



**TESTIMONY
OF THE
NEW YORK PUBLIC INTEREST RESEARCH GROUP
BEFORE THE
JOINT HEARING OF THE SENATE FINANCE AND ASSEMBLY WAYS & MEANS
COMMITTEES REGARDING THE
FISCAL YEAR 2017-2018 EXECUTIVE REFORM BUDGET PROPOSALS
January 31, 2017
Albany, N.Y.**

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

Given the unprecedented controversies and scandals that have engulfed both the legislative and executive branches, a sweeping package of reforms is warranted. Generally speaking, we believe that the governor has offered a robust package of reforms that merits serious consideration and, in many cases, approval. However, there is one important area in desperate need of consideration, but which has been ignored in the executive budget plan: the need for *independent* oversight of both the ethics and contracting practices of the state.

Our testimony will review the recommendations of the governor and offer suggestions on how to tackle the issue of independent oversight.

The Executive Budget proposal puts forth various changes to state election and ethics laws, including:

GOVERNMENT OPENNESS

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

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

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

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

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

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

Unfortunately, too often opacity is the hallmark of the Administration. The Committee on Open Government’s long time executive director Robert Freeman says that the current Administration “has been slower and more difficult than any previous administration in responding to formal Freedom of Information requests.”⁴ That has been our experience as well. In addition, the Administration has taken the indefensible position of requiring that state agencies automatically delete emails after 90 days.

It is clear that the executive branch needs to be held much more publicly accountable. We urge that you review the recommendations made by the Committee on Open Government in its 2016 annual report and consider them in your final budget proposal.

The executive’s proposal to allow attorneys’ fees when a person has substantially prevailed and the court finds that the agency denied access in *clear disregard* of the statutory exceptions would tilt the court to denying fees in all but the most egregious cases. The ability to receive attorneys’ fees is important because those seeking government records are also protecting the public’s interest. To ask parties to bear the costs of legitimate court challenges to wrongly withheld records is unfair and bad public policy.

Instead of the governor’s limited proposal, we support the recommendation made by the state’s FOIL watchdog, the Committee on Open Government. The Committee on Open Government summarized its proposal:

To address these concerns, we propose a “two-tiered” approach to the issue. The first tier would *permit* a court to award attorney’s fees when a person denied access “has substantially prevailed and when the agency failed to respond to a request or appeal within the statutory time.” The second tier would *require* the award of attorneys’ fees when a person denied access “has

² Heaney, J., “Secrecy, politics pervade project,” *Investigative Post*, 6/20/15, see: <http://www.timesunion.com/tuplus-local/article/Secrecy-politics-pervade-project-6339837.php>.

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

⁴ Sapien, J., “Capitol Case: Robert Freeman’s Enduring Fight Against Government Secrecy,” *Politico NY*, see: <https://www.propublica.org/article/capitol-case-robert-freemans-enduring-fight-against-government-secrecy>.

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substantially prevailed” *and* the court finds that “the agency had no reasonable basis for denying access.”⁵ [Emphasis in original.]

NYPIRG urges that you boost transparency in New York by significantly strengthening the ability of petitioners to receive attorneys’ fees when they successfully challenge a wrongful denial of access to public records as recommended by the Committee on Open Government.⁶

ETHICS

- **Limiting state legislators’ outside income to 15 percent of their base salary.**

The governor proposes a constitutional amendment to establish Congress-style limits on outside earned income. The governor’s proposal goes a long way toward reducing the obvious conflicts of interest that result from allowing elected officials to have significant outside employment. However, we believe limits on earned income should apply to the Legislature and all statewide offices, instead of only the Legislature. The governor’s proposal tracks the Congressional approach to limiting outside income,⁷ which was an outgrowth of the Watergate scandal and has a proven track record of being effective in removing outside conflicts.

When the Congress adopted its system, it observed that,

“ . . . substantial outside income creates at least the appearance of impropriety and thereby undermines public confidence in the integrity of government officials.”⁸

We agree that this potential conflict exists in Albany and the recent convictions of elected officials underscore how lucrative it can be for lawmakers to inappropriately use the powers of their public office for private gain.

The governor’s proposal mirrors the Congressional in key respects, but should also include a ban on the receipt of advance fees for publishing contracts.

Lastly, we do not believe that a constitutional amendment is necessary to achieve this reform. If the governor and the Legislature agree to advance limits on outside income, we urge that it be immediately put into place through statute; New Yorkers should not have to wait years for action in this area.

⁵ Committee on Open Government, 2016 Report To The Governor and the Legislature, p. 10, see: <https://www.dos.ny.gov/coog/pdfs/2016%20Annual%20Report.pdf>.

⁶ The Committee on Open Government’s FOIL attorneys’ fees proposal has been introduced in both houses as S.2392 (Gallivan) and A.2750 (Paulin).

⁷ We do note, however, that the Congressional model not only restricts the *amount* of outside income, but also restricts the *sources* of outside income, barring the types of work that create conflicts of interest, such as legal and accounting services. See *Serving Two Masters: Outside Income and Conflict of Interest in Albany*, NYPIRG, February 2015. This report may be accessed at http://www.nypirg.org/pubs/outside_income_report_2.23.15.pdf.

⁸ House Bipartisan Task Force on Ethics, Report on H.R. 3660, 101st Cong., 1st Sess. 12.

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- **Creating new financial disclosure requirements for local elected officials who earn salaries of \$50,000 and for county government heads.⁹**

Controversies over public officials having allegedly been involved in unethical conduct has not been unique to Albany; there have been allegations of unethical conduct in local governments as well. Apparently in response, the governor proposes in his executive budget greater ethics disclosures by high-ranking local officials. Unfortunately, our review of the governor's budget provided no additional resources for JCOPE to handle this new responsibility.

As you will read later in our testimony, we believe overhaul of JCOPE is necessary. However, it seems to make sense to provide JCOPE additional resources for new responsibilities.

- **Requiring the Legislative Ethics Commission to produce a formal advisory opinion on Legislators' outside income.**

The governor proposes a process for outside income clearance that involves the Legislative Ethics Commission, plus a member appointed by the Office of Court Administration. We believe that independent oversight is critical and that the LEC's structure is not consistent with needed independence. One curiosity on the governor's proposal: It proposes that the ninth member of the Legislative Ethics Commission be a designee of the state Office of Court Administration, but only for the limited purpose of reviewing outside income applications.

CAMPAIGN FINANCE

New York has long been on notice about the failure of its state's campaign finance law. Nearly thirty years ago, the final report of the Commission on Government Integrity was issued. The Commission's report condemned New York's lax ethical standards calling them "disgraceful" and "embarrassingly weak." The Commission then scolded state leaders for failing to act, "Instead partisan, personal and vested interests have been allowed to come before larger public interests."¹⁰

Yet, steps have not been taken to overhaul the state's campaign finance system. Indefensibly high contribution "limits," coupled with utterly inadequate disclosure requirements and nonexistent enforcement, have created a system that cries out for change, starting with the need for establishing a voluntary system of public financing.

- **Lowering Campaign Contribution limits.**

New York State relies on private donations to fund its political campaigns. Thirty-seven states limit the size of contributions individuals can make to candidates for office. New York's limits - \$60,800 to a candidate for statewide office - are the highest of any of these, and are more than twenty times the limit of the majority of these states.¹¹

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

⁹ NYPIRG also recommends eliminating the 5,000 population minimum threshold for local government lobbying disclosures.

¹⁰ New York State Commission on Government Integrity, "Restoring the Public Trust: A Blueprint for Government Integrity," Volume 1, December 1988.

¹¹ National Conference of State Legislatures, *State Limits on Contributions to Candidates* (June 1, 2012): [http://www.ncsl.org/Portals/1/documents/legismgt/Limits to Candidates 2011-2012v2.pdf](http://www.ncsl.org/Portals/1/documents/legismgt/Limits%20to%20Candidates%202011-2012v2.pdf)

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have business before the government.¹² For example, between 3/5 and 2/3 of all the money entering the political system comes from lobbying firms or their clients.¹³

This system shuts out ordinary New Yorkers. In the 2012 legislative election cycle,

- Only 3.3% of money entering the system came from individual donors who gave aggregate totals of \$250 or less;
- By contrast, 61.7% came from businesses or unions;
- 15.40% came from individuals giving \$2,500 or more;¹⁴ and,
- Only 40,381 individual state residents, or 0.21% of the state's population, donated during this time.

In addition, New York's sky-high contribution levels have fueled a shift away from smaller donors toward reliance on bigger ones. This reliance undermines the public's involvement in a system that can only be described as a money chase.

The Shift from Small to Big Campaign Donors, 2000 Compared to 2012

Contribution Level	% in 2012	Contribution Level	% in 2000
>=\$10,000	28.83%	>=\$10,000	14.60%
<\$10,000, >\$2,500	23.29%	<\$10,000, >\$2,300	20.07%
<=\$2,499, >=\$1,000	17.81%	<=\$2,300, >=\$1,000	19.92%
<\$1,000, >=\$250	18.99%	<\$1,000, >=\$200	29.67%
>\$250	11.09%	>\$200, <=\$100	11.91%
		<\$100	3.84%

The governor's proposal does lower campaign contribution limits. But as seen below, those limits are still too high. NYPIRG urges that limits are lowered to more reasonable levels, such as the maximum donation limit of \$2,600 per election for federal office.

Campaign contribution limits proposed in the Executive Budget¹⁵

Category	Current general + primary limits	Governor's proposal
Statewide	\$60,800	\$25,000
State Senate	\$16,800	\$10,000
State Assembly	\$8,200	\$6,000
State Parties	\$102,300(no limit for housekeeping)	\$25,000 (\$25,000 for housekeeping)

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

¹² See, e.g., NYPIRG, *Albany's Pay-To-Play Culture*, 19 April 2013.

¹³ NYPIRG released analyses of these three regions on April 19, May 30, and May 31, 2013.

¹⁴ NYPIRG, *Capital Investments 2012* (January 7, 2013).

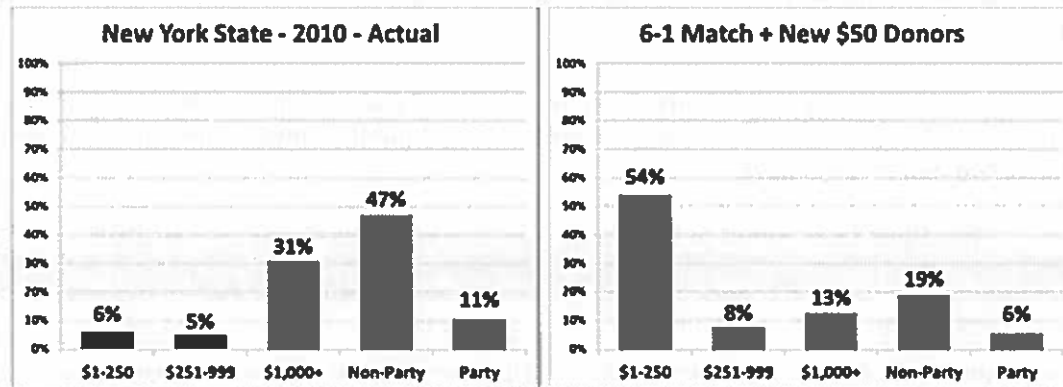
¹⁵ This chart lists the governor's proposed contribution limits for candidates who do not opt into the public financing system.

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

New York State relies on private donations to fund its political campaigns. Since New York State has the highest campaign contribution limits of any state with limits, candidates focus their fundraising on those who can give the most – and those individuals and entities usually have business before the government.¹⁶

Political campaigns in the United States are typically financed by a relative handful of donors. In New York State in 2012, only 6% of candidates' money came from donors who give \$250 or less. In contrast, 78% came from non-party-organizations (such as PACs) and individuals who gave \$1,000 or more.¹⁷



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

That system has shifted the balance from relying on a small number of large donors to a system relying on many small donors. It has given candidates an incentive to turn their attention toward small donors through a program that matches donor contributions of up to \$175 at the rate of 6 to 1. A study by the Campaign Finance Institute showed that a similarly dramatic result would be likely in state elections.¹⁸ It shows that even if matching funds brought no new donors into the system, the role of the small donors under a six-for-one system would shoot up from 6% to 30%. But that 30% number is almost surely too low. It assumes no new donors at all.

New York State's donor participation rate is near the bottom of the country. New York State's candidates for the Legislature in 2012 raised 76% of their money (through the final pre-election disclosure reports) from donors who gave them \$1,000 or more, and from interest groups. Only 8% came from donors who gave \$250 or less.¹⁹ If the match would lead state candidates to attract just enough new \$50 donors to bring participation up to the city's rate, the small donors would be worth 54% of the total amount raised.

¹⁶ See, e.g., NYPIRG, *Albany's Pay-To-Play Culture*, 19 April 2013.

¹⁷ Campaign Finance Institute, "Public Matching Fund System Would Reverse the Importance of Small and Large Donors in New York State Elections," 4/17/12, see: http://www.cfinst.org/Press/PReleases/12-04-17/Public_Matching_Fund_System_Would_Reverse_the_Importance_of_Small_and_Large_Donors_in_New_York_State_Elections.aspx.

¹⁸ *Id.*

¹⁹ Campaign Finance Institute, "Lower Contribution Limits with Public Matching Funds in NY State, Reversing the Role of Small & Large Donors, Would Leave Candidates "Whole" While Costing New Yorkers only \$2/year," see:

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This would be a dramatic change: from 8% to 54%. Small donors would become the most important donor constituency, instead of the least important. If the goal is to connect candidates more strongly with the people they are supposed to represent, the New York City system is the model to emulate.

In sum, a key way to minimize that obvious conflict is to create a system of public financing of elections. New York City has a system of public financing in which candidates who voluntarily opt into the system receive \$6 in a public match for every \$1 raised from small contributions (up to \$175), thus encouraging the solicitation of large numbers of small donors.²⁰ This stands in stark contrast to the state, in which as mentioned earlier, candidates rely on a small number of big donors.

NYPIRG urges support for a voluntary system of public financing.

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

New York exempts from contribution limits donations to so-called “housekeeping” for “party building activities.”²¹ There have been widespread abuses of this exemption. For example, in 2012, the Independence Party admitted to using soft money to pay for ads attacking specific candidates mere days before an election. \$311,000 of the funds used to buy these advertisements came from the Senate Republicans’ housekeeping account.²² Candidates for office must use campaign contributions for all of their administrative costs, why shouldn’t the parties? The housekeeping loophole has allowed donors to circumvent New York’s already-weak campaign limits.

The governor’s proposal places a \$25,000 limit on these donations, but that is still too high. There’s no legitimate basis for the distinction between so-called “hard” and “soft” money donations. New York State must eliminate this loophole and require party and political committees to raise and spend money just like candidates – through direct campaign contributions.

- **Place meaningful limits on campaign contributions from Limited Liability Companies (LLCs).**

The “LLC Loophole,” which treats each Limited Liability Company as an individual for purposes of how much may be donated, has allowed some donors to give well over a million dollars. This exemption is not found in the state’s Election Law. Rather, a 1996 opinion from the state Board of Elections determined that these business entities – creatures of state statute – should be treated as individual human donors, not corporations, for the purposes of calculating contribution limits.

Since the Board’s administrative decision, the role of LLCs in New York’s political system has skyrocketed. In the first six months of 2013, they accounted for 14% of all money raised by state-level candidates and party committees, giving more than three times as much as individuals who wrote checks smaller than \$1,000. While the Board in 1996 claimed the power to interpret this area of election law, when petitioned to reconsider their opinion, they have claimed that they do not have this power, and refuse to revisit the issue. This is true despite the fact that the FEC - which the Board used to justify its 1996 decision – has reversed course.²³

http://www.cfinst.org/Press/PReleases/13-04-01/Updated_CFI_Research_on_Public_Matching_Funds_Proposal_for_New_York_State.aspx.

²⁰ New York City Campaign Finance Board, see:

<http://www.nyccfb.info/candidates/candidates/publicmatchingfunds.aspx>.

²¹ New York State Election Law §14-124(3).

²² Kenneth Lovett, “Independence Party Goes Along With GOP Scheme. . .,” *NY Daily News*, 4 March, 2013.

²³ Federal Register, Vol. 64, No. 132, Monday July 12, 1999 (pp. 37397-37400).

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Through various entities and campaign accounts, real estate developer Leonard Litwin is perhaps the most frequent user of the LLC loophole, and often uses it to give more than \$1 million in a calendar year. In the six months between January 12 and July 11, 2013, Mr. Litwin was able to donate \$1,064,809, more than seven times the legal limit for an individual for an entire calendar year. Some of these donations are unconnected to the LLC loophole, and were the result of *Citizens United* or the housekeeping loophole. He gave \$639,809 in “hard” money directly to candidates.

According to the estimable Wayne Barrett, some \$20 million in campaign donations flows from LLCs into New York campaign coffers.²⁴ As the Moreland Commission pointed out, the LLC loophole obliterates the campaign finance laws, with the Commission noting that one entity used 25 separate LLCs and related entities to make 147 donations totaling more than \$3 million.²⁵

Moreover, we now know that LLCs were at the center of the recent scandals that have rocked state government.

Further, it is often difficult to tell the source of many of these donations by looking at the names of the donors or even performing an internet search. One side effect of the LLC loophole is the obfuscation of the true source of campaign funds. Mr. Litwin is not the only donor who has made use of this loophole. During the first six months of 2013, state-level committees received at least \$4.6 million from donors that used LLCs.

The governor proposes that LLCs be treated in the same manner as corporations – subject to a \$5,000 annual aggregate donation limit. LLCs would also be required to disclose the membership and their proportion of ownership of the LLC, with the proportionate amount of the contribution counting against the owners’ applicable limits. However, “affiliated” LLCs and corporations would be counted as separate entities. Thus, the governor’s restriction is undermined. NYPIRG urges that LLCs and corporations, plus their subsidiaries and affiliates, be subject to one limit.

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

While lobbyists give large amounts of money directly from their personal bank accounts, they can deliver even more through “bundling” money on behalf of their clients. Participants in this practice multiply their political contributions and influence by aggregating checks written by members, clients, or associates. Other governments, notably New York City’s, require committees to disclose which of their donations were bundled and by whom.²⁶ Bundling is a key way in which lobby firms magnify their influence and ingratiate themselves to decision makers.

²⁴ Keeping the cash coming: How Gov. Cuomo, Sen. Jeff Klein and others wound up preserving the LLC loophole, from which their campaigns rake in millions from real-estate interests and others, Wayne Barrett, New York Daily News, June 22, 2016. Accessed at www.nydailynews.com/opinion/wayne-barrett-keeping-cash-coming-article-1.2682589.

²⁵ Preliminary Moreland Report. p. 40. Accessed at <https://www.propublica.org/documents/item/1183017-moreland-commission-report.html>.

²⁶ New York City Administrative Code Section 3-701 (12) defines bundlers as follows: “The term ‘intermediary’ shall mean an individual, corporation, partnership, political committee, employee organization or other entity which, (i) other than in the regular course of business as a postal, delivery or messenger service, delivers any contribution from another person or entity to a candidate or authorized committee; or (ii) solicits contributions to a candidate or other authorized committee where such solicitation is known to such candidate or his or her authorized committee.”

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It is difficult, however, to establish exact numbers reflecting the extent of this process. New Yorkers deserve to know which interests have bought access to their elected officials; complete disclosure of bundling is the only way for them to do so.

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

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

According to Time Warner Cable News, the U.S. Attorney has alleged that LP Ciminelli, Buffalo's largest construction company, paid Todd Howe—who was simultaneously a private lobbyist and on the payroll of the state's Colleges of Nanoscale Science and Engineering (CNSE) —\$100,000 every year since 2013 to become the “favorable company” to develop the projects of CNSE. Moreover, “around the time LP Ciminelli was under consideration for CNSE projects,” Louis Ciminelli, head of LP Ciminelli, hosted a fundraiser for Governor Cuomo's campaign, where \$250,000 was raised.²⁷

Between 2009 and 2014, Ciminelli and his family members donated \$100,000 to Governor Cuomo's election campaign. According to the U.S. Attorney, Howe, with the help of Alain Kaloyeros, the president of SUNY Polytech Institute and the former CEO of CNSE, steered the Buffalo Billion project in the favor of LP Ciminelli.²⁸

According to the U.S. Attorney's office, in count 1 paragraph 2 of USA vs Joseph Percoco, Joseph Percoco, the former Executive Deputy Secretary, solicited money from “companies with business before the State.” In return, it is alleged, Percoco would take official actions that would benefit said companies. In count 2 paragraph 3, Percoco, using his influence as aide to the governor, caused the “Energy Company” to make payments to his wife, in return for favorable official actions that would be taken by Percoco on behalf of the company. In count 3 paragraph 4, Percoco allegedly solicited money from a Syracuse-based real estate developer, in exchange for favorable official actions.²⁹

How “pay to play” laws work and the legal justification:

The notion that those receiving government contracts can be restricted is not a new concept. The Securities and Exchange Commission (SEC), for example, has enacted a pay-to-play rule.³⁰ The rule, under the Investment Advisers Act of 1940, prohibits an investment adviser from providing services, directly or indirectly, to a government entity in exchange for a compensation, for two years after the adviser or an employee or an executive makes contributions to political campaigns of a candidate or an elected official, above a certain threshold.

Moreover, the rule prohibits an investment adviser or an employee or an executive from providing or agreeing to provide payments to a third party, on behalf of the adviser, in order to seek business from a

²⁷ Whalen, R., “Buffalo Billion Executives Fighting Charges After Being Named in Federal Corruption Complaint,” Time Warner Cable News, see: <http://www.twcnews.com/nys/buffalo/crime/2016/09/22/buffalo-billion-executives-named-in-federal-corruption-complaint.html>.

²⁸ Ibid.

²⁹ United States of America v. Joseph Percoco, et al, see: <https://www.justice.gov/usao-sdny/file/895131/download>.

³⁰ Advisers Act Rule 206 (4)-5, addressing pay to play law.

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government entity, unless the third party is a registered broker dealer or a registered investment adviser, in which case the party will be subjected to the pay-to-play restrictions.³¹

Under New Jersey's pay-to-play law, for-profit business entities that "have or are seeking" government contracts are prohibited from making campaign contributions prior to receiving contracts. Moreover, businesses are forbidden from making "certain contributions during the term of a contract." These pay-to-play restrictions apply at "state, county, and municipal levels of government."³²

NJ law requires contributions over \$300 to be reported, and the contributor's name, address and occupation to be identified. A government entity is prohibited from awarding a contract to a business entity, worth in excess of \$17,500, that made a campaign contribution of more than \$300 "to the official's candidate committee or to certain party committees," specifically to committees who are responsible for awarding the specific contracts.³³

However, we do not believe that limits should be placed solely on those seeking government contracts with the executive branch. A number of states place restrictions on campaign contributions from lobbyists, particularly during the legislative session. According to the National Conference of State Legislatures, 29 states have restrictions on campaign contributions during the legislative session. 14 of the states prohibit any and all contributions during the legislative session. 15 states prohibit lobbyists from campaign contribution during session.³⁴

VOTER REGISTRATION

New York State had a Voting Eligible Population (VEP) of nearly 13.7 million³⁵ in 2016. VEP is the most reasonable measure of participation and includes citizens over 18 who are not incarcerated for a felony or on felony parole. However, only 12.5 million New Yorkers were listed by the New York State Board of Elections as either active or inactive voters for the same time period. That means over one million *eligible* citizens were not registered to vote.³⁶ While the comparison of these two datasets is imperfect, it underscores that many New Yorkers who are eligible, are simply not registered to vote.

Simply put, New York's voter registration and voter participation rates are anemic. In the 2016 general election, a stunningly low percentage of registered New Yorkers – under 57 percent –voted. A review of

³¹ United States Security and Trade Commission, "Advisers Act Rule 206(4)-5 (Political Contributions by Certain Investment Advisers)," see: <https://www.sec.gov/rules/final/2010/ia-3043-secg.htm>.

³² New Jersey Campaign Financing and Lobbying Disclosure Election Law Enforcement Commission, see: <https://www.net1.state.nj.us/lpd/elec/ptp/p2p.html>.

³³ New Jersey Business & Industry Associates, "Fast Facts: Complying with New Jersey's 'Pay-To-Play' Law," see: <http://www.njbia.org/docs/default-source/fast-facts/Fast Facts Complying with NJ s Pay to Play Laws.pdf?sfvrsn=0>.

³⁴ National Conference of State Legislatures, "Limits on Campaign Contributions During The Legislative Session," 2011, see: <http://www.ncsl.org/research/elections-and-campaigns/limits-on-contributions-during-session.aspx>.

³⁵ United States Elections Project, *2016 November General Election Turnout Rates*: <http://www.electproject.org/2016g>.

³⁶ New York State Board of Elections, *Voter Enrollment by County*: http://www.elections.ny.gov/NYSBOE/enrollment/county/county_nov16.pdf. The State Board lists 11.5 million New York voters as "active registered" and an additional one million as "inactive voters." Added together, New York State has total of 12.5 million registered voters.

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the U.S. Elections Project analysis, showed New York to be among the six worst eligible voter turnout rates in the nation.³⁷

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

While many dedicated board staff and poll workers worked tirelessly before and on Election Day, the problems many voters faced are systemic. Policymakers need to focus on voter registration, voter education, Election Day operations and the administration of elections reforms or these same problems will continue—to the continuing diminution of our democracy. In 2017, your experience as a voter should be as easy and streamlined as getting coffee at Starbucks.

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

• Enact Same Day Registration.

The state's antiquated system of voter registration is a relic of a bygone era. It serves little purpose other than to help self-perpetuate the re-election of incumbents and limit voter participation. New York should join the states³⁸ offering Same Day Registration through the passage of an amendment to the State Constitution.

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

A system of "Same Day Registration" would dramatically increase voter participation in a state where participation has fallen to shockingly low levels. Electoral participation experts have long concluded that registration "black-out" periods lower voter turnout. One needs to look no further than the states that have same-day or no registration to show how well the system works (participation rates in "same-day" states are traditionally among the highest in the country).³⁹

³⁷ United States Elections Project, *2016 November General Election Turnout Rates*:

<http://www.electproject.org/2016g>. Percentage of "Voter Eligible Population, Total Ballots Counted." Arizona, Arkansas, Hawaii, New Mexico, and Texas all had lower turnouts.

³⁸ For a complete, up-to-date, list of states with same day registration, see National Conference of State Legislatures, <http://www.ncsl.org/research/elections-and-campaigns/same-day-registration.aspx>.

³⁹ Street, A., Murray, T. et al, "Estimating Voter Registration Deadline Effects with Web Search Data Political Analysis (Spring 2015) 23 (2): 225-241.

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

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

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

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

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

- **Amend the State Constitution to enable easier access to absentee ballots.**

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

In an age where some states such as Oregon successfully moved to conducting entire elections via mail, it’s time to rethink the state’s policies with an eye towards expanding absentee voter opportunities as a method of increasing voter participation. While NYPIRG does not have a position on moving to a vote by mail election, Oregon’s past experience shows that widespread use of mailed-in ballots has not resulted in fraud, but has increased overall turnout to among the highest in the nation.⁴⁰

- **Create a single statewide primary election for federal, state and local races.**

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

⁴⁰ Oregon notes that its convenient vote-by-mail system is related to its consistent high voter turn-out rates. See <http://sos.oregon.gov/voting/Pages/voteinor.aspx>.

- **Consider early voting for New York State.**

We are hopeful about the potential to increase the opportunities for voters to participate in elections and the possibility of reducing lines and congestion on Election Day through early voting. However, any provisions for early voting must ensure equal access across the state. In a large urban county, such as Kings (Brooklyn), early voting would undoubtedly benefit some, but if limited to one or two sites, its impact would be relatively negligible in addressing the goal of reducing congestion when a voter goes to cast their ballot. Any early voting model should ensure a ratio of sites and staffing per registered voter, have daytime as well as evening hours, run for a minimum of 10 days as well as ensure that rural voters do not have to travel more than a set distance to reach an early voting site.

One concern in implementing early voting is that there is an advantage to having voters cast their ballots on Election Day: the benefit of additional information about candidates and races. One recent national study funded by the Pew Research Center found that Early Voting was associated with lower turnout. They cited lessened civic engagement “dissipating the energy of Election Day over a longer period of time.”⁴¹

Because of concerns such as these, NYPIRG believes that implementation of Early Voting in New York should only come after a careful consideration of national trends. Questions for the Legislature to explore include: 1) whether New York’s current dismal participation rates would be more likely to benefit from Early Voting than other states’ experience; 2) whether states that experienced any reduction in turnout associated with Early Voting have similar voting hours to New York; and 3) whether Early Voting should be implemented for all elections, or only high turnout races, such as the Presidential or Gubernatorial General Elections.

- **Imposing automatic voter registration upon receiving a New York State driver’s license.**

In the area of voting and elections, the governor’s plan proposes automatic voter registration, a concept that we vigorously support. However, the plan would utilize only the Department of Motor Vehicles (“DMV”) as the agency to be responsible for automatic registration. We strongly believe that such a system must be expanded to all state agencies. As you know, many urban residents, as well as many New Yorkers of modest means, do not seek the services of the DMV. The lowest voter participation rates include just those residents. We urge that this provision to be expanded to all agencies.

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

⁴¹ Burden, B. C., Canon, D. T., Mayer, K. R. and Moynihan, D. P. (2014), Election Laws, Mobilization, and Turnout: The Unanticipated Consequences of Election Reform. *American Journal of Political Science*, 58: 95–109. doi: 10.1111/ajps.12063.

the discriminatory gerrymandering of students and to encourage on-campus poll sites for colleges with dormitory populations.⁴²

TERM LIMITS

- **Imposing term limits on the governor, lieutenant governor, comptroller, attorney general and members of the state Legislature of two four-year terms.** NYPIRG has no position on this issue.

However, we do not view term limits as an ethics reform measure. It would create a “churning” effect on elected offices – candidates would know that certain offices would lack an incumbent, the biggest advantage in running for office.

However, it is not clear that term limits would result in any change in the ethical behaviors of elected officials while in office. As one scholar wrote,

However, legislators in term limited chambers are no less eager than other members to sustain political careers. Because they cannot do so in their own chamber, many of them plan to seek higher office. I found that ambition, which itself fosters fundraising, negated much of the beneficial effect of term limits in lessening the influence of donors.⁴³

WHAT’S MISSING

- **Independent ethics oversight.**

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

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

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

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

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

⁴² Examples of college students being unfairly targeted in elections; see: <http://www.nyclu.org/news/nyclu-dutchess-county-protect-college-students%E2%80%99-voting-rights> and <http://www.nbcnews.com/news/asian-america/ny-attorney-general-raises-concerns-over-challenges-chinese-american-voters-n453801>.

⁴³ Powell, L., “The Influence of Campaign Contributions on Legislative Policy,” University of Rochester, 2013, see: http://www.cfinst.org/pdf/papers/02_Powell_Influence.pdf.

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From the public point of view, ethics watchdogs must be independent of all public officials subject to its jurisdiction; or its actions will always be suspect, undermining the very purpose of the ethics law to promote the reality and perception of integrity in government. The touchstones of independence may be found in commission members of high integrity, who hold no other government positions, are parties to no government contracts, engage in no lobbying of the government, and do not appear before the government in a representative capacity.

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

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

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

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

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

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

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

Designed to be independent, the incessant interference continues. If the next executive director is not hired from outside state government after an exhaustive search, the public trust will be inexorably destroyed.⁴⁴

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

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

⁴⁴ Times Union, see: <http://www.timesunion.com/tuplus-opinion/article/Letter-Ethics-panel-hire-a-questionable-move-6408151.php>.

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

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

There can be no doubt that the state’s ethics watchdogs need a thorough review. Both agencies have been frequently criticized as lacking structural independence and operating in secrecy.⁴⁵ The criticism was at least implicitly validated in JCOPE’s recent policy reform recommendations from February 2015:

“Increasing Transparency and Disclosure. Amend the Executive Law to provide JCOPE with more flexibility to make information public by a vote of the commissioners, including the ability to make investigative findings public if no legal violation is found or if JCOPE determines not to investigate. In addition, consider whether JCOPE’s current exemptions from the ‘Freedom of Information Law’ and ‘Open Meetings Law’ should be modified to increase the transparency of JCOPE’s operations while still protecting the integrity of JCOPE’s sensitive compliance and investigative functions.”⁴⁶

Even when compared to the rest of the nation, New York’s ethics enforcement ranks poorly: In a 2012 comparison of state ethics laws, New York’s ethics enforcement received a grade of “F.”⁴⁷

Reforms

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

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

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

One model is the state of Hawaii, whose Commission has five members chosen from a pool created by Hawaii’s Judicial Council, which nominates two individuals for each vacancy on the Commission. The

⁴⁵ King, H., “Three Years In, New York Ethics Commission Still Looking to Find Footing,” *Gotham Gazette*, 12/18/14, available at: <http://www.gothamgazette.com/index.php/government/5479-three-years-in-new-york-ethics-commission-still-looking-to-find-footing>.

⁴⁶ New York State Joint Commission on Public Ethics, “Report From The New York State Joint Commission On Public Ethics February 2015.”

⁴⁷ The Center for Public Integrity, State Integrity Investigation project, New York State ranking available at: http://www.stateintegrity.org/new_york.

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nominees' names are sent to the governor, who selects one of the nominees for appointment. Senate confirmation of appointees is not required.

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

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

- **Independent oversight of government contracting.**

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

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

We are aware that the governor has made a number of recommendations designed to strengthen *internal* oversight of the executive branch. Those recommendations are no substitute for independent oversight. We strongly urge you to consider the recommendations of the Comptroller in this regard.⁴⁸

You have a real opportunity to strengthen procurement oversight in this budget. Not only has the executive opened the door to debate by offering measures to strengthen its internal procedures, but its economic development programs offer an opportunity as well.

For example, the governor proposes to broadly use the "design build" concept for virtually all state and local agencies. As you know, the design build approach replaces the usual approach of separately bidding out aspects of a project and instead allowing the design and construction services to be contracted by a single entity known as the design-builder or design-build contractor. As you may know, the issue of influencing the design build process to benefit a favored company was identified in one of the U.S. Attorney's investigations.⁴⁹

NYPIRG has no position on which practice is best, but it is our understanding that the executive's plan exempts design build projects from the practice of competitive bidding, as well as transparent pricing disclosures.

Given the scandals triggered by alleged abuse of the state's contracting system, good practice should require widespread use of a competitive bidding system in which contracts are awarded to the lowest responsible bidder and that such contracts and project performance be as transparent as possible.

⁴⁸ New York Office of the State Comptroller, see: https://www.osc.state.ny.us/legislation/2015-16/oscb_nyspia_201516.htm.

⁴⁹ U.S. Department of Justice, U.S. Attorney's Office, Southern District of New York, Charges Against Senator Skelos, p. 39.

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NYPIRG recommends that you combine the expansion of the oversight powers of the Comptroller, restrictions on campaign contributions from those seeking government contracts and an open contracting process as central components of restoring public confidence in the state's use of taxpayer dollars.

Thank you.