



NYPIRG

NEW YORK PUBLIC INTEREST RESEARCH GROUP

**TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
JOINT HEARING OF THE SENATE FINANCE AND ASSEMBLY WAYS & MEANS
COMMITTEES REGARDING THE
FISCAL YEAR 2019-2020 EXECUTIVE REFORM BUDGET PROPOSALS
January 29, 2019
Albany, N.Y.**

Good afternoon, my name is Blair Horner and I am executive director of the New York Public Interest Research Group (NYPIRG). NYPIRG is a non-partisan, not-for-profit, research and advocacy organization. Consumer protection, environmental preservation, health care, higher education, and governmental reforms are our principal areas of concern. We appreciate the opportunity to testify on the governor's executive budget on ethics, transparency, campaign finance, and election law reforms.

There can be no doubt that New York State, considered "progressive" in many areas, with constitutional protections for labor, the poor, the environment, and the law. But when it comes to its democracy, New York is anything but progressive. From anemic voter participation rates to essentially unfettered campaign contributions, from widespread corruption to ineffective government watchdogs, New Yorkers suffer greatly from the state's flawed democracy. And while laws along cannot fix all that ails New York's democracy, reforms are needed.

Generally speaking, we believe that the governor has offered a significant, yet incomplete, package of reforms that merits serious consideration and, in many cases, approval. Unfortunately, his proposals are insufficient to the task at hand, much more needs to be done to improve the governor's plan and to enact additional reforms. For example, there is one important area in desperate need of consideration, but which has been ignored in the executive budget plan: the need for *independent* oversight of both the ethics and contracting practices of the state.

Our testimony will review the recommendations of the governor and offer suggestions on how to tackle the issue of independent oversight. We have categorized the executive budget's reform proposals into six broad areas: Government Openness, Voting and Elections, Contracting, Ethics, Lobbying, Campaign Finance. We start our testimony with the section on Government Openness since it is included in the Public Protection and General Government Article VII Budget Bill.

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1. Government Openness

- **Amending the Freedom of Information Law (FOIL).**

Part BB of the Public Protection and General Government Budget Bill expands the state's Freedom of Information Law Requirements to the Legislature. NYPIRG supports this measure.

Why stop there? The Committee on Open Government offers a number of recommendations that should be included.

NYPIRG urges that the Legislature reject the governor's proposal to allow a new exemption to FOIL for "critical infrastructure." As the head of the Committee on Open Government described it, it is "redundant" since current FOIL *already* allows for exemptions to infrastructure disclosures if there are threats to "public health and safety." Robert Freeman stated that the new language is "absolutely unnecessary."¹

NYPIRG agrees with the Committee and urges your *opposition* to the governor's new exemption.

It is our view that FOIL needs to be dramatically strengthened in its oversight of the executive branch. The use of state controlled not-for-profits was an end run around public oversight and has led to a serious scandal.

The Fort Schuyler Management Corporation, the state created not-for-profit entity involved in the "Buffalo Billion" economic development, had repeatedly ignored FOIL requests arguing it was outside of the scope of that law.² That secrecy contributed, we believe, to the scandal that has enveloped the Administration. Ironically, the Committee on Open Government had previously opined that similar entities should be covered by FOIL, yet that recommendation was ignored.³

It is clear that the executive branch needs to be held much more publicly accountable. **We urge that you review the recommendations made by the Committee on Open Government in its 2018 annual report and consider them in your final budget proposal, most notably ensuring that JCOPE is covered by FOIL and Open Meetings laws and that commercial entities annually renew their FOIL exemptions.**⁴

¹ Seiler, C, "Cuomo proposes a new FOIL exemption to protect 'critical infrastructure'," January 20, 2017, *Times Union*, <http://blog.timesunion.com/capitol/archives/271409/cuomo-proposes-a-new-foil-exemption-to-protect-critical-infrastructure/>.

² Heaney, J., "Secrecy, politics pervade project," *Investigative Post*, June 20, 2015, <http://www.timesunion.com/tuplus-local/article/Secrecy-politics-pervade-project-6339837.php>.

³ Committee on Open Government, FOIL-AO-17411, 2008. Recommendation to mandate FOIL compliance contained in "2016 Report To The Governor and Legislature," <https://www.dos.ny.gov/coog/pdfs/2016%20Annual%20Report.pdf>.

⁴ New York State Committee on Open Government, Annual Report 2018, available as a document through a link on <https://www.dos.ny.gov/coog/>.

2. Voting and Elections

New York State had a Voting Eligible Population (VEP) of nearly 13.7 million⁵ in 2016. VEP is the most reasonable measure of participation and includes citizens over 18 who are not incarcerated for a felony or on felony parole. However, only 12.5 million New Yorkers were listed by the New York State Board of Elections as either active or inactive voters for the same time period. That means over one million *eligible* citizens were not registered to vote.⁶ While the comparison of these two datasets is imperfect, it underscores that many New Yorkers who are eligible, are simply not registered to vote.

Simply put, New York's voter registration and voter participation rates are anemic. In the 2016 general election, a stunningly low percentage of registered New Yorkers – under 57 percent – voted. A review of the U.S. Elections Project analysis, showed New York to be among the worst eligible voter turnout rates in the nation.⁷

Based on NYPIRG's decades of experience running an election day voter helpline in New York City and helping students and other New Yorkers with election day problems throughout the rest of the state, we know that the problems New York faces with its dismal voter participation rates don't end with fixing its dismal system for registering voters. For heavy turnout elections in Presidential years, too many of New York's beleaguered voters stand in line for hours and face problems at the polls in order to cast their ballots. Broken machines, improperly trained or supervised poll workers, inaccessible poll sites, poor ballot design, insufficient numbers of ballots, and illegal requests for ID are ongoing problems for too many voters. These chronic problems at poll sites require strong and immediate action from city, state and local governments, as well as from Boards of Elections.

While many dedicated board staff and poll workers worked tirelessly before and on Election Day, the problems many voters faced are systemic. Policymakers need to focus on voter registration, voter education, Election Day operations and the administration of elections reforms or these same problems will continue—to the continuing diminution of our democracy. In 2019, your experience as a voter should be as easy and streamlined as getting coffee at Starbucks.

To be fair, it's important to recognize that the majority of voters across the city and state do not have significant problems when casting their vote. However, even when things go smoothly on Election Day, New York still has many unnecessary barriers that impede voter participation.

⁵United States Elections Project, *2016 November General Election Turnout Rates*: <http://www.electproject.org/2016g>.

⁶New York State Board of Elections, *Voter Enrollment by County*: http://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov16.pdf. The State Board lists 11.5 million New York voters as “active registered” and an additional one million as “inactive voters.” Added together, New York State has total of 12.5 million registered voters.

⁷United States Elections Project, *2016 November General Election Turnout Rates*: <http://www.electproject.org/2016g>. Percentage of “Voter Eligible Population, Total Ballots Counted.” Arizona, Arkansas, Hawaii, New Mexico, and Texas all had lower turnouts.

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NYPIRG applauds the actions of the governor, state Senate and Assembly to approve a package of voting and elections reforms. We view these actions as significant progress in modernizing the manner in which New York runs its elections.

Key Measures Already Approved

• **Same Day Registration.**

The state's antiquated system of voter registration is a relic of a bygone era. It serves little purpose other than to help self-perpetuate the re-election of incumbents and limit voter participation. New York should join the states⁸ offering Same Day Registration through the passage of an amendment to the State Constitution.

Each year, just as interest in elections and candidates begins to peak, potential voters find that the deadline for registering to vote has already passed. Here in New York, campaigns for statewide and local offices barely attract public attention before October. By the time voters begin to focus on the election, the deadline has already passed.

A system of "Same Day Registration" would dramatically increase voter participation in a state where participation has fallen to shockingly low levels. Electoral participation experts have long concluded that registration "black-out" periods lower voter turnout. One needs to look no further than the states that have same-day or no registration to show how well the system works (participation rates in "same-day" states are traditionally among the highest in the country).⁹

NYPIRG urges you to finish the job by second passage of this amendment in 2021 in order for it to be in place in time for the 2022 elections (subject to voter approval).

• **Enable easier access to absentee ballots.**

The State Constitution and Election Law currently place unnecessary restrictions and burdens on New Yorkers applying for an absentee ballot. Increased access to absentee ballots would likely mean increased voter participation from voters with work, school or childcare commitments who wouldn't currently qualify under current law.

In an age where some states such as Oregon successfully moved to conducting entire elections via mail, it's time to rethink the state's policies with an eye towards expanding absentee voter opportunities as a method of increasing voter participation.

NYPIRG urges you to finish the job by second passage of this amendment in 2021 in order for it to be in place in time for the 2022 elections (subject to voter approval).

⁸ For a list of states with same day registration, see National Conference of State Legislatures, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

⁹ Street, A., Murray, T. et al, "Estimating Voter Registration Deadline Effects with Web Search Data *Political Analysis* (Spring 2015) 23 (2): 225-241.

- **“Universal Registration” program for eligible state and city residents.**

Universal electronic registration enrolls voters when they move or interact with a government database. Under such a system, the state, and municipalities like New York City, would identify eligible voters through a centralized agency database and place them on the rolls. Duplicate registrations would be avoided by running potential new voters against the existing county and/or state databases of registered voters. Potential universal registrants identified through databases would only include those with citizenship information. Similarly, voters who move within a county/NYC would have their registrations automatically updated. This should dramatically cut down on administrative costs associated with “unclean voter rolls” and reduce affidavit ballots cast by voters who have recently moved within a county but who show up at their old or an incorrect poll site.

- **Single statewide primary election for federal, state and local races.**

The state’s current “dual primary system” is a waste of money and virtually guarantees reduced turnout at the polls. NYPIRG supports a single June primary, recognizing that changes in petitioning deadlines should also be considered to facilitate that process. Moving the primary to June would also address the problems encountered by New York City and the compressed timeframe necessary to conduct a run-off election for citywide municipal offices.

- **Early voting for New York State.**

We are hopeful about the potential to increase the opportunities for voters to participate in elections and the possibility of reducing lines and congestion on Election Day through early voting. However, any provisions for early voting must ensure equal access across the state. In a large urban county, such as Kings (Brooklyn), early voting would undoubtedly benefit some, but if limited to one or two sites, its impact would be relatively negligible in addressing the goal of reducing congestion when a voter goes to cast their ballot.

- **Pre-registration of 16 and 17-year olds.**

In a state with abysmally low voter participation rates, only slightly more than half of New York’s youngest citizens are registered to vote. According to the U.S. Census Bureau, only 47% of New York’s 18-24-year-old citizens were registered for the November 2016 Presidential election. However, once registered, large numbers of young people turn out at the polls. According to the Census Bureau, 75% of New York’s 18-24-year olds who were on the rolls voted that year (*Voting and Registration in the Election of November 2016*).

This common-sense legislation enables students to pre-register when 16 or 17 years of age—at the age where school is still compulsory and many come in contact with the Department of Motor Vehicles for licenses or non-driver’s identification cards. A study of programs in Florida and Hawaii supported by the respected Pew Charitable Trust, concluded that “Based on interviews with election administrators and data analysis, preregistration is recommended to be best implemented as a component of a broader program of student civic education and student poll worker recruitment.”¹⁰

¹⁰ *Voter PreRegistration Programs*, Dr. Michael P. MacDonald, George Mason University (2009). Accessed at http://www.cses.org/plancom/2009Toronto/CSES_2009Toronto_McDonald.pdf.

Additional Measures Under Consideration in the Executive Budget

In terms of the executive budget, the most significant additional measures deal with expanding the role of government agencies to register voters.

• **Direct state agencies to electronically capture and transmit voter registration data.**

The NVRA requires that the Department of Motor Vehicles (“DMV”), social service agencies and offices that primarily serve persons with disabilities provide voter registration services. Such services include the distribution of voter registration forms and assistance with their completion. *However, only the DMV has integrated the voter registration form into its own computerized applications for licenses.* Interested drivers simply fill out a few additional questions regarding their registration status and the DMV then enters and forwards the information to Boards of Elections. The program has been extended to a client’s interaction with their “account” on the DMV’s website or via terminals in DMV offices.

These extremely efficient methods of automatically and electronically transmitting voter registration data to Boards of Elections should be adopted by all state agencies covered under the NVRA. **The current system favors those who interact with DMV offices and must be expanded. If the program is not expanded, serious questions will arise about whether certain populations are being disenfranchised.**

Other measures that are included in the executive budget that we support include the increased amount of time workers get to vote (section H),¹¹ the expansion of primary voting hours for upstate voters (section I), the use of electronic poll books, and the option to register to vote online.

Stop the attacks on college student voting by rogue Boards of Elections and Commissioners. We urge one addition to the voting reforms under consideration, moves to strengthen the voting protections of college students. Year after year, students have faced discriminatory obstacles to registration and/or voting in various counties around the state. Some counties target students by further splitting campus populations into multiple EDs and/or removing the campus poll site. Language that clearly establishes a student’s right to register and vote from their college community if they so choose, should be enacted to help stop these annual assaults on election rights. We also hope that members of the Legislature will weigh in with their local Boards of Elections to eliminate the discriminatory gerrymandering of students and to encourage on-campus poll sites for colleges with dormitory populations.¹²

¹¹ Consider going one step further and making Election Day a state holiday. States that already do this include: Election Day is not a federal holiday, but it is a yearly or biennial holiday in some states (see table below article), include: Delaware, Hawaii, Illinois, Indiana, Michigan, Montana, West Virginia. Source: <https://www.timeanddate.com/holidays/us/election-day>.

¹² Examples of college students being unfairly targeted in elections; see: <http://www.nyclu.org/news/nyclu-dutchess-county-protect-college-students%E2%80%99-voting-rights> and <http://www.nbcnews.com/news/asian-america/ny-attorney-general-raises-concerns-over-challenges-chinese-american-voters-n453801>.

We believe that the measures to expand voting in New York must be coupled with additional appropriations for the State Board of elections, as well as significantly increased oversight by the Legislature.

3. Contracting

- **Prohibiting campaign donations from vendors seeking or engaged in state procurement.**

In his executive budget, the governor proposes new campaign finance restrictions on those seeking and receiving government contracts. The investigation by the U.S. Attorney's office into allegations that state contracts were rigged to benefit campaign contributors to the governor underscores the need for action in this area.¹³

How "pay to play" laws work and the legal justification:

The notion that those receiving government contracts can be restricted is not a new concept. The Securities and Exchange Commission (SEC), for example, has enacted a pay-to-play rule.¹⁴ The rule, under the Investment Advisers Act of 1940, prohibits an investment adviser from providing services, directly or indirectly, to a government entity in exchange for a compensation, for two years after the adviser or an employee or an executive makes contributions to political campaigns of a candidate or an elected official, above a certain threshold.

Moreover, the rule prohibits an investment adviser or an employee or an executive from providing or agreeing to provide payments to a third party, on behalf of the adviser, in order to seek business from a government entity, unless the third party is a registered broker dealer or a registered investment adviser, in which case the party will be subjected to the pay-to-play restrictions.¹⁵

Under New Jersey's pay-to-play law, for-profit business entities that "have or are seeking" government contracts are prohibited from making campaign contributions prior to receiving contracts. Moreover, businesses are forbidden from making "certain contributions during the term of a contract." These pay-to-play restrictions apply at state, county, and municipal levels of government.¹⁶

NJ law requires contributions over \$300 to be reported, and the contributor's name, address and occupation to be identified. A government entity is prohibited from awarding a contract worth in excess of \$17,500 to a business entity that made a campaign contribution of more than \$300 "to

¹³ Whalen, R., "Buffalo Billion Executives Fighting Charges After Being Named in Federal Corruption Complaint," *Time Warner Cable News*, September 22, 2016, <http://www.twcnews.com/nys/buffalo/crime/2016/09/22/buffalo-billion-executives-named-in-federal-corruption-complaint.html>.

¹⁴ Advisers Act Rule 206 (4)-5, addressing pay to play law.

¹⁵ United States Security and Trade Commission, "Advisers Act Rule 206(4)-5 (Political Contributions by Certain Investment Advisers)," <https://www.sec.gov/rules/final/2010/ia-3043-secg.htm>.

¹⁶ New Jersey Election Law Enforcement Commission, <http://www.elec.state.nj.us/pay2play/laws.html>.

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the official's candidate committee or to certain party committees," specifically to committees that are responsible for awarding the specific contracts.¹⁷

However, we do not believe that limits should be placed solely on those seeking government contracts with the executive branch. A number of states place restrictions on campaign contributions from lobbyists, particularly during the legislative session. According to the National Conference of State Legislatures, 18 states have restrictions on campaign contributions by lobbyists, with 12 of those states prohibiting lobbyists from campaign contribution during legislative session.¹⁸

While we support the idea of restricting donations from those seeking government contracts, the governor's proposal leaves a loophole – it limits contributions to the elected official involved in the awarding of contracts but allows contributions to other committees. Thus, given that the governor is the individual overseeing the award of the vast bulk of contracts, the budget proposal would prohibit contributions to the governor, but would allow them to the relevant state committee, for example. That committee as we all know is controlled by the governor. We urge you to follow closely the New Jersey law (and others) to rely on "best practice" to strengthen the governor's plan.

• Independent oversight of government contracting.

The government contracting scandals that have engulfed members of the Administration underscore the need for stronger independent oversight. The State Constitution established a separately-elected State Comptroller who is supposed to be free of interference from other governmental offices. It is the Comptroller who is charged with monitoring the state finances.

Unfortunately, in recent years the governor and the Legislature have approved laws that have cut back the Comptroller's oversight functions, coinciding with the period in which pay-to-play activities and bid-rigging were allegedly occurring.

NYPIRG applauds the governor's recent announcement that he has reached an agreement to restore auditing powers to the Comptroller. As described by the governor, the Comptroller will be empowered to review contracts that exceed \$250,000, but the review must be completed within 30 days.

We have not seen bill language on this agreement, but we do have concerns about setting an artificial time limits. As we have seen, the absence of oversight has contributed to major scandals regarding the misuse of taxpayer dollars. We look forward to seeing that language and urge that you use your considerable oversight capabilities to monitor contracting activities.

¹⁷ New Jersey Business & Industry Associates, "Fast Facts: Complying with New Jersey's 'Pay-To-Play' Law," <https://www.njbia.org/complying-new-jerseys-pay-play-laws/>.

¹⁸ National Conference of State Legislatures, "Limits on Campaign Contributions During The Legislative Session," <http://www.ncsl.org/research/elections-and-campaigns/prohibited-donors.aspx>.

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In addition, we urge that you include language in the budget that creates a searchable database of government contracts and requires qualified participants to report annually on projected and actual jobs created and retained in connection with any related economic development benefits.

4. Ethics

Much of what is proposed in the Good Government Article VII Budget Legislation are worthy of support. What is most glaring is what is not included – the need to establish an independent ethics watchdog entity. We will review the governor’s proposals and then discuss the need for additional reforms.

One note; the governor’s proposals contemplate a significant increase in work by the Joint Commission on Public Ethics (JCOPE), yet the executive budget adds nothing in terms of new revenues. More work for JCOPE should result in more resources available.

NYPIRG has no objections to increasing disclosure requirements for candidates for public office, for local elected officials, an increase in the length of time of the state’s “revolving door” restriction.

• **What’s Missing, Yet Crucial: Independent ethics oversight.**

The *Public Integrity and Reform Act of 2011* established a new Joint Commission on Public Ethics (“JCOPE”) to oversee executive branch ethics, lobbyist and client reporting and conduct, and empowered to investigate, but not punish, legislators. The legislation also created a new Legislative Ethics Commission. Legislators and staff would remain subject to punishment only by the Legislative Ethics Commission. The LEC’s membership totals 9 – all appointees of the legislative leaders with 4 of the 9 sitting legislators.

The JCOPE commission members are appointed by the governor (six of the 14 members with three being enrolled Republicans), the Senate Majority Leader and Speaker each appoint three members; and the Senate and Assembly Minority Leaders each get one appointment.

The JCOPE chair is chosen by the governor; the executive director is chosen by the commissioners and does not have a fixed term but may only be terminated as specified in statute. Financial penalties were toughened, and courts now have the ability to strip corrupt public officials of their pensions, if those lawmakers were seated after 2011.

Yet there’s a fundamental problem in this law: both new ethics oversight entities were fatally flawed.

Ethics watchdogs must be independent – not political creatures. The structure of both agencies was driven by fear of real independence.

From the public point of view, ethics watchdogs must be independent of all public officials subject to its jurisdiction, or else its actions will always be suspect, undermining the very

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purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in commission members of high integrity, who hold no other government positions, are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity.

Including legislators on the LEC destroys the independence of the LEC, discouraging legislators and staff from seeking opinions or filing complaints, for fear of breaches of confidentiality and retaliation.

Similarly, JCOPE's basic commission structure is flawed. First, the appointment (and removal) process by which three members are appointed (and removable) by the Speaker of the Assembly, three by the Temporary President of the Senate, one by the minority leader of the Assembly, one by the minority leader of the Senate, and six by the governor, severely undermines the independence and accountability of JCOPE.

Thus, although JCOPE has little actual authority over the Legislature and although the legislative branch constitutes less than two percent of the state work force, the majority of its membership comes from legislative appointees.

And with 14 members, JCOPE is too big, and even numbered panels are prone to gridlock. Large boards are unwieldy, inhibit substantive discussion and make decision-making more difficult.

Moreover, these factors are combined with the mandate that at least two of the members of JCOPE voting in favor of a full investigation of a legislative member or staff member must be appointees of a legislative leader or leaders of the same major political party as the subject of the investigation. This makes it virtually impossible to pursue an investigation of a member in the good graces of the leaders of either house.

This appointment process virtually guarantees the factionalizing and politicizing of JCOPE – anathema to an effective ethics system. This gives political leaders an effective veto over investigating or sanctioning any member—or any lobbyist or client—who they want to protect for any reason.

And we've seen that factionalization play out. In a public letter to the editor in the Times Union, four JCOPE commissioners bemoaned being out of the loop in the search for a new executive director:

*Designed to be independent, the incessant interference continues. If the next executive director is not hired from outside state government after an exhaustive search, the public trust will be inexorably destroyed.*¹⁹

¹⁹ Albany Times Union, <http://www.timesunion.com/tuplus-opinion/article/Letter-Ethics-panel-hire-a-questionable-move-6408151.php>.

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After a national search, however, the new JCOPE Executive Director is a former counsel to the governor. Interestingly, JCOPE has had three Executive Directors in its existence – all of whom have been former staff of the governor’s.

New York’s commission is unique in another way – it allows elected officials among its members. Typically, ethics boards have explicit prohibitions on the participation of elected officials.

Moreover, allowing elected officials to serve on the board of JCOPE – which has regulatory authority over the lobbying industry – creates an inherent conflict of interest (in fact, the first chairperson was not only an elected official, but one who also served as the head of a lobbying group).

When it comes to LEC, given Albany’s history, the members of the body overseeing legislative ethics must not even be appointed by the Legislature. Anything less invites (historically well-founded) cries of cronyism. And a system of split appointments, even when it does not engender paralysis, only exacerbates this problem.

There can be no doubt that the state’s ethics watchdogs need a thorough review. Both agencies have been frequently criticized as lacking structural independence and operating in secrecy.²⁰ The criticism was at least implicitly validated in JCOPE’s recent policy reform recommendations from February 2015:

“Increasing Transparency and Disclosure. Amend the Executive Law to provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate. In addition, consider whether JCOPE’s current exemptions from the ‘Freedom of Information Law’ and ‘Open Meetings Law’ should be modified to increase the transparency of JCOPE’s operations while still protecting the integrity of JCOPE’s sensitive compliance and investigative functions.”²¹

Even when compared to the rest of the nation, New York’s ethics enforcement ranks poorly: In a 2015 comparison of state ethics laws, New York’s ethics enforcement received a grade of “F.” Not surprisingly, that same group listed New York’s oversight of procurement as an “F” as well.²²

²⁰ King, H., “Three Years In, New York Ethics Commission Still Looking to Find Footing,” *Gotham Gazette*, <http://www.gothamgazette.com/index.php/government/5479-three-years-in-new-york-ethics-commission-still-looking-to-find-footing>.

²¹ New York State Joint Commission on Public Ethics, “Report From The New York State Joint Commission On Public Ethics February 2015.”

²² The Center for Public Integrity, State Integrity Investigation project, New York State ranking available at: <https://www.publicintegrity.org/2015/11/09/18477/new-york-gets-d-grade-2015-state-integrity-investigation>.

Reforms

First, the LEC must be abolished and its powers (except imposition of penalties) transferred to a new state ethics watchdog, which would have full power over the Legislature (except for penalties) — to provide advice and ethics training, to administer and enforce annual disclosure, and to enforce the ethics laws.

Thirty-nine states provide external ethics oversight through an independent ethics commission that has statutory authority and staffing that are independent of the rest of state government. Ethics commissions in only six states, including New York, do not have jurisdiction over state legislators.

Second, the new ethics watchdog must be reduced in size from fourteen members, and all of its members must be appointed by the governor with the advice and consent of the Legislature, without regard to political party affiliation.

One model is the state of Hawaii, whose Commission has five members chosen from a pool created by Hawaii's Judicial Council, which nominates two individuals for each vacancy on the Commission. The nominees' names are sent to the governor, who selects one of the nominees for appointment. Senate confirmation of appointees is not required.

Moreover, in seeking commissioners for JCOPE, New York should look beyond the "usual suspects" of attorneys and others with personal, political or business ties to political leaders. The Commission should look more like local community boards and less like a political insiders' club.

Finally, the law must protect the budget of the new ethics watchdog, perhaps as a percentage of the net total expense budget of the state or as a fixed amount with an inflation adjustment.

Unfortunately, a plan has not been offered by the executive in his budget plan. Therefore, NYPIRG urges both houses of the legislature to advance a plan to eliminate the existing ineffective oversight entities and replace them with an independent and effective ethics watchdog. **We urge that you advance a constitutional amendment to establish a new ethics agency, an independent one. The model for its creation can be the Commission on Judicial Conduct.** The majority of the appointments to this new Ethics Commission would be made by the courts, thus granting it sufficient independence. All of its members and staff must be prohibited from *ex parte* communications with their appointing authorities and its budget would be constitutionally protected.

5. Lobbying

The governor's budget advances changes to lobbying oversight, some that will significantly increase the regulatory burden for JCOPE and yet the budget adds no resources. For example, lowering the threshold amount of spending that triggers reporting to \$500 from \$5,000. We are

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not sure of the value of requiring such reporting (it's hard to believe that an entity spending \$501 is deeply involved in lobbying), but it could dramatically increase JCOPE's workload.

Moreover, the package ignores some of the revelations stemming from the most recent lobbying scandal in the Buffalo Billion trial. In that case, a well-connected consultant was hired by a government entity and was allowed to represent an entity with business before that agency. In addition, the consultant never registered as a lobbyist, even though it was clear that he was seeking to influence government officials. Again, independent oversight may have made a difference and as mentioned above, we recommend the establishment of a new oversight entity.

We are supportive of the executive's proposal to require that campaign contributions by lobbyists be disclosed to JCOPE. Although, again, this places significant new responsibilities on JCOPE, which gets no additional resources.

In addition, the executive budget advances proposals that should be critically examined in terms of the possible constitutional implications. For example, the executive budget prohibits individuals and entities that do political consulting from lobbying former clients who have been successfully elected to public office. While we are sympathetic to the goal of the governor, the right to petition the government is a constitutionally-protected one.

Another example is that proposed "Lobbyist Code of Conduct." While it's hard to believe that lobbyists who misbehave would be able to keep clients or relationships with public officials, one aspect of the plan raises questions.

The code of conduct states that the lobbyist must act in a "manner that is respectful" to the "government Institutions that he or she interacts with."²³ And who determines what is "respectful" and what is not? JCOPE. **The notion that government determines "respectful" behavior is one that raises very troubling questions. We urge you to request legal opinions from scholars on this idea.**

6. Campaign Finance

New York has long been on notice about the failure of its state's campaign finance law. Nearly thirty years ago, the final report of the Commission on Government Integrity was issued. The Commission's report condemned New York's lax ethical standards calling them "disgraceful" and "embarrassingly weak." The Commission then scolded state leaders for failing to act, "Instead partisan, personal and vested interests have been allowed to come before larger public interests."²⁴

Yet, until this month, in the past three decades no steps have been taken to overhaul the state's campaign finance system. Indefensibly high contribution "limits," coupled with utterly

²³ Good Government And Ethics Reform Article VII Legislation, Page 159, lines 17 and 18.

²⁴ New York State Commission on Government Integrity, "Restoring the Public Trust: A Blueprint for Government Integrity," Volume 1, December 1988.

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inadequate disclosure requirements and nonexistent enforcement, have created a system that cries out for change, starting with the need for establishing a voluntary system of public financing.

NYPIRG applauds your action to eliminate the disparity in the state's campaign finance system that allowed for Limited Liability Companies to contribute huge sums – and often in secret – to candidates for office. Treating LLCs as corporations does, however, highlight the weaknesses in corporate limits.

As you know, corporations (and now LLCs) are limited to no more than \$5,000 annually in contributions to all candidates combined (this does not apply to I.E. efforts). Yet, corporate subsidiaries are considered separate entities for the purposes of campaign contributions. Thus, large corporations (and now entities that control multiple LLCs) can contribute significant sums.

We urge you to support the ban on LLC and corporate contributions proposed in the Executive Budget bill. LLC contributions are completely banned in New York City and partially banned at the federal level (LLCs which are partnerships or single-member LLCs and have not chosen corporate tax treatment can make contributions to federal candidates).

Real estate companies can have dozens and sometimes hundreds of LLCs because typically each property they own or develop is its own LLC. Even companies like Amazon, which is a publicly traded C corporation, has LLCs in numerous states to avoid tax liability and to segment operations and functions within its company. While the sponsors have a different interpretation, we believe the legislature's bill allows each LLC to contribute \$5,000 annually. In other words, a person controlling 20 LLCs could make \$100,000 in annual contributions (20 x \$5,000 annual contributions) in addition to their personal limit. Creating an LLC in New York is easy to do and involves completion of a few short forms with the Department of State and providing notification of its creation in two local newspapers.

The legislature's bill requires the direct and indirect disclosure of members of the contributing LLC. However, we are concerned that this requirement will, in some cases, fail to disclose the person controlling the LLC or their beneficial owners. It is common for real estate industry LLCs to be controlled by other LLCs or controlled by layers of LLCs that are "stacked" or "nested" to obscure what persons control and fund them.

NYPIRG urges your support for the ban on corporate contributions as proposed in the executive budget.

- **Lowering Campaign Contribution limits.**

New York State relies on private donations to fund its political campaigns. Thirty-seven states limit the size of contributions individuals can make to candidates for office. New York's limits –

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as much as \$65,00 to a candidate for statewide office – are the highest of any of these and are more than ten times the average limit of these states.²⁵

Since New York State has the highest campaign contribution limits of any state with limits, candidates focus their fundraising on those who can give the most – and those individuals and entities usually have business before the government.

The governor's proposal does lower campaign contribution limits. But as seen below, those limits are still too high. NYPIRG urges that limits are lowered to more reasonable levels, such as the maximum donation limit of \$2,700 per election for federal office.

Campaign contribution limits proposed in the Executive Budget²⁶

| | Current Law | Proposed In Executive Budget |
|----------------|---------------------------------------|--------------------------------------|
| Statewide | \$65,000 | \$25,000 |
| State Senate | \$18,000 | \$10,000 |
| State Assembly | \$8,800 | \$6,000 |
| State Parties | \$109,600 (no limit for housekeeping) | \$25,000 (\$25,000 for housekeeping) |

As seen above, the governor's proposed limits would do little to force real change in the campaign finance system from the current one that relies on a small number of big donors to one that relies on a large number of small donors. **A new system – one that encourages the participation of small donors – must be established: A voluntary system of public financing.**

- **Establishing a voluntary system of public financing.**

New York State relies on private donations to fund its political campaigns. Since New York State has the highest campaign contribution limits of any state with limits, candidates focus their fundraising of those who can give the most – and those individuals and entities usually have business before the government.

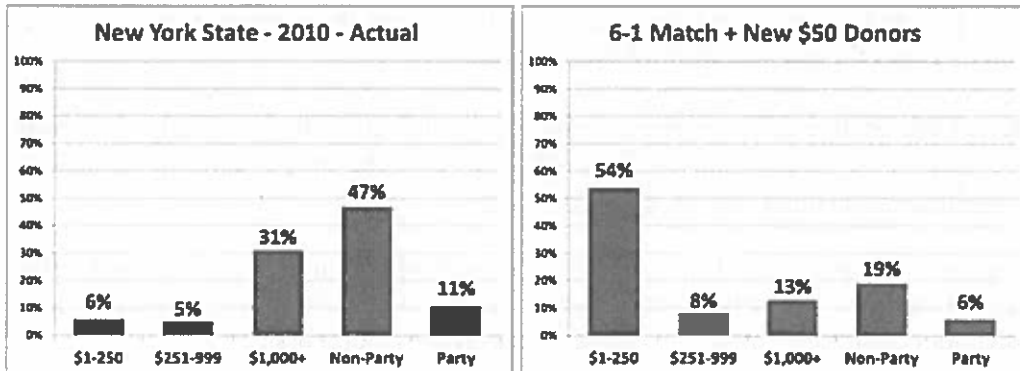
Political campaigns in the United States are typically financed by a relative handful of donors. In New York State in 2012, only 6% of candidates' money came from donors who give \$250 or less. In contrast, 78% came from non-party-organizations (such as PACs) and individuals who gave \$1,000 or more.²⁷

²⁵ National Conference of State Legislatures, *State Limits on Contributions to Candidates*, <http://www.ncsl.org/research/elections-and-campaigns/campaign-contribution-limits-overview.aspx>.

²⁶ This chart lists the governor's proposed contribution limits for candidates who do not opt into the public financing system.

²⁷ Campaign Finance Institute, "Public Matching Fund System Would Reverse the Importance of Small and Large Donors in New York State Elections," http://www.cfinst.org/Press/PReleases/12-04-17/Public_Matching_Fund_System_Would_Reverse_the_Importance_of_Small_and_Large_Donors_in_New_York_State_Elections.aspx.

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New York City has a system of voluntary public financing. Candidates who voluntarily choose to participate see their contributions enhanced when they raise donations of \$175 or less. In those cases, each \$1 raised is matched with \$6 in public funds.

That system has shifted the balance from relying on a small number of large donors to a system relying on many small donors. It has given candidates an incentive to turn their attention toward small donors through a program that matches donor contributions of up to \$175 at the rate of 6 to 1. A study by the Campaign Finance Institute showed that a similarly dramatic result would be likely in state elections.²⁸ It shows that even if matching funds brought no new donors into the system, the role of the small donors under a six-for-one system would shoot up from 6% to 30%. But that 30% number is almost surely too low. It assumes no new donors at all.

New York State's donor participation rate is near the bottom of the country. New York State's candidates for the Legislature in 2012 raised 76% of their money (through the final pre-election disclosure reports) from donors who gave them \$1,000 or more, and from interest groups. Only 8% came from donors who gave \$250 or less.²⁹ If the match would lead state candidates to attract just enough new \$50 donors to bring participation up to the city's rate, the small donors would be worth 54% of the total amount raised.

This would be a dramatic change: from 8% to 54%. Small donors would become the most important donor constituency, instead of the least important. If the goal is to connect candidates more strongly with the people they are supposed to represent, the New York City system is the model to emulate. New York City has a system of public financing³⁰ in which candidates who voluntarily opt into the system receive \$6 in a public match for every \$1 raised from small contributions (up to \$175), thus encouraging the solicitation of large numbers of small donors.³¹

²⁸ *Id.*

²⁹ Campaign Finance Institute, "Lower Contribution Limits with Public Matching Funds in NY State, Reversing the Role of Small & Large Donors, Would Leave Candidates "Whole" While Costing New Yorkers only \$2/year," http://www.cfinst.org/Press/PReleases/13-04-01/Updated_CFI_Research_on_Public_Matching_Funds_Proposal_for_New_York_State.aspx.

³⁰ In a New York City Charter Referendum last November, voters overwhelmingly approved expansion of the public financing system that includes an \$8 to \$1 match.

³¹ New York City Campaign Finance Board, <http://www.nyccfb.info/program/how-it-works/>.

NYPIRG urges support for a voluntary system of public financing.

• **Place meaningful limits on donations to “housekeeping accounts.”**

New York exempts from contribution limits donations to so-called “housekeeping” accounts for “party building activities.”³² There have been widespread abuses of this exemption. For example, in 2012, the Independence Party admitted to using soft money to pay for ads attacking specific candidates mere days before an election. \$311,000 of the funds used to buy these advertisements came from the Senate Republicans’ housekeeping account.³³ Candidates for office must use campaign contributions for all of their administrative costs, why shouldn’t the parties? The housekeeping loophole has allowed donors to circumvent New York’s already-weak campaign limits.

The governor’s proposal places a \$25,000 limit on these donations, but that is still too high. Moreover, the way the proposal is drafted, it would appear to allow a single donor to make multiple \$25,000 donations to multiple housekeeping accounts, e.g., state, legislative and county committee housekeeping accounts. The ability to transfer funds would render this “reform” meaningless. There’s no legitimate basis for the distinction between so-called “hard” and “soft” money donations. New York State must eliminate this loophole and require party and political committees to raise and spend money just like candidates – through direct campaign contributions.

• **Requiring the disclosure of campaign finance “bundlers.”**

While lobbyists give large amounts of money directly from their personal bank accounts, they can deliver even more through “bundling” money on behalf of their clients. Participants in this practice multiply their political contributions and influence by aggregating checks written by members, clients, or associates. Other governments, notably New York City’s, require committees to disclose which of their donations were bundled and by whom.³⁴ **Bundling is a key way in which lobby firms magnify their influence and ingratiate themselves to decision makers.** It is difficult, however, to establish exact numbers reflecting the extent of this process. New Yorkers deserve to know which interests have bought access to their elected officials; complete disclosure of bundling is the only way for them to do so.

Thank you for the opportunity to testify.

³² New York State Election Law §14-124(3).

³³ Kenneth Lovett, “Independence Party Goes Along With GOP Scheme. . .,” *New York Daily News*, March 4, 2013, <http://www.nydailynews.com/news/politics/lovett-independence-party-gop-annex-article-1.1278583>.

³⁴ New York City Administrative Code Section 3-701 (12) defines bundlers as follows: “The term ‘intermediary’ shall mean an individual, corporation, partnership, political committee, employee organization or other entity which, (i) other than in the regular course of business as a postal, delivery or messenger service, delivers any contribution from another person or entity to a candidate or authorized committee; or (ii) solicits contributions to a candidate or other authorized committee where such solicitation is known to such candidate or his or her authorized committee.”

