The Association of the Bar of the City of New York

Special Committee on Election Law

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December 3, 2004

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

Re: Proposed Amendments to Campaign Finance Board Rules

Dear Chairman Schwarz:

The Special Committee on Election Law (the "Committee") of the Association of the Bar of the City of New York (the "Association") respectfully submits the following comments in response to the Notice of Opportunity to Comment on Proposed Amendments to Campaign Finance Board Rules (the "Proposed Amendments") issued by the New York City Campaign Finance Board (the "Board") on October 13, 2004. The Committee has followed the New York City Campaign Finance Program (the "Program") since its inception. It has supported the Program as a genuine reform of the campaign finance system and the Board's work in overseeing the Program. It has offered its comments -- based in part on the direct experience of its members -- with respect to both proposed legislation and proposed rules affecting the Program and on the Program itself. *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 Proposed Amendments would:

> (a) amend Rules 3-03(c)(6) and 5-01(d)(11) of the Board's Rules to require the reporting of employment information (occupation, employer, business address) with respect to any contribution for which matching funds are sought under the program for all contributions above $99.00 instead of $500.00; and

(b) amend Rules 1-04(h) and (i) in order to set more precise standards governing when contributions from different entities having some relation to each other will be deemed as coming from a single source under the applicable contribution limits by adding specific standards for the treatment of labor unions and organizations and partnerships and limited liability companies.

The Committee supports the proposed reduction of the threshold for reporting employment information (occupation, employer, and business address) to $99.00 from $500.00. We believe that that reduction is warranted given the increased amount of matching funds being paid to participating campaigns under the Program in order to protect the interests of the public. The Committee also supports the proposed presumption that contributions made by any limited liability company or partnership (other than registered partnerships under Article 8-B of the New York Partnership Law) shall be deemed to have been made by the general partner or general manager of the partnership or corporation as the case may be, since it is the general partner or manager who controls the operations of the entity in question (Proposed Amendment adding Rule 1-03(h)(3), which codifies a prior Board opinion).[1]

With respect to the Board's legislative proposal that participants in the Program not be permitted to receive contributions by labor unions and organizations, the Committee has supported state legislation to prohibit such contributions across-the-board, *see To Make a Good Program Better* at 92. This restriction has not been enacted to date by the New York State Legislature or the New York City Council. The Committee further wishes to encourage the Board's effort to set clear standards applicable to labor unions and organizations that will offer clear guidance to participating campaigns as to the contributions they may or may not accept from those entities. At the same time, the Committee has some concerns with the standards as proposed by the Board and suggests an alternative that would in effect carry out much of what the Proposed Amendments seek to accomplish.

The Rules in their present form require that multiple contributions from persons, persons in combination, or entities be treated as coming from a single source for purposes of calculating the maximum contribution if maintained or controlled by a single person, group of persons in combination, or entity. The current Rules identify four general factors for determining maintenance or control. *See* Rule 1-04(h). The Proposed Amendments would presume: (a) that a national or international union and its political

[1] The proposed presumption would not apply to firms without a general partner or general manager. In addition, the Proposed Amendment changing the language of Rule 1-04(i) appears redundant in light of the added Rule 1-04(h)(3). The purpose of that language change -- other than to reiterate the substance of Rule 1-04(h)(3) -- is unclear to the Committee.

action committee ("PAC") would be deemed as a single source with any regional, state, or local subordinate organizations of that union and their respective PACs (Proposed Rule 1-04(h)(2)(i)); and (b) that an organization of national or international unions and its PAC would be deemed as a single source with any regional, state, or local subordinate bodies of that organization and their respective PACs (Proposed Rule 1-04(h)(2)(ii)). The Board's Explanation accompanying the Proposed Amendments specifies that the Board would not presume that labor organizations (such as the AFL-CIO) would control their member unions (such as the United Federation of Teachers). The Proposed Amendment parallels federal regulations with respect to labor unions and organizations. *See* 2 U.S.C. § 441a(a)(5); 11 C.F.R. §§ 1105(g) & 110.3(a).

Although sympathetic to the Board's attempt to clarify its standards with respect to labor organizations, the Committee is not confident that the Proposed Amendment rests on solid statutory legal basis. Specifically, Administrative Code §3-703(1)(f) permits participating candidates to accept contributions (in amounts up to a specified limit) "from any one . . . political committee, employee organization or other entity . . . ." The Board's longstanding Rule 1-04(h) treats separate entities as a single entity only when specific facts reflect common control. The Proposed Amendment would go further, creating a legal presumption of common control for certain employee organizations and political committees, without regard to whether there is a factual basis for such a conclusion. As proposed, this legal presumption appears to be at odds with the permission granted to participating candidates under Administrative Code §3-703(1)(f).

In addition, the federal regulations operate in the context of a legislative ban on union contributions (other than through PACs) to political campaigns. 2 U.S.C. § 441a(a)(5). That ban does not have a parallel in the New York Election Law or in the New York City legislation governing the Program. While the Committee supports the Board's proposals for such a legislative ban, *see To Make a Good Program Better* at 92, the Committee believes that the statutory basis for the Proposed Amendment would raise an open question for judicial determination.

As a practical matter, we also question the appropriateness of establishing a presumption that certain unions and organizations constitute single entities. Given that the Board's authority extends over *campaigns*, the proposed rule would require a *campaign* to prove that different labor organizations wishing to contribute should not be treated as single entities, essentially requiring demonstration of facts beyond the immediate control of that campaign. It does not appear realistic to expect campaigns to request such proof from the unions themselves on top of the contributions they solicit. In the context of an election and its inherent time pressures, a campaign might face the dilemma of accepting contributions from different unions that it believes (based on reasonable and objective evidence) do not constitute a single source notwithstanding the

presumption and risking a contrary Board determination *after* the relevant election or foregoing a contribution that might be valid and legal.

The Committee would propose an alternative based on the Board's own work that would obviate many of these issues and provide guidance in many instances. We note that the Board in its administration of the Program over many years has in fact determined that certain combinations of unions or umbrella organizations constitute a single source under the existing four factor test of Rule 1-04(h). The Board has thus considered the relationships among the labor unions and other organizations that have in fact been in the practice of making political contributions in New York City over a sustained period of time. We respectfully suggest that, as a starting point, the Board promulgate a list of organizations that it has found to constitute single sources under that test. The list would of course be non-exclusive; other combinations meeting the criteria of Rule 1-04(h) could always be found to constitute a single source. The list would provide an easy reference enabling campaigns to avoid acceptance of excessive contributions from entities the Board has found to constitute a single source. Listed unions and labor organizations would have the opportunity to challenge that finding through administrative or judicial declaration. With respect to organizations not listed, campaigns would still have the guidance of the four factor analysis under Rule 1-04(h) and could seek an advisory opinion from the Board under appropriate circumstances.

To the extent that the Proposed Amendments reflect an intention on the part of the Board to put candidates and practitioners on notice as to the types of organizations it may consider constitute single sources, the Board might give such notice as part of any published list of single sources. Such a result would remain consistent with the fact-based approach that has been the spirit and the letter of Rule 1-04(h).

If we can be of assistance in connection with this or any other issue, please do not hesitate to call on us.

Yours very truly,

Laurance D. Laufer
Chair

cc: Hon. Dale C. Christensen, Jr.
Hon. Katheryn C. Patterson
Hon. Joseph Potasnik
Hon. Alan N. Rechtschaffen
Sue Ellen Dodell, Esq.