VETO MESSAGE - No. 1

TO THE ASSEMBLY:

I am returning herewith, without my approval, the following bill:

Assembly Bill Number 9544, entitled:

"AN ACT to amend the executive law, in relation to establishing the executive ethics and compliance commission; to amend the legislative law, in relation to the creation of the New York state commission on lobbying ethics and compliance; to amend the legislative law, in relation to establishing the legislative office of ethics investigation and the joint legislative commission on ethics standards and to repeal certain provisions of such law relating to ethics; and to amend the public officers law, in relation to ethics reports; to amend the legislative law and the public officers law, in relation to financial disclosure of public officers; to amend the election law, in relation to a state board of elections enforcement unit and counsel, personal use of campaign funds, filing requirements, political communication, independent expenditure reporting, enforcement proceeding and penalties for violations; to repeal certain provisions of the election law relating to filing of statements; to repeal certain provisions of the legislative law relating to prohibited activities of legislative employees; and providing for the repeal of certain provisions upon the expiration thereof"

NOT APPROVED

At the opening of the 233rd Legislative Session, I said in my State of the State address that we must immediately deal with the chronic abuse of power. The continuing experiences of outside influence and internal decay have bred cynicism and prompted scorn from the people we represent. I called for addressing the unethical conduct and bad acts that have embarrassed us all by adopting an ambitious proposal to reform Albany that I presented to the Legislature last spring, and again respectfully submitted in revised form with my budget for Fiscal Year 2010-11. The centerpiece of that proposal is a truly independent ethics enforcement agency, which would apply one standard to both the Legislature and Executive, and would be beholden to neither.

The Legislature has responded by passing its own ethics and lobbying legislation, ostensibly to "provide more independence for the governmental structures that address issues of ethics" and "promote compliance with and enforcement of campaign finance laws" to expose the pay-to-play atmosphere with additional transparencies. While I passionately support the Legislature's stated goals, I am returning this bill with my disapproval not only because a number of its provisions are seriously flawed, but also because of what this bill is missing.

The bill makes significant changes to the structures for ethics advice and enforcement, but it manages to make such wholesale revisions without addressing the most glaring shortcomings of the current regime. It would establish a new State Commission on Lobbying to be known as the "New York State Commission on Lobbying Ethics and Compliance" to oversee ethics compliance by the Executive Branch, replacing the current Commission of Public Integrity. The bill also would establish a new "Joint

Legislative Commission on Ethics Standards" to replace the current Legislative Ethics Commission, and would further establish a new "Legislative Office of Ethics Investigations" responsible for assisting the Legislature in carrying out its investigatory and enforcement responsibilities with respect to ethical standards. The executive directors of these new entities would be appointed by a majority vote of the commissioners and would serve fixed terms. The executive directors could be removed only for cause, by a majority vote of the commissioners. The legislation also would mandate the institution of an enforcement unit within the State Board of Elections (SBOE) and require that at least 35 percent of the SBOE's annual budget be dedicated to the unit to promote increased enforcement of campaign finance laws.

I am encouraged by certain aspects of this bill, including increased penalties for non-compliance, enhanced reporting of certain outside business, a revision of the definition of widely attended events and clarification of the nominal gift amount, that indicate the Legislature is serious about its interest in such reforms and recognizes that we must address these very important issues together. I stand ready to work with the Legislature to build a system of truly independent enforcement that is premised upon transparent disclosure and ends the unfair and disproportionate influence of special interests and lobbyists in our State Capitol. But unfortunately, I cannot accomplish those goals by signing this legislation, which falls far short of what the people of New York seek and deserve.

This bill contains many serious deficiencies, which either fail to improve current law or substantially limit the effectiveness of the new requirements the Legislature seeks to impose. For example:

The bill fails to address the most glaring shortfall of the present system for ethics enforcement: the absence of any independent oversight of the Legislature. The current system, by which the Legislature polices itself, has been a dismal failure. Neither the Legislative Ethics Commission, nor its predecessor the Legislative Ethics Committee, has filed a single notice of reasonable cause - that is, it has never charged anyone with any misconduct whatsoever - while several legislators and other State officers have been criminally charged for having misused their offices corruptly. Indeed, the Legislative Ethics Commission still has not been fully constituted - nearly three years after it was created. The sponsors contend that the New Legislative Office of Ethics Investigations will strengthen the weakest link in the ethics chain, because it would be comprised of persons who are not members of the Legislature, although they would be appointed by legislators. But the current Legislative Ethics Commission, if ever fully formed, would have a majority of non-members, a fact that has not heretofore led to one iota of enforcement. Indeed, the lack of separation between members and their appointees was demonstrated only recently when the appointee of the former Senate Majority Leader to this body determined it appropriate to hold a fundraiser for his appointer's legal defense from public corruption charges. There is simply nothing in this bill that would alter that astounding level of coziness between enforcer and legislator, including the making of political contributions.

The ultimate decision-maker under this bill for legislative ethics - the Joint Legislative Commission on Ethics Standards - would actually

represent an increase in the influence of legislative members. The current Legislative Ethics Commission is required to have a non-legislator majority of 5-4. The new Joint Commission in evenly split, 4-4. Thus, under present law, a majority of non-members could impose discipline over the uniform wishes of the legislators to the contrary. This could not happen under the new body that would be created by this bill. In sum, the notion of legislative ethics reform reflected in this bill is a weaker adjudicative body, more heavily dominated by the Legislature. It is difficult to imagine, therefore, on what basis one could conclude that the new ethics overseer proposed in this bill - even if the Legislature got around to appointing all of its members - could provide effective enforcement. Even with respect to the Executive Branch, the legislation would continue the practice by which individuals under an enforcement body's jurisdiction appoint the members of that body. I have proposed legislation that would deprive me of the right to appoint the entity that would oversee ethics in the Executive Branch. I simply ask that the Legislature accept the same basic principle.

The bill would purport to provide greater disclosure for the Legislature, while actually shielding legislators' outside clients from sunlight. Full disclosure would reduce any appearance of impropriety, supply information to the public and aid in detecting violations. Instead, the sponsors have defended the continued omission from the law of a requirement that lawyers and other members of the Legislature who are employed in so-called "protected professions" fully disclose their clients. Thus, under the proposed bill a legislator could earn hundreds of thousands from a client with a direct interest in legislation, yet not have to disclose that fact. Such concealment is defended by claims of "attorney-client privilege," but that is simply a smokescreen, as the privilege does not apply to the client's identity. See Priest v. Hennessey, 427 N.Y.S.2d 110 (4th Dep't), aff'd 51 N.Y.2d 62 (1980). Further, New York Disciplinary Rule Section 7-102(A)(3) provides that a lawyer shall not "conceal or knowingly fail to disclose that which the lawyer is required by law to reveal."

The bill provides fixed terms for the executive directors of the ethics enforcers. While it makes sense to provide for fixed terms for the commissioners so they can be independent, the role of an executive director is to carry out the policies set by the commission. Providing a fixed term, and thereby making it difficult to terminate the executive director's employment, creates an unwarranted risk of a demagogue or rogue ignoring the commissioners' express wishes. Moreover, towards the end of a fixed term, an executive director could jettison his or her purported independence as he or she networks for future employment opportunities. Indeed, the most recent crisis at the Public Integrity Commission involved allegations of misconduct by the executive director. This bill would not aid in the removal of the director in such a case; it would hinder it. There is a simple solution to this problem: create a truly independent Board to oversee the work of the director.

The bill as drafted would weaken the investigative and enforcement authority within the proposed Commission on Lobbying Ethics and Compliance by limiting the authority of lobbyist enforcement solely to the

Legislature, as opposed to the current structure within the Commission on Public Integrity that applies investigative and enforcement powers evenly in respect to lobbying the Executive and Legislative Branches. It appears that the drafters of this bill exclude any investigatory authority by the Commission on Lobbying Ethics and Compliance with respect to the Executive Branch. Since it is a well established principle that agencies may only act in ways that are within their specific grants of authority, any actions taken outside such authority may be ultra vires.

This bill makes some improvements to enforcement of our campaign finance laws and improves certain disclosure requirements; however, it lacks the key element to real campaign finance reform -- reducing the corrupting influence of money in our election system. New York State's campaign finance laws are among the weakest in the United States, including having some of the highest contribution limits and lowest participation percentages. Moreover, prodigious loopholes, coupled with inadequate enforcement, allow these already weak laws to be subverted with ease. Enactment of meaningful campaign finance reform is critical to ensuring integrity in government by stemming the influence of wealthy special interests in elections and the legislative process. There are no reductions whatsoever in New York's high and, in some cases, unlimited campaign contribution limits. While New York has some of the highest campaign contribution limits in the nation, it has the lowest campaign participation. That is because ordinary New Yorkers cannot compete with monied interest who individually can contribute over $50,000 to a candidate for Governor, or Political Action Committees that can give unlimited contributions to a candidate or party committee's so called "housekeeping account." In order to encourage more participation and, therefore, more interest in the election process, my bill would cap contribution limits at $1,000 and include a four to one public matching system, capped at $250 per contribution, which would allow more people to participate in elections in a meaningful way. And we must ensure that enforcement of the campaign finance laws is carried out in a non-partisan, fair and equitable manner. I am willing to negotiate different contribution levels and to separate a new public campaign financing regime from an Ethics Bill, but I believe there must be substantial reductions in the amount of permissible contributions. And whatever bill emerges, it is important that it ensure that enforcement of our campaign finance laws is carried out without affording advantage to the party in power.

The problems contained in this bill are not trivial. They would undermine efforts to signal to New Yorkers that all public officers and employees are adhering to high standards of ethical conduct and accountability.

I said in my State of the State address that we must all reflect on how different our position and standing would be today if we had earlier instituted adequate procedures to address the unethical conduct and bad acts that have embarrassed us all. Now, the public wants and deserves bolder and more decisive initiatives to win back its trust. The goal we share is to bring fairness and openness to government. There is, particularly now, an urgent need to be able to point to rules and structures that address impropriety promptly and fairly, and minimize the potential

for conflicts of interest.

I am told, by some who profess expertise in these matters, that by disapproving this legislation I am making the "perfect the enemy of the good." I must respectfully disagree. I am not opposed to taking limited and positive steps towards improving the ethical climate of New York government, whenever such opportunities present themselves. Indeed, upon its delivery, I will sign a separate bill (S.6439/A.9559) that would prohibit public officers from using state property, services or other resources for private business purposes. It would further seek to end

the use by public officials of State property, services or other resources for private business or other compensated non-governmental purposes that deprives the government of $1,000 or more. That bill would close a small but dangerous hole in our ethics laws, and therefore represents a positive improvement.

The present bill, however, is another matter. It would enact a fundamental and complex restructuring of the State's ethics enforcers for the second time in three years, and yet leave the most fundamental shortcoming of the current system untouched. It would purport to offer the public greater disclosure, and then allow the same legislators who claim to create genuine transparency to hide their conflicts of interest from public view. In sum, it would trade a historic opportunity for the institutionalization of false promises. That is not the progress that New Yorkers want to see.

Many of those who now urge me to support this bill held quite a different view very recently. In the past year, the League of Women Voters testified before the Legislature in favor of "combin(ing) the (ethics) oversight functions into one new entity"; and said such entity would be a "critical step in the right direction" and that ethics reform "will not be achieved without enforcement by an adequately funded independent body." The Citizens Union echoed the need for an independent and unified enforcer. And the New York Public Interest Research Group has pointed out persuasively that "no one can argue that self-regulation (by the Legislature) has worked." Yet these same advocates now would have me sign a bill that would create a trifurcated ethics enforcement regime, and that would leave in place precisely what they have previously condemned: self-policing by the Legislature. I do not know why they have abandoned their earlier views, so recently professed. But I have not abandoned mine.

Some in the Legislature already have announced that they would vote to override my veto, and thereby establish the deeply flawed arrangements of the legislation before me into law. Under our Constitution, that is their prerogative if they can secure the requisite number of votes. But while the Legislature can turn this bill into law if it wishes, there are some things that are beyond its power to accomplish in this manner. An override will not regain it the public's trust. It will not make an ethics enforcement body truly independent when it is beholden to its appointing authority. It cannot somehow reverse the weak record of self-enforcement by the Legislature. And it cannot create transparency while hiding the facts most significant to the public.

It is time to try a better approach: to dispense once and for all with the deck chair-rearranging on New York's ethical Titanic. I call upon

the Legislature, both majority and minority conferences, to work together with me on a bill that would restore the integrity and trust of our citizens, and that would no longer allow all of us to be painted in a bad light because of a few bad apples. This is the appropriate moment to enact into law a truly independent ethics enforcer, apply a unified standard to the Legislature and Executive alike, end our system of pay-to-play politics, increase transparency and accountability, strengthen enforcement in a non-partisan manner and allow the people of this State to understand fully the conflicts and incentives under which their elected representatives operate.

The bill is disapproved. (signed) DAVID A. PATERSON

_____