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Hearing before the New York City Campaign Finance Board
Re: Pay-to-Play Proposal

Testimony of Craig Holman
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As a former resident of New York City, and currently a campaign finance lobbyist for Public Citizen in Washington, DC, I appreciate the opportunity to offer this written testimony regarding Mayor Michael Bloomberg's proposal to address the problems of "pay-to-play" in city contracting.

Though the culture of "pay-to-play" corruption in government contracting is pervasive among federal, state and local jurisdictions across the country, it usually goes unnoticed by the public, unless uncovered in a sensational FBI sting operation, such as we are now witnessing in Philadelphia. That is why Mayor Bloomberg and the New York City Campaign Finance Board are to be applauded for recognizing and attempting to deal with this pernicious problem that can come at considerable expense to the city – both in terms of tax dollars and public trust in government.

In the context of city contracting, "pay-to-play" is the all-too-common practice of a business entity making campaign contributions to a public official with the hope of gaining a lucrative government contract. Pay-to-play corrupts the government contracting process by awarding city contracts based on campaign contributions rather than merit.

Pay-to-play corruption can present itself in one of two ways: (i) as a business interest making campaign contributions in order to influence decisions by city officials on government contracts, or (ii) as city officials expecting contributions from a business interest in order to be considered for city contracts (as appears to be the case in Philadelphia). Either way, under these conditions, city contracts are not awarded on merit and the taxpayer ultimately pays the price.

Usually, pay-to-play practices do not constitute outright bribery for a government contract. Rather, pay-to-play usually involves a business entity buying access for consideration of a government contract. Nevertheless, the appearance of corruption – and the public cynicism – that arises when the timing of campaign contributions and the

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issuance of government contracts closely coincides warrants some prudent safeguards in government contracting procedures.

Mayor Bloomberg's proposal seeks to offer such reasonable safeguards. The plan begins to move the city in the right direction to address pay-to-play practices, but it has some significant shortcomings that cause the plan to lose sight of its objectives. With a few basic structural changes, the Mayor's proposal could be appropriately modified into an effective pay-to-play policy.

The amendments to the proposal that I recommend include:

1. **Make the pay-to-play policy primarily a reform of government contracting procedures rather than a campaign finance reform.**

Currently, the proposal is offered exclusively as a reform of the city's campaign finance program. Though an effective pay-to-play policy necessarily affects campaign finance practices, there are several inherent weaknesses in establishing pay-to-play restrictions as a campaign finance policy – not the least of which is enforcement.

As a campaign finance law, rather than a government contracting law, the proposal vests authority for ensuring compliance solely with the New York City Campaign Finance Board. Despite the phenomenal leadership the Board has shown in monitoring and enforcing the city's campaign finance program, the Board does not have the authority to cancel government contracts for those found in violation pay-to-play laws or to prohibit violators from seeking future government contracts. At most, the Campaign Finance Board could levy financial penalties for violations of reporting requirements or contribution limits, or – as is the case in the Mayor's proposal – hold candidates financially liable for the violations by government contractors.

This approach misplaces both enforcement authority and liability for pay-to-play infractions.

A fine is not sufficient penalty to prevent a business entity from exercising inappropriate leverage in negotiating a multi-million dollar city contract. Only cancellation of the contract and a suspension of privileges for negotiating future contracts for a specified time period is an effective penalty for pay-to-play abuses. This enforcement action is the authority of the Mayor's Office of Contract Services, not the Campaign Finance Board.

Similarly, by vesting enforcement authority with the Campaign Finance Board, candidates rather than government contractors are held primarily liable for abuses. While any candidate who knowingly solicits and accepts campaign contributions in violation of the restrictions of a pay-to-play policy, or knowingly fails to report such contributions, should be held financially liable for the violations, primary liability should be placed on the government contractor.

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It is the government contractor, not the candidate, who is most capable of knowing how much and to whom it has made campaign contributions. It is also the contractor who ultimately decides whether or not to violate the pay-to-play restrictions. Again, the Mayor's Office of Contract Services is best in the position of holding the contractor liable for transgressions and able to mete out an appropriate penalty against the contractor.

This is not to say that the Campaign Finance Board should play no role in a pay-to-play policy. The Board is the primary agency charged with monitoring campaign contributions. In a well-tailored pay-to-play policy, potential government contractors should declare to the Office of Contract Services that they are in compliance with city contracting procedures, including the restrictions on campaign contributions, and report all campaign contributions to Contract Services, at which point the Campaign Finance Board verifies compliance with campaign finance laws and continues to monitor the campaign finance activities of contractors. The Board should also be vested with the authority to fine candidates who knowingly encourage contractors to violate the law.

It is worth noting at this point that New York City is uniquely capable of ensuring full compliance with a pay-to-play policy because of its system of electronic records of government contractors kept by the Office of Contract Services. Very few jurisdictions across the country keep such records in such an easily-manageable electronic database.

2. Pay-to-play policy should not be tied to the city's public financing program.

Mayor Bloomberg's proposal not only misplaces the focus of pay-to-play policy on campaign finance law rather than on government contracting procedures, it goes even further by tying the policy specifically to the public financing program. The first mis-direction lays responsibility for compliance on candidates rather than contractors; the second lays this responsibility only on some candidates, not all.

Only candidates who participate in the public financing program are required to abide by pay-to-play restrictions. It is ironic and highly inappropriate to hold only publicly-financed candidates – those who generally are less subject to the corrupting influences of special interest money – accountable to a pay-to-play policy. The candidates who opt out of public financing and chase after special interest dollars are the ones most subject to the corrupting influence of government contractor contributions and are most in need of falling under the restrictions of a pay-to-play policy.

Furthermore, limiting the pay-to-play policy to the public financing program places an additional disincentive for candidates to opt in to the program. New York City's public financing program, which strives to clean up city politics, should in no way be a casualty of pay-to-play. A good pay-to-play policy attempts to address corruption wherever it lies.

3. Apply the pay-to-play restrictions prior to awarding of a contract.

The history of pay-to-play culture shows that the attempt to buy favor through campaign contributions usually occurs early and often. Business entities seeking to endear

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themselves to officeholders in a bid for a government contract routinely make campaign contributions *prior* to receiving the contract. Once a contract is received, a pattern of on-going campaign contributions frequently serves to maintain a good rapport with an officeholder to retain the existing contract or to help secure future contracts.

The key to curtailing pay-to-play abuses is to impose restrictions on campaign contributions early in the process – at least with the commencement of contract negotiations – or, more appropriately, for one or two years prior to contract negotiations. The most effective pay-to-play policies on the books are Rule G-37 of the Securities and Exchange Commission and New Jersey's Executive Order 134. Rule G-37 restricts campaign contributions from potential bond buyers for two years prior to the bond sale, and Executive Order 134 restrict contributions from potential government contractors 18 months prior to contract negotiations.

For most contracting negotiations, it is simply too late to stem undue influence from campaign contributions by restricting these contributions *after* a contract has been awarded.

An ideal pay-to-play policy places stringent limits on the amount a business entity may contribute to political party committees, leadership PACs and officeholders ultimately responsible for the awarding of a contract for two years prior to commencement of negotiations. The business entity should be provided a safe harbor under this limit by being given an opportunity to "cure" excess campaign contributions made in this early period by requesting their return. Once a business entity fully engages in negotiations for a government contract, it should then be put on notice that no further campaign contributions are allowed from commencement of negotiations through denial of the contract or one year after termination of the contract. For one year following termination of the contract, campaign contributions should not be permitted as an expression of gratuity for the contract.

4. The threshold triggering pay-to-play restrictions should be increased.

The current proposal appropriately recognizes that the pay-to-play culture extends beyond procurement contracts and into the bond business, real estate transactions and municipal grants. No other jurisdiction offers such a comprehensive pay-to-play program, despite the fact pay-to-play abuses elsewhere in the nation abound in bond bidding,[1] land swaps and redevelopment projects,[2] and the issuance of major government grants.[3]

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[1] See, for example, John Archibald, "Philadelphia Story Raises Questions," *Birmingham News* (Jan. 23, 2005). ["Prosecutors in Pennsylvania are likely done with LeCroy, a former J.P. Morgan Securities Inc. executive who for years has worked with Jefferson County to devise municipal bond deals or swaps. They apparently don't believe he has anything to add to their case against Philadelphia city officials charged with carrying out a "pay-to-play" scheme in which city business was awarded on the basis of friendships, campaign contributions and improper payments. LeCroy was but a bit player in the case there, brought in only after a wiretap of Mayor John F. Street's office uncovered the fraud."]

[2] See, for example, Lawrence Hanja, "Schundler Back's Petty island Preservation," *The Courier* (Jan 7, 2005) ["The political battle over Pennsauken's Petty's Island intensified Thursday as GOP gubernatorial candidate Bret Schundler called for preservation of the island. Taking aim at South Jersey

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However, the triggering threshold for the pay-to-play restrictions seems unusually low, affecting all government deals valued at $1,000 or more. The potential for corruption is not likely to arise for such small government contracts or grants. And such a low threshold will impose burdensome reporting requirements on any number of recipients of small contracts and grants, conceivably even students awarded educational or research grants.

It should not be the objective a pay-to-play policy to capture all these recipients of city support. A higher threshold to activate the pay-to-play restrictions for "substantial" government contracts and grants is more appropriate.

Conclusion

These modifications to Mayor Bloomberg's pay-to-play proposal – making the pay-to-play policy a government contracting reform, disassociating the policy from the public financing program, applying the restrictions prior to the awarding of a contract, and raising the triggering threshold – would strengthen the proposal into a comprehensive policy tailored to address the problematic pay-to-play culture in government contracting. The pay-to-play culture has becoming increasing prevalent as federal, state and local governments play a larger role in the development of the business community. Reasonable regulations on government contracting procedures are well past due.

Many elements of Mayor Bloomberg's pay-to-play proposal are excellent, particularly the expansive definition of business entity to include senior management and lobbyists. The application of the pay-to-play policy to only non-competitive bid contracts, while unnecessarily limited in scope, avoids the present legal squabbles at play between the state of New Jersey and the Federal Highway Administration.[4]

By taking the simple step of divorcing large campaign contributions from government contracts, a well-crafted pay-to-play measure will help ensure public confidence in the integrity of New York City's government contracting process and help avoid the career-ending scandals that have afflicted so many other jurisdictions across the country.

Democratic boss George E. Norcross III, Schundler argued Pennsauken's effort to redevelop the Delaware River island as the centerpiece of a billion-dollar redevelopment project is 'a clear example of pay-to-play' and a 'clear example of what's wrong with the culture of Trenton today.'"]

[3] See, for example, Cathy Franklin, "News," *City News Service* (Oct. 6, 2004) ["McDonald solicited a $50,000 campaign contribution from The Furman Group, which helps its clients, including the WBMWD board, obtain federal funding and grants for infrastructure projects, Smith said. In exchange, McDonald promised an increase in Furman's annual contract fee so that the $50,000 would not come out of the owner's pocket, Smith said."]

[4] In an ill-advised legal challenge, the Federal Highway Administration (FHWA) is attempting to claim that New Jersey's pay-to-play restriction impinges upon federal requirements governing competitive bidding procedures. New Jersey's Executive Order 134 appropriately applies to competitively-bid contracts as well as non-competitively-bid contracts. FHWA is arguing that New Jersey's efforts to prevent bribery and extortion in contracting procedures unfairly limits the pool of competitive bidders where federal highway funds are concerned. *State of New Jersey v. Mineta*, civ. 05-228 (2005).

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