Statement of

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For the New York State Commission on Public Integrity

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The Brennan Center for Justice[1] thanks the Commission for convening this public hearing. The Brennan Center is a nonpartisan think tank and legal advocacy organization that focuses on democracy and justice.[2] Our remarks here focus briefly on the proposal to amend New York State's lobbyist law.[3]

Disclosure of Lobbyists' Political Consulting, Fundraising and Expenditures Should Be Added to 2010 Legislative Proposal No. 2

The staff legislative proposals to amend the New York State Lobbying Act include 2010 Legislative Proposal No. 2, which would add contributions by lobbyists and their clients to items which must be disclosed on lobbyists' respective bi-monthly and semi-annual reports.

The Brennan Center commends 2010 Legislative Proposal No. 2 as a step in the right direction. Disclosure of contributions by lobbyists and their clients would mirror laws already in place in South Carolina and Utah. [4]

But this proposed reform is incomplete. At the very least, both independent expenditures and contributions should be disclosed by lobbyists and their clients.[5] Under New York Elections Law, "independent expenditures" are not presently reported as a distinct category making it impossible for the public to track them.[6] Independent expenditures are defined at

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[1] The Brennan Center is a registered lobbyist in New York State.

[2] The Center's Democracy Program has been working in the area of campaign finance reform on the federal, state, and local levels since its inception in 1995. The Center was part of the legal defense team in *McConnell v. FEC*, 540 U.S. 93 (2003), in which the U.S. Supreme Court upheld virtually all of the key provisions of the federal Bipartisan Campaign Reform Act of 2002. Center attorneys have also successfully helped to defend numerous challenges to state campaign finance laws throughout the country, including *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000) (upholding low contribution limits in Missouri); *Daggett v. Commission on Governmental Ethics & Election Practices*, 205 F.3d 445 (1st Cir. 2000) (upholding full public financing); *Duke v. Leake*, 524 F.3d 427 (4th Cir. 2008) (upholding judicial public financing). Presently, the Brennan Center is assisting the State of Connecticut in defending the pay to play laws enacted in 2005. *Green Party of Connecticut v. Garfield*, 3:06 CV 01030 (D. Conn).

[3] For specific questions, please feel free to contact Ciara Torres-Spelliscy at 212-998-6025 or ciara.torres-spelliscy@nyu.edu.

[4] S.C. STAT § 2-17-35(A)(8); UTAH STAT. § 36-11-201(3).

[5] REV. CODE WASH. § 42.17.170(2)(c) (requiring reporting of independent expenditures by lobbyists); *see also* Washington Public Disclosure Commission, *Form L-3: Employer's Lobbying Expenses*, http://www.pdc.wa.gov/filers/blank_forms/acrobat/lobbying/pdcl3.PDF.

[6] Linda King, National Institute on Money in State Politics, *Indecent Disclosure Public Access to Independent Expenditure Information at the State Level* A-5 (Aug. 1, 2007), https://www.policyarchive.org/bitstream/handle/10207/5807/200708011.pdf?sequence=1 (finding "While not identified as [Independent Expenditure] committees, all committees supporting or opposing candidates or issues must file reports with the state elections board indicating whether they are authorized or unauthorized by the candidate/issue committee. Those unauthorized are making what amounts to independent expenditures in support or opposition to the candidate but there is no way to distinguish these expenditures due to the manner

the federal level as expenditures which support or oppose a candidate for office which are made without coordination with the candidate who benefits from the expenditure.[7] Often independent expenditures (which are unlimited) dwarf the size of contributions (which are limited). To disclose contributions without disclosing independent expenditures would enable lobbyists and their clients to use independent expenditures as a means to circumvent disclosure provisions on direct contributions.

In addition to reporting campaign contributions, New York State should consider requiring registered lobbyists and their clients meeting the higher threshold for registration to file separate, comprehensive reports detailing their political consulting and fundraising activities. Both New York City and the federal government require these reports.[8] In both cases, these reports are filed via a simple-to-use online system, and the information is almost instantaneously available for inspection by the public on the Internet.

Finally, given the large number of contributors to state races that are corporations and other entities in New York State (one of only 28 states that allow this type of contribution), contributions by affiliates of lobbyists and their clients should also be disclosed, utilizing a meaningful definition of the term "affiliate."

Pay-to-Play Restrictions Would be a More Appropriate Reform

As the Brennan Center has previously explained in reports about New York State's campaign finance law, the state's campaign finance system suffers from systemic weaknesses including: campaign contribution loopholes, some of the highest contribution limits in the nation, weak rules on the personal use of campaign funds and poor enforcement.[9] Given its weak campaign finance system, New York State needs pay-to-play protections to guard against the potential for corruption and the appearance of corruption inhering in the close relationship between elected officials and lobbying organizations. Contribution restrictions that apply to lobbyists, government contractors or highly regulated industries are often known as "pay-to-play" restrictions because they seek to prevent deals whereby contributors "pay" officials for the opportunity to "play" with the government or in a government-regulated arena. Contributions made by or through lobbyists, who meet directly with public officials about legislation or administrative action affecting the lobbyists' clients at the same time they are delivering checks to candidates, raise at least the appearance of corruption.

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in which the state makes information available to the public. The state does not include an 'indicator' in their database as to whether a committee is authorized or nonauthorized and no 'hard copy' list kept.").

[7] An independent expenditure is an expenditure for a communication "expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents." 11 C.F.R. 100.16(a).

[8] *See* http://www.cityclerk.nyc.gov/html/lobbying/law_admin.shtml (New York City lobbying law). At the federal level, registered lobbyists must disclose direct contributions twice per year as well as contributions to presidential libraries, charities, inaugurations, etc.: http://lobbyingdisclosure.house.gov/amended_lda_guide.html#section7.

[9] Ciara Torres-Spelliscy & Ari Weisbard, *What Albany Could Learn from New York City: A Model of Meaningful Campaign Finance Reform in Action*, 1 ALBANY GOV'T L.R.194 (2008) available at www.ssrn.com; Suzanne Novak & Seema Shah, *Paper Thin: The Flimsy Facade of Campaign Finance Laws in New York* (2006), http://www.brennancenter.org/content/resource/paper_thin_the_flimsy_facade_of_campaign_finance_laws_in_new_york/.

Most States Have Restrictions on Contributions from Lobbyists

Contributions from lobbyists raise concerns about the appearance of corruption, given lobbyists' unparalleled access to, and influence over, legislators. As the Supreme Court recognized over fifty years ago, a state's interest in combating corruption can justify special regulations on lobbyists because of their influence on the legislative process. *U.S. v. Harriss*, 347 U.S. 612 (1954) (upholding disclosure requirements for federal lobbyists). The Court described modern legislative process in the following way:

> Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. *Otherwise the voices of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.* This is the evil the [federal] Lobbying Act was designed to prevent.

U.S. v. Harriss, 347 U.S. 612, 625 (1954) (emphasis added).

Moreover, lobbyists frequently make contributions, not because they agree ideologically with the recipient, but in an attempt to purchase influence over elected officials. This is evidenced by the fact that lobbyists have been known to give to both political parties.[10] For example, in the 2008 election cycle in New York State, lobbyist firms Wilson Elser Moskowitz Edelman & Dicker LLP gave $207,024 to Democratic committees and $163,701 to Republican committees; Patricia Lynch Associates gave $43,601 to Democratic committees and $16,166 to Republican committees (while Patricia J Lynch gave an additional $40,350 to Democratic committees and $33,975 to Republican committees); and Greenberg Traurig gave $22,275 to Democratic committees and $32,250 to Republican committees.[11] Therefore, there is ample basis for regulating contributions by lobbyists.

There are a number of options for dealing with pay-to-play regulation of lobbyists. New York State could (1) regulate contributions from lobbyists when the legislature is in session as 21 states have done, (2) regulate contributions from lobbyists and state contractors year round as five states have done, [12] or (3) subject lobbyists and state contractors to lower contribution limits than other contributors, as New York City did in 2007. We believe that the preferable course would be to regulate contributions from lobbyists and their clients year-round, since limits on such contributions during the legislative session could be circumvented once the session has ended.

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[10] *See also McConnell v. FEC*, 540 U.S. 93, 124-125 (2003) (noting "Moreover, the largest corporate donors often made substantial contributions to both parties. Such practices corroborate evidence indicating that many corporate contributions were motivated by a desire for access to candidates and a fear of being placed at a disadvantage in the legislative process relative to other contributors, rather than by ideological support for the candidates and parties.").

[11] National Institute on Money in State Politics, www.followthemoney.org (enter the name of the desired lobbyist firms in the "contributor" field).

[12] Five states have lobbyist pay-to play restrictions. *See* WEST'S ANN. CAL. GOV. CODE § 85702; CONN. GEN. STAT. § 9-610(g); MD. STAT. § 15-714(d)(1)(i); NC GEN STAT. ANN. § 138A-3(30); S.C. STAT. § 2-17-80.

Regulations on Lobbyists Generally Pass Constitutional Muster

Across the nation, state and federal courts have upheld pay-to-play laws as serving to prevent corruption and the appearance of corruption. Over the past few months, a steady parade of cases reaffirmed the value and validity of these protective measures. In New Jersey, the recent *Earle Asphalt Co.* case upheld a state law prohibiting any agency from awarding a large contract to a business that has contributed more than $300 to certain political candidates.[13] *Ognibene v. Parkes* upheld New York City's law subjecting those doing business with the city (including city lobbyists) to lower contribution limits.[14] And *Green Party of Connecticut v. Garfield* upheld Connecticut's ban on contributions and solicitations from lobbyists and state contractors.[15]

Whether a court will uphold a particular "pay-to-play" ban or regulation as constitutional depends upon the reach of the law and the grounds for imposing it. While narrow pay-to-play regulations are generally upheld, *see, e.g., Blount v. SEC*, 61 F.3d 938, 944-48 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations prohibiting municipal finance underwriters from making campaign contributions over $250 to officials who award government underwriting contracts), court decisions on broader pay-to-play regulations (which either extend to more people or apply to a larger range of contributions) have been mixed, depending on the courts' judgments about whether the broader restrictions were necessary to address the potential for corruption.[16]

Conclusion

The Brennan Center recommends that 2010 Legislative Proposal No. 2 be amended to include reporting of independent expenditures and political contributions as well as political consulting and fundraising by lobbyists and their clients. In addition, the legislature should pass a pay-to-play restriction for registered New York State lobbyists to curb corruption and the appearance of corruption in New York politics. Such pay-to-play restrictions could take a number of forms: (1) an in-session contribution ban for lobbyists, (2) a year-round contribution ban for lobbyists or (3) reduced contribution limits for lobbyists.

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[13] *Earle Asphalt Co.*, A-37-08 (N.J. 2009).

[14] *Ognibene v. Parkes*, No. 08 Civ. 1335 (S.D.N.Y. 2009).

[15] *Green Party of Connecticut v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008).

[16] *See N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 718 (4th Cir. 1999) (upholding sessional ban on lobbyist's contributions as constitutional); *Blount v. Sec. Exch. Comm'n*, 61 F.3d 938, 946-47 (D.C. Cir. 1995) (upholding constitutionality of SEC regulations that prohibit municipal finance underwriters from making campaign contributions over $250 to officeholders who award government underwriting contracts); *Wachsman v. City of Dallas*, 704 F.2d 160, 173 (5th Cir. 1983) (upholding City charter provision prohibiting contributions by City employees to City council elections); *Green Party of Conn. v. Garfield*, 590 F. Supp. 2d 288 (D. Conn. 2008) (upholding lobbyists' and state contractors' contribution and solicitation bans); *Inst. of Governmental Advocates v. Fair Political Practices Comm'n*, 164 F. Supp. 2d 1183, 1192 (E.D. Cal. 2001) (upholding ban on contributions from lobbyists to offices lobbied); *State v. Alaska Civil Liberties Union*, 978 P.2d 597, 619-20 (Ala. 1999) (upholding a restriction on lobbyists' giving contributions to candidates outside of their own district); *Kimbell v. Hooper*, 164 Vt. 80, 665 A.2d 44, 48 (1995) (upholding sessional ban on lobbyist's contributions). *But see Dallman v. Ritter*, No. 09CV1188 (D. Colo. July 17, 2009) (enjoining law which prohibited holders of state contracts over $100,000 from making contributions to candidates for any elected office in the state or in connection with any ballot issue); *DePaul v. Commonwealth*, 969 A.2d 536 (Pa. 2009) (finding that complete ban on political contributions by individuals affiliated with licensed gaming violated the Pennsylvania Constitution); *Fair Political Practices Comm'n v. Superior Ct.*, 25 Cal. 3d 33, 45 (1979) (noting the importance of ridding the political system of corruption but nonetheless striking down as overbroad a state law that banned all contributions from lobbyists).