NEW YORK
CITY BAR

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COMMITTEE ON ELECTION LAW

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Hon. Frederick A.O. Schwarz, Jr., Chair
Hon. Dale C. Christensen, Jr.
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New York City Campaign Finance Board
40 Rector Street, 7th Floor
New York, New York 10006

Re: New York City Campaign Finance Board: December 2005 Public Hearings

Honorable Ladies and Gentlemen:

The Special Committee on Election Law (the "Committee") of the Association of the Bar of the City of New York (the "Association") writes in response to the letter dated November 17, 2005, from Nicole Gordon, Esq., Executive Director of the New York City Campaign Finance Board (the "Board"), inviting testimony at a public hearing of the Board on December 12 and 13, 2005. The Committee has followed the New York City Campaign Finance Program (the "Program"), which the Board administers, closely since its inception. Our members include former members of the staff of the Board, counsel who have represented candidates who have participated in the Program, academics, and representatives of public interest groups. On many occasions, we have testified to the Board on the Program. We have endorsed the Program and its goals in our reports, including a report specifically dedicated to the Program. *See generally The New York City Campaign Finance Program in the 2001 Elections: To Make a Good Program Better*, Report of the Special Committee on Election Law of the Association of the Bar of the City of New York dated October 2003 ("*To Make a Good Program Better*").

The Committee reiterates its overall strong support for the Program – including the Board's administration of the Program on an impartial and non-political basis – and for the goals underlying the Program: the reduction of the corrupting effect of large campaign contributions on public officials, the encouragement of candidates to run for public office who would otherwise lack the resources to do so, and the motivation of public participation in the electoral process by dispelling the cynicism generated by the sort of open public corruption that plagued New York City during the late 1980's. We welcome the opportunity to participate in the process

of commenting upon the program in a constructive manner that is intended to protect the Program and its goals against charges of politicization, as we have done in the past. We strongly and respectfully urge those offering their comments on the Program to do so with recognition of the benefits the Program has conferred on New York City politics. We equally strongly and respectfully urge the Board and its staff to receive those comments in the constructive spirit with which they are made, with an eye toward correcting any flaws in the Program in order that the Program may better serve the people of New York City. The issues we raise in this letter can and should be addressed through open and positive discussion among those that participate in the New York City political process. Ignored and left to fester, they may encourage criticism of and discourage participation in the Program. Faced and corrected by parties acting in good faith, they will leave the Program stronger and more effective in achieving those goals which we all wish to attain.

Based on our observations and experiences during the 2005 election, we urge that the Board focus on the following issues:

1. **Impact of spending limits on candidate competitiveness.** Our Committee has emphasized the importance of encouraging competition in elections in its reports on public campaign financing. *See, e.g.,* Towards a Level Playing Field – A Pragmatic Approach to Public Campaign Financing, 52 Record of the Association of the Bar 660, 677, 678-79 (1997). As we have stated, any public campaign financing system that limits campaign expenditures runs the risk of affording an undue advantage to incumbent candidates and disadvantaging challengers. Even with term limits on City officials, allowing challengers the opportunity to compete with incumbents on equal footing remains a significant concern. Furthermore, even where no incumbent is running, the reality is that for many candidates – whether "insurgents" waging a challenge in a Democratic primary or Republicans running in a general election – unduly low spending limits can prove to be an unfair constraint.

   Unfortunately, the existing spending limits (in 2005, $150,000 per election for City Council) simply are often not large enough to allow typical challengers to overcome an adversary's advantages of incumbency. By contrast, this Committee as far back as 1997 recommended limits for State legislative office that are significantly greater ($2 million per election cycle or $1.5 million per contested election for State Senate, $1 million or $750,000 for Assembly – *see* 52 Record at 692) and were based on our understanding that candidates who spent up to those levels would have the chance to wage competitive campaigns for those offices for no matter what the opposition spent.

   Even apart from spending limits that are too low, other aspects of the Program discourage competitive races. For example, political party committees can contribute no more than any one individual, with the result that a party (subject to Election Law § 2-126) cannot "jump start" a nominee with funding sufficient to induce people to become candidates or to provide "seed money" necessary to begin a competitive campaign. We urge that political parties be permitted to contribute at materially higher levels than under the Program, although not to make unlimited "transfers" as is permitted under the State Election Law.

Some may recoil at the reforms that are necessary to encourage competition and a level playing field such as this Committee has advocated in the past. However, it must be emphasized that a perception by an elected official that he or she is effectively immune from challenge by an insurgent (from his or her own or from another party) may do far more to foster the potential for corruption and disregard of the public interest than even large – but publicly disclosed – contributions could ever do.

2. **Candidates with limited competition.** Candidates who participate in the Program currently receive public financing, even in races where they have no realistic opposition. Although the public financing of such candidates may be seen as a waste of public funds, the Committee has deep concerns as to the feasibility of any objective standard under which a participating candidate could be deprived of public funds based on noncompetitiveness short of having an uncontested election. Criteria based on spending levels, for example, might prove meaningless if the opponent happened to be an extremely popular celebrity or if the opponent simply attracted public attention ostensibly by working for a "public interest" group. We would propose that candidates who did not believe that they had serious opposition could voluntarily release their public funds for use by a designated campaign that was facing non-participating opposition that was spending far in excess of the voluntary limits imposed on Program participants. Under our proposal, the candidates without competition would have a real incentive to release their public funding. At the same time, there would be no loss to the public, since the funds would already have been appropriated.

3. **High spending by non-participating candidates.** One of the concerns that has been raised by this Fall's city elections has to do with high spending campaigns by candidates who do not participate in the Program and either finance their own campaigns or rely on contributions by supporters or use some combination of the two. Mayor Bloomberg's reelection campaigns and the New Jersey gubernatorial campaign between Jon Corzine and Doug Forrester are two examples just from 2005. Current First Amendment law assumes that such self-financing poses no danger of corruption of the political process, since such candidates cannot be corrupted by their own funds. Nevertheless, the presence of such candidates in a campaign can dampen the enthusiasm and discourage the candidacies of their less well-financed opponents. This can undercut one of the primary purposes of the Program, namely to encourage and stimulate political participation and electoral competition. Given the lack of an identified constitutional way to limit the ability of candidates to use their personal wealth to subsidize their own campaigns, the solution for the political imbalance that their high spending can cause is to find ways to further enhance the financing of or public communication opportunities for the campaigns of their publicly-subsidized opponents.

The Program currently does attempt to provide protection for participants against being grossly outspent by self-financed candidacies or other candidacies outside the Program. The spending limits for participating campaigns are eliminated if the opposition spends more than three times the current expenditure limit for that office under the Program. At the same time, the "match" of public funds to private contributions is increased from 4:1 to 6:1. These protections can of course be adjusted as

necessary, especially the spending level of the opposition that "triggers" these enhancements.

Three additional approaches might prove promising. The Board should first consider raising the contribution limits -- either across the board or based on a non-participating campaign's spending beyond a "trigger" level" -- to make it easier for participating candidates to raise funds from supporters to counter the resources of the self-financed wealthy candidates. At the same time, care must be taken to protect against the exploitation of increased contribution levels by influence-peddlers, which would undermine the fundamental goal of the Program. Secondly, since the office of Mayor has attracted self-financed campaigns in three of the five mayoral elections under the Program, the Board should consider increasing the number of mandatory debates for the Office of Mayor, especially if triggered by a high spending campaign outside the Program. We believe that, at the Mayoral level, such debates would attract public attention and provide a meaningful counterbalance to a participating candidate who is being greatly outspent by a self-financed opponent. Although the self-financed candidate cannot be compelled to debate, increasing the number of mandatory debates for his or her participating opponents would at least generate public pressure for the self-financed candidate to agree to a like number of public debates (as happened in this year's general election) or would otherwise provide a "free media" forum for the participating candidates to challenge the "no-show." Finally, should our proposal regarding the voluntary release of public funds by candidates with no serious opposition (Point 2) be accepted, the Program would have additional resources to enhance the public funding of participating candidates being greatly outspent without impairing the public purse. These various proposals could help restore public confidence in the ability of the public financing program to stimulate competitive campaigns that will raise electoral issues fully and vigorously.

4. **Due process.** In recent years, the City Council has amended the Campaign Finance Act to codify requirements for administrative penalty assessments, including notice and opportunity to be heard, and to disqualify candidates from receiving public funds if a repayment claim or a civil penalty remains unpaid from a prior election. Campaigns have been persuaded to enter into voluntary payment agreements -- addressing assessed penalties and repayment claims -- without resort to litigation. Moreover, since 2001, the Board has succeeded in a significant number of civil actions for collection of administrative penalties and public funds repayments. These developments reflect and should help promote increased efficiency in enforcement.

At the same time, candidates and treasurers have challenged the due process sufficiency of Board notices of violation and the scope of personal liability asserted by the Board for public funds repayments – and met with some success in the courts. Among those who have been subject to the Board's audit and enforcement, concerns about procedural unfairness abound.

The gulf in perceptions is evident to the practitioners on our Committee. While the Board frequently characterizes its administrative penalty proceedings as "non-adversarial," respondents believe that the Campaign Finance Board staff (who act in the role of prosecutors) and the Board (who act in the role of judges) do engage in *ex parte* communications in connection with these proceedings. It would be a mistake to conclude

that candidate acquiescence in the outcome of these proceedings reflects acceptance of the result or the procedures that led to it.

Our 2003 report contains a number of recommendations to promote fair and open proceedings, including adjudication before independent administrative tribunals for the most serious allegations of violation, fraud, or misuse of public funds. We urge the Board to acknowledge and initiate a dialogue with the regulated community on its due process concerns.

5. **Union Contributions.** The Committee notes the passage of legislation by the New York City Council with respect to the standards under which affiliated unions are to be deemed under common control for purposes of making political contributions to Program participants. The Committee reiterates its position that participants in the Program not be permitted to receive contributions by labor unions and organizations and its support of state legislation to prohibit such contributions -- and contributions by corporations and entities other than individuals or political committees -- across-the-board, *see To Make a Good Program Better* at 92. In the absence of such legislation, the Committee urges that the Board (a) publish a list of unions it deems to be affiliated with other unions in order that campaigns and unions will have notice as to whether a contribution would be allowed or disallowed by the Board and (b) with respect to questions of affiliation among unions not so listed, continue to employ the four-factor test that has been set forth in the Board's Rule 1-04(h) since the early years of the Program. *See* Letter dated December 3, 2004, from Laurence D. Laufer to Hon. Frederick A.O. Schwarz, Jr.

6. **Standards for coordinated expenditures.** Coordination between candidates and the activities of third parties has emerged as a significant issue for the Program in recent elections. Specifically, although outside parties have the right to engage in political activities that are truly independent of any campaign, and to give assistance to some degree to political campaigns, the extent to which such activities are de facto contributions -- outside of and often of a value in excess of contribution limits -- presents a direct challenge to the very essence of the Program. To permit a third party to engage in planned and coordinated activity in support of a candidate without any accounting to the program will permit candidates to outsource activity to shadow campaigns functioning beyond the Program's limitations. This will subvert the very nature of campaign finance reform, undoing three of its intended effects – leveling the playing field, forcing campaign activity into the open, and reducing the influence of special interests and of access to vast resources.

It is a challenge to strike the right balance between not intruding on political activity protected under the First Amendment, nurturing participation in the political process, and enforcement of the Program's coordination requirements and thus its contribution limits. Timely and accurate guidance as to how to comport with coordination requirements will ease this challenge for the Board and campaigns alike.

The definition of "contribution" set forth in the Campaign Finance Act and in the Board's Rule 1-08(f) regulates coordinated activity in some detail. It is also notable that, pursuant to legislative amendments adopted in 2004, these standards apply to participating and non-participating campaigns with equal force. At this time, the Committee would not recommend further elaboration in the statute or the Board's rules.

Rather, the Committee takes note that the Board last published a significant public policy analysis on the subject of coordinated activities in 1997. *See* Campaign Finance Board, *Friends in Need: Joint and Independent Spending by Candidates* (Jan. 1997); *see also* Campaign Finance Board, *Party Favors* (Jan. 1995). Given the importance and complexity of this issue in recent and future campaigns, the Committee urges the Board to publish, prior to the comprehensive report that it is due to submit to the Mayor and City Council in September 2006, if feasible, a special report containing an in-depth discussion of cases from the elections since 2001 in which coordinated expenditures were at issue and how that issue was resolved in each case. Such an analysis, based on actual experience, would be invaluable for guiding candidates and practitioners, and would likely spur further public discussion on whether the existing standards merit adjustments in light of their actual application.

We also await with great interest the Board's analysis on the presence and impact, if any, of so-called "pay-to-play" contributions by individuals doing business with the City of New York and/or agencies or instrumentalities of the City. The Association has long urged that such contributions be tightly restricted as the very essence of what the Program seeks to protect the political system against. We were encouraged by the efforts undertaken last spring by the Board and the Mayor to identify potential "pay-to-play" contributors as a first step toward eliminating any corruption generated by such contributions. At that time, and after three public hearings, the Board issued a statement dated April 14, 2005, that, prior to implementing any changes in the Program with respect to "pay-to-play" contributions, the Board would collect data from the 2005 election cycle and analyze their effect, if any, on the process. We look forward to working with the Board to address this issue based on that analysis when it becomes available.

We would be happy to help you in any way that we can to make the New York City Campaign Finance Program work efficiently and for the benefit of the public as it has in the past and has always been intended to do. If we can be of assistance in this regard, please do not hesitate to call on us.

Yours very truly,

LAURENCE D. LAUFER
Chair