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New York City Campaign Finance Board Hearing on "Doing Business" & "Contracting" With the City

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Comments of Paul S. Ryan
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Good morning Honorable Members of the Campaign Finance Board:

My name is Paul Seamus Ryan. I serve as Associate Legal Counsel to the Campaign Legal Center in Washington, DC. I sincerely appreciate this opportunity to testify before you today, regarding your interest in regulation of entities "doing business" and "contracting" with New York City.

In a memo circulated with invitations to this hearing, you posed a series of questions related to this topic. For the sake of efficiency and clarity, I will direct my comments to several of these specific questions.

Courts throughout the United States, including the U.S. Supreme Court, have consistently recognized the threat of real and apparent corruption posed by large contributions to candidates and elected officials. Although some individuals make campaign contributions for ideological reasons, most donors make political contributions to obtain access to public decision makers. These access seekers pose the greatest threat of corruption and—at the core of this group—are entities doing business with the government.

This political-economic reality is not the fault of candidates or contributors but is, rather, the predictable result of a political system that typically forces candidates to raise huge sums of money from private sources to run competitive campaigns. New York City has taken great strides toward remedying this problem by providing partial public financing to candidates. But the City's high contribution limits continue to allow large contributions from entities doing business with the City. This may, at the very least, feed public perception that government is corrupt.

Nevertheless, because candidates here have access to public funding for their campaigns, the City is in the best position imaginable to further address real or apparent corruption in City politics—by prohibiting or strictly limiting contributions and increasing disclosure from entities doing business with the City. Such restrictions are often referred to as "pay to play" regulations and have been adopted by the federal government, the states of New Jersey, West Virginia, Ohio, Kentucky and South Carolina, and by several local governments in California and New Jersey.

You've asked whether contributors—or candidates—should be regulated? The federal government and most other jurisdictions adopting "pay to play" laws have chosen to regulate would-be contributors, rather than candidates. Federal law, for example, prohibits contributions to federal political parties, committees and candidates from any person who enters a contract for which Congress appropriates funds. The prohibition applies from the commencement of contract negotiations until performance of the contract is complete. 2 U.S.C. § 441c(a).

The rationale behind this common approach is that prospective contributors are in a better position to know whether they are doing business with the government, than are candidates. The development of a database of contractors here in New York City may ease the burden on candidates, should the City choose to regulate their activities rather than the activities of contractors. To be certain, the database will be an invaluable tool for enforcing any "pay to play" regulations the City chooses to adopt.

One complicating factor here in New York City, which might dictate the City's approach, is that the Charter authorizes this Board to regulate candidate activities, not contractor activities. This leads to another specific question you've posed.

You've asked whether legislation by the City Council or regulation by the Board is the better avenue for addressing the problem? The Charter appears to grant limited authority to the Board with regard to regulation in this area, leaving City Council legislation as the only open avenue for some types of "pay to play" restrictions.

The Charter provision added by referendum in 1998 authorizes the Board to require disclosure of contributions from entities doing business with the city from any candidates who file disclosure reports with the Board—and to "promulgate such rules as it deems necessary to implement and administer this provision . . . ." N.Y. City Charter Chapter 46 § 1052(a)(11)(a). Under current city law, as amended late in 2004, all candidates for City office are required to file disclosure reports with the Board and, consequently, the Board may require specific disclosure related to contributions from entities doing business with the City from all City candidates.

The same section of the Charter authorizes the Board to "promulgate such rules as it deems necessary to regulate the acceptance by candidates participating in the voluntary system of campaign finance reform of campaign contributions from individuals and entities doing business with the city . . . ." N.Y. City Charter Chapter 46 § 1052(a)(11)(a). By contrast to the Charter-authorized promulgation of disclosure rules for all City candidates, the Board's authority to adopt rules restricting contributions from entities doing business with the City seems to extend only as far as participating candidates.

In other words, under Charter Chapter 46 § 1052(a)(11)(a), the Board may impose "pay to play" disclosure requirements on all City candidates, but may impose "pay to play" contribution restrictions only on candidates participating in the public financing program.

For this reason, the Board might enact "pay to play" disclosure requirements for all candidates through its rulemaking process. The Board should propose to the City Council adoption by local law "pay to play" regulations beyond candidate disclosure requirements, including restrictions on contributions to both participating and nonparticipating candidates from entities doing business with the City.

Should the public financing program, you've asked, offer any benefit to participating candidates who agree not to take money from entities that do business with the City? The current public financing program structure seems sufficiently generous to participating candidates; and the threat of corruption posed by contributions from government contractors exists regardless of whether the receiving candidate is a program participant. Any adopted "pay to play" regulations should not be tied to program participation.

With regard to the question of **whether contributions from entities doing business with the City should be banned entirely or only limited in amount**, my answer depends on the scope of the regulation. The broader the scope, the stronger the reason to limit, rather than prohibit, contributions. The dependence of my answer on the scope of regulation is rooted in legal considerations, rather than policy considerations.

The U.S. Supreme Court made clear in its recent *Beaumont* decision, upholding the federal prohibition on political contributions from corporate treasury funds, that:

> [R]estrictions on political contributions have long been treated as marginal speech restrictions subject to relatively complaisant First Amendment review because contributions lie closer to the edges than to the core of political expression. Thus, a contribution limit passes muster if it is closely drawn to match a sufficiently important interest. The time to consider the difference between a ban and a limit is when applying scrutiny at the level selected, not in selecting the standard of review itself.

FEC v. Beaumont, 539 U.S. 146, 147-48 (2003) (emphasis added). But in its discussion of whether the federal corporate contribution prohibition is closely drawn to match a sufficiently important interest, the Court made clear that the constitutionality of the federal law rested largely on the fact that federal law leaves open an alternative avenue of political participation by individuals related to corporations. Corporations are permitted to form separate segregated political committees and make contributions through these committees.

Should the City choose to block entirely one avenue of political participation through enactment of an outright ban on contributions from one or more identified groups, the City should consciously determine that sufficient alternative avenues of political participation remain open. However, should the city choose to impose an amount limit on contributions rather than an outright ban, then no avenues of political participation will have been blocked.

To put this analysis in more concrete terms, if the scope of the City's "pay to play" regulation is narrow, including only government contractors for example, then an outright prohibition on contributions might be deemed by a court to be closely drawn to match a sufficiently important City interest in avoiding real and apparent corruption.

The more broad the City's regulatory net, the less "closely drawn" it will inherently be. If the City were to cast a very broad net, to include entities seeking land use permits and entities with business before boards of public authorities, for example, then the City might consider imposing an amount limit rather than an outright prohibition on contributions—in order to decrease the burden on First Amendment activity and increase the likelihood of surviving judicial scrutiny.

Furthermore, the **City should determine a dollar value of the business dealings that trigger the "pay to play" regulations**. The New Jersey "pay to play" Executive Order currently in effect, for example, applies only to contracts valued above $17,500. The "pay to play" ordinance

pending in the City of Los Angeles would apply only to contracts valued at $100,000 or more. The federal "pay to play" law does not contain a contract value trigger. Federal contracts, however, always involve large appropriations. Such is not the case at the state and local government level and a contract value trigger seems a wise way to ensure that the regulation is "closely drawn" to an important government interest.

A "pay to play" contribution limit or prohibition should apply to subcontractors and also to agents of the entity doing business with the City, with the term "agent" defined to include officers of the entities, any person who owns three percent or more interest in the entity and any other individual authorized to represent the entity before the City.

Finally, the Board should not allow the ideal or perfect "pay to play" regulation to be the enemy of an attainable "pay to play" regulation. As with all of the laws you administer and implement, "pay to play" laws will inevitably require near-constant fine tuning and adjustment. This Board is known nationwide for its willingness to reevaluate and adjust the City's campaign finance laws on a regular basis. This public hearing is a striking example this quality. Regulation of entities doing business with the City should be approached with the same attitude. The City should consider beginning its "pay to play" regulation with a focus on contractors and lobbyists—regulations of the sort that have been implemented successfully in other jurisdictions. The City may then identify a need to expand its regulations into areas such as land use—areas that have not yet been subject to "pay to play" regulations in other jurisdictions.

I thank you for this opportunity to comment on these important matters of public policy and would be happy to answer, to the best of my abilities, any questions you might have.