



REPORT ON THE NEW YORK CITY CHARTER REVISION COMMISSION 2019

Pursuant to New York City Council Law 91 of 2018, signed by the Mayor of New York City on April 30, 2019, a Charter Revision Commission (“Commission”) was established to review the entire City Charter of New York City and submit proposed Charter amendments to be voted upon by the voters of the City at the general election on November 5, 2019 and during the “early voting” period commencing October 26, 2019. Accordingly, President Roger Juan Maldonado of the New York City Bar Association appointed this Charter Revision Task Force (“Task Force”) to monitor and evaluate the work of the Commission.

During the tenure of the Commission, the Task Force issued a Preliminary Report, dated April 25, 2019,¹ and members of the Task Force attended and testified at Commission hearings.

As a result of its deliberations, the Commission placed five questions on the ballot, each to be voted upon by the voters of the New York City.

The Task Force offers the following comments.²

I. THE BALLOT QUESTIONS ARE COMPOSED OF DISPARATE PROPOSALS, DEPRIVING VOTERS OF CLEAR CHOICES

The subject matter of the five Ballot Questions are characterized by the Commission as pertaining to Elections; the Civilian Complaint Review Board; Ethics and Governance; the City Budget; and Land Use. However, each one of these Questions contains multiple proposed changes to the City Charter. “Elections,” for example, includes the establishment of a rank-choice voting system for municipal public offices; proposed Charter amendments relating to the timing of special elections to fill vacancies in municipal public offices; and the timing by which the City’s decennial redistricting process must be effected. A voter can be in favor of one or more of these changes, or against one or more. Yet all three are combined into one Question, compelling the voter to approve all or none of them.

In fact, each of the five Ballot Questions is structured similarly – each is actually a set of proposals, some of which are substantively disparate from others. The Ethics and Governance Question, to cite another example, combines no less than five unrelated issues: the imposition of

¹ Available at <https://www.nycbar.org/member-and-career-services/committees/reports-listing/reports/detail/initial-report-of-the-charter-revision-commission-task-force>.

² The Task Force was aided in its work by the New York City Bar Association’s Committees on New York City Affairs, Election Law and Land Use Planning and Zoning.

an extended post-employment appearance ban for public officials; a restructuring of the Conflicts of Interest Board; a ban on political activity by members of the Conflicts of Interest Board; the requirement that a Minority- and Women-Owned Business Director report directly to the Mayor; and the requirement that the Mayor's appointment of the City's Corporation Counsel be confirmed by the City Council. Here, too, a voter can support some of these changes but not others. Yet the voter must cast one ballot in favor or against these conjoined proposals.

Unlike some states that require a ballot question to contain only a "single subject," New York does not bar Charter Commissions from grouping various issues into one Question. Indeed, this is not the first Commission to do so. Yet, we would be remiss not to observe that the format this Commission has chosen deprives voters of the opportunity to vote on specific proposals without compromising their views on other issues that have been folded into one Ballot Question. This is quite unfortunate.

This method of combining various issues into one question will no doubt confuse some voters, and may provoke public cynicism, perhaps causing them either to refrain from voting or to reluctantly embrace changes they do not support.

We respectfully recommend that future Charter Commissions avoid this practice and list proposals separately so that they can be voted upon individually.

II. BALLOT QUESTIONS

a. Ballot Question 1: Elections

The New York City Bar Association, and this Task Force, are on record supporting the introduction of Ranked Choice Voting ("RCV").³ Curiously, the Commission has opted to propose this reform for primary elections and special elections, but not for general elections. This seems like a missed opportunity.

The stated rationale for omitting RCV from general elections is that New York's general election ballot permits fusion voting, in which a single candidate's name may appear on the ballot multiple times on different party lines. Thus, the Commission believes, RCV in a general election might prove too confusing.⁴

This rationale makes little to no sense because fusion voting exists in special elections as well. Indeed, employing RCV for primaries and special elections but not for general elections could itself confuse voters as to how to cast their ballots in different elections.

³ See <https://www2.nycbar.org/pdf/report/uploads/20072754-ReportonproposedNYClawreinstantrun-offelec-tions.pdf>. RCV is a system whereby voters rank candidates by preference.

⁴ See Final Report of the 2019 New York City Charter Revision Commission, August 2, 2019 ("Final Report"), p. 31, https://static1.squarespace.com/static/5bfc4cecf7fde7d3719c06/t/5d83dffb8b08c5b3087ecc4/1568923645088/Final+Report_8.2.pdf.

The Commission also erred by not addressing the high probability that RCV may cause a greater number of extraneous markings on the ballot. When a voter casts a ballot, if there are extraneous markings outside the candidate's voting square or bubble, the Board of Elections and courts are likely to invalidate the ballot. With voters casting up to five votes on one ballot, there are bound to be a greater number of stray marks and cross-outs on the ballot. The possibility of a higher number of invalidated ballots obviously is inconsistent with the Commission's desire to increase participation and support fairer elections.

Despite the Commission's silence on the issue, if RCV is adopted, we urge the Board of Elections to address this potential problem in advance of RCV taking effect.

Notwithstanding our concerns, the Task Force commends the Commission for proposing RCV as a significant reform in primary and special elections. This method of voting allows a victorious candidate to have support of a majority of voters, and to eliminate the rare but costly runoff primary elections for city-wide offices.

We also commend the Commission for acknowledging the importance of educating voters about this new method of voting and tasking the New York City Campaign Finance Board ("CFB") with conducting "a voter education campaign to familiarize voters with ranked choice voting." We urge the Board of Elections and the CFB to work closely together in this necessary effort to make the voting and vote tallying processes clear to voters.

In the same Ballot Question, the Commission's proposal to alter the timeline for special elections is also welcome. We wish the Commission would have addressed the overarching issue of whether special elections, with their historically low turnout rates, are necessary, or whether winning candidates in special elections should be able to serve the remainder of a term rather than immediately having to run in a primary and general election. If this Question passes, we recommend that the City Council address this issue.

Given the state legislature's adoption of June primary elections, the Commission's proposal to modify the timeline by which the New York City's redistricting commission must report its results is also welcome.

b. Ballot Question 2: Civilian Complaint Review Board

Several proposals are included in this Ballot Question as well. First, the Commission recommends that the Civilian Complaint Review Board ("CCRB")⁵ have a dedicated funding stream. The Task Force has misgivings about dedicating funds to the CCRB without doing so for other equally important agencies that also require certainty of funding.

Second, the Commission proposes a change in the membership of the CCRB, adding one member appointed by the Public Advocate and another jointly by the Mayor and City Council. It

⁵ See <https://www1.nyc.gov/site/ccrb/index.page>.

further suggests that the Council directly appoint its members rather than recommending its choices to the Mayor.

In the absence of any rationale or indication that the current appointment process is flawed or any meaningful public demand to make this change, the Task Force has a concern that this may be motivated by those who simply favor a more influential City Council. Without more, it appears problematic to amend the Charter for such a change.

Finally, the Commission proposes that the CCRB Executive Director be given unilateral decision-making authority to issue subpoenas. Here, too, there appears to be no reason that the Executive Director cannot expeditiously convene a video or audio conference call of the CCRB commissioners to make such significant determinations.

Notwithstanding these questions and concerns, none of these proposals seem overly objectionable.

c. Ballot Question 3: Ethics and Governance

This Ballot Question consists of five different proposals, loosely connected by the theme of “ethics and governance.”

The first proposal would extend the so-called “cooling off” period that bans former City public servants from appearing before their former agency (or in certain cases, their former branch of government) from one year to two years. The current Charter prohibits public servants from appearing before the City agency in which they have served within a period of one year after leaving government. For elected officials and certain senior administrative officers, this prohibition extends to the entire branch of City government in which they served. The Commission proposal would extend the appearance ban to two years.

Cooling-off periods for former public servants are a standard part of government ethics codes, addressing the potential for, or appearance of, favored treatment for the former public servant. There is no obviously correct length of time for a cooling off period, nor is there any requirement that the appearance ban be of the same duration for all public servants.

The Commission notes that New York State already applies a two-year ban to most state employees. Although a longer post-employment appearance ban for New York City may discourage some people from accepting senior positions in government, the longer prohibition seems to be a reasonable measure to promote public confidence in government.

The next two proposals relate to the composition and political activities of the members of the Conflicts of Interest Board (“COIB”). The COIB is currently composed of five public members appointed by the Mayor, subject to the advice and consent of the City Council, serving for staggered six-year terms. The Commission would change the appointment structure so that the Public Advocate and the Comptroller would each appoint a Board member. Like the mayoral appointees, the Public Advocate and Comptroller appointees would be subject to Council advice and consent and serve for six-year terms. The chair would continue to be designated by the Mayor.

In a related suggestion, the Commission would add new restrictions to the political activities of COIB members. Currently, a COIB member is prohibited from holding any public office, seeking election to any public office, being a public employee in any jurisdiction, holding any political party office, or appearing as a lobbyist before the City. The Commission would add to that list a ban on COIB members from “participat[ing] in any capacity” in the campaign of a candidate for municipal office, and a limit on COIB members’ campaign contributions with the same restrictions applied to those who have business dealings with the City.

The Commission provides only the thinnest of justifications for these two COIB proposals – just a paragraph for each in its Final Report.⁶ It purports to justify the change in the appointing authority by citing the Los Angeles Ethics Commission, which consists of appointees by multiple elected officials. Nevertheless, the Commission fails to identify any problems with the COIB’s current structure or public demand to make a change. That said, given the COIB’s jurisdiction in addressing potential conflicts of interest of all elected and appointed public officials in the City, it is not unreasonable for non-mayoral public officials to appoint members to sit on the Board.

Similarly, the Commission fails to provide any justification for the additional restrictions on the political activities of COIB members. There are no references to untoward conduct that the proposed change would address, and, again, there appears to be no demand by the public, the Council or the CFB for these regulations. Nonetheless, as the Commission’s Final Report states, these new restrictions would likely strengthen the public’s perception of the COIB’s impartiality and independence.⁷

The fourth proposal in this Ballot Question includes in the Charter for the first time an office of Minority- and Women-Owned Enterprise (“M/WBE”) with the requirement that the director of that office report directly to the Mayor. In 2005, the City created an M/WBE program within the Department of Small Business Services to promote City government contracting opportunities for minority- and women-owned businesses. The program requires the head of each City agency to designate an M/WBE officer responsible for implementing the agency’s M/WBE responsibilities. In 2013, a citywide M/WBE director was added by local law, with the director reporting directly to the Mayor. The Commission’s proposal would add to the Charter a new section adding the Office of M/WBE and placing it in the Office of the Mayor.

Although the proposal would amend the Charter, it would not change the current City’s governmental structure. Rather, it simply codifies the current practice with respect to M/WBE. Although we should be cautious about adding to the Charter a matter that could be – and in this case, has been – adequately handled by local law, it does not seem objectionable to add this to the Charter.

The final proposal in Ballot Question 3 is a fundamental change in the office of the Corporation Counsel, the head of the City’s Law Department and the City’s chief legal officer. Currently, the Corporation Counsel is appointed by the Mayor, without the advice and consent of the City Council. This has long been the procedure for the appointment of the Corporation Counsel, and

⁶ See Final Report, pp. 60–61.

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is consistent with the procedure for the appointment of most agency heads, although for some positions – the commissioner of the Department of Investigation, and the members of several multi-member boards and commissions, including the City Planning Commission, the Taxi and Limousine Commission, the Landmarks Preservation Commission, the Civil Service Commission, and the COIB – the consent of the Council is required. The Charter Commission proposes to require the Council’s consent to the Mayor’s appointment of a Corporation Counsel.

As stated by the Commission in its Final Report, the Corporation Counsel represents not only the Mayor and mayoral agencies, but all City officials and entities, including the Council.⁸ The Council and other city officials thus have a stake in the representation provided by the Corporation Counsel. The proposed amendment to require Council consent to the appointment of the Corporation Counsel recognizes the Council’s interest, while still vesting sole responsibility for nominating the Corporation Counsel in the Mayor.

Although we have a concern that some supporters of this proposed change may be motivated simply by a desire to increase the power of the City Council, we are hopeful that, if passed, this change will be implemented in good faith.

d. Ballot Question 4: City Budget

This Question, like the others, includes multiple issues, though the proposals all relate to the budgeting process.

First, the Commission proposes that the City limit its balanced budget requirement to allow money earned in a previous year and kept in a “rainy day” fund to be used to pay for current operations. This is a helpful first step to reduce or eliminate the practice of covering costs by making reduced deposits into the Retiree Health Benefits Trust. However, a change in state law would also be required to allow spending from a rainy day fund.

The Commission also proposes to protect the budgets for the Public Advocate and the Borough Presidents. These budgets are determined through the normal budgetary process that is historically dominated by the Mayor and City Council. In recent political history, the budgets of these offices have been sharply reduced. The Commission proposes to keep these budgets at their current levels, adjusted annually. The Mayor would still be able to reduce their funding, but only if he or she made a written determination that the cuts were part of overall budget reductions for City operations or were caused by unforeseen circumstances.

This proposal acknowledges the value these offices provide, without eliminating the Mayor’s authority in dire financial times.

The Commission also makes two proposals that require the Mayor to comply with an improved timeline for communicating financial data to other officials and the public. The first proposal requires the Mayor to deliver revenue estimates earlier in the budgetary process, aiding the Council to perform its responsibilities. The second requires the Mayor, who creates a four-year

⁸ See Final Report, pp. 63–65.

financial plan and reviews it quarterly, to notify the City Council and the Comptroller expeditiously after any revision.

These proposals appear to provide greater government transparency and more efficient operations.

e. Ballot Question 5: Land Use

The Commission proposes to amend Uniform Land Use Review Procedure (“ULURP”) by requiring that a developer or the City prepare a pre-certification “project summary” of its application to be transmitted to the affected Community Planning Board and posted to the website of the Department of City Planning (“DCP”). This appears to be a welcome step in informing and empowering local neighborhoods to participate meaningfully in the land-use process.

In order for project summaries to be useful to the Community Boards, however, the DCP should create general guidelines for these summaries to ensure that they include essential information and follow a standardized format. DCP consideration of draft summaries prepared by the applicant would also be useful to ensure the efficacy of this new procedure.

We note that the proposal requires that certified applications be “substantially consistent with the project summary.” This will allow for a certified application to be modified from the earlier summary in minor respects. The proposal also offers Community Boards additional time to review and provide recommendations to ULURP applications that are certified in June and July.

The Task Force believes these modest proposals will facilitate a more effective and collegial ULURP process.

III. CONCLUSION

It is respectfully submitted that if the Commission had separated the proposals rather than combine multiple disparate proposals under five Ballot Questions, New York City voters would be able to cast their ballots more intelligently. Indeed, had the Commission separated each proposal, this Task Force may not have supported all of the proposals. Given the structure of the five Questions, however, and despite certain stated misgivings, the Task Force is, on balance, supportive of each Question.

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* Abstains on Section II.C.

** Abstains on Section II.A as it pertains to the New York City Campaign Finance Board.