

**THE COMMISSION
TO INVESTIGATE PUBLIC CORRUPTION**



PRELIMINARY REPORT

DECEMBER 2, 2013

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STATE OF NEW YORK

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December 2, 2013

Honorable Andrew M. Cuomo
Governor of the State of New York
State Capitol
Albany, New York 12224

Dear Governor Cuomo,

The Commission to Investigate Public Corruption is pleased to present you with this Preliminary Report. This Report has two purposes: to share the status of our investigation into public corruption in our State, and to propose reforms to combat public corruption in the future. Our investigation is active and ongoing. Based on what we have learned so far, we conclude that deep and comprehensive reform cannot wait.

This Report is built around four core areas, each relating to a piece of our investigation, and to a corresponding set of policy reforms to fight public corruption and restore public faith. Some of the proposed reforms are specific and surgical. Others are systemic. All will help combat public corruption. This package of reforms may be helpful to you, and to the legislature, in crafting comprehensive reforms to address public corruption in our state and to restore ordinary New Yorkers' faith in our political system.

The Commission will proceed with ongoing investigations as we continue to follow the money. We will also continue to consider new policy areas where reform can bring greater transparency, accountability, and integrity to our governing bodies. Because reform cannot wait, though, we urge you, and the legislature, to consider the reforms in this Report now.

The Commission is committed to restoring New Yorkers' faith in the integrity of our civic institutions. We hope this Report is a strong first step towards that end.

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EXECUTIVE SUMMARY

By Executive Order issued on July 2, 2013, Governor Andrew M. Cuomo established this Commission to investigate public corruption in the State of New York.¹ Governor Cuomo appointed twenty-five Commissioners and three Special Advisors from across our State, including three co-chairs: Onondaga County District Attorney William Fitzpatrick, Nassau County District Attorney Kathleen Rice, and attorney Milton Williams, Jr. of New York City. To strengthen and expand the Commission's investigatory authority, the Commissioners and senior investigative attorneys were, in accordance with the terms of the Executive Order, deputized by Attorney General Eric T. Schneiderman and thereby invested with broad powers to issue subpoenas and compel testimony.

Through his Executive Order, the Governor tasked this Commission with investigating the management and affairs of our State Board of Elections; the effectiveness of our campaign finance laws; the weaknesses in our laws relating to lobbying, conflicts of interest, and public ethics; the use of tax-exempt organizations to influence public policy and elections; and the strength and effectiveness of our criminal laws with respect to public corruption and abuses of the public trust. These investigations are guided by the Executive Order's twin propositions that "abuse of office by public officials and misconduct while in office, criminal or otherwise, undermines the trust of the People and diminishes the ability of government to function," and that "the laws, regulations, and procedures involving our electoral process, including the nomination of candidates, and the financing of campaigns and elections, must further the public trust and promote democracy and the accountability of elected officials to the voters and the selection of ethical public servants."

The Commission's investigations and fact-finding to date have yielded more than enough information to warrant sounding the alarm for immediate legislative action to help stem the tide of corruption in the New York. Reform of our dysfunctional electoral and political systems must include: a revamped and strengthened campaign finance system that includes a small-donor matching system of public financing to help reduce the impact of massive donations from wealthy and powerful interests; an independent agency for enforcing election and campaign finance laws; more robust disclosure of election spending by independent groups and of possible conflicts of interest by elected officials; and more effective tools for state prosecutors to uncover and prosecute acts of corruption by public officials.

Background

This Commission was created in response to an epidemic of public corruption that has infected this State. In recent years, too many local and state elected officials, staff members, and party leaders have been indicted and convicted for offenses running the gamut of shame: bribery,

¹ Executive Order No. 106 (July 2, 2013). This Commission was established pursuant to Sections 6 and 63(8) of the Executive Law. *Id.*

embezzlement, self-dealing, and fraud. Public corruption has become all too commonplace and has eroded the public trust and confidence. One out of every eleven legislators to leave office since 1999 has done so under the cloud of ethical or criminal violations, and multiple sitting officials are facing indictments on public corruption charges. The list goes on, and on:

- **Assemblymember Nelson Castro:** pleaded guilty in 2013 to perjury and making false statements to law enforcement agents.
- **Assemblymember William Boyland:** charged in 2013 with alleged solicitation of bribes and per diem fraud.
- **Senator Malcolm Smith:** charged in 2013 with allegedly participating in scheme to bribe public officials.
- **Assemblymember Eric Stevenson:** charged in 2013 for allegedly accepting bribes in exchange for official acts.
- **Senator John Sampson:** charged in 2013 with allegedly embezzling funds entrusted to him as a court-appointed referee of foreclosed properties.
- **Senator Shirley Huntley:** pleaded guilty in 2013 in connection with an embezzlement scheme in which she stole funds from the non-profit she established.
- **Senator Pedro Espada:** convicted in 2012 of charges relating to his theft from a non-profit he controlled that received state and federal funding.
- **Senator Joseph Bruno:** indicted in 2012 for allegedly taking bribes and kickbacks.
- **Senator Hiram Monserrate:** pleaded guilty to tax evasion in 2012 in connection with his misappropriation of New York City Council discretionary funds to a non-profit he controlled.
- **Senator Carl Kruger:** pleaded guilty in 2011 in connection with bribery schemes in which he accepted nearly half million dollars in exchange for taking official actions.
- **Senator Vincent Leibell:** pleaded guilty in 2010 to obstructing a federal grand jury investigation into whether he extorted money, and failure to file the money he received from the extortion on his income tax returns.
- **Assemblymember Anthony Seminerio:** pleaded guilty in 2009 to honest services fraud in connection with his use of his “consulting firm” to solicit and receive payments from client organizations and subsequently lobby other legislators and agency heads to take positions favorable to his clients.
- **Senator Efrain Gonzalez:** pleaded guilty in 2009 to conspiracy and mail fraud charges in connection with his directing of discretionary funds to non-profits he controlled.

- **Assemblymember Diane Gordon:** convicted in 2008 in connection with a bribery scheme in which she solicited a free home in exchange for taking official actions.
- **Assemblymember Brian McLaughlin:** pleaded guilty in 2008 to racketeering and making false statements on a loan application in connection with stealing money from his position as a labor leader and misappropriating state funds by creating fictitious staff positions and filing false reimbursements.
- **Assemblymember Clarence Norman:** convicted following jury trials in 2005 for soliciting and receiving illegal campaign contributions, and stealing \$5,000 donated to his campaign account and depositing it in his personal account, and then in 2007 of a scheme to extort a judicial candidate in exchange for party support and of soliciting and receiving illegal campaign contributions.
- **Senator Guy Veleva:** pleaded guilty in 2004 in connection with bribery schemes run through his law firm that took money in exchange for directing state of contracts.
- **Assemblymember Roger Green:** pleaded guilty in 2004 to petit larceny and filing a false instrument in connection with submitting false travel expense reports.
- **Assemblymember Gloria Davis:** pleaded guilty in 2003 to bribery charges.

Earlier this year, a ring of elected local and state-level elected and party officials, including former Senate leader Senator Malcolm Smith, was charged in a scheme to trade cash for the Republican nomination for Mayor of New York City. In that case, New York City Councilman, and Senator Smith's co-defendant, Daniel Halloran allegedly made the following statement in a secretly recorded conversation:

That's politics, that's politics, it's all about how much. Not about whether or will, it's about how much, and that's our politicians in New York, they're all like that, all like that. And they get like that because of the drive that the money does for everything else. You can't do anything without the f**king money.

Without a doubt, sorrier words have never been spoken about "our politicians in New York." To be sure, these words are overkill, and there are many honest and well-intentioned public officials in this state who serve well and admirably. But, as is clear already from the Commission's ongoing investigations, the system itself truly is "all about how much."

The Commission believes it is time for that to change in Albany. In adherence to the Executive Order, the Commission respectfully submits this Report to the Governor setting forth the Commission's preliminary findings and making recommendations for the consideration and enactment of statutory reforms by the Governor and legislature in the 2014 Legislative Session.

The Commission's Robust and Ongoing Investigation

The Commission's investigation is aggressive, active, and ongoing. We have used every tool at our disposal to conduct a broad investigation of systemic weaknesses and public corruption in New York. In furtherance of our mandate, the Commission has undertaken the following investigative actions, among others:

- The Commission has issued some 200 subpoenas and requests for information.
- The Commission has received and reviewed millions of pages of documents.
- The Commission has conducted dozens of interviews and depositions, including of former and current legislators and other public officials, lobbyists and their clients, political insiders and whistleblowers, and expert and lay witnesses.
- The Commission has heard testimony from federal and state prosecutors, good government groups, public officials, and members of the public at three public hearings held in the last several months.
- The Commission has worked hand-in-hand with numerous state agencies, and with local, state, and federal prosecutors and law enforcement entities.
- The Commission, with its partners, has conducted undercover operations, including surveillance, recorded calls, and meets.

In addition, the Commission has engaged a leading investigative and risk analytics consulting firm, to integrate vast datasets using a unique and versatile data analytics tool originally developed for use in the counter-terrorism context. Since its inception, this analytics platform has been adapted for use by numerous government agencies in a wide variety of complex criminal, civil, and intelligence-gathering matters. Among other things, we have used this analytics platform to ingest and analyze Board of Elections campaign finance information; elected officials' financial disclosure statements; lobbyist and client disclosures; legislative election results; legislative initiatives; publicly available biographical and professional data about elected officials mined from media, social media sites, and other databases; and proprietary research meticulously gathered by the Commission's investigative staff. To date, we have used this analytics tool to focus in on and uncover connections and relationships that otherwise would have been difficult or impossible to discern, thereby allowing Commission staff to create dossiers on companies, organizations, and persons of interest to "connect the dots" and construct timelines and relationships maps.

The Commission's ingestion and analysis of these vast data sets will help us identify eyebrow-raising patterns of potential misconduct. To take just one of many possible examples, this data analytics platform allowed us to focus in on one particular company that made outsized, bipartisan – and less than transparent – contributions to the chairs of the legislative committees that, through the legislative process, ultimately control and regulate its industry. This company,

which operates in a controversial and heavily regulated industry, lobbied hard for a favorable bill to pass the legislature. As part of that effort, and after the successful passage of that bill, the company has made many large payments to so-called “housekeeping” accounts for both parties, and to the industry committee chairs for both chambers. Many of these payments were made through shadowy corporate affiliates with generic names that do not readily appear to have anything to do with the company. These connections were made using analytics trend-spotting capabilities and our own investigative efforts. This investigation, which is continuing, is one of many such examples of the ways in which technology and good old-fashioned investigative work join together to further our investigation.

With comprehensive campaign finance and lobbying data already ingested into our analytics platform, the Commission will continue its investigations using its own investigative resources and this powerful analytics tool to untangle the web of money and influence that has allowed well-financed special interests to play such a dominant role in New York government. By layering into our analytics platform additional data compelled by Commission subpoenas, and examining phone records, emails, and financial data, the Commission’s investigators will be able to identify any irregularities such as improper bundling to obfuscate contribution limits, conflicts between outside employment and legislative work, and troubling relationships between campaign contributions and legislative action. Drawing on its investigative staff and its analytics platform, the Commission will continue to review payroll, timesheet, official reimbursements (such as per diems and travel expenses), legislative office budgets, and official swipecard access data to identify any no-show jobs, instances of nepotism, and potentially improper personal and political uses of public funds.

Many of the specifics from our active investigations, such as names and identifying details, cannot be shared in this Preliminary Report without compromising the integrity and confidentiality of those investigations. What we can describe, though, is deplorable conduct, some of it perfectly legal yet profoundly wrong; some of it potentially illegal – and, indeed, this Commission will make appropriate criminal referrals at such time as it deems appropriate. New Yorkers already are too aware, from the laundry list of indicted public officials, that our State has been hit hard by corruption. Our investigation thus far reveals a pay-to-play political culture driven by large checks, anemic enforcement of the weak laws we have on the books, and loopholes and workarounds that make those laws weaker still. Among many other things that the Commission has been investigating, and will continue to investigate, our review includes the following:

- **Pay-to-play:** The Commission is investigating a number of so-called “pay-to-play” arrangements, in which wealthy interests allegedly exchange targeted campaign contributions for targeted pieces of legislative action. Among other areas, these investigations include a tax abatement program benefiting certain real estate interests; a carve-out for a large retailer to the minimum wage increase; an exemption for a big company to an independent contractor law; and various custom-tailored laws that a

particularly influential lobbyist has been able to secure for a disparate group of high-paying clients. Because these investigations are ongoing, the Commission has drawn no conclusions about the propriety of the particular actions and actors under review.

- **Loopholes:** The Commission is investigating gaping loopholes, including the LLC and party “housekeeping” account loopholes, which allow wealthy donors to side-step already sky-high contribution limits. With respect to the LLC loophole, for example, the Commission has found that one entity has used 25 separate LLCs and subsidiary entities to make 147 separate political contributions totaling more than \$3.1 million dollars since 2008. With respect to the housekeeping loophole, the Commission finds it to be unjustifiable in light of the apparent electioneering and coordination that is facilitated by the high contributions made into these accounts. For example, in one investigation, the Commission has uncovered seeming coordination between two party housekeeping accounts, in which one bankrolled attack ads that were run in the other’s name. With respect to both loopholes, the Commission has seen frank discussions about their utility as a contribution vehicle by those who take full advantage of them.
- **Use of Campaign Funds:** The Commission is investigating certain legislators’ liberal use of campaign funds for apparently personal uses. The concern is that the contribution of almost unlimited campaign funds from wealthy donors to contract for specialized legislation can amount to legalized bribery when those “campaign” funds can be used by the legislator to buy anything from clothing to cigars to stereo equipment. More troubling than these itemized expenditures are the bulk *unitemized* expenditures that are regularly drawn from campaign accounts without any indication as to how and for what the money is being used. Perhaps most troubling of all are what may be instances of “double-dipping,” in which several legislators appear to lease or purchase expensive vehicles with campaign funds while personally claiming tens of thousands in travel reimbursement from the state. The Commission is mindful that these investigations are preliminary and ultimately may show nothing more than campaign finance deficiencies. However, the ongoing investigation – which will entail a careful review of campaign bank records, credit cards, and swipecards – will resolve these outstanding questions.
- **Conflicts of Interest:** The Commission is investigating conflicts of interest, including conflicts arising from legislators’ outside employment and from their allocation of member item and other discretionary funding. In the intersection of these areas of investigation, the Commission has been examining the relationship between an elected official, a company the official owns, and an entity doing business with that company. We have found that the entity has paid large sums of money to the official, indirectly through the official’s company; at the same time, the official has been directing discretionary funds toward the entity. In one instance, after the entity received notification of a large grant procured with the assistance of the official, an executive of the entity remarked in an e-mail that “it was likely that over the last 15 years, we had

paid [the Official] . . . more than [the Official] was now giving us.” Because the Commission continues to investigate context and relationships, and because it has not yet heard the perspectives of the official and the entity (both of whom have cooperated with the Commission), we emphasize that we have found no impropriety to date and reach no conclusion at this time.

- **Member Items and Legislatively-Directed Funding Grants:** The Commission is looking closely at a group of non-profits in another investigation into potential conflicts of interest and legislatively-directed discretionary funding grants. In this investigation, the Commission has focused on one small storefront in New York City that appears to house several interconnected non-profit organizations that receive state funding to provide various medical services. Initial findings suggest that one organization alone has received nearly \$3 million in legislatively-directed discretionary state funding from powerful out-of-district lawmakers to perform these services with little scrutiny and no medical oversight. Our undercover investigation and our analysis of subpoenaed documents raise questions about the justification for, and oversight of, the discretionary spending. Because the Commission continues to investigate this organization – which may well offer certain legitimate services – and because it has not yet heard the perspectives of the individuals involved, we emphasize that we have found no impropriety to date and reach no conclusion at this time.
- **Board of Elections:** The Commission is investigating the State Board of Elections, focusing on the Board’s enforcement practices. In conducting this investigation, the Commission has held a public hearing, issued subpoenas, conducted numerous witness interviews, deposed a former Board investigator, conducted an in-depth audit of every complaint received by the Board since 2008, and analyzed hundreds of thousands of documents. We have found that the Board’s process for considering complaints is inadequate, and that the Board fails to prioritize complaints in any meaningful way. By Board policy, anonymous complaints are closed without inquiry, and complaints related to an upcoming election are ignored until the election has passed. When the Board does review complaints, there are inexcusable delays, and the Board almost never opens investigations. To the extent the Board engages in any enforcement-related activity, this activity is generally inadequate and inefficient. This activity generally consists of audits that are critically deficient and fail to single out the most significant offenders or repeat offenders for possible further enforcement action. In spite of the Board’s consistent refrain that it lacks the resources needed to engage in significant enforcement activity, the Board fails to make use of the resources and powers it has at its disposal. The Board has a “bipartisan” structure, whereby significant positions, including the commissioner positions, are split evenly between the Democrats and the Republicans. We have found that this bipartisan structure inhibits, and at times prevents, significant enforcement action from being taken. The Board has failed to carry out its duty to enforce the Election Law, enabling the culture of corruption in Albany.

The Commission’s preliminary observation is that both the general state of our political system, and the way business is transacted within it, cry out urgently for reform. New York needs comprehensive reform to restore the public trust, including changes to our election law enforcement, our campaign finance system, to our policing of conflicts of interest, and to the penal law tools that we give prosecutors to fight corruption. The reforms we propose are a strong and holistic step toward making our State an unwelcome, unforgiving environment for misconduct and public abuses.

The Commission’s Recommendations

Increase the Required Disclosure for Elected Officials: Our investigation reveals that corruption and the appearance of corruption thrive when actual and potential conflicts of interest are shrouded in darkness. The Commission strongly urges greater transparency from our legislators, and within the legislative process.

- **Broader Disclosure of Outside Income and Lobbyist Relationships:** Many legislators earn substantial outside income, but disclose only a general description of what they do. New York’s ethics reform law, which created a new public ethics commission and mandated some disclosure of outside income, is a good start. But particularly in the current environment, greater disclosure of potential conflicts is needed. We recommend broader disclosure of large clients, both by legislators and their firms, when those clients have business before the State. We also recommend disclosure of all direct referrals of business to legislators or their firms from lobbyists and those they represent.
- **More Transparency in Legislative Sponsorship of Discretionary Funding:** So-called “member items” – legislative grants of discretionary funding that are not lined out in the State budget – have been used in some of the most egregious corruption schemes by corrupt officials who funnel state money to those who line the officials’ pockets. Governor Cuomo has curtailed this practice, and recipients of state funds are now better regulated. We recommend greater transparency so that the public will know which legislators are sponsoring what public projects.

Reform Our Campaign Finance System with Public Financing, Robust Disclosure, and Tighter Rules: Albany’s pay-to-play political culture is greased by a campaign finance system in which large donors set the legislative agenda. Wide-open loopholes allow virtually unlimited contributions through vehicles like limited liability companies and party “housekeeping” accounts. Meanwhile, outside spending groups make unlimited independent expenditures to influence our elections, hiding behind out-of-state dummy corporations to shield their donors in the absence of robust disclosure rules. Our investigation – including testimony taken at public hearings – also reveals that public financing systems, like the one in place in New York City, make a real difference, empowering regular citizens, reducing the power of massive checks and special interests, and increasing the accountability of officials to those they serve.

New York needs comprehensive campaign finance reform. The Commission recommends, among other things, lowering contribution limits and closing campaign finance loopholes, empowering regular New Yorkers with a small donor matching system of public financing, limiting the use of campaign funds, and creating tough new disclosure rules for shadowy outside spending groups.

- **Lower Contribution Limits, and Fix Loopholes:** Truly massive contributions – over \$50,000 to a statewide candidate for office and unlimited checks to party “housekeeping” accounts – are currently *legal* in New York. This must end. We recommend substantially lowering the contribution limits to political campaigns and political parties. We recommend closing the so-called “LLC loophole” that allows certain, easily-formed companies to make contributions of up to \$150,000, and the party “housekeeping” account loophole that allows unlimited contributions to political parties. We also recommend new limits for transfers from political parties to campaigns.
- **Institute Public Financing of Campaigns for New York:** The Commission believes that public financing of campaigns, in the form of small donor matching funds, frees elected officials from reliance on massive donations from wealthy and powerful interests and invigorates citizens’ democratic participation, increasing public accountability and renewing the public trust. Small donor matching also allows those without access to well-heeled interests and without the support of large independent expenditures to nevertheless compete in elections.
- **Limit Use of Campaign Accounts:** We recommend tougher and more specific standards for restricting the personal use of campaign funds and for better disclosure of campaign expenditures.
- **Disclose and Monitor Outside Spending:** We recommend changing our laws to ensure that New Yorkers can know who is spending to influence our elections. That means expanding the legal definition of an “independent expenditure” to cover ads that reasonable people would think are campaign ads; requiring disclosure of ultimate sources of funding for all of those ads, before the election; and making the disclosed information easily accessible in a searchable database.

Create an Independent Election Law Enforcement Agency: Our investigation reveals that the State Board of Elections lacks the structural independence, the resources, and the will to enforce election and campaign finance laws. The Board’s “bipartisan” structure has effectively led to a tacit, bipartisan agreement to do nothing – or, as one former enforcement counsel said, to “do the basement.” The Board’s practices are marked by a haphazard intake process for complaints; lengthy, inexplicable delays in making even initial determinations; an extreme paucity of actual investigations; and an abject failure to use legal and human resources for enforcement.

Our State needs an independent, professional watchdog for our elections and campaign finance laws. The Commission recommends creating an entirely new, structurally independent election and campaign finance law enforcement agency, headed by a director appointed to a fixed, five-year term by the Governor with Senate confirmation, and removable only for cause. If the public financing system that the Commission recommends in this Report is created, the new agency would also administer that system.

The agency would be structured for professional, nonpartisan, vigorous enforcement. All staff would be hired without partisan considerations, and would be free to conduct timely investigations, using all of the tools at their disposal, without the cumbersome burden of political hurdles, and without a politicized approval process. All election law enforcement would benefit from a non-partisan, structurally independent, professional enforcer whose sole purpose is safeguarding the integrity of our elections and our political system.

Provide Powerful New Tools for Prosecutors: Our criminal laws are not strong enough to allow New York prosecutors to aggressively fight corruption and self-dealing. Our State’s bribery statute is singularly weak; we have no law on the books against undisclosed self-dealing; we have no means of preventing corrupt officials from re-entering public life; and our criminal procedure laws make it difficult to crack open inherently insular corruption schemes. We recommend tough new laws, and penalties that fit the crime.

- **Reform the Bribery Statute:** Bribery is the most blatant form of public corruption, yet our laws make public servant bribery incredibly hard to prosecute. The Commission recommends:
 - Ending New York’s “agreement or understanding” requirement for public servant bribery, and bringing our bribery laws into line with federal law, the laws of 48 other states, and our own labor, sports, and commercial bribery laws.
 - Lowering the dollar threshold for bribery of a public official – a \$5,000 bribe is still a bribe, and our law should reflect that.
 - Creating a new offense, failure to report bribery, to hold all elected officials to a high standard of integrity and create leverage for bribery prosecutors.
- **Prohibit Undisclosed Self-Dealing by Public Officials:** Our laws do not do enough to discourage self-dealing behavior by elected officials – like a public servant steering a state contract to a company she or a family member secretly owns. The Commission recommends a new criminal offense of “Undisclosed Self-Dealing” to help combat corrupt behavior by our public servants.
- **Tough New Consequences for Corruption:** The recent corruption scandals in New York strongly suggest that corrupt officials are not being deterred from abusing their offices. The Commission recommends:

- Tough new penalties for violating the public trust, including sentencing enhancements for corruption offenses and other offenses, like larceny, when they are committed against the state by public officials.
- Strong collateral consequences that permanently bar those convicted of public corruption crimes from serving in a public office, registering as a government lobbyist, or obtaining government contracts.
- **Reforming New York's Immunity Rules:** New York's criminal procedure laws grant total immunity to anyone who testifies before a grand jury. That means that corrupt officials can be immunized from prosecution even if prosecutors would have discovered their role in a corrupt scheme by some other means. These rules make it harder to expose corruption schemes and convict corrupt officials. We recommend offering a less expansive form of immunity in public corruption cases.

Reforming New York's Corroboration Rules: Similarly, our laws do not allow testimony from an accomplice to be the basis for a criminal conviction. Because corrupt schemes are by their nature secretive, the bar on accomplice testimony makes prosecuting corruption much harder than in federal court. The Commission recommends allowing accomplice testimony to support a conviction for public corruption.

Conclusion

The Commission will proceed with our ongoing investigations as we continue to follow the money. We will also continue to consider new policy areas where reform can bring greater transparency, accountability, and integrity to our governing bodies.

The changes we propose here are a strong first step toward that end. We know these changes will not come easily. But the need for reform is clear; each new indictment is merely an exclamation point. Our elected leaders should not delay. They owe that much to the citizens whom they serve.

OUTSIDE INCOME, MEMBER ITEMS, AND PERSONAL USE OF CAMPAIGN FUNDS

I. Outside Income

New York law allows our “part-time” legislators to earn income outside of their legislative salaries. This is not inherently wrong. But our State needs stronger disclosure rules to avoid conflicts of interest – or even the appearance of such conflicts, which likewise can erode public confidence in the integrity of government.

Legislative Income: Lawmakers’ service is considered “part-time” throughout the year and lawmakers are allowed to earn outside income in addition to their legislative salaries. Legislators’ base salary for their public service is \$79,500 per year, significantly higher than the average income for New Yorkers.² In addition, many lawmakers earn stipends for leadership positions – so-called “lulus” – that, as of 2012, can range from \$9,000 to \$41,500 for committee chairs, ranking members and other leaders. As of 2012, the average legislative income for currently sitting legislators, including these “lulus,” is approximately \$89,500 for members of the Assembly, and approximately \$95,500 for members of the Senate.

Outside Income: In addition to this legislative income, lawmakers often earn significant outside income. For the 2012 calendar year, 89 of the 174 legislators who served in 2012 and returned in 2013 reported at least one source of outside income.³ Approximately 73% of these 89 legislators earned in excess of \$20,000 in outside income from a single source and approximately 65% of those same 89 legislators earned their income from firms or companies in professional services industries that serve clients such as law, insurance, and financial services. The top reported source of income was from the practice of law. Combined legislative and outside income can be substantial: in 2012, including outside income,⁴ lulus, and legislative income, Assembly Speaker Sheldon Silver earned at least \$471,000; Senate Majority Leader Dean Skelos earned at least \$271,000; and Independent Democratic Conference leader Jeffrey Klein earned at least \$148,000.

An Improved but Incomplete System of Disclosure: Recent reforms require legislators to disclose the amount and sources of their outside income. In 2011, Governor Cuomo proposed, and the legislature passed, the Public Integrity Reform Act. Among other things, the Act created

² According to the 2010 US Census, the average median per-capita income in New York was \$31,796 (2011 dollars). See United States Census Bureau, New York State and County Quickfacts, <http://quickfacts.census.gov/qfd/states/36000.html>.

³ Drawn from financial disclosures to the Joint Commission on Public Ethics, or JCOPE. This figure is based on responses to Question 13 of the Financial Disclosure Form, but does not include rental income, spousal income, or various types of investment and retirement income. This total also does not include individuals who indicated outside employment that yielded no income in 2012.

⁴ These totals do not include rental income, spousal income, or various types of investment and retirement income.

the State Joint Commission on Public Ethics, or JCOPE, which oversees the current disclosure regime for outside income and conflicts of interest for state legislators and executive branch policymaking staff.⁵

However, lawmakers are not required to describe the sources of their income in any detail. Instead, they list the general sources of their outside income, and a range within which their income falls.⁶ Legislators must disclose specific clients only in very narrow circumstances. Currently, legislators must disclose the name of a client only if:

- (1) the legislator personally provided services to the client or referred that client to the firm for services,⁷
- (2) the legislator or the legislator's firm earned more than \$10,000 for those services, and
- (3) those services were in direct connection with a proposed bill, a state contract or grant, or a case before a state agency.⁸

The "personal services" requirement means that, particularly for lawyers who work for an income-sharing partnership, public officials need not disclose the source of income that passes to them from firm clients they do not personally serve or refer to their firm, even if those clients have business before the government. Indeed, in the 2012 financial disclosures, only one legislator disclosed only one client who had dealings with the State.⁹

Outside Income and Conflicts of Interests: Our legislators also are bound by a code of ethics. They may not "have any interest, financial or otherwise, direct or indirect, . . . which is in substantial conflict with the proper discharge of [their] duties in the public interest."¹⁰ The code of ethics specifically recognizes that outside employment can lead to conflicts of interest: a legislator is forbidden from accepting "other employment which will impair his independence of judgment in the exercise of his official duties."¹¹

A legislator has a responsibility to serve the interests of his or her constituents. However, the legislator's outside employment may create competing interests and fiduciary responsibilities. A lawyer, for example, has a duty to represent the interests of his or her clients, but those interests may diverge from the interests of the lawyer-legislator's constituents.

⁵ See EXECUTIVE LAW § 94.

⁶ See PUBLIC OFFICERS LAW § 73-a (providing the content of the disclosure form).

⁷ "Referred to the firm" is defined as "having intentionally and knowingly taken a specific act or series of acts to intentionally procure for the reporting individual's firm or knowingly solicit or direct to the reporting individual's firm in whole or substantial part, a person or entity that becomes a client of that firm for the purposes of representation for a matter as defined in subparagraphs." *Id.*

⁸ *Id.* Furthermore, a relationship need not be disclosed if it falls within other, specific exceptions, such as providing medical services, or working on criminal defense matters or family law matters. EXECUTIVE LAW § 94 i-1.

⁹ One member disclosed that his firm represents an estate that owns facilities with state agency dealings.

¹⁰ PUBLIC OFFICERS LAW § 74(2).

¹¹ *Id.* at § 74(3)(a).

Moreover, legislators may have broader pecuniary interests that can influence official actions. A lawyer-legislator who is a member of a firm may feel compelled to serve the interests of the firm's clients, even if the lawyer-legislator does not personally provide services to that client, because those clients contribute to the business of the firm and thus to the ultimate compensation of the lawyer-legislator. A legislator has a responsibility to serve the interests of his or her constituents. However, the legislator's outside employment may create competing interests and fiduciary responsibilities. A lawyer, for example, has a duty to represent the interests of his or her clients, but those interests may diverge from the interests of the lawyer-legislator's constituents. Moreover, legislators may have broader pecuniary interests that can influence official actions. A lawyer-legislator who is a member of a firm may feel compelled to serve the interests of the firm's clients, even if the lawyer-legislator does not personally provide services to that client, because those clients contribute to the business of the firm and thus to the ultimate compensation of the lawyer-legislator. For example, where a legislator is a member of a personal injury or malpractice firm, there is at least the appearance of competing fiduciary interests when that legislator votes against tort reform that would seriously limit awards that clients or would-be clients could recover. When a legislator is a member of one of the chamber's health or insurance committees, and works in a law firm with a sizeable health care or insurance practice that is regulated by that committee, competing fiduciary interests also may at least appear to obtain. And when a legislator's website touts his lobbying and election law compliance practice, and he sits on powerful committees like the Rules and Ways and Means Committees, the appearance of potential conflicts, at a minimum, may arise. The current disclosure regime gives the public a general idea of the source and amount of legislators' outside income. But it does not require more detailed information – such as the identities of certain large clients – that might reveal conflicts of interest like the ones discussed above, or that might otherwise place a legislator's activities in a broader context.

Outside Income and Corruption: In the past, some unscrupulous lawmakers have used or allegedly used their outside employment to facilitate kickback and bribery schemes. Several recent examples include:

- Senator (and former Majority and Minority Leader) John Sampson was recently indicted¹² in federal court on charges related to his alleged embezzlement of \$440,000 from escrow accounts he supervised as a court-appointed attorney referee.¹³
- Former Senator Carl Kruger is currently serving a seven year sentence for taking \$500,000 in bribes, much of which was disguised as consulting fees, in exchange for taking official action to benefit various lobbying clients.¹⁴

¹² Indictments are allegations only. A criminal defendant is presumed innocent until proven guilty in a court of law.

¹³ Mosi Secret, "John Sampson Faces Charges After Corruption Inquiry," THE NEW YORK TIMES (May 6, 2013), available at http://www.nytimes.com/2013/05/07/nyregion/john-sampson-faces-charges-after-corruption-inquiry.html?_r=0.

- In 2009, former Assemblymember Anthony Seminerio pleaded guilty in federal court¹⁵ to honest services fraud for using his consulting firm to solicit and receive payments disguised as “consulting fees” in exchange for taking official action. In a recorded conversation, Seminerio explained to former Assemblymember Brian McLaughlin (who was also convicted of public corruption crimes) that Seminerio got the “idea” for creating his consulting company from two Senators who had consulting firms, elaborating: “I was doing favors for these sons-of-bitches [the healthcare industry and hospitals] there, you know, they were making thousands. ‘Screw you, from now on, you know, I’m a consultant.’”¹⁶
- In 2004, former Senator Guy Velella pleaded guilty to charges that he took bribes through sham payments to his law firm from business intereststo help obtain state contracts.¹⁷

Of course, the legislators who cross the line into criminal behavior are the outliers. But it is clear that outside employment can present ethical challenges and conflicts of interest. That some legislators have used outside employment to facilitate criminal activity only strengthens the case for broad and robust disclosure of potential conflicts.

The Commission’s Subpoenas: The Commission’s mandate requires that we investigate, among other things, the “existing laws, regulations, and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government.”¹⁸ The Commission is investigating whether there are real or perceived conflicts inherent in legislators’ outside income, and how any such conflicts may be redressed or eliminated.

On August 29, 2013, the Commission sent a letter request to each member of the legislature reporting \$20,000 or more of income during the 2012 calendar year from an outside employment source.¹⁹ Several lawmakers voluntarily provided the requested information, but some declined to do so, or simply declined to respond at all.

Several of the responsive letters asserted that the request for information violated the legislative privilege and the separation of powers. Thereafter, the Commission issued subpoenas – not to any legislators personally, but rather to legislators’ employers or self-owned businesses

¹⁴ William K. Rashbaum, “After Resigning, Tearful Senator Pleads Guilty to Accepting Bribes,” THE NEW YORK TIMES (December 20, 2011), *available at* http://www.nytimes.com/2011/12/21/nyregion/senator-carl-kruger-pleads-guilty-in-corruption-case.html?_r=0.

¹⁵ Seminerio’s conviction was abated as he died prior to exhausting all of his appeals.

¹⁶ Colin Moynihan & A.G. Sulzberger, City Room Blog, “Queens Assemblyman Pleads Guilty in Corruption Case,” THE NEW YORK TIMES (June 24, 2009), *available at* <http://cityroom.blogs.nytimes.com/2009/06/24/seminerio-pleads-guilty-in-federal-court/>; Benjamin Weiser, City Room Blog, “Assemblyman Charged in Fraud Scheme,” THE NEW YORK TIMES (September 10, 2008), *available at* <http://cityroom.blogs.nytimes.com/2008/09/10/assemblyman-charged-in-fraud-scheme/>.

¹⁷ Tom Robbins, “The Art of the Shakedown,” THE VILLAGE VOICE (May 11, 2004).

¹⁸ Executive Order No. 106 (July 2, 2013).

¹⁹ Freshman members of the Legislature who held full-time employment prior to the start of the 2012 session were exempted from responding to the Commission’s request.

that had paid a legislator more than \$50,000 in 2012. The Commission also sent follow-up letters, in lieu of subpoenas, to those legislators who provided substantive responses to our original letter requests. In both rounds of subpoenas, the Commission requested, among other things, the source and basis of the legislator's compensation.²⁰

To date, a number of outside employers have produced responsive documents pursuant to the Commission's subpoenas, and, based upon recent correspondence with additional employers, we expect further cooperation. Disappointingly, however, several firms have moved to quash the Commission's subpoenas. Perhaps even more disquieting for New Yorkers is that some of the firms that have moved to quash are associated with the legislative leaders, and both chambers have in fact sought to join in the motion.

While the Commission's investigation into legislators' outside income remains ongoing, it is already clear that even New York's relatively strong disclosure regime does not capture the outside income picture in sufficient detail, particularly with respect to potential conflicts of interest from individual clients. Because full disclosure of clients by law firms and other fiduciary entities may, at times, pose ethical problems, there may be no way to truly remove these potential conflicts without broad limitations on outside income. But additional disclosure would be a strong step toward exposing potential conflicts of interest for public servants.

A. Recommendations: Further Disclose Outside Income

While New York has strengthened its disclosure requirements, they should be further expanded to provide greater transparency.

More Disclosure of Clients: Currently, reporting individuals are required to disclose only the names of clients to whom they personally provide services or who they have referred to their firm for services, if the services provided relate directly to business before the state.

The Commission recommends expanding that disclosure. In a January 2010 report, the New York City Bar Association found that "[t]he gravity of recent breaches of public trust in New York State and the failure of the existing ethics structure necessitate a simple, transparent system of disclosure that applies to all officials with private sources of income, even income from law practices."²¹ It recommended that all lawmakers, including attorney-legislators, be

²⁰ New York courts have uniformly held that communications regarding "the identity of a client and information about fees paid by the client" are not generally protected under the attorney-client privilege." *In the Matter of Nassau County Grand Jury Subpoena v. Doe Law Firm*, 4 N.Y.3d 665, 669 (2005) (citing *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 69 (1980); see also *Matter of Claydon*, 103 A.D.3d 1051, 1053 (2013) (finding that the identities of clients and fee arrangements are not protected confidential communications).

²¹ Loren Gesinsky, Gregory G. Ballard, & Jeffrey A. Udell, New York City Bar Association, *Report on Legislation by the Committee on State Affairs, the Committee on Government Ethics, and the Committee on Professional Responsibility: Reforming New York State's Financial Disclosure Requirements for Attorney Legislators* 11 (January 2010).

required to disclose information about their sources of outside income, “including the identity of their clients, their fees and a clear description of the services rendered.”²²

At a minimum, legislators should disclose the names of their clients or their firm’s clients who have business before the state, regardless of whether the services rendered by the reporting individual related to that business. If a client has business before the state, then that client’s name should be made public.

More Disclosure of Services Rendered: Currently, if a legislator practices law or receives outside income in a regulated profession, he or she must provide a very general description of the subject areas of his or her services. However, a legislator is not required to disclose what services they are actually performing to earn their outside income.

The Commission believes more detail is necessary. Reporting individuals should be required to disclose what services they actually provide, so that the public more clearly understands their outside employment activity.

More Disclosure of Relationships with Lobbyists: Current law does not mandate that legislators disclose the source of business referrals. Referrals of business are a form of compensation and regular referrals of business establish a business relationship between one entity and another. As this Report suggests,²³ lobbyists and parties employing lobbyists can play a significant role in the legislative process. As a result, business relationships with lobbyists can raise the appearance of impropriety. Therefore, the relationship between elected officials and lobbyists must be scrutinized more closely. There can be no scrutiny without greater disclosure.

The Commission recommends that legislators disclose all direct referrals of business to their firms by lobbyists or clients of lobbyists. This would make transparent for the public another potential source of conflicts of interest.

II. Abuse of Member Items and Legislatively-Directed Funding

Over the past ten years, no fewer than twenty-one state legislators have left office in disgrace due to criminal or ethical malfeasance, and four more are currently under federal indictment. New Yorkers have watched this parade of horrors with disgust and growing disaffection. The charges point to several areas that seem particularly vulnerable to abuse, one of which relates to member items and funds directed by legislators. To be sure, important reforms have been enacted to increase transparency and accountability, most notably Governor Cuomo’s policy to end all new funding for member items.

²² *Id.*

²³ *See, e.g., infra* nn. 41-42 and accompanying text.

In concept, legislators were meant to use their legislatively-directed grants to fund deserving non-profit agencies, but in practice – as New Yorkers have seen in the lurid details of too many criminal cases – member items also have been used to fund legislators’ own interests and lifestyles. While there are many honest and well-meaning public servants who sit in the state legislature, the sheer volume of member item scandals is not the product of happenstance. To take a few recent examples:

- In 2011, Assemblymember William Boyland was charged with bribery in federal district court related, in part, to his promise to take official action and steer state grant money in exchange for \$250,000. Boyland proposed a scheme by which he would receive bribes in exchange for providing state grants to help two undercover agents, who he believed to be developers, secure the purchase of a hospital and resell the property to one of Boyland’s non-profit organizations for a significant profit.²⁴
- Former Senator Shirley Huntley is currently serving a one year sentence in prison on a charge relating to her siphoning of discretionary education-related funding in 2008 and 2009 to a sham non-profit for her own personal use.²⁵
- In 2010, former Senator Vincent Leibell pleaded guilty in federal district court to obstruction charges related to an investigation into his extortion of payments from attorneys doing business for Putnam County and a non-profit doing business for the county. The non-profit in question was established and partially controlled by Leibell and received millions of dollars in member item grants sponsored by Leibell.²⁶
- In 2009 former Senator Efrain Gonzalez, Jr. pleaded guilty in federal district court to charges relating to his direction of member items to a sham non-profit for his own personal use.²⁷

In the wake of these scandals involving lawmakers’ self-dealing through the use of funds directed by legislators, the Commission has made efforts to track spending from its initial legislative appropriation through to its ultimate disbursement by the State Comptroller. With its broad investigative powers, and with assistance from officials at the Division of Budget (“DOB”), the Office of the State Comptroller, agency budget officers, and former legislative

²⁴ Mosi Secret & Benjamin Weiser, “Assemblyman William Boyland, Jr. Charged Again with Bribery,” THE NEW YORK TIMES (November 29, 2011), *available at* <http://www.nytimes.com/2011/11/30/nyregion/assemblyman-william-boyland-jr-charged-again-with-bribery.html>.

²⁵ Mosi Secret, “Ex-Senator Shirley Huntley Pleads Guilty in Second Fraud Case,” THE NEW YORK TIMES (February 13, 2013), *available at* <http://www.nytimes.com/2013/02/14/nyregion/ex-senator-shirley-huntley-pleads-guilty-in-2nd-fraud-case.html>.

²⁶ William K. Rashbaum & Nate Schweber, “Sidewalk Meeting for State Senator and Lawyer Leads to Guilty Plea,” THE NEW YORK TIMES (December 6, 2010), *available at* <http://www.nytimes.com/2010/12/07/nyregion/07leibell.html>.

²⁷ Nicholas Confessore, “Ex-State Senator Pleads Guilty to Fraud Charges,” THE NEW YORK TIMES (May 6, 2009), *available at* <http://www.nytimes.com/2009/05/09/nyregion/09gonzalez.html>.

finance staffers, the Commission is examining the process by which lawmakers have historically directed funds toward projects and organizations of their choosing.

Grants to non-profit organizations appropriated at the request of a specific legislator or group of legislators are commonly referred to as “member items.” Member items fund community projects, civic causes, public health programs, and other non-profit initiatives. As noted, some lawmakers have directed member items to front groups that, while claiming a noble purpose, merely serve as vehicles for lawmakers to funnel public money to family members, friends, and ultimately into their own pockets.

Recent reforms have ended the former member item system that supported so much abuse. Since coming into office, Governor Andrew Cuomo has committed to no new funding for member items. Additionally, he announced that he would veto new member items, and allow only those member items authorized in prior budgets, but not yet spent, to be funded or “reappropriated.” The last time member item funding was authorized was in 2009, prior to the important reforms put forward by Governor Cuomo. The Governor also determined to veto any previously-authorized member items that were subsequently altered or diverted in some way from their initial purpose. In the 2012-2013 budget, Governor Cuomo vetoed 122 proposed member items that the legislature attempted to add or divert from their previously-authorized status.

Additionally – and laudably – funding previously authorized to be spent in earlier budgets, but not yet spent and re-appropriated, has been more closely scrutinized. For instance, not-for-profit recipients of more than \$5,000 of state funds are required to undergo a pre-qualification process that requires recipients to, among other things, disclose information relating to the composition of their boards of directors, provide certain tax forms, and make various certifications. Recipients of less than \$5,000 of state funds also undergo a background check.

Furthermore, prior to Governor Cuomo taking office, funding was also appropriated to support economic and community capital projects proposed by the Legislature. No new funding has been appropriated since Governor Cuomo took office, and much of the spending from these appropriations took place prior to his administration. This funding must be used for capital improvements and cannot be used to cover operating costs. Additionally, any money spent out of these reappropriations must adhere to the statutory purpose for which they were originally appropriated. Therefore, only projects that meet the statutory criteria may be funded. This funding from prior years is governed by a series of reviews, including a due diligence review by the administering entity to ensure that funding is in place for all of the projects and that the projects all meet the stringent standards for tax-exempt financing. The bond financing for all these projects must be authorized by the board of the administering agency, as well as by the Public Authorities Control Board in an open meeting. Expenditures above a certain amount must be approved by the Office of the State Comptroller.

These reforms are significant, and the Commission believes that transparency as to which legislator is responsible for a particular grant can only improve the process. Commission investigators found that, in some cases, the legislative sponsor of a particular member item or other legislatively-directed capital funding was not always identifiable through publicly available documents (often called “member initiative forms”). In other cases, one-house resolutions in the legislative record provide limited insight into the funding sponsors and uses. However, in some cases, it has proven impossible for the Commission to identify the legislator or legislators at whose discretion member items or other legislatively-directed capital funding were disbursed. Not only do sponsors regularly fail to identify themselves on member initiative forms, but at times, a legislator will swap out his or her own name for the name of another legislator who actually has no connection to the funding. In the course of the Commission’s investigations, we have discovered several examples of this apparent behavior.

In one instance, a witness told investigators that the witness observed a lawmaker ask a colleague to “sponsor” a member item grant to an organization at which a close relative was an employee, in an apparent effort to conceal the lawmaker’s influence on the funding.

With only limited success to date, the Commission has attempted to reverse-engineer the somewhat inscrutable process of determining which legislator was responsible for the allocation of funding to particular non-profits. Toward that end, the Commission has used all the investigative tools at its disposal – including issuing numerous subpoenas, conducting surveillance, and using undercover agents to place recorded phone calls and conduct site inspections – in an effort to track questionable grants and to test the sponsorship of the funding, the propriety of the grant, the controls in place to prevent abuse, and the ultimate use of state funding. Several of these ongoing investigations illustrate the point.

Illustration #1

Lawmakers justify the importance of legislatively-directed discretionary grant funding to non-profit organizations as a valuable mechanism to address the unique needs of the communities they represent and know best. It is therefore surprising when legislators at times direct funding to out-of-district organizations that have no apparent ties to their constituents. The Commission also has heard troubling testimony that legislators may, at times, lend their names as the purported sponsor of certain legislatively-directed discretionary grants to help a colleague – the true sponsor – avoid scrutiny.

In the wake of shocking abuses of legislatively-directed discretionary funds by state legislators, the Commission is conducting a wide-ranging examination of legislatively-directed discretionary funding grants. In one ongoing review, the Commission has been investigating one small storefront in New York City that appears to house several interconnected non-profit organizations that receive state funding to provide various medical services. Initial findings suggest that one organization alone has received nearly \$3 million in legislatively-directed discretionary state

funding, from a geographically and politically diverse group of some of the state's most powerful lawmakers, to perform these services with little scrutiny and no medical oversight.

To date, investigators have found that several State and New York City agencies have provided funding to the organization for varying purposes. The funding does not appear to be the result of any competitive bidding process, but has instead been appropriated primarily through legislatively-directed discretionary grants—including member item funding—from high-profile lawmakers. Its director earns a six-figure salary and records show that it employs an in-house lobbyist, as well as a top-shelf outside lobbying firm.

Surveillance and a pole camera of the storefront over 25 days showed little foot traffic to the building, and an undercover site inspection found only one person working in the office. The worker told investigators that most of the organization's operations were in other states and two other countries and acknowledged that she was the only on-site employee. In addition, the worker said that the organization sublets much of its office space to another non-profit, though records show the organization receives a taxpayer-funded rent subsidy. Investigators also visited the organization's other claimed offices in New York and New Jersey, and they appear to be private homes.

When undercover investigators called the group's "hotline" to test the services the organization claims to provide, their calls went to voicemail. When calls were eventually returned, conversations were brief, involved only the bare minimum of personal and medical history, and only generic guidance was offered. A review of call records produced in response to a Commission subpoena shows that the overwhelming majority of calls were very brief, raising questions about how substantive the calls can actually be, and about the legitimacy of the justification for these large legislatively-directed discretionary grants.

This investigation remains in its early stages, and it is possible that the organization provides laudable services to the public. However, the investigation has raised significant questions as to the propriety of the legislatively-directed discretionary funding grants, the motivation of the sponsors, the efficacy of the services provided by the recipients, the financial oversight by administering agencies, and medical supervision by public health authorities.

Illustration #2

As part of its inquiries into outside income and conflicts of interest, the Commission has been reviewing the relationship between a company (the "Company") owned by an elected official (the "Official"), and a corporate entity (the "Entity"). The Commission has issued numerous subpoenas and reviewed voluminous records, including e-mails and financial records. The Commission's focus has been two-fold: first, to examine the nature and extent of the Entity's relationship with the Official's Company; and second, to examine the nature and extent of the Official's involvement in facilitating – or attempting to facilitate – the disbursement of

state funds to the Entity. The Commission's investigation is preliminary and ongoing, and the Commission emphasizes that it has yet to reach conclusions with respect to the conduct described in this Report.

The Official's Company provides commercial, non-legislative services to its clients. According to the Commission's investigation to date, the Entity has paid hundreds of thousands of dollars to the Company over a period of several years. During the same time, the two next highest-paying clients paid the Company only tens of thousands of dollars, and most of the Company's clients paid the Company only a few thousand dollars at most.

Despite the significant sums spent by the Entity for the Company's services – and while the Entity received certain additional benefits for the money it spent and maintains that it obtained value from the Company's services – the full extent of the services provided by the Company is not presently clear from the Commission's review of documents to date. Until 2013, the Company's agreements with the Entity were oral and may not have been reviewed by the Entity's legal counsel.²⁸ Moreover, invoices were, at times, inconsistent and occasionally incorrect – for instance, it appears that the Entity made a \$25,000 overpayment during one year in which the Company provided services. The Commission is attempting to understand the amounts paid by the Entity and the services it received, but regardless of whether the Entity received the benefit of its bargain, the Entity stands out as the Company's largest client by a wide margin.

During the same period in which the Entity was making such large payments to the Company, it also received and/or applied for millions of dollars in state funding, some – but not all – of which was sponsored by, or had some connection to, the Official. It is unclear at this stage of the investigation exactly how much state funding is connected to the Official (or other elected officials who facilitated or otherwise procured funds for the Entity). Preliminarily, it appears that the Official in some way facilitated the procurement – or attempted procurement – of more than \$750,000 in state grants, although not all such grants have been received by the Entity. Moreover, the Official's connection to such grants is not easily discernible. For example, one grant appears in the public record to have been officially sponsored by a legislative body unrelated to the Official; however, a handwritten note produced to the Commission suggests that the Official was in some way involved, and credited, with its procurement.

In one instance, after the Entity received notification of a large grant procured with the assistance of the Official, an executive of the Entity remarked in an e-mail that “it was likely that over the last 15 years, we had paid [the Official] . . . more than [the Official] was now giving us.” The executive also noted that one of the executive's colleagues was “insulted” at the amount of funding that the Official had facilitated. In another e-mail between an executive of the Entity and an individual familiar with the relationship between the Entity and the Company,

²⁸ From records received from numerous other Company clients, many of its agreements appear to have been verbal; it does not appear that any were more than lightly papered.

that individual questioned the appropriateness of the relationship, and advised the Entity to “check with your lawyers that [the Official’s] gift . . . of discretionary funds is ok.” The Commission continues to investigate the context in which these communications were made, as well as the relationship between the Entity, the Company, and the Official, and thus reaches no conclusions at this time. To date, all such parties have been cooperative and forthcoming with the Commission’s preliminary but continuing investigation.

A. Recommendations: Even Greater Accountability

The legislature must not only avoid corruption, but even the whiff of it. Government watchdogs, the media, and, most of all, members of the public have a right to understand how their tax dollars are spent and by whom, as well as the process used to appropriate state funds. The Commission recommends certain additional reforms to ensure that the abuses of the past cannot be replicated in the future.

Identify the Sponsors of Legislatively-Directed Funds: As projects supported with previously authorized funding move forward, the Commission recommends that, in order to promote greater transparency and accountability of the process, legislators must identify themselves as the sponsor of an expenditure using a publicly available method. Such identification must include: (1) the name of the sponsoring lawmaker, and (2) an attestation by the sponsoring lawmaker under penalty of perjury that the funds are being directed for a lawful purpose and that the lawmaker is unaware of any conflicts of interest in connection with the expenditure. Without such an identification and attestation, no expenditure should be allowed.

Keep Member Items in New York’s Past: Moreover, the Commission recommends that the State should continue Governor Cuomo’s commitment to discontinue new member item funding. The Commission believes that if a project is worthwhile, it should be lined out in the budget. These projects should be subject to sunlight and scrutiny and should stand on their own merits.

III. Unlawful Personal Use of Campaign Accounts

Although not part of the package of reforms the Commission recommends to improve the financing of election campaigns, the Commission also proposes that our election laws be amended to address personal use of campaign accounts. Campaign contributions are intended to help candidates pay the costs of their election campaigns. What saves contributions from impropriety – and, in fact, makes them a positive contribution to the functioning of our democracy – is that they cannot be used by candidates for their personal activities and are, instead, reserved for campaign purposes. But New York’s Election Law fails to clearly preclude the personal use of campaign funds.

The Commission is investigating candidate expenditures to examine potential misuse of campaign funds by candidates for personal purposes. The Commission has observed numerous

instances of candidates compensating their relatives for certain campaign jobs and events, paying for such things as expensive clothing and cigars, as well as dozens of instances of candidates paying large credit card bills with campaign funds with no attempt to itemize the underlying expenses that contribute to those bills. Many of these expenses may in fact constitute valid campaign expenses. The Commission has issued numerous bank account subpoenas and will wait to make those judgments while its investigation continues. At a minimum, however, these filings provide further evidence that the existing Board of Elections enforcement structure – discussed at length later in this Report – does little to compel elected officials to provide a full accounting of their expenses. Candidates cannot be allowed to summarize tens of thousands of dollars of campaign expenditures with an inscrutable or inapt description – or, often, no description at all – that provides the public with no detail as to where the money is actually going or how it is being spent.

In addition, the Commission has investigated whether campaign funds are being improperly used to pay for certain vehicle expenses.²⁹ Legislators are entitled to reimbursement for travel expenses related to their official duties; however in order to claim a reimbursement, a legislator has to actually incur an expense. The Commission’s efforts to reconcile campaign finance records against official travel reimbursement records suggests that some legislators may be using campaign funds to purchase vehicles, EZ Passes, and fuel while simultaneously claiming full reimbursement from the state for mileage expenses. If substantiated, this “double-dipping” would allow legislators to pocket the taxpayer-funded reimbursement. The Commission’s investigation of this practice is ongoing; we have not yet drawn conclusions about the propriety of the type of reimbursement requests depicted in the accompanying chart.

	Campaign Paid Vehicle Expenses 2010-2013*	State-Paid Mileage Reimbursement 2010-2013
GOP Senator	\$50,275	\$15,884
Dem. Assemblymember	\$33,689	\$16,775
Dem. Senator	\$27,159	\$5,254
GOP Senator	\$23,135	\$8,715
GOP Senator	\$20,209	\$22,960
GOP Senator	\$19,773	\$18,500
GOP Senator	\$18,373	\$18,832
Dem. Assemblymember**	\$15,285	\$27,792
Dem. Assemblymember	\$5,970	\$26,922
Dem. Assemblymember**	\$5,894	\$14,123

* Totals include vehicle loan/lease payments, insurance, maintenance, and repair costs identifiable in campaign financial disclosures. Gas charges, which one legislator charged his campaign nearly \$23,000, were excluded, though state mileage reimbursement should include gas costs.
 ** This member is no longer serving in the legislature.

²⁹ The Commission is also investigating Legislative per diems and travel reimbursements. In the Assembly, the per diem and travel expenses payments from 2008 through 2012 have averaged approximately \$17,000 for Assemblymembers and approximately \$16,700 for Senators.

The Commission has also begun to look into the uses of the campaign accounts of individuals who have left office. Of 40 former candidates selected for review, the Commission has identified almost \$3.5 million in reported expenditures since 2000 that were incurred after a candidate ceased to be a candidate. The uses of these campaign funds are multitudinous: some former candidates become lobbyists and contribute their campaign cash to those they may lobby, and some use the campaign funds for holiday cards, travel, and other expenses. However, these former candidates plainly are not using the funds for campaign purposes.

A. Recommendation: End Unlawful Personal Use

There are few rules limiting the personal use of campaign funds and even less enforcement. Consistent with a 2013 legislative proposal submitted by Governor Cuomo, campaign contributions should be used only for a purpose “directly related to promoting the nomination or election of a candidate or the execution of duties associated with the holding of a public office or party position.”³⁰ To that end, the Commission believes the Election Law should provide more details on what constitutes impermissible use in order to prevent these recurrent abuses of campaign funds. Federal law expressly bars the use of campaign funds for personal use, which it defines as “a commitment, obligation or expense of any person that would exist irrespective of the candidate's campaign or duties as” an officeholder,³¹ and then provides a detailed listing of expenditures considered to be personal use. This could provide a useful model for our election laws and regulations.

OUR CAMPAIGN FINANCE SYSTEM

New York’s campaign finance rules “must further the public trust and promote democracy and the accountability of elected officials to the voters and the selection of ethical public servants.”³² Yet our laws fail to achieve these crucial goals. Instead, our campaign finance system undermines the very public trust and democracy it ought to promote.

This is not simply a matter of criminal misconduct, although the string of recent corruption prosecutions demonstrates that such misconduct is a saddening problem. The real scandal is what remains legal. New York’s campaign finance laws and practices enable special interests and wealthy individuals to flood the political process with enormous amounts of money. Sky-high contribution limits, gaping loopholes governing the use of party “housekeeping” accounts and limited liability companies (“LLCs”), the lack of disclosure requirements for

³⁰ Governor’s 2013 Program Bill #12 at 22-23, *available at* <http://www.governor.ny.gov/assets/documents/GPB12-BILL.pdf>.

³¹ 11 C.F.R. § 113.1(g).

³² Executive Order No. 106 (July 2, 2013).

outside spending groups, and ineffectual enforcement of even the weak laws on the books all enable big-ticket contributions and expenditures to dominate our election campaigns and distort governmental decision-making.

It is expensive to run for office in New York. Candidates and political parties need to raise and spend money if they are to compete effectively, get their messages out, and mobilize voters. Because our laws make it easy to raise very large sums of money from a very small number of special interest donors – and do not provide an alternative source of funding – the system gives candidates and parties a powerful incentive to concentrate their fund-raising efforts on people or entities who have the means (vast resources) and the motive (significant financial interests in government decisions) to write large checks. Some of these large donors expect at least a hearing – if not more – for their views on economic regulation, tax breaks, government contracts, and other public matters in which they have a stake. Ordinary citizens also have a lot at stake in the decisions of our government, but they lack the money, and the access money can buy, to make their voices heard.

Our campaign finance system affects democratic engagement. Ordinary New Yorkers see campaigns and independent expenditures financed largely by wealthy and powerful interests, and they justifiably feel left out of one of the most meaningful ways to participate in politics and affect our government's agenda.

It is time for fundamental and comprehensive reform and a campaign finance system that promotes public trust and democracy. Based upon our investigations to date, the Commission believes that reform must have four basic components:

- Lower contribution limits and the elimination of the loopholes that have allowed moneyed interests to pump millions of dollars into our elections.
- A robust disclosure regime to address the shadowy outside spending that began to enter our elections in the aftermath of the Supreme Court's *Citizens United* decision.
- A small-donor match public financing system, similar to the one that has been in place in New York City since the late 1980s, that will empower ordinary New Yorkers and reduce the role of special interest money.
- An independent and effective agency to vigorously enforce our campaign finance laws.

These reforms are interconnected:

- Lowering contribution limits and closing the loopholes are essential to address the massive donations that are legally contributed to candidates and party committees by a very small number of very big donors.
- But simply curbing campaign contributions will have only a limited effect, because big money can reenter the system through independent committees that can raise and

spend unlimited sums. Strengthened disclosure rules will allow the voters to learn who is using veiled political committees to attempt to influence our elections.

- A small-donor matching system will give candidates a viable alternative source of funding so that they do not have to turn to large, special interest donors to get the money they need to compete effectively. With public funding, candidates can look to regular New Yorkers to finance their campaigns. This will reduce the power of special interests, make it easier for challengers and political outsiders to run for office, and give candidates an incentive to bring ordinary citizens into the political process.
- None of these reforms will work without timely and effective enforcement. For this reason, the Commission recommends a new campaign finance and election law enforcement agency with the powers and commitment to enforce the rules of our campaign finance system.

The Commission recognizes that these reforms, even taken together, will not magically transform our system. Big money will always have a voice in politics, and misconduct may well occur even in a reformed system. Public funding will cost money, although the amount is likely to be very small and justified by the savings that will result from a more accountable government. But the Commission believes that by decreasing the role of special interest groups and magnifying the voice of ordinary citizens, the measures we propose, particularly public funding, will make our campaign finance laws far more effective in promoting public trust, democracy, and the accountability of elected officials.

I. The Commission's Investigation of Money in Politics

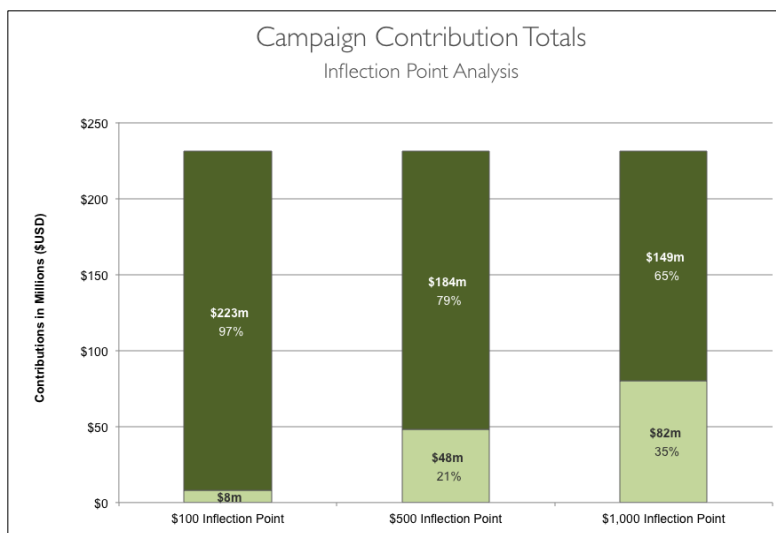
The Commission is vigorously investigating the role of money in politics and the weaknesses within New York's current campaign finance system. We have issued dozens of subpoenas and requests for information, conducted interviews (including former and current legislators and other officials, lobbyists and their clients, and expert and lay witnesses), received millions of pages of documents, taken testimony at three public hearings, and engaged a sophisticated data analytics platform to synthesize massive data sets. Much of what our investigation reveals must await fuller public disclosure. What can be shared is deeply disheartening but perhaps unsurprising: the effect of unregulated or under-regulated money in our political system profoundly corrodes that system. Data gathered in just a few of our investigations illustrate these pervasive problems.

A. Large Donations and Pay-to-Play Culture

The Commission’s ongoing investigations make clear that large campaign donations are literally the coin of the realm in Albany. Political contributions from 2009 to 2012 totaled some \$232 million dollars; when approximately \$693 million in lobbyist expenditures are added in, the total amount of direct political spending on lobbying and campaign contributions approaches a staggering \$1 billion.³³



Large Donors Dominate: Large donations by a small number of special interests and wealthy individuals dominate the campaign finance system. For example, candidates during the period from 2009 to 2012 drew 79% of their funds, over \$180 million, from donors – both organizations and individuals – who gave more than \$500, and 65% of their funds from donors who gave \$1000 or more.³⁴ During that same period, only 3% of all candidate funding came from donations of under



³³ Unless otherwise noted, all data on political contributions is drawn from NYSBOE campaign finance data. The \$232 million figure is the sum of contributions disclosed on NYSBOE Schedules A through E in 2009 through 2012 to all campaign committees that were issued an NYSBOE Filer Identification Number and were associated with candidates for state-level office. Data on lobbying is drawn from filings with JCOPE. This figure includes all compensation paid to lobbyists from 2009 to 2012 as disclosed to JCOPE by the lobbyists’ clients.

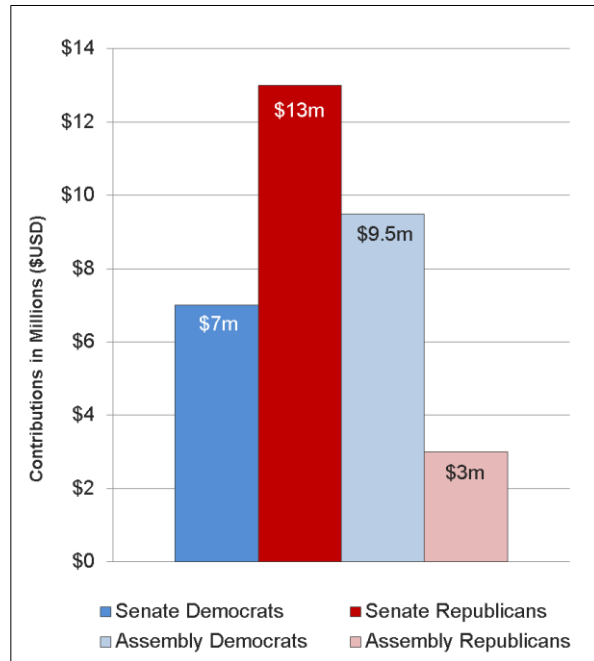
³⁴ Drawn from NYSBOE campaign finance data. The related graphic, “The \$500 Question,” represents an analysis of contributions disclosed between 2009 and 2012 to all campaign committees that were issued an NYSBOE Filer Identification Number and were associated with candidates for state-level office. In this graphic, “small donors” are defined as those who donated \$500 or less in a single contribution and “large donors” are defined as those who contributed more than \$500 in a single contribution.

\$100.³⁵

Candidates for New York state offices rely far more on large donors than do candidates in other states. Only about 40,000 New York residents – or less than 1% of the people who voted in the 2010 gubernatorial election – provided all the individual donations in the 2011-12 election cycle.³⁶ The Campaign Finance Institute has found that New York ranked 32nd out of the 35 states that held gubernatorial and state legislative elections in 2010 in terms of the percentage of the voting age population that made a campaign contribution.³⁷

Access, Not Ideology, Motivates

Giving: Special interest donations appear motivated not by party or ideology, but rather by the need for access to the party, and the player, in power. The same powerful interest groups give to leadership on both sides of the aisle, including Democrats in the Assembly and Republicans in the Senate, a pattern that both reflects and reinforces the distribution of political power. For example, in 2012, Assembly Democrats, who hold a majority, took in approximately \$9.5 million in contributions, compared to \$3 million for the minority Assembly Republicans. In the Senate, where the Republicans hold power, the situation is reversed: Senate Republicans took in approximately \$13 million in 2012, compared to \$7 million for Senate Democrats.³⁸ Indeed, when the Democrats briefly held power in the Senate, in 2010, donations flowed to Senate Democrats. When they lost power, the donations were re-routed and flowed back to the Republicans.³⁹



³⁵ Drawn from NYSBOE campaign finance data.

³⁶ Written Testimony of Bill Mahoney of New York Public Interest Research Group, Submitted at the September 24, 2013 Moreland Commission Public Hearing [hereinafter “Mahoney Testimony”] at 12.

³⁷ Campaign Finance Institute, *Vermont and Rhode Island Had the Highest Percentages of Adults Contributing in 2010 and 2006 State Elections; New York, Utah, California and Florida the Lowest*, December 20, 2012, available at http://www.cfinst.org/Press/PReleases/12-12-20/VT_and_RI_Had_the_Highest_Percentages_of_Adults_Contributing_in_2010_and_2006_State_Elections_NY_UT_CA_and_FL_the_Lowest.aspx.

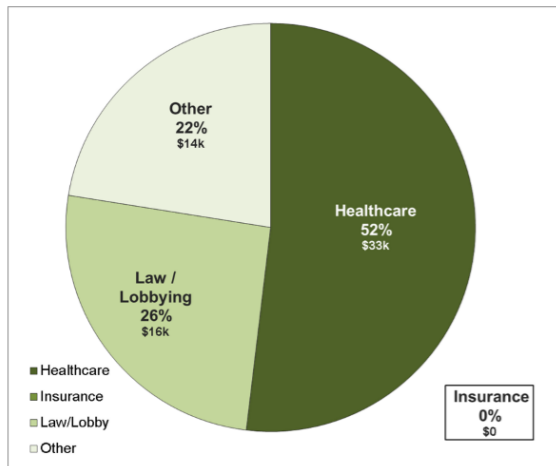
³⁸ Drawn from BOE campaign finance data. See also generally NYPIRG, *Capital Investments 2012* (January 7, 2013). The related bar graph analyzing 2012 contributions aggregates contributions to current legislators.

³⁹ While Senate Republicans outraised Senate Democrats by millions of dollars in 2012, the situation was reversed in 2010, when Senate Democrats raised almost \$8 million more than Republicans. See, e.g., NYPIRG, *Capital Investments 2010* (January 2011) at 7-8.

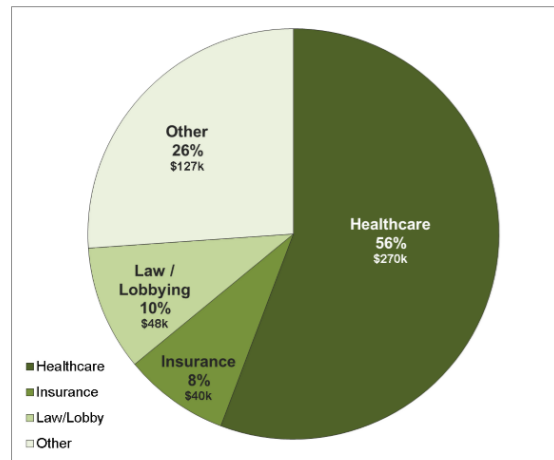
Likewise, legislative committee chairs often draw much or most of their campaign funds from the very industries they are supposed to oversee. For example, between 2011 and 2012, the Republican Chair of the Senate Health Committee received 56% of his campaign funds from the health industry and another 8% from the insurance industry. The Democratic chair of the Assembly Health Committee similarly received 52% of his funds from the health industry. And the ranking minority members of the two committees collected between 33% and 40% of their funds from those industries.⁴⁰ Moreover, the Commission has identified approximately two dozen industry and professional PACs and other entities in the insurance and health sectors who gave substantial contributions to both the Assembly and Senate Health Committee chairs. This cross-partisan pattern of contributions by the same entities suggests that the contributions were not motivated by party or ideology. Our investigation reveals that the same industry groups, trade associations, and interests give to leaders on both sides.

NYS Assembly & Senate Health Committees Industry Contribution Analysis (2011-2012)

Assembly Chair (D)



Senate Chair (R)



Source: NYS BoE

⁴⁰ Drawn from NYSBOE campaign finance data. The related chart represents contributions made by commercial organizations and PACs to the leaders of the New York State Senate and New York State Assembly Health Committees. These charts represent only the contributions that were linked to either a commercial organization or PAC donors – contributions from individual donors or other political committees are not included in this analysis. The commercial and PAC contributors were categorized into industry sectors based on the primary purpose of the commercial organization or PAC as determined by a review of publicly available data. Some of these entities could potentially fall into multiple categories.

Yet another example from the Commission’s investigation demonstrates how certain loopholes –for LLCs and “housekeeping” accounts, both discussed below – help facilitate the larger pay-to-play culture. In 2008, the chairs of the Assembly and Senate committees responsible for regulating a controversial industry introduced legislation endorsed by the industry’s key trade organization. One of the largest players in the industry gave political contributions on both sides of the aisle: \$25,000 to the housekeeping account of the Senate Republican Campaign Committee and \$25,000 to the housekeeping account of the Democratic Assembly Campaign Committee. In late 2008, four of the company’s affiliates gave contributions totaling \$10,000 in one day to one of the chairs. Although the 2008 bill did not pass, a bill containing substantially the same language passed in late 2009. Shortly after the bill was signed into law, the company and two of its affiliates each gave \$2,000 contributions to one of the chairs. Several months later, the company and two different affiliates gave contributions totaling nearly \$10,000 in one day to the other chair.

Pay to Play: Campaign contributions are often closely connected to lobbying. Lobbying and law firms themselves account for 10 to 12% of business contributions.⁴¹ As this Commission already has seen (and expects to further report) in a number of investigations in this area, trade associations and lobbyists treat campaign contributions as a critical part of their business. Political contributions appear to be the entrance fees that buy access.

For example, in one ongoing investigation,⁴² a trade association sponsored a fundraiser for the Democratic Assembly Campaign Committee and urged its members to contribute \$10,000 each to attend the event for this reason: “[o]ur future ability to adopt favorable legislation, stop terrible legislation or modify legislation to limit the pain to our industry is directly tied to our continued positive relationship with all the leaders in Albany. Failure to do so will seriously impact our ability to serve you and our industry.” The same trade association then sent a similar solicitation for donations to the Senate Republican Campaign Committee. Likewise, in another investigation, an attorney working to advance a piece of legislation emailed his client that a lobbyist “strongly suggests a contribution” to an elected official because the “ball is in the hands of the Assembly and [the elected official] has a lot of say on” a particular piece of legislation in which the client was highly interested. The lawyer promptly followed that email up with another, in which he informed his client that although the official had shown willingness to support the legislation, the lawyer would continue making campaign contributions because he was a “believer in not counting the chickens until they hatch as well as knowing from experience with the NYS Legislature it is not over until the fat lady sings.”

⁴¹ Mahoney Testimony at 6.

⁴² Citations relating to this and other ongoing investigations are omitted in order to protect the integrity and confidentiality of those investigations. Moreover, because the investigations cited herein are ongoing, the Commission reserves judgment and draws no conclusions at this time, particularly with respect to the propriety of the particular legislative initiatives sought by the parties involved.

Contributions may also be expected in exchange for political support. In a separate investigation, a lobbyist emailed a prospective client about a bill before the state legislature. In negotiating the terms of his contract, the lobbyist provided the client with what the lobbyist referred to as “a fair projection of expenses.” In addition to informing the client of the lobbyist’s fees, the “expenses” the lobbyist lined out included costly “political contributions” that the client would have to make to certain elected officials, including the chairs of committees that would have jurisdiction over the bill. In this same investigation, the client complained to the lobbyist in an email that an elected official critical of the bill had received over \$50,000 in campaign contributions from an individual who opposed the bill. The client hypothesized that “the money [the individual] spent on [the elected official] is directly related to us” and that such a contribution was an attempt to “pay NOT to let them play.”

These are only some of the casual examples of the pay-to-play culture that has infected our body politic. Again and again, our investigations have uncovered evidence showing that access to elected officials comes at a price, and that the fight over legislation is often between entities with vast financial resources at their disposal. When political power and access is so closely and disproportionately tied to large donations, the majority of New Yorkers are shut out of the political process.

Indeed, the appearance of a relationship between large donations and legislation that specifically benefits large donors is demoralizing to the public. A striking instance of this was the reaction to the news that, in January 2013, an omnibus bill related to affordable housing in New York City provided a very generous tax break for five luxury real estate developments, including four major campaign contributors. Under the section 421-a Property Tax Exemption Program, a condominium developer may receive a ten-year tax abatement if it provides affordable housing subject to certain technical restrictions. The 2013 legislation, however, waived a key restriction for five specifically-identified properties, reducing their real estate tax liabilities by tens of millions of dollars over the abatement period. According to the Commission's investigation thus far, the specific waiver was the result of negotiations between real estate interests and the Assembly. Real estate interests originally pushed to remove the restriction entirely – which they argue was a technical mistake. However, in part because of the City’s concerns about loss of tax revenues, the ultimate legislation waived the restriction only for those projects that had already broken ground. The waiver was part of a larger piece of housing legislation that was vital to the City’s interests. This included amendments to New York City’s Loft Law, and extended and modified both the Condominium and Cooperative real property tax abatement provisions and the J-51 program. Our investigation continues and we draw no premature conclusions on whether the extension of the 421-a tax abatement to these specific properties involved any improper action, but it is clear that the combination of very large campaign contributions and very narrowly targeted benefits to those same donors creates an appearance of impropriety that undermines public trust in our elected representatives.

The Incumbent Advantage: Our campaign system skews funding toward entrenched incumbents, making elections less competitive. At the same time, it incentivizes campaign contributions even when there is no competitive race. In the 2012 general legislative elections, in 54% of legislative races (or 113 contests), the winner won with 80% of the vote or more. Of those 113 winners who won with 80% or more of the vote, more than 90% were incumbents. In many of these races, even though the incumbents were virtually assured re-election, they still pulled in more than 40% of all the donations given to current New York State legislators in the 2012 election cycle.⁴³ Between 2009 and 2012, the 12 longest serving incumbents in the legislature raised over \$5.2 million, while their primary and general election challengers during this same time period raised less than \$1 million. Of these 12 incumbents, only 1 was involved in a general election race in 2010 or 2012 where the winner received less than 60% of the vote.⁴⁴ These contributions appear motivated not to influence an election that was never in doubt, but to gain access to an officeholder who was likely to remain in power after the election.

B. Unlimited Contributions: High Limits, Party “Housekeeping” Accounts and LLCs

The dominant role in our election campaigns of very large donations by special interests is a direct result of New York State’s campaign finance laws. Three features of the rules governing contributions make it very easy for wealthy individuals and interest groups to pump virtually unlimited sums into our elections.

High Contribution Limits: New York’s contribution limits are substantially higher than those of any other state that has adopted contribution limits. Indeed, they can scarcely be called limits at all. Individuals in New York are permitted to give up to \$60,800 for primary and general election campaigns combined to candidates for state-wide office, \$16,800 for State Senate candidates, and \$8,200 for Assembly candidates.⁴⁵ By comparison, federal law limits contributions to a candidate for United States senator or member of the United States House of Representatives to just \$5,200 for the combined primary and general election period and New York City law limits contributions to mayoral candidates to \$4,950.⁴⁶

While both federal and New York City laws bar corporate campaign contributions, state law permits them, subject to a \$5,000 annual limit.⁴⁷ State law also limits donations to political party committees from any individual contributor, albeit at the very high level of \$102,300 in a

⁴³ Drawn from NYSBOE campaign finance and elections data and Ballotpedia, <http://ballotpedia.org>.

⁴⁴ *Id.*

⁴⁵ See ELECTION LAW § 14-114; see also New York State Board of Elections, “Contribution Limits,” available at <http://www.elections.ny.gov/CFContributionLimits.html>.

⁴⁶ See Federal Election Commission, “The FEC and the Federal Campaign Finance Law,” available at <http://www.fec.gov/pages/brochures/fecfeca.shtml> (explaining contribution limits under the Federal Election Campaign Act, 2 U.S.C. § 431 *et seq.*); New York City Campaign Finance Board, “2013 Limits, Requirements, and Public Funds,” available at <http://www.nycffb.info/candidates/candidates/limits/2013.htm>.

⁴⁷ See New York State Board of Elections, “Contribution Limits,” *supra*.

calendar year, and caps an individual's aggregate contributions to all candidates and political party committees at \$150,000 per year.⁴⁸ However, the corporate, party, and aggregate limits are effectively eroded by the "LLC" and "housekeeping account" loopholes.

LLCs: Limited liability corporations, or LLCs, are business entities that have some of the features of both partnerships and corporations. Like corporations, they have such features as ongoing existence even when membership changes, transferable interests, limited liability for members, and the ability to accumulate capital. In 1996, the Board of Elections determined that the \$5,000 annual limit on corporate contributions does not apply to LLCs.⁴⁹ Instead, the Board determined to treat LLCs as individuals, subject only to the much higher limits on individual donations to candidates and the \$150,000 aggregate contribution limit applicable to private individuals. At the time of the 1996 opinion, LLCs were a relatively new form of business, and the Board relied heavily on a 1995 opinion of the Federal Election Commission ("FEC") concerning the treatment of LLCs under federal campaign finance law.⁵⁰ The FEC changed its position in 1999 and concluded that LLCs in many circumstances should be treated as corporations for campaign finance purposes.⁵¹ The Board, however, continues to adhere to its original position.

As a result, LLCs registered in New York are able to contribute up to \$150,000 in campaign donations per year. Moreover, there is no effective limit on the number of LLCs an individual or firm can create. Each LLC can contribute up to the statutory maximum even though an individual can create multiple LLCs and coordinate their activities such that each can make its maximum individual contribution to the same candidate on the same day. This "LLC loophole" essentially renders meaningless the \$5,000 donation limit applicable to corporations and allows wealthy individuals and businesses to contribute virtually unlimited amounts in New York elections.

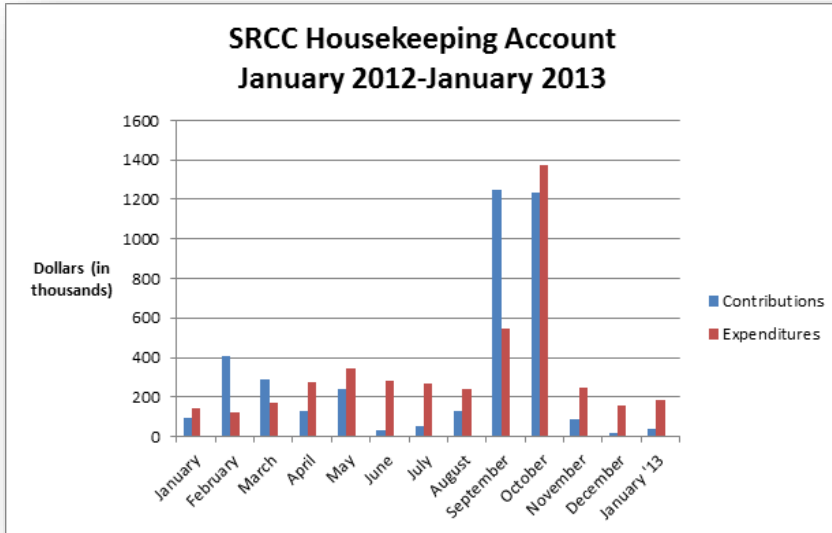
The Commission is investigating the use of LLCs as political contribution vehicles in New York State. While we continue to review documents produced in response to our subpoenas, we can already say that numerous entities and organizations unabashedly use this loophole. In one of many examples, an email from an industry group urged its members to donate political contributions of \$25,000, noting that "[u]nder the State's campaign finance rules, such contributions can be provided by LLCs, partnerships or personal accounts. (A corporate account can only write a \$5,000 check.)" Another representative string of emails involves a lively discussion among members of an organization about which of the organization's LLCs should be used to make a round of outsized contributions, based upon which ones had already given outsized contributions in the past. The Commission's investigation reveals that certain

⁴⁸ *Id.*

⁴⁹ New York State Board of Elections 1996 Opinion No. 1 (January 30, 1996).

⁵⁰ *Id.*

⁵¹ *See* 11 C.F.R. § 110.1(g).

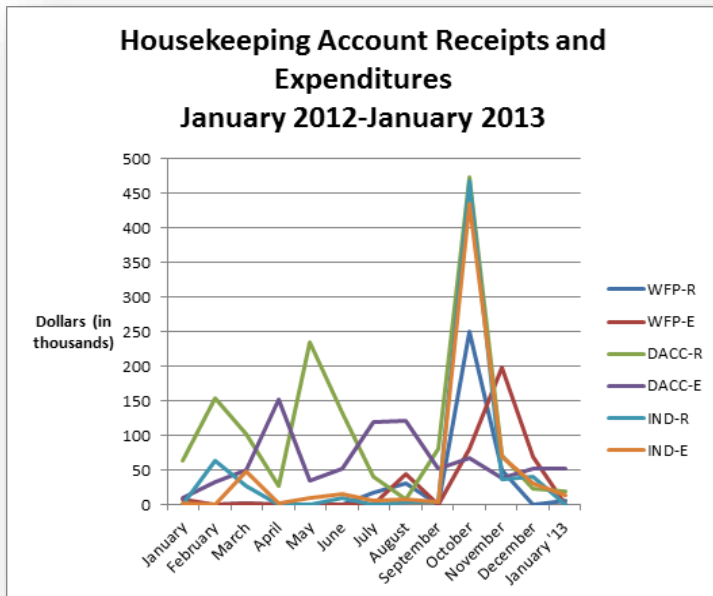


entities use dozens of LLCs in this manner in order to contribute virtually unlimited so-called “hard money.”

To take one representative sample (among many): according to its own documents, one entity has utilized 25 separate LLCs and subsidiary entities to make 147 separate political

contributions totaling more than \$3.1 million dollars since 2008. This allowed the entity to work around the individual contribution limits in some cases. For example, between August and October of 2008, two related entities and LLCs combined to make eight separate donations totaling \$384,000 to the State Assembly and Senate Campaign Committees of both the Republican and Democratic parties.⁵² Had it been limited to donating only in its corporate capacity, this entity would only have

been able to give \$5,000 for the entire year. While perfectly legal, this loophole dramatically undermines the limits already in place.



Party “Housekeeping” Accounts: As previously noted, corporate donations are subject to an annual aggregate cap of \$5,000 and individual donations to political party committees are subject to an annual cap of \$103,200. But even that extremely high limit has been effectively eviscerated by the provision of New York’s Election Law that exempts donations to so-called “housekeeping” accounts from the contribution limitations.⁵³ Under

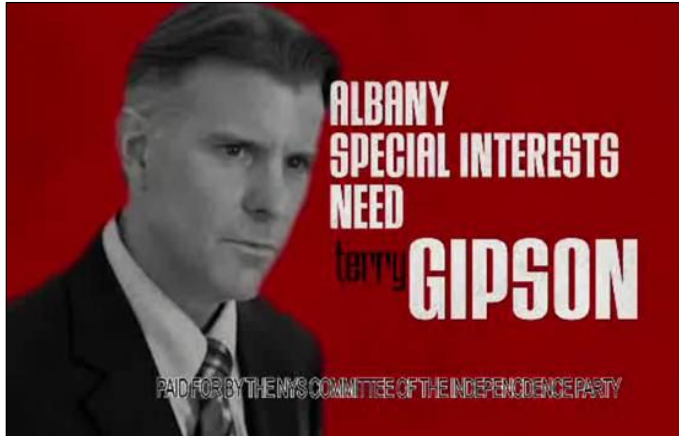
the law, “housekeeping” accounts must be used only “to maintain a permanent headquarters and staff

⁵² Citation omitted. This investigation is ongoing.

⁵³ ELECTION LAW § 14-124(3).

and carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates.”⁵⁴ However, housekeeping accounts have become a device for raising virtually unlimited sums for campaign use. According to one study, a total of 59 donors gave \$200,000 or more – and 12 donors gave \$1 million or more – to party housekeeping accounts between 2006 and 2013.⁵⁵ The Commission has served eleven subpoenas relating to party housekeeping accounts, including nine on the accounts themselves. This investigation continues, but the information already collected, combined with publicly available data, shows how housekeeping accounts have been misused.

Emails and other information reviewed by the Commission reveal that party housekeeping accounts have been used to pay for campaign staffers whose roles included “incumbency projects” and “oversight of individual campaigns,” as well as for political consultants, polling, television advertising, and contributions to community organizing and canvassing groups. As shown in the above graphs, the expenditures from the most active housekeeping accounts, like the Senate



Republican Housekeeping Account, spike dramatically right before an election.⁵⁶

One example drawn from the Commission’s investigation exemplifies the misuse of party housekeeping accounts. During the 2012 election, the Senate Republican Housekeeping Account made a series of three transfers to the Independence Party Housekeeping Account, totaling over \$350,000.

Invoices and communications produced to the Commission reveal that much of this money was then spent by the Independence Party on negative television advertisements, such as the one depicted here attacking Democratic Senator Terry Gipson, who was then locked in a tight race with a Republican challenger. Emails further reveal extensive coordination between the two parties’ housekeeping accounts on attack mailers in several Senate races. In one thread, Tom Connolly, the vice chairman of the Independence Party, commenting on a proof of an attack mailer portraying Democratic Senate candidate Joseph Addabbo as Dracula, asked, “Is this ours? Don’t know anything about it.” Scott Stevens, the Director of Operations for the Senate Republican housekeeping account, replied, “It’s ours but they would like it

⁵⁴ *Id.*

⁵⁵ Common Cause New York, Report, *The Life of the Party: Hard Facts on Soft Money ‘Housekeeping’ Accounts in New York State*, May 2013.

⁵⁶ Data drawn from NYSBOE campaign finance data as well as data produced to the Commission. In the related graphs, “WFP,” “DACC,” “IND,” and “SRCC” denote the housekeeping accounts of the Working Families Party, the Assembly Democrats, the Independence Party, and the Senate Republicans.

to go through IDP [Independence Party]” To this, the Independence Party representative responded: “Absolutely ok to go with us.”⁵⁷

C. Undisclosed Independent Expenditures in New York



Under campaign finance law, “independent expenditures” are expenses incurred by individuals or organizations engaging in electioneering activity independently of candidates and political parties. Organizations that make independent expenditures are required to register with the Board of Elections and report their expenditures and contributions. But this disclosure requirement is undermined by the Board’s narrow definition of electioneering, which requires that a campaign message expressly call for the election or defeat of a candidate.⁵⁸ Although at one time the United States Supreme Court imposed such a “magic words” test on federal disclosure requirements,⁵⁹ the Court more recently has held that disclosure can be required when a group runs ads that refer to a candidate

in the preelection period or are otherwise the “functional equivalent” of express advocacy.⁶⁰ Nevertheless, our Board of Elections has failed to adopt this more expansive definition.

The Commission’s ongoing investigation of independent expenditures in New York reveals the growing problem of groups spending large sums of money in our elections without reporting their activities or disclosing their donors. The story of one group with the *nom de guerre* of “Common Sense Principles” illustrates just how difficult it is to track down the sources of the cash used to influence our elections.

“Common Sense” is a Virginia-based 501(c)(4) group that is very interested in New York politics, but that operates in its shadows.⁶¹ It maintains a professionally-designed website, “commonsenseprinciples.com,” attacking various Democratic members of the New York Senate, as well as a Twitter account and a Facebook page, both of which were active at least through

⁵⁷ Citations omitted. This investigation is ongoing.

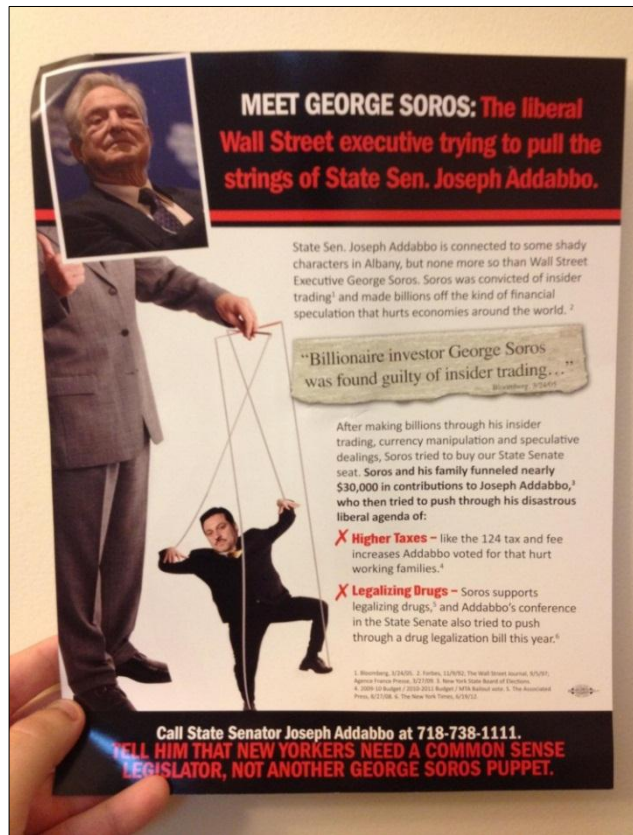
⁵⁸ The Board has interpreted “express advocacy” in the narrowest of terms, requiring the use of “magic words” like “vote for” or “vote against.” See 9 NYCRR § 6200.10. For a detailed discussion see *infra* nn.117-125 and accompanying text.

⁵⁹ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁶⁰ See *McConnell v. FEC*, 540 U.S. 93 (2003).

⁶¹ Virginia State Corporation Commission, Business Entity Details for Common Sense, available at <https://sccefile.scc.virginia.gov/Business/0721742>.

Election Day in 2012.⁶² Common Sense spent nearly \$1 million on targeted mailers attacking Democratic Senate candidates during the 2012 State Senate elections, and \$2.5 million running attack ads against Democratic candidates in 2010. The example seen here, from 2012, is typical: Democratic Senate candidate Joseph Addabbo is pictured as the “puppet” of “liberal Wall Street executive” George Soros, and assailed as supporting “higher taxes” and “legalizing drugs.”⁶³



Common Sense does not report its campaign spending to the Board of Elections because it considers its mailers to fall outside of the Board’s narrow definition of “express advocacy.”⁶⁴ It has registered as a lobbyist with JCOPE, but its filing listed only a single donor: The Center for Common Sense, LLC, a Florida-based entity that in turn lists its address as the office of a local accountant.⁶⁵

So who pays for Common Sense’s political spending in New York? Despite issuing a number of subpoenas and conducting several interviews, the Commission still cannot say. A New York-based direct mail company that sent the 2012 attack mailers has informed the Commission that the Common Sense mailer had been ordered by a Florida-based intermediary company. Common Sense, according to the

direct mail company, is a “ghost company.” Service of the Commission’s subpoenas cannot be perfected on either the Virginia-based 501(c)(4) entity or the Florida companies. This daisy chain of out-of-state corporations and “ghost companies” appears to exist for one reason: to hide the source of money used to fund negative advertising and influence our local elections. Even

⁶² See, e.g., <https://twitter.com/#!/CSPrinciples> (twitter feed for Common Sense Principles).

⁶³ See Azi Paybarah, “A Virginia-based PAC does the George Soros bit for Eric Ulrich,” CAPITAL NEW YORK (October 8, 2012), available at <http://www.capitalnewyork.com/article/politics/2012/10/6537864/virginia-based-pac-does-george-soros-bit-eric-ulrich>. Common Sense’s activities were reported on extensively in the political press. See, e.g., Thomas Kaplan, “Attack Ads, by Outside Groups with Murky Ties, Shape 3 Senate Races,” THE NEW YORK TIMES (October 16, 2012), available at http://www.nytimes.com/2012/10/17/nyregion/3-new-york-senate-races-flooded-by-money-from-outside-groups.html?_r=0.

⁶⁴ See *supra* n.58 and accompanying text.

⁶⁵ The Albany Times-Union described these disclosures as “a performance satire of the state’s election laws.” Jimmy Vielkind, Capital Confidential Blog, “Drumroll: Common Sense Principles Lists Its Donor,” THE ALBANY TIMES-UNION (February 6, 2013), available at <http://blog.timesunion.com/capitol/archives/177691/drumroll-common-sense-principles-lists-its-donor/>.

this Commission, armed with subpoena power, still has been unable to track down the sources of the torrent of money flowing into and within our state. Perhaps most alarming is that this is the story of just one group. Outside spending groups are growing in numbers and power with each election. Common Sense is only one of many entities spending big money to influence New York State politics.

II. Reforming Our Campaign Finance System

Fundamental reform is required to create a campaign finance system that promotes public trust and democracy, changes our pay-to-play political culture, and empowers ordinary New Yorkers. This means lowering contribution limits, closing loopholes, improving disclosure, and creating an independent and vigorous campaign finance law enforcer. It will also require the adoption of a small-donor match public funding system, similar to the one that has been in place in New York City since the late 1980s, which will give a campaign financing role to ordinary citizens. With public funding, small contributions from individual donors are matched and multiplied by public funds, leveraging the power of ordinary individuals and reducing the influence of large donors and special interest money.

A. Recommendation: Public Financing of Candidates for State Office

The Case for Reform: At its three public hearings, the Commission heard from numerous witnesses who, drawing on the examples of the public funding systems of New York City and Connecticut, testified about the benefits of public financing of campaigns in decreasing the influence of large donors, and increasing the impact of ordinary citizens. Eric Ulrich, a current member of the New York City Council representing the 32nd Council District in Queens who also ran for the New York State Senate in 2012, was able to speak from personal experience. Councilman Ulrich testified that the differences between running for office in a publicly-funded system versus one based solely on private donations are substantial. In the publicly funded city system, Ulrich testified before the Commission:

I don't need the blessing of any special interest group or major support from any large group of donors from any industry. I serve my constituents and I'm able to vote on a budget and make legislative decisions based upon what I think is right for the people that I represent.⁶⁶

Running for state office, however, was a very different experience: "My [State Senate] campaign was able to accept sky-high campaign contributions, and the various party committees and independent expenditure groups that spent on my behalf probably did more harm than good."⁶⁷ When asked what role the voluntary small donor matching system had on elections in

⁶⁶ Moreland Public Hearing, September 17, 2013 [hereinafter "September Hearing"] Tr. 56:1-10 (Ulrich Testimony).

⁶⁷ *Id.* at 56:11-15.

New York City, Councilman Ulrich responded, “You know, those people [small donors] are playing a very significant role in that candidate’s campaign . . . the role of the candidate [is] to get the attention of the voters and get the support of the voters in their district.”⁶⁸

New York City Campaign Finance Board Executive Director Amy Loprest testified before the Commission that in 2013 nearly 79% of candidates for City office in either the primary or general election opted into the program and that, of the private contributions collected by City candidates this past year, an impressive 93% came from individuals.⁶⁹

The New York City public funding system has greatly expanded participation in the financing of the City’s elections. In 2009, when the City first moved from a 4-to-1 to a 6-to-1 small donor match, participating candidates received 38% of their funds in donations of less than \$250; when public matching funds are included, these small donors were responsible for 63% of the money raised that year by participating City Council candidates.⁷⁰ By contrast, small donors were responsible for only 7% of the money raised in the 2006 state-level elections.⁷¹ In 2009, nearly 92,000 individuals made campaign contributions in City elections, more than double the number of individuals in all of New York State who made campaign contributions in New York’s state elections in 2010.⁷² This is not because City residents have any greater propensity to contribute, but rather because the City law operates as an incentive to candidates to seek small donations. Indeed, City residents’ donor participation rate – the percentage of voting age people who made a political contribution of any size – is dramatically higher for City elections than for state elections: City residents’ rate of giving to candidates in the 2009 City elections was *more than eight times* their rate of giving to state-level candidates in the 2006 state elections.⁷³

The New York City public funding system has also dramatically diversified the donor base. The Bureau of the Census divides New York City into 5,733 “census block groups” that contain between 600 and 3000 people each. In 2009, 5,128 of these block groups (89%) were home to at least one donor who gave \$100 or less, and donors of \$250 or less lived in 5,267 (92%) of the City’s census block groups. By contrast, in 2010 only 30% of the City’s census block groups had at least one small donor to a State Assembly candidate.⁷⁴ Moreover, the census blocks with low-dollar

⁶⁸ *Id.* at 59:9-18.

⁶⁹ Written Testimony of Amy Loprest, Submitted at the October 28, 2013 Moreland Commission Public Hearing, available at <http://www.nycffb.info/press/news/testimony/pdf/cfb/2013-10-28-AL-Testimony.pdf>.

⁷⁰ Michael J. Malbin and Peter W. Brusoe, *Small Donors, Big Democracy: New York City’s Matching Funds Program as a Model for the Nation and States*, 11 ELEC. L. J. 3, 14 (2012), available at http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf.

⁷¹ *Id.* at 13.

⁷² *Id.* at 6; Michael J. Malbin and Peter W. Brusoe, *Small Donors, Big Democracy: New York City’s Matching Funds Program as a Model for the Nation and States*, Campaign Finance Institute Draft Version (July 11, 2011), at 12-13,30, available at <http://www.cfinst.org/pdf/state/NYC-as-a-Model.pdf>.

⁷³ *Id.* at 12-13, 30.

⁷⁴ See Written Testimony of Lawrence Norden, Brennan Center for Justice, Submitted at the September Hearing, at 5, available at http://www.brennancenter.org/sites/default/files/analysis/Moreland_testimony_091713.pdf; see also Angela Migally & Susan Liss, Brennan Center for Justice, *Small Donor Matching Funds: The NYC Election*

donors who contributed in City elections were generally poorer, with higher percentages of nonwhite residents and residents with lower levels of education. As the leading academic study of the New York City matching system's impact on participation explained:

“There can be little doubt that bringing more small donors into the system has contributed to a greater diversity of neighborhood experience in the donor pool. Increasing the number of small donors therefore has been more than a means to dilute the power of major givers. It has also led candidates to reach out to and engage a more diverse and more representative set of constituents”⁷⁵

There is also some evidence that public funding contributes to more competitive elections, although New York City's adoption of term limits for local office has also undoubtedly contributed to the high degree of competition. In the 2013 primary elections, 38 Democratic primaries had at least two contestants, and nearly two-thirds of the contested Democratic primaries for City Council were competitive, with the victor winning less than 60% of the vote. Two or more candidates qualified to receive matching funds for the primary in each of 31 Council races.⁷⁶ Both of the winning primary candidates for mayor relied on public funding. In the highly competitive Democratic primary for comptroller, public matching funds accounted for roughly one-third of the \$6.1 million in spending by the winning candidate Scott Stringer; his unsuccessful opponent, Eliot Spitzer, spent more than \$10.3 million, all from his own personal wealth.⁷⁷

In addition to testimony about New York City, the Commission also heard testimony about Connecticut's public funding system. James Spallone, Connecticut's Deputy Secretary of State, testified before the Commission about our neighboring state's campaign finance reform.⁷⁸ Following a corruption scandal that led to the resignation of a sitting governor, Connecticut enacted the Comprehensive Campaign Reform Act of 2005, which created the Connecticut Citizens' Election public funding program. In 2012, a record 77% of elected state legislators participated in the program, including Governor Malloy and all current statewide elected officials.⁷⁹ The vast majority of sitting members of the General Assembly also participated in

Experience 11-12 (2010), available at

<http://www.brennancenter.org/sites/default/files/legacy/Small%20Donor%20Matching%20Funds-The%20NYC%20Election%20Experience.pdf>.

⁷⁵ Malbin & Brusoe, *supra*, at 13.

⁷⁶ New York City Campaign Finance Board, *Full Disclosure*, Oct. 2013, at 1, available at http://www.nycfb.info/press/news/full_disclosure/FD_10312013.pdf.

⁷⁷ New York City Campaign Finance Board, *Full Disclosure*, Sept. 2013, at 1, available at http://www.nycfb.info/press/news/full_disclosure/FD_9302013.pdf.

⁷⁸ Connecticut does not use a small-donor matching program but instead provides a flat grant to candidates who raise a threshold amount of funds, in small donations, from at least a minimum number of state residents.

⁷⁹ J. Mijin Cha & Miles Rapoport, Demos, *Fresh Start: The Impact of Public Campaign Financing in Connecticut* (2013), at 5.

the system during their most recent election, including nearly two-thirds of Republican candidates and 80% of Democrats.⁸⁰

Another study of the Connecticut public funding program submitted to the Commission found that public financing allows legislators to spend more time interacting with constituents, increases the number of donors, reduces the influence of lobbyists, increases the diversity of candidates and legislators, and improves the legislative process.⁸¹ As one Connecticut state senator explained, “the playing field has been leveled and everyone has to compete based on the merits of their proposals. Certainly there are some lobbyists that are more influential, but now, their influence has to be on the arguments they make rather than any financial benefits they can bestow.”⁸² The number of contested races for the Connecticut General Assembly has increased and the program has widened the candidate pool by lowering the barrier to entry for candidates who have not traditionally had access to large funding sources, including younger candidates, women candidates, and minority candidates.⁸³

Designing a Public Funding System for New York State: The Commission notes that, during the last legislative session, attractive and relatively similar public funding bills were introduced by Speaker Silver, Senator Klein, and by the Governor as a Program Bill. New York City also provides a model for our state. New York City’s small-donor matching system was first adopted in 1988 in response to the political corruption scandals that shook the City in the mid-1980s, and it has lasted through seven election cycles. The City has repeatedly revised the program to lower the matchable amount and increase the match ratio. By virtually all accounts, the program has succeeded in making New York City’s elected officials more accountable to City voters, in dramatically expanding the participation of citizens of modest means in the electoral process, and in making City candidates far less dependent on large donors.

Instead of laying out specific details, many of which can be found in the Silver, Klein, and Governor’s Program bills, this Report focuses on what the majority of the Commission believes are the essential elements for a successful public funding system.

Small Donor Matching: Evidence from New York City and from states that have adopted systems for publically-financed elections suggests that public financing makes elections more competitive, allowing qualified candidates without great personal wealth or moneyed connections to launch viable campaigns. Several empirical studies on the subject confirm this conclusion.⁸⁴ Making small donors attractive to candidates requires a high match ratio. When

⁸⁰ Written Testimony of Deputy Secretary of State James Spallone, Submitted at the October Hearing, *available at* <http://publiccorruption.moreland.ny.gov/sites/default/files/Spallone-Moreland-Commission-testimony-10-28-13.pdf>.

⁸¹ Cha & Rapoport, *supra*.

⁸² *Id.* at 10.

⁸³ *Id.*

⁸⁴ *See, e.g.,* Michael G. Miller, *Clean Elections vs. Political Speech* at 2 (2011), *available at* <http://www.maineclanelections.org/assets/files/Clean%20Elections%20v%20Political%20Speech%20Miller%20M>

New York City first adopted public funding in 1988, it provided only a simple dollar-for-dollar match. That was subsequently changed to a 4-to-1 match, and then to a 6-to-1 match. A high match ratio provides the best opportunity for New Yorkers of modest means to exercise a significant voice in the political process. When a donation as small as \$10 is – due to the \$60 in matching public funds – worth \$70 to the candidate, the incentive to seek such small donations grows. Indeed, there is evidence that the change in the matching formula from 4-to-1 to 6-to-1 led to a huge surge in the number of individuals making contributions because it became more worthwhile for candidates to seek out small donors.⁸⁵ New York City’s current matching system – in which contributions of \$175 or less are matched with public dollars at a rate of 6-to-1 – has enhanced the importance of small donations and encouraged participation by small donors.

The Commission believes that a system based on New York City’s successful model of a 6-to-1 public funds match on small contributions up to \$175 is the correct approach for New York State.⁸⁶ Only the donations of individual New Yorkers – “natural persons” – would be matched. Corporations, unions, associations, and nonresidents would remain free to make campaign contributions, but only donations from New York individuals would trigger the payment of public funds to candidates. This system would be in place for both primary and general elections and would apply to all statewide elections and to elections for the New York State Senate and Assembly.

Qualification Thresholds: Public financing should only be available to candidates who can demonstrate some basic level of support from the electorate. The 2013 plans proposed by Governor Cuomo, Speaker Silver, and Senator Klein have nearly identical fundraising requirements that must be met during the course of the primary and general election. The Commission recommends that these thresholds be adopted in New York’s public financing system:

- Governor: \$650,000 in contributions, including at least 6,500 matchable contributions.
- Lieutenant Governor, Comptroller, Attorney General: \$200,000 in contributions, including at least 2,000 matchable contributions.
- Senator: \$20,000 in contributions, including at least 200 matchable contributions.
- Assembly: \$10,000 in contributions, including at least 100 matchable contributions.

Funding Availability: All of the major public financing proposals require some cap on the amount of public funding available to participating candidates. The Commission similarly agrees that the amount of public financing available to a particular candidate should be limited to the average cost of a successful campaign for the office in question over the last two election

arch%202011.pdf; Neil Malhotra, *The Impact of Public Financing on Electoral Competition: Evidence from Arizona and Maine*, 8 ST. POLS. & POL’Y Q. 263, 263 (2008), available at <http://www.stanford.edu/~neilm/sppq.pdf>.

⁸⁵ Malbin & Brusoe, *supra*, at 11-12.

⁸⁶ The vote was 17 to 7 to 1.

cycles. If campaign costs rise over time, the maximum public grant would rise as well. But the size of the public grant any specific candidate receives would always be based on his or her ability to raise matchable individual contributions. The goal of public funding is to make small donations attractive to candidates, and that will require public funding to keep up with the cost of elections for those candidates who are able to attract the support of small donors.

Although the public grant would be limited, *no spending limit* would be imposed on candidates who take public funding. Public funding is a voluntary program. Candidates with extensive support from special interests, or who are wealthy enough to fund their own campaigns, may choose not to participate. Even with public funding, Super PACs and other independent groups will be able to pour large sums of money into ad campaigns. Public funding will remain attractive to candidates only if they are able to respond to high-spending, non-participating candidates or interest groups. The Supreme Court recently held that it is unconstitutional for a state to provide a publicly-funded candidate with additional funds in order to respond to a high volume of spending by a privately-funded candidate or Super PAC.⁸⁷ To deal with the challenge of high-spending, privately-funded candidates and Super PACs, publicly-funded candidates should be free to continue to raise and spend non-matchable contributions, subject to generally applicable contribution limits.

Finally, funding should only be available to candidates who face meaningful opposition. New York City has adopted rules for determining when a candidate has meaningful opposition.⁸⁸ These provide a useful model for the state to follow.

Countervailing Considerations: Although fourteen states⁸⁹ and as many cities⁹⁰ provide some form of public financing to candidates for some offices, public funding continues to be a controversial idea. As proponents of public funding we agree with skeptics that any proposal for a new program to spend taxpayer dollars must be justified. That involves consideration of both costs and benefits.

The Commission has examined estimates of the costs of a system of public financing similar to what we are recommending. Any estimate of cost is necessarily sensitive to many assumptions, such as how many candidates will participate in such a system, how many will qualify for public support, and how much qualified candidates will raise in matchable contributions. The Campaign Finance Institute (“CFI”) undertook an extensive analysis, submitted in testimony to the Commission, of the costs of implementing Speaker Silver’s

⁸⁷ See *Arizona Free Enterprise Club’s Freedom Club PAC v. Bennett*, 131 S. Ct. 2806, 2813 (2011).

⁸⁸ See N.Y.C. Admin. Code § 3-705(7).

⁸⁹ National Conference of State Legislatures, *States Offering Public Financing to Candidates*, January 13, 2013, <http://www.ncsl.org/research/elections-and-campaigns/public-financing-of-campaigns-overview.aspx>.

⁹⁰ Center for Governmental Studies, “Mapping Public Financing in American Elections,” (2009) (two local governments provide full public financing for some offices and twelve provide matching funds for elections for some offices).

campaign finance proposal. Looking to donor participation in the 2010 (statewide and legislative) and 2012 (legislative only) elections and making estimates assuming a significant increase in the number of small donors, a tripling of the number of primary challengers, and an increase in the number of contested general elections, CFI concluded that the highest likely four-year cost of the program would be \$165.7 million – or roughly \$41.4 million per year.⁹¹ State Comptroller Thomas DiNapoli recently agreed that the upper bound cost of public financing for New York state elections is \$41 million per year.⁹² Extrapolating from the costs of operating New York City’s public funding system, CFI also estimated there would be administrative costs of between \$17.5 million and \$20.9 million per year, although these costs would also produce improvements in the administration and enforcement of the state’s campaign finance laws generally. The total cost, then, would be no more than \$62 million per year. That is roughly 2/3 of one-tenth of one percent of New York’s \$90 billion state operating funds budget.⁹³ This is about \$3.20 per New Yorker.

And what will the average New Yorker get for \$3.20 per year? It is impossible to quantify with certainty, but the Commission believes that reducing the role of big donors in financing campaigns will reduce in turn the pressures donors place on our elected officials to provide targeted tax breaks for special interests and to spend public funds on pork barrel projects of doubtful public value. In many years the elimination of just one wasteful tax expenditure or one unnecessary spending program could cover the full cost of the program. As the New York Times editorial board aptly put it: “[M]ost deep-pocketed donors cost the taxpayer dearly. They do so by demanding special treatment – enacting this law, undoing that one – in ways that benefit them, not all of us.”⁹⁴

Of course, it may also be objected that public funding will not eliminate the influence of big money on our elections. That is certainly correct. Public funding by itself cannot stem the flow of large donations and expenditures into the political system. Reducing contribution limits, closing loopholes, enhancing disclosure of independent spending, and strengthening our penal law and enforcement mechanisms are also essential. Even a fully reformed system will remain subject to the influence of private wealth and special interest spending. Under the Supreme

⁹¹ Written Testimony of Michael Malbin, Submitted at the October Hearing, *available at* http://www.cfinst.org/pdf/testimony/Malbin_Testimony_Moreland-Commission_28Oct2013.pdf.

⁹² Jessica Alaimo, “Comptrollers, good-government groups call for state-level campaign financing,” *CAPITAL NEW YORK* (Nov. 20, 2013), *available at* <http://www.capitalnewyork.com/article/albany/2013/11/8536315/comptrollers-good-government-groups-call-state-level-campaign-financi>.

⁹³ Senator Klein’s campaign finance reform bill, S. 4897, proposes to pay for the public funding system from the state’s pool of unclaimed funds, which consists of “lost,” “abandoned,” or otherwise unclaimed funds owed to individuals and organizations from banks, corporations, insurance companies, and other entities. A portion of that fund is swept into the state’s general fund each year. In the 2012-13 fiscal year, the state received \$715 million from unclaimed funds; one-tenth of that sum would cover the cost of a public funding system. Senator Klein’s proposal is worth considering but the Commission takes no position on how the public funding program should be financed, or whether funds should come from a dedicated revenue source or from general revenues.

⁹⁴ Editorial, “Climbing Out of Albany’s Swamp,” *NEW YORK TIMES* (Nov. 22, 2013).

Court's interpretation of the First Amendment, the independent spending of individuals, corporations, unions, and other groups cannot be limited, and lower court decisions have held that limits cannot be placed on donations to groups that engage in independent spending.⁹⁵ Given these constitutional constraints on regulation, independent spending will almost surely be a factor even in publicly-funded elections. Indeed, there was a total of \$15.8 million in independent spending in New York City's recent municipal elections, with \$9.4 million – almost two-thirds of the total – coming from just three groups.⁹⁶ This very high level of special interest spending is surely troubling. But it is crucial to note that this independent spending was more than offset by the \$37.6 million in public funds and the many millions of dollars in small private donations that allowed candidates to qualify for public grants.⁹⁷ In several New York City Council races in the 2013 election, public funds provided crucial assistance to candidates threatened with inundation by hostile independent spending. In Council District 48, Chaim Deutsch was able to rely on \$92,400 in public funds to overcome \$346,400 in opposition independent expenditures. In District 36, Robert Cornegy, Jr. spent \$92,400 in public funds and prevailed notwithstanding \$358,070 in opposition independent expenditures. In District 38, Carlos Menchaca spent \$92,400 and won even though his opponent benefited from more than \$400,000 in independent spending.⁹⁸ *How much more serious would be the challenge to public trust and democracy in New York City were there no public funds or qualifying small private donations to offset the impact of multi-million dollar spending by a handful of special interest groups?*

It has been argued that public funding will promote frivolous candidacies, extremist parties, or “zombie” third parties that are merely intended to draw votes away from the major parties.⁹⁹ But frivolous candidates, extremist groups, and shell parties intended to distract the voters from the principal candidates already exist under our privately funded system. A proper set of rules requiring candidates to attract a large enough number of contributions from individual residents in order to qualify for public funds will assure that public dollars will go only to those candidates who enjoy real voter support.

It has also been argued that public funding will increase corruption by matching donations from special interest groups.¹⁰⁰ But under our proposal, public funds will match only small donations from individual New York residents.

⁹⁵ See, e.g., *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010).

⁹⁶ New York City Campaign Finance Board, Campaign Finance Summary 2013 Elections, available at http://www.nycffb.info/VSApps/WebForm_Finance_Summary.aspx?as_election_cycle=2013.

⁹⁷ *Id.*

⁹⁸ Election results based on data supplied by the New York City Campaign Finance Board. In the C.D. 36 race, Cornegy also benefited from \$30,280 in independent spending., and in the C,D. 38 race, Menchaca benefited from \$110,932 in independent spending.

⁹⁹ Testimony of David Keating, Center for Competitive Politics, State Senate hearing, May 7, 2013.

¹⁰⁰ *Id.*

Public funding is the only constitutional means of balancing the impact of big money on our elections. The Supreme Court has held that campaign expenditures – whether by candidates, wealthy individuals, organizations, corporations, or unions – cannot be limited.¹⁰¹ Contributions may be limited, but donors who hit a contribution ceiling can continue to support or oppose candidates through independent expenditures, whether by spending directly or by giving unlimited sums to independent committees. Although aggregate contribution limits, which cap the total amount of money an individual can give to all candidates or parties in a calendar year or election cycle, may be enacted, they have been challenged in a case before the Supreme Court that could make it more difficult to regulate contributions generally.¹⁰²

The most constitutionally sound way to limit the role of big money and address the dependency of candidates on large donors is to bring new money – money that comes without strings attached – into our system. This requires strengthening the role of small donors through public matching funds. Moreover, small-donor match public funding is completely consistent with the constitutional values of speech, participation, and voter information articulated by the Supreme Court. Indeed, the Supreme Court has specifically recognized that public funding is a constitutional means “to reduce the deleterious influence of large contributions on our political process” and “to facilitate communication by candidates with the electorate.”¹⁰³ Public funding makes it likely that more and different voices – ordinary citizens and the candidates they support – will be heard in the political process.

Public financing is no panacea. No law can stop wealthy interests and individuals from exercising influence over elections and government. No law can prevent unethical individuals from holding office or stop an elected official from succumbing to temptation.¹⁰⁴ Campaign finance laws cannot affect lobbying expenditures, or constitutionally limit the ability of any individual or organization to put unlimited sums into an outside spending campaign.¹⁰⁵ What campaign finance laws can do is inform the voters, through effective disclosure, about who is trying to influence elections; prevent very large sums from being given directly to candidates and political parties; and, through the use of public matching grants, create a countervailing force of small donors to offset the impact of big money.

¹⁰¹ See *Citizens United v. FEC*, 558 U.S. 310 (2010); *Buckley v. Valeo*, 424 U.S. 1 (1976).

¹⁰² *McCutcheon v. FEC*, No. 12-cv-1034, 2012 WL 4466482 (D.D.C. Sept. 28, 2012), pending, No. 12-536.

¹⁰³ *Buckley*, 424 U.S. at 91.

¹⁰⁴ Officeholders in jurisdictions that use public funding, such as New York City, have also been charged with misusing their offices – although it is also case that New York City has witnessed no repetition of the scandals that rocked the City’s government in the 1980s since public funding was adopted.

¹⁰⁵ For example, despite New York City’s strong system of small donor matching, one outside group was able to make a dramatic impact on the City’s recent mayoral election, raising over \$1.2 million, and spending almost \$800,000, on its “Anybody But Quinn” campaign of negative ads in the Democratic primary. See New York City Campaign Finance Board, Independent Spender Profile – NYC4S, http://www.nycfb.info/VSAApps/IndependentSpenderSummary.aspx?spender_id=Z15&as_election_cycle=2013&candidate_name=NYCN4S; see also Raillan Brooks, Blog, “Advocacy Group ‘Anybody But Quinn’ Got Exactly What They Wanted,” THE VILLAGE VOICE (September 11, 2013), available at http://blogs.villagevoice.com/runninscared/2013/09/anybody_but_quinn.php.

By matching and multiplying the small-dollar contributions of New Yorkers of average means, a small donor matching system would leverage the power and influence of each small contribution, amplifying the voices of those who are drowned out by the blare of big money. Instead of having to shape their official actions to the values and concerns of large donors, elected officials and candidates will be able to focus on ordinary citizens. Further, small donor matching would allow qualified candidates of ordinary means who otherwise would not dream of seeking elective office to enter the political arena for the first time.

B. Dissenting Opinion: Public Financing

This dissent is put forth by seven¹⁰⁶ of the Commissioners who disagree with the Commission's view of public financing. Several Commissioners strongly believe that the Commission's recommendation regarding public financing is significantly flawed. The proponents of public financing proclaim its far reaching benefits. We believe that such assertions fail to take into account the realities of the how political campaigns are now conducted. In a post-*Citizens United* world, where millions of dollars of unregulated funds flood even local elections, the power of public financing to "even the playing field" is greatly diminished. Any time taxpayer funds are expended, the burden is on those who wish to spend those funds to prove that the benefits are worth the cost. We do not believe that burden has been satisfied.

Originally, one of the key selling points of public financing was that it was the only way to limit a candidate's total expenditures on a campaign without running afoul of the U.S. Constitution. In particular, spending limits violate the First Amendment as limits on political speech unless they are a voluntary condition a candidate accepts in exchange for public funds. Additionally, proponents advocated that public financing would provide incentives for candidates to seek the support of small donors who would normally not have a say in the political process. However, now that unlimited "independent expenditures" are available following *Citizens United*, a candidate can accept public funds and still benefit from unlimited amounts spent in support of a campaign.

New York City's most recent elections illustrate the point. A recent report by Common Cause states that the 47 independent expenditure committees that were established for the 2013 New York City elections spent nearly \$15.4 million in races for Mayor, Comptroller, Public Advocate, Borough President, and City Council.

¹⁰⁶ The seven dissenting votes include District Attorneys Frank Sedita, Kristy Sprague, Derek Champagne and Kate Hogan; County Executive Joanie Mahoney; Eric Corngold and Pat Barrett.

Independent Expenditures by Election¹⁰⁷

Category	Number of Committees Active	Amount	%
Primary Election	41	\$13,156,367.38	85%
Public Advocate Runoff	4	\$297,498.12	2%
General Election	15	\$1,936,395.25	13%
TOTAL	47	\$15,390,260.75	100%

88% of the funds raised by independent expenditure committees came from unions and corporations, with 70% of all independent expenditure funds having been raised through contributions of \$100,000 or greater.

Total Independent Expenditures in 2013 NYC Elections by Type of Supporter¹⁰⁸

Category	Number of Committees	Amount	Amount %
Labor	22	\$8,215,739.49	53%
Business	7	\$5,780,448.32	38%
Advocacy	12	\$1,312,129.97	9%
Local Club/Politician	6	\$81,942.97	<1%

Simply put, public financing has done little to stop the importance of large sums of money from politically and financially powerful groups. Common Cause notes that “New York Progress” spent over \$1 million on attack ads against Joe Lhota during the general election, even though polling showed Bill de Blasio with a consistent 40 point lead in the polls. Common Cause concludes that these expenditures may have been made with the intent to curry favor rather than to ensure victory. And with unlimited money in campaigns, public financing of candidates will have less and less of a meaningful impact on elections over time. Candidates will never receive enough public financing to compete against such independent expenditures. The courts continue to uphold these expenditures; only recently, the Second Circuit Court of Appeals upheld the right of an outside PAC to spend money to support Mr. Lhota’s mayoral campaign.

Indeed, the very expenditure limits that were once a benefit of such systems now exacerbate the negative impact of independent expenditures. The Commission has heard testimony that the Connecticut State Legislature and Governor reversed several of the 2005 contribution caps originally put in place. The caps were rolled back due to an influx of unregulated independent expenditures as a result of *Citizens United*. The reality of independent

¹⁰⁷ Common Cause New York, Report, Analysis of Independent Expenditures in the 2013 New York City Elections, November 2013.

¹⁰⁸ *Id.*

expenditures illustrates how extraordinarily difficult it has become to keep private money out of the electoral system. Simply adding taxpayer money to the pot will not change that reality.

We believe that this situation is particularly significant in statewide races. Such races attract large donations and overwhelming interest from powerful sectors. If public financing is adopted for statewide races, the burden on the taxpayer is likely to be particularly high,¹⁰⁹ while the potential benefits are low given the attention such races get from entities that can make large independent expenditures.

The lessening impact of public financing amidst the rise of independent expenditures renders the use of taxpayer funds for campaigns increasingly problematic. The impact of public financing must be sufficiently great to justify a large new state commitment to this approach. Estimates of the costs of the system vary widely, but it is clear that substantial funding and state resources must be expended to maintain the system. In addition, some Commissioners object to requiring that individual taxpayers support candidates whose views they do not share.

Public financing is also subject to manipulation by the political process to benefit favored interests. Even in the vaunted New York City publicly-financed system, there are loopholes for special interests that are known and permitted to exist. In 2005, the New York City Campaign Finance Board codified the long-standing practice of considering campaign contributions from union local chapters or organizations affiliated with the same labor union to be from a single source.¹¹⁰ In an unprecedented vote, the members of the City Council, many of whom received union contributions, overruled the CFB's determination and passed legislation that allowed unions and their affiliates to be considered separately, thus authorizing the unions to exceed what would otherwise be their campaign contribution limit. Frederick A.O. Schwarz, Jr., then the Chairman of the CFB, confirmed that the Council's legislation "would create a gaping loophole for union contributions, undermining the contribution limits established by the Campaign Finance Act." Several government watchdog groups expressed concern, with a senior counsel to NYPIRG stating that the legislation "weaken the substance" of the campaign finance law but noted that "the sponsors of the bill think this will help them in the speaker's race." Thus, the union contributions are given different consideration, not because the CFB wanted to permit special treatment, but rather because a majority of the members of the City Council, many of whom received union support, voted to overrule the CFB's independent determination.

¹⁰⁹ James Spallone, Deputy Secretary of State for Connecticut testified that every Connecticut gubernatorial candidate is eligible to receive at least \$1.25 million in taxpayer funds for a primary race and \$6 million for a general election (to be adjusted for inflation in January 2014) if they raise only \$250,000 in small contributions of \$100 or less in order to participate in the program. (Moreland Commission hearing October 28, 2013). Since New York's population is over 5 times larger than Connecticut's and its annual budget is significantly larger we can expect that a comparable taxpayer funded matching system could easily multiply based on both our larger population and budget.

¹¹⁰ Nicholas Confessore, "City Council Plans to Loosen Limits on Political Contributions by Unions," THE NEW YORK TIMES (June 2, 2005), *available at* http://www.nytimes.com/2005/06/02/nyregion/metrocampaigns/02finance.html?_r=0.

Nor can the Commission cite any persuasive evidence that public financing reduces the kinds of public corruption that spawned this Commission. As a recent example of the shortcomings of public financing, Senator Malcolm Smith was indicted for allegedly scheming to obtain the Republican Party's permission to run as a Republican candidate in the primary election (i.e., a "Wilson-Pakula" certificate) in exchange for payments to party leaders. Adoption of a public financing system would not prevent this type of abuse and thus the Commission should not endorse it on erroneous belief that it would be a solution.

Moreover, we believe that it is premature, in this Preliminary Report, for the Commission to recommend public financing. The Commission has commenced and is pursuing several investigations relating to way New York campaigns and elections are conducted. What we have learned so far, as described in this Preliminary Report, is deeply troubling, and some form of public finance, for some or all state elections, may be part of the solution. But our work is ongoing and we do not believe that we have, at this time, provided the public with adequate answers to the serious concerns expressed in this opinion.

We believe that there is much to be done to reform New York's campaign finance system, which is why we join the Commission's well-reasoned recommendations to close loopholes, increase transparency, correct the fundamental failings of the Board of Elections, adopt a strong independent enforcement agency, strengthen Penal Law statutes to assist state prosecutors and proceed with investigating corruption. However, for the reasons set forth above, we disagree with the Commission's recommendation of public financing of campaigns.

C. Reforming Our Contribution Limits

The purpose of public financing is to reduce the influence of large donors and special interests on our elections and our government by providing an alternative source of campaign funding. But reducing the impact of big money also requires lowering the contribution ceilings and closing the loopholes that make it so easy to legally give extraordinary sums of money to candidates and political parties.

Lower Limits on Contributions to Candidates: In the past session, the legislature had before it proposals from Speaker Silver, Senator Klein, and Governor Cuomo to lower contribution limits. The Commission believes that any of these options would be far superior to the current system and it urges the legislature to adopt commonsense and reasonable campaign contribution caps in accordance with these proposals.

- One of the 2013 legislative proposals in this area caps contributions for each primary and general election at \$2,000 for the Assembly, \$4,000 for the Senate, and \$6,000 for statewide candidates for those who participate in the public financing system, and \$3,000 for the Assembly, \$5,000 for the Senate, and \$10,000 for statewide candidates for those who choose not to participate.

- An alternative proposal would establish a cap of \$2,600 no matter which office the candidate is running for and regardless of whether the candidate has opted into the public financing system. Similarly, the Brennan Center has advocated for a \$2,000 cap across the board. Across-the-board caps could be created regardless of whether the State adopts public financing.

Lower Limits on Contributions to Political Parties and Eliminate the Exemption for Party Housekeeping Accounts: The Commission believes the current cap of \$103,200 on contributions to parties is far in excess of what should be allowed. Consistent with a number of legislative proposals, the Commission believes that contributions to parties, *including* party housekeeping accounts, should be lowered to \$25,000. A political party committee could continue to maintain a housekeeping account but contributions to it would be subject to the overall limit of \$25,000 on donations to that party committee.

Regulate Party Transfers: Even with lower limits on contributions to party committees, parties will still be able to accept much larger contributions than individual candidates. As such, there must be some limits on the amount of support a party can directly provide its candidates, to prevent donations to parties from becoming a means for evading the limits on donations to candidates. At least two different proposals address this problem:

- The first would place a \$5,000 limit on coordinated party spending in support of a candidate. However, parties could spend an unlimited amount in support of a candidate provided they do so from a special fund consisting of contributions of not more than \$500. This would give parties, like candidates, an incentive to focus on relatively small donors and would allow the parties to serve the desirable function of amplifying the voice of small donors.
- Alternatively, party donations to a candidate could be subject to the same limits as individual donations to candidates.

Close the LLC Loophole: LLCs should be treated as corporations rather than individuals and subject to the same \$5,000 corporate contribution limitation applicable to all other corporate entities. In addition, all related LLCs and other business entities created by the same individual or firm should be subject to one \$5,000 contribution limit.

D. Strengthened Disclosure Requirements

Disclosure is critical to campaign finance law. Voters are entitled to know who is trying to influence them. Knowing the identity of the individuals behind an ad campaign helps voters assess the real meaning and purpose of the campaign. The Supreme Court has explained that disclosure of the sources of campaign funds “allows voters to place each candidate in the political spectrum more precisely than is often possible on the basis of party labels and campaign

speeches.”¹¹¹ By informing voters about who is paying for the ads praising or attacking a candidate, disclosure also “alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate[s] prediction of future performance in office.”¹¹²

New York’s campaign finance disclosure laws, however, do a poor job of requiring independent expenditure committees – that is, organizations that spend money on communications to support or oppose candidates without directly coordinating their actions with the candidates they back – to report their activities. This is particularly unfortunate because the role of such independent expenditures in our elections appears to be growing. The Supreme Court’s decision in *Citizens United v. FEC* allowed unlimited independent spending by corporations and unions; lower court cases, such as the recent decision of the United States Court of Appeals for the Second Circuit in *New York Progress and Protection PAC v. Walsh*,¹¹³ make it possible for such independent committees to raise unlimited sums from donors. Moreover, the outside spending problem is likely to grow even more if, as the Commission proposes, hard money contribution limits are lowered and loopholes are closed.¹¹⁴

New York has seen a number of promising regulatory reforms in this area over the last year, but the current regime is a patchwork of regulations that could be more comprehensive and less burdensome. A noteworthy reform adopted by JCOPE is the “source of funding” regulation. “Source of funding” requires lobbyists who lobby on their own behalf, or on behalf of clients who devote substantial resources to lobbying in New York State, to disclose each source of funds over \$5,000 that supports such lobbying.¹¹⁵ The attorney general also adopted new rules requiring that certain not-for-profit organizations that are already required by law to register and file annual reports with the attorney general must disclose their electioneering activities.¹¹⁶ These efforts, while crucial, are by definition limited in scope and should be supplemented and expanded by amendments to those portions of the Election Law that govern campaign finance.

Creating an effective disclosure regime for independent expenditure activity requires three actions: (1) broadening the definition of electioneering activity that triggers the duty to disclose; (2) mandating the disclosure of the names and addresses of significant donors to organizations that engage in independent spending; and (3) providing effective public access to campaign finance reports.

¹¹¹ *Buckley*, 424 U.S. at 67.

¹¹² *Id.*

¹¹³ No. 13-3889, ___ F.3d ___ (2d Cir. Oct. 24, 2013).

¹¹⁴ *Cf.* Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1709 (1999) (“If money has the outcome-determining effects on the electoral process that reformers have identified, then moneyed political interests will continue trying to use money to influence outcomes whatever the regulatory regime.”).

¹¹⁵ *See* 19 NYCRR § 938.1.

¹¹⁶ *See* 13 NYCRR § 91.6. Nonprofits that hold charitable assets, conduct charitable activities, or raise charitable funds above certain thresholds in New York must register with OAG and provide annual reports that OAG makes available to the public. *See* Executive Law §§ 172 & 172-B.

Redefining Electioneering: Under the Election Law, an independent committee’s duty to register, report, and disclose its activities turns on whether it is engaged in election-related activity. The Board of Elections, however, employs a very narrow definition of election-related activity. The duties to register, report, and disclose apply only to organizations that expressly advocate the election or defeat of a candidate or ballot measure, and express advocacy in turn requires the use of what have come to be known as the “magic words” of express advocacy. An ad must use the actual words “elect” or “defeat” or “support” or “oppose” or very similar terms in order to qualify as electioneering.¹¹⁷ Yet very few independent committee ads are so blunt as to literally say “elect” or “defeat.” The anti-Gipson and anti-Addabbo ads discussed earlier in this report are perfect examples of this. The anti-Gipson ad declares facetiously “Special Interests Need Gipson.” The anti-Addabbo ad depicts Addabbo as a puppet of Wall Street (or alternately as Count Dracula), criticizes the policies it claims he supports, and urges readers to call Addabbo’s office to complain. Both are powerful campaign ads, but because both avoid the magic words of advocacy, neither is considered a campaign ad under New York law.

The “magic words” test derives from the Supreme Court’s 1976 *Buckley v. Valeo* decision,¹¹⁸ but in more recent cases the Court has indicated that it will uphold broader definitions of election-related speech that trigger reporting and disclosure obligations. In the Bipartisan Campaign Reform Act of 2002 (“BCRA”) – popularly known as McCain-Feingold – Congress created the category of “electioneering communication,” defined as cable or broadcast ads that mention a candidate by name and that are aired in the candidate’s constituency within sixty days before a general election or thirty days before a primary election. The Supreme Court upheld that test in *McConnell v. FEC*.¹¹⁹ Indeed, the *Citizens United* Court confirmed the value of disclosure, explaining “disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way.”¹²⁰ Similarly, Chief Justice Roberts recently wrote for the Court that disclosure “promotes transparency and accountability in the electoral process to the extent other measures cannot.”¹²¹

Other states have built on the expanded BCRA definition of electioneering communication and extended it to include communications in other media, including mass mailings, telephone banks, and newspapers and magazines, and lower federal courts have upheld these broader definitions.¹²²

New York should similarly expand its definition of what types of independent spending trigger the duty to register, report, and disclose. This expanded definition should include

¹¹⁷ NYCRR § 6200.10(b)(1), (2).

¹¹⁸ 424 U.S. at 44 n. 52.

¹¹⁹ 540 U.S. 93 (2003).

¹²⁰ 130 S. Ct. 876, 916 (2010).

¹²¹ *John Doe #1 v. Reed*, 130 S. Ct. 2811, 2819 (2011).

¹²² See, e.g., N.C. Gen. Stat. § 163.278.6(8j); *S.C. Citizens for Life, Inc. v. Krawcheck*, 759 F. Supp. 2d 708, 726 (D.S.C. 2010); *Nat’l Org. for Marriage v. Roberts*, 753 F. Supp. 2d 1217, 1219 (N.D. Fla. 2010).

expenditures above a threshold level (such as \$1,000) on electioneering communications, which would include mass media communications that clearly refer to a candidate, are targeted at the candidate's constituency, and are disseminated within two months before the election in which the candidate is on the ballot. We also recommend expanding the definition of electioneering for communications outside of the immediate pre-election period.¹²³ Drawing from federal law, we recommend defining as electioneering any communication that "is the functional equivalent" of express advocacy because "it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified" candidate.¹²⁴ The Supreme Court has similarly agreed that an ad may be treated as "the functional equivalent of express advocacy" if it meets those criteria.¹²⁵ New York's definition of an election-related expenditure triggering the duty to report and disclose should be similarly expanded to include this "no reasonable interpretation" test.

Disclosing Sources: Many of the most prominent independent spending groups use nondescript names – like New York Progress and Protection, Jobs for New York, Common Sense Principles, or United for the Future – that give little evidence of their interests, motives, or sources of funding. If a key purpose of disclosure is enabling voters to know who is seeking to influence their votes so they can know how to assess and interpret campaign messages, then disclosure simply of the name of the committee paying for the ad is inadequate. Voters need to know the sources of funds that are really paying for the ad and that are behind its message. The Commission recommends that any independent committee that spends \$1,000 or more in an election must report the name and address of every donor who has contributed \$1,000 or more to the committee.

The Commission recognizes that many groups that engage in independent spending are not-for-profit organizations that engage in both election-related and non-election-related activities. Many of these groups enjoy tax-exempt status as social welfare organizations under section 501(c)(4) of the Internal Revenue Code,¹²⁶ but (although the tax code permits them to engage in election-related activities) such electioneering must not be their primary activity. Many donors who contribute to these organizations may intend to support only their non-election-related activities. Consequently, the Commission recommends exempting from the donor disclosure requirement donations that are clearly earmarked for the non-electoral activities of such an organization. Alternatively, if the organization chooses to fund its election-related activities only from funds earmarked for such election-related activities, then the organization would be required to disclose only those donors who provided funds, above the disclosure threshold, for election-related activities.

¹²³ The Supreme Court has not upheld the stricter, three part *McConnell* test for electioneering outside of the time period immediately preceding an election. However, New York's definition of electioneering can and should be expanded from the current law with respect to communications outside of the immediate pre-election period.

¹²⁴ 11 C.F.R. § 100.22.

¹²⁵ *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 469-70 (2007) (Roberts, C.J., concurring)

¹²⁶ In addition some independent spenders are labor organizations under § 501(c)(5) or trade associations under § 501(c)(6) of the tax code.

Accessible Disclosure. Disclosure is meaningful only if the reported information concerning campaign contributions and expenditures is easily accessible by the public. All of the information disclosed by independent expenditure groups should be submitted electronically, and collected and presented to the public in a centralized data environment that also includes all other campaign finance reports, and that links to data on lobbying and state spending. All campaign finance reports should be accessible online, easily searchable, and downloadable.

E. Strengthened Administration and Enforcement

Improved campaign finance laws will do little good unless these laws are promptly, vigorously, and impartially administered and enforced. Indeed, the better the campaign finance law, the more important its effective enforcement. Contribution limits and disclosure requirements are meaningless unless candidates, parties, political committees, and donors are actually required to abide by the limits and to make the full disclosures required by law in a timely fashion.

The adoption of a public funding system increases the importance of effective administration. To function successfully, public funding will require an agency that can promptly and impartially verify, among other matters, whether a candidate has met the threshold for qualifying for public funds, whether the candidate has real opposition, and whether the private contributions submitted for matching meet the law's criteria. The agency will have to provide qualifying candidates with the funds they need in a timely manner and, to protect the taxpayers, will have to be able to carry out thorough post-election audits of candidates who have accepted public funds. To be sure, the adoption of a public funding system may actually facilitate enforcement of other campaign finance obligations. Candidates may be extra-careful to meet disclosure rules and filing deadlines and to accept contribution restrictions if failure to do so will cost them public funds. But the main point is that public funding administration, like campaign finance law enforcement generally, requires an independent and effective agency.

As the record of the New York City Campaign Finance Board demonstrates, there are independent agencies that do effectively enforce campaign finance laws and implement public funding. The Commission's investigation of the Board of Elections, as described previously in this Report, unfortunately demonstrates that the Board is not such an agency. Campaign finance law enforcement, including the implementation of the proposed public funding program, must be entrusted to a new agency, designed to be impartial and effective, and provided with the resources necessary for it to carry out its vital work.¹²⁷

¹²⁷ The Commission believes the structure of such a campaign finance board is vital to the effective management of a public financing system. The Commission continues to examine the options for the structure of such a board. *See also supra* n. 328.

THE BOARD OF ELECTIONS AND ELECTION LAW ENFORCEMENT

The New York State Board of Elections (“NYSBOE” or the “Board”) has broad statutory powers and duties with respect to elections and elected officials, including the duty to enforce the campaign finance provisions of the Election Law.¹²⁸ The Board has failed to satisfy its statutory mandate. Due in large part to that failure, state-level enforcement of critical provisions of the Election Law is all but non-existent.

In its ongoing investigation of the Board, the Commission has held a public hearing, issued subpoenas, conducted numerous witness interviews, deposed a former Board investigator, conducted an in-depth audit of every complaint received by NYSBOE since 2008, and analyzed hundreds of thousands of documents, including thousands of e-mails and internal memoranda.¹²⁹ At the Commission’s October 28, 2013 hearing (the “October Hearing”), NYSBOE Co-Executive Directors (“EDs”) Robert Brehm and Todd Valentine offered testimony on behalf of the Board, and, together with NYSBOE Deputy Enforcement Counsel (“Dep. Counsel”) William McCann, responded to the Commission’s inquiries. Throughout this investigation, the Board has persistently contended that it lacks the resources necessary to undertake additional investigatory and enforcement activity. At the October Hearing, the EDs testified that the Board’s primary function, and its focus, is managing disclosure compliance and running elections, not conducting investigations and taking enforcement action – even in the face of clear Election Law violations.¹³⁰

Abuses result not only from weak laws, but also from weak enforcement. Contrary to the views expressed at the October Hearing and echoed by Board representatives during the course of the Commission’s investigation, under the Election Law enforcement is a primary function of the Board. The Board serves as the state’s principal investigatory and enforcement body in virtually all matters relating to elections and campaigns. New York must adequately fund the Board’s investigatory and enforcement operations. But the Board’s failures are not only a result of inadequate funding. As detailed below, the problem is also structural and political: the Board lacks the structural independence necessary to serve as a watchdog for our campaigns and elections. Its party-based structure has resulted in political stalemates and inaction, both at the

¹²⁸ See ELECTION LAW §§ 3-102, -104, -107.

¹²⁹ Elizabeth Hogan, NYSBOE’s enforcement counsel from 2007 until October 2013, was served with a subpoena in New York on October 5, 2013, requiring her to appear for a deposition in New York on October 23, 2013. Counsel Hogan proceeded to move to Florida and refused to appear for the deposition on the scheduled date. Counsel Hogan’s only attempt to inform the Commission of her refusal to appear was a letter that, though dated October 11, 2013, was not postmarked until October 19, 2013 and was not received by the Commission until after the scheduled deposition date.

¹³⁰ See Moreland Public Hearing, Oct. 28, 2013 [hereinafter “October Hearing”] Tr. 101:5-14 (Dep. Counsel McCann: “I consider the Board of Elections to be a compliance agency, first and foremost.”); *id.* at 142:16-19 (ED Brehm: “I unfortunately agree with you, that we just have never, for a very long time have never had to get to that investigatory framework. So because of that, for such a long time they have prioritized to be a compliance unit.”); *id.* at 10:23 to 11:1 (ED Valentine: “The county Board’s candidates and campaigns rely on the advice and expertise of the State Board to guide them through the State’s ballot access process.”); *id.* at 14:4-5 (ED Valentine: “The Board remains committed to providing transparent and accessible and accurate elections.”).

commissioner level and within the Board’s Enforcement Unit. In addition, the Board has promulgated internal policies, and tolerated or encouraged practices, that further promote inefficiency and inaction in its investigations, referrals, and hiring.

New York needs structurally independent, professional election and campaign finance law enforcement, not just an elections administrator. Campaign finance and election law enforcers should be insulated from partisan control, and should be given the autonomy and authority to aggressively pursue violations and enforce our laws.

I. A Stagnant, Party-Based Structure

A Party-Driven Board: To some extent, the Board’s party-based structure is written into the Election Law. By law, appointment of the Board’s four commissioners is divided between the two “major political parties.”¹³¹ The legislative leaders of each party recommend an individual to be appointed by the Governor to serve in one of the two co-chair positions.¹³² Each party also provides the Governor with a list of at least two recommended individuals to fill one of the remaining two commissioner positions.¹³³ The four commissioners are therefore always two Republicans and two Democrats, each selected by their party’s leadership. Three votes are required for the Board to take any official action, so nothing can happen without bipartisan agreement.¹³⁴

While not required by law, the Board has replicated this party-based structure for all non-civil-service positions, including critical staff charged with enforcement. Commissioners from each party are entitled by law to appoint one of the two EDs, but the Election Law does not require party-based appointments for other Board employees.¹³⁵ Nevertheless, all positions that are not classified as civil service positions – and there are currently 30 such “non-competitive” positions at NYSBOE¹³⁶ – are split evenly between the two parties as a matter of internal policy.¹³⁷ Significant positions are “paired” so that an individual who holds such a position is a member of one party, while their deputy or assistant is from the other party.¹³⁸ This practice of divvying up all non-competitive positions by party has been in place for many years.¹³⁹ Non-competitive positions are filled by word-of-mouth, and job openings are never advertised.¹⁴⁰ Neither ED Brehm nor ED Valentine, in their

¹³¹ ELECTION LAW § 3-100(1).

¹³² *Id.* at § 3-100(1), (2).

¹³³ *Id.* at § 3-100(1).

¹³⁴ *Id.* at § 3-100(4).

¹³⁵ *See id.* at § 3-100(3) (requiring the Board to “appoint two co-executive directors, counsel and such other staff members as are necessary in the exercise of its functions,” and specifying that “the commissioners . . . of each of the major political parties shall appoint one co-executive director”).

¹³⁶ NYSBOE, New York State Board of Elections Employees By Unit (produced by NYSBOE on Oct. 18, 2013).

¹³⁷ *See* October Hearing Tr. 18:8 to 19:3; *see also* New York State Board of Elections Employees By Unit (showing that NYSBOE has 15 appointments assigned to the Democrats and 15 appointments assigned to the Republicans).

¹³⁸ *See id.*

¹³⁹ *See* October Hearing Tr. 18:8 to 19:3.

¹⁴⁰ *Id.* at 23:24 to 25:4.

testimony at the October Hearing, provided a clear answer about how this word-of-mouth hiring process works – or about who outside of NYSBOE influences it.¹⁴¹

EDs Brehm and Valentine refused to acknowledge that the political nature of the organization negatively impacts its function.¹⁴² This refusal, however, is belied by Board documents reviewed by the Commission. The documents show a consistent pattern of employees – and particularly the two EDs – communicating with employees from their own party, but not with employees from the other party, even where it would be natural to include both an individual and his or her deputy or assistant from the other party. For example, Republican ED Valentine consistently sent e-mails to the Republican special counsel or copied the Republican special counsel on e-mails without copying the Democratic deputy special counsel.¹⁴³ Along the same lines, in an interview with the Commission, Democratic ED Brehm acknowledged that he would take enforcement issues to Elizabeth Hogan, the Democratic former enforcement counsel (“Counsel”), but not to Republican Dep. Counsel McCann.¹⁴⁴ This “party divide” at NYSBOE limits the flow of information within the agency.¹⁴⁵

It also breeds hostility and undermines cooperation. In an e-mail chain titled “DO NOT BE AGREEABLE WITH THEM,” a Republican counsel expressed her frustration with the Democrats at NYSBOE, and ED Valentine responded by setting forth his view on working with them:

It can be very frustrating. . . . I[']ve found it’s best not to ask the dems to write anything but rather, give it to them as take it or leave it, avoid the negotiating because none of them here has any authority to do anything, and that includes [Democratic Board Co-Chair Douglas] Kellner.¹⁴⁶

¹⁴¹ See *id.* at 19:18 to 25:17.

¹⁴² See *id.* at 32:23 to 35:8.

¹⁴³ *E.g.*, E-mail from Todd Valentine to Kimberly Galvin re: FW: Voting Machines (June 11, 2013, 09:26) (e-mail regarding RFP form for voting machine vendors); E-mail from Todd Valentine to Tom Kraus re: Fwd: NASS Federal Election Reform Alert: President Scheduled to sign Defense Authorization Bill on Wednesday, Oct. 28, 2009; NASS Summary (Oct. 27, 2009, 11:47) (e-mail regarding Uniformed and Overseas Citizens Absentee Voting Act, with Galvin copied but not Democratic Deputy Special Counsel Paul Collins).

¹⁴⁴ Interview with Robert Brehm, NYSBOE Co-Executive Director, Sept. 26, 2013.

¹⁴⁵ NYSBOE e-mails show ED Valentine e-mailing a group of Republican-appointed NYSBOE employees regarding an “R-team meeting.” See E-mail from Todd Valentine to Kimberly Galvin, Joseph Burns, William McCann, Robert Eckels, Vikki Gonzalo, Mary Ellen Walsh, Mark Popp, Gregory Fiozzo, and John Conklin, re: No R-team meeting this morning (Dec. 28, 2011, 08:35). At the October Hearing, ED Valentine confirmed that he would frequently have meetings only with employees appointed by his own party. October Hearing Tr. 26:16-24. This practice is further corroborated by other e-mails reviewed by the Commission. *E.g.*, E-mail from Elizabeth Hogan to Stan Zalen, re: Deirdre (Sept. 17, 2008, 17:38) (noting that Ms. Hogan heard that Stan Zalen, former Democratic co-executive director, “went in to the Republicans this morning”). ED Valentine attempted to defend this practice by asserting that the meetings were not about agency business, but rather were just a chance to “vent[],” talk about “personal issues,” or “do movie reviews,” despite the fact that these meetings seemingly occurred during the work day. October Hearing Tr. 26:21 to 27:2, 27:14 to 28:18.

¹⁴⁶ E-mail from Todd Valentine to Kimberly Galvin, re: DO NOT BE AGREEABLE WITH THEM (Sept. 23, 2011, 21:10).

At the October Hearing, ED Valentine tried to characterize this e-mail as normal office friction.¹⁴⁷ The Board’s bipartisan structure, however, pervades all significant aspects of its work, and exacerbates typical workplace tensions. It also undermines NYSBOE’s efficacy as an enforcement agency.

An Ineffective Enforcement Unit: NYSBOE’s Enforcement Unit (the “Unit”) is responsible for the administration and audit of campaign finance disclosures and the enforcement of the Election Law as it relates to campaign finance.¹⁴⁸

Most positions in the Unit are appointed, and, consistent with NYSBOE’s broader practice, evenly divided between Republicans and Democrats (Figure 1).¹⁴⁹ This party divide did not always exist in the Enforcement Unit. Originally, the Unit was staffed with employees hired through the civil-service system.¹⁵⁰ At some time during the last seven years, the staffing structure changed, and all new employees, including administrative staff, were hired through word-of-mouth appointments.¹⁵¹ It is unclear whether this change originated with the commissioners or if it was influenced by party leaders.

The structure of the Board contributes to the Unit’s inaction, often ensuring that the Unit engages in little or no enforcement. When the Commission’s staff asked NYSBOE Commissioner Douglas Kellner whether the party-based structure negatively affected the enforcement of Election Law violations, he said “absolutely.”¹⁵² Commissioner Kellner explained that when the commissioners cannot agree on how to vote on a complaint before them, they sometimes simply “table” the decision, delaying the resolution of that complaint.¹⁵³ Agreement among the commissioners to open an investigation is apparently rare: only a handful of complaints ever leads to an investigation by the Enforcement Unit.¹⁵⁴

¹⁴⁷ October Hearing Tr. 31:25 to 32:8, 32:17-22.

¹⁴⁸ See generally ELECTION LAW §3–104.

¹⁴⁹ NYSBOE, Organizational Chart - Campaign Finance-Enforcement Unit (produced by NYSBOE on Aug. 5, 2013).

¹⁵⁰ October Hearing Tr. 40:6-9 (Dep. Counsel McCann: “Originally the campaign finance unit was only comprised of – we only had civil servants. When they created the 21 exempt class positions, they were creating those political positions.”).

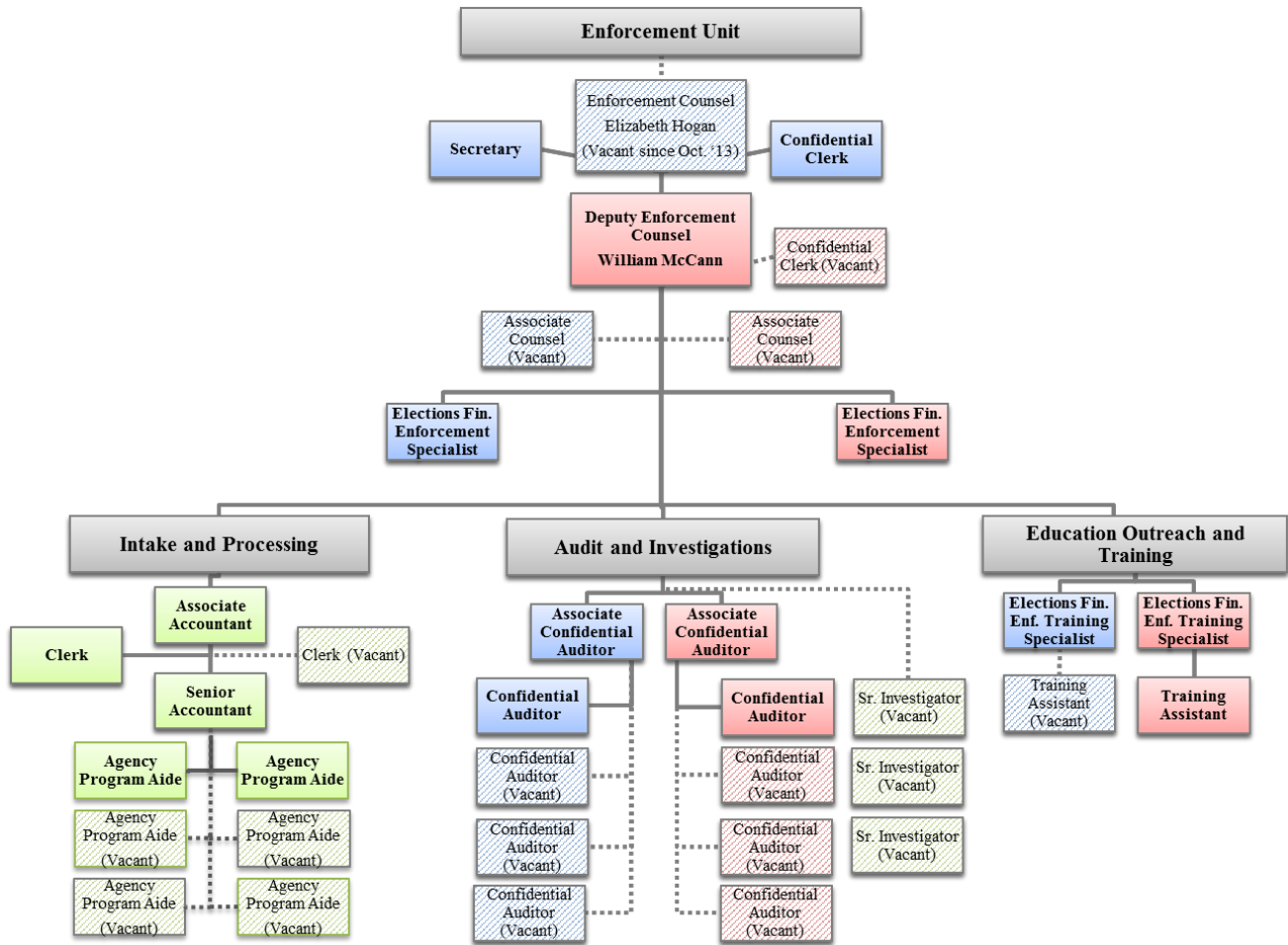
¹⁵¹ *Id.*; see also *id.* at 23:24 to 24:11.

¹⁵² Interview with Douglas Kellner, NYSBOE Co-Chair, Oct. 10, 2013.

¹⁵³ *Id.*

¹⁵⁴ The Board voted to open only five investigations from the 409 complaints it received between 2008 and 2013. See Figures 2 and 3, *infra*.

Figure 1: NYSBOE Campaign Finance Enforcement Unit



Color Code: Blue – Held by a Democrat; Red – Held by a Republican; Green – Competitive Position

II. Policies and Practices Designed for Inaction

The Board’s policies and practices for handling complaints, enforcing campaign finance laws, and utilizing human and legal resources actively prevent aggressive Election Law enforcement. These anti-enforcement policies and practices are rooted in partisanship, and are exacerbated by willful inaction.

A. Mismanagement of Complaints and Refusal to Open Investigations

The Board's current complaint procedures are inadequate. The Enforcement Unit must maintain a procedure whereby any person can submit a complaint to the Board reporting a potential violation of the Election Law.¹⁵⁵ The Board must address the complaint and, "whenever" there is substantial belief that a violation of the Election Law has occurred, "expeditiously make an investigation."¹⁵⁶ The current system involves a haphazard, inefficient complaint intake process, an inexcusably long waiting period for a determination, and an actual investigation in only the rarest of cases.

A Haphazard Complaint Intake Process: Under current practice, once a complaint is received (by mail, e-mail, or referral from other agencies or local election boards) the enforcement counsel "processes" the complaint by assigning a case number and adding the complaint to a "Complaints List" maintained by the enforcement counsel's secretary.¹⁵⁷ The complaints are queued in the order they are received.¹⁵⁸ Prior to her retirement in October 2013, Counsel Hogan assigned each complaint to herself or to Dep. Counsel McCann.¹⁵⁹ Once a complaint is logged and assigned, counsel's secretary acknowledges receipt of the complaint in a form letter.¹⁶⁰

This initial intake process is designed for inefficiency.

First, the Enforcement Unit has no case management system to track the lifecycle and disposition of a complaint.¹⁶¹ The "Complaints List" is a document that tracks only basic case details: the date received and acknowledged, the attorney working on the complaint, the date of commissioner review, and the result of the review.¹⁶² The "Complaints List" does not contain a description of the complaint, and does not track developments in the case or the investigation. There is no centralized repository of information regarding the lifecycle of a complaint.¹⁶³ In fact, each unit maintains its own log, further obfuscating the process.¹⁶⁴ Without a shared, unified database, enforcement counsels, co-executive directors, and commissioners cannot easily ascertain or update the status of a complaint.

¹⁵⁵ See ELECTION LAW § 3-104.

¹⁵⁶ *Id.*

¹⁵⁷ October Hearing Tr. 40:16-23, 41:1-19.

¹⁵⁸ *Id.* at 112:11-14.

¹⁵⁹ *Id.* at 46:20-23.

¹⁶⁰ *Id.* at 47:1-12; *see, e.g.*, Letter from Elizabeth Hogan Re: CMP08-21 ("The New York State Board of Elections is in receipt of your complaint and has referred it to me for review. Following that review, you will be informed as to whether the Board intends to investigate your complaint."). While about half of complaints are acknowledged within a week, it takes counsel over a month to respond with the same form letter in over 10% of cases.

¹⁶¹ October Hearing Tr. 50:2-8 (ED Brehm: "The log that is kept is a typed document. It's not – it's not a case management electronic system.").

¹⁶² *Id.* at 50:2-14; *see also* Complaint List 2008-2013.

¹⁶³ October Hearing Tr. 50:23 to 51:6, 51:18 to 52:4.

¹⁶⁴ *Id.* at 45:6-10.

Nor is there a formal process to update, monitor, or maintain the “Complaints List.” Neither the co-executive directors nor the commissioners monitor the progress of a complaint on a regular basis.¹⁶⁵ Because it is not consistently updated, the “Complaints List” is unreliable. Moreover, it is unclear whether the original complaint files are readily available to all members of the Enforcement Unit. According to a former NYSBOE investigator, each counsel maintained separate files in their own offices.¹⁶⁶

Second, the Enforcement Unit does not prioritize or categorize complaints when it receives them. Dep. Counsel McCann testified that all complaints are considered in the order in which they are received.¹⁶⁷ The Unit does not prioritize cases that are time-sensitive, such as those where the applicable limitations period will soon expire. It does not identify complex cases, or plainly meritless ones, at the initial stage.¹⁶⁸ Despite the fact that the Board views its enforcement powers as best used to induce compliance rather than to punish violators, there is no process to identify complaints that could be quickly resolved by encouraging compliance.¹⁶⁹ Almost half of the complaints submitted to the Board relate to simple compliance issues, typically alleged failures to register or file necessary financial disclosures. These complaints were not prioritized in any way, and it took the Unit almost the same amount of time (almost a year on average) to close these “compliance” complaints or refer them to the Audit and Investigations Division within the Unit for resolution as it did to close other complaints.¹⁷⁰

Similarly, the Board generally takes the same amount of time to process and close complaints involving complex campaign finance violations as it does to process and close complaints alleging frivolous claims or claims that are outside NYSBOE’s jurisdiction. For example, when NYSBOE received a complaint alleging that a committee was attempting to thwart contribution limits by acting as an unauthorized multi-candidate committee, the Board sat on the complaint with little action until it was referred to a district attorney’s office almost a year

¹⁶⁵ See *id.* at 50:23 to 52:15.

¹⁶⁶ Javan Owens Deposition 94:19 to 95:11 (Oct. 24, 2013).

¹⁶⁷ October Hearing Tr. 112:11-13.

¹⁶⁸ *Id.* at 112:14-18.

¹⁶⁹ Based on the Commission’s review of NYSBOE complaints received between 2008 and 2013, all types of complaints are generally treated the same regardless of whether the allegations are related to Article 14 – campaign finance disclosure – compliance. While complaints closed pending Article 14 resolution do appear to be closed in less time (in approximately 241 days) than the average complaint (302 days), these complaints are closed as an administrative matter and the violations underlying these complaints are not truly resolved until the Audit and Investigations Division handles them some weeks or months later. Further, it takes on average almost the same amount of time to close complaints where no violation of the Election Law has occurred (approximately 316 days), as well as complaints against non-filers (approximately 293 days). *Cf. id.* at 132:9 to 133:15 (McCann noting that the Board may conduct “prioritization in some regard” for complaints raising simple disclosure issues and “complaint[s] not requiring a preliminary determination where on its face [there] is not a violation or that violation has been resolved.”).

¹⁷⁰ Based on an analysis of all complaints received by NYSBOE between 2008 and 2013, compared to those complaints where a committee or candidate has allegedly failed to file necessary financial disclosures in violation of Article 14 and those complaints that were closed pending resolution of Article 14 issues with members of the Audit and Investigations Division within the Enforcement Unit.

later.¹⁷¹ In comparison, a complaint that was received the same day involving the qualifications of President Obama, a matter outside the scope of NYSBOE's directive, inexplicably took almost the same amount of time to reach a determination.¹⁷² Both NYSBOE Commissioner Kellner and ED Brehm remarked on the importance of triaging complaints, yet the Board has taken no steps towards prioritizing complaints.¹⁷³

Third, the Enforcement Unit does not evenly assign complaints among its counsels. According to Dep. Counsel McCann's testimony before the Commission, complaints are assigned relatively equally to counsels.¹⁷⁴ However, McCann was the sole enforcement counsel on less than a quarter of the complaints received over the past five years.¹⁷⁵ Dep. Counsel McCann could not clarify what caused this discrepancy in assignments because he did not know Counsel Hogan's basis for assigning complaints.¹⁷⁶ When Dep. Counsel McCann was questioned as to whether NYSBOE had a policy of assigning complaints based on enforcement counsel's political affiliation, he asserted that, to his knowledge, it did not.¹⁷⁷

¹⁷¹ See CMP08-55, Preliminary Determination (May 15, 2009).

¹⁷² See CMP08-52, Preliminary Determination (July 15, 2009).

¹⁷³ See Kellner Interview and October Hearing Tr. 131:3-5.

¹⁷⁴ October Hearing Tr. 46:11-13.

¹⁷⁵ Between 2008 and 2013, Counsel Hogan handled 189 of the 409 complaints received by NYSBOE while Dep. Counsel McCann handled 91 complaints. The remaining 129 complaints were shared by both counsels.

¹⁷⁶ October Hearing Tr. 45:14 to 46:2.

¹⁷⁷ *Id.* at 46:3-6.

A closer analysis of the assignment of complaints, however, reveals that in at least some instances, the political affiliation of the counsels may impact the assignment of complaints. For

Figure 2: Complaints Analysis

Year	Complaints Overall	Closed Complaints	Complaints Still Open	Complaints Opened to Investigation	Complaints Referred to DAs Prior to Investigation	Complaints Referred to Elec. Ops of Div. of NYSBOE	Avg. # of Days Complaint is Open
2008	108	94	0	4	2	8	449
2009	141	134	0	0	1	6	261
2010	65	61	0	0	1	3	245
2011	52	51	0	1	0	0	275
2012	35	26	7	1	0	1	222
2013	8	3	5	0	0	0	n/a
TOTAL	409	369	12	6	4	18	302

example, over the past five years, there have been several complaints involving Rensselaer County and City elections, committees, and candidates. An analysis of those complaints reveals that when the complaints were made against Republican candidates or committees in Rensselaer County, Dep. Counsel McCann, a Republican appointee, was assigned as the counsel to the complaints.¹⁷⁸ Likewise, when complaints were filed against the Democrats in the County, the complaints were mostly handled by Counsel Hogan, a Democratic appointee.¹⁷⁹ A former NYSBOE Investigator told the Commission that it had previously been his practice to speak with local elections commissioners.¹⁸⁰ However, toward the end of his career, he was admonished not to approach a Republican commissioner in Rensselaer County during an investigation.¹⁸¹ He was told “that I could not talk to him – talk to the Rensselaer County Republican commissioner unless I went through Bill McCann.”¹⁸² All six complaints involving Rensselaer County were eventually closed without formal investigation.

Inexplicably Delayed Determinations: Once a complaint is assigned to enforcement counsel, almost a year passes, on average, before the counsels make a recommendation to the commissioners regarding the determination of the complaint (Figure 2).¹⁸³ In his testimony,

¹⁷⁸ CMP08-64 (June 13, 2011), CMP09-148 (June 22, 2010), and CMP11-11 (Aug. 7, 2012) all involved allegations of misconduct against either Republican candidates or committees and were assigned to Dep. Counsel McCann, the Republican appointee.

¹⁷⁹ CMP08-100 (Nov. 10, 2009), CMP09-14 (July 15, 2009), and CMP09-101 (Dec. 15, 2009) were all allegations against Democratic candidates or committees. CMP09-14 and CMP09-101 were handled by Counsel Hogan, the Democratic appointee, while CMP08-100 was handled by both Counsel Hogan and Dep. Counsel McCann.

¹⁸⁰ Owens Dep. 27:4-14.

¹⁸¹ *Id.* at 27:20 to 28:11.

¹⁸² *Id.* at 28:1-3.

¹⁸³ It takes approximately 300 days on average for a complaint to be closed or referred by the Board (*see* Figure 2), despite the fact that many are simply closed without investigation. This calculation is based on the number of days between when the complaint is received by NYSBOE and the date of determination.

Dep. Counsel McCann could not provide any explanation as to what action, if any, the Enforcement Unit takes during this time period, simply stating that “the enforcement aspect of the Board of Elections is a part of what we do.”¹⁸⁴ While Dep. Counsel McCann further stated that “[t]here is no question that the process could work more efficiently and better,” neither he nor the co-EDs could point to any protocols or measures taken in order to expedite the evaluation of open complaints.¹⁸⁵

The lengthy delay in evaluating open complaints is even more mystifying because, in almost all cases, there is no initial investigation of the allegations in a complaint.¹⁸⁶ Enforcement counsels use only the information provided by the complainant to assess potential Election Law violations.¹⁸⁷ The Board does not use investigators or other available outside resources to expedite the complaint review process; indeed, the Board maintains a policy (which does not have any statutory basis) that an investigator can work only on formal investigations opened by a vote of the commissioners.¹⁸⁸ As discussed in greater detail below, the Board had an investigator on staff whose caseload dwindled markedly between 2008 and 2012.¹⁸⁹ He repeatedly asked for work but was rebuffed.¹⁹⁰ During this same period, the Board was closing dozens of complaints citing limited resources and various “directives” from the commissioners to address cases “of greater vintage,” “of greater priority,” and “in the most expeditious manner.”¹⁹¹ Dep. Counsel McCann testified that these directives all meant one thing: clearing out old complaints to reduce the backlog.¹⁹² Despite a backlog of over 300 complaints, the Board left its sole investigator idle and asking for work while open complaints aged into obsolescence.

¹⁸⁴ October Hearing Tr. 47:23-25; *see generally id.* at 59:6 to 63:12.

¹⁸⁵ *Id.* at 104:16-17; *see also id.* at 131:10-21.

¹⁸⁶ *See id.* at 59:6 to 63:12.

¹⁸⁷ *Id.* at 103:14-16.

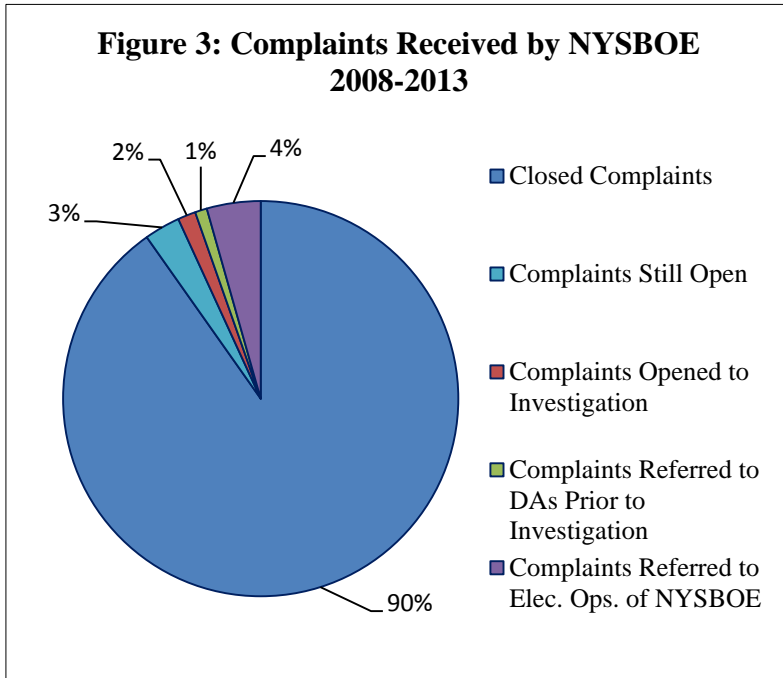
¹⁸⁸ *Id.* at 64:3-11.

¹⁸⁹ Owens Dep. 21:19 to 22:7.

¹⁹⁰ *Id.* at 35:2-23; *see also infra* nn.292-302 and accompanying text.

¹⁹¹ *Compare* CMP08-21, Preliminary Determination (May 6, 2009) (recommending closure due to “limited resources of the Board, and in line with the Board’s recent directive to address cases of greater vintage”) *with* CMP09-188, Preliminary Determination (Jan. 19, 2011) (recommending closure due to “limited resources of the Board, and in line with the Board’s recent directive to address cases of greater priority”) *and* CMP08-68, Preliminary Determination (Aug. 28, 2009) (recommending closure “in line with the Board’s recent directive to address cases in the most expeditious manner”).

¹⁹² October Hearing Tr. 104:16 to 105:16; 106:16 to 107:5; 108:20 to 109:4.



The Commission believes that partisan gridlock may be the reason why certain cases sat untouched for months, sometimes years. The Board asserts that, at least during the last five years, no vote on whether to open an investigation has ever come to a 2-2 tie.¹⁹³ However, controversial complaints can be, and are, “tabled” indeterminately for further discussion. Moreover, partisan enforcement counsel can simply choose not to present a case to the commissioners for determination, which further

undermines the integrity of the purportedly bipartisan enforcement process. According to the Commission’s interview with NYSBOE Commissioner Kellner, when there is disagreement among the commissioners concerning a complaint, the commissioners will sometimes table the complaint or enter executive session in order to further discuss the matter.¹⁹⁴ It appears that the commissioners do not vote on such complaints until they reach an agreement, in effect agreeing not to enforce the law. Commissioner Kellner noted that this was precisely the cause of the delay in referring one complaint to the Albany County District Attorney’s Office.¹⁹⁵

¹⁹³ Letter from Robert Brehm and Todd Valentine, NYSBOE EDs, to John Spagna, Special Counsel Moreland Commission (Oct. 10, 2009) [hereinafter “October 10th NYSBOE Letter”] (stating “[a] review of NYSBOE minutes and transcripts did not find any instances that ‘the Board failed to open an enforcement action because of deadlocked or 2-2 vote.’”).

¹⁹⁴ Kellner Intv.; *see also* NYSBOE Meeting Tr. at 14, June 12, 2009.

¹⁹⁵ Kellner Intv. (discussing CMP08-52).

Refusal to Open Investigations: The Board almost never opens investigations into alleged Election Law violations. Between January 2008 and April 2013, the Board received 409 complaints, averaging about 80 complaints per year (Figure 2, *supra*).¹⁹⁶

Over 90% of these complaints were closed without any formal investigation whatsoever (Figure 3). The Board has opened only five investigations from complaints received since 2008,¹⁹⁷ and only one from complaints received since 2009.¹⁹⁸ Of the five complaints that led to investigations, three were ultimately closed with no further Board action¹⁹⁹ and one was referred to a district attorney's office.²⁰⁰ The remaining complaint, received nearly five years ago, remains open.²⁰¹

In the handful of cases where NYSBOE commissioners have voted to open an investigation, it has taken up to four years to reach a final determination.²⁰² Indeed, while the investigatory work itself took an average of three months to complete, many open investigation files were not closed by the Board for two years or longer.²⁰³ In one investigation involving the distribution of an anonymous mailer, the Audit and Investigations Division within the Enforcement Unit completed its investigation almost 30 months before the Board's final determination.²⁰⁴ In at least two instances, the delay in the Board's final determination was so long that the investigatory documents were lost before the Board could make a determination, and the matter was closed as a result.²⁰⁵

Indeed, the delay can be so long that an investigation and complaint must be closed because the statute of limitations has run. For example, five investigations were closed on the same date, August 7, 2012, following more than two years of inactivity.²⁰⁶ One of the final determination memoranda submitted to the Board on that day states:

¹⁹⁶ The total number of complaints received by NYSBOE between January 2008 and April 2013 does not include any matters arising out of corporate over-contribution audits, legislative over-contribution audits, or non-filer audits, as these matters do not arise through a complaint but are rather brought as a result of routine NYSBOE audits, discussed in detail below.

¹⁹⁷ Based on the 409 complaints received between 2008 and 2013, NYSBOE opened only five formal investigations. NYSBOE also voted to open six formal investigations based on complaints received between 2006 and 2007.

¹⁹⁸ CMP11-17 and CMP12-20 were received in 2011, and then consolidated and opened to investigation SC12-01.

¹⁹⁹ CMP08-01/ SC09-04, Final Determination (Aug. 7, 2012); CMP08-69/ SC09-06, Final Determination (March 23, 2010); CMP08-61/ SC10-01, Final Determination (Aug. 7, 2012).

²⁰⁰ CMP11-17/ CMP12-20/ SC12-01, Final Determination (April 9, 2013).

²⁰¹ CMP08-108/ SC09-05, Preliminary Determination (Sept. 30, 2009).

²⁰² For complaints received since 2006, the Board has opened eleven investigations. It took an average of 1,302 days for NYSBOE to reach a final determination in those cases.

²⁰³ See, e.g. CMP06-26/ SC08-02 (Aug. 7, 2012).

²⁰⁴ Compare CMP08-01/ SC09-04, Investigation Memorandum (Feb. 17, 2010) with CMP08-01/ SC09-04, Final Determination (Aug. 7, 2012).

²⁰⁵ See CMP08-61/ SC10-01 (Aug. 7, 2012); CMP06-85/ SC09-01 (Aug. 7, 2012).

²⁰⁶ See CMP06-26/ SC08-02, Final Determination (Aug. 7, 2012); CMP06-50/ SC08-03 and CMP07-04/ SC08-04, Final Determination (Aug. 7, 2012); CMP06-85/ SC09-01, Final Determination (Aug. 7, 2012); CMP08-01/ SC09-

“Counsel cannot recall the specifics of this allegation as the original complaint was in 2006 and it was already 3 years old when the Board decided to review it Most significantly, the Statute of Limitations relative to a referral ran out some time ago. In the interests of a housekeeping clean up of old files, this should be closed.”²⁰⁷

Given that the Board has no policies on prioritization or triage, it is unclear what – if not partisanship at NYSBOE – would cause complaints and even completed investigations to languish for years only to be closed for “housekeeping” and other similarly non-substantive reasons.

The quality of the Board’s investigations is also unclear. There is no mechanism for holding enforcement counsel accountable. Prior to Counsel Hogan joining the Board in 2007, NYSBOE investigators would complete an “Investigative Report” detailing all investigative activity, including a summary of the case, a list of affidavits, interviews, records and documents obtained, and subpoenas issued.²⁰⁸ However, the former NYSBOE investigator informed the Commission that Counsel Hogan instructed him to discontinue this procedure because she thought it unnecessary.²⁰⁹ Not only do these practices create a barrier to the free flow of information, they also create an opportunity for enforcement counsel to bury complaints and investigations, leaving them to age out in the absence of oversight or accountability.

Specific Policies of Inaction: The Board has numerous internal policies with no basis in the Election Law that further undermine effective enforcement. Examples of such policies include the automatic closure of anonymous complaints and a refusal to investigate complaints regarding upcoming elections.

Refusal to Accept Anonymous Complaints: Anonymous complaints are often a valuable source of information for law enforcement agencies. NYSBOE policy, however, prohibits the review of such complaints, regardless of the severity of the allegations involved or the quality of the information provided by the anonymous complainant.²¹⁰ The Board closed at least 35 cases pursuant to this policy in the past five years. In one particularly detailed anonymous complaint, the complainant provided documentation, including a handwritten note on New York State Assembly stationery, bills, and checks, strongly suggesting that a staff member to a New York

04, Final Determination (Aug.7, 2012); CMP08-61/ SC10-01, Final Determination (Aug.7, 2012). The Board Meeting Transcript from August 7, 2012 states as follows: “‘Last item on the agenda are the determinations from the campaign finance unit. We have the long list of numbers here. Does anybody want to discuss any of them in Executive Session? Alright so I move the adoption of the staff report. Those in favor say aye.’ All: ‘Aye.’” NYSBOE Meeting Tr. at 25, Aug. 7, 2012.

²⁰⁷ CMP06-85/ SC09-01, Final Determination.

²⁰⁸ Owens Dep. 16:22 to 17:5, 17:15 to 18:6. (referencing exhibit 3).

²⁰⁹ *Id.* at 17:6-12, 18:7-14.

²¹⁰ See CMP09-16, Determination (July 7, 2009) (articulating the Board’s procedure as the following: “the complainant is anonymous, [and] the Board’s policy is to close the mater[*sic*] as a complaint not requiring preliminary determination”).

State Assemblyman accepted funds from a committee's housekeeping account for the purpose of defending a lawsuit arising out of campaign activity.²¹¹ Despite evidence that the complainant was an "insider" who likely was concerned with potential reprisals for coming forward, the complaint was summarily dismissed three months after it was received.²¹²

The Board's co-executive directors explained in their testimony that anonymous complaints are not accepted due to the "partisan nature of politics."²¹³ NYSBOE Commissioner Walsh said in his interview with Commission staff that the value of protecting against possible political vendettas outweighed the cost of not addressing potentially meritorious anonymous complaints.²¹⁴ Furthermore, he agreed that this policy holds regardless of the severity of the allegations involved or the quality of the information provided by the anonymous complainant.²¹⁵ The Commission disagrees with this misguided policy.

Four days after the October Hearing, the NYSBOE commissioners unanimously voted to change the policy against reviewing anonymous complaints.²¹⁶ Although the Commission acknowledges that this is a step in the right direction, it is only one small step towards rectifying the Board's failure to effectively enforce our Election Law.

Failure to Investigate Complaints Relating to Upcoming Elections: The Board's internal policy prohibits its Enforcement Unit from investigating allegations of election misconduct during the period leading up to the subject election.²¹⁷ The Board asserts that, as a bipartisan agency, it does not want to affect the outcome of an election by opening an investigation into alleged misconduct shortly before Election Day, particularly when candidates may use complaints to the Board as a political tactic.²¹⁸ This is a specious argument: investigations can be conducted confidentially, at least until allegations have been verified or discredited.²¹⁹ The Board's current policy ensures both that politically-motivated complaints – even if made public by the complainant – will not be proven false in a timely manner, and that real violations will go uninvestigated and unpunished until after an election, if at all.

²¹¹ *Id.*

²¹² *Id.*

²¹³ Written testimony of the NYSBOE, Submitted at the October Hearing of the Moreland Commission [hereinafter "NYSBOE October Hearing Written Testimony"], at 17.

²¹⁴ Interview with James Walsh, NYSBOE Commissioner, Oct. 16, 2013.

²¹⁵ *Id.*

²¹⁶ Jessica Alaimo, "Elections board makes changes after Moreland's public flogging," CAPITAL NEW YORK (Nov. 1, 2013) [hereinafter "Capital New York NYSBOE Article"], available at <http://www.capitalnewyork.com/article/politics/2013/11/8535399/elections-board-makes-changes-after-morelands-public-flogging> (last visited Nov. 26, 2013).

²¹⁷ October Hearing Tr. 125:10-15.

²¹⁸ *Id.* at 126:6-11.

²¹⁹ *Id.* at 118:22-24.

On November 1, 2013, in the wake of the October Hearing, the Board agreed to formulate a new policy to consider complaints filed close in time to an election.²²⁰ Although the Commission is encouraged by this action, we have concerns about the ability of NYSBOE to successfully implement this plan, especially given its recent enforcement record and its other investigation-related policies.

B. Incompetent Enforcement of Campaign Finance Laws

For campaign finance regulations to have any meaningful effect on the fairness of New York State elections, compliance with financial disclosure filing requirements²²¹ must be closely monitored, and enforcement by the Board must be swift and effective. Even when NYSBOE undertakes enforcement-related activity, it does so in an inefficient manner. In particular, NYSBOE uses a significant amount of its enforcement resources on audits that are ill-conceived and wasteful. This illogical use of resources is a key reason why the Board has failed to fulfill its duties, allowing corruption to flourish.

Undifferentiated Treatment of Non-Filers: The Board has adopted the inexplicable policy of treating everyone who fails to file disclosure reports in the same fashion, regardless of the seriousness of the offenses or the sophistication of the actors. The Board is required by law to send notification letters to candidates and treasurers of political committees who have failed to file a statement not later than ten days after the statutory deadline.²²² Under the statute, “[f]ailure to file within five days of receipt of such notice shall constitute prima facie evidence of a willful failure to file.”²²³ Each year, the Board performs an audit of non-filers for the previous year and, in accordance with the Election Law, mails the required notices.²²⁴ If the non-filer still does not file the required statements, the Board seeks a civil judgment against them.²²⁵ Seeking a civil judgment against every single non-filer is neither required by statute nor a prudent use of resources.²²⁶

By treating all non-filer violations the same, the Board fails to identify large-scale violations or repeat violators of the campaign finance laws. During their informal interviews with the Commission, both EDs Brehm and Valentine admitted that no effort is made within NYSBOE to identify the more significant violators and use NYSBOE’s limited resources to

²²⁰ Capital New York NYSBOE Article.

²²¹ ELECTION LAW §§ 14-102, -104.

²²² *See id.* at § 14-108(5).

²²³ *Id.*

²²⁴ *See, e.g.* Letter from Elizabeth Hogan to Hon. P. David Soares, Albany County District Attorney (July 18, 2013) [hereinafter “DA Non-Filer Letter”].

²²⁵ *See, e.g., NYSBOE v. Michele Adolphe, Candidate, et al.*, Index No. 7845-08 (N.Y. Sup. Ct. 2008).

²²⁶ *See* NYSBOE October 10th Letter (citing Election Law § 14-126(1), which provides that “[a]ny person who fails to file a statement required to be filed by this article shall be subject to a civil penalty, not in excess of one thousand dollars, to be recoverable in a special proceeding or civil action,” as the basis for their belief that civil judgments must be sought against all non-filers). No logical reading of this provision can lead to a conclusion that the legislature *mandated* that the Board treat all non-filers equally.

focus attention on them.²²⁷ Moreover, it is unclear whether the Board has an internal system for tracking non-filers on a year-to-year basis.

The Board has touted its enforcement record by noting that every year it refers the names of numerous non-filers to the Albany County District Attorney's Office. But these referrals are tantamount to obfuscation: the Board's referral simply lists non-filers from a particular year in alphabetical order.²²⁸ An assistant district attorney receiving this referral has no way of easily determining whether an individual who failed to file is the volunteer treasurer of a local candidate or the paid treasurer of a well-funded, active committee, or how often and by how much a person or committee has violated the law.

According to its testimony, the Board considers itself a compliance agency, charged with improving disclosure rather than prosecuting individuals and committees that violate disclosure laws.²²⁹ It is plainly true that compliance and informal enforcement, including seeking civil judgments, are important parts of the Board's function. The Board's policy, however, seems driven more by a willful lack of effort than a desire for "compliance." When asked during an informal interview about the Board's referrals to district attorneys, Counsel Hogan stated, "[w]e do the basement."²³⁰ That is, she and Dep. Counsel McCann do only the minimum required by statute, and nothing more.²³¹ After reviewing the Board's practices regarding enforcement against non-filers, it is clear that the Board's minimal effort in tracking and referring violations, even if it increases compliance, succeeds in camouflaging chronic non-filers and other "bad actors" seeking to avoid filing requirements.

For example: according to NYSBOE records, former State Senator Pedro Espada, Jr. participated in eight elections over the course of 18 years.²³² According to an internal memorandum created by Counsel Hogan in 2009, over that time, Mr. Espada (or a committee working on his behalf) failed to file required statements approximately 42 times.²³³ According to Counsel Hogan's memorandum, the Board obtained approximately 27 judgments totaling approximately \$12,552 against Mr. Espada or a committee working on his behalf.²³⁴ On February 26, 2009, Mr. Espada's then-attorney met with Counsel Hogan to discuss Mr. Espada's history of failing to file required statements and the judgments and fines resulting from those failures.²³⁵ Despite Mr. Espada's obvious disregard for the Election Law, Counsel Hogan

²²⁷ Brehm Intv.; Interview with Todd Valentine, NYSBOE Co-Executive Director, Sept. 27, 2013.

²²⁸ See, e.g. DA Non-Filer Letter.

²²⁹ October Hearing Tr. 101:5-14.

²³⁰ Interview with Elizabeth Hogan, former NYSBOE Enforcement Counsel, and William McCann, NYSBOE Deputy Enforcement Counsel, September 23, 2013.

²³¹ Hogan and McCann Intv.

²³² See NYSBOE, Pedro Espada, Jr. Preliminary Candidate and Committee Information (Nov. 27, 2012).

²³³ See Elizabeth Hogan, Memo to file re Pedro Espada (May 14, 2009).

²³⁴ *Id.*

²³⁵ *Id.* at 2.

assigned NYSBOE's sole senior accountant to "work with them in resolving their issues."²³⁶ Counsel Hogan said in a memorandum that, after the meeting, Mr. Espada's attorney's sole subsequent contact with the Board was a request to "pretend" that a PAC designation for PAC A30709 ("Espada for the People") "never had been in place."²³⁷ Based on her memorandum, Counsel Hogan told Mr. Espada's attorney that she would "consider his request and get back to him."²³⁸ Meanwhile, in 2010, Mr. Espada was indicted by federal prosecutors on charges that he embezzled hundreds of thousands of dollars from a nonprofit he founded.²³⁹ He was ultimately convicted on several counts relating to this scheme.²⁴⁰

It does not appear that Counsel Hogan informed an outside agency of these communications with Mr. Espada's attorney nor did she make a special referral regarding Mr. Espada's non-filing to the Albany County District Attorney's Office. A committee associated with Mr. Espada appears on the list of non-filers for the year 2010, undifferentiated in any way from the hundreds of other names and addresses of fellow non-filers for that year.²⁴¹

Mr. Espada represents one end of the spectrum. On the other end, some of the non-filers on the same lists as Mr. Espada are likely there because of the Board's outdated technology for the filing, tracking, and publication of campaign finance information. The software used by committee treasurers to produce campaign finance disclosures is from 1994 and is not web-based.²⁴² Treasurers first must use the software to create a filing, and then send an e-mail to the Board with the filing attached.²⁴³ If the e-mail is not received, the Board has no way of knowing about the filing.²⁴⁴ There are cases where treasurers who are not computer-savvy fail to realize that the software is not web-based, do not send the Board an e-mail after creating the filing, and thus become "non-filers" because of this outdated technology.²⁴⁵ The Board at some point lost the source code for the software, so even minor changes that might improve its functioning – including changes that could make such accidental non-filing events less frequent – cannot be implemented.²⁴⁶ Accidental non-filings are inevitable, and will remain so until NYSBOE updates its software.

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ Superseding Indictment, *United States v. Pedro Espada, Jr. et al*, No. 10 Cr. 985, ECF No. 20 at 12 (E.D.N.Y. Mar. 25, 2011).

²⁴⁰ United States Department of Justice, Press Release, *Former New York State Senate Majority Leader Convicted of Stealing From Non-Profit Medical Clinics*, May 14, 2012, available at www.justice.gov/usao/nye/pr/2012/2012may14b.html.

²⁴¹ DA Non-Filer Letter.

²⁴² Interview with David Loomis, NSYBOE Chief Information Officer, Oct. 11, 2013.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *See, e.g.*, CMP 12-31 (Dec. 12, 2012).

²⁴⁶ Loomis Intv.

The inevitability of accidental non-filing events only makes it worse that all non-filers – from the unsophisticated treasurer, at one end of the spectrum, to Mr. Espada, at the other – end up on the same list and receive the same treatment. The lack of more aggressive enforcement action against the likes of Mr. Espada is the type of failure that has eroded public confidence in our political system and created an atmosphere conducive to corruption.

Inadequate Enforcement Against Corporate Violators: The Board’s efforts have been insufficient to enforce the Election Law against corporate “over-contributors.” Under New York law, a corporation is allowed to make expenditures “for political purposes,” including contributions, up to an aggregate of \$5,000 in each calendar year.²⁴⁷ Contributing an aggregate amount in excess of this \$5,000 limit can be a misdemeanor.²⁴⁸ An “over-contribution” is simply an illegal corporate contribution in excess of this \$5,000 limit.

In recent years, the Board has conducted an audit of all corporate contributions for each calendar year to identify those corporations that have made contributions in excess of the \$5,000 limit. Much like the audits of non-filers, this process is wasteful and does little to discourage intentional wrongdoers.

Once the Board identifies corporations who have exceeded the \$5,000 limit, it attempts to resolve the issue with each corporation by encouraging corporations to voluntarily come into “compliance.” This process does not require actual compliance with the law. Because a corporation cannot force a candidate to return contributions, the Board accepts good-faith requests by a corporation for contribution returns as sufficient “compliance.”²⁴⁹ Thus, the Board designates corporations as compliant even when they have made unreturned contributions over the legal limit.²⁵⁰ In some years, fewer than half of the corporations identified as voluntarily compliant managed to obtain a full refund of their over-contribution.²⁵¹ Meanwhile, it is not clear that the Board pursues candidates who refuse to return corporate over-contributions in any systemic way, even though soliciting or knowingly receiving over-contributions is itself a misdemeanor.²⁵²

²⁴⁷ ELECTION LAW § 14-116(2).

²⁴⁸ *Id.* at §§ 14-116(1), -126(3).

²⁴⁹ See Elizabeth Hogan, Confidential Memorandum Re: Preliminary Determination: CMP11-08 – 2009 Corporate Over Contributors and Repeat Offenders (Apr. 8, 2011) [hereinafter “2009 Corp. OC Memo”] (“Once corporations were identified as over contributors, staff employed the process previously approved by this Board to allow corporations to bring themselves into compliance by obtaining refunds or making good faith attempts to do so.”); see also Marie Woodward, Vikki Gonzalo, and Kathryn Orsino, Memorandum Re: 2008 Corporate Over Contribution Report (Dec. 8, 2009) (defining as compliant “corporations [that] sent letters requesting refunds but did not receive any or all refunds requested . . . [and] [p]rovided BOE with copies of documentation as proof they made good faith attempt to obtain refunds to become compliant”).

²⁵⁰ See 2009 Corp. OC Memo (counting as “compliant” any corporation that made a good-faith attempt to obtain a return).

²⁵¹ *E.g., id.* (stating that 107 corporations obtained full refunds and that 143 corporations came into “compliance” by obtaining partial refunds or making good-faith attempts to obtain refunds).

²⁵² ELECTION LAW § 14-116(1), (2).

At the end of this voluntary compliance process, NYSBOE enforcement counsel sends a memorandum to the four commissioners explaining how many corporations came into compliance, how many corporations came into partial compliance, and how many corporations remain non-compliant after the audit.²⁵³ Consistent with NYSBOE’s view of itself as a “compliance agency” rather than a “law enforcement agency,” the memorandum touts the “compliance rate” for the audit but does not mention the possibility of an investigation or enforcement action by NYSBOE against non-compliant corporations.²⁵⁴ The only information included with regard to each corporation is the name of the corporation and the amount by which its contributions exceeded the \$5,000 limit.²⁵⁵ In recent years, the memorandum to the commissioners has also included an alphabetical list of corporations that were non-compliant both prior to the beginning of that year’s voluntary compliance process and also prior to the beginning of another year’s voluntary compliance process within the past three years – the so-called “repeat offenders.”²⁵⁶

Corporations that remain non-compliant at the end of the voluntary compliance process are referred to the district attorney of the appropriate county for criminal prosecution.²⁵⁷ These referrals are skeletal at best. For each referral, a form letter is generated that includes (1) a brief discussion of the statutory cap on corporate contributions, and (2) an assertion that the corporations listed in the letter contributed in excess of the \$5,000 limit and failed to make at least an effort to voluntarily come into compliance in spite of NYSBOE’s letters and calls.²⁵⁸ Inexplicably, these letters to district attorneys do not specify the amount by which the corporation exceeded the \$5,000 limit, or provide any other information with regard to the specific corporation.²⁵⁹ In recent years, at least some referral letters have noted whether the corporation in question has been a “repeat offender.”²⁶⁰ Even though the Board could easily determine if a specific “repeat offender” eventually came into compliance in the prior year or years where the offender initially over-contributed, it leaves district attorneys guessing on this point, explaining that the offender may or may not have eventually come into compliance in the prior year or years.²⁶¹ For referrals from 2006 and 2007, enforcement counsel’s sparse file on the over-contributor, including a copy of counsel’s memorandum to the commissioners, was

²⁵³ *E.g.*, 2009 Corp. OC Memo (explaining that 250 corporations came into “compliance” while 35 corporations remain non-compliant).

²⁵⁴ *E.g.*, *id.* (touting a “compliance rate” of 87.72%, and suggesting no further action except referral to the appropriate district attorneys’ offices).

²⁵⁵ *E.g.*, *id.*

²⁵⁶ *E.g.*, *id.*

²⁵⁷ *E.g.*, Letter from Elizabeth Hogan to Hon. Thomas J. Spota, Suffolk County District Attorney (Apr. 20, 2011) [hereinafter “Spota Letter I”].

²⁵⁸ *E.g.*, *id.*

²⁵⁹ *See, e.g.*, *id.*

²⁶⁰ *E.g.*, Letter from Elizabeth Hogan to Hon. Thomas J. Spota, Suffolk County District Attorney (Apr. 20, 2011) [hereinafter “Spota Letter II”].

²⁶¹ *E.g.*, *id.*

included with each referral letter.²⁶² But this practice was discontinued: the referral letters for subsequent audits simply instruct the district attorney in question to contact the Board for additional information.²⁶³ Despite the fact that NYSBOE believes proof of both knowledge and willfulness on the part of the violator is needed for the criminal prosecution of a corporation that exceeds the \$5,000 limit,²⁶⁴ the Board makes no attempt to provide district attorneys with “state of mind,” or *mens rea*, evidence. With regard to the single largest over-contributor uncovered from the audits between 2006 and 2011, the referral letter sent to the district attorney merely said that, in light of the corporation’s failure to come into voluntary “compliance,” NYSBOE “considers the over contributions to be knowing and willful,” offering no actual evidence of knowledge or willfulness.²⁶⁵ NYSBOE’s internal files show that NYSBOE had only attempted to call the offender, who was “no longer in [b]usiness so lady said at [phone number].”²⁶⁶ No district attorney could reasonably argue knowledge and willfulness based on this evidence.

More egregious, though, is the delay in referring cases at all. For the corporate over-contribution audit for calendar year 2006, for instance, enforcement counsel did not send its memorandum to the commissioners until June 8, 2009, more than two years after the subject year ended.²⁶⁷ These referral letters suggest the possibility of prosecution under Election Law section 14-126(3), which makes it a misdemeanor to knowingly and willfully violate any provision of Article 14 of the Election Law.²⁶⁸ However, by 2009, the two-year statute of limitations for misdemeanors had already run.²⁶⁹ While some delay in the audit and voluntary compliance process itself may be understandable, delays in referring a completed audit to prosecutors is indefensible. For the 2010 audit, the investigative auditors’ final memorandum to the enforcement counsels regarding the completed audit was dated January 10, 2012,²⁷⁰ but the commissioners did not actually vote to refer cases to the relevant district attorneys until six

²⁶² Letter from Elizabeth Hogan to Hon. Thomas J. Spota, Suffolk County District Attorney (July 2, 2009) (“Enclosed is a copy of the Board’s file in reference to this matter, including the issued Determination.”).

²⁶³ *E.g.*, Spota Letter I.

²⁶⁴ *See, e.g.*, Spota Letter II (“The Board considers the over contributions to be knowing and willful, and requests that you consider [them] for prosecution pursuant to Election Law § 14-126(3).”); *see also* ELECTION LAW § 14-126(3) (“[A]ny person who knowingly and willfully violates any other provision of this article shall be guilty of a misdemeanor.”). It is unclear if prosecution of a corporation for over-contribution may also be possible without proof of any knowledge or willfulness pursuant to section 14-116(1) of the Election Law. *See id.* at § 14-116(1) (“Any officer, director, stock-holder, attorney or agent of any corporation or joint-stock association which violates any of the provisions of this section, who participates in, aids, abets or advises or consents to any such violations, and any person who solicits or knowingly receives any money or property in violation of this section, shall be guilty of a misdemeanor.”).

²⁶⁵ Spota Letter I.

²⁶⁶ NYSBOE, Corporation Contact Form (July 20, 2010).

²⁶⁷ Elizabeth Hogan, Confidential Memorandum re: Preliminary Determinations; 2006 Corporate Over Contributions – CMP09-21 thru CMP09-55 (June 8, 2009).

²⁶⁸ *E.g.*, Spota Letter I, Spota Letter II; *see also* ELECTION LAW § 14-126(3).

²⁶⁹ *See* CRIMINAL PROCEDURE LAW § 30.10(2)(c).

²⁷⁰ Marie Woodward, Vikki Gonzalo, and Kathryn Orsino, Memorandum Re: 2010 Corporate Over Contribution & 2010 Repeat Offender Report (Jan. 10, 2012) [hereinafter “Jan. 10, 2012 Memo”].

months later – by which point the statute of limitations had run.²⁷¹ Even worse, the Audit and Investigations Division within the Enforcement Unit actually completed its audit in late October 2011, but the audit remained open for more than two additional months, during which time only two more corporations came into compliance.²⁷² This is a total – and totally avoidable – failure.

Making matters still worse, this particular compliance exercise is rendered absurd by the existence of the “LLC loophole,” discussed in detail elsewhere in this Report. Any corporation can easily create one or more LLCs and then contribute up to an aggregate of \$150,000 from each LLC in each calendar year.²⁷³ The Commission has found that certain companies take advantage of this loophole to contribute hundreds of thousands of dollars to campaigns and party committees.²⁷⁴ Under the NYSBOE’s 1996 advisory opinion on the treatment of LLCs, this activity is perfectly legal and will not be flagged by the corporate over-contribution audit.²⁷⁵ Instead, the corporate over-contribution audit will flag only the activity of those corporations who are not clever enough to create LLCs and funnel their contributions through those entities. Unsurprisingly, the corporate over-contributions flagged by this NYSBOE audit tend to pale in comparison to the contributions made by the biggest abusers of the LLC loophole. The largest over-contribution amount for any corporation was only \$36,800, based upon the 2006-2011 corporate over-contribution audit files provided by NYSBOE to the Commission.²⁷⁶ No violation of our Election Law should be condoned, but the Board’s spending its resources on relatively small corporate over-contributions while maintaining the LLC loophole exemplifies its failed priorities.

C. Failure to Use Available Resources

The Election Law grants the Board considerable power to meet its enforcement obligations.²⁷⁷ The Board “ha[s] jurisdiction of, and [is] responsible for, the execution and enforcement of the provisions of article fourteen . . . and other statutes governing campaigns,

²⁷¹ Elizabeth Hogan, Confidential Memorandum re: Preliminary Determination: CMP12-04- Report of 2010 Corporate Over Contribution Audit (June 12, 2012).

²⁷² Compare Marie Woodward, Vikki Gonzalo, and Kathryn Orsino, Memorandum Re: 2010 Corporate Over Contribution & 2010 Repeat Offender Report (Nov. 22, 2011) (asserting that 209 corporations were compliant), with Jan. 10, 2012 Memo (asserting that 211 corporations were compliant).

²⁷³ See New York State Department of State, Articles of Organization Form, DOS-1336 (Revised Feb. 2012) (showing the insignificant amount of information that must be provided to create an LLC in New York); see also ELECTION LAW § 14-114(8) (setting the aggregate individual contribution limit at \$150,000 per year).

²⁷⁴ See *supra* n.49-52 and accompanying text; see also Chris Bragg, “Real Estate Exploits Loophole in Election Effort,” CRAIN’S INSIDER (July 17, 2013), available at <http://www.craigslist.com/article/20130717/BLOGS04/130719910>.

²⁷⁵ New York State Board of Elections 1996 Opinion No. 1 (January 30, 1996), collected in New York State Board of Elections, Formal Opinions of the New York State Board of Elections 1974-Present (2013), available at <http://www.elections.ny.gov/NYSBOE/download/law/Opinions07292013.pdf>. (deciding that LLCs are not subject to the lower corporate contribution limit).

²⁷⁶ See 2009 Corp. OC Memo.

²⁷⁷ See ELECTION LAW §§ 3-102, -104, -107.

elections and related procedures.”²⁷⁸ Moreover, “whenever the [Board] . . . shall determine on its own initiative or upon complaint, or otherwise, that there is substantial reason to believe a violation of [the Election Law] has occurred, it shall expeditiously make an investigation.”²⁷⁹

Despite NYSBOE’s repeated complaints about inadequate resources, the Commission’s investigation has revealed that the Board has largely abdicated its duty to enforce our election and campaign finance laws. The Board has at its disposal significant investigative tools that are either grossly underutilized or not used at all. In fact, the enforcement mechanisms available to NYSBOE are often superior to those at the disposal of other law enforcement agencies and district attorney’s offices. Moreover, the Board has both human and financial resources that it allows to lie fallow. The Board cannot credibly blame insufficient resources when it fails to use the resources it has.

Failures to Hire and Misuse of Personnel: The state’s 2007-2008 budget provided NYSBOE with funding for 21 additional full-time employees (“FTEs”).²⁸⁰ In light of the Board’s claim that its lack of investigatory and enforcement activity is a result of insufficient resources – including employees – one would expect these 21 funded FTEs to have been hired as quickly as possible.

Instead, the Board delayed. It did not approve job titles and descriptions for the majority of these positions for over seven months.²⁸¹ Largely due to this delay, the required approvals from the Department of Civil Service and the Division of Budget were not received for all 21 positions until around February 28, 2008.²⁸² According to the Commission’s investigation, the Board filled just 10 of these positions between the approval of the funding in early April 2007 and Governor Paterson’s announcement of a hiring freeze on July 30, 2008.²⁸³ Two more hires were made shortly after the governor’s announcement, but two of the twelve total hires were terminated by late September 2008.²⁸⁴ Based on the documents produced to the Commission by NYSBOE, one of the terminated

²⁷⁸ *Id.* at § 3-104(1).

²⁷⁹ *Id.* at § 3-104(2).

²⁸⁰ *See* NYSBOE October Hearing Written Testimony at 9.

²⁸¹ William McCann and Elizabeth Hogan, Enforcement Synopsis Memorandum (Nov. 20, 2007) (proposing job descriptions and titles for 15 of the 21 positions on November 20, 2007, and including a handwritten note stating that these descriptions and titles were approved by the commissioners on November 29, 2007).

²⁸² E-mail from Pat Tracey to Elizabeth Hogan, Stan Zalen, Todd Valentine, and William McCann, re: ICF Positions (Feb. 28, 2008, 09:36).

²⁸³ NYSBOE, November 1 Response to October 30 Commission Letter Request, Attachment A (Nov. 1, 2013); *see also* State of New York Division of the Budget, Press Release, “Governor Paterson Reopens Budget Process, Ordering Current-Year Spending Cuts, Special Legislative Session and Hard Hiring Freeze to Address Plummeting State Revenues” (July 30, 2008), *available at* http://www.budget.ny.gov/pubs/press/2008/press_release08_0730.html.

²⁸⁴ November 1 Response to October 30 Commission Letter Request, Attachment A. NYSBOE’s testimony for the October Hearing asserted that “the Board proceeded with the filling of 13 of the new positions.” NYSBOE October Hearing Written Testimony at 9. NYSBOE’s testimony makes no mention of the two terminations, and, based on the documents provided to the Commission by NYSBOE, only 12 individuals were hired in the first place. Of the 12 hires, 7 were Democratic appointees and 5 were Republican appointees. *See* November 1 Response to October

hires, Laurel Herdman, appears to have been terminated because she tried to improve certain areas of NYSBOE's functions, in particular NYSBOE's information technology deficiencies.²⁸⁵ Rather than being commended for trying to improve NYSBOE functionality, Ms. Herdman was told that her efforts were beyond the scope of her duties.²⁸⁶ In a lawsuit filed against NYSBOE, Ms. Herdman alleged that Counsel Hogan told her that "she was not a 'fit' and was 'too enthusiastic.'"²⁸⁷ After these two terminations, when NYSBOE was subsequently stripped of the remaining positions,²⁸⁸ it was left with just 10 added employees, even though it had been funded for 21 positions. At the October Hearing, ED Brehm conceded that, in retrospect, NYSBOE could have moved more quickly to secure all 21 FTEs, but no credible explanation was given for why there was not more urgency back in 2007 and 2008.²⁸⁹

It is not disputed that the Board's Enforcement Unit is severely understaffed. Dep. Counsel McCann is currently the only enforcement counsel on staff. The chief enforcement counsel position was formerly held by Counsel Hogan, who retired in October 2013, and the position has not yet been filled. In addition to the positions noted above, the Enforcement Unit has 19 outstanding vacancies, including positions for three investigators and two associate counsels.²⁹⁰ The Enforcement Unit's Audit and Investigations Division has been without a single investigator since May of 2012, despite the availability of funding for at least one such position for at least the remainder of 2012.²⁹¹

30 Commission Letter Request, Attachment A. Both terminated hires were Democratic appointees. *Id.* In a form completed for the Department of Labor after her termination, one of the terminated hires wrote that her termination was "part of [a] 'wave' of political dismissals." Laurel Herdman, Department of Labor Questionnaire (Aug. 4, 2008).

²⁸⁵ See e-mail from George Stanton to Elizabeth Hogan, Josie Jackson, Lorraine Delcostello, Laurel Herdman, Nancy Rao, Patricia Lloyd, Philip Perry, Stan Valen, Todd Valentine, Vikki Pietruccia, and William McCann, re: ITU Project Phases (July 1, 2008, 14:45); see also Department of Labor Questionnaire re: Laurel Herdman (July 28, 2008) (completed by NYSBOE, but individual completing form is not identified).

²⁸⁶ See Laurel Herdman, Department of Labor Questionnaire (Aug. 4, 2008).

²⁸⁷ Order, *Herdman v. Hogan*, No. 1:10-cv-1328, ECF No. 16 at 4 (N.D.N.Y. Sept. 29, 2011). Ms. Herdman alleged that she was terminated in retaliation for speech protected by the First Amendment. See Order at 4-5. Hogan's motion to dismiss was granted because Ms. Herdman was speaking pursuant to her official duties and this speech was not protected by the First Amendment. See *id.* at 6-9. The dismissal of the suit on these legal grounds says nothing about the veracity of Ms. Herdman's factual allegations about the reasons Counsel Hogan provided for the termination.

²⁸⁸ See NYSBOE October Hearing Written Testimony at 9.

²⁸⁹ October Hearing Tr. 56:19 to 57:5.

²⁹⁰ NYSBOE, Organizational Chart-Campaign Finance-Enforcement Unit (showing 18 vacant positions, but including Elizabeth Hogan as enforcement counsel when her position has been vacant since October 2013).

²⁹¹ The Audit and Investigations Division within the Enforcement Unit once had as many as seven investigators. See Owens Dep. 8:10-22. Over time, the number of investigations dwindled and the investigation staff shrank; by 2005, NYSBOE was left with a single investigator and for the next seven years Javan Owens was the sole investigator for the NYSBOE. *Id.* at 12:9-16. Following Inv. Owens' retirement in May 2012, the Enforcement Unit was left without an investigator on staff, despite apparently having funding to fill his position at least through the end of 2012. NYSBOE Board Meeting Tr. at 9 (June 12, 2012) (Hogan: "That position is funded you know through the rest of the fiscal year . . .").

The Commission had an opportunity to depose former NYSBOE Investigator (“Inv.”) Javan Owens in the course of its investigation. Unlike Counsel Hogan, who refused to comply with the Commission’s subpoena, Inv. Owens voluntarily agreed to be deposed. Throughout the deposition, Inv. Owens appeared forthcoming, honest, and cooperative. He corroborated his oral testimony with numerous documents. At the October Hearing, Dep. Counsel McCann described Inv. Owens as a “great man,” and said that he had “no problems with [Owens’] work.”²⁹² Inv. Owens’ story illustrates the Board’s failure to use its available resources.

Inv. Owens informed the Commission that earlier in his career he had handled approximately 25-30 cases per year.²⁹³ In more recent years, his caseload decreased considerably, and in 2012 he did not work on any investigations.²⁹⁴ He said that he repeatedly asked Counsel Hogan and Dep. Counsel McCann for substantive work, but was only promised cases that never materialized.²⁹⁵ Despite being respected statewide as an investigator and being explicitly commended for his service by local officials during his career,²⁹⁶ Inv. Owens told the Commission that he spent much of 2007 through 2012 playing solitaire and studying the Bible online during work hours.²⁹⁷

In certain instances, Inv. Owens was ordered to stop performing his duties. For example, a few years ago, ED Valentine told Owens that he was not permitted to visit polling stations on Election Day.²⁹⁸ Throughout his career, Inv. Owens had audited polling stations in areas of New York State where there had been accusations of impropriety.²⁹⁹ According to Owens, Valentine provided the following illogical reasoning as the basis for this change in policy: “if there [were] any kind of misrepresentation or kind of violations of the law and you are there, you might compromise the future investigations.”³⁰⁰ At the October Hearing, ED Valentine said that he could not recall this conversation with Inv. Owens.³⁰¹

Failure to Use Special Investigators: New York law allows the Board to appoint a special investigator to lead investigations into Election Law violations.³⁰² Such special investigators have the ability to inspect homes and places of business during the course of their investigations.³⁰³ Moreover, special investigators have the power to inspect and copy (at no

²⁹² October Hearing Tr. 63:7-8.

²⁹³ Owens Dep. 11:17-25.

²⁹⁴ *Id.* at 12:17 to 13:16, 22:4-7.

²⁹⁵ *Id.* at 35:7 to 36:10.

²⁹⁶ *See id.* at 41:21 to 42:12.

²⁹⁷ *Id.* at 34:10 to 35:6.

²⁹⁸ *See id.* at 48:4 to 50:2.

²⁹⁹ *See id.* at 48:4-21.

³⁰⁰ *Id.* at 49:13-15.

³⁰¹ October Hearing Tr. 78:15 to 79:13.

³⁰² *See* ELECTION LAW § 3-107.

³⁰³ *Id.* at § 3-107(1).

expense to the Board) books, records, and documents relating to an election or registration of voters.³⁰⁴ Most importantly, any individual who neglects or refuses to furnish any information required by the Election Law, or to exhibit records, papers, or documents to be inspected or which are required to be exhibited, can be charged with a misdemeanor.³⁰⁵ According to the testimony of NYSBOE officials, the Board has never appointed a special investigator.³⁰⁶

Failure to Use Subpoena Powers: New York law also grants the Board the power to issue subpoenas to compel the production of documents.³⁰⁷ Over the past six years, NYSBOE's issuance of these subpoenas has declined dramatically,³⁰⁸ due in large part to its own internal policies.³⁰⁹ According to Inv. Owens, he at one time carried subpoenas that he used when he was in the field as an effective means of preserving evidence.³¹⁰ Inv. Owens testified that, after Counsel Hogan was installed as enforcement counsel, he was prohibited from carrying subpoenas – without any explanation for the change.³¹¹ At the October Hearing, Dep. Counsel McCann corroborated this testimony by claiming that it was the policy of NYSBOE to issue subpoenas only after formal investigations have been opened – that is, only after the commissioners have voted to do so.³¹²

The effects of this change in policy are stark: the Board has issued only four subpoenas since the beginning of 2012, all in relation to one investigation.³¹³ The subpoena policy in the Enforcement Unit over the past six years has created undue delays in the investigation of suspected Election Law violations, increased the possibility that evidence could be destroyed or spoiled, and increased the possibility of partisanship coloring enforcement.

The Board also has the power to use subpoenas to compel testimony.³¹⁴ According to the Commission's investigation, the Board has only rarely taken testimony from a potential wrongdoer. Unlike grand jury subpoenas, NYSBOE subpoenas can compel testimony before the Board without conferring immunity.³¹⁵ The ability to examine witnesses under oath without granting such individuals immunity is arguably the most powerful tool a law enforcement agency can possess.

³⁰⁴ *Id.* at § 3-107(2).

³⁰⁵ ELECTION LAW § 3-107.

³⁰⁶ October Hearing Tr. 85:21-22.

³⁰⁷ ELECTION LAW §3-102(5).

³⁰⁸ *See* October Hearing Tr. 86:24 to 87:13.

³⁰⁹ *See id.* at 69:7-18 (testimony from Dep. Counsel McCann about NYSBOE's policies of (1) generally requiring commissioner approval for the issuance of subpoenas and (2) only issuing subpoenas if the commissioners have already voted to open an investigation).

³¹⁰ Owens Dep. 9:8 to 10:3, 11:7-11.

³¹¹ *Id.* at 10:4-22.

³¹² October Hearing Tr. 69:13-18.

³¹³ CMP11-17/ CMP12-13/ SC12-01, Subpoenas Duces Tecum (Nov. 21, 2012 and Feb. 4, 2013).

³¹⁴ ELECTION LAW § 3-102(5).

³¹⁵ *See id.* at § 3-102(5), (6).

NYSBOE's failure to secure sworn testimony from potential wrongdoers severely undercuts the ability of other law enforcement agencies to pursue charges against these individuals.

Failure to Use State Troopers: The Board also has the power to demand and receive assistance from the New York State Police in any Board investigation – without incurring additional costs to the Board.³¹⁶ Over the past six years, the Board has fully utilized state troopers in only one investigation. (A member of the state troopers' computer unit was consulted in another case.)³¹⁷ Despite its repeated claims of insufficient resources and a backlog of over 300 outstanding complaints, the Board did not attempt to create a liaison between itself and the State Police until two weeks prior to the departure of its sole investigator in 2012.³¹⁸ When Dep. Counsel McCann was asked by the Commission why the Board did not utilize this valuable resource, he oddly attributed the Board's failure to a lack of resources.³¹⁹

NYSBOE requested full assistance from the State Police in a case involving allegations that an individual, who had been prohibited from opening a commercial establishment for reasons unrelated to the Election Law, had been operating the business improperly as a PAC.³²⁰ The original complaint was filed on June 23, 2011,³²¹ with a second complaint filed by another individual on March 7, 2012.³²² The Board took no investigative action in the case until the commissioners voted to open the investigation in August 2012.³²³ The Board requested assistance from the State Police in December 2012.³²⁴

This investigation was the most robust of any Board investigation reviewed by this Commission. State troopers issued subpoenas, interviewed witnesses, and conducted field investigations.³²⁵ They took detailed notes and drafted comprehensive enforcement memoranda.³²⁶ A review of the case file reveals that the troopers were fully capable of conducting a complete and thorough investigation of purported Election Law violations. Their work resulted in a referral to the Westchester County District Attorney's Office.³²⁷

³¹⁶ *Id.* at § 3-105(2).

³¹⁷ October Hearing Tr. 89:10-19.

³¹⁸ Letter from Elizabeth Hogan to Stephen Hogan (May 16, 2012).

³¹⁹ October Hearing Tr. 90:14 to 91:21.

³²⁰ CMP11-17/ CMP12-13/ SC12-01 (Apr. 9, 2013).

³²¹ *Id.*, Initial Complaint (June 23, 2011).

³²² *Id.*, Second Complaint (Mar. 7, 2012).

³²³ *See id.*, Confidential Memorandum re: CMP 11-17, CMP 12-13 (Aug. 7, 2012).

³²⁴ *See id.*, New York State Police Memorandum (Dec. 31, 2012) (stating that the case was opened on Dec. 14, 2012).

³²⁵ *See* CMP11-17/ CMP12-13/ SC12-01.

³²⁶ *See, e.g., id.*

³²⁷ Letter from Elizabeth Hogan to Hon. Janet DiFiore, Westchester County District Attorney, re: CMP11-17/ CMP12-13/ SC12-01 (Apr. 15, 2013).

The Board has consistently told this Commission that it lacks the resources to serve as an effective enforcement agency. Yet it has failed to call upon the State Police despite their commendable work. It has let its sole investigator play solitaire rather than work on its backlog of cases. It has failed to fill vacancies even when it had the funding do so. And it has failed to use its substantial legal authority. The Commission’s investigation demonstrates beyond doubt that the Board’s enforcement failures are due less to a lack of resources than to a lack of will.

III. Recommendation: Create an Independent Enforcement Structure

The existing structure of the Board’s Enforcement Unit does not work. Our inescapable conclusion is that the Board’s chronic, willful inaction, and anti-enforcement policies and practices, are rooted in the Board’s party-driven structure. The word “bipartisan” usually has positive connotations – cooperation, and broad public support. For the Board, bipartisanship means a tacit agreement among the parties to do nothing to enforce our laws. It means all-encompassing partisan gridlock that infects every decision, and does little to ensure anyone’s compliance with the Election Law.

Dividing the four commissioner positions and the Enforcement Unit between the two major parties, and requiring the support of a majority of the commissioners to undertake any significant enforcement action, is fundamentally ineffective. Our State needs structurally independent election and campaign finance law enforcement.

The Commission recommends creating a structurally independent enforcement agency. This new agency would be independent of the current Board of Elections. If the public financing system that the Commission recommends in this Report is created, the new agency would also administer that system.³²⁸ We recommend that this new enforcement entity be headed by a director appointed to a fixed, five-year term by the Governor with Senate confirmation, and removable only for cause. The entity would be structured to promote political independence, and professionalism, and would be a much stronger Election Law watchdog.

The professional staff would be free to conduct timely investigations, using all of the tools at their disposal, without the cumbersome burdens of political hurdles and a politicized approval process. The agency would focus on enforcing our campaign finance laws – like New York City’s Campaign Finance Board – as well as enforcing other aspects of New York State Election Law, including registration and voting, absentee ballots, compliance with federal law, military and overseas voters, and polling place misconduct. All election law enforcement would benefit from a non-partisan, structurally independent, professional enforcer whose sole purpose is safeguarding the integrity of our elections and our political system.

³²⁸ The administration of the Commission’s proposed public financing system is discussed elsewhere in this Report. See *supra* n.127 and accompanying text.

Campaign finance and election law enforcement raises a set of interpretation and enforcement issues that are quite different from voter registration, holding elections, and tallying the results – the other duties of the Board of Elections. The Commission believes that the enforcement of state election law related to campaigns should be separated out from the implementation of elections. Both jobs will be done better if they are separated. With enforcement handled by an independent agency, the Board of Elections can focus on its constitutional duty³²⁹ as an elections administrator.

TOOLS TO FIGHT CORRUPTION

New Yorkers are justifiably concerned about the steady stream of corruption cases involving their elected and appointed officials. Lawmakers who should exemplify the highest of ethical standards have violated the public trust invested in them. New Yorkers now question who their elected officials represent – their constituents or their own self-interests. A recent Siena College poll found that 91% of all respondents believed corruption in the New York State Legislature was either somewhat or very serious.³³⁰

The sheer number of corruption cases is alarming. According to a 2011 analysis, 1 out of every 11 legislators who has left office since 1999 did so because of ethical misconduct or criminal charges;³³¹ according to a 2009 report, legislators were more likely to leave office due to ethical misconduct than to redistricting.³³² While elsewhere in this Report the Commission offers recommendations for tighter regulation of the interaction between money and politics, a strong and independent enforcement agency, and continued ethics and disclosure reforms, it also is clear that New York’s prosecutors need better tools to identify and fight public corruption.

Nearly all of the recent public corruption cases have been brought by federal prosecutors in federal court. This is not because New York state prosecutors are not up to the job but because they lack many of the necessary tools available to their federal counterparts. In

³²⁹ See N.Y. Const. art. II, § 8 (providing for “bi-partisan” election boards with “the duty of qualifying voters, or of distributing ballots to voters, or of receiving, recording or counting votes at elections”).

³³⁰ Siena Research Institute, “Moreland and Its Work Largely Unknown to Voters, Who Strongly Want Commission to Continue Investigations,” Siena College, Loudonville, NY, October 21, 2013, *available at* http://www.siena.edu/uploadedfiles/home/parents_and_community/community_page/sri/sny_poll/SNY%20October%202013%20Poll%20Release--FINAL.pdf.

³³¹ Citizens Union of the City of New York, *Examining Turnover in the New York State Legislature: 2009-2010 Update 6*, February 2011, *available at* http://www.citizensunion.org/www/cu/site/hosting/Reports/CU_ExaminingTurnover_Update_Feb2011.pdf.

³³² Citizens Union of the City of New York, *Examining Turnover in the New York State Legislature: Ethical Misconduct Increasingly the Cause for Legislators Leaving*, 4-9, November 2009, *available at* http://www.citizensunion.org/www/cu/site/hosting/Reports/CUF_Turnover_Report-November%202009.pdf.

particular, New York’s Penal Law makes it more difficult to prove bribery or effectively use witnesses in public corruption prosecutions than does federal law or the law of most states.

Over the past few years, numerous proposals have advocated for changes in New York’s public corruption laws. This past June, Governor Cuomo proposed the Public Trust Act, a package of reforms that was endorsed by all 62 district attorneys in the state.³³³ Other proposals include reforms advocated by New York County District Attorney Cyrus Vance, and by then-Senator (and current Attorney General) Eric Schneiderman,³³⁴ as well as reports issued by the New York State Bar Association’s Task Force on Government Ethics³³⁵ and the New York State White Collar Crime Task Force, an initiative of the District Attorneys Association of the State of New York.³³⁶ Despite these proposals, the Legislature has failed to act each time.

Continued legislative inaction is unacceptable. Federal prosecutors like United States Attorneys Preet Bharara and Loretta Lynch – both of whom testified before this Commission³³⁷ – should be applauded for their efforts to root out and punish illegal conduct by our public officials. But public corruption is a New York problem that requires a New York solution. We cannot rely only on federal prosecutors, who are charged with addressing other critical matters, like terrorism and national security issues, to deal with New York’s public corruption problems. As District Attorney Vance asked the Commission: “Why, in a government that gives states primacy in police power, would New York cede this area to a federal government of limited powers, whose future resources and attention may be diverted to different priorities?”³³⁸ Our state prosecutors must be better equipped to prosecute public corruption violations.

New Yorkers can no longer afford the inadequate protection of outdated public corruption laws. The Commission asks the Legislature to act on the following recommendations to strengthen our Penal Law and better arm our prosecutors to fight public corruption.

³³³ See generally Governor’s 2013 Program Bill #3, Memorandum on the Public Trust Act [hereinafter “Public Trust Act Memo”], available at <https://www.governor.ny.gov/assets/documents/GPB3-PUBLIC-TRUST-ACT-MEMO.pdf>.

³³⁴ Editorial, “There Ought to Be a Bruno Law,” THE NEW YORK TIMES (May 8, 2010), available at <http://www.nytimes.com/2010/05/09/opinion/09sun3.html>; Editorial, “Pass Joe’s Law: Bruno’s federal crimes must be state offenses too,” THE NEW YORK DAILY NEWS (May 6, 2010), available at <http://www.nydailynews.com/opinion/pass-joe-law-bruno-federal-crimes-state-offenses-article-1.448694>.

³³⁵ See generally Report, New York State Bar Association Task Force on Government Ethics, Jan. 28, 2011, available at <http://www.nysba.org/WorkArea/DownloadAsset.aspx?id=26662>.

³³⁶ See generally Report of the New York State White Collar Crime Task Force [hereinafter “White Collar Crime Task Force Report”], September 2013, available at <http://www.manhattanda.org/sites/default/files/WCTF%20Report.pdf.pdf>.

³³⁷ September Hearing Tr. 13-26 (Bharara Testimony); September Hearing Tr. 27-41 (Lynch Testimony).

³³⁸ Written Testimony of Cyrus R. Vance, Jr., Submitted at the September Hearing [hereinafter “Vance Testimony”] at 3.

I. Penal Law Reforms to Combat Corruption

A. Recommendation: Reform the Bribery Statute

Bribery often lies at the root of public corruption cases. Bribery cases brought by federal prosecutors in the past years include the convictions of Senators Carl Kruger and Guy Veleva, and Assemblymembers Brian McLaughlin, Diane Gordon, and Anthony Seminerio,³³⁹ and the pending indictments against Senator Joseph Bruno and Assemblymembers Eric Stevenson and William Boyland.³⁴⁰ Bribery is among the most nefarious forms of public corruption: the elected official literally sells out the voters who elected him. Similarly, corrupt public officials who serve in non-elected positions and engage in bribery schemes put their own greed above their sworn duty. Given the seriousness and frequency of the offense, one would expect New York's public servant bribery laws to be at least equal to those of other states and the federal government. This is not the case.

Eliminate the need to prove an “agreement or understanding” in New York’s public servant bribery statute: Under New York law, it is substantially harder to successfully prosecute people who bribe public officials than those who bribe a boxer, fight promoter, or referee. This anomaly must end.

New York's current public servant bribery law states that “[a] person is guilty of bribery . . . when he confers, or offers or agrees to confer, any benefit upon a public servant *upon an agreement or understanding* that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant will thereby be influenced.”³⁴¹ In a pivotal decision, *People v. Bac Tran*,³⁴² the New York Court of Appeals held that, to secure a conviction for bribe giving, prosecutors must show proof of “an agreement or understanding” between the bribe offeror and the bribe receiver that the bribe will actually result in official action by the public servant. New York's public servant bribery law stands apart from federal law, the bribery laws of 48 other states³⁴³ and even our own labor, sports, and commercial bribery laws³⁴⁴ in imposing this requirement.

In *Bac Tran*, a fire safety inspector told the defendant, a fire safety director for two Manhattan hotels with outstanding fire code violations, that he was being issued an additional fire code violation. The defendant placed \$310 in the inspector's pocket. The inspector removed

³³⁹ As previously noted, Seminerio's conviction was abated because he died prior to exhausting all of his appeals.

³⁴⁰ As previously noted, indictments are allegations only. A criminal defendant is presumed innocent until proven guilty in a court of law.

³⁴¹ PENAL LAW § 200.00 *et seq.* (emphasis added).

³⁴² 80 N.Y.2d 170 (1992).

³⁴³ White Collar Crime Task Force Report at 73.

³⁴⁴ See PENAL LAW § 180.00 *et seq.* (describing offenses of commercial bribing and bribe receiving, bribing and bribe receiving by a labor official, and sports bribing and bribe receiving).

the money and insisted that the violation would still be reported. The defendant told the inspector to keep the money “even if [he] wrote a violation” and to “do whatever [he] had to do, but keep the [the money].”³⁴⁵ The Court of Appeals threw out the defendant’s bribery conviction, holding that “if a benefit is offered with only the hope that a public servant would be influenced thereby, then the crime of bribe giving is not committed.”³⁴⁶ *Bac Tran* established that an explicit agreement or understanding between the bribe giver and bribe receiver is required to prove bribery of a public servant.

Simple logic dictates that an agreement or understanding on the part of the bribe-receiving public servant is not necessarily relevant to the corrupt intentions of the bribe giver. Instead, “[i]t is the effort [on the part of the bribe giver] to bypass the orderly process of government to secure an impermissible advantage that is criminal.”³⁴⁷ This concept is reflected in New York’s other bribery statutes, such as sports bribery, where prosecutors need only prove the briber’s “intent to influence” a sports official or participant.³⁴⁸

Prosecuting corrupt citizens who attempt to bribe government officials is important in its own right. But removing unnecessary barriers to such prosecutions also would create additional leverage that prosecutors could use to convict the corrupt officials themselves. Experience has shown that once a bribe giver is convicted – or is in danger of being convicted – he or she will have an incentive to cooperate with law enforcement officials and provide valuable information that could help convict the corrupt public official, or others involved in the scheme.

To remove this extraordinary barrier to obtaining a bribery conviction, the Commission recommends that the “agreement or understanding” requirement in New York’s public servant bribery laws be replaced with an “intent to influence” standard more closely aligned with federal law, the law of most other states, and New York’s own laws dealing with bribery in other contexts. The Commission specifically recommends that New York’s public servant bribery statute, Penal Law § 200.00, be amended in a manner similar to the following:

§ 200.00 Bribery in the third degree.

A person is guilty of bribery in the third degree when he or she confers, or offers or agrees to confer, any benefit upon a public servant ~~upon an agreement or understanding that~~ with the intent to influence such public servant’s vote, opinion, judgment, action, decision or exercise of discretion as a public servant ~~will thereby~~ be influenced.

³⁴⁵ *Bac Tran*, 80 N.Y.2d at 173.

³⁴⁶ *Id.* at 177.

³⁴⁷ *Id.* at 181 n.1 (Simons, J., dissenting in part).

³⁴⁸ PENAL LAW § 180.40.

In order to ensure that lawful campaign contributions are not included under this amended version of the crime, the Commission also recommends that the following defense be added to the Penal Law:

§ 200.05 Bribery; defense.

In any prosecution for bribery:

1. It is a defense that the defendant conferred or agreed to confer the benefit involved upon the public servant involved as a result of conduct of the latter constituting larceny committed by means of extortion, or an attempt to commit the same, or coercion, or an attempt to commit coercion.

2. It is also a defense that the benefit that the defendant conferred, or offered or agreed to confer, upon the public servant was a legitimate campaign contribution, unless such contribution was made upon an agreement or understanding that such public servant's vote, opinion, judgment, action, decision or exercise of discretion as a public servant would thereby be influenced.

Change the dollar threshold for bribery: A \$5,000 bribe is still a bribe. Consistent with proposals in both the Governor's Public Trust Act and the White Collar Crime Task Force Report, the Commission also recommends a downward revision of the dollar threshold for felony bribery involving a public servant. Currently, if a bribe is valued in excess of \$10,000, the bribe giver is guilty of Bribery in the Second Degree, a Class C felony.³⁴⁹ Although this offense carries a potential maximum sentence of up to 15 years in prison, the Commission believes the current \$10,000 value threshold is too high to adequately hold accountable those convicted of this aggravated form of public servant bribery. Therefore, the Commission recommends lowering the threshold to \$5,000, with a parallel change in the appropriate public servant bribe receiving statute.³⁵⁰

Require public officials to report bribery: Public servants must be held to the highest ethical standards. Many of the bribery cases that have shocked New Yorkers involved both active participants and passive observers. Too often, these observers are elected or appointed officials who have sworn to serve the public interest. Public servants who witness or are aware of an act of bribery or attempted bribery must not look the other way. They should be held responsible for preventing bribery in all its forms, and for safeguarding the integrity of our public institutions. The Commission recommends that an affirmative obligation be placed on public servants who personally observe or become aware of an act of bribery or attempted bribery

³⁴⁹ See *id.* at § 200.03.

³⁵⁰ See *id.* at § 200.11.

involving a public servant, to report the alleged offense to the appropriate law enforcement officials. Failure to do so would be a crime.³⁵¹

B. Recommendation: Prohibit Undisclosed Self-Dealing by Public Officials

Certain elected officials are willing and able to reap personal financial benefits from their official actions and decisions. As revealed by many of the cases involving pre-2011 member-items, as well as the Commission's investigations, it is not uncommon for legislators to steer state funds to entities in which they hold an economic interest.

It is, of course, a fundamental conflict of interest for an elected official to use his or her official position to provide personal financial benefits to himself or herself. Conduct by a public official in steering a state contract, or state funding, or a state benefit, to an entity in which he or she holds an undisclosed financial interest does not constitute bribery, but it clearly contaminates what is supposed to be an unbiased decision-making process where the only legitimate consideration is the best interest of the people of New York.

New York's laws do not adequately discourage this behavior. At best, a failure to disclose these conflicts of interest might, depending on the circumstances, constitute a Class A misdemeanor or a Class E felony, neither of which is a sufficient deterrent to this egregious form of self-dealing.³⁵² Moreover, due to a recent Supreme Court case, *Skilling v. United States*,³⁵³ the State can no longer rely on the federal government to prosecute undisclosed self-dealing.

New York can play a leading role in ensuring that government decision-making is untainted by undisclosed economic interests. The Commission recommends a criminal prohibition on undisclosed self-dealing. This proposal follows the recommendation of the White Collar Crime Task Force, as well as the Task Force on Government Ethics. Consistent with those recommendations, the Commission offers the following statutory language as a model for this new criminal offense. Under the proposal, an individual would be guilty of Undisclosed Self-Dealing in the Second Degree, a class D felony, when:

being a public servant, he or she intentionally engages in conduct or a course of conduct in his or her official capacity in connection with the award of a public contract or public grant or other effort to obtain or retain public business or public funds that is intended to confer an undisclosed benefit on himself, herself or a relative³⁵⁴, and thereby obtains or attempts to obtain a benefit for himself,

³⁵¹ See Public Trust Act Memo at 3.

³⁵² PUBLIC OFFICERS LAW § 73-a; PENAL LAW § 175.35.

³⁵³ 130 S. Ct. 2896 (2010).

³⁵⁴ We do not address here the precise degree of consanguinity or affinity required to generate an undisclosed conflict of interest.

herself or a relative with a value in excess of \$3,000. A benefit is disclosed if its existence is made known prior to the alleged wrongful conduct to either (i) the relevant state or local ethics commission or (ii) the official responsible for the public servant's appointment to his or her position, provided that person is not a participant in the alleged wrongful conduct.

The more serious offense of Undisclosed Self-Dealing in the First Degree, a class C felony, would contain the same elements as the above crime, but the dollar threshold would be raised to \$10,000.

The Commission acknowledges that there are multiple ways to prohibit this type of corrupt conduct. A recent proposal advocated the creation of a new crime, "Corrupting the Government," which would not be restricted to public servants.³⁵⁵ The model language for this proposed offense conduct reads as follows, with appropriate scaling of the severity of the offense based on dollar thresholds:

A person is guilty of corrupting the government when he or she engages in a scheme constituting a systematic ongoing course of conduct with intent to defraud the state or one or more political subdivisions of the state or one or more governmental instrumentalities within the state, or to obtain property, services or other resources from any such state, political subdivision or governmental instrumentality by false or fraudulent pretenses, representations or promises.

C. Recommendation: Sentencing Enhancements and New Collateral Consequences for Public Servants Who Abuse Their Official Positions

Governor Cuomo, the Office of the State Comptroller and the White Collar Crime Task Force have all recommended some form of sentencing enhancement for individuals who victimize the government and violate the public trust.

Sentencing Enhancements for Corrupt Officials: The Office of the State Comptroller³⁵⁶ and the White Collar Crime Task Force³⁵⁷ have recommended a sentencing enhancement for public servants who intentionally use their official positions to facilitate the commission (or concealment) of

³⁵⁵ Public Trust Act Memo at 2-3.

³⁵⁶ See Comptroller's 2013 Program Bill #11, Memorandum, at 2, *available at* http://www.osc.state.ny.us/legislation/2013-14/OSCB11_memo.pdf.

³⁵⁷ White Collar Crime Task Force Report at 83.

an offense. This enhancement would apply to certain existing offenses that do not include the defendant's status as a public servant as an element of the offense.³⁵⁸

Offenses such as bribery involving a public servant or rewarding official misconduct include the perpetrator's status as a public servant as an element of the offense. But public officials also can use their offices to commit other offenses, such as grand larceny, forgery, and money laundering. These offenses are not graded to capture the aggravating factor that the public official abused his or her office in the commission of the crime.

The following all-too-common scenario exemplifies the point: A senator uses her position to funnel taxpayer funds to a bogus charity so her boyfriend or family member can get paid for a no-show or low-show job. The official may not be involved in the day-to-day activities of the charity, and the only provable criminal conduct that may be attributed to the public official might relate to false statements or omissions she made on the filings relating to the state appropriation (such as the failure to disclose the familial relationship). This conduct would constitute Offering a False Instrument for Filing, and, as such, might rise to the level of an A misdemeanor or perhaps an E felony. However, these offenses do not capture the most egregious feature of the offenses: the senator's abuse of her office. Even if the facts would support a grand larceny charge against the senator (*i.e.*, if it could be proven the senator *knew* her relative was simply taking a taxpayer-funded salary for doing no work), the grand larceny charge would be only a class D felony and thus would not take into account the senator's abuse of her official position.

The Commission agrees with the White Collar Crime Task Force and the Comptroller: the facts that cause the additional harm associated with a public servant's abuse of his or her official position should be addressed through an appropriate sentencing enhancement when the underlying offense does not already account for that aggravating element. Such an enhancement would increase, by one felony grade, the potential penalties for a public servant who abuses his or her official position in this manner. The defendant would be charged with a distinct "Abuse of Trust" offense on top of the underlying substantive Penal Law violation. Evidence supporting this "enhanced" charge would be presented to a grand jury for felony cases, and would be pleaded in the indictment or other charging instruments so as to give the defendant notice of the charge. Upon a conviction for the substantive offense, the level of the offense would be elevated by one classification level for sentencing purposes.³⁵⁹

Sentencing Enhancements for Crimes Against the Government: The public trust suffers when officials steal, misappropriate, or otherwise improperly use financial or other

³⁵⁸ The advisory federal Sentencing Guidelines also provide for a two-point increase to a defendant's offense level upon a showing that the defendant "abused a position of public or private trust" when that fact is not already captured by the base offense level. *See* U.S.S.G. § 3B1.3.

³⁵⁹ *See* White Collar Crime Task Force Report at 83-84 & app'x G-5 (providing suggested legislative language for this proposal).

resources of the state or local governments. New Yorkers can be deprived of critical services, and their tax dollars wasted. Public officials who misuse or outright steal government resources must be held accountable for their actions.

Accordingly, similar to a proposal in the Governor's Public Trust Act, the Commission recommends elevating the classification level of existing crimes such as larceny, unauthorized use of a vehicle, and money laundering when the victim of the offense is a public entity and the perpetrator is a public official who knows that the victim is a public entity. Under this proposal, a crime such as Petit Larceny, which would otherwise be a class A misdemeanor, would become a class E felony when the state or a locality is a victim of the larceny and the perpetrator is a public official.³⁶⁰

Removing Corrupt Officials from Public Life: Corrupt officials may not limit themselves to just one corrupt scheme. It dramatically undermines public faith in government when officials continue to serve in and influence our politics after they have abused their office and the public trust.

New York has certain “revolving door” provisions to limit those who have been in public service from entering the private sector and gaining an unfair advantage because of information they gained while in service.³⁶¹ But, under current law, there is nothing to stop an elected official, lobbyist, individual, or company convicted of a public corruption offense from continuing to do further business with the state. The Commission endorses a proposal made in Governor Cuomo's Public Trust Act, that those individuals and entities convicted of public corruption crimes be barred for life from serving in a public office, registering as a government lobbyist, or obtaining government contracts.

D. Recommendation: Replace Transactional Immunity with Use Immunity in Public Corruption Cases

Under federal law and the law of most states, individuals who testify in a grand jury proceeding receive “use immunity.” Use immunity means that any testimony given by a witness or any evidence derived from that testimony may not be used against the witness in a criminal proceeding. New York law, however, provides that a witness who is compelled to provide evidence in a legal proceeding or in a grand jury proceeding receives “transactional immunity.”³⁶² Transactional immunity renders a testifying witness immune from prosecution for *any matter* on which he or she testifies, regardless of whether independent evidence of guilt has been developed. New York is in the minority when it comes to following the transactional immunity rule. In all, 33 states and the federal government provide use immunity. Only 13

³⁶⁰ Public Trust Act Memo at 2-3.

³⁶¹ PUBLIC OFFICERS LAW § 73(8)(a).

³⁶² CRIMINAL PROCEDURE LAW §§ 50.20, 190.40.

states, including New York, provide transactional immunity in all cases, and four states utilize a hybrid system.³⁶³

The breadth of transactional immunity causes two problems. First, prosecutors may unknowingly immunize wrongdoers due to the mere mention of a matter during testimony.³⁶⁴ Prosecutors have seen fewer instances of “unknowing immunization” in recent years³⁶⁵ due to the second fundamental problem with transactional immunity: It places a chilling effect on prosecutors, who fear that by calling wrongdoers to testify they could inadvertently give them full immunity for any of their crimes. During his testimony before this Commission, District Attorney Vance recalled a criminal defendant stating: “I never knew about this thing, immunity . . . They can’t throw you before the grand jury ’cause they don’t know what’s gonna come out. That’s the name of the game.”³⁶⁶

Public corruption cases are often multifaceted criminal enterprises, where witnesses play a key role in untangling the complexities of a given scheme. The chilling effect of “unknowing immunization” places prosecutors at a significant disadvantage in pursuing public sector corruption cases. In the federal cases the Commission has reviewed, accomplices often provided crucial information that led to effective criminal prosecutions.

Prosecutors must not be chilled from zealously prosecuting those who have betrayed the public trust. They must have access to the same full complement of resources as their federal counterparts, who have proven so adept at prosecuting these crimes. Accordingly, the Commission recommends that the Criminal Procedure Law be amended to replace transactional immunity with use immunity for all criminal prosecutions in cases of public corruption.³⁶⁷

E. Recommendation: Reform New York’s Accomplice Corroboration Requirement in Public Corruption Cases

New York is one of the few states that require independent corroboration of accomplice testimony,³⁶⁸ no matter how many accomplices provide evidence of wrongdoing, that testimony

³⁶³ White Collar Crime Task Force Report at 27 n.117.

³⁶⁴ See *People v. Henderson*, 257 A.D.2d 213 (3d Dep’t 1999); *Matter of Carey v. Kitson*, 93 A.D.2d 50 (2d Dep’t 1983).

³⁶⁵ See White Collar Crime Task Force Report at 28.

³⁶⁶ Vance Testimony at 4.

³⁶⁷ The Commission acknowledges that some groups have advocated for a replacement of transactional immunity with use immunity in all crimes, not just public corruption crimes. See White Collar Crime Task Force Report at 26-31. Given the mandate of this Commission under the Executive Order to “investigate weaknesses in existing laws, regulations and procedures relating to addressing *public corruption, conflicts of interest, and ethics* in State Government, including but not limited to criminal laws protecting against abuses of the public trust; and make recommendations to reform any weaknesses uncovered in existing State laws, regulations and procedures,” Executive Order No. 106 (emphasis added), the Commission confines itself to the subject matter of the Executive Order and recommends that at a minimum, the rule be altered for public corruption matters.

³⁶⁸ Only 18 states require corroboration of an accomplice’s testimony. See White Collar Crime Task Force Report at 32, n.153.

must be corroborated by a non-accomplice. Once again, New York prosecutors lack the tools of their federal counterparts, who may use accomplice testimony without presenting corroboration evidence.³⁶⁹

Public corruption cases often hinge on the testimony of accomplices. The close circle of insiders in a corruption scheme may be the only ones privy to vital facts needed to effectively prosecute wrongdoing. Without this tool, New York prosecutors are frequently left powerless to effectively prosecute complex public corruption cases.

The Commission recognizes that accomplice testimony may deserve sharp scrutiny, but a blanket rule against it acts as an arbitrary bar to what may well be credible testimony. The Commission believes that appropriate safeguards, such as instructions from the trial court about the potential dangers of such testimony, can assist juries in doing what they are empanelled to do: weigh the credibility of the evidence before them. Accordingly, the Commission recommends amending New York’s Criminal Procedure Law to allow accomplice testimony as a source of corroborating evidence in public corruption crimes.³⁷⁰

F. Dissenting Opinion: Reforming New York’s Immunity and Accomplice Corroboration Rules

A group of Commissioners dissent from the Commission’s recommendations with respect to the Criminal Procedure Law’s provisions for transactional immunity and accomplice corroboration.

A substantial number of this group of Commissioners³⁷¹ agrees with the majority that the current rules create unwarranted obstacles to bringing wrongdoers to justice, and that these rules should be amended. This group disagrees, however, with replacing transactional immunity with use immunity, and with permitting uncorroborated accomplice testimony, only “in cases of public corruption.” They believe that the rules should either be changed across the board, or they should not be changed at all.

³⁶⁹ See Vance Testimony at 4.

³⁷⁰ The Commission heard testimony that one of the major reasons why many public corruption cases have been handled at the federal rather than the state level is New York’s system of transactional rather than use immunity. See September Hearing Tr. 46-47 (Vance Oral Testimony). The Commission believes that such a change would greatly enhance New York State’s ability to prosecute such crimes. While some Commissioners feel strongly that it would be inappropriate to make a change to New York criminal procedure for just a specific type of crime – such as public corruption – the Commission notes that its mandate is strictly limited to public corruption matters. See *supra* n.367. At the same time, the Commission acknowledges that some groups have advocated for allowing accomplice corroboration of accomplice testimony in all cases, not just public corruption cases. See White Collar Crime Task Force Report at 32-33. The mandate of this Commission under the Executive Order is to “investigate weaknesses in existing laws, regulations and procedures relating to addressing public corruption, conflicts of interest, and ethics in State Government, including but not limited to criminal laws protecting against abuses of the public trust.” We decline to exceed this mandate. See *supra* n.367.

³⁷¹ This group is comprised of Gerald Mollen, Dan Castleman, Kate Hogan, Robert Johnson, Joanie Mahoney, and Thomas Zugibe. Judge Betty Weinberg Ellerin joins this group with respect to the immunity rule issue only.

This group argues that the nature of “public corruption cases” is not so unusual or distinctive as to justify recommending changes to two fundamental evidentiary rules in this category of cases alone. If the Commission’s recommendations were adopted in their current form, this group asserts, persons accused in “public corruption cases” (however those cases might be defined) could be convicted and sentenced to imprisonment based on investigations founded on testimony elicited through use immunity and accomplice testimony corroborated only by other accomplice testimony, while at the same time a wide range of more serious and more violent offenders, such as violent gang members and organized crime bosses, would remain shielded by the evidentiary rules the Commission has judged to be unnecessary obstacles to justice.

There is no other evidentiary rule in New York, this group notes, which so fundamentally distinguishes – based only on the kind of offense charged – among the kinds of evidence that can support a criminal conviction. This group therefore believes that such a dramatic dividing line between “public corruption cases” and all other cases is unjustified, and indeed that it would be unjust to adopt the changes in public corruption cases only. This group recognizes that the mandate of the Commission is limited to investigating weaknesses in laws addressing public corruption. But it asserts that the Commission’s recommendations should respect the integrity of existing legal structures, and the principle that accused offenders deserve equal and proportionate treatment under the law. This group therefore urges that these rule changes be adopted in all cases, but not in only public corruption cases.

Another group of Commissioners³⁷² opposes dispensing with New York’s long-standing accomplice corroboration rule under any circumstances.

This group argues that accomplice testimony is an inherently suspect class of evidence. The accomplice, they note, is an admitted criminal with a strong motivation to shape his or her testimony to please those offering a deal to avoid prison altogether, or to receive other forms of favorable treatment. They argue that allowing this testimony to be buttressed by testimony of the same unreliable character severely undermines the integrity of the truth-finding process, and unfairly disadvantages those who insist on innocence and refuse to plead guilty in return for inducements from the prosecution. This group is concerned that admission of uncorroborated accomplice testimony would open the door to convictions based on inherently suspect testimony, increasing the possibility of wrongful and unjust convictions. This group feels that judicial instructions about accomplice testimony are insufficient in the face of such grave possibilities and will not provide a check on the likely occurrence of unjust convictions. This group therefore urges that the current accomplice corroboration rule be maintained.

³⁷² This group is comprised of Seymour James, David Jones, and Judge Betty Weinberg Ellerin.

CONCLUSION AND NEXT STEPS

This Commission has discovered much in just a few short months. Our ongoing investigations have revealed phantom health clinics, inexplicable statutes, pay-to-play arrangements, underdisclosed outside income, misuse of party “housekeeping accounts,” potentially improper use of campaign funds, and more.

The Commission will continue investigating areas that impact the integrity of our political system, following the money and the connections, making criminal referrals when the facts warrant them and considering new proposals directed towards improving the public’s faith in our institutions.

But the need for reform, now, is clear. Delay should not be an option. We have proposed in this Report a broad menu of reforms. These measures will be a strong step toward reining in corruption and restoring New Yorkers’ trust in government. Our elected leaders should consider and enact them as soon as possible.