

**Testimony of Lawrence D. Norden
Deputy Director, Democracy Program
Brennan Center for Justice at NYU School of Law**

Submitted to the Moreland Commission to Investigate Public Corruption

Public Hearing, September 17, 2013

Co-chairs Fitzpatrick, Rice, and Williams, and members and staff of the Commission, thank you for the opportunity to testify today. There are few things more important to the health of our State than ensuring that state government has the trust of the people. On behalf of the Brennan Center for Justice at NYU School of Law,¹ I thank you for your service.

Many of today's speakers will rightly focus on the criminal scandals that have enveloped Albany in the last few years, and what tools are necessary to ensure that those committing such crimes are brought to justice. On this score, I have little to add to the testimony of the distinguished speakers who have come before me. It is obvious that more must be done. In particular, the Brennan Center has long argued that it is crucial the state establish a new, independent board or unit to administer and enforce all campaign finance laws and that we vest the Attorney General and local district attorneys with power to independently investigate and prosecute alleged violations of campaign finance laws. Prosecution and censure for illegal activity is, of course, a necessary step if we are to prevent that activity in the future.

But it is not enough. Often, what is most scandalous in Albany is what is perfectly *legal*. And this encourages behavior that many New Yorkers rightly consider corrupt, whether technically legal or not.

Even where no *quid pro quo* bribe has taken place, moneyed special interests dominate our state's politics, elections and policies in a way that the public sees as corrupt.² The public record

¹ The Brennan Center for Justice is a non-partisan public policy and legal advocacy organization that focuses on fundamental issues of democracy and justice. Our Money in Politics project works with policy makers and activists to help draft and enact legislation, defend campaign finance laws in court, and promote innovative public financing solutions nationwide, particularly small donor matching funds.

² "The job being done by New York's state legislature is rated negatively by 71% of likely voters, and 82% place the blame for the legislature's poor performance on corruption and the influence of money in politics." Global Strategy Group & Mercury, Polling Memo, May 6, 2013, <http://fairelectionsny.org/cms/wp-content/uploads/2013/05/MayPollingMemo.pdf>.

is rife with special benefits provided by the legislature and others in government to big donors. From jobs at state agencies³ to retroactive tax breaks (on projects that *were already underway*),⁴ to earmarks for big contributors,⁵ there is evidence that money greases the wheels of the system. Voters who cannot afford to donate thousands of dollars have little influence over who becomes a candidate, who gets elected, and what agenda gets debated and acted upon. This inability to meaningfully participate in the system breeds disaffection and cynicism.

There is evidence that political giving from special interests has less to do with ideology or political speech than with securing access to those in power. When the Democrats took control of the Senate in 2009, corporate contributions to Republicans fell to half of their 2008 level and contributions to Democrats increased significantly.⁶ Similarly, unions' contributions to Senate Republicans fell to half their 2007 levels.⁷ The greater part of these contributions flowed back to Republicans when they regained control in 2011. The same dynamic played out for contributions to committee chairs as party control switched back and forth. As I will discuss in greater detail in my testimony, this is the money that dominates New York State's political system.

It would be a tragedy if the Commission failed to address this systemic and most basic problem in the State's political culture. As I will more thoroughly detail in this testimony, all of the state's major good government groups, as well as editorial boards from around the State, agree that any systemic solution to the corrupting influence of money in politics must include comprehensive campaign finance reform, with a small donor matching system like New York City's at its core.⁸

I. Tax Break Extensions for Major Contributors

The repeated extension of tax breaks for major campaign contributors is a prime example of how our state's broken campaign finance system has warped policy outcomes. Until now, it has

³ Danny Hakim, *Many Openings at State Agency Go to Those With Ties to Cuomo*, N.Y. TIMES, Apr. 27, 2013, <http://www.nytimes.com/2013/04/28/nyregion/many-openings-at-state-agency-go-to-those-with-ties-to-cuomo.html>.

⁴ Daniel Beekman, *NY lawmakers mandate massive tax breaks for millionaires' Manhattan apartments*, N.Y. DAILY NEWS, June 18, 2013, <http://www.nydailynews.com/new-york/uptown/big-tax-breaks-mandated-millionaires-nyc-digs-article-1.1375297>.

⁵ Frederic U. Dicker, *Cuomo's pay-to-play rap for nonprofits*, N.Y. POST, Oct. 23, 2009, <http://nypost.com/2009/10/23/cuomos-pay-to-play-rap-for-nonprofits/>.

⁶ CENTER FOR WORKING FAMILIES, *THE BIG SWITCH* (2012), <http://www.cwfny.org/wordpress/wp-content/uploads/2012/10/The-Big-Switch-CWF.pdf>.

⁷ Nicholas Confessore, *State Republicans Lose Fundraising Edge*, N.Y. TIMES, Aug. 11, 2009, <http://www.nytimes.com/2009/08/12/nyregion/12repubs.html>.

⁸ See, e.g., *The Best Hope for Reform*, THE TIMES UNION, Jun 16, 2013, <http://blog.timesunion.com/opinion/the-best-hope-for-reform/25373/>; Editorial, *Albany Leaders Can do Big Things in the Final Week of the Legislative Session*, THE POST DISPATCH, June 16, 2013, http://blog.syracuse.com/opinion/2013/06/albany_leaders_can_do_big_thin.html; Editorial, *Campaign Finance Reform – Less Talk, More Action*, THE J. NEWS, June 10, 2013, <http://www.lohud.com/article/20130610/OPINION/306100073/Editorial-Campaign-finance-reform-less-talk-more-action>; Editorial, *Enact Public Financing in New York to Disrupt Albany's Culture of Corruption*, THE POST-STANDARD, http://blog.syracuse.com/opinion/2013/04/enact_public_campaign_financin.html; Editorial, *New York Reform = Public Financing*, N.Y. TIMES, April 19, 2013, http://www.nytimes.com/2013/04/20/opinion/new-york-reform-public-financing.html?_r=0;

received little attention. The Brennan Center has identified fourteen separate tax credits that have been repeatedly extended over the last several years. All of them have been provided to industries that are major sources of campaign contributions in New York State: financial services, gambling, film production, energy and real estate. A list of these extensions is provided in appendix A of this testimony.

To be clear, *the Brennan Center takes no position on the wisdom of these tax incentives as a policy matter*. It is entirely possible that each has a positive impact on the State's environment, jobs, or economy. But if these provisions are indeed good policy, generating positive results, the legislature should make them permanent.

Instead, what we appear to have in New York is a phenomenon that Professor Rebecca Kysar of Brooklyn Law School has documented at the federal level, where tax sunsets and extensions make it easier "for politicians to more easily extract ... campaign contributions from the parties affected by the threatened provision."⁹ By ensuring a tax break is revisited repeatedly, politicians also make certain that interest groups cannot afford to let their influence wane. The pattern of scheduling the expiration and extension of tax breaks and over and over suggests that their presence in the tax code involves something more than a mere policy choice.

Of course, there are policy justifications for making some tax provisions temporary. The provision might address an inherently temporary problem, such as reconstruction after a disaster, or the legislature might want to test whether the provision works in practice before making it permanent. Sunset provisions can also make tax expenditures appear cheaper from a budgetary perspective, which is not a compelling policy justification, but certainly a political reality. However, these justifications fall away when tax provisions are reauthorized repeatedly over many years, making them temporary only in theory and permanent in practice.

This appears to be the case with many of the repeated extensions the Brennan Center has identified. At the very least this process is inefficient, but more importantly, it increases the likelihood of conflicts of interest and corruption in policy making.

Economists have documented that sunseting tax breaks are also frequently harmful to our economy.¹⁰ Businesses cannot effectively plan without knowing how their actions will affect their tax bill.¹¹ A high level of uncertainty makes businesses unwilling to invest, and it can even encourage businesses to move out of the state.¹² Especially where tax credits are designed to encourage investment in a preferred field or technology, it is irrational to keep the constant threat

⁹ Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 340 (2006).

¹⁰ PRESIDENT'S ADVISORY PANEL ON FED. TAX REFORM, SIMPLE, FAIR, AND PRO-GROWTH: PROPOSALS TO FIX AMERICA'S TAX SYSTEM xiii, 15 (2005), <http://www.taxpolicycenter.org/taxtopics/upload/tax-panel-2.pdf>.

¹¹ Len Burman, *Three Strikes and You're Out for Tax Extenders*, FORBES, Jan. 30, 2012, <http://www.forbes.com/sites/leonardburman/2012/01/30/three-strikes-and-youre-out-for-tax-extenders>.

¹² See John D. McKinnon et al., *'Temporary' Tax Code Puts Nation in a Lasting Bind*, WALL ST. JOURNAL, Dec. 14, 2010, <http://online.wsj.com/article/SB10001424052748703963704576005960558986604.html> (discussing the dramatic rise in temporary tax breaks in the federal system and the resulting disincentive for investment).

of expiration hanging over taxpayers' heads.¹³ In some cases, Albany actually allows tax credits to expire and then makes the extension effective retroactively. This process increases administrative burdens on both the state and its taxpayers, and it further limits businesses' ability to plan.¹⁴

II. The Need for Comprehensive Campaign Finance Reform

The apparent conflict of interest posed by temporary tax credits and associated political giving is an example of the corrupting culture of Albany. Sky-high contribution limits, low levels of political participation, a lack of disclosure, and lax enforcement all contribute to a system that seems to allow money to buy legislative favoritism. Public trust in government has been eroded not just by politicians' indictments and prison terms, but by the completely legal ways that wealthy interests influence Albany's policy choices.

It should not be surprising that New York State is at the very bottom of states in terms of percentages of adults contributing to state election campaigns.¹⁵ Why contribute when the playing field is so heavily tilted to a small number of moneyed, special interest donors?

This explains why the vast majority of New Yorkers (78 percent) agree that "reforming New York's campaign finance laws is key to cleaning up Albany, rooting out corruption and improving the work of state government."¹⁶ It is also why the Brennan Center, all of the state's major good government groups, and editorial boards across the state have argued that combating systemic corruption requires reform that includes the following:

- **Limited matching funds for small donations.** A voluntary program for candidates that matches small donations – \$175 or less – with public funds will encourage small donors to contribute and participate in the electoral process. When small donations are matched, average New Yorkers will be able to offer meaningful support to candidates, and candidates will be able to combine campaigning and fundraising. A similar system of matching small donations has been in place for twenty years in New York City and has earned strong support among voters and candidates alike.
- **Reasonable contribution limits.** New York State's soft money loopholes and exorbitant contribution limits encourage politicians to seek huge funds from their contributors. Setting reasonable limits will allow individuals to show their political support without

¹³ Edward D. Kleinbard, *The Congress Within the Congress: How Tax Expenditures Distort Our Budget and Our Political Processes*, 36 OHIO N.U.L. REV. 1, 23-24 (2010) (wind and solar industries are smaller and have less capital because of the uncertainty of temporary subsidies).

¹⁴ See Kysar, *supra* note 9, at 335, 368-69.

¹⁵ Press Release, 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, (Dec. 20, 2012), 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.

¹⁶ Global Strategy Group & Mercury, Polling Memo, May 6, 2013, <http://fairelectionsny.org/cms/wp-content/uploads/2013/05/MayPollingMemo.pdf>.

being shaken down for unlimited donations. Ending pay-to-play will save public dollars by preventing contributions and bundling by contractors and lobbyists from influencing decisions about state business.

- **Disclosure of campaign contributions and political expenditures.** As a result of the *Citizens United* decision, tens of millions of dollars in political spending are hidden from public view. Transparency is an essential principle of free and competitive markets. The rise of Super PACs during the 2012 election cycle makes this reform even more urgent.
- **Independent and robust enforcement.** New York State's enforcement of campaign finance laws is notoriously lax, leading to corruption and abuses of the system. We need professionalized, non-partisan administration of campaign finance laws that also helps candidates and donors with compliance.

I provide a more detailed explanation of the Brennan Center's policy recommendations in Appendix B of this testimony.

III. The New York City Experience with Systemic Reform

New York City's overhaul of its campaign finance system in 1989, after widespread corruption scandals, demonstrates the transformative impact of such changes. Simply put, since passing its small donor public financing system, New York City elections have a far greater number and diversity of contributors to candidates than in state contests.¹⁷ Encouraged by the matching funds, New York City residents contribute to city elections at a rate three times that of state elections.¹⁸ As the city system increased its matching ratio between 1997 and 2009, the pool of small donors increased by 40 percent. In 2009, almost 90 percent of New York City's census block groups had at least one person who gave \$175 or less to a City Council candidate.¹⁹ By contrast, in 2010, only 30 percent of the city's census block groups had at least one small donor to a State Assembly candidate.²⁰

Moreover, a much higher percentage of money raised in City elections is from individuals and small donors, with special interest money playing a much smaller role in elections: in 2012, nearly 70 percent of contributions in state legislative races came from special interests, and less

¹⁷ ANGELA MIGALLY & SUSAN LISS, BRENNAN CENTER FOR JUSTICE, SMALL DONOR MATCHING FUNDS: THE NYC ELECTION EXPERIENCE 11-12 (2010), <http://www.brennancenter.org/publication/small-donor-matching-funds-nyc-election-experience>; Press Release, Campaign Finance Institute, Public Matching Fund System Would Reverse the Importance of Small and Large Donors in the New York State Elections, (Apr. 17, 2012), [http://cfinst.org/Press/PReleases/12-04-](http://cfinst.org/Press/PReleases/12-04-17/Public_Matching_Fund_System_Would_Reverse_the_Importance_of_Small_and_Large_Donors_in_New_York_State_Elections.aspx)

[17/Public_Matching_Fund_System_Would_Reverse_the_Importance_of_Small_and_Large_Donors_in_New_York_State_Elections.aspx](http://cfinst.org/Press/PReleases/12-04-17/Public_Matching_Fund_System_Would_Reverse_the_Importance_of_Small_and_Large_Donors_in_New_York_State_Elections.aspx); ELISABETH GENN ET AL., BRENNAN CENTER FOR JUSTICE, DONOR DIVERSITY THROUGH PUBLIC MATCHING FUNDS (2012), <http://www.brennancenter.org/publication/donor-diversity-through-public-matching-funds>.

¹⁸ MIGALLY & LISS, *supra* note 17, at 12.

¹⁹ A census block group is "a geographic unit created by the U.S. Census Bureau" that "will generally contain between 600 and 3,000 people . . . with an optimal size of 1,500." GENN ET AL., *supra* note 17, at 8. (quoting U.S. Census Bureau, Cartographic Boundary Files: Census Block Groups, CENSUS.GOV, <http://www.census.gov/geo/www/cob/bgmetadata.html> (last visited May 2, 2012)).

²⁰ GENN ET AL., *supra* note 17, at 4,12, figs. 4,5.

than a third from individuals; by contrast, less than 7 percent of contributions to New York City candidates in 2013 have come from special interests, versus over 90 percent from individuals.²¹

Since the enactment of public campaign financing, New York City has not seen another corruption crisis even remotely resembling that of the 1980s. Of course, any system is still vulnerable to bad actors, and New York City is no exception. But the city's reforms have succeeded in making elections more competitive, in allowing candidates to campaign more than they fundraise, and in greatly increasing the influence and voice of small donors who lack access to large sums of money.²²

The scandals of the last few years have taken a toll on the public's faith in State government. We need to be wary of stoking that cynicism. Comprehensive change to our campaign finance system, including small donor public financing, is the systemic change we should be offering. The Brennan Center respectfully urges the commission to make such change a focus of its investigation and recommendations.

²¹ E-mail from Eric Friedman, Director of External Affairs, NYC Campaign Finance Board, to Lawrence Norden, Deputy Director, Democracy Program, Brennan Center for Justice (Sept, 12, 2013) (on file with the Brennan Center); *Candidates Focus on the Voters When Fundraising*, FULL DISCLOSURE (New York City Campaign Finance Board), April 2013, at 1, http://www.nyccfb.info/press/news/full_disclosure/FD_4292013.pdf.

²² See MIGALLY & LISS, *supra* note 17.... Public financing programs in other states have been found to increase voter participation and the competitiveness of elections. See LAURA LOY ET AL., BRENNAN CENTER FOR JUSTICE, MORE THAN COMBATING CORRUPTION: THE OTHER BENEFITS OF PUBLIC FINANCING (2011), <http://www.brennancenter.org/analysis/more-combating-corruption-other-be....>; See GENN ET AL., *supra* note 17.

Appendix A

Repeatedly Extended Tax Breaks

The tax law of New York State contains many tax breaks that single out a narrow industry. Several of these tax incentives have sunset provisions written into them – language that makes the provision expire on a given date. But for many of these temporary tax breaks, the sun never sets. The legislature extends them over and over, some as many as seven times. The provisions are not made permanent by removing the sunset provision, but rather the expiration date is pushed back by one year or a few years, only to be pushed back again the next time it approaches.

The Brennan Center takes no position on the wisdom of these tax incentives as a policy matter. It is entirely possible that each has a positive impact on the State’s environment, jobs, or economy. But if these provisions are indeed good policy, generating positive results, the legislature should make them permanent.

Instead, what we appear to have in New York is a phenomenon that Professor Rebecca Kysar of Brooklyn Law School has documented at the federal level, where tax sunsets and extensions make it easier “for politicians to more easily extract ... campaign contributions from the parties affected by the threatened provision.”²³ By ensuring a tax break is revisited repeatedly, politicians also make certain that interest groups cannot afford to let their influence wane. The pattern of scheduling the expiration and extension of tax breaks and over and over suggests that their presence in the tax code involves something more than a mere policy choice.

The Brennan Center has identified fourteen separate tax breaks that have been repeatedly extended over the last several years. They are all provided to industries that are significant sources of campaign contributions in New York State: real estate development, financial services, gambling, film production (four tax credits), and energy (seven tax credits).

Investment tax credit for the financial services industry

Extended three times since 2002

In 1998, the legislature authorized a tax credit to encourage investment by the financial services industry. It allows businesses and individuals to claim a credit for certain property, including buildings, that is “principally used in the ordinary course of the taxpayer’s trade or business as a broker or dealer in connection with the purchase or sale” of securities.²⁴ In order to be eligible for the credit, taxpayers must also meet certain requirements regarding the number of people they employ in New York State.

The 1998 law contained a sunset provision: the credit only applied to property placed into service before October 1, 2003.²⁵ But the sun has never set on this tax break; the legislature has inserted extensions preserving the tax credit for varying lengths of time in three budget bills since the tax credit was created. In 2002, the legislature extended the deadline five years, to

²³ Rebecca M. Kysar, *The Sun Also Rises: The Political Economy of Sunset Provisions in the Tax Code*, 40 GA. L. REV. 335, 340 (2006).

²⁴ N.Y. TAX LAW § 210(12)(b)(i)(D).

²⁵ S. 6094B (1998), Section 124(2)(c) of Part A of Ch. 56 of the Laws of 1998.

2008.²⁶ When 2008 arrived, the sunset was extended by three years to 2011.²⁷ Most recently, Albany gave the securities industry another four years to enjoy its tax credit, until 2015.²⁸

According to the State Division of the Budget and the Department of Taxation and Finance, this tax credit cost the state \$33.6 million in 2009, and it is estimated to amount to \$30.4 million in lost revenue this year.²⁹

The financial industry is one of the biggest sources of political donors for New York's elected officials. The insurance, financial, and banking industry is the third largest political contributor of New York's business sectors.³⁰ Narrowing the category to securities and investment firms, these interests gave more \$3 million in 2012 and \$8.2 million in 2010.³¹ In the 11 years that the expiration of the investment tax credit has periodically approached only to be moved back, investment firms, their leaders, and their PACs have given large amounts to New York's elected officials and the committees that support their reelection.

Yearly reauthorization of lower pari-mutuel tax rates

Extended seven times since 2007

Over the course of the 1990s, a series of bills lowered the pari-mutuel wagering tax rates, which had been as high as 7.5 percent of the betting pool for some types of bets. Legislation from 1999 established a rate of 2.6 percent for less than seven months, to be followed by a 1.6 percent rate that was set to be effective between April 1, 2001 and December 31, 2007.³² A one-year extension of the lower rate was enacted in 2007, and every year since then has seen another one-year delay of the sunset.³³ This tax rate has been the policy of the state for twelve years, but for most of that time, there has been a constant threat that Albany would let it expire. Year after year, the legislature effectively pronounces that the rate will only last until the next December, only to change its mind again the next year.

The entertainment industry, which includes horseracing interests, ranks seventh for political giving among New York businesses.³⁴ The horseracing industry makes disproportionately large political donations in New York, considering its share of the state's economy. Racino interests

²⁶ A. 9762B (2002), Section 5 of Part V of Ch. 85 of the Laws of 2002.

²⁷ S. 6807C (2008), Part YY-1 of Ch. 57 of the Laws of 2008.

²⁸ S. 2811 (2011), Part E of Ch. 61 of the Laws of 2011.

²⁹ N.Y. DIVISION OF THE BUDGET & DEP'T OF TAXATION AND FINANCE, ANNUAL REPORT ON NEW YORK STATE TAX EXPENDITURES: 2013-14 STATE FISCAL YEAR 145 (2013), <http://publications.budget.ny.gov/eBudget1314/fy1314ter/TaxExpenditure2013-14.pdf>.

³⁰ NYPIRG, CAPITAL INVESTMENTS 2012: ANALYSIS OF CAMPAIGN FUNDRAISING THE 2012 ELECTION 8-9 (2013), <http://www.scribd.com/doc/119322900/Capital-Investments-2012>.

³¹ Nat'l Inst. on Money in State Politics, *New York 2012*, http://www.followthemoney.org/database/state_overview.phtml?s=NY&y=2012; Nat'l Inst. on Money in State Politics, *New York 2010*, http://www.followthemoney.org/database/state_overview.phtml?s=NY&y=2010.

³² N.Y. RACING, PARI-MUTUEL WAGERING AND BREEDING LAW § 238(1)(a).

³³ Most recently, the lower rate was reauthorized until December 31, 2014. A. 3009D (2013), § 9 of Part U of Ch. 59 of the Laws of 2013. Several other provisions governing pari-mutuel businesses have been subject to the same annual extensions of their sunsets.

³⁴ NYPIRG, CAPITAL INVESTMENTS 2012: ANALYSIS OF CAMPAIGN FUNDRAISING THE 2012 ELECTION 8-9 (2013), <http://www.scribd.com/doc/119322900/Capital-Investments-2012>.

contributed \$2.5 million to political campaigns in the state between 2005 and 2012, and another \$2.4 million to the Committee to Save New York.³⁵ In addition, horseracing interests other than the racinos contributed \$2.2 million during that period.

Film and commercial production tax credits

Extended three times since 2006

In 2004, the Empire State Film Production Credit was created, allowing film and television productions in New York State to claim a credit for a percentage of their production costs.³⁶ The tax credit was scheduled to expire in four years.³⁷ It was extended twice, in 2006 and 2008. The legislature eliminated the provision that the law “shall expire and be deemed repealed” in 2010, although it maintained a sunset by providing funding for the credit only until 2014.³⁸ Another tax credit for post production costs was also added, subject to the same funding sunset as the main film production credit. This year, the funding for these credits was extended to 2019, and an additional tax credit for wages paid in certain counties was added that will expire in 2019.³⁹

In 2006, the legislature created a similar credit for the production of commercials.⁴⁰ The law contained a sunset date of December 31, 2011.⁴¹ The credit actually expired at that time, but it was resurrected a few months later in budget legislation, which extended it for another three years.⁴² The current expiration date is January 1, 2015.⁴³

The State Division of the Budget and the Department of Taxation and Finance estimate that the four film and commercial production tax credits will cost the state \$374 million in 2013.⁴⁴

As noted above, the entertainment industry is one of the main sources of business donations to politics; the industry gave \$1.6 million in the 2011-2012 election cycle.⁴⁵ Just a handful of the film and television production companies that have benefited the most from the film production credit have together given over \$400,000 since it was first enacted.

Lower tax rate on conveyances of real property to real estate investment trusts

Extended seven times since 1996

³⁵ COMMON CAUSE/NY, STACKING THE DECK: THE GAMBLING INDUSTRY’S POLITICAL SPENDING IN NEW YORK STATE 2 (2012), <http://www.commoncause.org/atf/cf/%7BFB3C17E2-CDD1-4DF6-92BE-BD4429893665%7D/Gambling%20Report%20-%20Final.pdf>.

³⁶ N.Y. TAX LAW § 24.

³⁷ S. 6060B (2004), Section 9 of Ch. 60 of the Laws of 2004.

³⁸ A. 9710D (2010), Section 11 of Part Q of Ch. 57 of the Laws of 2010.

³⁹ S. 2609D (2013), Sections 3, 7 of Part B of Ch. 59 of the Laws of 2013.

⁴⁰ N.Y. TAX LAW § 28.

⁴¹ A. 6460 (2006), Section 10 of Part V of the Laws of 2006.

⁴² A. 9059D (2012), Section 7 of Part I of Ch. 59 of the Laws of 2012.

⁴³ A. 9059D (2012), Section 7 of Part I of Ch. 59 of the Laws of 2012.

⁴⁴ N.Y. DIVISION OF THE BUDGET & DEP’T OF TAXATION AND FINANCE, ANNUAL REPORT ON NEW YORK STATE TAX EXPENDITURES: 2013-14 STATE FISCAL YEAR 147 (2013), <http://publications.budget.ny.gov/eBudget1314/fy1314ter/TaxExpenditure2013-14.pdf>.

⁴⁵ NYPIRG, CAPITAL INVESTMENTS 2012: ANALYSIS OF CAMPAIGN FUNDRAISING THE 2012 ELECTION 8-9 (2013), <http://www.scribd.com/doc/119322900/Capital-Investments-2012>.

In 1994, the state created a preferential rate for conveyances of real property to real estate investment trusts, half the rate for other conveyances.⁴⁶ A real estate investment trust (“REIT”) is a corporation, trust, or association owned by 100 or more people whose primary purpose is to invest in real estate, as defined by the sources of its income and the types of assets it holds.⁴⁷ This special rate was scheduled to expire two years later, on July 1, 1996. The first extension, passed in 1996, was for only two months.⁴⁸ Since then, the sunset has been extended six times, for three years each time.⁴⁹ This preferential rate is estimated to mean that \$1.2 million less will go into state coffers in the 2013-2014 fiscal year.⁵⁰

The real estate development and construction industry is the most openhanded part of New York’s business sector when it comes to political giving. Interests from the industry gave more than any other business category in recent election years: \$13.8 million in 2010 and \$7.5 million in 2012.⁵¹

Alternative fuels

Extended twice since 2011

New York State provides seven distinct tax incentives to certain forms of alternative fuels for use in motor vehicles: compressed natural gas, hydrogen, and fuel that is 85 percent ethanol (“E85”) or 20 percent biodiesel (“B20”).⁵² They are:

1. sales tax exemption for E85, compressed natural gas, and hydrogen
2. sales tax exemption for B20
3. petroleum business tax exemption for compressed natural gas and hydrogen
4. petroleum business tax exemption for E85
5. petroleum business tax exemption for B20
6. reimbursement for sales tax paid by a purchaser for E85
7. reimbursement for sales tax paid by a purchaser for B20

These exemptions originated in a budget bill from 2006, and they were scheduled to expire on September 1, 2011.⁵³ A 2011 budget bill extended them for one year.⁵⁴ Most recently, the 2012

⁴⁶ S. 8599, A. 11854 (1994), Section 300 of Ch. 170 of the Laws of 1994.

⁴⁷ N.Y. TAX LAW § 1402 (incorporating definition in 26 U.S.C. § 856).

⁴⁸ S. 7554 (1996), Section 1 of Ch. 94 of the Laws of 1996.

⁴⁹ S. 7946, A. 11319 (1996), Sections 429, 430 of Ch. 309 of the Laws of 1996; S. 6110, A. 9019 (1999), Section 1 of Part G of Ch. 407 of the Laws of 1999; A. 9762B, S. 6260B (2002), Section 1 of Part K of Ch. 85 of the Laws of 2002; S. 6460 (2006), Section 1 of Part J of Ch. 62 of the Laws of 2006; A. 10766 (2008), Section 1 of Ch. 416 of the Laws of 2008; A. 6274 (2011), Section 1 of Ch. 493 of the Laws of 2011.

⁵⁰ N.Y. DIVISION OF THE BUDGET & DEP’T OF TAXATION AND FINANCE, ANNUAL REPORT ON NEW YORK STATE TAX EXPENDITURES: 2013-14 STATE FISCAL YEAR 143 (2013), <http://publications.budget.ny.gov/eBudget1314/fy1314ter/TaxExpenditure2013-14.pdf>.

⁵¹ NYPIRG, CAPITAL INVESTMENTS 2012: ANALYSIS OF CAMPAIGN FUNDRAISING THE 2012 ELECTION 9 (2013), <http://www.scribd.com/doc/119322900/Capital-Investments-2012>; NYPIRG, CAPITAL INVESTMENT\$ 2010: ANALYSIS OF CAMPAIGN SPENDING IN THE 2010 NEW YORK ELECTION 11 (2011), <http://www.scribd.com/doc/46213253/Capital-Investments-2010>.

⁵² N.Y. Tax Law §§ 289-c(1-a)(d), 301-b(a), 301-c(n), (o), 1102, 1111(n), 1115(a)(42).

⁵³ S. 8471 (2006), § 19 of Part W-1 of Ch. 109 of the Laws of 2006.

budget extended the tax breaks for two years, until September 1, 2014.⁵⁵ The exemptions of these alternative fuels from the petroleum business tax are estimated to cost a combined \$6.7 million this year.⁵⁶

The energy industry gave more than \$800,000 in political donations in the 2011-2012 cycle.⁵⁷ Because compressed natural gas is one of the fuels exempted from the sales and petroleum business taxes, the natural gas industry benefits from the alternative fuel tax incentives. Donors connected to natural gas drilling have given over \$14 million to state and local candidates and parties since 2007.⁵⁸

⁵⁴ S. 2811C (2011), Part L of Ch. 61 of the Laws of 2011.

⁵⁵ A. 9059D (2012), Part D of Ch. 59 of the Laws of 2012.

⁵⁶ N.Y. DIVISION OF THE BUDGET & DEP'T OF TAXATION AND FINANCE, ANNUAL REPORT ON NEW YORK STATE TAX EXPENDITURES: 2013-14 STATE FISCAL YEAR 126-27 (2013), <http://publications.budget.ny.gov/eBudget1314/fy1314ter/TaxExpenditure2013-14.pdf>.

⁵⁷ NYPIRG, CAPITAL INVESTMENTS 2012: ANALYSIS OF CAMPAIGN FUNDRAISING THE 2012 ELECTION 9 (2013), <http://www.scribd.com/doc/119322900/Capital-Investments-2012>.

⁵⁸ Press Release, Common Cause/NY, "Moreland Monday" Analysis of Pro-Fracking Contributions Raises Serious Issues for Commission to Investigate (July 22, 2013), <http://www.commoncause.org/site/apps/nlnet/content2.aspx?c=dkLNK1MQIwG&b=5287775&ct=13223851>.

Appendix B

BRENNAN
CENTER
FOR JUSTICE

Brennan Center for Justice
at New York University School of Law

161 Avenue of the Americas
12th Floor
New York, New York 10013
212.998.6730 Fax 212.995.4550
www.brennancenter.org

MEMORANDUM

To: Interested parties
From: Brennan Center for Justice
Date: September 5, 2013
Re: Policy recommendations for the Commission to Investigate Public Corruption

This memorandum outlines policy recommendations the Brennan Center believes are necessary to address the public corruption that the Commission has been established to investigate. The Brennan Center believes that New York State's corrupting political culture must be reformed by comprehensive campaign finance reform that increases transparency, gives everyday New Yorkers more say in the political process, and strengthens enforcement of state laws. Most crucially, the Brennan Center believes that the key to transforming Albany's corrupt culture is the adoption of a small donor matching system of public financing, modeled on New York City's successful campaign finance law. Implementing a small donor system for New York State elections will increase civic engagement and electoral competition, and improve public confidence in government. Only by endorsing a system of small donor matching for all State elections can the Commission fulfill its unique opportunity to recommend truly transformative change for New York.

In order to eliminate the shadow of public corruption, conflicts of interest, and ethical misconduct that recent scandals have cast over Albany, the Brennan Center recommends the adoption of the policies listed below. The recommendations are based on our study of the strengths and weaknesses of the public financing system in New York City, as well as campaign finance regulations throughout the nation. Changes like these have dramatically improved the campaign finance systems in New York City, Connecticut, Los Angeles, and other jurisdictions.

A fuller discussion of our proposals follows this outline.

I. Public financing

- A 6-to-1 match of small contributions up to \$175 from natural persons residing in New York
 - Qualifying thresholds that require candidates to raise a certain amount and collect small donations from a certain number of donors (in their district, if applicable) before being eligible for public funds
 - Caps on the amount of public funding each candidate may receive

- A “sure winner” provision to prevent unopposed or only nominally opposed candidates from receiving the full amount of public funds
- A requirement that candidates repay any funds not spent on their campaign
- Dedicated funding streams, backed up by the general fund

II. Enforcement and administration

- A new, independent board to administer the public funding system and enforce all campaign finance laws
 - An enforcement unit within the board with broad investigatory powers
 - Compliance assistance for candidates on a “customer service” model
- Vesting the Attorney General and local district attorneys with power to independently investigate and prosecute alleged violations of campaign finance laws
- Detailed definitions of permissible and prohibited expenditures of campaign funds
- Increased penalties for campaign finance violations, including contribution limits and disclosure requirements

III. Contribution limits

- Lower contribution limits of \$2,000 per election for all candidates
- Treatment of affiliated entities as a single source and definition of LLCs as corporations, to prevent evasion of contribution limits
- Lower limits on contributions to parties
- Regulation of party housekeeping, including contribution limits and detailed definitions of permissible and prohibited expenditures from housekeeping accounts
- Limits on parties’ ability to spend in support of candidates, and to transfer cash to candidates
- Lower contribution limits for lobbyists and contractors doing business with the state (i.e., pay-to-play rules)

IV. Disclosure

- Improved disclosure of outside spending on elections
 - A broader definition of independent expenditures to require disclosure of communications that are the functional equivalent of express advocacy
 - Disclosure of sham issue ads through regulation of electioneering communications
- Increased disclosure from campaigns, including employer information for contributors, more frequent periodic reports, and disclosure of bundlers

I. Public financing

As noted above, we recommend in the strongest possible terms that the centerpiece of campaign finance reform should be a voluntary public funding system that empowers small donors and decreases candidates' reliance on large donors. The system should provide qualified candidates a 6-to-1 public funds match on small contributions up to \$175 from natural persons residing in New York. A multiple match system will lift the voices of regular New Yorkers up and allow candidates to depend on fundraising from the constituents they seek to serve, rather than wealthy special interests seeking government favors. New York City's system has encouraged more people to give to candidates, including people from communities where political giving has been rare, and it has made campaigns more competitive by making it possible for candidates with grassroots support to run.

This year, campaign finance reform bills were proposed by Assembly Speaker Sheldon Silver (A. 4980), Senate Majority Co-leader Jeffrey Klein (S. 4897), and Governor Andrew Cuomo (Program Bill #12).¹ All of these bills propose a public financing system like that described above, except that while the Cuomo bill would match the first \$175, the Silver and Klein bills would match the first \$250.

A. Qualifying thresholds

To ensure that only quality candidates with support among the electorate receive public funds, campaigns should be required to meet small-donor fundraising thresholds in order to participate in the public funding system. All three 2013 bills take this approach, and they have almost identical thresholds. Some of those thresholds are too high, however; they would have disqualified some recent, successful candidates.²

We recommend the following qualifying thresholds, which are based on the candidates' fundraising patterns in recent elections. (These thresholds should be indexed to inflation.)

- Governor: \$300,000 in matchable contributions, and at least 3,000 matchable contributions
- Lieutenant governor, attorney general, comptroller: \$100,000 in matchable contributions, and at least 1,000 matchable contributions
- Senator: \$12,500 in matchable contributions, and at least 125 matchable contributions from residents of the district

¹ Parts of Governor Cuomo's campaign finance reform proposal are set out in Program Bill #4, which would change the State Board of Elections's enforcement mechanism.

² For example, all three bills would require gubernatorial candidates to garner 6,500 contributions. By way of comparison, Governor Cuomo collected donations from 6,473 individuals for his 2010 race, while his opponent Carl Paladino collected only 6,047 individual contributions. The bills would require candidates for comptroller and attorney general to collect 2,000 matchable contributions. Eric Schneiderman collected contributions from only 1,764 individuals in 2010, while Thomas DiNapoli collected only 1,529 individual donations.

- Assembly member: \$5,000 in matchable contributions, and at least 50 matchable contributions from residents of the district

In addition to fundraising thresholds, we recommend that the receipt of public funds be conditioned on candidates' agreement to appear in public debates and a voter guide. It is only fair that candidates receiving public funds give voters meaningful opportunities to learn about them.

B. Funding limits

We recommend that the total amount of public funds available for each candidate should be capped at a reasonable limit, but that participating candidates should not be subject to expenditure limits. Spending limits should be avoided because they would limit participating candidates' ability to run competitive campaigns, especially given the possibility of large outside spending in any given race. Such outside spending could discourage participation in the public funding program if participation imposed a hard cap on spending.

In order to protect the fiscal integrity of the system, campaigns should have a limit on the amount of public funds they can receive, depending on the office sought. These dollar limits should be indexed to inflation to ensure the viability of the system in future years. This is the approach taken by all three 2013 bills, although the specific funding limits differ.

Legislation should require that any public funds not spent on the campaign be returned after the election, and detailed definitions of acceptable campaign expenditures and prohibited uses of campaign funds should be included in reform legislation.

In addition, the system should have a mechanism to limit public funding to candidates in truly noncompetitive races to prevent disbursements of public funds where candidates do not need them. Although all three 2013 bills prohibit candidates who are unopposed from receiving public funds, none has a mechanism to limit funding to candidates with only nominal opposition. The New York City system does have such a mechanism, keeping the disbursement of public funds to a candidate at a relatively low level unless certain indicia of competitiveness are present.³

Finally, the system should have a reliable source of funding. The abandoned property fund provides enough money each year to fund a public financing system many times over. Both the Klein and Cuomo bill provide that abandoned property be used to fund public campaign financing. Other sources of revenue have also been mentioned in proposed bills, such as a surcharge on penalties for securities fraud and a voluntary tax check-off. All these possible sources warrant consideration, but whatever the revenue

³ N.Y. City Admin. Code § 3-705(7). One of the indicia of competitiveness, the amount the opponent has fundraised, was struck down, but the others remain in effect. *Ognibene v. Parkes*, No. 08 Civ. 1335, 2013 WL 1348462 (S.D.N.Y. Apr. 4, 2013).

sources ultimately proposed, any shortfalls should be covered by the general fund to ensure that the system can reliably function.

II. Enforcement and administration

A. Board structure

Meaningful reform requires the creation of a new, truly independent oversight and enforcement body with responsibility for administering the public financing system and enforcing all campaign finance laws. This board should be independent of the State Board of Elections and should have a bipartisan structure to keep it from becoming a political tool. We recommend that members be prohibited from holding elective office and lobbying and be removable only for cause, again to limit the influence of partisan politics. Members should serve terms of five years (or another odd number) to avoid overlap with the state election cycle.

There are various board structures that could guard against partisanship and control of the board by any one elected official. In New York City, the Campaign Finance Board has five members who serve staggered five-year terms and no more than three of whom may be members of the same political party.⁴ A state-level analog would allow each of the four legislative leaders to appoint one member and the governor to appoint the chair in consultation with the majority leader of the senate. A similar model is included in Speaker Silver's bill, albeit without the requirement of consultation with the senate leader. The practical effect would be to give the governor's party a majority on the board, which could invite partisanship in the board's enforcement and regulatory actions.

As an alternative, the board could be composed of an even number of members and split equally between the parties. For example, the board could have six members, one appointed by each of the four legislative leaders, and two appointed by the governor who cannot be enrolled in the same party. Any action taken by a vote of the board would then require a bipartisan majority. In order to avoid bipartisan gridlock in enforcement actions, such a board should appoint enforcement staff empowered to investigate and recommend action. Those recommendations should be deemed approved by the board unless rejected or modified by a majority vote—so that a tie vote results in action rather than inaction. This structure would still risk gridlock on administrative decisions due to the even party split, as the example of the Federal Election Commission shows. A variation which could address this concern would be to have the six members jointly appoint an executive director, who would not vote in enforcement matters, but could cast a tie-breaking vote on administrative matters if the six members dead-locked.

Regardless of the structure of the board itself, it will need staff to investigate violations. The new board should appoint an enforcement counsel and deputy enforcement counsel, who should be members of different political parties, to head an enforcement unit. The enforcement unit should have broad investigatory powers, including subpoena power. It

⁴ See N.Y. CITY CHARTER § 1052.

should be able to investigate campaign finance violations upon complaint or on its own initiative, and make recommendations to the board. The board should be able to accept, modify, or reject enforcement unit recommendations by a public majority vote, but if the board takes no action within a set time—30 or 60 days, for example—the recommendation should be deemed accepted.

Distinct from its enforcement function, the board's administration of the public financing system will require it to assist candidates with compliance. The board should dedicate staff and resources to "customer service" for candidates and their staff members. This will help the system run smoothly and reduce the number of minor and unintentional violations. Enhanced customer service has been an important part of the success of the public financing system in Connecticut, which is highly popular with elected officials. At a minimum, this effort should involve outreach to candidates about requirements, a user-friendly reporting system, and each campaign being assigned a board staff member to contact in case of questions or problems.

The Board should receive adequate funding to develop and use new technologies that will simplify candidate reporting, auditing, and public access to campaign finance data. A proposal for new administrative technology, modeled after the New York City system that, for the first time this election cycle will be all-digital, can be found at www.opencampaignworkinggroup.org.

In addition to a state enforcement unit, the Attorney General and local district attorneys should have the power to independently investigate and prosecute alleged violations of the Election Law. Although we expect the kind of independent and adequately financed board we recommend would vigorously enforce the campaign finance laws, as has been the case in New York City and Connecticut, independent enforcement by prosecutors would serve as a check and ensure that violations do not slip through the cracks.

B. Increased clarity and penalties

To aid enforcement and make it easier for candidates to ensure their own compliance, legislation should better define personal use of campaign contributions by clarifying permissible and prohibited expenditures. Governor Cuomo's 2013 bill provides details defining prohibited expenditures for "personal use."

We recommend that reform legislation substantially increase fines for exceeding contribution limits and violating campaign finance disclosure laws. Campaigns should face strong deterrents to flouting the law. The penalty for failing to file should be increased. Violations that are only currently an A misdemeanor or an E felony should be subject to higher civil penalties, particularly for knowing and willing violations of campaign finance law.

III. Contribution limits

We strongly recommend that New York’s contribution limits be reduced to reasonable levels. The current limits leave an enormous gap between the amount most people can afford to give and the amount the wealthiest are allowed to give, inviting influence-seeking by a few. We recommend reducing the contribution limit to \$2,000 from any source for all candidates, whether or not they participate in the public financing system. These contribution limits should be indexed to inflation, as in the federal system, and should apply to all contributors—including individuals, PACs, and corporate or union entities—except for lobbyists and contractors. As explained in Part C., below, these entities should be subject to lower pay-to-play limits.

Under the proposal for uniform \$2,000 contribution limits, contributions from non-political accounts of affiliated unions, LLCs, LLPs, and corporations should be treated as coming from a single source, to prevent these organizations from evading contribution limits through the use of affiliated entities.⁵ An alternative, fully constitutional approach would be to ban corporate and union contributions entirely. While there are strong policy arguments that would recommend such a proposal, banning these contributions entirely is likely to have the practical result of driving these contributions to outside political groups which are less accountable than candidates.

A. *Limits on contributions to parties and their “housekeeping” accounts*

Limits on hard money to state and local party committees should be lowered to a more reasonable level from the current six-figure ceiling. Contributions to political party committees, irrespective of whether such committees serve the state or local party or clubs, should count toward overall limits on party contributions. Although the Silver bill would not change party contribution limits, the Klein bill places a \$10,000 limit on contributions to parties, and the Cuomo bill a \$25,000 limit.

Even the current high party contribution limits can be evaded through contributions to parties’ “housekeeping” accounts, which are subject to no limits whatsoever. The “housekeeping” exception to party contribution limits allows parties to accept unlimited amounts of money for non-candidate expenditures, which are expenditures “to maintain a permanent headquarters and staff and carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates.”⁶ The prohibition on using housekeeping funds to promote specific candidates is not enforced, however, effectively allowing the evasion of limits on contributions to parties and candidates. The text of the law, if it prohibits anything, seems to prohibit providing housekeeping money

⁵ An example of a single source rule can be found in N.Y. City Campaign Finance Board Rule 1-04(h). Another source of sample language is the federal tax code’s definition of a controlled group of corporations. 26 U.S.C. § 1563.

⁶ N.Y. ELEC. LAW §§ 14-100(5); 14-114(5); 14-124(3).

directly to candidates, but even that has been allowed by the Board of Elections.⁷ The housekeeping provision should be reformed in the following ways:

- Require parties to maintain separate housekeeping committees and accounts.
- Provide a detailed definition of what housekeeping funds may and may not be spent on.
- Expressly provide that spending housekeeping funds to promote specific candidates is a violation of the election law and set down penalties.
- Introduce limits on contributions to housekeeping accounts.

1. Separate housekeeping committees

Currently, the law allows but does not require parties to maintain separate housekeeping committees for the purpose of reporting housekeeping receipts and expenditures.⁸ Parties that accept housekeeping donations should be required to maintain a separate committee with a separate bank account.⁹ Housekeeping donations, currently subject to no contribution limits, should only be allowed to go to housekeeping accounts. These accounts will be prohibited from spending to promote specific candidates.

2. Definition of housekeeping expenditures

Current law does not provide useful guidance as to what types of expenditures housekeeping funds may be used for.¹⁰ A more detailed provision would help the parties ensure they are in compliance and would make enforcement easier. Legislation should include a list of expenditures that are deemed to be promotion of candidates and therefore may not be paid for with housekeeping funds.

Parties should not be permitted to use housekeeping funds for any of the following:

- Transfers of funds to candidates or political committees.¹¹

⁷ “Several election lawyers said that sending money directly from housekeeping accounts to individual campaigns appeared to be illegal. But Lee K. Daghlian, a spokesman for the State Board of Elections, said the law does not specifically prohibit such transfers, so they are permissible in some cases, as long as they do not violate contribution limits.” Michael Cooper, *Political Donations Pour Through Cap in New York Laws*, N.Y. TIMES, Feb. 17, 2005.

⁸ N.Y. STATE BOARD OF ELECTIONS, CAMPAIGN FINANCE HANDBOOK 2012, at 19.

⁹ For example, Texas law excepts donations for party overhead from some contribution rules, but requires that the funds be held in a separate account. TEX. ELEC. CODE ANN. § 257.002.

¹⁰ Parties may spend housekeeping funds “to maintain a permanent headquarters and staff and carry on ordinary activities which are not for the express purpose of promoting the candidacy of specific candidates.” N.Y. ELEC. LAW § 14-124(3).

¹¹ Rhode Island applies a higher contribution limit on donations to parties for “organizational and party building activities” but these funds “shall not be used for contributions to candidates state and local for public office.” R.I. GEN. LAWS § 17-25-10.1(a)(2).

- Communications supporting or opposing a candidate, including Independent Expenditures, Electioneering Communications, and dissemination of campaign materials.
- Campaign expenses, such as:
 - staff salaries, fees, or reimbursements, including travel expenses;
 - office supplies;
 - printing costs;
 - postage; and
 - real estate rental.
- Expenses in connection with an events that benefits a candidate’s campaign, including:
 - entry fees or tickets;
 - invitations or promotional material;
 - sponsorship or ads in an event publication;
 - food or entertainment; and
 - facility or equipment rental.
- Any expenditure deemed to be an in-kind contribution.

3. Violations and penalties

Spending housekeeping funds for the purpose of benefiting specific candidates should be expressly enumerated as a violation of the Election Law by amendment to § 14-126. Violations should be punishable by a fine equal to the amount spent plus up to \$10,000.

4. Contribution limits

Limits on contributions to parties in New York are high—\$102,300 as of 2012—but even these high amounts can be dwarfed by unlimited housekeeping contributions. The housekeeping exception was presumably created to ensure the parties’ ability to keep up their operations and engage in voter outreach without being hamstrung by a cap on contributions. Yet it is unlikely that the parties face any difficulty raising enough funds to meet their overhead costs; parties’ largest expenses probably consist of paid media concerning elections.¹² Reasonable limits on housekeeping contributions would not threaten the parties’ ability to pay for overhead and party-building activities; Cuomo’s bill called for a \$25,000 limit on housekeeping contributions.

B. Party spending

In order to prevent an end run around contribution limits and to preserve the public financing system’s ability to encourage candidates to depend on small donors, party support of participating candidates should be limited. Party transfers to and spending in

¹² “Of the \$53 million donated to party housekeeping accounts since 1999, only about \$45,000 has been spent for voter registration and outreach. Great chunks went for mailings, polls and advertising, especially during election years.” Editorial, *Psst, Want to Buy a Party?*, N.Y. TIMES, Sept. 3, 2006.

support of publicly funded candidates should either be subject to a reasonable ceiling or should be limited to funds that have been raised in small donations consistent with contribution limits for candidates. The Silver and Klein bills both take the first approach, placing dollar limits on party support for candidates, although the amounts are dramatically different.

The second approach would allow parties to set up candidate support accounts. Contributions to these accounts would be subject to the same limits as direct contributions to candidates, but the party could choose how to distribute the funds.

Governor Cuomo's bill combines versions of these two mechanisms: it would place a \$5,000 limit on party spending in support of a candidate but also allow parties to spend an unlimited amount in support of a candidate no more than \$500 from each contributor to the party.

C. Pay to play

In order to address the “pay-to-play” culture of Albany, lobbyists and contractors doing business with the state should be subject to lower contribution limits than other individuals and their contributions should not be matched by public funds. The state should create a “doing business” database to track individuals and entities that would be subject to these limits. New York City's system has these features, as does the system proposed by Senator Klein's bill. Governor Cuomo's bill provides that contributions from lobbyists are not matchable in the public funding program.

IV. Disclosure

New York desperately needs greater transparency for political spending, both of candidates' campaign finances and of outside spending. Information about financial support is vital to voters' ability to evaluate the trustworthiness of the political messages they hear and serves as a signal of political allegiances.¹³

A. Independent spending

All communications to the general public that are designed to influence the outcome of an election should be subject to disclosure regarding the source of the money spent. Because of constitutional limits on government regulation of independent election spending, there are few options available to address the rapidly increasing levels of

¹³ See *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976) (“[Disclosure] allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.”).

outside spending.¹⁴ However, disclosure requirements for independent expenditures have been upheld repeatedly, and should be strengthened.¹⁵

1. Express Advocacy.

The State should require disclosure of Independent Expenditures that contain express advocacy. Currently, New York State Board of Elections regulations require reporting for expenditures that contain the so-called “magic words” of express advocacy—words like “vote for,” “elect,” or “defeat.”¹⁶ Federal rules¹⁷ and numerous Supreme Court cases,¹⁸ however, recognized that even communications that do not use the magic words are the functional equivalent of express advocacy, and are appropriately regulated as such. Accordingly, to ensure that all express advocacy is disclosed, New York should adopt a definition of express advocacy that applies not only to communications that contain the magic words, but also to speech that is susceptible of no reasonable interpretation other than as an appeal to vote for or against a candidate, or to approve or reject any proposed ballot measure or referendum.¹⁹

¹⁴ See *Citizens United v. FEC*, 558 U.S. 310 (2010) (striking down limits on independent expenditures by corporations and labor unions).

¹⁵ See, e.g., *Doe v. Reed*, 130 S. Ct. 2811, 2819-21 (2010); *Citizens United*, 558 U.S. at 368-70.

¹⁶ N.Y. COMP. CODES R. & REGS. tit. 9, § 6200.10(b)(2) (2013).

¹⁷ See 11 C.F.R. § 100.22(b).

¹⁸ The Court blessed disclosure of expenditures that are the functional equivalent of express advocacy in *McConnell v. FEC*, 540 U.S. 93 (2003), *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007), and *Citizens United v. FEC*, 130 S. Ct. 876 (2010). All these cases reflected the recognition that speech which is susceptible of no reasonable interpretation other than as an appeal to vote for or against is considered express advocacy, not issue advocacy—even if it does not use the magic words. See generally, Brennan Center for Justice, *Comment to NYS Board of Elections on Draft Independent Expenditure Regulations*, at <http://www.brennancenter.org/analysis/comment-nys-board-elections-draft-independent-expenditure-regulations>.

¹⁹ Model language for a New York rule can be found in sub-part (b) of the federal definition, 11 C.F.R. § 100.22(b), which defines express advocacy to include any communications that:

(b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because—

(1) The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

(2) Reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action.

2. Electioneering Communications

Because outside spenders frequently choose to run advertisements that avoid express advocacy but include appeals to vote for or against candidates made in the guise of “issue advocacy,” New York should require disclosure of such sham issue ads as Electioneering Communications. Electioneering Communications are communications that refer to a clearly identifiable candidate; that are issued in the months immediately preceding an election; and that are targeted to the candidate’s electorate. At the federal level, Electioneering Communications include television and radio advertisements; in the more than two dozen states with similar laws, Electioneering Communications encompass those and various other media types.

New York should adopt a rule that requires outside groups to report expenditures of more than a given amount on Electioneering Communications.²⁰ Elements of an effective Electioneering Communications rule include the following:

- The rule should define Electioneering Communications as communications that (a) refer to a clearly identified candidate; (b) are distributed to an audience that includes members of the electorate for the office sought by the candidate; and (c) are publicly distributed within the following windows: (i) if referring to candidates for statewide office, within a minimum of 90 days before a primary or general election; or (ii) if referring to candidates for legislative office, within a minimum of 30 days before a primary or 60 days before a general election. There are strong arguments to support reporting windows longer than these 30/60/90 day proposals.
- The rule should apply to advertisements broadcast through television or radio; to advertising in newspapers or other print periodicals with circulation above a specific threshold; to billboards; to paid Internet advertising; and to mass mailings or phone banking that reach an audience above a specified threshold.
- The rule should exempt from disclosure member-to-member communications within membership organizations, except in the case of party committees, constituted committees, political clubs, or other entities organized primarily for the purpose of influencing elections.
- The rule should include an exemption for communications appearing in a news article, editorial, opinion, or commentary, provided that the communication is not distributed via any media owned or controlled by any candidate or political committee.
- The rule should exempt any communication made in any candidate debate or candidate forum, or to promote such a debate or forum, if made by or on behalf of the person sponsoring the debate or forum.

²⁰ In establishing reasonable minimum reporting thresholds, the rule could be crafted to include different reporting thresholds for Electioneering Communications in different races — for example, a higher threshold could be adopted for state-wide races, and a lower threshold adopted for district-based races.

Model Electioneering Communications rules include statutes passed in 2012 in Rhode Island²¹ and Delaware.²²

3. Source Disclosure

New York should also require reporting of the identity of donors who contributed more than \$1,000 to an entity making Independent Expenditures or Electioneering Communications within the year preceding the expenditure, except that such a contribution need not be disclosed if the major donor expressly directs that the contribution not be used for Independent Expenditures or Electioneering Communications. Such a rule would help voters to understand who is actually paying for election advertising nominally sponsored by groups with innocuous, uninformative names.

To ensure that the funders of outside election spending are not able to easily disguise their identities simply by routing donations through one or more shell entities, New York should adopt a rule that “follows the money” to its original source. A useful model for such language can be found in Section 2 of the federal DISCLOSE 2013 Act (H.R. 148). The source disclosure rule should also make clear that multiple contributions shall be treated as contributions from a single source if they are received from any person, persons, or entity who or which establishes, maintains, or controls another entity and every entity so established, maintained, or controlled by the same person, persons or entity.²³

New York’s source disclosure rule should exempt reporting of income from member dues, commercial activity, and investment income that is collected in the ordinary course of business by an entity that makes Independent Expenditures or Electioneering Communications. Model language for such exemptions can be found in the DISCLOSE 2012 Act (H.R. 4010).

4. Sponsor Disclaimers

New York should adopt a rule, similar to the kind of “stand by your ad” disclaimers used in federal elections, for both Independent Expenditures and Electioneering Communications. Such a rule would require disclaimers identifying the top funders whose contributions pay for outside groups’ political spending, if their contributions surpass a specific dollar threshold or represent a percentage of the independent spenders’ budget above a specific threshold. Disclaimers would provide all voters who see the ad with information about its source, reducing the voters’ burden of seeking information.

²¹ R.I. GEN. LAWS § 17-25-3(14).

²² DEL. CODE tit. 15, § 8002(10).

²³ An effective model for such a single source rule can be found in N.Y. City Campaign Finance Board Rule 1-04(h).

It is appropriate for the number of donors required to be listed in a given communication to vary depending on the medium used; for example, it is feasible for a television ad to list the names of more donors in a crawl at the bottom of the screen, while fewer donors could be listed in a radio ad in which the names must be read aloud. Section 3(e) of the proposed federal DISCLOSE 2013 Act (H.R. 148)—which requires identification of the top five donors in television ads and the top two donors in radio ads—provides a useful model, as do state laws adopted by numerous states in recent years. A non-exclusive list of these states includes Alaska, which requires that independent spenders list the top three donors in their ads;²⁴ California, which requires independent spenders to list the top two donors of more than \$50,000;²⁵ North Carolina, which requires printed ads to list the top five donors to the sponsor;²⁶ and Washington State, which requires disclosures of the five donors to have given the largest contributions above \$700.²⁷

B. Campaign contributions

The reporting of campaign contributions should be required to include the full name, home address, and employer or business name and address for each contributor. Donor employer information is vital to the public's ability to evaluate relationships between elected officials and the interests that may seek to influence policy. Campaigns should be required to submit two additional periodic campaign finance reports during the legislative session to reflect contributions given during the budget adoption and review process.

Campaigns should be required to disclose the names and employers of bundlers, again to track the potential of individual bundlers and the industries they represent to influence elected officials or create conflicts of interest. The Silver and Cuomo bills both provide for this.

In addition, the reporting process should be modernized. The use of contemporary technology can make reporting easier for candidates and reduce errors due to data entry from paper forms to electronic databases.

²⁴ ALASKA STAT. § 15.13.090(a)(2)(C).

²⁵ CAL. GOV'T CODE § 84503.

²⁶ N.C. Gen. Stat. § 163-278.39(a)(7)(2013).

²⁷ WASH. REV. Code § 42.17A.320