REPORT ON BALLOT PROPOSALS OF THE 2005 NEW YORK CITY CHARTER REVISION COMMISSION

THE NEW YORK CITY BAR ASSOCIATION

COMMITTEE ON NEW YORK CITY AFFAIRS
COMMITTEE ON ADMINISTRATIVE LAW

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The Association of the Bar of the City of New York

Statement on Charter Revision Ballot Proposals

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Introduction

On the November 8, 2005 municipal election ballot New York City voters will vote on two propositions to amend the City Charter as proposed by the Charter Revision Commission (the "Commission") appointed by Mayor Michael M. Bloomberg in August 19, 2004. One proposed change would incorporate features of State law with respect to fiscal management and borrowing restrictions. A second ballot question relates to the City's administrative justice system.

The New York City Bar Association (the "Association") applauds the work respects, particularly its public outreach. The Commission held many public meetings and hearings at diverse locales throughout the five boroughs. The Commission promptly posted on its web page transcripts of its hearings and meetings as well as historical information about the Commission and the Charter. Scheduling information was readily available to the public on both the Commission's website and through the Commission's mailings. The Commission succeeded in keeping the public fully and timely informed about its activities. Importantly, also, the Commission was appointed more than a year prior to the required date for submitting formal ballot questions. Unlike some recent Charter Revision Commissions which had a limited and rushed time to report, the 2005 Commission proceeded in an informed and orderly manner, thereby enhancing its work and the public's opportunity to be heard.

The Association also commends the Commission for including on the November 2005 general election ballot only those matters on which the Commission determined that a consensus truly had been reached. In this connection, after concluding that a consensus did not exist among stakeholders with regard to the appointment of a Commission on Public Reporting and Accountability that would have reviewed local law reporting requirements, the Commission decided to omit the proposed appointment from its ballot proposals. In addition, after hearing expert testimony on the subject, the Commission endorsed utilizing an Executive Order to establish the position of an Administrative Justice Coordinator with oversight over the various New York City administrative tribunals, rather than making the creation of the position the subject of Charter Revision. This recommendation was previously advocated by the Association.

With respect to the Commission's substantive ballot proposals, the Association offers the following comments:

I. Ballot Question Four

The Commission's Ballot Question Four would incorporate features of the New York State Financial Emergency Act (the "FEA") into the City Charter. The FEA was enacted under dire financial emergency circumstances in 1975 and may expire in 2008. Essentially, the Commission would amend that City Charter to require that: the City would end its fiscal year with a budget balanced according to Generally Accepted Accounting Principles ("GAAP"); the City would have a Four-Year Financial Plan, modified quarterly; the City would strictly limit short-term borrowing as currently limited by the FEA; and the City would conduct an annual audit in accordance with GAAP. Each of these requirements is important, wise, and necessary for a disciplined, transparent, credible budget process and as a means of providing both reliable information to investors in New York City debt and assurance to such investors of a sound financial management regime.

At the time such nearly identical provisions were mandated by State legislation in 1975, New York City was excluded from the capital markets. These and other reforms (such as the 1977 agreement with the City's five actuarially funded pension systems to provide an Official Statement in connection with the sale of New York City general obligation bonds to the pension systems) restored verifiable credibility to the City's financial practices and fiscal policy soundness to City government. Following the enactment of federal guaranties for City long-term bonds in or about 1979, New York City regained access to the capital markets.

When the FEA was enacted, it contained enforcement mechanisms to compel compliance and to offer additional reassurance to potential purchasers of New York City debt. Thus, e.g., the Emergency Financial Control Board (the "EFCB") had to approve the City's financial plans and each quarterly modification. There was a Special State Deputy Comptroller for New York City that served as staff to the EFCB and generated independent data and conducted performance audits. There was a statutory tension created that encroached upon the City's home rule perogatives and threatened take over of the City's financial management. This indirect management by the State gradually ebbed and the EFCB went into twilight as the FCB.

Pursuant to Ballot Question Four, and after the FEA expires (if it expires), there would not be an overt enforcement mechanism other than the force of subject-to-amendment City law and the demands of the capital markets. Home rule would be restored fully and sound financial practices would be maintained. The Association registers its strong support of those objectives.

Other than with respect to minor changes such as not continuing the FEA's allowable annual deficit of $100 million, the Commission did not debate whether the FEA provisions, adopted under duress, could be improved. The Association notes, however, that there was ample opportunity for proponents of change to be heard and,

in fact, there was consultation with capital markets analysts such as Moody's Investors Services, Inc. In the final analysis, while there can be strict rules and procedures, sound fiscal policy and financial management are functions of judgment, and those who would make policy judgments and manage local government are answerable to the voters. That is the essence and value of home rule.

The Association endorses Ballot Question Four and advocates its passage. The Association hopes that adoption of Ballot Question Four in 2005 will dissuade the New York State legislature from continuing the FEA or like provisions beyond 2008. With its adoption, New York City will have demonstrated that State management of City finances, direct or indirect, is not required.

II. Ballot Question Three

Pursuant to Ballot Question Three, the Mayor and the Chief Administrative Law Judge at the Office of Administrative Trials and Hearings ("OATH") would be required jointly to establish a uniform code of conduct for Administrative Law Judges ("ALJ's") and City departmental hearing officers. The Association is previously on record in urging the establishment of such a uniform code for New York City administrative hearings. Such hearings are quasi-judicial in nature, and uniform rules are essential to the achievement of justice and fairness. A uniform code is also necessary to curb possible abuses that may arise from a lack of independence of hearing officers from the various departments and agencies of City government that employ them.

The Association commends the Commission (and the 2003 Commission) for addressing this important issue. The findings of the Commission confirm the independent conclusions of the Association with respect to the uneven quality and conduct of administrative hearings within New York City government.

The Association endorses Ballot Question Three and advocates its passage.

In its comments with respect both to the work of the 2003 Commission and to that of the current Commission, the Association urged the appointment of an Administrative Justice Coordinator as an analog to the existing Criminal Justice Coordinator. As noted by the Association and the Commission, a charter amendment is not necessary to empower the Mayor to make such an appointment. Similarly, the Association does not believe that the Commission has articulated a convincing rationale why the Mayor by executive order could not also require to be promulgated a uniform administrative justice code of conduct. The Association believes that the Mayor simply could order such promulgation by the appropriate parties.

III. The Charter Revision Process

There have been six Charter Revision Commissions appointed since 1998. Each was appointed and staffed by the Mayor. No other city elected official was invited to make appointments to the Commission. The Commission agendas were set by the Mayor. Unlike the 2004 Commission, the Commissions were short-lived and worked primarily in the summer months. The appointment of these Commissions brought objections from separately elected municipal officials whose governmental prerogatives arguably were being bypassed.

Charter Revision Commissions are a means of having referenda. But too many referenda exalt participatory democracy over representative government to the detriment of the latter. When the referenda process is solely controlled by the Mayor, and overused, it is abused.

Prior to 1988/1989, Charter Revision Commissions were rarely appointed. A 1989 Commission was necessary due to the ruling that the Board of Estimate governing structure was not constitutional. But since the 1989 Commission and the restructuring it effected, which included a substantial enhancement of the power of the City Council,

there has not been a compelling reason for any of the subsequently appointed Commissions. There certainly was not a compelling reason for the 2005 Commission which proposes laudable but unnecessary revisions, viz: The FEA does not expire until 2008 so that which the Commission proposes with respect to financial controls would not have any binding effect at least until 2008 or later if the FEA were to be extended; and with respect to administrative justice, a charter amendment is not required to achieve the objective proposed.

The current Commission continues and emphasizes a troublesome trend. There was no public outcry for Charter review. In prior reports with respect to other recent Charter Revision Commissions the Association decried the use of mayoral appointed and dominated Charter Revision vehicles which permit a Mayor to supercede the City Council or deny others ballot access. The Association warned that any proposals emanating "from a flawed political process would have to clear a presumption of raw political motivation." That presumption has not been cleared by the current Commission. The Association noted in prior reports, and emphasizes in this report, that Charter Revision Commission proposals should be evaluated in the context of maintaining the balance of power between the executive and legislative branches of government, as well as providing for meaningful public accountability. Charter Revision Commissions are not intended to be and should not be employed as a convenient and compliant legislature to bypass the City Council.

Section 36 of the Municipal Home Rule Law permits a mayor to establish a commission of associates to place questions on the ballot formulated in the manner of the commission's choice that would promulgate laws the legislature may choose not be enact. Lack of restraint in using such power could allow mayors to circumvent the representative legislative processes. Six mayoral commissions in the last eight years evidences a lack of restraint that diminishes rather than enhances democracy in New York City.