Statement of William Josephson and Peter J. Kiernan

Before the New York City Campaign Finance Board

March 1, 2005

Mr. Chairman and members of the New York City Campaign Finance Board, Ms. Gordon.

Bill Josephson and Peter Kiernan, along with the present New York City Corporation Counsel, Michael A. Cardozo, Esq., were leaders in the efforts of The Association of the Bar of The City of New York to ban campaign contributions by lawyers in return for government engagements. We are happy to appear before this Board to discuss the issue of candidates for City office who accept contributions from those doing business with the City. We appear in our individual capacities and not as representatives of the City Bar.

1. We note that the Mayor's proposal on doing business is a complex disclosure proposal. However, most "pay-to-play" regulation takes the form of prohibitions. This is true, for example, of the ban on United States Government contractors political contributions which now appears in the Federal Election Campaign Act of 1974, as amended, of Municipal Securities Rule Making Board Rule G-37 and of the measures adopted by the legal profession (applicable in New York to all lawyers.) We are hardly opposed to disclosure, but we do think

it material that the precedents for dealing with this activity are prohibitions. Of course, prohibitions may be beyond the jurisdiction of the New York Campaign Finance Board.

2. The Mayor's disclosure proposals depend heavily on the ability of the City to overhaul its Vendex reporting systems. One must be skeptical about the transformation of this system until it occurs. For example, when Bill Josephson took over New York State Attorney General Eliot Spitzer's Charities Bureau in April of 1999, one of his first acts was to try to work out arrangements with the City of New York through the Office of Management and Budget and the Comptroller so that City grants and contracts would not unknowingly be awarded to non-profit organizations which should have been registered with the Attorney General but were not, or which the Attorney General was investigating. Despite a series of meetings, it proved to be impossible for the City to take, what would appear to be, such a simple step in its own interest.

3. If and when it is clear that the Vendex system can accommodate the necessary disclosure regime, public officials must responsibly determine on whom the burden of inquiry should fall. Under the Mayor's proposal, it would fall on all contributors as well as on candidates.

Obviously a sophisticated person or an entity doing substantial business with the City knows that it is, so no disclosure issue is raised. This is one

of the reasons why grantee or contractor political contribution regulation is, as indicated above, usually in the form of a prohibition on the contractor.

We believe that to make all other contributors responsible for determining whether a proposed contribution might raise a doing business issue is an undue burden on a protected First Amendment activity. To do so, for example, probably would be quite beyond the wherewithal of the usual contributor, for example, to a primary candidate for election to the City Council.

The Federal Election Campaign Act of 1974, as amended, and the regulations thereunder, place the burden of determining whether the political contributions are disqualified on the candidate or the candidate's committee. This is where it should be.

4. For a definition of doing business, it would be sensible to start with the definition that now appears in the ethics section of the New York City Charter. There are questions, however, as to the appropriate scope of that definition in this context as the January 31, 2005 testimony of Special Counsel to the Mayor Anthony W. Crowell before the City Council indicates. In any event, there should be a minimum threshold. Resolutions of these issues would seem to be, again, beyond the jurisdiction of the New York City Campaign Finance Board and properly the province of the legislative process.

5. There is a substantial question in our minds as to whether any such regulation should extend to all candidates for City office. Clearly, it should extend to the three elected City-wide offices and to the Borough Presidents. Whether it should extend to candidates for election to the City Council is dubious, except perhaps with respect to the candidacy of an incumbent Speaker or prominent committee chair running for re-election. We note, however, the conumdrums presented by the circumstances of a candidate for council re-election who is widely anticipated to run for citywide office in the immediately following election, or the current citywide office holder running for state or federal office.

6. The application of any such regulation to nonprofit entities also raises issues. Many nonprofit entities are indistinguishable as a practical matter from for-profit entities with whom they compete, for example, banks and credit unions, supermarkets and cooperative food stores, for-profit consulting firms and nonprofit consulting firms. The Internal Revenue Code describes more than a score of entities entitled to apply for exemption from federal income tax including trade associations and labor unions, social clubs and agricultural cooperatives. One cannot deal with the issues each of these entities raise under the simple rubric of nonprofit. Distinctions among nonprofits are required. Increasingly, many nonprofits do the work of government, particularly the delivery of social services. Other nonprofits comprise huge enterprises such as certain hospital consortia. And

some non health care related nonprofits are among the City's major employers. Still others are advocacy groups, some for good government, some for self interest.

7. Attribution issues also should be considered, stockholders of for-profit organizations, controlling or non-controlling; members of nonprofit organizations, controlling or non-controlling; directors or trustees and officers; members of their family, does family include forbearers, descendents, collaterals, and if so, to what degree? Given the desirability in our society of increasing citizen participation in the election of public officers, any regulation in this area must be far more carefully thought through, mindful of the important First Amendment values, than the Mayor's proposed local law appears to have done. Similar questions are presented with respect to a attribution involving nonprofits. Qualified persons should not be discouraged from becoming trustees of nonprofits especially persons who contribute or raise funds for nonprofits, as opposed to those trustees who benefit from them.

8. In this brief presentation we intend primarily to emphasize the complexity and difficulty of this matter. In the effort to achieve an ethical rule prohibiting lawyers from accepting government engagements for two years after the making of political contributions to candidates for government positions that allow its holders to influence legal retainers, many of these issues were encountered, particularly with respect to First Amendment rights and questions of

enforcement. The pay-to-play issue advocacy with respect to lawyers spanned many years and repeated examination at multiple levels by a variety of panels, commissions, associations and institutions.

We applaud and support the intent to limit the practice of pay-to-play and the inefficiency and unfairness it can cause. Yet we urge utmost care and rigorous analysis lest there be an unintended interference with a vigorous political fabric that our most fundamental rights protect and encourage.