Ethics and Governance Reform Transition Policy Group

PREPARED FOR GOVERNOR-ELECT JON S. CORZINE

Final Report

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EXECUTIVE SUMMARY

The group was principally charged with mapping out short- and long-term strategies for implementing the ethics agenda that then-candidate Jon S. Corzine set forth during the campaign. That agenda included a series of sweeping ethics proposals that aim to increase efficiencies in government operations and ultimately restore public confidence in state government. Most notable among the proposals was an independently-elected State Comptroller, a full-time government watchdog rooting out corruption from state agencies down to local school boards. Other proposals included implementing a ban on pay-to-play at all levels of government; strengthening the financial disclosure process; and developing proposals for campaign finance reform, including a ban on so-called wheeling.

The group divided itself into three working groups: one on the Elected State Comptroller proposal (subgroup A); one on government contracting, pay-to-play, and campaign finance reform (subgroup B); and one on financial disclosure and executive branch ethics (subgroup C). The work product of subgroup A does not consist of a report but rather a proposed Constitutional amendment and suggested implementing legislation, and drafts of these are still in progress. Similarly, Executive Order No. 1, which Governor Corzine signed only hours after taking office, embodies the recommendations of subgroup C, especially the recommendation that the financial disclosure requirement of prior executive orders be extended to hundreds of additional officials serving on dozens of governmental bodies. Subgroup C also endorsed pending legislation regarding the State Ethics Commission and procurement that have since been enacted. The report that follows comprises the work of subgroup B.

GOVERNMENT CONTRACTS: AWARDS AND PERFORMANCE/ CAMPAIGN FINANCE REFORM

Money must not be permitted to influence government decision making. This means money in any form, whether campaign contributions or corrupt exchanges.

There is no more important area for money to be excluded than the award and performance of government contracts. Given the multiplicity of governmental units in New Jersey -- state, county, municipal and other local units -- vast amounts of public funds are spent each year to meet public needs and to undertake public projects. We must be on guard to assure that these funds are spent judiciously. That means contracts must be let exclusively on the basis of merit and must be performed honestly and competently.

No single initiative can achieve these goals. What is needed is a combination of legislative and administrative reform initiatives including campaign finance reform, improved procurement procedures, enhanced enforcement of anti-corruption statutes and consideration of legislative amendments to the bribery and gratuity statutes to strengthen the hand of law enforcement. Also needed is a heightened sense of responsibility and ethical awareness by those in public office and to have this state of mind find expression in the process of awarding contracts as well as in the performance of all other official duties. Laws, codes, regulations, while of

course essential and must be put in place, will never be entirely adequate absent individual human commitment to integrity and to honest public performance.

While time and effort are required to achieve necessary results -- reform here is a long-term process -- following are recommendations as to what we believe should be considered:

Campaign Finance

Public Financing

The most comprehensive reform would be to bar private dollars from political campaigns and adopt a system of public financing of elections.[1] Public financing presents complex substantive issues, such as whether primary elections as well as general elections should be covered, and obviously much attention has to be directed toward cost, especially in these troubled fiscal times. We advocate a series of legislative committee hearings to flesh the subject matter out fully and hopefully then to move to implementing legislation. The recent system of full public financing for legislature and statewide elections recently enacted by the Connecticut Legislature could be an instructive program to review.

Short of public financing, we believe: effective pay-to-play prohibitions must be put in place together with collateral reforms dealing with "wheeling"; the permissible amount of campaign contributions must be reduced and the ban applied uniformly; the flow of monies between political organizations which could result in the frustration of campaign contribution limitations must be curtailed; and provision must be made for greater transparency in the identification of contributors to political committees and private public interest entities. There must also be enhanced oversight of the contractual process by law enforcement and administrative agencies.

Pay to Play

P.L. 2005, c.51, codified Executive Order No. 134 (2004). The statute, as the Executive Order, forbids those who receive state contracts from making reportable contributions ($300 or more) to gubernatorial candidates or to state and county political committees. "Wheeling" -- the transfer of political committee funds to other political committees whether local, county or state -- is not addressed by the law.

As to contracts at the county and local level, P.L. 2004, c.19, which took effect January 1, 2006, prohibits one who is awarded a county or local contract from contributing to a candidate for (or a holder of) an office in the governmental body responsible for awarding the contract. The law exempts contracts awarded pursuant to a “fair and open process,” an exemption that has been criticized as too ill-defined. The law goes on to prohibit "wheeling." But the prohibition encompasses only primary elections. Clearly, this is not adequate. "Wheeling"

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[1] We note that in the 2005 Assembly elections, two pilot districts participated in publicly financed "Fair and Clean Elections." An oversight Fair and Clean Elections Commission will soon fix a report evaluating the experiment and offering recommendations for the future.

must be banned for general elections as well. We urge the Legislature to so extend the prohibition. Legislation has been pending (S-119 of 2004-2005) that addresses various campaign financing issues and does impose such a ban. We urge that its enactment receive serious consideration.

We also concur that these prohibitions and restrictions should be applied to campaign contributions by developers who seek land use approvals from municipal or county government. This regulation is proposed in S-214 currently pending in the Legislature and we likewise believe this legislation should receive serious attention.

Other Campaign Finance Reforms

The ceiling on the amount which may be contributed should be lowered. In addition, contributions should be restricted to those made by an individual person. Contributions by corporations or other entities should be prohibited. Transfers between political committees and/or PACs should be prohibited. And transparency, in terms of both the identity and financial commitment of contributors to PACs, political committees and private public service entities, should be improved.

To these ends, we propose the following action:

- require much more information to be disclosed by lobbyists about their clients, their finances and, as stated in a recent New York Times Op-ed, "just who is paying whom and for what." A necessary initiative to make such disclosure meaningful is to make sure ELEC has the investigative and enforcement resources to review the disclosure and take whatever further action concerning them as is necessary.

- ban political contributions by corporations and other business entities to candidate campaigns, similar to the ban under federal law (which, parenthetically, goes back to the Theodore Roosevelt Administration) and thus individualize the process in New Jersey.

- extend this corporate ban to encompass contributions to PACs and to all political party entities including political committees.

- drive down the dollar ceiling for contributions to the campaigns of candidates for public office and make the ceiling applicable to all contributors whether they be individuals, PACs or political party entities including political committees.

- require PACs and all political party entities, including political committees, to adhere to the same dollar ceiling when contributing to a campaign.

- ban transfer of money from "PAC to PAC" and from "political entity to political entity" including from "political committee to political committee" to foreclose the possibility that multiple contributions from different entities funded by the original transferring entity could be made to a political campaign.

- anticipating that public bans might generate contributions to private interest groups such as the 527 organizations which sprang to life on the federal scene in the wake of

McCain/Feingold, require private public interest entities to disclose publicly the names of their contributors and the amounts contributed.

- adopt legislation akin to that recently enacted in Connecticut which requires monies donated to private public interest entities to be counted when the permissible amount of a political contribution is being calculated and thus applied to reduce that amount.

Procurement and Enforcement

To bolster the likelihood that contracts will be awarded on a merit basis and performed with integrity, we suggest:

- Lobbyist participation in the process of awarding contracts by the Division of Purchase and Property and any other state agency should be prohibited and legislation should be adopted, and/or an executive order issued, prohibiting such lobbyist participation.

- No-bid contracts, including professional service contracts, let without competitive bidding should be restricted to situations of absolute and justifiable necessity, and a governmental agency which awards such a contract should be required to prepare, file and publicize a report detailing the facts and factors which established, in the agency's judgment, the need to proceed without competitive bids and the basis upon which the particular awardee was selected.

- An easily available forum should be established for aggrieved parties to contest the award of no-bid contracts.

- Mechanisms for overseeing contractual performance should be established. In this regard, initiatives such as the use of contract managers and the requirement that the contractor submit periodic performance reports, both called for in S-2194 (2004-2005), should be considered. The possible use of private inspectors general should also be considered. The private inspector general concept, and some operational characteristics, were identified in the September 16, 2005 Interim Report of the "Task Force on Independent Authorities Appointed by Senator Jon S. Corzine."

Law enforcement oversight -- and involvement when appropriate -- should be heightened. In this regard, the following existing statutes should be utilized and an effort should be made to reinstate sections of the bribery/gratuity statute which were removed in 2004:

- N.J.S.A. 2C:21-34, enacted in 1999 and amended in 2004, makes it a crime to submit a "claim for payment for the performance of a government contract knowing . . . [it] to be false fictitious, or fraudulent." Subsection c of the same statue makes it a crime to "knowingly . . . [make] a material representation that is false in connection with those negotiations, award or performance of a government contract. N.J.S.A. 56:9-11 expressly applies the State anti-trust statute's criminal penalties to "bid rigging." Both are relatively

easily applied and could be most helpful in pursuing prosecutions where appropriate and, by way of deterrent effect, inducing contractors to perform honestly and well.

- Useful provisions in the bribery/gratuity statute, which aided prosecution of corrupt officials and those who would improperly seek to influence their decisions, were repealed by the Legislature in 2004, should be restored. The repeal makes prosecution more difficult and thus makes it far easier for lobbyists to pay gratuities to public officials and for public officials to accept them.

- The 2004 legislative action removed the criminal prohibition applicable to gifts to public servants, which had been a crime under N.J.S.A. 2C:27-6. N.J.S.A. 2C:27-6 has also made it a crime for a public servant to knowingly and under color of office, directly or indirectly, solicit, accept or agree to accept any benefit not allowed by law [subsection a.], and for a person to directly or indirectly confer or agree to confer any benefit not allowed by law to a public servant [subsection b.], thereby proscribing unauthorized gifts. This provision was jettisoned as well.

The 2004 law also inexplicably decriminalized conflicts of interest involving public servants and public contracts. Before 2004, N.J.S.A. 2C:27-4a(3) made it a crime for a public servant to directly or indirectly receive any benefit from, or by reason of, a contract or agreement entered into by the public servant's employing agency. Obviously, this provision helped ensure the integrity of the contracting process and guarded against conflicts of interest.

The 2004 law also added new elements which increased the burden of proving gratuities under 2C:27-4a(1) and, regrettably, (2) also eliminated coverage for certain conduct. First, the 2004 law added the requirements that the state prove the solicitation or taking of bribes or gratuities was "under color of office" and that the receipt of the dollar benefit was in fact to influence the performance of an official duty. The full practical effect of adding "under color of office" as an element is as yet unclear, but it suggests that the State will be required to prove that the public servant used his or her title and position to solicit the benefit. Additionally, reintroduction of the element requiring that the benefit proffered be "to influence . . . performance" suggests that the payment must be tied to the performance of a specifically identified official act. It also suggests that a payment made after the occurrence of the official act may not be criminal. These changes are harmful to maintaining honest performance and should be removed.

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