



October 17, 2021

Submitted electronically to [comments@elections.ny.gov](mailto:comments@elections.ny.gov)

Ekow Yankah, Chair  
Public Campaign Finance Board  
40 North Pearl Street  
Albany, New York

Dear Chair Yankah,

Campaign Legal Center (“CLC”) respectfully submits these written comments to the Public Campaign Finance Board (“PCFB”) regarding its draft regulations to implement New York’s public financing program for statewide and legislative office candidates.<sup>1</sup>

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening democracy at all levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court and in numerous other federal and state court proceedings. Our work promotes every citizen’s right to participate in the democratic process.

CLC is a longtime proponent of public financing in state and local elections, and we support the PCFB’s initiation of this rulemaking to implement New York’s program in advance of the 2024 election cycle. As a strong body of empirical evidence demonstrates, public financing programs offer an effective alternative to the traditional system of private campaign financing that can broaden political participation and amplify the voices of all citizens in our democracy—not just those who can afford to give large campaign contributions.<sup>2</sup>

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<sup>1</sup> See Vol. XLIII, Issue 33 N.Y. Reg. 4-5 (Aug. 18, 2021), <https://dos.ny.gov/system/files/documents/2021/08/081821.pdf>

<sup>2</sup> See, e.g., Brian J. McCabe & Jennifer A. Heerwig, *Diversifying the Donor Pool: How Did Seattle’s Democracy Voucher Program Reshape Participation in Municipal Campaign Finance?*, 18 ELEC. L.J. 323 (2019); Michael J. Malbin, Peter W. Brusoe, & Brendan Glavin, *Small Donors, Big Democracy: New York City’s Matching Funds*

CLC's comments are intended to ensure that the PCFB's final regulations provide critical guidance to candidates who opt to join the program, while also advancing the legislative objectives of New York's public financing law, including "improving public confidence in the state's democratic processes and continuing to ensure a government that is accountable to all of the voters of the state regardless of wealth or position," and reducing "the potential for and appearance of corruption."<sup>3</sup>

### **Recommendations for the PCFB's Final Regulations**

The following recommendations concern critical components of New York's public financing law that should be clarified or enhanced in the PCFB's final regulations. For each point, we describe the portion of the draft rulemaking at issue, outline relevant statutory provisions, and explain how our recommendation would serve to augment the PCFB's regulations and advance the underlying objectives of New York's program.

#### ***I. Require participating candidates to itemize all contributions and expenditures on their campaign disclosure statements.***

CLC recommends that the PCFB's final regulations specify that participating candidates must itemize all contributions of \$5 or more and all expenditures on their campaign finance disclosure statements. This addition would constitute a valid exercise of the PCFB's broad rulemaking authority,<sup>4</sup> and it would serve to promote public confidence in New York's public financing system.

New York's public financing statute does not include specific itemization thresholds for reporting participating candidates' contributions or expenditures beyond referring to the existing statutory provisions for candidate and political committee reporting, which provide that only contributions exceeding \$99 and expenditures above \$50 must be itemized.<sup>5</sup> However, the law does stipulate that "[c]ontributions that are not itemized in reports filed with the PCFB shall not be matchable."<sup>6</sup>

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*as a Model for the Nation and States*, 11 ELEC. L.J. 385 (2012), [http://www.cfinst.org/pdf/state/NYC-as-a-Model\\_ELJ\\_As-Published\\_March2012.pdf](http://www.cfinst.org/pdf/state/NYC-as-a-Model_ELJ_As-Published_March2012.pdf).

<sup>3</sup> N.Y. Elec. Law § 14-200.

<sup>4</sup> *See id.* § 14-207(4) ("The PCFB shall have the authority to promulgate such rules and regulations . . . as it deems necessary for the administration of this title.").

<sup>5</sup> *See id.* §§ 14-102(1), 14-104(1).

<sup>6</sup> *Id.* § 14-201(3)(c).

Like the statute, the PCFB’s draft regulations specify that “unitemized contributions are ineligible to be matched” with public funds.<sup>7</sup> However, the same section of the draft regulations would *not* require participating candidates to itemize a contribution of \$99 or less on their disclosure statements *unless* that contribution would cause the aggregate amount of contributions made by that donor in the election cycle to exceed the \$99 itemization threshold.<sup>8</sup> Thus, the draft regulations are somewhat unclear about whether participating candidates must in fact itemize contributions of \$99 or less. The draft regulations similarly do not specify whether there is a specific itemization threshold for reporting expenditures, but they do state that participating candidates’ statements must include “total unitemized expenditures” made within a reporting period, which suggests that at least some expenditures would not have to be itemized on participating candidates’ disclosure statements.<sup>9</sup> While the PCFB’s draft regulations would require participating candidates to maintain internal records of all contributions received and expenditures made by their campaigns, and would require candidates to make those records available to the PCFB upon request, the public would not have access to complete information about unitemized contributions and expenditures.<sup>10</sup>

Comprehensive public disclosure of participating candidates’ contribution and expenditure information is critical not only because it promotes electoral transparency, but also because it builds confidence in public financing by ensuring voters have access to relevant data regarding candidates’ contributions and expenditures, including their use of public monies received during the campaign. For these reasons, public financing programs in other jurisdictions, including New York City’s matching funds system and the D.C. Fair Elections Program, require candidates to itemize every match-eligible contribution as well as every expenditure of public funds as part of their campaign finance reports.<sup>11</sup>

By requiring itemization of all contributions of \$5 or more received and all expenditures on statements filed by participating candidates in New York’s public financing program, the PCFB’s regulations would similarly engender more transparency and accountability in state elections, including by giving journalists, watchdog organizations, and other citizens access to a wider range of campaign finance data to integrate into their assessments of both specific candidates and the public financing program as a whole. It would also enable the public to review contribution and expenditure information

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<sup>7</sup> Draft Regulations § 6221.13(a)(9).

<sup>8</sup> *Id.* § 6221.13(b).

<sup>9</sup> *Id.* § 6221.13(a)(10).

<sup>10</sup> *See id.* § 6221.19(b).

<sup>11</sup> *See* 52 R.N.Y.C. § 4-05(c)(ii)(B), (c)(iv)(C); D.C. Mun. Regs. tit. 3, §§ 4213.6, 4213.7.

more thoroughly and promptly notify the PCFB of potential violations of the program's rules, including its restrictions regarding "matchable contributions" and "qualified campaign expenditures."<sup>12</sup>

In the final regulations, the PCFB should eliminate the inconsistent provisions regarding the reporting of contributions under \$99 and, instead, clearly require comprehensive itemization of all contributions of \$5 or more and all expenditures by participating candidates.

## ***II. Clarify what "supporting documentation" is required to substantiate matchable contribution claims.***

Next, CLC recommends the PCFB's final regulations more clearly specify how participating candidates should submit "supporting documentation" to validate their claims for matchable contributions. The draft regulations are not sufficiently clear regarding the requirements for submitting documents to corroborate candidates' requests for public funds, and the final regulations should clarify exactly how this important piece of the New York program will work.

New York's public financing statute authorizes the PCFB to establish recordkeeping and verification procedures for matchable contributions raised by participating candidates.<sup>13</sup> Section 6221.18(a) of the draft regulations in turn would require participating candidates to furnish "back up documentation" or "supporting documentation" with each claim of matchable contributions submitted to the PCFB,<sup>14</sup> and the draft regulations would only permit the payment of public funds to a candidate who has submitted "valid matchable contribution claims."<sup>15</sup> Separately, section 6221.19(b) of the draft regulations identifies the specific records and documentation that participating candidates must maintain and provide to the PCFB, "upon request," for contributions by cash, check, money order, or credit card.<sup>16</sup>

The draft regulations seem to intend for candidates to submit the applicable "back up" or "supporting documentation" to the PCFB with their disclosure statements to substantiate claims for matchable contributions, and to

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<sup>12</sup> See N.Y. Elec. Law §§ 14-201-a(11), 14-206.

<sup>13</sup> *Id.* § 14-202, 14-208(3).

<sup>14</sup> See Draft Regulations § 6221.18(a) ("Regardless of any request for the records, all back up documentation shall be provided with the first claim for matchable contribution payment pursuant to the applicable schedule established by the PCFB. Such supporting documentation must also be provided with each subsequent claim.").

<sup>15</sup> *Id.* § 6221.20(c).

<sup>16</sup> *Id.* § 6221.19(b).

preclude candidates' eligibility to receive matching payments without those documents. However, the draft regulations do not clearly connect section 6221.18(a)'s requirement to submit "supporting documentation" for matchable contribution claims to the specific records required under section 6221.19(b).

The submission and review of candidates' claims for funds is an integral part of any public financing program, both for candidates, who must comply with recordkeeping and filing duties to receive public funds, and for election administrators, who must verify that each contribution submitted for matching payments is in fact eligible for public money. Because of the importance of the verification process for match-eligible contributions, other jurisdictions have promulgated thorough regulatory procedures explaining how candidates submit their claims for public funds and what documentation is necessary to verify their claims.<sup>17</sup> For example, the District of Columbia issued comprehensive regulations in 2019 that detail each step necessary for candidates in D.C.'s Fair Elections Program to submit and validate their claims for matching payments, including what supporting documents must accompany those claims.<sup>18</sup> We recommend that the PCFB likewise clearly specify the supporting documents that must accompany matchable contribution claims in its final regulations.

***III. Explain the circumstances in which PCFB will reject matchable contribution claims and how candidates can correct issues as part of a preliminary review.***

Relatedly, CLC recommends that the final regulations set forth potential questions and violations that the PCFB could raise in its preliminary review of participating candidates' disclosure statements, and that the regulations explain how and when a candidate can resolve compliance issues during the preliminary review. This important addition to the regulations would promote administrative efficiency and help participating candidates comply with the verification process for their matchable contributions.

In accordance with New York's public financing law, the PCFB must review participating candidates' disclosure statements and notify candidates of any questions or issues regarding their compliance with the law or with their matchable contribution claims.<sup>19</sup> As part of this review, the law

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<sup>17</sup> See, e.g., D.C. Mun. Regs. tit. 3, §§ 4300—4307 ("The Verification Process"); S.F., Cal., Mun. Regs. to Campaign Fin. Reform Ord., § 1.142-3 ("Supporting Material Required for Qualifying and Matching Contributions").

<sup>18</sup> See D.C. Mun. Regs. tit. 3, § 4302 ("Supporting Documentation").

<sup>19</sup> N.Y. Elec. Law § 14-201(3)(b).

requires the PCFB to provide candidates the opportunity to answer questions or correct potential violations “concerning their matchable contribution claims or other issues concerning eligibility for receiving public matching funds.”<sup>20</sup>

Section 6221.17 of the draft regulations further details the PCFB’s procedures for conducting “preliminary reviews” of candidates’ disclosure statements and matchable contribution claims. Like the statute, the draft regulations provide participating candidates “an opportunity to respond to and correct potential violations and address questions the PCFB has concerning matchable contribution claims or other issues concerning eligibility for receiving public matching funds,” before any enforcement action will be taken.<sup>21</sup> However, the draft regulations do not specify the problems or potential violations that the PCFB could raise in its preliminary review, nor do they explain how participating candidates can “respond to and correct potential violations” flagged by the PCFB.

To promote efficient administration of the verification process and to foster compliance among candidates, the PCFB’s final regulations should list common problems or violations that could be identified during the preliminary review, and also make clear how candidates can resolve those issues and when their responses are due to the PCFB. For example, D.C. has promulgated regulations describing its equivalent procedures for reviewing candidates’ matching payment requests under its Fair Elections Program, and those regulations outline various reasons why the D.C. Office of Campaign Finance will deny such a request, including when a contribution is from an impermissible source, is not properly documented or reported, or exceeds applicable contribution limits.<sup>22</sup> Likewise, the N.Y.C. Campaign Finance Board’s regulations for the city’s matching funds program list various reasons why the Campaign Finance Board will delay or deny a candidate’s claim for payment of public funds.<sup>23</sup> N.Y.C.’s regulations also provide that, as part of the Campaign Finance Board’s preliminary review of a participating candidate’s matching funds claims, the CFB may notify the candidate that it has determined some of their matching claims are invalid prior to making a final decision about payment of those claims, and the candidate may respond to the CFB within a certain timeframe by providing additional information or documentation that demonstrates the disputed matching claims are in fact valid.<sup>24</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> Draft Regulations § 6221.17(c).

<sup>22</sup> D.C. Mun. Regs. tit. 3, § 4305.

<sup>23</sup> 52 R.N.Y.C. § 3-01(d).

<sup>24</sup> *Id.* § 7-02(b)(i).

The PCFB's draft regulations' lack of specificity regarding questions or potential violations that the PCFB could raise in its preliminary review of disclosure statements, as well as the lack of guidance on how candidates may correct those violations, could lead to otherwise preventable compliance issues and impede the prompt issuance of public funds to participating candidates. We therefore recommend that the PCFB's final regulations clarify common issues or violations that could arise during a preliminary review and explain the steps and timing for candidates to correct potential violations.

***IV. Streamline the criteria for assessing whether a participating candidate is running against a “competitive” opponent.***

Because full public financing under New York's program will only be available to a participating candidate who is opposed by another “competitive candidate” in the race, CLC recommends that the PCFB's final regulations use criteria more directly indicative of whether an opposing candidate is “competitive.”<sup>25</sup>

Pursuant to New York's public financing law, the PCFB must issue regulations that delineate “objective standards” to determine when a participating candidate faces a “competitive” opponent and, thus, is eligible to receive the full amount of public financing for the election.<sup>26</sup> The PCFB's draft regulations set out nine different circumstances in which a participating candidate's opponent would be considered “competitive,” including “when the participating candidate is opposed by any candidate who has been deemed eligible to receive public funds payments for the covered election.”<sup>27</sup> However, some of the other factors listed in the draft regulations, such as when “the participating candidate is opposed by a candidate who has had significant media exposure in the twelve months preceding the election,” or when “the participating candidate is opposed by a candidate whose name is substantially similar to the candidate's,”<sup>28</sup> do not bear such a clear nexus to whether a participating candidate's opponent is “competitive,” as they do not necessarily reflect the opponent's popular support or financial resources.

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<sup>25</sup> N.Y. Elec. Law § 14-205(4). Under the law, the total public funds payable to a participating candidate in a covered election may not exceed 25% of the maximum public funds payment otherwise applicable unless the participating candidate is opposed by a competitive opponent. *Id.*

<sup>26</sup> N.Y. Elec. Law § 14-205(4).

<sup>27</sup> Draft Regulations § 6221.21(g).

<sup>28</sup> *Id.*

The PCFB should revise these criteria in its final regulations to focus on factors that better indicate whether a participating candidate's opponent has shown they are electorally viable. For example, in San Francisco, candidates for mayor or the Board of Supervisors are only eligible for public funding if they are opposed by another candidate who either (i) has established their own eligibility for the public financing program, or (ii) has received contributions or made expenditures in excess of a certain threshold, which varies depending on the elective office at issue.<sup>29</sup> Likewise, the New York City Campaign Finance Board has supported narrowing the city's existing criteria for determining when a participating candidate faces serious opposition and therefore qualifies for full public funding,<sup>30</sup> to include factors that are more immediately indicative of the opponent's level of public support, such as when the opponent has received at least 25% of the total votes cast in a prior election in the relevant area within the last eight years, or has received endorsements from certain city, state, or federal elected officials or from large membership organizations.<sup>31</sup>

To conserve public money and program resources for participating candidates who face real competition in their races, the PCFB's final regulations should refocus the criteria used to determine whether a candidate is running against a "competitive" opponent for public funding eligibility purposes, using objective factors that reflect an opponent's viability in the upcoming election.

**V. *Address how public funds will be paid out in special elections.***

CLC recommends that the PCFB explain in the final regulations how public funds will be paid out to participating candidates in special elections.

Pursuant to New York's public financing law, the PCFB must establish regulations for "the prompt issuance" of matching funds to candidates in special elections.<sup>32</sup> However, the draft regulations do not address the timing of matching payments for special elections despite the statute's directive. If left unaddressed, this omission would result in uncertainty regarding when and how public funds would be disbursed in special elections, which typically involve a highly compressed campaign cycle, and could discourage program participation by candidates in those races. The PCFB's final regulations should specify a payment schedule and related procedures for

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<sup>29</sup> S.F. Campaign & Gov't Conduct Code § 1.140(c)(3).

<sup>30</sup> N.Y.C. Admin. Code § 3-705(7).

<sup>31</sup> See N.Y.C. CAMPAIGN FIN. BD., KEEPING DEMOCRACY STRONG: NEW YORK CITY'S CAMPAIGN FINANCE PROGRAM IN THE 2017 CITYWIDE ELECTIONS 128-29 (2018), [https://www.nyccfb.info/pdf/2017\\_Post-Election\\_Report\\_2.pdf](https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf).

<sup>32</sup> N.Y. Elec. Law § 14-205(6).



candidates running in special elections to provide more clarity and guidance about the public financing program's operation in that context.

**VI. *Allow candidates more time to respond to allegations of fundamental breach of program certification.***

CLC recommends that the PCFB's final regulations extend the time for candidates to request a hearing upon receipt of a notice of fundamental breach of certification and to respond to the PCFB's preliminary determination regarding the breach. The deadlines in the draft regulations may not allot sufficient time for many candidates, especially those who are running for office for the first-time or who are not experienced with legal proceedings, to gather relevant evidence and mount an effective defense against allegations of serious misconduct.

Pursuant to New York's public financing statute, the PCFB must provide written notice and "an opportunity to be heard" to a candidate alleged to have committed "a fundamental breach" of certification under the program.<sup>33</sup> The draft regulations specify that, before making a final determination of a fundamental breach of certification, the PCFB must provide notice of its preliminary determination to the candidate, who would have three business days to request a hearing.<sup>34</sup> Upon receiving the PCFB's preliminary determination and supporting documents, the candidate would have five business days to respond to the PCFB's allegations and evidence.<sup>35</sup>

Despite the gravity of fundamental breaches of program certification, the proposed three-day and five-day deadlines for candidates to request a hearing and to respond to the PCFB's preliminary determination appear too short to allow sufficient time for many participating candidates to effectively respond to the PCFB's charges. We recommend that the PCFB extend both deadlines in its final regulations so that candidates have adequate time to defend against allegations of a fundamental breach of certification.

**VII. *Align the meaning of "average median income" with U.S. Census Bureau's data for median household income.***

Finally, CLC recommends that the PCFB's final regulations calculate a legislative district's "average median income," for purposes of the public

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<sup>33</sup> N.Y. Elec. Law § 14-209(2). After providing notice and an opportunity to respond, the PCFB may directly assess penalties and may refer certain knowing and willful infractions to the New York Attorney General for criminal prosecution. *Id.*

<sup>34</sup> Draft Regulations § 6221.8(c).

<sup>35</sup> *Id.*

financing program’s qualification thresholds, using the “median household income” data published by the U.S. Census Bureau.

New York’s statute incorporates lower contribution thresholds for program qualification when participating candidates for the state legislature are running in “districts where the average median income (‘AMI’) is below the AMI as determined by the United States Census Bureau.”<sup>36</sup> The draft regulations also refer to “average median income” with respect to contribution thresholds to qualify for the program.<sup>37</sup>

But the Census Bureau does not publish data about the “average median income” for specific regions of the country; rather, the Census utilizes a metric known as “median household income,” which functionally aligns with the meaning of “average median income” in the statute and offers a ready substitute for measuring average incomes across New York’s legislative districts.<sup>38</sup> Accordingly, we recommend that the final regulations clarify that “average median income” means “median household income” for purposes of qualifying contribution thresholds under the program.

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<sup>36</sup> N.Y. Elec. Law § 14-203(2)(c).

<sup>37</sup> Draft Regulations § 6221.11(a)(5), (6).

<sup>38</sup> See EMILY A. SHRIDER ET AL., U.S. CENSUS BUREAU, INCOME AND POVERTY IN THE UNITED STATES: 2020 (Sept. 2021), <https://www.census.gov/content/dam/Census/library/publications/2021/demo/p60-273.pdf>.

## Conclusion

CLC thanks the PCFB for its consideration of our comments and recommendations regarding this important rulemaking. We would be glad to provide further assistance to the PCFB as it prepares to administer New York's public financing program. CLC's website includes numerous informational materials regarding public financing of elections,<sup>39</sup> and we encourage the PCFB and its staff to contact CLC with any follow-up questions about public financing of elections in other states and localities.

Respectfully,

/s/ Austin Graham

Austin Graham  
Legal Counsel

/s/ Patrick Llewellyn

Patrick Llewellyn  
Director, State Campaign Finance

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<sup>39</sup> See Public Financing of Elections, CAMPAIGN LEGAL CTR., <https://campaignlegal.org/democracyu/inclusion/public-financing-elections>.