**Testimony of**
**Frederick A.O. Schwarz, Jr., Chairman**
**New York City Campaign Finance Board**
**September 29, 2004**
**City Council Committee on Governmental Operations**

Good morning, Chairman Perkins and members of the Committee. I am Fritz Schwarz, chairman of the New York City Campaign Finance Board. Thank you for the opportunity to appear before you on these important issues.

The Council should and, I know, does, take pride in its adoption of the pioneer New York City Campaign Finance Program. The Council, furthermore, should, and, I know, does, take pride in its consistent preservation of this Program over the years by amending it to ensure that changing circumstances and weaknesses exposed during the real-life test of real campaigning are addressed in a timely way.

I am eager to see this continued. I believe that the bills before you today largely support these goals and help maintain the Program as the premier model for similar reform efforts across the country. At the same time, this is very late in the election season to be making changes which require many administrative adjustments and candidate education. I urge the Council, if it seeks to make these changes, to do so without any further delay. Unfortunately, we did not get the text of the current proposals before you until two days ago, which is very late in the process. While we have reviewed the legislation in some detail, nonetheless we have not completed our review and will be supplying additional comments to you.

The purposes of the Campaign Finance Law are, among other things, to maintain an even playing field among candidates as much as is reasonable, to give serious candidates who do not have access to sources of wealth an opportunity to compete in a meaningful way, to allow candidates to compete successfully without reliance on special interest money, to give the public meaningful and timely disclosure of campaign finances, and to inform the public about issues relating to New York City campaigns. At all times, of course, guarding the public fisc must be at the front of our concerns

as we study the potential impact of reform generally and of candidates' use of public funds in particular.

I will describe below the Board's view of the major provisions of the proposed laws. Overall, it represents some good improvements in the current Act.

Before I begin, I want to report that we have a new mayoral appointment to the Board, Katheryn Patterson, who will be with us for our next scheduled Board meeting. We look forward to welcoming her and to her presence on the Board. I would also like to note publicly my appreciation for the service of Fred Cerullo, who was a constructive and enjoyable presence on the Board and who is continuing his service to the city as a member of the NYC Planning Commission. Thus neither Ms. Patterson nor Mr. Cerullo has had any involvement in the comments I will be making today. What I will be saying, on this short notice, represents general consensus of the Board, but without the opportunity of every Board member to examine every detail or agree upon every aspect of the legislation as it now appears before you.

**Provisions in the three bills pending now before the Council that have not thus far received much attention.**

There are proposals in the bill that have thus far not received much attention, but which serve a good government purpose and have been objectives of the Board for years.

Some proposals are broad—like applying the City's timely and effective disclosure rules and contribution limits to all candidates running for City office. Some are very focused—like strengthening the ban on the use of government funds for mass mailings by City officials in the period before an election. Some are intended to save public funds—like reducing public funds payments to candidates who face only minimal opposition.

**1. Imposing Disclosure and Contribution Limits on Non-Participating Candidates**

These bills would apply disclosure and contribution limits to all candidates for the offices of Mayor, Public Advocate, Comptroller, Borough President, and City Council members, including those who do not join the Program. Candidates who do not join the Program would, by definition, not receive public funding. Also, for constitutional reasons, they would not be subject to limits on expenditures, or to limits on their own contributions to their own campaigns.

**a. Equivalent Disclosure for Non-participants.** This change would mean that the public would have available to it detailed and timely computerized financial information about all candidates for the same office, without regard to whether they join the Program. With respect to candidates in the City's Campaign Finance Program, computerized financial disclosure—possibly the most sophisticated in the country—already provides detailed and timely information about candidates' campaign contributions and expenditures, including contributors' employers and occupations and intermediaries (or "bundlers") who deliver the contributions of others to campaigns. This information is made available in searchable format on the Internet within hours of filing with the Campaign Finance Board. However, under current law, candidates not in the Program do not file their disclosure statements with the Board. And the filings they do make elsewhere are less detailed, are not available electronically, and are not audited. As a consequence, the public is unable to subject all candidates for City office to the same degree of public scrutiny. This proposal would serve the public interest by eliminating that discrepancy.

Adequate time will be needed to allow development and testing of new software to implement this bill when it goes into effect. Because participation in the Program cannot be determined until the opt-in deadline, all candidates would be provided with the same candidate software until the deadline passes. This will inevitably mean that some candidates who ultimately do not participate in the Program will initially be using software that has been designed for participants and that requests information that does not apply to non-participants. Special instructions will be given to alert candidates to information that need not be supplied. Immediately after the opt-in deadline, the Board anticipates that it would issue special software for continued filing for non-participants.

**b. Equivalent Contribution Limits for Non-participants.** Overly large political contributions harm the public's confidence in its officials by needlessly increasing the risk or appearance that large contributors can exercise undue influence. The City has an interest in having fair elections, in maintaining the appearance of fair elections, and in providing, to the extent it reasonably can, level playing fields. For these reasons, this proposal lowers the contribution limits from the extraordinarily high limits under State Law that now apply to non-participants and applies to non-participants the corporate ban that participants already operate under.

**2. Restrictions on the Use of Government Resources During An Election Year (Int. No. 124A)**

In 1998, the Council passed a local law prohibiting certain uses of government funds and resources by City employees or officers for political purposes. This bill clarifies the provisions and would strengthen the existing law by lengthening the prohibition on the use of government resources for mass mailings and other mass communications before an election from 30 to 90 days, to be enforced by the Board. Int. 124, the previous version of this bill, would have banned altogether the use of government resources for distributing gifts to promote an office holder's candidacy and would have included a number of other strengthening provisions to regulate this difficult area. The Board is disappointed that these changes were dropped. In addition, the previous version contemplated an enforcement mechanism for all aspects of the section, but the current version does not give enforcement powers for most of its provisions to any agency. Reinstating these previous provisions would go a long way toward leveling the playing field for insurgents. The Board also continues to believe that an enforcement mechanism should exist and that it should reside in the first instance with the Conflicts of Interest Board, which is the agency that has general jurisdiction over the misuse of government resources. The bill also limits potential penalties to the fair market value of the impermissible use without requiring reimbursement to the city. This is unlike most penalties assessed by the Campaign Finance Board, which can run up to $10,000 per violation. Finally, the bill does not give the Campaign Finance Board the authority to determine whether an illegal contribution has been made to the campaign that should also be charged against the expenditure limit. This should be corrected, unless the Council believes this can be accomplished by rulemaking, in which

case that should be stated in the Council's Memorandum-in-Support. Nonetheless, the Board believes that overall the new bill is an improvement over existing law.

**3. Limited Public Funds Payments to Participating Candidates With Minimal Opposition**

A number of Program participants receive maximum public funds for races in which they face only minimal opposition. This can be wasteful of public funds. Under Local Law No. 12 of 2003, amendments were passed in an attempt to address this. Nonetheless, a number of candidates continued to receive full public funding although they won overwhelmingly against opponents who had little financial support. Thus the standards for disbursing public funds proved not to be stringent enough.

The bill attempts to address this problem. Of course, it is clear that the Board cannot, and should not, make subjective findings as to whether races are likely to be competitive. The requirements for getting full public funding have to be objective.

Under current law, there are three ways in which a candidate can get full public funding—provided, of course, that he or she has reached the qualifying threshold and has the necessary matchable contributions. (Otherwise, the candidate may receive only 25% of the maximum allowable in public funds.) The three ways under current law are: (1) having a participating opponent who has qualified to receive public funds; or (2) having an opponent who has raised or spent one-fifth of the spending limit; or (3) submitting a "statement of need" letter requesting public funds notwithstanding an opponent's minimal financial activity. The current law simply requires candidates to state that they need more than 25% of the maximum public funds payment. The Board has no authority to question this.

Although the experience has only been with one level of office for one election, in the 2003 elections these provisions appear not to have been a significant bar to candidates' receipt of public funds when they have only minimal opposition.

In light of this record, the current bill includes several changes. First, the bill eliminates the opportunity to get additional funds by simply submitting a letter of need. Second, the bill eliminates the provision automatically allowing for a full public funds payment when a participant has a participating opponent who has qualified to receive any amount in public funds. Thus, the fact that a participant reaches the modest threshold requirements to receive public funds will not justify an opponent's receipt of up to the maximum allowable in public funds. Additionally, the bill proposes new fixed monetary triggers to establish meaningful opposition under the Act. The current trigger for City Council is $30,000. The proposed triggers are:

(i) mayor, not less than $500,000;
(ii) public advocate and comptroller, not less than $250,000;
(iii) borough president, not less than $150,000;
(iv) member of City Council, not less than $35,000.

The monetary triggers, however, are overcome whenever the participant's opponent is an elected official or former elected official, or one who holds or has held an elected party position. The Board believes this is too broad an exception and will often trigger the release of funds unnecessarily.

The bill also allows for candidates to ask the Board for additional funds when they face an opponent whose name recognition is so great that there is no need for that opponent to make significant campaign expenditures to gain significant votes. The Board supports this exception. Nonetheless, the provisions should be strengthened to address the comments above.

Although imperfect, these changes are aimed at reducing the inappropriate and unnecessary expenditure of public funds. If enacted, they should save the City money.

**4. Restrictions on the Uses of Surplus Funds from Prior Elections**

In order to lessen the unfair competitive advantage enjoyed by candidates who have "war chests", the Board believes that the use of surplus funds from a prior election for an election in which the candidate is a Program participant should be prohibited. This bill does not accomplish

this. The previous version of this bill banned transfers. In response to concerns that imposition of a ban in the 2005 election would be unfair to candidates who had relied on using surplus funds already collected, an exception was contemplated to permit transfers within certain constraints. What remains in this bill is the concept of the exception, but not an ultimate post-2005 ban. This bill continues to permit transfers.

In an apparent attempt, however, to control the funds transferred into a participant's election, the bill places onerous recordkeeping requirements on the candidates and the Board and places a fundraising cost on the money transferred. Indeed, the bill requires that in calculating fundraising costs, the beginning point is to include all expenditures made by the transferring committee as fundraising costs, which is clearly out of proportion to the real costs of fundraising in most cases. The Board is concerned that these constraints will be extremely cumbersome for candidates in an already difficult area, for questionable benefit. The Board continues to support a ban.

**5. Vendors' Contributions Not Matchable**

Some contributors whose contributions are matched with public funds are also vendors to campaigns. When this occurs, the Public Fund effectively reimburses the vendor's contribution. The bill would not prevent vendors from making contributions. But it would end matchability for vendors' contributions, thus eliminating this area of potential abuse.

**6. The Debate Law**

As you know, the debate provisions of the Campaign Finance Act were passed to ensure that the public would have the benefit of seeing major contenders for citywide office meet in a setting that would offer the widest possible audience. The Debate Program has been very successful in achieving this. At the same time, however, many in the public and many potential sponsors of the debates have concluded that their value is diminished by the presence of too many candidates who do not have a meaningful impact on the election. Aspects of the bill should make the Debate Program more attractive to more sponsors by permitting them, based upon objective criteria, to

determine which candidates should be included. Similarly, it is hoped that changes in the Debate Law will make the debates themselves more useful to the public.

The current program provides for two debates for each of the three citywide offices in the primary, again in a run-off, and again in the general election. Thus, a minimum of six debates in the primary and another six in the general election period are administered by the Board. This bill would add another three debates (one for each citywide office) in the primary and another three in the general election period. While many people would argue that more debates are always preferable, and I personally would like to see more of them, the Board is against adding an additional set of mandatory debates that are run under the constraints of the Campaign Finance Act. It is the Board's experience that soliciting sponsors and scheduling debates during an already busy season with many religious and other holidays, as well as potential World Series games, is difficult even under the current law. Many potential debate sponsors do not want to work within the boundaries that the Debate Law requires, thereby reducing the pool of potential sponsors. For example, no advertising is permitted during broadcast debates. The commitment of television stations to these debates therefore represents a substantial monetary investment in this good government program. And the new version of the bill, over the Board's objection, continues to require sponsors to indemnify the City in the event liability arises from the debates. The indemnification requirement has already scared off potential sponsors, particularly small community organizations whose involvement in the process would be invaluable. I am sure that the Council has an interest, as the Board does, in making sure that these debates are seen by as many people as possible. In 2001, a competitive Public Advocate primary was not able to draw <u>any</u> television sponsor. We fear that the Board's ability to deliver quality debates in the widest possible forum will be compromised and that the public will lose meaningful opportunities to learn about the candidates.

The constraints the Board must operate under <u>as a government agency</u> do not exist for independent groups that are willing to host debates. The Council should leave some dates open during an extremely busy time of year for other groups to host their own debates according to different sets of rules.

**7. Recommendations Designed to Improve the Board's Administration of the Program, and Further Protect the Public Fund**

The bill also includes a number of recommendations that would improve the Board's administration of the Program: by further protecting the Public Fund, enhancing disclosure to the public, and ensuring that post-election activities funded by private contributions are limited. These include:

- Allowing the Board to withhold up to 5% of the public funds payment to which a participant would otherwise be entitled until the last payment date for the election. The Board's experience is that some participants fail to comply with Program requirements, particularly the requirement to file complete and timely disclosure statements, once they have received the maximum in public funds. The proposed legislation would create an incentive for continued compliance.

- Requiring that the occupation of a contributor be disclosed if the contributor works for the participating candidate.

- Making a participant ineligible to receive public funds if the Board determines that the participant or his or her authorized committee from a previous election owes penalties or must repay funds to the Board. This proposal clarifies in the law a long-standing Board policy. But, new material in this version of the bill hampers the Boards ability to protect the public fund. The Board agrees that candidates should have notice before there is any withholding. The new requirements would (presumably inadvertently) shift the burden away from the candidate to demonstrate compliance, and effectively require the Board to continue to pay candidates pending final decisions even if potential fraud is at issue. The provision also does not correctly describe Board procedures.

- Amending the transition and inaugural provisions to prohibit transition and inaugural entities ("TIEs") from incurring liabilities after January 31st in the year following the election; allowing self-funding of these activities by the candidate; requiring return of

all unexpended funds to the TIEs' donors; and conforming the disclosure requirements for TIEs to those of the Program.

- The bill does not adequately conform all sections to reflect the longstanding Board practice and courts' interpretation of the law to include the candidate and the committee as liable parties. While the purpose of the law and the Board's rules are clear, wasteful litigation over drafting ambiguities in the law would be avoided if all sections were conformed, sparing the City thousands and thousands of dollars.

**D. Provisions That Have Already Received Substantial Attention**

**1. Two-Tiered Enhanced Matches.**

The bill provides for a change in the "match" of contributions that are $250 (or lower) up to $6-to-$1 in certain extraordinary circumstances. Under current law, the match goes from $4-to-$1 to $5-to-$1 when a candidate outside of the Program raises or spends more than 50% of the spending limit imposed on participants in the Program. This bill retains the $5-to-$1 match and provides for a second tier match at $6-to-$1 when a well-financed opponent raises or spends two times the spending limit.

In addition to having two tiers that serve as a <u>partial</u> leveling of the playing field, the bill proposes to <u>reduce</u> somewhat the relief from the spending limit given to a Program participant when faced by a well-financed opponent. Thus, under current law, when a well-financed opponent raises or spends 50% of the spending limit, a Program participant is wholly relieved from the spending limit. In contrast, under the bill, the Program participant is given an expenditure limit of 150% of the current limit if an opponent triggers the $5-to-$1 match and is not wholly relieved of an expenditure limit until the high spending opponent has raised or spent two times the spending limit.

**2. The Option to be a "Limited Participant".** This Committee previously heard testimony by Nicole Gordon on this recommendation in June of 2003, as well as by me in December 2003. Under this new category, entirely self-funded candidates would be able to join the Program while

continuing to be entirely self-funded. To do so, they would have to agree, among other things, to limit their expenditures to the same level as candidates in the Program. In return for their participation, they would not trigger any bonus for their opponents otherwise applicable under the law.

**E. Proposed Additions**

The Board continues to urge the City Council to adopt other legislative recommendations that are not in the current bill. The Board and many civic groups have urged that the Council extend the ban on corporate contributions to all organizations, including unions. The Board and civic groups have also urged both lower contribution and lower spending limits. Although the proposed legislation contains a mechanism for containing contribution and spending limits in the long term, the Board believes that the limits should be lowered now. Further, the Board asks that the Council adopt a lower public funds maximum for City Council. The maximum public funds payment a Council candidate could receive in 1997 was $40,000. It has now risen to $82,500. In its 2001 post-election report, the Board recommended lowering this maximum to $70,000. The Board recently published its 2003 post-election report, which you all have received, citing additional possible solutions to consider at a future date should the legislation before you not sufficiently address some of the troubling trends the Board has identified through its analysis of the data from both the 2001 and the 2003 elections. In addition, the Board identified issues of continued concern, such as how to account for durable goods, retained by campaign committees after an election.

**F. Conclusion**

The Board always welcomes the Council's interest in strengthening the Campaign Finance Act. The Board prides itself on its ability to carry out its mandates effectively and strives to give candidates as much notice as possible when changes are made to the Act or the Rules. The Board is concerned about candidates' justifiable frustration at late implementation of changes in the law. I would encourage the Council to act immediately if it decides to enact changes applicable to the 2005 elections.

I applaud the Council's efforts to reverse some trends by enacting changes in the current bill. I reiterate that in most respects the proposed bill makes an overall improvement over current law. However, I urge you to make the adjustments recommended by the Board in my testimony to strengthen the Program further.

Thank you for your continued interest in the Campaign Finance Program, and I would be pleased to answer any questions you may have.