4. Candidates' Knowledge of Reimbursement Schemes

The investigation did not reveal credible evidence to prove beyond a reasonable doubt that any candidate or any member of any candidate's staff or finance committee knew that Tigani, N.K.S., Zimmerman, Erkan, or United Medical reimbursed contributions. Investigators questioned various witnesses and reviewed documents for evidence that any candidate or anyone

[100] Because United Medical reimbursed the straw donors' contributions, the contributions should be deemed as having been made by United Medical. And because Erkan owns 100% of United Medical, 100% of each contribution is attributable to Erkan under Section 8012(e) of Title 15.

acting on behalf of any candidate had knowledge of any reimbursement scheme. As noted in the Executive Summary, if the investigation had yielded credible evidence that could prove beyond a reasonable doubt that any candidate or staffer had such knowledge, the candidate or staffer could face potential criminal liability.[101]

The candidates and staffers who were questioned by investigators all vehemently denied any such knowledge. Some witnesses—certain participants in the reimbursement schemes described above—speculated or suspected that certain candidates or campaign staffers were aware of, or even proposed, a reimbursement scheme. But suspicion and speculation are not evidence and, despite the efforts of the investigative team, corroborating evidence of such misconduct was not uncovered.[102]

Tigani speculated in an interview with investigators that a candidate, and others, must have known of the Tigani-N.K.S. reimbursement scheme. Tigani based his surmise on the facts that (i) the candidate or his agents asked Tigani to raise large sums of money and Tigani bundled and delivered the purported donors' checks to the campaign, and (ii) Tigani believed that certain words used by the candidate or his agents were coded references to a shared knowledge about how contribution laws could be circumvented (but about which Tigani and other person never communicated directly, whether in word or gesture). This is not sufficient evidence from which to draw an inference that any candidate or agent of a candidate knew about the reimbursement scheme.

Zimmerman told investigators that a member of a candidate's campaign staff told him that "reimbursing was the way to do it." He also sent an email to a *News Journal* reporter to this

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[101] *Supra* Section I.B.3.

[102] *See id.*

effect. But he could not identify that person during interviews with investigators. Zimmerman stated that the candidate himself never proposed or otherwise discussed reimbursement with him. He stated that he met, on multiple occasions, with several campaign staff members, and that one of them had suggested reimbursement, but he could not recall which one. This is not sufficient evidence from which to draw an inference that any candidate or agent of a candidate knew about the reimbursement scheme.

Investigators reviewed campaign and contributor documents and emails, public records, campaign databases, and other sources. Investigators also interviewed individuals and found no credible evidence sufficient to support an inference that any candidate or agent of a candidate knew about any reimbursements. The emails and other data that the investigation did uncover were inconclusive, at best. And the statements of Tigani and Zimmerman amounted only to the witnesses' suspicions, speculations, or incomplete memories. However firmly they held their suspicions and speculations, their statements were not supported by probative, admissible evidence. As discussed in the Executive Summary, Delaware statutory and case law, while permitting reasonable inferences from circumstantial evidence, does not bridge the considerable gap between surmise, suspicion, speculation, or skepticism on the one hand and credible proof on the other hand.[103] Thus, this speculation or hazy recollection by Tigani and Zimmerman, even if credible, would not establish a *prima facie* case of knowledge, and the investigation did not locate sufficient evidence—in the statements by Tigani and Zimmerman or otherwise—to create an inference of knowledge sufficient to prove beyond a reasonable doubt that a candidate or campaign staffer knowingly accepted illegal contributions. Therefore, Independent Counsel has no basis to pursue this matter further.

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[103] *See id.* (discussing circumstantial evidence).

B. *Entity Contributions and the Attribution Rule*

1. Use of Entity Contributions to Make Large Contributions

In contrast to the federal law governing contributions to federal political campaigns, [104] Delaware law permits corporations and other business entities to contribute to state political campaigns, subject to the standard contribution limits established in Title 15, Section 8010(a) of the Delaware Code.[105] Contributions by entities that have an owner with a 50% or greater interest in the entity, however, must be attributed ratably to the person who owns such interest. Moreover, an individual contribution to a candidate by a person who owns 50% or more of an entity must be aggregated with that person's ratable portion of any contribution by the entity to that candidate in determining whether the statutory maximum has been exceeded. Specifically, Title 15, Section 8012(e) of the Delaware Code provides as follows:

> A corporation, partnership or other entity (other than a political committee) which makes a contribution to a political committee shall notify such political committee in writing of the names and addresses of all persons who, directly or otherwise, own a legal or equitable interest of 50 percent or greater (whether in the form of stock ownership, percentage of partnership interest, liability for the debts of the entity, entitlement to the profits from the other entity or other indicia of interest) in such

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[104] Federal law prohibits corporate contributions to federal candidates. *See* 2 U.S.C. § 441b(a) (prohibiting contributions by corporations in connection with any election for president, vice president, representative, senator, or delegate or resident commissioner to Congress); *see also* FEDERAL ELECTION COMM'N, THE FEC AND THE FEDERAL CAMPAIGN FINANCE LAW, http://www.fec.gov/pages/brochures/fecfeca.shtml (updated Jan. 2013) (outlining various rules and limits applicable with respect to contributions to campaigns for federal office). Other types of entities, such as partnerships, may contribute if the applicable regulatory scheme is satisfied, including a rule that contributions be attributed to the contributing partners. *See* FEDERAL ELECTION COMM'N, PARTNERSHIPS, http://www.fec.gov/pages/brochures/partner.shtml (updated Jan. 2013) (describing rules and citing applicable regulations).

[105] *See* DEL. CODE ANN. tit. 15, § 8010(a) ("No person . . . shall make, and no candidate . . . shall accept, any contribution which will cause the total amount of such person's contributions to or in support of such candidate to exceed, with respect to a statewide election, $1,200 during an election period, or with respect to any election that is not statewide, $600 during an election period."); *see also* DEL. CODE ANN. tit. 15, § 8002(17) (defining "person" for purpose of the campaign finance laws to include "any individual, corporation, company, incorporated or unincorporated association, general or limited partnership, society, joint stock company, and any other organization or institution of any nature").

> corporation, partnership or other entity, or that no such persons exist. The political committee may rely on such notification, and should the notification provided by the representative of the entity be inaccurate or misleading, the person or persons responsible for the notification, and not the political committee which received the contribution, shall be liable therefor. A ratable portion of the contribution by the corporation, partnership or other entity shall be deemed to be a contribution under this chapter to the political committee by each such person who owns a 50 percent or greater interest in the entity, shall be included within the limit imposed by this section on individual contributions, and shall be so included in the reports filed by the candidate committee with the Commissioner under § 8030 of this title.[106]

Because entity contributions are permitted under Delaware law, groups of business entities under a common effective controller may be used to make contributions in amounts greater than the contribution limits without violating the statute, so long as one person does not own 50% or more of the entity. For example, an individual might own 49% of each of ten entities, the remaining 51% interest in each of which is spread among various members of the individual's family (or other associates). As a practical matter, the 49% owner in such situations frequently operates or controls the business or cooperates with family members (or other associates) to do so; the 49% owner may also be recognized in the community (and by the candidate and campaign staff) as the individual affiliated with that group of businesses and thus be seen as "credited" with the businesses' activities, including campaign contributions. If the 49% owner causes each of the ten businesses to make a maximum contribution of $1,200 to a candidate for statewide office, that individual can effectively cause contributions of $12,000 to the campaign (plus an additional $1,200 individual contribution, if desired) without violating the Delaware campaign finance statute.

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[106] DEL. CODE ANN. tit. 15, § 8012(e). On August 15, 2012, the Governor signed a bill that amended Section 8012(e), among other sections of the campaign finance law, effective June 30, 2013. H.R. 300, 146th Gen. Assem. (Del. 2012). The discussion of Section 8012(e) in this report refers to the pre-amendment version of the statute, which would have applied to the conduct at issue in the investigation. The entity contribution issues discussed in this report—and areas for potential reform—remain substantially the same even if the amended statutory language is considered, however.

The investigation revealed numerous contributions that may fit this pattern—*i.e.* groups of entities with a single "controlling" individual who does not own (or was not established by the investigation to own) 50% or more of the contributing entities. Although such contributions do not violate the current campaign finance laws in Delaware, they raise serious concerns about circumvention of the spirit of the laws, as well as concerns about the "Delaware way," the "pay to play" culture in Delaware, and the potential creation of methods of "gaming" the system. They allow individuals who may own 49% of an entity, but may have effective control over businesses with certain structures, a greater potential influence in the electoral process than those who do not control such businesses, and with little public transparency.[107] Moreover, the statutory language setting forth the 50% ownership rule may be difficult for contributors, political committees, regulators, and law enforcement officers to interpret and apply, particularly in the context of alternative entity business structures such as LLCs.

For example, it can be very difficult to interpret and apply the standard that contributions must be attributed to a person who owns, "directly *or otherwise*," a 50% or greater interest in an entity. Business ownership structures are often complex, and the statute does not clearly define the nature of non-direct interests that implicate the statute (nor, perhaps, could it). Moreover, it can be similarly difficult or impossible for law enforcement officers or investigators to determine, in the campaign-finance context as well as other contexts, which persons or entities have interests—of any type—in any particular entity. It is also simple to form a corporation or other entity, and such entities need not have a business purpose. And other avenues for making political contributions, such as contributing to a PAC, are available.

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[107] *See* Maureen Milford, *Illegal Donations to Markell Discovered,* WILM. NEWS J., Sept. 22, 2013, at A1 ("Critics charge that political giving through LLCs has led to an outsized influence by real estate developers .... Real estate developers often create many separate LLCs .... And they enjoy more privacy about their structure and operations ... than those required by a corporation.").

All of these factors counsel against continuing to permit direct campaign contributions by entities. Although legal if the statute is complied with, the current situation makes no policy sense, in our opinion. In the discussion of suggested reforms below, we therefore propose that the statute be amended to prohibit campaign contributions from entities.

2. Campaigns' Obligations Under Section 8012

The plain language of the statute requires a contributing entity to notify the recipient campaign if any person owns 50% or more of the entity *or that no such persons exist.* The statute permits the campaign to rely on such notification, but only if such notice is received. Moreover, unless it receives notice—in either the affirmative or the negative—regarding ownership, a campaign cannot ensure that it is satisfying the attribution and reporting requirements, which clearly apply to a campaign that receives a contribution from a corporation or other entity. Thus, the reliance provision, the requirement that notice be given by a contributing entity whether or not a 50% or greater owner exists, and the attribution and reporting requirements all lead to the conclusion that the statute requires political committees to obtain notification of entity ownership (*i.e.* either the name and address of each person who, directly or otherwise, owns a legal or equitable interest of 50% or more, *or* that no such person exists) before accepting a contribution from an entity.

Obtaining the necessary information does not appear to have been a common practice among campaigns in Delaware, however. In general, campaign staff members who were interviewed reported that their campaigns notified contributors of the contribution limits and, for some campaigns and contributors, the ownership threshold that triggers attribution of contributions by entities. Some campaign staff members stated that when the campaign received a contribution from a corporation or other entity, campaign staff would "do as much research as

possible" and "do our best to get as much information as possible to make sure we were able to accept that contribution" but could not recall any specific instances in which any research or follow-up had occurred with respect to seeking entity ownership information. The investigation revealed limited, if any, evidence of inquiries by campaigns regarding ownership of entities that made contributions.

3. Investigative Findings with Respect to Entity Contributions

a. *Failure to Attribute Entity Contributions, Without Evidence of Knowledge*

The investigation identified certain contributions from entities in which an individual held a 50% or greater interest for which the recipient campaign did not attribute the entity contributions to the owner(s) but for which investigators found no evidence that the campaign was aware of the ownership structure. In these instances, however, investigators also did not find evidence that the contributors actively misled the campaign. Rather, it appears that contributors failed to provide—and campaigns failed to make appropriate inquiries regarding—ownership information, in violation of Section 8012(e).

Instances in which entity contributions were not properly attributed, but in which there is no evidence that the campaigns were aware that the contributing entities had owners of 50% or more, involved contributions by entities affiliated with Stephen Silver, Ronald Schafer, Michael Zimmerman, Constantine Malmberg, and Salvatore Leone. Investigators' review of public campaign finance records and other evidence, including bank records, identified contributions by entities affiliated with Silver and Schafer that were not properly attributed under Section 8012(e). In August 2008, Capitol Nursing & Rehabilitation Center LLC and Healthcare Hotels LP dba Comfort Suites Orlando each contributed $1,200 to John Carney's gubernatorial primary campaign. Silver and Schafer each owns 50% of each of these entities, yet the contributions

were not attributed pro rata to Silver or Schafer. Schafer also made an individual contribution of $1,200 on September 5, 2008. Thus, in addition to violating Section 8012(e), Schafer's contributions exceeded the limits set forth in Section 8010.[108]

On August 28, 2008, Capitol Nursing & Rehabilitation Center LLC contributed $1,200 to the Jack Markell gubernatorial campaign, and no pro rata attribution was made to Silver or Schafer. On November 7, 2008, Rehab Dynamics and Long Term Care Corp. each contributed $1,200 to the Markell campaign. Silver and Schafer each owns 50% of each of these entities, but no attribution was made. In addition, Schafer contributed $250 on June 14, 2007 and $950 on November 23, 2007, both of which dates were in the same election period as the August 28, 2008 Capitol Nursing contribution.[109] When coupled with half of the Capitol Nursing contribution that is properly attributable to Schafer, Schafer's contributions exceeded the contribution limits by $600.

Investigators did not identify any evidence (i) that Carney or Markell, or any representatives of their respective campaigns, were aware that Silver and Schafer each owned 50% of these entities; (ii) that the contributing entities notified the campaigns, as required by Section 8012(e), that Silver and Schafer owned 50% of the entities; or (iii) that the campaigns made any inquiry regarding the ownership of the entities. Knowing violation of Section 8012(e)

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[108] Because Schafer owns 50% of Capitol Nursing and 50% of Healthcare Hotels, $600 of the contribution made by each of those entities—or $1,200 in total—is attributable to Schafer. When added to Schafer's personal $1,200 contribution, Schafer contributed $2,400 to the Carney campaign in a single election period, thus exceeding the contribution limit by $1,200. *See* DEL. CODE ANN. tit. 15, §§ 8010, 8012(e); *see also* DEL. CODE ANN. tit. 15, § 8002(11)(a)(3) (setting forth the applicable election period for a candidate for election to an office which he does not hold).

[109] *See* DEL. CODE ANN. tit. 15, § 8002(11)(a)(3)-(4) (setting forth the applicable election period for a candidate for election to an office which he does not hold, and providing that "for a candidate in a general election who was nominated for such office in a primary election, the election period shall end on the day of the primary and the next election period shall begin on the day after the primary").

is a class A misdemeanor, with a three-year statute of limitations.[110] The statute of limitations periods for any charges for violations of Section 8012(e) with respect to unattributed contributions by the Silver-Schafer entities therefore expired in August and November 2011, well before these facts were revealed in the investigation.

Investigators' review of public campaign finance records and other evidence, including bank records, also identified contributions by entities affiliated with Michael Zimmerman, Constantine Malmberg, and Salvatore Leone that were not properly attributed under Section 8012(e).[111] On or about October 26, 2008, Black Pearl Marina LLC, Linkside LLC, Linkside Apartments LLC, Linkside Townhomes LLC, and TBC Enterprises LLC each contributed $1,200 to the Jack Markell gubernatorial campaign. Zimmerman indirectly owns 65% of Black Pearl Marina and at least 62.5% of each of Linkside LLC and Linkside Apartments LLC; he directly owns 50% of Linkside Townhomes LLC (Constantine Malmberg owns the other 50%) and 50% of TBC Enterprises (Salvatore Leone owns the other 50%). No pro rata attribution of the contributions by these entities was made.[112] Also on or about October 26, 2008, Michael Zimmerman and Salvatore Leone each contributed $1,200 to the Markell campaign.

There is evidence that, in response to an inquiry from Zimmerman, the campaign notified him of the attribution rules governing entity contributions. But investigators did not identify any evidence (i) that Markell, or any representative of his campaign, was aware that Zimmerman, Malmberg, or Leone owned 50% or more of any of these entities; (ii) that the contributing

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[110] DEL. CODE ANN. tit. 15, § 8043(b); DEL. CODE ANN. title 11, § 205(b)(2).

[111] Contributions by straw donors that Zimmerman improperly reimbursed, for which Zimmerman pleaded guilty to violating Title 15, Section 8006(b), are discussed *supra* V.A.2.

[112] On the same date, State Street Exchange LLC also contributed $1,200 to the Markell campaign. Zimmerman, Malmberg, and another individual each owns 1/3 of that entity. Thus, the State Street contribution did not violate Section 8012(e).

entities notified the campaign, as required by Section 8012(e), that Zimmerman, Malmberg, or Leone held a 50% or greater interest in any of the entities (or that no one held such an interest); or (iii) that the campaigns made any inquiry regarding the ownership of the entities. The statute of limitations periods for any charges for violations of Section 8012(e) with respect to unattributed contributions by the Zimmerman, Malmberg, and Leone entities expired in or about October 2011, well before these facts were revealed in the investigation. Although proper attribution of the entity contributions to Zimmerman and Leone, together with their individual $1,200 contributions, also results in violations of the contribution limits in Section 8010, any charges with respect thereto are similarly barred by the three-year statute of limitations.

b. ***Evidence of Campaigns' Knowledge with Respect to Entity Contributions***

In March 2008, Zimmerman emailed candidate Jack Markell to inquire regarding the law governing entity contributions. Zimmerman wrote:

> Jack What is the max my Zimmal LLC a company I and Conny Malmberg own that operates and owns the dormitories at Wesley College give?

An email from Markell's email account responded:

> Thanks for asking. It depends on how the ownership is split up. If you own 50% or more, then the company can't give, because you are maxed out and it would be attributed to you. If you own less than 50% (even if it's 49.999%), then the company can contribute $1,200.

Then, in October 2008, Zimmal Properties LLC contributed $1,200 to the campaign. Zimmerman and Malmberg each own 50% of Zimmal Properties. The investigation did not reveal any evidence that Zimmal Properties notified the campaign that no one held a 50% or greater interest in the company (which notification would have been false in any event). Nor did the investigation reveal any evidence that the campaign made any further inquiry regarding the ownership of Zimmal Properties, despite the fact that Zimmerman had told the campaign that the company had two owners (from which the campaign should have inferred that at least one person

held a 50% or greater interest in the company). Moreover, the campaign accepted other contributions from entities of which Zimmerman and/or Malmberg owned 50% or more. Thus, the campaign failed to make appropriate inquiries, and in fact accepted an entity contribution without proper attribution under Section 8012(e), even where it had information suggesting that the contribution was improper.

The investigation identified at least one other group of contributions for which there is evidence that a campaign may have had some knowledge that an individual held a 50% or greater interest in certain contributing entities. Yet the campaign did not attribute the contributions to that owner on its campaign finance report or decline or return contributions from such entities that would exceed the contribution limits. In June 2007, an email was sent from Jack Markell's personal e-mail account to Keith Stoltz regarding the entity attribution rules, apparently in response to an inquiry from Stoltz regarding such rules. The email from Markell's account stated:

> It was good to talk to you.
>
> As I mentioned, less than 50% is the cutoff. So if entities are owned 49/49/2, or even 49.9/49.9/.2, then I can take as many of those entity checks as there are.[113]
>
> Below is the specific language from the code. The $1,200 limit applies to individuals as well as corporate entities.
>
> A ratable portion of the contribution by the corporation, partnership or other entity shall be deemed to be a contribution under this chapter to the political committee by each such person who owns a 50% or greater interest in the entity, shall be included within the limit imposed by this section on individual contributions, and

[113] That statement of the law may not appropriately take into account the fact that the 50% ownership provision refers to "persons who, *directly or otherwise*, own a *legal or equitable interest* of 50 percent or greater (*whether in the form of stock ownership, percentage of partnership interest, liability for the debts of the entity, entitlement to the profits from the other entity or other indicia of interest*)." DEL. CODE ANN. tit. 15, § 8012(e) (emphasis added). No Delaware court has applied or interpreted the meaning of this provision, however.

> shall be so included in the reports filed by the candidate committee with the Commissioner under §8030 of this title.
>
> Thanks for your help. . . .

Then in July 2007, an email was sent from another personal email account of Jack Markell, stating, in part: "The maximum contribution is $1,200 per person or $2,400 per couple. In addition it's $1,200 per corporation, partnership, llc, etc."

Several months later, numerous entities affiliated with Stoltz contributed $1,200 each to Jack Markell's campaign for governor. In December 2007, an email was sent from Markell's personal email account to Stoltz, asking for the street addresses of the contributing entities, presumably in connection with preparing year-end campaign finance reports. Approximately one week later, Stoltz's assistant replied by email, with a copy to Stoltz, attaching a spreadsheet that listed the entities, their mailing addresses, the amount contributed, and the check number. The attachment also included a column that indicated the "ownership of property with GP's share"; the column was formatted in such a way that its contents were not immediately visible to an email recipient of the attachment, but they could be viewed by using formatting features of the spreadsheet software. The ownership column indicated 50% ownership for eight of the contributing entities.

There is evidence that Markell, as well as several members of his campaign staff, opened the attachment and reviewed the spreadsheet, though investigators were not able to identify any evidence demonstrating whether or not Markell or any member of his campaign staff viewed the ownership column. Investigators did not identify any evidence that the campaign made any further inquiry regarding the ownership of the entities, attributed the contributions to the 50% owner, or returned the contributions. Then, the following year, six of the entities identified in the ownership column on the December 2007 spreadsheet as having a 50% owner again made

contributions to the Markell campaign of $1,200 each. Yet, again, there is no evidence that the campaign made any further inquiry regarding such ownership, attributed the contributions to the 50% owner, or returned the contributions. The statute of limitations periods for any charges for violations of Sections 8010 or 8012(e) in connection with the unattributed contributions expired by December 2011, well before these facts were revealed in the investigation. Moreover, with respect to Stoltz and the contributing entities, for which indirect interests are implicated in reaching the 50% threshold, it appears that Stoltz was responding to repeated requests for contributions from Markell, Stoltz sought and relied in good faith on advice from the Markell campaign regarding the law governing contributions by entities, and the campaign may have inaccurately stated the law. The investigation found no evidence that Stoltz knowingly violated any campaign finance laws.

c. *Contributions by Other Entities and Individuals*

In order to determine if other companies or individuals might have engaged in campaign contribution reimbursement schemes similar to the schemes carried out by Tigani, N.K.S., Zimmerman, Erkan, and United Medical, investigators reviewed public campaign finance records for patterns of contributions similar to the pattern of contributions in the identified reimbursement schemes. This review identified several groups of contributions with respect to which investigators undertook a thorough analysis.

Entity A Contributors

Investigators identified a pattern of contributions by Entity A, entities affiliated with its parent organization ("Entity A-Affiliated Entities"), and the members and family members of their leadership teams (collectively, the "Entity A Contributors"). The investigative team therefore undertook a more thorough examination of contributions associated with the Entity A Contributors. By using public campaign finance records and other sources, investigators

identified contributions to state candidates by at least twenty-four officers, employees, and their family members of Entity A and the Entity A-Affiliated Entities, including both Delaware and non-Delaware residents.

Between 2004 and 2011, the Entity A Contributors made $95,887.45 in contributions to Delaware candidate and party political committees. Many of these contributions were made in the amount of the legal limit applicable to contributions to the candidates receiving the contributions. The most notable groups of contributions were three groups of contributions to the Jack Markell campaign, in 2008-2010. On October 23, 2008, a group of Entity A Contributors contributed $10,200 to Markell for Delaware. On September 21, 2009, a group of Entity A Contributors contributed $10,800 to Markell for Delaware. Additionally, on August 23, 2010, a group of Entity A Contributors contributed $22,800 to Markell for Delaware.

Investigators reviewed the contributions of the Entity A Contributors for evidence of illegal contributions or reimbursements, with particular emphasis on the contributions made on the three dates identified above. Specifically, investigators reviewed bank records, obtained by subpoena, of the bank accounts of certain Entity A Contributors and the Markell for Delaware campaign. Based on the review of the records, investigators concluded that the reporting by Markell for Delaware was consistent with the contributions that were made. During an interview in 2012, investigators asked Governor Markell about contributions by the Entity A Contributors and, in particular, the Entity A Contributors who were not Delaware residents. Governor Markell stated that he had met one of the Entity A Contributors ("Individual Contributor 1"), who agreed to assist with fundraising for Markell for Delaware. He further stated that Individual Contributor 1 had hosted a fundraising dinner at a restaurant in New York, which now-Governor

Markell attended, along with Individual Contributor 1 and several invitees, who contributed to Markell for Delaware in connection with the event.

Importantly, the investigators found no evidence of reimbursement of any of the contributions nor evidence that any of the contributions of the Entity A Contributors were otherwise illegal.[114] Investigators concluded that there was no indication of any campaign finance violation, by either contributors or the recipient political committees, relating to contributions made by the Entity A Contributors.

Entity B Contributors

Investigators identified a pattern of contributions by entities and individuals (and their family members) affiliated with Individual Contributor 3 (collectively, the "Entity B Contributors"). The investigative team therefore undertook a more thorough examination of contributions by the Entity B Contributors. By using public campaign finance records and other sources, investigators identified contributions to state candidates by at least seventeen entities and officers, employees, and their family members of entities affiliated with Individual Contributor 3.

Between 2006 and 2010, the Entity B Contributors made $33,800 in contributions to the campaign committees of Jack Markell and Beau Biden. Of the twenty-nine individually reported contributions identified, twenty-seven contributions were made in the amount of the legal limit

[114] The review of the records of bank accounts belonging to one of the Entity A Contributors ("Individual Contributor 2") showed no apparent reimbursements by Entity A or any of the Entity A-Affiliated Entities for contributions made by Individual Contributor 2. Investigators did analyze one check drawn on an account of Individual Contributor 2, payable to a family member of Individual Contributor 2, because campaign records showed that the family member made a contribution in the same amount around the same time, on a starter check. Investigators could identify no motive of Individual Contributor 2 for causing the family member to make a contribution and illegally reimbursing that contribution, however, because Individual Contributor 2 had not made a contribution during the same election period and thus could have made the contribution directly, without exceeding contribution limits. Moreover, records revealed that Individual Contributor 2 had, on several other occasions not associated with any contributions, written checks to the family member in amounts consistent with the check at issue.

applicable to contributions to the Jack Markell and Beau Biden campaigns. The most notable groups of contributions were a group of contributions on or about October 9, 2006 to Biden for Attorney General, totaling $13,600, and a group of contributions to Markell for Delaware on or about October 17, 2008, totaling $9,600.

Investigators reviewed the contributions of the Entity B Contributors for evidence of illegal contributions or reimbursements. Specifically, investigators reviewed bank records, obtained by subpoena, of the bank accounts of certain Entity B Contributors and Biden for Attorney General and Markell for Delaware. Based on the review of the records, investigators concluded that the reporting by the candidate committees was consistent with the contributions that were made. Importantly, the investigators found no evidence of reimbursement of any of the contributions nor evidence that any of the contributions of the Entity B Contributors were otherwise illegal.[115]

Investigators concluded that there was no indication of any campaign finance violations, by either contributors or the recipient political committees, relating to contributions made by the Entity B Contributors.

C. *Remedial Action by Campaigns*

When certain candidate committees learned—from media reports, our investigation, or otherwise—about the Tigani reimbursement scheme (or other improprieties), they donated the tainted funds to charitable organizations in the community. For example, in June 2011, after reports of the federal investigation of Christopher Tigani became public, Markell for Delaware

[115] The review of the records of a bank account belonging to one of the Entity B Contributors, an entity affiliated with Individual Contributor 3, identified one check drawn on the account in the amount of $2400 and payable to an individual associated with Individual Contributor 3. A review of public records of campaign contributions failed to identify any campaign contribution made by the recipient individual or any entity associated with that individual.

identified $15,100 in Tigani-related contributions to the campaign between 2002 and 2008. Following that review, the campaign donated $15,200 to four community organizations. Through information obtained by investigators for Independent Counsel, the campaign became aware of an additional $12,000 in Tigani-related contributions to the campaign that had been illegally reimbursed. Upon receipt of that notice, the campaign donated an additional $12,000 to five community organizations.

In July 2011, after reports of the federal investigation of Christopher Tigani became public, the candidate committee for Matthew Denn's campaign for lieutenant governor donated $6,500 to a community organization, based on a newspaper reporter's estimate that the Denn campaign had received $6,500 in Tigani-related contributions. Through contact with Independent Counsel, the campaign became aware of an additional $11,200 in Tigani-related contributions to the campaign that had been illegally reimbursed. Upon receipt of that notice, the campaign donated an additional $11,200 to a community organization.[116]

Questions have recently been raised concerning whether such charitable donations constitute an effective cure, in light of the provisions in Section 8043(h) of the Delaware campaign finance statute. That section provides as follows:

> A candidate or a treasurer who receives a prohibited contribution . . . without any intention to violate [the Delaware campaign finance law], but who returns the contribution ... within 7 days after learning that the contribution ... was prohibited, shall not be liable for any violation of this chapter.[117]

[116] Other campaigns took similar remedial measures with respect to improper or potentially improper contributions about which the campaigns learned from media reports or contact with investigators.

[117] DEL. CODE ANN. tit. 15, § 8043(h).

The concerns that have been publicly expressed cited two points: (i) the statute provides *only* a "return" to the reimburser as a remedy, and (ii) the campaign and the candidate would "look good" by donating to charity.[118]

The most reasonable interpretation of Section 8043(h) is that it is intended primarily to prevent campaigns from benefiting from illegal or excess contributions that they may unknowingly have accepted in the first instance and to provide a safe harbor for campaigns to address their unintentional receipt of prohibited contributions. We therefore conclude that the candidates' conduct in disgorging tainted contributions by donating them to charity rather than returning them to Tigani, N.K.S., or another alleged perpetrator comports with the spirit of the law and should not be subject to prosecution under present circumstances.

Section 8043(h) provides that a "return" of a prohibited contribution, which presumably refers to returning the funds to the contributor, will prevent liability. The literal language of the statute does not establish a charitable donation as a basis for a campaign to divest itself of unintentional acceptance of a prohibited contribution. But the statute also does not *exclude* means other than a return to a perpetrator, including a charitable donation, as potential lawful approaches to dealing with tainted funds. Nor does the statute state that failing to return to the contributor a contribution that the campaign received without knowing that the contribution was prohibited is a basis for criminal liability. In our view, it would not be reasonable to conclude that Section 8043(h) was intended to *require* a return of tainted contributions to a person who intentionally engaged in an illegal reimbursement scheme or other violation of the campaign finance statute. Section 8043(h) simply provides for return to a contributor as one safe harbor.

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[118] *See* Jonathan Starkey, *Biden Rebuffs Call for Probe.* WILM. NEWS J., Aug. 13, 2013, at B1.

A "safe harbor" is an "objectively delineated categor[y] of conduct that will be conclusively deemed not to violate" a broader regulatory scheme.[119] Safe harbors are a legislative tool for dealing with the fact that "it is impossible in any context to write in advance an appropriate, objective and specific rule for every situation."[120] Reading Section 8043(h) as creating a safe harbor method for campaigns to address the not uncommon situation in which a campaign unwittingly receives a contribution in excess of the amounts permitted by the statute leaves open the potential for campaigns to take different approaches to addressing other situations, such as those presented here, without violating the statute.[121]

A return to the reimburser of such contributions would prevent campaigns from benefiting from illegal contributions that they unintentionally accepted—which would be consistent with the goals of the statute. But a return to the reimburser would shift the benefit to the perpetrator who intentionally made the illegal contributions. Thus, the perpetrator would receive a refund of his illegal contributions—which would be inconsistent with the goals of the statute. Therefore, the campaigns' approach of donating the contributions to charity—which

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[119] Andrew Morrison Stumpff, *Case Law, Systematic Law, and a Very Modest Suggestion*, U. Mich. Pub. L. Research Paper. No. 261, at 14 (July 18, 2013), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295245 (emphasis omitted).

[120] *Id.* at 1; *see also id.* ("A legislature that creates even a simple rule like 'No vehicles allowed in the park' will probably never be able to foresee all the necessary exceptions and special applications of that rule. (In the case of this rule these include, among infinite possible examples, an emergency vehicle entering the park in response to a call, a toy car, a motorized scooter, and a war memorial incorporating a real tank.)"); Andrew Morrison Stumpff, *The Law Is a Fractal: The Attempt to Anticipate Everything*, 44 LOY. U. CHI. L.J. 649, 649 (2013) ("Define an inappropriate rule as a rule that, if followed literally, would in at least some cases produce results that can be concluded with reasonable certainty to have been unintended by and unacceptable to even the rule's author. Even under this definition, it is impossible for a rule writer to write an appropriate and objective rule to cover every situation in advance.").

[121] *See* Stumpff, *supra* note 119, at 15 (safe harbors allow legislators to create a general standard while addressing "the specific situations expected to arise most frequently" with "specifically tailored, objective safe-harbor (or unsafe-harbor) rules").

removes the benefit from the campaign without shifting the benefit to the perpetrator—would, in our view, be an approach that comports with the spirit of the law under these circumstances.

Moreover, in our view, it would be irrational and absurd to interpret this statute as going beyond a safe harbor provision and *requiring* the return of an illegal contribution to the reimburser. The statute was not drafted as a requirement. In *Coastal Barge Corp. v. Coastal Zone Industrial Control Board*, the Delaware Supreme Court held that an "irrational or absurd" statutory interpretation must be avoided: "The golden rule of statutory interpretation ... is that unreasonableness of the result produced by one among alternative possible interpretations of a statute is reason for rejecting that interpretation in favor of another that would produce a reasonable result."[122] Thus, the court held that it would not adopt a literal reading of a statute that "would lead to an irrational and absurd result."[123] Under the circumstances that have been revealed in this investigation, it is more reasonable to interpret the statute as leaving open the possibility that a campaign's disgorgement of tainted funds by donation to charity may be a more appropriate approach to dealing with tainted funds (within the confines of the law) than disgorging the funds by returning them to a perpetrator of campaign finance violations.

In sum, we have concluded that a campaign that timely disgorges an allegedly (or proven) reimbursed contribution by a good faith donation to a legitimate, third-party charity should not be prosecuted for failing to carry out the "irrational and absurd" result of being required to return the reimbursed contribution to the perpetrator. Therefore, the Independent Counsel determined that there is no basis to pursue criminal charges against candidates or their

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[122] *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1247 (Del. 1985).

[123] *Id.*

agents who had no knowledge of illegal reimbursements and opted to make charitable contributions rather than returning the funds to Tigani, N.K.S., or another alleged perpetrator.

Recognizing that the statute should be clarified—and to eliminate the inference that candidates or public officials may receive, or may be perceived as receiving, a political or other benefit from contributing to charity—we recommend that Section 8043(h) be amended or rewritten to provide one or more other safe harbors, such as payment of disgorged improper contributions to a specific state or public entity. One potential remedy could make it a safe harbor to donate funds to a state entity such as the Delaware Special Law Enforcement Assistance Fund (SLEAF) in such circumstances. An appropriately drafted provision would ameliorate the concerns that have been expressed regarding candidates' charitable contributions and would make funds available to law enforcement agencies that could be used to enhance enforcement of the campaign finance laws or other law-enforcement goals.

VI. OTHER ISSUES

A. *Gifts to Elected Officials*

1. Public Integrity Law

After reviewing documents and conducting interviews, investigators concluded that certain public officers received valuable gifts of alcohol from Tigani and/or N.K.S. and did not report the gifts as required by law. Delaware law provides that public officers are required to file financial disclosures with the PIC. The law requires that public officers must disclose a variety of financial interests, including receipt of any gift valued at more than $250.[124] Willful failure to

[124] DEL. CODE ANN. tit. 29, § 5813(a)(4)(e). A public officer is defined to include "[a]ny person elected to any state office." DEL. CODE ANN. tit. 29, § 5812(n)(1).

file a required report is a class B misdemeanor.[125] Knowingly filing a report that is false in any material respect is a class A misdemeanor.[126]

Yet office holders who are required to file those reports do not always report gifts that should be reported. The PIC's powers to enforce the legal requirements in its bailiwick are limited and should be strengthened. Unreported gifts of alcohol, concert tickets, and sporting event tickets to elected officials where the value sometimes is over $250 have become a part of the unfortunate "pay-to-play" culture in Delaware politics.

In addition to the reimbursed campaign contributions and violations of the entity attribution rules, the investigation also revealed that Tigani, on behalf of N.K.S., provided valuable gifts (*e.g.*, alcohol and event tickets) to certain Delaware elected officials. The gifts were not reported as required. Neither the gifts nor the failure to report constitute proof of the crime of bribery, [127] but public officials are required to report the receipt of gifts over that dollar amount to the PIC. Although the failure to report is a violation of the PIC Law,[128] such potential violations, as set forth below, will not be prosecuted either because the statute of limitations has run or in the exercise of prosecutorial discretion. Once the law is strengthened, however, law enforcement may take a different approach. Some examples follow.

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[125] DEL. CODE ANN. tit. 29, § 5815(a).

[126] DEL. CODE ANN. tit. 29, § 5815(b).

[127] Investigators did not find any evidence that the crime of bribery as defined in DEL CODE ANN. tit. 11, §1201 would apply to these gifts, as discussed below. Delaware's bribery law is discussed *supra* Section IV.C.1.

[128] DEL. CODE ANN. tit. 29, §5813(a)(4)(e) requires every public officer to report "[a]ny gift with a value in excess of $250 received from any person, identifying also in each case the amount of each such gift. For purposes of compliance with this gift reporting obligation, the recipient may rely in good faith upon the representation of the source of the gift as to the gift's value."

2. Investigative Findings

Investigators concluded that Senator David McBride received a gift of alcohol with a value in excess of $250 without reporting the gift as required by statute.[129] N.K.S. employees who were interviewed reported that, on Fridays in summer, Senator McBride frequently stopped at the N.K.S. warehouse in Milford en route to his vacation home near the beach to pick up alcohol for which he did not pay. Christopher Tigani approved the gifts.

In an interview with investigators, Senator McBride stated that he did stop at the NKS warehouse in Milford en route to the beach to receive alcohol for which he did not pay, but disputed that he did so frequently. Senator McBride estimated that he stopped at the N.K.S. warehouse a total of two or three times.

Investigators concluded that on or about June 13, 2008, Senator McBride received at the N.K.S. warehouse in Milford three cases of Corona Light beer (12-ounce bottles) and a case of Ketel One vodka (a product that N.K.S. did not carry, but which N.K.S. purchased at retail for the purpose of making the gift to Senator McBride). Senator McBride did not pay for this gift, the estimated value of which is at least $330. Senator McBride did not report this gift. In an email to an N.K.S. employee on June 13, 2008, Christopher Tigani wrote: "Taxes aren't going up but [Senator McBride] gets beer and vodka. . . can you have a case of Ketel One 750ml (have to buy) and 3 cases of Corona for him at 2:30 pm TODAY in Milford." When asked to explain this, Tigani told investigators "It means [Senator McBride] does not vote for increased excise tax … This was not a bribe or quid pro quo." Investigators asked Tigani if Senator McBride would have voted the other way if he had not received the gift. Tigani replied, "No." On July 1, 2008, H.B. 518, which would have imposed a 50% increase in the alcoholic beverage tax, was defeated

[129] DEL. CODE ANN. tit. 29, § 5813(a)(4)(e).

in the Senate. Senator McBride voted against the bill. Although this scenario is representative of the "pay-to-play" culture discussed elsewhere in this report, investigators did not identify prosecutable evidence that Senator McBride's vote was the quid pro quo of any gift or promise of a gift by Christopher Tigani and, thus, was not a bribe.

Under the public integrity law, "[a]ny public officer who *knowingly* files any report required by § 5813 . . . that is false in any material respect shall be guilty of a class A misdemeanor."[130] Despite finding that Senator McBride accepted a gift valued in excess of $250 and did not report it on his financial disclosures for the applicable years, thus rendering his reports false in a material respect, investigators concluded that there was insufficient evidence to support beyond a reasonable doubt a charge that Senator McBride knew that the value of the gift exceeded $250. Thus, there is no proof that he "knowingly" filed a false report.

After reviewing documents and conducting interviews, investigators concluded that Senator David Sokola received gifts with a value in excess of $250 without reporting the gifts as required by statute.[131] Documents and interviews revealed that Senator Sokola received tickets to sporting events, the value of which exceeded $250. In an interview with investigators, Senator Sokola reported a variety of sporting events that he attended with tickets provided by N.K.S. or Christopher Tigani.

Investigators reviewed documents identifying at least two separate occasions on which the retail value of the tickets received by Senator Sokola exceeded $250. On or about September 21, 2008, Senator Sokola received three tickets to a Philadelphia Eagles football game, plus a

[130] DEL. CODE ANN. tit. 29, § 5815(b) (emphasis added).

[131] DEL. CODE ANN. tit. 29, § 5813(a)(4)(e).

parking pass. The tickets were for seats in the Club Suites level of the football stadium. He did not pay for this gift, the estimated value of which is approximately $500.

On or about October 26, 2007, Senator Sokola received two tickets to a Philadelphia Eagles football game. The tickets were for seats in the Club Suites level of the football stadium. He did not pay for this gift, the estimated value of which is at least $300.

"Any public officer who knowingly files any report required by § 5813 . . . that is false in any material respect shall be guilty of a class A misdemeanor."[132] Despite finding that Senator Sokola accepted gifts valued in excess of $250 and did not report them on his financial disclosures for the applicable years, thus rendering his reports false in a material respect, investigators concluded that there was insufficient evidence to support a charge beyond a reasonable doubt that Senator Sokola knew that the value of the gifts exceeded $250. Thus, there is no proof that he "knowingly" filed a false report.

After conducting interviews, investigators concluded that on one occasion the candidate committee of Senator Bonini received in-kind campaign contributions without reporting them as required by statute.[133] Documents and interviews revealed that one day in 2004, Christopher Tigani assigned two NKS employees to assist Senator Bonini in erecting campaign signs. The two employees met Senator Bonini at the NKS warehouse in Milford and accompanied the senator in his truck; they worked with Senator Bonini on erecting campaign signs for between four and eight hours. The employees were not volunteers; NKS paid the employees their regular rates of pay for this work. The fair market value of these services is estimated to exceed $100.

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[132] DEL. CODE ANN. tit. 29, § 5815(b). Willful failure to file a required report by a public officer is a class B misdemeanor. DEL. CODE ANN. tit. 29, § 5815(a).

[133] DEL. CODE ANN. tit. 15, § 8030.

A candidate committee must report in-kind contributions "to the extent that the fair market value . . . exceeds $100."[134] "Any candidate or treasurer who knowingly files" a campaign finance report "that is false in any material respect" is guilty of a class A misdemeanor.[135] Despite finding that Senator Bonini received an in-kind contribution of services valued in excess of $100 and did not report them on his campaign finance report for the relevant period, thus arguably rendering his report false in a material respect, investigators concluded that there was insufficient evidence to support a charge beyond a reasonable doubt that Senator Bonini knew that N.K.S. paid the employees for their services to the campaign and thus that the services constituted a reportable contribution.[136] Thus, there is no proof that he "knowingly" filed a false report.

In 2007, Tigani hosted a chartered plane trip to Quebec, Canada, in which he transported then-Governor Ruth Ann Minner and others. In an interview with investigators Tigani stated that the cost of the Quebec charter was "about $17,000 – 18,000." The trip was therefore a valuable gift to those passengers of well over $250. Governor Minner and others who took the trip did not reimburse Tigani or N.K.S. and did not report the gift.

Prosecution of any reporting violation in connection with the Quebec trip would be barred by the applicable statute of limitations as to former office holders. As noted, knowingly filing a report that is false in any material respect is a Class A misdemeanor, and willfully failing

[134] DEL. CODE ANN. tit. 15, § 8030(d)(11).

[135] DEL. CODE ANN. tit. 15, § 8043(c).

[136] During the same reporting period, Christopher Tigani contributed $600 to Senator Bonini's campaign, for which he was reimbursed by N. K.S. Thus, the contributions made by N.K.S. during the period—a $600 monetary contribution plus an in-kind contribution of services the value of which exceeded $100—exceeded the contribution limit for Senator Bonini's campaign. DEL. CODE ANN. tit. 15, § 8010(a). But investigators identified no evidence that Senator Bonini knew that N.K.S. reimbursed Christopher Tigani for his contribution and that the campaign therefore received contributions from N.K.S. in excess of the contribution limits.

to file a report is a Class B misdemeanor.[137] Class A misdemeanors are subject to a three-year statute of limitations, and Class B misdemeanors are subject to a two-year statute of limitations.[138] For any offense based upon misconduct in office by a public officer or employee, however, the statute is extended such that a prosecution may be commenced "at any time when the defendant is in public office or employment or within 2 years thereafter," but no more than three years beyond the time that the statute of limitations would have expired without the exception.[139]

Independent Counsel will not, because of lack of proof of knowledge, the statute of limitations, or in the exercise of prosecutorial discretion, seek indictments of incumbent elected officials who received the gifts identified above without reporting them. But going forward, such gifting, if unreported, should not be excused. To the extent that transparency is compromised by unreported gifting, this is a problem that should be corrected and we recommend certain reforms in this area, including reforms to strengthen the public integrity laws.[140]

B. *Report to Division of Alcohol and Tobacco Enforcement*

The investigation into N.K.S. campaign finance contributions and gifts to office holders revealed evidence of potential violations of Delaware's alcoholic beverage control laws. The sale of alcoholic beverages is regulated under Delaware's Liquor Control Act (Title 4 of the

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[137] DEL. CODE ANN. tit. 29, § 5815(a)-(b).

[138] *See* DEL. CODE ANN. tit. 11, § 205(b)(2)-(3) (setting forth three-year and two-year statutes of limitations for prosecutions for class A and class B misdemeanors, respectively).

[139] DEL. CODE ANN. tit. 11, § 205(d).

[140] See *infra* Section VII.D. for discussion of the suggested reforms.

Delaware Code).[141] The Alcoholic Beverage Control Commissioner ("ABC Commissioner") promulgates rules and regulations consistent with the Code to control the manufacture, sale, dispensation, distribution, and importation of alcoholic liquor.[142]

These rules regulate, among other things, alcohol importers. An importer is "the person transporting or ordering, authorizing or arranging the transportation or shipment of alcoholic liquors into this State, whether the person is a resident or citizen of this State or not"[143] and includes operators such as N.K.S. Alcohol importers are prohibited (with limited exceptions) from selling alcohol other than to persons who are licensed to resell alcohol.[144]

Importers may sell, ship, transport, or deliver alcoholic beverages only in accordance with the ABC Commissioner's regulations.[145] Importers must make monthly reports to the ABC Commissioner of their manufacture, purchases, stocks, and sales of alcoholic liquor.[146] The Code establishes criminal liability for selling alcohol without the requisite license.[147] The ABC Commissioner may suspend any license if certain violations are repeated and continuous.[148] Moreover, ABC Rule No. 2 ("Prohibited Trade Practices") prevents importers from engaging in

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[141] DEL. CODE ANN. tit. 4.

[142] DEL. CODE ANN. tit. 4, § 304(2).

[143] DEL. CODE ANN. tit. 4, § 101(22).

[144] *Id.*

[145] DEL. CODE ANN. tit. 4, § 703.

[146] DEL. CODE ANN. tit. 4, § 710.

[147] *See e.g.*, DEL. CODE ANN. tit. 4, §§ 901(4), 902(1)-(2), 903; *see also id.* §§ 901-916 (setting forth penalties).

[148] *See* DEL. CODE ANN. tit. 4, § 561 (providing for suspension for (i) violating any provision of the Liquor Control Act or any regulation of the Commissioner or (ii) the licensee's conviction of a felony or of violating any of the general or local liquor laws of the State, including the Code, since the granting of the licensee's license).

discriminatory practices or encouraging excessive drinking, including by giving alcoholic beverages to any individual or entity.[149]

Evidence gathered in the course of the investigation raised concerns regarding possible violations of the ABC laws. Because Delaware law vests responsibility for enforcing the alcoholic beverage control laws in the Division of Alcohol and Tobacco Enforcement ("DATE"), investigators met with a DATE officer in order to provide DATE with information and evidence relating to possible violations within DATE's enforcement jurisdiction.

VII. SUGGESTED LAW REFORMS

A. *Preliminary Statement*

We suggest certain campaign finance law reforms to address some areas that the investigation highlighted as particular areas of concern. In 2004, the Campaign Finance Disclosure Project, written by the Center for Governmental Studies in partnership with the California Voter Foundation and UCLA School of Law, and sponsored by the Pew Charitable Trusts, released the Campaign Finance Disclosure Model Law (the "Model Law"). The Model Law serves as a valuable resource for a comprehensive campaign finance law and analysis of the

[149] ABC Rule No. 2(IV)(B)(1) provides:

> No importer shall engage in any trade practice which can reasonably be expected to injure any retailer through discriminatory practices, nor shall any importer engage in any trade practices which can reasonably be expected to cause, encourage, or induce a consumer to purchase, receive, or consume alcoholic beverages in excessive amounts or at any unduly rapid rate and shall include, but not be limited to, the following: (a) *Giving alcoholic beverages in any form, either directly or indirectly, to any individual, organization, group, or other entity*; (b) Giving any form of cash (medium of exchange) either directly or indirectly, to any individual, organization, etc. except for bona fide contributions to not for profit entities and provided that such contribution is in no way conditional upon the purchase and/or consumption of alcoholic beverages.

Del. Div. of Alcohol and Tobacco Enforcement, Prohibited Trade Practices, Rule 2 (1992), *available at* http://date.delaware.gov/dabcpublic/dabc_rules_1_10.html#RULE%20#%202 (emphasis added).

purpose and effect of the provisions that it includes. The General Assembly may wish to consider the desirability of incorporating into Delaware law some provisions of the Model Law in addition to the reform measures discussed in this report.

Some of the reforms that we suggest with respect to the campaign finance laws may have the effect of reducing the sources of funds or the overall amounts that may be available to candidates. That is not the goal of the proposed reforms. Rather, the proposed reforms are focused on enhancing transparency and addressing certain loopholes or areas that appear to be problematic from a circumvention perspective or are otherwise inconsistent with the intent and purpose of the laws governing campaign finance. One counterbalancing measure that might be considered is increasing the contribution limits.

Statutory regulation of contributions to political candidates addresses an important interest in "the prevention of corruption and the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office."[150] Disclosure requirements are of particular importance and have consistently withstood constitutional challenges.[151] Moreover, the Supreme Court has consistently upheld laws that restrict direct contributions to candidates, because of the risk of quid pro quo political favors and public perception of corruption.[152]

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

[151] *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 366-67 (2010) (upholding disclosure and disclaimer requirements, which, as explained in *Buckley*, "could be justified based on a governmental interest in 'provid[ing] the electorate with information' about the sources of election-related spending"); *see also* Center for Governmental Studies, *Campaign Finance Disclosure Model Law*, at v (2004), http://www.campaigndisclosure.org/modellaw/ModelDisclosureLaw.pdf (hereinafter "Model Law") ("Easily accessible and transparent disclosure of political information lies at the heart of any democracy. Full and open disclosure of campaign finance information is a critical safeguard for preserving that democracy.").

[152] *Citizens United*, 558 U.S. at 345, 356-57 (discussing Supreme Court decisions upholding direct contribution limits, including *Buckley*); *see also id.* at 343 ("At least since the latter part of the 19th

But there may be contribution limits other than the limits currently set forth in the Delaware statute that sufficiently address such concerns while simultaneously recognizing that "[m]onetary contributions to political campaigns are a legitimate form of participation in the American political process" and the "rapidly increasing costs of political campaigns."[153] The contribution limits in Delaware are below the national average and the national median.[154] Moreover, the contribution limits currently set forth in the Delaware statute were enacted in 1990.[155] We do not suggest that the contribution limits should be raised (or lowered) in order to strike the appropriate balance. That is a legislative policy judgment for the General Assembly. We simply note that a change in the contribution limits may be an appropriate part of a comprehensive review and amendment of the campaign finance laws that balances the multiple interests that motivate the campaign finance law.

In 2012 and 2013, the General Assembly took several legislative actions to improve (or study how to improve) the law in areas bearing on this investigation. These enactments are summarized below. To be clear, we have recommended some limited but important further areas

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century, the laws of some States and of the United States imposed a ban on corporate direct contributions to candidates.").

[153] Model Law, *supra* note 151, § 102.01.

[154] *See* National Conference of State Legislatures, *Limits on Individual Contributions to Candidates: National Average and Median*, *at* http://www.ncsl.org/research/elections-and-campaigns/contributions-to-candidates-average-limits.aspx (last updated Oct. 3, 2011) (listing the national average contribution limit for the office of governor as $8,579 (median $5,000), the national average for state senator as $4,003 (median $2,000), and national average for state representative as $3,632 (median $2,000)); *see also* National Conference of State Legislatures, *State Limits on Contributions to Candidates 2011-2012 Election Cycle*, *at* http://www.ncsl.org/Portals/1/documents/legismgt/Limits_to_Candidates_2011-2012.pdf (last updated Sept. 30, 2011) (summarizing contribution limits and other campaign finance laws state-by-state) (hereinafter, "*NCSL Campaign Finance Law Summary*").

[155] DEL. CODE ANN. tit. 15, § 8010.

of reform. We believe that a comprehensive overhaul, considering these and other suggestions in broad context, is highly desirable.

B. *Some Recently Enacted Laws Helpful*

1. Election Law Task Force

In June 2013, the General Assembly passed a concurrent resolution establishing an "'Election Law Task Force' . . . to comprehensively review, study and make findings and recommendations regarding Title 15 Elections."[156] The task force shall consist of two members of the house of representatives (one each from the majority and minority caucuses), two members of the senate (one each from the majority and minority caucuses), the Elections Commissioner (who shall serve as chair), and a representative from the governor's office.[157] The Election Commissioner's legal counsel shall serve as an ex-officio non-voting member.[158] The resolution provides that the task force shall meet monthly, beginning within sixty days of enactment, and shall report its findings by March 30, 2014.[159] As of the time of the release of this report, the task force has held five meetings; another meeting is scheduled for January 15, 2014; the topic for the January meeting is the campaign finance laws. Members of the Independent Counsel team have reached out to Commissioner Elaine Manlove and other participants in the task force to share information and recommendations.

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[156] S. Con. Res. 20, 147th Gen. Assem. (Del. 2013).

[157] *Id.*

[158] *Id.*

[159] *Id.*

2. Elections Disclosure Act

In 2012, the General Assembly passed, and the Governor signed, the Delaware Elections Disclosure Act, which amended certain provisions of the election and campaign finance law. The act amended certain disclosure and disclaimer requirements with respect to third-party "electioneering communications" and the funding of such communications.[160] Also in 2012, the General Assembly passed, and the Governor signed, legislation increasing the fine for late filing of campaign finance reports from $50 per month to $50 per day.[161]

3. Electronic Filing

In early 2013, the Commissioner of Elections promulgated regulations requiring electronic filing of campaign finance reports. This is an important change to the regulatory scheme. Mandatory electronic filing is one of the "ten most important" provisions of the Model Law. The Model Law explains as follows:

> Electronic filing of campaign disclosure reports is the most significant advance in campaign disclosure in 30 years. Campaign disclosure reports have moved from dusty file cabinets accessible only to people in the State Capitol to an electronic medium where anyone in the world can access them. In many cases, electronic filing requirements lead to the availability of more campaign finance information on state websites. Reporters, public interest groups, voters, and academics now have the opportunity to examine and use the information the candidates and campaign committees file each year.[162]

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[160] H.R. 300, 146th Gen. Assem. (Del. 2012). As discussed above, the bill also made certain changes to Section 8012(e).

[161] H.R. 310, 146th Gen. Assem. (Del. 2012).

[162] Model Law, *supra* note 151, at viii. The Model Law provides for exceptions to electronic filing for campaigns that expend less than $10,000. *Id.*; *see also id.* § 146.01(3), (7)-(10).

An important corollary to electronic filing is ensuring public, online access to campaign finance reports, in searchable (and preferably sortable) format.[163] Online availability in searchable format enhances the ability of media, public interest groups, voters, academics, and law enforcement to use and analyze the information reported. The Office of the Commissioner of Elections has recently significantly improved the online availability of campaign finance reports in Delaware—this trend should be continued.

4. Lying to Law Enforcement

As previously noted, in 2012 the General Assembly passed, and the Governor signed into law, a new statute on Providing a False Statement to Law Enforcement. The statute provides that "[a] person is guilty of providing a false statement to law enforcement when, with intent to prevent, hinder or delay the investigation of any crime or offense by a law-enforcement officer or agency, the person knowingly provides any false written or oral statement to the law-enforcement officer or agency when such statement is material to the investigation."[164] Where the underlying crime being investigated is a felony, a violation of this section is a class G felony; where the underlying crime being investigated is not a felony, a violation of this section is a misdemeanor.[165] This important new law will deter witnesses and investigation targets from lying to or hiding information from any law enforcement officer, including prosecutors, or otherwise impeding an investigation.

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[163] *See id.* at ix-x ("Unless the data are put into a searchable online database, it is very difficult for the public to sort, summarize, or analyze the information in a meaningful way.").

[164] DEL. CODE ANN. tit. 11, § 1245A(a).

[165] DEL. CODE ANN. tit. 11, § 1245A(c)-(d).

5. Lobbying Laws

Delaware's lobbying laws were also amended in 2012, effective January 1, 2013. The new law modernizes the old (such as by providing for electronic filing) and adds welcome transparency. For example, it includes a new restriction that provides that lobbyists may not "promote, advocate, influence or oppose any bill or resolution pending before the General Assembly by direct communication with a member of the General Assembly, the Lieutenant Governor, or the Governor, or any proposed regulation pending before a state agency by direct communication with an employee or official of that state agency, unless the lobbyist reports to the Public Integrity Commission the identity by number of each bill or resolution, and by number and/or title each regulation, in connection with which the lobbyist has made or intends to make such direct communication, and the name of the employer on whose behalf such direct communication occurs."[166] These reports are to be posted on the internet by the Commission.[167]

C. *Recommendations for Enhancing Laws Governing Campaign Finance and Disclosure*

1. Disclosure of Contributor's Employer and Occupation

The campaign finance statute should be amended to require political committees to report occupation and employer information for contributions received.[168] Disclosure of occupation and employer information has top billing in the Campaign Disclosure Project's list of the "Ten

[166] DEL. CODE ANN. tit. 29, § 5836(a).

[167] DEL. CODE ANN. tit. 29, § 5836(d).

[168] *See* DEL. CODE ANN. tit. 15, § 8030(d)(2) (providing that political committees must report the name and mailing address of each person who has made aggregate contributions of more than $100 in an election period, the total of all contributions from each such person during the election period, and the amount and date of all contributions from each such person during the reporting period, but not requiring reporting of employer or occupation information).

Most Important Disclosure Provisions."[169] Disclosure of occupation and employer information facilitates enforcement of campaign finance laws and provides the public with access to important information about the sources of support for candidates. The Campaign Disclosure Project describes the benefits of occupation and employer reporting as follows:

> These disclosures are essential to a healthy campaign reporting program. If only contributor's [sic] names and addresses are listed (without occupation and employers), it is difficult to determine which industry, company or group is providing funds to a candidate, committee, or ballot measure. Many money-laundering schemes have been unearthed because someone questioned whether persons of limited means could give especially large contributions. Without occupation and employer reporting, it is much more difficult to enforce the disclosure laws and determine if certain groups may be trying to influence the political process.[170]

These issues have been implicated in the matters that have been subject to this investigation. For example, many of the contributors in the Tigani/N.K.S. reimbursement scheme were arguably "persons of limited means" whose ability to make large political contributions might have been questioned if employer and occupation information had been reported. And disclosure of employer information would have aided investigators in identifying potentially associated contributions and analyzing contribution patterns for suspicious activity that warranted further investigation.

2. Ban Entity Contributions

As discussed above, Delaware law permits corporations and other business entities to contribute to state political campaigns, subject to the standard contribution limits established in Title 15, Section 8010(a) of the Delaware Code and the notification and attribution requirements

[169] *See* Model Law, *supra* note 151, at vii.

[170] *Id.*

set forth in Title 15, Section 8012(e).[171] The investigation identified certain violations of the campaign finance laws with respect to contributions made by entities and also concluded that campaigns generally have not implemented the necessary processes to comply with the law when accepting entity contributions. Moreover, Section V.B. above discusses the public policy issues that arise when entity contributions are permitted, even when the contributions comply with the existing law governing such contributions. These issues include the fact that permitting contributions by entities allows individuals who control multiple entities effectively to circumvent contribution limits and feeds public concern about "gaming the system" and a "pay to play" culture, because the existing laws permit certain individuals to have outsized political influence by virtue of their control over certain entities, and with little public transparency.

In addition to the public policy issues mentioned above, the law as written may be difficult for contributors, political committees, regulators, and law enforcement officers to interpret and apply, particularly in the context of alternative entity business structures. In particular, the language defining the threshold ownership interest that triggers notification and attribution may be inadequate to address the complexity of modern alternative entity structures.

For example, imagine that a limited liability company, "Doe LLC," makes a $1,200 contribution to a candidate for statewide office. The members of Doe LLC are two corporations. Corporation A owns 40% of Doe LLC and Corporation B owns 60% of Doe LLC, and each corporation has control over the activities of Doe LLC in proportion to its respective interest. Jane Doe owns 100% of Corporation A and 25% of Corporation B, and has control over the

[171] *See supra* Section V.B (discussing the Delaware laws governing campaign contributions by corporations and other business entities). Approximately twenty states ban corporate campaign contributions; in seven of those states, the ban on corporate (and union) contributions is the only contribution limit (or among very few) imposed by state law. *NCSL Campaign Finance Law Summary*, *supra* note 154.

activities of each of those entities in proportion to her interests. Thus, Jane Doe indirectly owns 40% of Doe LLC, plus another 1/4 of 60% of Doe LLC, for an indirect interest of 55% in the contributing company. But she may not be able to control whether Doe LLC makes a political contribution: she can cause Corporation A to "vote" its 40% interest in Doe LLC against a contribution, but she may be outvoted by the other shareholders of Corporation B with respect to exercising Corporation B's 60% interest in Doe LLC against such contribution.

Under such circumstances, it may be unfair to attribute 55% of Doe LLC's $1,200 contribution to Jane Doe. In contrast, one can envision a scenario in which a person's aggregate, indirect interest in an entity falls below 50%, but in which that person exercises actual control over the conduct of the entity. In that scenario, is it fair and consistent with the purposes of the campaign finance law *not* to attribute that entity's contribution to the controlling person? And in either case, is the statute clear enough to enable contributors, political committees, and law enforcement personnel to determine whether a potential or actual contribution complies with the law?

For these reasons and the reasons discussed Section V.B of this report, we therefore propose that the General Assembly amend the statute to prohibit all campaign contributions from entities. If such contributions are not prohibited, then we recommend that the General Assembly amend Section 8012(e) to set forth more clearly and specifically the circumstances under which entity contributions must be attributed to a control person[172] and provide for a transparent reporting system.

[172] For the Model Law's approach to entity contributions, see Model Law, *supra* note 151, § 106.01(2). Many of the same issues of interpretation and application would likely arise with respect to the Model Law provision as are discussed in this report with respect to Section 8012(e).

3. Address Attribution of Contributions from Joint Accounts

It appears to be a common practice among Delaware candidates to accept a check for double the maximum individual contribution limit, drawn on a joint account belonging to a married couple and signed by one of the spouses, and to attribute one-half of the contribution amount to each spouse, without any inquiry regarding the non-signing spouse's consent to the contribution. The Delaware statute does not address, and thus does not authorize, this practice.

Under federal law, the prohibition on making campaign contributions in the name of another person prohibits a spouse from contributing in the other spouse's name without his or her consent. Specifically, the federal campaign finance regulations provide that "[a]ny contribution made by more than one person . . . shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing."[173] The regulations further provide that a campaign may reattribute a contribution among joint account holders, such as spouses, (1) if the campaign asks permission to reattribute the contribution and receives written notice from each contributor indicating the amount that should be attributed to each contributor or (2) automatically under certain circumstances, if the campaign, within sixty days of receipt of the contribution, notifies each contributor in writing of how the campaign attributed the contribution and that the contributor may request a refund if the contribution was not intended to be a joint contribution.[174]

As noted above, Delaware candidates appear to have been automatically reattributing contributions that would exceed individual contribution limits (*i.e.* $1,200 and $600) and are made from a joint account but signed by only one account holder without any further

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[173] Contributions by Persons Other Than Multicandidate Political Committees, 11 C.F.R. § 110.1(k)(1).

[174] *Id.* § 110.1(k)(3).

communication with the signing or non-signing account holder—a practice that is not authorized by Delaware law, which does not provide for such reattribution at all, and that does not even comply with the federal scheme for reattribution. We therefore propose that the General Assembly amend the statute (or that the Commissioner of Elections promulgate regulations, if appropriate) to address this issue or, if no statutory or regulatory change occurs, that political committees cease this common but unauthorized practice.

4. Mandate That All Reportable Information Is on File Before a Political Committee May Deposit a Contribution

Section 132.01(3)(E) of the Model Law provides that a political committee may not deposit a contribution unless the committee has all the information about the contribution that is required to be reported.[175] This provision "guarantees that the campaign committee will make every effort to determine occupation and employer [and all other reportable] information in a timely manner."[176] As discussed above,[177] investigators concluded that campaigns made insufficient efforts to obtain information regarding the ownership of entities that made contributions, despite the requirements that (i) contributing entities must notify the campaign regarding persons owning a 50% or greater interest in the entity or that no such entity exists, and (ii) campaigns must attribute such contributions to such owners in proportion to their ownership

[175] *See* Model Law, *supra* note 151, § 321.01(3)(E) ("If all of the information is not on file, the political committee shall not deposit the contribution."). This requirement could become applicable when a campaign reaches the threshold cumulative contribution amount that triggers the requirement that a political committee file a statement of organization. *See* Del. Code Ann. tit. 15, § 8005(1) ("A political committee shall . . . [f]ile a statement of organization with the Commissioner no later than 24 hours after it receives any contribution or makes any expenditure that causes the aggregate amount of contributions by or expenditures to such committee to exceed $500 during an election period.").

[176] *Id.* at vii.

[177] *Supra* Section V.B.3.

and report the contributions accordingly.[178] Amending the Delaware campaign finance statute to include a provision like Model Law Section 132.01(3)(E) would address this and similar issues.

5. Amend Safe Harbor Provisions of Section 8043(h)

As discussed above, certain candidate committees disgorged contributions associated with contributors who were determined (or suspected) to have made illegal contributions by donating amounts equivalent to such contributions to charitable organizations. Section V.C. of this report explains Independent Counsel's decision that such charitable donations were appropriate remedial measures under the circumstances. As a matter of public policy, charitable donations are by no means a perfect solution, however, in particular because candidates or public officials may receive—or may be perceived as receiving—a political or other benefit from making such charitable donations.[179] Thus, legislative attention to Section 8043(h) is very desirable.

Section 8043(h) could be amended to provide for different remedial measures under different circumstances: for example, the statute could provide for returning a contribution to a contributor when a candidate committee realizes that it has inadvertently accepted a contribution that clearly causes a contributor to exceed the contribution limits, while providing a different

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[178] DEL. CODE ANN. tit. 15, § 8012(e).

[179] *Cf.* Model Law, *supra* note 151, at x ("A few jurisdictions require candidates and officeholders to disclose, on a periodic basis, charitable contributions they have raised. The purpose of this provision is to provide more information about officeholders who may be using their position to solicit funds from persons who are trying to influence the officeholder. Charities are sometimes closely connected to an officeholder, and a contribution to the charity is as appreciated by the officeholder as a contribution to the officeholder directly. The Model Law recommends that charitable contributions raised by a candidate or officeholder be reported annually by the officeholder."); *see also* Chase Davis & Liz Austin Peterson, *Charity Donations Help Harris Officials' Donors Stand Out*, HOUSTON CHRON., July 27, 2008, http://www.chron.com/news/houston-texas/article/Charity-donations-help-Harris-officials-donors-1535513.php ("[C]ampaign watchdogs argue that contributing to politicians' pet charities shelters donors from public scrutiny—an attractive benefit for those who want to earn political favor without having their largesse exposed to watchdogs and competitors.").

remedy under other circumstances, such as when an alleged reimbursement scheme or other illegality is discovered or proven. In order to avoid the appearance of political or other benefits to the candidate in connection with charitable donations—and to increase the availability of funds for use in enforcing campaign finance and other laws—such other remedy could be payment of disgorged funds to the State general fund or to a state-sponsored entity such as the Delaware Special Law Enforcement Assistance Fund (SLEAF).[180]

6. Anonymous Reporting of Violations and Protection from Retaliation

Reimbursement schemes and other campaign-finance violations can be difficult to identify and, therefore, to enforce. Disclosure rules that improve transparency, such as some of the reforms suggested above, enhance enforceability. The best sources of information about campaign finance violations, however, are people who participate in, are asked to get involved in, or otherwise observe or become aware of the violations—such as campaign workers or the employees of businesses involved. These individuals may be afraid to come forward with information, however, because they may fear losing their jobs, suffering other employment-related repercussions, or even experiencing threats to their physical safety. One witness told investigators that the witness had attempted anonymously to report campaign finance violations to the state government but was told by a state employee who took the call that a report could not be made anonymously.

Reform efforts should assess existing avenues for receiving reports of campaign finance violations, ensure that state employees are trained concerning where to direct callers who are attempting to report violations, and ensure that effective mechanisms for anonymous reporting (and appropriate review and follow through) are in place. In corporations today it is common

[180] DEL. CODE ANN. tit. 11, §§ 4110-16.

practice to have a "hotline" or other mechanism in which someone (*e.g.*, an employee) who observes misconduct and wishes to report it, anonymously or otherwise, is encouraged to do so.[181]

Lawmakers may also want to consider establishing or clarifying whistleblower protection—protection against retaliation—for employees who report campaign finance violations by their employers. The Delaware Whistleblowers' Protection Act[182] protects employees against retaliation by employers in connection with employees' reports of, or refusal to participate in, certain "violations" by employers. The covered violations are defined as "an act or omission by an employer, or an agent thereof, that is":

> a. Materially inconsistent with, and a serious deviation from, standards implemented pursuant to a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect employees or other persons from health, safety, or environmental hazards while on the employer's premises or elsewhere; or
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> b. Materially inconsistent with, and a serious deviation from, financial management or accounting standards implemented pursuant to a rule or regulation promulgated by the employer or a law, rule, or regulation promulgated under the laws of this State, a political subdivision of this State, or the United States, to protect any person from fraud, deceit, or misappropriation of public or private funds or assets under the control of the employer.[183]

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[181] *See, e.g.*, Robert S. Bennett et al., *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 BUS. LAW. 55, 60-61 (2006). Moreover, in the "new reality" of corporate America, the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 ushered in provisions for incentives and further protections of whistleblowers. *See* E. NORMAN VEASEY & CHRISTINE T. DI GUGLIELMO, INDISPENSABLE COUNSEL: THE CHIEF LEGAL OFFICER IN THE NEW REALITY 20-25 (2012).

[182] DEL. CODE ANN. tit. 19, §§ 1701-08.

[183] DEL. CODE ANN. tit. 19, § 1702(6).

It is not clear, and no Delaware court has decided, whether campaign finance violations are a category of violations for which a reporting employee would receive protection from retaliation under the Delaware Whistleblowers' Protection Act.[184]

D. *Recommendations for Enhancing Public Integrity Laws and Their Enforcement*

1. PIC Authority with Respect to Conduct of Public Officers

We have noted that our investigation revealed that part of the problem with the "pay to play" culture is the failure of some public officers to report gifts of value. Aside from the fact that public officers need to be diligent about reporting, the authority and resources of the PIC, as the relevant enforcement agency, need strengthening.

We have discussed the laws requiring public officers to report to the PIC gifts and other financial information.[185] The statute establishing the PIC and its functions is in Chapter 58 of Title 29 of the Delaware Code. Section 5813 requires every public officer to file a report disclosing financial interests. Section 5813(a)(4)(e) requires that each report shall include the source of any "gift with a value in excess of $250 received from any person, identifying also in each case the amount of each such gift."[186] Section 5815 provides that a public officer who "wilfully fails to file" a required report shall be guilty of a class B misdemeanor, and a public

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[184] *Cf. Town of Cheswold v. Vann*, 9 A.3d 467, 470 n.1 (Del. 2010) (noting that the parties had stipulated that police chief's report that "he was investigating the Town Council for fabricating meeting minutes to reflect that the Council had voted to appoint Edward Ryan as Town Manager when, in fact, no vote had ever occurred" was an act protected by the Whistleblowers' Protection Act); *Meltzer v. City of Wilmington*, 2011 Del. Super. LEXIS 154, at *26-27 (Del. Super. Ct. Apr. 6, 2011) (concluding that plaintiff's report of matters that, he contended, could cause a "significant financial loss" to the city did not constitute a "violation" of "financial management and accounting standards" under the Whistleblowers' Protection Act).

[185] See discussion *supra* Section VI.A.1. Section 5812(n) lists seventeen categories of public officers, including "[a]ny person elected to any state office." DEL. CODE ANN. tit. 29, § 5812(n)(1).

[186] DEL. CODE ANN. tit. 29, § 5813(a)(4)(e).

officer who knowingly files a required report that is false in any material respect shall be guilty of a class A misdemeanor.

The statutory enforcement mechanism for the PIC centers around the Commission Counsel. Among the many powers and duties of Counsel provided in Section 5808A is the power to "investigate information coming to the attention of the Commission that, if true, would constitute a violation of any provision of this chapter and/or to recommend that possible violations ... be referred by the Commission to the Attorney General ... for investigation and prosecution."[187] Counsel's other duties,[188] which we understand are very time consuming, include attending and responding to the many requests by public officers for advisory opinions, which may become a safe harbor for a public officer who acts in good faith.[189]

We conferred with former and current PIC Counsel and were advised that Counsel's investigatory powers are relatively weak[190] in practice for several reasons, including lack of resources and follow-up collaboration when matters are referred to the Office of the Attorney General.[191] Moreover, we have been advised that, in practice, review of any issue usually

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[187] DEL. CODE ANN. tit. 29, § 5808A(a)(4).

[188] One such power is to prosecute disciplinary proceedings, but only upon the determination of a majority vote of the Commission, which meets ten or twelve times a year. DEL. CODE ANN. tit. 29, § 5808A(a)(5).

[189] DEL. CODE ANN. tit. 29, § 5807.

[190] In recent years governors have promulgated executive orders dealing with relatively high-level executive department officers, such as members of the Cabinet. There had been an order (Executive Order # 5) signed by Governor Carper requiring the prior advice of the PIC on gifts over $250. This was later changed requiring notice, rather than prior approval, of the gift within 30 days of receipt. Executive Order Numbers 5 and 19, dated May 10, 1993, and March 11, 1994, were repealed on January 18th, 2001, in Executive Order Number 8, signed by Governor Minner. That Executive Order provides for such Executive Department personnel to report such gifts on the first day of April, July, October, and January to the Office of the Governor. Those gifts will be posted on the Governor's website within ten business days after receipt thereof.

[191] Although the Commission itself has some statutory powers, such as subpoena power, we have not heard that such powers have ever been used.

requires a formal complaint to the Commission. Suggestions of misconduct or inappropriate gifts emerging from sources such as media reports are not, in practice, sufficient to initiate an investigation. Some official complaints have been referred to the Attorney General's Office, without result.

The enforcement and investigative powers of PIC Counsel are severely hamstrung by inadequate resources. The PIC is an agency under the Department of State, which most recently directed the PIC not to seek any increase in the PIC annual budget and, moreover, to reduce the previous budgeted amount by 1%. The PIC budget for FY 2013 was only $188,500. Of this amount $85,000 is allocated to the salary of Counsel and $33,000 to the salary of an Administrative Assistant. Other expenses include meeting fees of $100 per meeting per Commissioner plus mileage for some Commissioners.[192] The PIC's resources are inadequate, in our view, for the Commission to undertake any serious inquiry or investigation into potential wrongdoing.

The powers of the Commission Counsel need to be substantially strengthened and the resources of the Commission substantially enhanced.[193] Delaware could consider adopting the essence of the inspector general model. This model is employed in a number of jurisdictions. The function and authority of an inspector general has been well described, and the Association of Inspectors General has drafted model legislation (the "Inspector General Model Legislation")

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[192] DEL. CODE ANN. tit. 29, § 5808(e). The Commission consists of seven members (no more than a majority of whom may be from the same political party) who are appointed by the Governor with Senate confirmation for seven-year terms. DEL. CODE ANN. tit. 29, § 5808(b),(c).

[193] There should be an increased staff with substantially increased appropriations through the annual state budget; the budget increase can be at least partially supported by revenue collection through the establishment of filing fees for lobbyist registration. Delaware is one of only a handful of states that do not charge any such filing fees.

for the office of inspector general.[194] We do not recommend that model, as such. A new, separate office of inspector general is not necessary in this small state. But resources, flexibility, and authority, perhaps informed by the inspector general model, should be considered to enhance the effectiveness of the PIC and Commission Counsel.

Delaware's PIC is responsible for enforcing rules for about 48,000 government employees, but it currently is staffed by just two people.[195] Many states are providing greater resources to their ethics commissions[196] than is Delaware. By way of comparison, Rhode Island's Ethics Commission's budget for 2013 was $1,560,008, more than eight times that of Delaware's PIC. The budget of the New Jersey State Ethics Commission was $1,000,000. The District of Columbia's Board of Ethics and Government Accountability had a budget in 2013 of $1,039,000, and its Office of the Inspector General had a budget of $15,685,662.[197] Some of

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[194] *See* Association of Inspectors General, Principles and Standards for Offices of Inspector General at 3-6, http://inspectorsgeneral.org/files/2012/06/IGStandards_revised_july2012.pdf (discussing the typical authority and function of an inspector general); *see also* Association of Inspectors General, Model Legislation for the Establishment of Offices of Inspector General, http://inspectorsgeneral.org/files/2011/01/IG-Model-Legislation.pdf (setting forth a model law for the establishment of an office of inspector general) (hereinafter "Inspector General Model Legislation").

[195] *See* Caitlin Ginley, *Grading the Nation: How Accountable Is Your State*, THE CENTER FOR PUBLIC INTEGRITY, Mar. 19, 2012, http://www.publicintegrity.org/2012/03/19/8423/grading-nation-how-accountable-your-state.

[196] *See* National Conference of State Legislatures, Ethics: State Ethics Commissions, Oct. 2013, http://www.ncsl.org/legislatures-elections/ethicshome/state-ethics-commissions.aspx#ethics.

[197] *Cf.* Delaware Operating Budget FY 2013, Final Operating Budget Act, S. 260, 146th Gen. Assem. (Del. 2012), *available at* http://budget.delaware.gov/fy2013/operating/op_sb260.pdf; Fiscal Year 2013 Operating Budget Supplement, *available at* http://budget.delaware.gov/fy2013/operating/op_budget_supplements.pdf; Rhode Island Budget as Enacted for Fiscal Year 2013, June 8, 2013, *available at* http://www.budget.ri.gov/Documents/Prior%20Year%20Budgets/Operating%20Budget%202013/FY%202013%20Budget%20as%20Enacted.pdf; New Jersey Governor's FY 2013 Budget, Feb. 21, 2012 available at http://www.state.nj.us/treasury/omb/publications/13bib/BIB.pdf; and District of Columbia FY 2013 Proposed Budget and Financial Plan, June 22, 2012, *available at* http://cfo.dc.gov/sites/default/files/dc/sites/ocfo/publication/attachments/ocfo_fy2013_volume_2_chapters_part_1.pdf.

these are larger jurisdictions to be sure, but Rhode Island, for example, is not much larger than Delaware in population but has a much higher budget allocation.

The PIC's powers could also be expanded to include the power to audit state government operations. Currently, audits are mentioned in Chapter 58 of the Delaware Code only insofar as the State Auditor is required to conduct annual audits to ensure that public officials are not double-paid for multiple state positions. A more general audit power, in the hands of the PIC or Counsel, could uncover wrongdoing and could incentivize compliant bookkeeping by public officers.

The District of Columbia's statute for its Inspector General could serve as an example for the PIC. The DC statute provides that "[t]he Inspector General shall[] [c]onduct independent fiscal and management audits of District government operations."[198] Such a power could be provided to the PIC and could be written so as to allow the PIC to audit campaigns, in coordination with the Elections Commissioner.

Delaware's PIC currently has the authority to prosecute complaints under Chapter 58 through (1) a letter of reprimand or censure to any person; (2) removal, demotion, suspension or other appropriate action against public officials, other than elected officials; and (3) for appointees to Boards and Commission, recommending to an appointing authority that the official be removed.[199] It does not have the power to levy monetary fines, as does, for example, California's Fair Political Practices Commission, which can impose a fine of up to $5,000 per violation, or, for certain offenses, seek treble damages.[200] PIC Counsel could also be appointed

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[198] D.C. CODE § 1-301.115a(a)(3)(A).

[199] *See* DEL. CODE ANN. tit. 29, § 5810(d).

[200] *See, e.g.*, California Political Reform Act of 1974 §§ 91001, 91005, 91005.5, *available at* http://www.fppc.ca.gov/Act/2012_Act.pdf.

as a special deputy attorney general, who would be free to act where the appropriate deputy is disqualified, fails to file an information or seek an indictment for 180 days, or refers the matter back to the PIC.[201]

The PIC could be given the authority to bring civil actions. It could also be given the authority to prosecute criminal violations when the cases it refers are not prosecuted. All of these changes would strengthen the PIC's ability effectively to enforce Delaware's public integrity laws.

2. Regulation of and Reporting by Lobbyists

For years there has been concern in some circles that Delaware needs more transparency regarding the activities of lobbyists.[202] These concerns came to a head in the spring of 2012 when the General Assembly passed and the Governor signed Senate Bill 185.[203] This new legislation did increase transparency with respect to lobbyists and their activities.

Under the new laws, lobbyists are required to register electronically with the PIC before acting as a lobbyist, provide information regarding expenditures, report gifts over $50, and disclose the bill or action the lobbyist seeks and communications with the legislative or executive branches, among other things. Violations could result in prosecution as a misdemeanor, and the PIC Counsel may be required by the PIC to investigate or refer to the attorney general for prosecution.

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[201] *See* IND. CODE § 4-2-7-7(b).

[202] *See* Jonathan Starkey, *Lobbyist Rules Clear Final Hurdle*, WILM. NEWS J., May 18, 2012, at A1.

[203] Senate Bill 185, with various amendments, was eventually codified as DEL. CODE ANN. tit. 29, §§ 5832, 5835-5838.

Although the legislative process surrounding the adoption of this law engendered debate (was it too broad or too narrow?),[204] it is a step in the right direction. Nevertheless, it is another burden on the PIC, and adds to the need to strengthen the PIC Counsel's powers and resources. For example, the reporting and follow-up mechanisms themselves suggest not only the need for more staff but also the desirability of imposing meaningful filing and oversight fees to be collected and used by the PIC.

In short, therefore, in the areas of enforcing gift reporting requirements and lobbyist filings and oversight, we recommend substantially increased powers and funding for the PIC and its Counsel.

VIII. CONCLUSION

In spite of the costs that the State incurred as a result of the Tigani/N.K.S. reimbursement scheme, which catalyzed the events that led to this investigation, we hope that some public value has emerged. Such value includes (1) making known to the public the circumstances of the Tigani/N.K.S. and other schemes and obtaining convictions and civil settlements in connection with those schemes; (2) achievement of some deterrent effect to minimize future violations and abuses; and (3) a path forward with respect to some specific reform measures that the executive and legislative branches should promptly consider.

The reforms recommended in this report should not gather dust on a shelf. We respectfully submit that the reforms and improvements suggested in the report, such as banning the entity contributions that have led to a pernicious gaming of the system and other reforms, should be taken up promptly, with a new session of the General Assembly set to convene in a few weeks.

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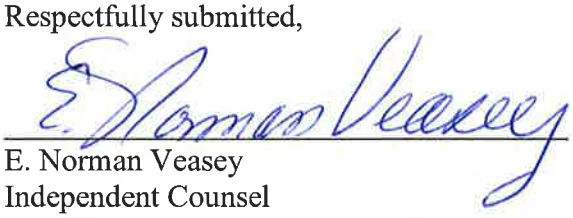
[204] *See* Starkey, *supra* note 202.

It has been an honor for the Independent Counsel and the entire investigating team to have had the opportunity for this important public service. For now our work is mostly finished. But we say "mostly" because we remain available to address any follow up that the appropriate offices of the State may determine is desirable.

Respectfully submitted,



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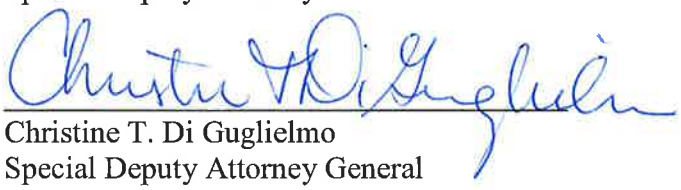

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December 28, 2013