

The New York City Campaign Finance Program in the 2001 Elections: To Make a Good Program Better

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*By the Special Committee on Election Law
Of the Association of the Bar of the City of New York*

I. Introduction

The Special Committee on Election Law (the “Committee”) offers this analysis of the New York City Campaign Finance Program (the “Program”). This Report focuses on the significant changes in the laws and regulations underlying the Program that were enacted for the 2001 New York City elections and the administration of the Program during that election, together with an overview of the Program from the creation of the New York City Campaign Finance Board (the “CFB” or “Board”) in 1988 to the present. Our purpose in conducting this analysis is to evaluate the Program and its administration.

We submit this analysis with great respect for the work performed by the Board and support for the overall Program. The Program and the Board have become a national model for campaign finance reform, and the Board has established a record of integrity that is beyond question. This Association has issued five full reports since 1986¹ favoring voluntary publicly funded campaign-finance systems that limit total expenditures by participating campaigns.² While those reports vary in scope and perspective, what unites them is the Association’s commitment to a

¹ *Campaign Finance Legislation*, by the Committee on State Legislation, 41 *Record of the Association of the Bar of the City of New York* 746 (Oct. 1986); *Federal Election Campaign Finance Reform*, by the Committee on Federal Legislation, Unpublished Report dated May 1990; *Constitutional Issues in Campaign Finance Reform*, by the Committee on Federal Legislation, 49 *Record* 681 (Oct. 1994); *Towards a Level Playing Field - A Pragmatic Approach to Public Campaign Financing*, by the Special Committee on Election Law, 52 *Record* 660 (Oct. 1997); and *Dollars and Democracy*, by the Commission on Campaign Finance Reform, 55 *Record* 645 (Oct. 2000).

² Most courts have interpreted *Buckley v. Valeo*, 424 U.S. 1 (1976) (*per curiam*), to preclude mandatory limitations on campaign expenditures. Most public financing proposals, including the Program, therefore invite voluntary participation by offering public funding to campaigns that agree to conduct themselves within certain limitations,

public financing system that will reduce the corrupting influences of campaign contributions on the political system and will encourage participation by serious campaigns. That commitment remains steadfast. Simply put, our goal is to help make a good program better.

Campaign Finance Legislation, by the Committee on State Legislation, 41 *Record* of the Association of the Bar of the City of New York 746 (Oct. 1986), stated the underlying principle for reform:

The Committee believes that excessive amounts of money injected into the electoral process distort the process in a way that threatens to undermine the principles of democracy. The appearance of impropriety that results from the contribution of large sums of money by persons and organizations to candidates who, once elected to public office, have the power to regulate and enter into business relationships with those very individuals and organizations which provided financial support is of great concern to the Committee.³

Subsequent reports have reiterated this principle.⁴

including limitations on overall expenditures.

³ 41 *Record* at 746-47.

⁴ *E.g.*, *Towards a Level Playing Field*, 52 *Record* at 691. - 2 -

At the same time, *Campaign Finance Legislation* stressed that a public financing system ought to encourage participation by campaigns, as opposed to punishing those campaigns that did not choose to join.⁵ *Towards a Level Playing Field - A Pragmatic Approach to Public Campaign Financing*, by the Special Committee on Election Law, 52 *Record* 660 (Oct. 1997), added to this approach by analyzing the cost of various New York State campaigns and proposed a system of block grants that would enable qualifying campaigns to reach the financial level necessary to become competitive but would be refundable on a \$1 for \$3 basis after campaigns reached a second, higher level, together with expenditure limitations that were calculated to encourage participation. *Towards a Level Playing Field* also proposed opportunities for free publicity (including free television time, subsidized mailings, and candidates' forums) and recommended that incumbents should be prohibited from using staff and other resources of office to their advantage in election campaigns.⁶

The 2001 elections were the first citywide elections administered under the City's term limits law⁷ and substantial changes in the City's campaign finance laws, including a new "4:1" public matching funds formula, discussed below. These changes helped bring about an unprecedented number of open seats for City Council and large increase in the number of candidates for City offices. Total public funds payments to candidates increased six-fold from the preceding citywide elections in 1997: from less than \$7 million to over \$41 million. Indeed, total payments to

⁵ 41 *Record* at 764-65. *Constitutional Issues in Campaign Finance Reform* also noted constitutional problems with legislation intended to punish campaigns that chose not to participate in public financing programs. 49 *Record* at 683.

⁶ 52 *Record* at 679-80, 682-83, 691-93. In 1996, the Association also proposed a court rule limiting contributions that could be made by attorneys engaged in the municipal bond business. *Towards a Level Playing Field* proposed that such a restriction should apply to all persons or entities doing business with the State. See *Towards a Level Playing Field*, 52 *Record* at 666-67, 685-86.

⁷ NYC Charter §1038.

candidates in the 2001 elections far surpassed the total of public funds paid to candidates in *all* previous elections covered by the Program from 1989 through 2000.

The Committee believes the 2001 elections demonstrated that the Program is succeeding in its broad mission of enabling serious candidates to mount effective campaigns for City office, in most cases without need of large contributions from special interests or great personal wealth. The Program has enhanced competition for office, vastly improved the information available to the public about the sources and uses of campaign funds, and broadened the involvement of city residents in election campaigns by encouraging small contributions.

The Program's public financing is now the main engine for bringing new people - candidates, campaign workers and contributors - into the political process, a job once performed by political party organizations. As such, it is important that it be administered in a way that invigorates the political process, without overwhelming the best efforts of the many dedicated individuals who volunteer their time and energy to help candidates succeed.

In the most recent City elections by far the largest source of campaign funding (with one notable exception⁴) was the City itself - the public matching funds distributed through the Board. As with any program that disburses public funds, vigorous audit and other anti-fraud protections are required to prevent the misuse of those funds. The potential threat that public funds will be withheld at the peak of the campaign season gives the CFB enormous leverage in its dealings with campaigns. This leverage can be used to secure a campaign's compliance not only with the requirements of the New York City Campaign Finance Act (the "Act"), but also with the CFB's rules, advisory opinions, and administrative procedures. The Board's enforcement efforts

⁴ Specifically, the self-financed and successful mayoral campaign of Michael Bloomberg. See discussion *infra* at footnote 140 and related text.

acquired greater urgency and required greater care once legislative changes directed it to distribute enormous sums of public money in the 2001 elections.

To date, the CFB has found that more than half the campaigns in the Program in the 2001 elections committed one or more violations of Program requirements. For most violations, the CFB seeks to impose civil penalties. These provide a disincentive to violate the Program's requirements. But the Committee believes the Program's administration would also benefit from additional sensitivity to the special challenges all political campaigns face in maintaining full compliance.

A political campaign is a short-term endeavor, staffed largely by volunteers or workers receiving nominal compensation who may never have worked together before and are likely to disband soon after the election is over. In addition to helping the candidate run for election, these individuals are now expected to master and comply with detailed anti-fraud, disclosure, record keeping, receipt and disbursement requirements, meet a series of fixed deadlines, and remain available to respond to an audit that the CFB conducts months after the election. There is little room for error, but a high likelihood that it will occur. In enforcing the Act, the Board should recognize that non-compliance is often the product of inexperience or honest misunderstanding rather than inexcusable neglect or fraudulent intent and should accordingly administer the Program so as not to deter future participation by good-faith campaigns. In instances of honest, minor errors, it is in the public interest that an effort be made to have campaigns correct the errors, with the threat of penalty or suspension of public funds payments reserved primarily for cases evidencing pervasive violations, intent to evade the law or criminal conduct.

The Campaign Finance Board faces a difficult challenge. On the one hand, the voluntary Program should be made as "user-friendly" as possible, so that candidates who join are not faced

with an overwhelming compliance burden. On the other hand, reform often comes at a price and requiring campaigns to make good faith efforts to follow the rules is not an unreasonable price for a cleaner system. The CFB requires tools to ensure that public funds will be disbursed only to those campaigns that qualify and that any attempted theft of public dollars or any fraud will be exposed and punished. It is often not easy to develop rules and procedures that strike an optimal balance between these goals.

There is a clear public interest in having a campaign finance law that is effective and well administered. Many different people and institutions are involved with this law, including the Campaign Finance Board, the City Council, the Mayor, other elected officials, candidates, campaign workers and volunteers, political committee treasurers, civic organizations, and professionals practicing in this field. Each has a unique and valuable perspective on how this public interest can best be served. In our democracy, the public interest ultimately emerges from the crucible of debate among such various perspectives. Indeed, this report itself is the product of debate among individuals who have different views on how the Program is working and what improvements would best serve the public interest.

As set forth in detail below at Part IV (text associated with footnotes 182 *et seq.*), we offer a series of specific recommendations to improve the Program and better enable it to achieve its overriding goal, the elimination of undue influence and the promotion of fair competition in the politics of New York City. Our recommendations include:

- a) moving the primary date from September to June in order to afford campaigns more time to take advantage of the benefits of the Program;
- b) permitting contributions to participating and non-participating candidates only from individuals and registered political committees;

- c) making *some* public funds available before a candidate qualifies for the ballot;
- d) implementing due process safeguards including legislative codification of CFB authority to make findings and assess violations in accordance with statutory procedures and requiring written determinations, together with the addition of an ombudsman reporting directly to the Board;
- e) making additional public information available on CFB decisions, with adversary proceedings to be conducted before an independent hearing officer who issues written findings of fact and conclusions of law; and
- f) making administrative changes to help accelerate the pace of audits and public funds payments and to enable the Board to take a more flexible approach to payment determinations.

We offer these recommendations on the basis of first-hand observations and careful study of the Program by our members during the 2001 and prior City elections, rather than on the basis of survey or academic-style research. These recommendations reflect one consensus view of how the Program should be improved (subject, of course, to the exceptions noted in separate statements submitted by Committee members). We are not social scientists and do not purport to bring the standards of that discipline to this report. Rather, our Committee comprises practitioners who regularly represent candidates before the Board and have first-hand experience in complying with the Program. Our numbers also include officials of the New York City Board of Elections (the “Board of Elections”), the CFB’s former general counsel and a current CFB staff attorney⁹, practitioners representing both major and minor parties and their candidates, representatives of

⁹Since 1992, three different CFB attorneys have served as members of the Committee. The current Committee member participated in Committee deliberations and has submitted a separate statement.

civil liberties and public interest organizations, and a former member of the State Commission on Government Integrity (the "Feerick Commission").¹⁰ In addition, on June 13, 2002, the Board's executive director was the Committee's guest and had an opportunity for a full and frank exchange of views.¹¹

Our recommendations also build on testimony the Committee has submitted to the CFB on each set of new rules the Board has proposed for public comment, beginning in January 2000.¹²

We believe the CFB has always given respectful consideration to the Association's and the Committee's views and, in several instances, it has modified proposed rules in a manner that appeared to be responsive to the Committee's concerns. Many of the Committee's comments have not been addressed in rules adopted by the CFB, however, and thus we commend these for consideration by the CFB, and by the City Council as it seeks to make improvements to the Program.

¹⁰The drafting of the report was the work of a subcommittee on campaign finance, appointed by former Committee chair Lawrence Mandelker in October 2001. The original subcommittee members were Paul Windels, the subcommittee chair, Henry Berger, Laurence Laufer, Darrell Paster, and Richard Weinberg. Deborah Goldberg was subsequently appointed to the subcommittee, after which drafting assignments were made. After the initial drafting was completed, Jordan Stern joined the Committee and was appointed to the subcommittee.

Members of the drafting subcommittee, as well as other Committee members, have been directly involved in some of the matters addressed in this report. Where relevant and as disclosed to the full Committee, these instances are noted below.

The Association's Committee on Government Ethics prepared comments on an earlier draft of this Report. These comments are reproduced in an Appendix to this Report. Some changes were made in the final report in response to these comments.

¹¹ Subsequent to the Committee's adoption of a draft final report, that draft was submitted to the CFB for its review and comment. **The CFB's comments reflect its consideration of that draft report.** In the final report some changes were made in response to CFB comments, which are reproduced in an Appendix to this Report.

¹² The Committee submitted testimony to the CFB on proposed rules on January 31, 2000, March 7, 2001, June 14, 2002, October 25, 2002, and December 19, 2002. The Committee assisted in preparation of testimony delivered by former Association President Evan A. Davis before the Campaign Finance Board on December 11, 2001. Copies of this testimony are annexed as the appendix to this Report. The Committee also assisted in preparation of Association testimony in previous elections. See Testimony on behalf of the Association of the Bar of the City of New York on the Program before the New York City Campaign Finance Board, Dec. 9, 1993. The Committee's prior report, *Towards a Level Playing Field*, included reference to the CFB as a model of independent administration and took note of its resilience in the face of

New York City has an effective campaign finance law, one that has had a positive effect on the democratic process and deservedly should be a model for other jurisdictions. It has benefited from the regular reviews the Board publishes pursuant to statutory mandate.¹³ Likewise, we believe that an independent study of how the Program is working can help make a good program even better. That is the goal of this report.

After 15 years, the Board has reached a level of institutional maturity, security and achievement sufficient to give us complete confidence that our study will not be confused with lack of support for its mission, which we support wholeheartedly. Indeed, the most useful support we can give is to offer an independent analysis of the Program and its administration.

political pressure. 52 *Record* at 684-85.

¹³ NYC Administrative Code §3-713. *Campaign Finance Board, Dollars and Disclosure: Campaign Finance Reform in New York City* (Sept. 1990); *Windows of Opportunity: Campaign Finance Reform and the New City Council* (July 1992); *On the Road to Reform: Campaign Finance and the New York City Elections* (Sept. 1994); *A Decade of Reform 1988-1998* (Sept. 1998); *An Election Interrupted . . . An Election Transformed* (Sept. 2002).

We take note of the Campaign Finance Board's remarkable record of accomplishment under Chairman Joseph A. O'Hare, S.J., who retired at the conclusion of his third five-year term on March 31, 2003.¹⁴ In no small part due to Father O'Hare's leadership, the CFB is now well regarded as a non-partisan bulwark of the City's political process. We are confident that the new Chairman, Frederick A. O. Schwarz, Jr., will uphold the high standard of non-partisanship and integrity set by Father O'Hare. We encourage the chair to take the lead in bringing about constructive changes in the Program and its administration, as we have proposed in this report, and look forward to working with him.

Finally, in 2001, the City elections took on a dimension no one could have imagined. September 11, 2001 was the day of the primary election. Both the Campaign Finance Board and City's Board of Elections are located within a few city blocks of the World Trade Center attack. In a time of horror, trauma and dislocation, both agencies did a superlative job in restoring and maintaining their operations for the rescheduled primary election on September 25, two citywide runoff elections on October 11, and the general election on November 6, 2001. We salute their dedication and service to the public; it was an extraordinary achievement.

II. Campaign Finance History and Development

¹⁴*New York Times*, Jan. 9, 2003, B6.

New York State Law has regulated campaign financing in state and local elections to some extent since the early 1900's. Prior to 1974, penal provisions prohibited contributions by corporations¹⁵ and limited amounts to be expended by and for candidates for state and local election.¹⁶ Violations of these provisions were misdemeanors. In 1974 the New York Election Law (the "Election Law") was amended to provide for reporting campaign contributions and expenditures and to add limitations on campaign contributions and expenditures.¹⁷ In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court ruled that campaign contributions and expenditures were entitled to First Amendment protection, but that prevention of corruption was a sufficient governmental interest to justify limitations on campaign contributions. The Court held, however, that the interest in corruption prevention was inadequate to justify the federal limitations on campaign expenditures, which were, therefore, unconstitutional. Following the decision in *Buckley*, the Election Law was amended to repeal the state's campaign expenditure limitations which the legislature had deemed unconstitutional.¹⁸

¹⁵Elec. L. §460.

¹⁶Elec. L. §455.

¹⁷1974 N.Y. Laws 604.

¹⁸1976 N.Y. Laws 577.

When the City first considered adopting campaign finance reform in the late 1980's, campaign contributions were limited by Election Law §14-114 to one-half cent per registered voter in a state-wide election and one-half cent per voter enrolled in a political party in that party's state-wide primary election.¹⁹ Contribution limits for local elections, however, were established at five cents per registered voter in the district for the general election and five cents per voter enrolled in a political party in a district for that party's primary election in the district, but not to exceed \$50,000 per election.²⁰ The \$50,000 maximum applied only to elections which involved one million voters or more. In New York City, this cap applied in the city-wide general elections and Democratic primary elections.²¹

Efforts to establish effective campaign reform including meaningful contribution limits and expenditure limits linked to public financing of elections have been unsuccessful in the state legislature. During the 1980's the New York State Assembly repeatedly passed legislation to establish such programs for state-wide elected officials and the state legislature only to see the legislation die in the State Senate.²²

Meanwhile, in the mid-1980's, a series of scandals were exposed in New York City government involving the Wedtech corporation, the Brooklyn Navy Yard and the Parking Violations Bureau. These scandals reached high into government, including two Borough Presidents and a United States Congressman. As a result, Governor Mario Cuomo and Mayor

¹⁹Elec. L. §14-114(1)(a). Former section 14-114(9) also limited persons and entities doing business before the Board of Estimate from making contributions to the members of that Board during a period beginning six months before and ending twelve months after that Board's official consideration of a matter. 1986 N.Y. Laws 689 §1, *repealed by* 1997 N.Y. Laws 128 §1.

²⁰ Elec. L. §14-114(1)(b).

²¹ The \$50,000 cap was subsequently lowered in city-wide elections. 1992 N.Y. Laws 79 §24, *amending* Election Law §14-114(1)(b).

²² See, e.g. N.Y.A. 3663-A, 109th Sess. (1986).

Edward Koch created the State-City Commission on Integrity in Government chaired by Michael Sovern (the "Sovern Commission"). While they did not directly involve campaign finance activities, the public scandals focused attention on the issue of the influence exerted by large campaign contributions on elected officials.

The Sovern Commission considered the issue of the reliance on large contributions in campaigns for public office and the perception that such contributions provided access and improper influence over the decision-making process of elected officials. The Sovern Commission, in recommending a program of public financing of election campaigns, noted:

Contemporary campaign finance resembles a veritable gold rush. The amounts of money that change hands in the course of a political campaign not only serve to discourage less affluent candidates, but also result in massive problems of supervision and control to assure compliance with the law by candidates, contributors and political committees. The huge sums involved create vast opportunities for abuse, influence peddling and other improprieties. And they give rise to a substantial appearance of impropriety, a belief that large contributors receive a *quid pro quo* from those they support.²³

²³State-City Commission on Integrity in Government: Report and Recommendations at 31 (1987).

Following further unsuccessful efforts to establish a campaign finance reform program by the Assembly, this time including New York City elections,³⁴ a bill providing for a program of public financing for candidates for city office was introduced in the New York City Council.³⁵ The New York City Campaign Finance Act was adopted by the Council on February 9, 1988 and signed into law by Mayor Koch on February 29, 1988.³⁶

As enacted, the Act provided that candidates for mayor, comptroller, City Council president (now Public Advocate), borough president and City Council member may receive public matching funds in return for accepting campaign contribution and expenditure limits as set forth in the Act. The contribution limit established in 1988, to be effective for the 1989 elections, ranged from \$2,000 for Council candidates to \$3,000 for city-wide candidates for each of the primary and general elections.³⁷ Expenditures were limited to a range of \$60,000 in a primary or general election by Council candidate to \$3,000,000 in each election by a mayoral candidate.³⁸ Additional expenditure limitations were also imposed in the third year of the four-year election cycle.³⁹ The contribution and expenditure limits were to be adjusted for inflation quadrennially commencing in 1990.⁴⁰

³⁴N.Y.A. 6809, 8526, 110th Sess. (1987).

³⁵New York City Council Intro. 906 (1987).

³⁶N.Y.C. Local Law 8 (1988).

³⁷N.Y. Admin. Code §3-703(f).

³⁸*Id.* §3-706(1)(a).

³⁹*Id.* §3-706(2).

⁴⁰*Id.* §§3-706(1)(e), 3-703(7).

To be eligible for public funds a candidate was required to raise a threshold amount. For example, candidates for mayor were required to raise \$250,000 from at least 1,000 city residents and Council candidates were required to raise \$7,500 from at least 50 residents of their Council district.³¹ Upon reaching this threshold, the candidate was eligible to receive matching public funds of up to \$500 per individual contribution on a dollar-for-dollar basis provided that no more than \$500 in matching funds could be received for contributions from any household.³² If a candidate's opponent did not participate in the Program and spent more than half of the expenditure limit, the expenditure limit for the participating candidate was lifted and the participating candidate was eligible for a two-for-one match for each eligible contribution.³³ The maximum public funds available to any candidate was one-half of the expenditure limit.³⁴ The Campaign Finance Board, an independent five member body appointed by the Mayor and the Vice Chairman (now Speaker) of the City Council, was created to administer the Act.³⁵

³¹ *Id.* §3-703(2)(a).

³² *Id.* §3-705(2). The household restriction was repealed in 1990. N.Y.C. Local Law 69 §2 (1990).

³³ *Id.* §3-706(4).

³⁴ *Id.*

³⁵ A 1988 Charter revision codified the Board and its general powers in the City Charter, required it to publish a voter guide in City elections, specified that it would operate in a non-partisan manner, and created a mechanism to protect against shortfalls in appropriations to the fund for paying matching funds to candidates in the 1989 elections. In 1989, a further Charter revision made the funding protection permanent. See NYC Charter Chapter 46.

In 1989 the expenditure limit was effectively increased by adding an additional allowance for fund raising costs. The additional expenditure limit was 20% of the existing expenditure limit.³⁶

Following the 1989 elections, the CFB recommended a number of changes to the law, many of which were embodied in Local Law 69 adopted by the City Council in 1990. The contribution limit was changed from a per election limit to a per campaign limit and the fund raising allowance was eliminated. The per campaign contribution limit ranged from \$3,000 for council candidates to \$6,500 for mayoral candidates.³⁷ The expenditure limits were increased to a range of \$105,000 per election for council candidates to \$4,000,000 per election for mayoral candidates.³⁸ In addition, contributions raised to meet the threshold became matchable and, recognizing the increased size of the City Council (and the resulting smaller districts), the threshold for council candidates was reduced to \$5,000, including at least 50 contributors resident in the Council district.³⁹

The Act was further amended in 1994 to provide that in order to preserve matchable contributions, contemporaneous semi-annual filings prior to joining the Program were required of all participating candidates other than Council candidates.⁴⁰ Previously, no disclosure to the CFB was required prior to the deadline for joining the Program. Beginning in 1994, the CFB adopted rules imposing expenditure limits covering the first two years of the four-year election cycle for participating citywide and borough president candidates for the 1997 elections and for participating

³⁶N.Y.C. Local Law 4 (1989).

³⁷N.Y.C. Local Law 69 § 3 (1990).

³⁸N.Y.C. Local Law 69 § 5 (1990).

³⁹N.Y.C. Local Law 69 § 3 (1990).

⁴⁰N.Y.C. Local Law 37 § 1 (1994).

City Council candidates for the 2001 elections."⁵² In 1996, the Act was amended to require participating candidates for mayor, public advocate and comptroller to appear in debates sponsored by organizations selected by the CFB.⁵³

Following the 1997 elections, the Act and corollary City Charter provisions were extensively amended. In effect, a new public financing program was created by City Council legislation, Charter revision, and new CFB rules.

⁵² RCNY 1-08(j).

⁵³ N.Y.C. Local Law 90 (1996).

The City Council adopted changes, overriding a mayoral veto, to lower contribution limits for participating candidates,⁴³ to permit participating candidates to donate personal funds up to three times the amount of the new contribution limit to their own campaigns, and to give candidates more time to decide whether to join the voluntary Program (up to June 1 in the election year).⁴⁴ For the first time, participating candidates were prohibited from accepting certain categories of contributions altogether: contributions from corporations and from political committees that had not met a new requirement for registration with the Board.⁴⁵

The Council's "corporate ban" applied, however, only to those participants seeking public funding at a new, higher matching rate. The higher matching rate was set at four dollars in public funds for each of the first \$250 of a matchable contribution.⁴⁶ Maximum public funding was increased from 50 percent to 55 percent of the expenditure limit in each election. The public funding level was increased further to a 5:1 match (up to \$1,250 in public funds for the first \$250 of a matchable contribution) and to a maximum of two-thirds of the pre-existing expenditure limit, whenever the CFB determined that a non-participant had raised or spent more than one-half the amount of the expenditure limit.⁴⁷

⁴³The new contribution limits were \$4,500 for citywide offices, \$3,500 for borough president, and \$2,500 for City Council.

⁴⁴ N.Y.C. Local Law 48 (1998), *codified as* New York City Administrative Code §3-703(1)(f), (h), and (c).

⁴⁵ *Id.* at Admin. Code §§3-703(1-a), (1)(k), and 3-707. The political committee registration form requires committees: to identify the committee, its chairperson, and treasurer; classify the committee as a political action committee, a political party committee, a political club, or a candidate committee; state the purpose of the committee; lists persons with authority to determine the candidates for whom the committee makes contributions or independent expenditures; and indicate whether the committee accepts and may use contributions from corporations for giving to candidates.

⁴⁶ *Id.* at Admin. Code §3-705(2). The pre-existing 1:1 matching rate (up to \$1,000 per contributor) was retained for participants accepting contributions from corporations.

⁴⁷ *Id.* at Admin. Code §3-706(3). The non-participant financing "trigger" for Council candidates was increased from \$30,000 to one-half of the expenditure limit (\$137,000 in each 2001 election).

Other 1998 Council enactments clarified that participating candidates were permitted to appear at events where no contributions were solicited for the candidate without the cost of the event being considered an in-kind contribution to the candidate,⁴⁸ regulated the private financing of elected candidates' transition and inauguration into office under CFB auspices,⁴⁹ and limited appearances and participation by elected officials and other city employees in advertising and other communications financed by government in city election years.⁵⁰

⁴⁸ *Id.* at Admin. Code §3-716.

⁴⁹ N.Y.C. Local Law 39 (1998), *codified in* New York City Administrative Code §3-801, *et seq.*

⁵⁰ N.Y.C. Local Law 40 (1998).

A mayoral Charter revision commission proposed other campaign finance reforms, which were adopted by the electorate later in 1998. The Charter amendment directed the CFB to prohibit participating candidates from accepting contributions from corporations.⁵¹ The CFB was charged to adopt rules requiring that participants disclose the acceptance of contributions from individuals and entities doing business with the city, to regulate the acceptance of such contributions, and to determine the business dealings to be covered by these rules.⁵² Charter revision also granted the CFB authority to adopt rules to curb “soft money” (described in the Charter as “expenditures that indirectly assist or benefit a [participating] candidate”) and added protections for the CFB’s operating budget and the funding of the voter guide.⁵³ The budget provisions are an important step forward for safeguarding the Board’s independence and helping it secure the resources it must have to administer the Program.

Following these legislative changes, the CFB revised its administrative rules in the summer of 1999, in the spring of 2000 and again in the spring of 2001. Among the more notable changes were:

Joint Fundraising. When a participant cooperates in fundraising for another candidate or political committee, the rule adopted in 2000 deemed the participant to have accepted an

⁵¹ New York City Charter §1052(a)(12). The CFB resolved the conflict between the Council’s and the Charter’s different corporate bans by concluding that the Council’s preservation of a 1:1 matching rate for those participants accepting corporate contributions was effectively eliminated. Thus, since all participating candidates would have agreed not to accept contributions from corporations, all could qualify for the new 4:1 matching rate. CFB Advisory Opinion No. 1998-2 (October 23, 1998). The mayor disputed the CFB’s interpretation. An action brought to overturn the CFB’s position, *City of New York v. New York City Campaign Finance Board*, Index No. 01/400550 (Sup. Ct. NY Co. 2001), was ultimately rendered moot when the Council reenacted (again over mayoral veto) the 4:1 matching rate for all participating candidates. N.Y.C. Local Law 21 (2001).

⁵² New York City Charter §1052(a)(11)(a). In the fall of 1999, the CFB initiated a rulemaking with alternative approaches for implementing the Charter’s directive on contributions from persons and entities doing business with the city. To date, however, the CFB has not adopted final rules on this subject. See *An Election Interrupted* at 160.

⁵³ New York City Charter §1052(a)(11)(b).

in-kind contribution equal to the cost of the fundraising, unless the participant demonstrated that the recipient of the contributions has not made expenditures that directly or indirectly benefit the participant.⁵⁴

⁵⁴ Campaign Finance Board Rule 1-04(p)(1), 52 RCNY §1-04(p)(1). This rule was intended to implement the Charter directive to curb “soft money”. This rule’s relationship to Administrative Code §3-716, permitting candidate appearances without an in-kind contribution consequence, is discussed in CFB Advisory Opinion No. 2001-2 (May 17, 2001). The CFB recently replaced this rule with different requirements for political activities by participating candidates, which the CFB believes will be less burdensome. The Committee submitted testimony on the proposed rules, dated December 19, 2002, objecting to the adoption of the new requirements because these would pose new burdens and are not narrowly tailored to address the risk of “soft money” abuses.

Contributions for Anticipated Runoff Primary Elections. The 1998 Council legislation lowered the contribution limits retroactively, requiring the return of the excess portion of contributions previously received for future city elections.⁵⁵ To protect against the acceptance and use of excessive contributions, the CFB denied campaigns permission to set aside the excess portions up to the law's separate limit for a runoff primary election in a separate runoff account and required, for the first time, that campaigns demonstrate that a runoff primary is "reasonably anticipated" before fundraising under the separate runoff limit could be initiated.⁵⁶

Matchable Contribution Claims. CFB rules now give priority to reviewing matchable contribution claims made in disclosure statements submitted by January 15 of the election year – long prior to the deadline for joining the voluntary Program – in order to encourage early filings.⁵⁷ In the 2001 election, for the first time, to expedite the review of matchable contribution claims these "pre-opt-in" disclosure statements were required to be accompanied by copies of "backup documentation" for the claimed contributions (checks, cash, money orders, credit card receipts).⁵⁸ After July 11, 2001, the required documentation for cash and money order contributions includes the contributor's affirmation that the contribution is from the contributor's personal funds, is not being

⁵⁵ N.Y.C. Local Law 48 §13 (1998).

⁵⁶ CFB Advisory Opinion No. 1999-1 (January 7, 1999), *codified in* CFB Rule 1-04(q). This change led to a series of opinions concerning contribution limits for anticipated mayoral and public advocate runoff primary elections. Advisory Opinions Nos. 2001-1 (March 13, 2001), 2001-3 (May 17, 2001), 2001-10 (August 23, 2001); *see also* Advisory Opinion Nos. 2001-7 (June 14, 2001) and 2001-11 (September 7, 2001).

⁵⁷ CFB Rule 3-02(a)(2).

⁵⁸ CFB Rule 3-04(a).

reimbursed in any manner, and is not being made as a loan.⁵⁹

⁵⁹ CFB Rule 4-01(b)(3). The Board reasoned that the new requirement would prevent and help expose fraud. The Committee expressed its disagreement with this requirement in testimony submitted to the CFB on proposed rules, dated March 7, 2001, maintaining that the new requirement would complicate compliance and discourage contributions from persons without checking accounts, and would not deter fraud or significantly enhance the Board's ability to uncover fraud. In 2002, the CFB adopted new rules to require additional statements in contributor affirmations for cash and money order contributions and to prescribe statements warning of State law prohibitions in all written contribution solicitations.

Public Funds Payments. A longstanding CFB presumption is that certain expenditures, such as contributions to other candidates, derive from matchable contributions and, consequently, result in a corresponding deduction from public funds payable. Given the new 4:1 matching rate, this rule was modified to require a deduction from public funds equal to four times the amount of these expenditures.⁶⁰ Also, new rules delay the first release of public funds until after the Board of Elections conducts hearings on ballot petitions, so as to ensure payments would not be made to candidates never ruled to be on the ballot.⁶¹

Repayment of Public Funds. Exercising an option under the new local law, the CFB set the January 11 following the election as the final deadline for returning unspent campaign funds, up to the full amount of public funds received.⁶² New restrictions were adopted on the post-election expenditure of excess funds (overruling previous CFB advisory opinions) to protect against the waste of public funds and to eliminate circumstances in which the Board would otherwise have to evaluate the reasonableness of post-election expenditures.⁶³

⁶⁰ CFB Rule 5-01(n). In 2002, the CFB amended this rule to provide a limited exception to deductions when separate accounts are maintained for making such expenditures. The Committee expressed its disagreement with the rule amendment in testimony, dated June 14, 2002, suggesting instead that the rule's objective would be better served by a simpler alternative (discussed below in Recommendation B 6b).

⁶¹ CFB Rule 5-01(q). Prior to this rule amendment, the CFB released public funds to two candidates in a February 1999 special election, the first under the 4:1 matching rate, who never were placed on the ballot either by Board of Elections or court determination. In 2002, the CFB amended this rule to prohibit public funds payments to candidates initially found to be on the ballot by the Board of Elections, but then disqualified by a State Supreme Court determination. The Committee expressed its disagreement with the rule amendment in testimony, dated June 14, 2002, because the new rule creates an additional incentive for ballot petition litigation.

⁶² CFB Rule 5-03(e)(1). In 2002, the CFB amended this rule to extend the deadline until the issuance of its final audit report. The Committee expressed its support for this rule amendment in testimony, dated June 14, 2002.

⁶³ CFB Rule 5-03(e)(2)(ii). The Committee expressed its disagreement with the amendment as originally proposed in testimony submitted to the CFB on proposed rules, dated March 7, 2001, maintaining that existing rules were sufficient for protecting against the improper use of public funds. In 2002, the CFB made additional changes to this rule, on which the Committee made comment in testimony, dated October 25, 2002.

Breach of Certification. A new rule enumerated abuses the CFB considers to be a “fundamental breach” of the candidate’s certification when joining the voluntary Program, which would result in a Board determination of ineligibility for and forfeiture of all public funds: fraudulent matchable contribution claims, use of public funds for fraudulent campaign expenditures, cooperation in alleged independent expenditures that in fact are not independent, and use of a political committee the participant controls to conceal from the CFB expenditures that directly or indirectly assist or benefit the participant’s nomination or election.⁶⁴

⁶⁴ CFB Rule 2-02. The CFB adopted amendments to this rule in 2002, on which the Committee made comment in testimony, dated June 14, 2002. Other significant rules changes adopted for the 2001 election include: participants must keep copy of a written contract or other contemporaneously written record of vendors retained (Rule 4-01(l)); after July 11, 2001, participants must obtain a statement from each intermediary, affirming that the intermediated contributors were not reimbursed and that none of the intermediated contributions was made as a loan (Rule 4-01(b)(5)) (the Committee expressed its disagreement with this requirement in testimony, dated March 7, 2001); elimination of the disclosure statement previously due four days before an election (and consequent extension of period covered by daily pre-election disclosure submissions to two weeks) (Rule 3-02(c), (e)); provision for submission for CFB approval of a methodology for exempt expenditure claims in advance of making expenditures that exceed the limit (Rule 1-08(l)) (the Committee expressed its disagreement with the rules amendment, as proposed, in testimony, dated March 7, 2001). In 2002, the CFB modified Rule 1-08(l) to repeal the option of submitting an exempt expenditure methodology for pre-approval and adopt new rules for substantiating exempt expenditure claims. The Committee submitted comments on these rules, as originally proposed, in testimony dated October 25, 2002.

Vigilance, impartiality, and integrity have characterized the administration of the Program throughout its history. Of equal importance, the Board has resisted political pressure. As one illustration, during the 1993 and 1997 mayoral campaigns, the Board levied substantial civil penalties against the campaigns of two incumbent mayors. After the 1993 election, the Mayor in effect ousted the Chairman of the Board by refusing to reappoint him (the Chairman's term had expired eight months prior to the election and he was serving as a holdover). Public outrage resulted in the resignation of the Mayor's appointee to succeed the original Chairman and the reappointment of the original Chairman by the new Mayor.⁶⁵

In January 1999, early in a dispute between the Mayor and the CFB over the interplay between different campaign finance reforms adopted by the City Council and by a Charter revision referendum,⁶⁶ the City administration took the unprecedented steps of stopping payment on checks made out by the CFB to pay public funds owed to candidates and then refusing to approve the CFB's request for funding to pay participating campaigns in an upcoming special election. The Mayor's Office of Management and Budget ("OMB") also sent letters to participating candidates informing them that no public funds would be paid until the CFB reversed its legal position. For the first time, the CFB had to tap reserve funds in order to make timely payments to candidates. Several weeks later, and again in 2000, OMB proposed moving the CFB's offices from lower Manhattan, located within several blocks of the City's Board of Elections, to Brooklyn, ostensibly on the basis of cost savings. The office move never took place. Throughout the dispute, the Board steadfastly maintained its legal interpretation, which was ultimately vindicated by the City

⁶⁵*New York Times* Oct. 21, 1993, at I 1:3, January 6, 1994, at A20.

⁶⁶*See* footnote 51, *supra*.

Council, after the City administration filed a legal challenge in February 2001.⁶⁷

The CFB anticipated that term limits and the 4:1 match would bring a large increase in the number of candidates in the 2001 elections, posing an unprecedented administrative challenge for the Campaign Finance Board. In rising to meet this challenge, the CFB had to operate in a context of pre-existing structural tensions unique to New York City's reform, as discussed below. These tensions put a premium on the quality of the CFB's effort to educate and inform candidates, their campaign teams, the press, and the public, as a prelude to enforcement.

⁶⁷ See *An Election Interrupted* at 5 - 6.

Voluntary Participation. The Program remains completely voluntary. Candidates need not participate. Because the City lacks authority to regulate those who choose not to participate, no aspect of the city's campaign finance reform applies to those who do not sign up. As is the case in other jurisdictions with public financing systems, the law and the CFB rules set essentially the same standards for all 59 offices covered.⁶⁸ Council campaigns are generally expected to meet the same series of requirements as mayoral campaigns, regardless of the fact that the spending limit for a mayoral election is much greater (approximately 38 times greater in the 2001 elections). The resources and sophistication campaigns bring toward achieving compliance varies widely. Regardless, every participating campaign is audited and every audit examines compliance with the same standards. The CFB seeks to impose penalties for certain kinds of violations and has been vigilant in seeking to ensure that all participating campaigns are in compliance.

For campaigns compliance with requirements will always be an objective secondary to political goals. When compliance is perceived as difficult to maintain, or enforcement is perceived to be very strict, participation is discouraged. The 4:1 match is an overwhelming inducement, however, and many candidates choose to participate regardless of their concerns about day-to-day burdens and distraction.

⁶⁸ The two notable exceptions are the requirements that participating candidates appear in debates, discussed below, which applies only to candidates for the three citywide offices of mayor, public advocate and comptroller, *see* Admin. Code §3-709.5, and the requirement that campaigns preserve matching funds claims by filing semi-annual disclosure statements before joining the Program, which does not apply to City Council candidates, *see* Admin. Code §3-703(12); *see also* footnote 186, *infra*, and associated text, discussing recent legislative changes.

The Program's requirements have tended to increase over time. This is not merely filling loopholes, but also an affirmative effort to use the Program as a means of improving the manner in which political campaigns are conducted. After all, the public has a right to expect a substantial return from its large investment of tax dollars in political campaigns. Because entry into the Program is voluntary, those who participate exercise their First Amendment rights differently from campaigns that have not joined the Program, which are constrained only by state law.⁶⁹ Also, with the Council's adoption of the 4:1 matching rate, the Board has become increasingly concerned with the possibility of fraudulent matching claims and this has become a significant factor in recent additions to CFB rules.

Non-Participation. The campaign finance requirements in City elections are not the same for all candidates. Because non-participants are not included, every reform effort made by the City (such as the searchable campaign finance transaction database now available on the CFB's website) is inherently incomplete. Non-participants are not subject to *any* aspect of the City Program: eligibility for public funds, disclosure, limits, record keeping, audit, penalties.

Different candidates may have different reasons for not participating. In some cases non-participation may reflect a judgment that the campaign cannot be competitive under the CFB limits. Sometimes elected officials choose not to join so as not to complicate a re-election campaign that otherwise requires little effort. Wealthy candidates who wish to provide substantial funding to their own campaigns will also remain outside the Program. Non-participation may also reflect a candidate's philosophical opposition to public financing or a judgment that the candidate will not be able to meet the criteria for receiving public funds. More troubling is that non-participation may also be the result of a desire to avoid disclosure and scrutiny or even ignorance

⁶⁹*Buckley v. Valeo*; see Jeffrey D. Friedlander, Stephen E. Louis, Laurence D. Laufer, "The New York City Campaign Finance Act", 16 Hofstra Law Review 345 (Winter 1988).

of the Program altogether.

It is unquestionably appropriate that candidates who remain beyond the range of *all* City campaign finance regulations cannot receive any public financing. But, in turn, the City's public financing is now the price taxpayers pay to gain candidate acceptance of *any* of the City's reforms - including those rules of campaign conduct the public might reasonably expect of all opposing candidates (*e.g.*, comparable public disclosure). The Committee supports the CFB's recommendation that the State Legislature amend the Election Law to extend the Program's disclosure requirements and contribution restrictions to *all* City candidates.⁷⁰ This change would set a higher uniform standard for all City candidates, regardless whether they voluntarily participate in the public financing and spending limits of the City's Program. It could also provide a basis for reducing the level of public financing necessary to secure candidate agreement to adhere to those Program elements that remain voluntary.

⁷⁰ See *An Election Interrupted* at pp. 157 - 158.

A central point is that candidates, by participating in the Program, choose to subject themselves to the Program's higher standards. Often lost in news stories of participants' errors and transgressions is that other candidates may be running for the same office who are not subject to comparable requirements and scrutiny. The possibility arises that the CFB's active enforcement efforts may tend to put participants in a worse public light than non-participants. On the other hand, candidates have also received heavy editorial criticism for not participating in the Program.⁷¹

Pre-Participation. The deadline for joining the Program is now June 1 in the election year. Since elections for City offices are generally held every four years, most of the "election cycle" takes place before candidates actually join the Program.

This period of "pre-participation" is, in effect, a third distinct campaign finance regime for city elections. It is a preparatory period during which CFB requirements are not mandatory because the candidate is not yet a participant in the voluntary Program. It is a regulatory regime of anticipation and uncertainty, for both candidates and the CFB.

Under CFB rules the expectation is that "prospective participants" will conform their campaign finances to City requirements before joining the Program. Because the Act's civil penalties for violation of City requirements apply only against participating candidates, however, the threatened loss of public funds (and not the threat of civil penalties) has been the most effective tool available to the CFB for securing compliance by prospective participants.⁷² (The imposition of penalties once the candidate opts-in remains a latent threat.)

From 1989 through the 1993 elections, CFB disclosure requirements applied only after the candidate joined the Program. The initial disclosure reports were catch-up filings covering the

⁷¹*E.g.*, *N.Y. Times* Jul. 21, 2001, Oct. 29, 1999, Oct. 30, 1997, May 29, 1993; *N.Y. Daily News* July 18, 2001, Oct. 29, 1993, Feb. 19, 1993, Jan. 22, 1993; *Newsday*, Dec. 7, 2001, Oct. 26, 1993, Jun. 1, 1993, Feb. 17, 1993.

⁷²See discussion *infra* at footnotes 99-102 and associated text.

“pre-opt-in” portion of the cycle, including information about transactions previously reported to the Board of Elections on a semi-annual basis. The CFB made these and subsequent public disclosure reports the only vehicle for presenting matching funds claims. CFB auditors reviewed the information reported in these filings. Most of the audit work took place after the elections.

Since 1994 CFB disclosure deadlines have been extended to prospective participants in the pre-opt-in period (coinciding with the Board of Elections’ semi-annual filings). For candidates who ultimately run for an office other than Council, pre-participation filings are required to preserve matching funds claims on contributions received in this time period. For Council candidates, pre-participation disclosure is optional and not necessary for preserving matching funds claims. The CFB continues to provide for a catch-up filing for campaigns not making disclosure in the pre-opt-in period.

For the 1997 elections, the CFB encouraged but did not require campaigns to submit “backup documentation” for matchable contribution claims with their pre-participation disclosure statements. Following the advent of the 4:1 matching rate in 1998, CFB rules were amended to make the submission of these records a requirement for those candidates filing pre-participation disclosure statements.

Thus, even as the deadline for joining the Program has been set later, the CFB has developed procedures that enable it to initiate a review of prospective participants’ eligibility for public funds and compliance with City requirements at a much earlier point in the election cycle. Nonetheless, in part because most campaign expenditure activity takes place in the period shortly before the election, the most in-depth portion of the CFB’s audits continues to take place after the election, as had been the case before there was any CFB monitoring of prospective participants.

III. The 2001 Elections

After a long period of relative stability in the amount of public funds disbursed and the number of participating candidates and of modest evolution in requirements (1989 - 1997), a much bigger Program came into effect for the 2001 elections. The following statistics reflect both the enormous administrative challenge the CFB faced and the effort campaigns made to meet this unprecedented opportunity.

In 2001, 353 candidates participated, an 86% increase from 1997. Two hundred eighty participants were on the ballot, virtually double the 1997 total. Participating candidates constituted 79% of all candidates on the ballot for the five offices covered by the Program - another record.⁷³

Compared with the 1997 elections, the number of contributions reported by participating candidates increased by 95%; the total amount contributed increased by 85%. The number of contributions claimed as “matchable” with public funds rose 81%. Campaign expenditures by participating candidates increased from approximately \$37 million to over \$94 million - a more than two-and-one-half-fold increase.⁷⁴

Public matching funds payments rose from the previous high of \$6.9 million in 1997 to over \$41 million - a six-fold increase. A record 198 candidates received public funds payments before the election; according to the CFB, these recipients comprised 71% of participating candidates on the ballot. The CFB reviewed hundreds of thousands of financial transactions in making multiple payment determinations for, and conducting audits of, several hundred candidates.

The public face of the Program was also changed by the CFB’s full-scale implementation of a searchable contribution and expenditure database on its website (www.nyccfb.info). Visitors to

⁷³ *An Election Interrupted* at 13, 17.

⁷⁴ *Id.* at 17, 71.

the site can browse all campaign finance transactions reported by participating candidates, perform a variety of data inquiries, and review summary reports totaling candidate fundraising, spending and other financial activity. The CFB updates this information immediately after disclosure statements are received. In clarity, ease of access, and timeliness, this unique public information resource fulfills and surpasses the Act's goals for detailed public disclosure of campaign finance information.

Regulation of Private Sources of Funding

The Board brought new attention to the regulation of volunteer professional services and in-kind contributions with its determination in connection with the services provided to the mayoral campaign of Alan Hevesi by political consultant Hank Morris and the firm of Morris, Carrick & Guma (of which Mr. Morris was the sole shareholder). In August 2001, the Board withheld payment of matching funds to the Hevesi campaign on the ground that it had received improper, in-kind contributions from Mr. Morris and the Morris firm.⁷⁵ Specifically, the Hevesi campaign had retained the Morris firm and its staff as campaign consultants. Mr. Morris, however, personally provided services to the campaign as a volunteer, including production of television commercials and purchase of air time. Mr. Morris claimed that he would not make any profit from the Morris firm's work for the Hevesi campaign. In addition, although the Hevesi campaign operated out of the Morris firm's offices, it paid no rent. Following a hearing, the Board assessed a reasonable value for Mr. Morris's volunteer services and for office rent and required the campaign to reimburse the Morris firm for those amounts.⁷⁶ The campaign complied with these requirements and received the matching funds that had been withheld. To date, the CFB has not found the campaign in violation of any legal requirement as a result of the Morris firm's work or

sought to impose civil penalties.

The Morris case raised an extremely difficult question of a professional campaign consultant providing his firm's services at a deep discount under a complex agreement. To have permitted the arrangement between the Hevesi campaign and the Morris firm would, at the very least, have given the Hevesi campaign a significant and unfair advantage over its rivals. In the complex matter of valuing personal services, the Board's treatment of the Hevesi matter may well be justified, given the specific factual record. We would also note that the provision of more tangible forms of assistance than personal services (such as lending equipment, telephone banks, office space or the use of paid staff) appears to be more susceptible to regulation and more identifiable as an abuse.⁷⁷

⁷⁵ Letter dated August 2, 2001, from Amy Loprest to Hank Morris.

⁷⁶ See *An Election Interrupted* at 134-35.

⁷⁷ The issue is a recurring one. In the current election, one gubernatorial campaign paid \$5,000 per month for office space being listed at \$30,000 per month in a building owned by individuals who had each contributed \$42,500 (almost the maximum) to that campaign. In that case, the issue was whether those individuals were making an in-kind contribution greater than the maximum contribution allowed under the Election law. *N.Y. Daily News*, Aug. 2, 2002, at 2.

Nevertheless, for practitioners, the Hevesi proceeding raised several problematical issues whose resolution is not helped by the absence of a public, written decision. The scope of the decision as reported in the press⁷⁸ did not appear limited to the narrow context of volunteer services provided by an individual whose firm had a contractual relationship with the campaign. Yet both the correspondence between the Board and the Morris firm and the transcript of the hearing reflected that, in the mind of the Board, its inquiry was narrowly limited to those circumstances.⁷⁹ The absence of a written opinion left most campaigns with no guidance other than press reports.

It would have been better if the Board had issued a contemporaneous opinion specifying what it found improper about the relationship between the Hevesi campaign and Morris firm.⁸⁰ Doing so would have clarified that ordinary volunteer activities were not subject to regulation, which we understand was the actual conclusion of the Board. Leaving open the possibility that any professional's volunteer time would count as an in-kind contribution creates the potential for a deeply chilling effect on volunteering for campaigns, which many professionals do and on which many political organizations rely. To regulate the ability of individuals to participate in the political process through volunteering raises serious First Amendment implications involving core political speech."

⁷⁸ See *N.Y. Times*, Aug 4, 2002, Aug. 7, 2001, Aug. 8, 2001, Aug. 17, 2001.

⁷⁹ See letter dated August 2, 2001, from Ms. Loprest to Mr. Morris; Transcript of August 6, 2001 hearing ("Hearing Tr.") at 3 (Chairman O'Hare "There is no question that Mr. Morris could be a volunteer for a campaign that had not made a contract with his own firm, but with some other consulting firm. There's no question about that").

⁸⁰ In February 2003, the Board returned to the question whether a vendor may provide services on a voluntary basis. In Advisory Opinion No. 2003-1 (February 11, 2003), the CFB clarified that once an individual has been compensated for a service, the individual may not be considered a volunteer when providing the same service to the same campaign at another time.

⁸¹ The narrative description of the Hevesi proceeding in the Board's Report *An Election Interrupted* (N.Y.C. Campaign

Finance Board, Sept. 2002) at 134-35 contains neither a formal statement of the relevant facts nor any *ratio decidendi* for the ultimate result, which are the cornerstones of any formal opinion. *An Election Interrupted*, a comprehensive report on the 2001 election, was also issued more than a year after the Hevesi proceeding and therefore does not constitute a contemporaneous explanation of the Board's actions.

Equally problematic is the attempt at valuing Mr. Morris's services. Although the Board attempted to measure what the Morris firm was charging the Hevesi campaign against what it was charging other clients, such an analysis is fraught with difficulties.⁸² Any well run campaign will negotiate vigorously to obtain the most advantageous consulting arrangement possible. For example, although the Board focused great attention on the percentage commission that the Morris firm was receiving from purchasing television space, we are aware of at least one major campaign that refused to pay any commission whatsoever for such services on the part of its campaign professionals.

At the same time, the issue of in-kind contributions is a serious one and we do not wish in any way to discourage the Board from pursuing it. In any campaign finance system where the amount of dollar expenditures is limited, a campaign that receives in-kind assistance obtains a competitive advantage over other campaigns. In previous elections, where allegations of violation comparable in magnitude in terms of dollar amounts at issue and press attention arose in the mayoral election, the Board had issued written determinations in a timely fashion explaining its conclusions of fact and law.⁸³ A written opinion in the Hevesi case may have provided guidance in these difficult areas.

⁸² The Board itself stated that it "accepts the proposition that one campaign can operate in a manner that is far more frugal than another." Letter dated August 2, 2001, from Ms. Loprest to Mr. Morris.

⁸³ See, e.g., CFB, *In the Matter of Friends of Rudy Giuliani 1997 Election Contributions (Affiliated Contributions)*, Administrative Proceeding No. 1997-2 (Sept. 23, 1997); *Dinkins (1993 Primary Election Expenditures)*, Administrative Proceeding No. 1993-9 (Oct. 20, 1993); *Giuliani v. Dinkins (New York State Democratic Committee Expenditures)*, Administrative Proceeding No. 1993-8 (Oct 19, 1993).

As a separate matter, in *An Election Interrupted*, the Board addressed the issue of campaign contributions by individuals or entities doing business with the City, commonly called “pay-to-play” contributions.⁸⁴ Noting that the 1998 City Charter amendments required the Board to promulgate rules regulating pay-to-play contributions, the Board nevertheless “determined not to adopt these rules” after receiving public comment on three proposed regulations.⁸⁵ In support of this decision, the Board cited the difficulty of obtaining “the comprehensive information necessary to enforce any rule” and the “numerous other requirements the Program imposes on candidates” and suggested that “this problem would be better addressed by limiting the actions of the contributor rather than the recipient of the contribution”⁸⁶

In 2001, the CFB issued one ruling on the scope of the contribution limit that ultimately became significant in the general election for mayor. The Act provides: “a candidate . . . may accept additional contributions which do not exceed one half the amount of the applicable limitation for any run-off primary election . . . or election held pursuant to court order”⁸⁷ But in a June 2001 advisory opinion, the Board found that the additional \$2,250 contribution limit the Act now provides for candidates in a run-off primary would *not* also have the effect of increasing

⁸⁴ In *Towards a Level Playing Field*, the Committee recommended that pay-to-play contributions should be drastically restricted across the board. 52 *Record* at 686.

⁸⁵ *An Election Interrupted* at 160. The CFB’s proposals defined “doing business” to include persons and entities under the jurisdiction of the Procurement Policy Board and lobbyists and applied to campaigns raising more than \$500,000 (*i.e.*, citywide campaigns). The Committee recommended adoption of one of these approaches: that the Board would obtain a list of parties doing business with the City, compare that list with candidates’ finance statements, and request a response from candidates receiving contributions from such entities, which would then be published. See Letter dated January 31, 2000, from Lawrence Mandelker to Hon. Joseph O’Hare and enclosed comments.

⁸⁶ *Id.* The Board cited the example of Securities and Exchange Commission Municipal Securities Rulemaking Board Rule G-37, which restricts firms in the municipal bond business from receiving business from entities that they supported with political contributions. *Id.* Rule G-37, however, is limited in scope to the securities business and itself may not be enforced as thoroughly as might be expected. See *New York Times* June 21, 2001, at B1:1 (noting bond lawyer doing business with City as “bundler” of contributions to the Comptroller, who was a candidate for mayor).

⁸⁷ Admin. Code §3-703(1)(f).

the overall contribution limit to \$6,750.⁸⁸ The interpretation limited Democratic nominee Mark Green's private fundraising options once he emerged from the run-off primary.

Public Funding

As of the general election, public funds payments totaled \$41,137,438 to 198 participating campaigns in the 2001 elections. In April 2002, the CFB began to release additional public funds payments to 2001 candidates upon completion of their audits. In addition, many campaigns have or will return unused campaign funds to the city (up to the full amount of public funds payments received by those campaigns), which will reduce the net disbursement of public funds for the 2001 elections.

Matchable contributions. To demonstrate qualification for public funding, participating campaigns make claims for "matchable contributions" in disclosure statements submitted to the CFB, together with "backup documentation" for those claims (copies of checks for check contributions, signed contribution cards for cash contributions, credit card receipts for credit card contributions, money orders and signed money order contribution cards for money order contributions). The matching claims are then reviewed by the CFB for validity. The CFB issues "invalid matching claims reports," giving campaigns an opportunity to address the CFB's reason(s) for invalidating particular claims.

To be matchable, the Act specifies the contribution must be:

- "made by a natural person resident in the city of New York"
- "to a participating candidate"
- "reported in full to the campaign finance board"

⁸⁸ CFB Advisory Opinion No. 2001-7 (June 14, 2001).

— contributed on or before December 31 in the year of the election.⁸⁹

⁸⁹ NYC Admin. Code §3-702(3).

A participant may claim no more than \$250 per contributor as matchable for all covered elections (primary and general) held in the same calendar year.⁹⁰ Loans and in-kind contributions are not matchable.⁹¹ Furthermore, except for Council candidates, candidates must submit disclosure statements to the CFB “in a contemporaneous manner . . . in order for any contributions received during the periods covered by such reports . . . to qualify as matchable contributions.”⁹² CFB rules enumerate factors for determining whether matchable contribution claims are invalid.⁹³

Administrative process for demonstrating qualification for payment. Participating candidates had varying degrees of success in raising matchable contributions, making valid matching claims, addressing CFB invalid matching claims reports, demonstrating eligibility for

⁹⁰ See *id.*, Admin. Code §§3-703(2), 3-705(2).

⁹¹ NYC Admin. Code §3-702(3). Likewise contributions “in the form of the purchase price paid for an item with significant and enduring value . . . or otherwise induced by a chance to participate in a raffle, lottery, or similar drawing for valuable prizes” are not matchable. *Id.*

⁹² NYC Admin. Code §3-703(12)(a).

⁹³ Former CFB Rule 5-01(d). In the 2001 elections, these included:

- (2) contributor addressees that are not residential addresses in New York City
- (4) contributors that are entities other than individuals
- (5) cash contributions over the \$100 state law limit
- (6) contributions that exceed the Act’s contribution limit
- (7) contributions made or accepted in violation of any law
- (8) contributions that were returned to or not paid by the contributor
- (12) contributions originally received for a different election
- (15) contributions for which a record required under CFB rules was not kept or provided on request
- (18) contribution checks drawn on business accounts
- (19) checks drawn by a person other than the contributor
- (21) any information that suggests the contribution was not processed or reported in accordance with CFB requirements
- (22) any other information that suggests the claim may be invalid
- (23 – 25) except for Council candidates, contributions received before January 12 in the election year that were not contemporaneously reported in pre-participation disclosure statements filed in a complete and timely manner
- (27) contributions of \$1,000 or more for which complete contributor employment information has not been reported, unless a record of the participant’s good faith effort to obtain such information is submitted with the disclosure statement.

In 2002, the CFB amended this rule, including by renumbering the enumerated bases for invalidating matching claims. The Committee expressed its disagreement with portions of these amendments in testimony, dated June 14, 2002.

public funds and receiving full and timely public funds payments. While the CFB payment process requires significant attention by campaigns to detail, in 2001, most candidates meeting threshold requirements received one or more payments before the election.

There were various administrative actions that complicated the payment process for campaigns which the Committee has every confidence the Board will address. After the 1998 legislative changes, the CFB did not finalize its rules, disclosure forms, instructions, and procedures until the spring of 2001. Less sophisticated campaigns were caught unaware of changes in, for example, the backup documentation required for cash and money order contributions, which took effect on July 12, 2001. Some campaigns had matching claims invalidated as a result of their ignorance of these changes.

The administrative process for qualifying for public funds begins with the filing of disclosure statements. The CFB provides free software, "C-SMART" (Candidate Software for Managing and Reporting Transactions), to participating candidates. This software is used to produce the electronic disclosure statements that are filed with the CFB and the paper submissions that are filed with the City Board of Elections. Electronic and paper disclosures to the CFB are entered into its internal database, "CFIS" (Campaign Finance Information System), which in turn generates the searchable database that is on the CFB's website.

C-SMART also enables campaigns to maintain some of the records required by CFB rules (such as for petty cash, advances, and checkbook register). It contains many prompts that warn users that information for a transaction is incomplete or potentially violates a Program requirement, which certainly helps spur compliance with Program requirements. In 2001, most

participating campaigns used C-SMART.*

* In 2002, the CFB adopted rules that eliminate submission of disclosure statements on paper forms except in specific cases in which the CFB grants permission in advance upon request. *See* CFB Rules Chapter 9, as amended. The Committee expressed its disagreement with aspects of this requirement in testimony, dated June 14, 2002, because the rule did not contain standards for granting permission to use paper forms and because the new rule maintained the requirement that the electronic filing be accompanied by a redundant paper printout.. The CFB is also seeking to enable participating campaigns to make electronic filings over the Internet, as the State Board of Elections has instituted for Statewide and state legislative committees that are required to file in Albany.

C-SMART was updated several times in 2001, the last “patch” being issued in late August 2001.⁹⁵ The software has several utilities relating to matching funds claims, including a “threshold report” intended to enable a campaign to “estimate the campaign’s progress” toward meeting the fundraising requirements for receiving public funds and an “invalid matching contributions” report.⁹⁶ The software is programmed to consider certain contributions to be invalid, and that assessment is then reflected in these reports.

C-SMART lists some contributions as invalid for incorrect reasons (*e.g.*, missing contributor employment information for contributions over \$99). Also, as noted in the CFB’s Handbook, C-SMART “does not perform numerous other tests that are relevant for determining whether a matching claim or threshold calculation is valid,” many of which are related to documentation requirements.⁹⁷ Thus, the software can give campaigns a misleading impression about whether they have qualified to receive public funds and/or which “invalid” contributions require corrective action. As a result, some campaigns have worked to “validate” claims where there is actually no risk of invalidation, but overlook the need to correct claims that the CFB is likely to invalidate.⁹⁸ CFB instructional materials should aim to focus campaigns on identifying and addressing problems that are most likely to cause delays or reductions in public funds payments.

⁹⁵ As an administrative measure, the CFB requires that campaigns using the CFB software incorporate the latest update patch before submitting their filings. Otherwise, the filing may be considered insufficient, treated as late and result in a public funds payment delay and civil penalties.

⁹⁶ Campaign Finance Board, *2001 Campaign Finance Handbook* (April 2001) at 182.

⁹⁷ *Id.* at 183.

⁹⁸ The software can be re-programmed to correct inaccurate invalidations, but it will never reflect the many bases for invalidation that arise solely because of problems in “backup documentation,” which account for a large portion of the invalidations ultimately made by the CFB.

Beginning in 2000, CFB rules required pre-participation disclosure statements to include backup documentation for matchable contribution claims.⁹⁹ The CFB sent written notice to campaigns alerting them to the new requirement. When a *prospective* participant's political committee failed to include backup documentation with a disclosure statement submitted by deadline in July 2000 (the documents were submitted four days after the statement filing deadline, after the campaign was contacted by the CFB), the CFB invalidated *all* the matchable contributions claimed in the disclosure statement, resulting in a loss of over \$80,000 in public funds.¹⁰⁰ This was the only sanction available to the CFB because the Act's civil penalty for failure to file required records in a timely manner applies only to participating candidates, not prospective participants.¹⁰¹ This decision is notable because it was the first time the Board invalidated all matchable contribution claims in a prospective participant's disclosure statement because of lateness in submitting documents and it showed that the consequences for a seemingly minor infraction of a new requirement by a candidate who had not yet joined the Program could be severe. The ruling seemed to signal an increased linkage between the CFB's payment and enforcement procedures.¹⁰²

⁹⁹ CFB Rule 3-04(a).

¹⁰⁰ See Campaign Finance Board, "Campaign Finance Board Invalidates Matching Funds Claimed By Two Candidates" (September 18, 2000) (press release). The cited basis for the invalidation was former Rule 5-01(d)(15): "contributions for which a record required . . . was not kept or provided upon request." See Letter of Sue Ellen Dodell to Bruce Bronster (September 15, 2000). In its comments to the Committee, the CFB has emphasized that it considered the Badillo campaign's presentation in a September 2000 appearance before the Board to be unresponsive and deficient. Committee member Lawrence Mandelker subsequently represented the candidate in seeking to appeal from this decision.

¹⁰¹ Admin. Code §3-711(1). To date, the CFB has set civil penalties for late disclosure statements of no more than \$25 - \$100 per day. It has never sought a civil penalty for the late submission of backup documentation for matchable contribution claims. In 2002, the CFB amended Rule 1-09 (a)(3)(iv) and (c) to effectively redefine disclosure statement to include the backup documentation. The new rule appears to create a basis for the CFB to seek civil penalties from participating candidates for a deficient or late filing solely on the basis of missing backup documentation. The Committee objected to this rule change in testimony, dated June 14, 2002, maintaining that the threat of penalty is unnecessary since the Board will not release public funds to match claims for which backup documentation is missing.

¹⁰² The CFB issued a press release, but did not publish a formal ruling. It is unclear whether the precedent of this ruling

It also contrasts with the Board's appropriately flexible approach in validating claims for which documentation is first submitted in response to invalid matching claims reports.

By requiring submission of these records earlier than in the past, the CFB was able to generate invalid matching claims reports for prospective participants before they joined the Program, offering campaigns more time to rectify matching claims the CFB initially questioned. The CFB issued a separate invalid claims report for each disclosure statement, and re-issued invalid claims reports for previous disclosure statements, giving campaigns multiple opportunities to "maximize" their public matching funds. Campaigns submitted written responses, additional supporting documents and, often, disclosure statement amendments to address the issues listed in these reports.

The CFB exercises an important public trust in ensuring the proper distribution of public funds. It is appropriate that the Board takes a conservative approach in reviewing matchable contribution claims - the burden of demonstrating "matchability" is and must remain with the candidates. While the Committee believes that the practices and standards the Board follows in reviewing matching claims are generally sound, certain aspects merit improvement.

For example, minor deviations in how the contributor wrote the recipient committee's name on the check generally led to an initial invalidation requiring the campaign to respond. Often the contributor's intent was sufficiently clear that contributions should not have been invalidated on this basis. Many contributions were invalidated incorrectly because of "non-residential address" arising from poor computer programming, which the CFB advises will be corrected for the 2003 elections.

extends to Council candidates, who are subject to the same rules requirement that pre-participation disclosure statements include backup documentation, Rules 3-04(a) and 4-06, but, until 2004, are not subject to the underlying legal requirement that pre-participation disclosure statements be submitted to preserve the matchable contribution claims made therein. Admin. Code §3-703(12). See footnote 186, *infra*, and associated text, discussing recent legislative changes.

Invalid claims reports list each contribution with which the Board took issue, and total the aggregate claims that have been “invalidated.” These reports were not designed to, and do not, show campaigns whether they have met the threshold or what additional actions would be necessary to meet the threshold. They should do so. The reports specify the reason(s) why a claim is invalid, using one or more of over 40 boilerplate phrases. Most of these are clear and likewise make clear the response, if any, that could be made.¹⁰³

¹⁰³ *E.g.*, “contributor is not an individual”, “contributor has non-NYC address”, “ backup documentation is illegible”, “contributor card is not properly signed.”

In some instances, however, the reason given for invalidation (and possible remedy) was obscure. *E.g.*, “Not accepted by Board.” This reason often reflected the CFB’s sense that a matching claim was fraudulent (*e.g.*, sequential money orders appearing to be in the same handwriting). Such suspicions were not made clear to the affected campaigns, however. Rather than sending campaigns a notice of violation with an opportunity to contest under CFB Rule 7-02(c), the CFB generally treats suspected fraud as a matter to be referred for criminal prosecution.¹⁰⁴ A better policy would be to send a notice of violation with an opportunity to contest. The Board always has the option of making a criminal referral.¹⁰⁵ In other instances, the reasons given for invalidation were incorrect and therefore confusing to the respondent-campaigns.¹⁰⁶

Some campaigns also received invalid claims reports the CFB re-issued for previous

¹⁰⁴ In 2002, the CFB added Rule 5-01(d)(23) to expressly invalidate: “contributions purportedly from different contributors that were made by money orders bearing consecutive serial numbers or other markings indicating that they were purchased simultaneously”. The Committee submitted comments on this rule, as proposed, in testimony dated June 14, 2002.

¹⁰⁵ Criminal referrals are certainly appropriate if the CFB finds evidence of hard-core criminal activity, such as when matching claims are permeated with fraud. In 1994, the CFB referred irregularities found in its audit of Ron Reale’s campaign for public advocate to the United States Attorney’s office. These became a major component of a racketeering and conspiracy prosecution resulting in several felony convictions. *See A Decade of Reform* at 108 - 109.

Other considerations arise when the alleged misconduct is less extensive. It is not clear whether criminal referrals are routinely made by the Board in such instances and how many result in actual prosecutions. Routine referrals of such matters to prosecutorial authorities may not always be the most efficient means for determining whether serious abuses have taken place. Instituting civil proceedings may often be preferable, given prosecutorial priorities and appropriate prosecutorial caution in considering cases arising in a political contest. Further, the difficulties of determining *mens rea* on the part of candidates, campaign workers, contributors, and others is another complicating factor in assessing whether perceived misconduct is criminal. The Committee hopes that the mere possibility of criminal prosecution will not become a routine basis for delaying CFB resolution of compliance questions and campaign eligibility for public funds payments.

¹⁰⁶ For example, “contributor card is not properly signed” was at times used for contributions made by check, for which signed contribution cards are not required documents. In 2002, based on suggestions made by criminal prosecutors, the CFB proposed requiring that all monetary contributions, including checks, be accompanied by affirmations from the contributors, reflecting their acknowledgement of criminal sanctions for the submission of false information. The Committee expressed its disagreement with this proposed rule in testimony dated October 25, 2002, noting the chilling effect it would have on legitimate contributions. The CFB decided not to adopt this proposal.

disclosure statements that did not explain why previous responses were not considered sufficient or even note whether those responses had been reviewed. In several cases, the CFB did not issue invalid claims reports for later disclosure statements until after the election or at all.

Given the Program's intricacies, the volume of transactions to be reviewed, and the time constraints of the public funds payment process, it would be unreasonable to expect the CFB's administration would be entirely devoid of error. But in addition to working to identify and minimize errors, additional flexibility should be built into the payment process to minimize the potential adverse consequences when errors occur, whether on the part of candidates or of the CFB.

Until payments were made, campaigns received no advance notice of amounts that would be withheld pursuant to the CFB presumption that certain uses of funds (*e.g.* to pay debts from a previous election or to make political contributions to other candidates) derive from matchable sources.¹⁰⁷ This lack of specific notice contrasts with the detailed information the CFB otherwise provides in invalid claims reports. The consequence of the presumption is a deduction from public funds payable equal to *four* times the amount of the expenditures covered by the rule. The deduction is intended to protect against the possible diversion of matchable contributions to uses for elections not subject to Campaign Finance Act requirements. In 2001, such deductions from payments were consistently made, even though the Board did not reach consensus on the proper interpretation of the presumption,¹⁰⁸ except in the case of a candidate who challenged the

¹⁰⁷ CFB Rule 5-01(n).

¹⁰⁸ The Board deadlocked and was unable to answer an advisory opinion request asking whether this presumption was rebuttable (specifically concerning the use of a separate account in which only non-matchable contributions were deposited). Letter of Harris M. Lirtzman to Sue Ellen Dodell, dated May 31, 2001. In 2002, the CFB amended Rule 5-01(n) to provide a limited exception to deductions when separate accounts are maintained for making such expenditures. The Committee expressed its disagreement with the rule amendment in testimony, dated June 14, 2002, suggesting a simpler alternative that would meet the objectives of the Board's rule (discussed below in

deduction in court, which the CFB resolved by releasing most of the public funds that had been withheld.¹⁰⁹

Recommendation B 6b).

¹⁰⁹ *Eisland v. N.Y.C. Camp. Fin. Bd.*, Sup. Ct., N.Y. Cty., Index No. 116202/01. Committee Chair Henry Berger represented the candidate and Committee member Laurence Laufer served as a consultant to the candidate.

The CFB also generally did not give *advance* notice of amounts withheld “for non-compliance” or in anticipation of possible civil penalty assessments for suspected violations. As discussed below, candidates later received formal notices of violations and recommended penalties, with an opportunity to contest, before the Board made the findings and penalties final.

After the deadline for joining the Program, the CFB sent letters advising campaigns that they had met the threshold.¹¹⁰ The CFB does not give similar advance notice of the amount of public funds a campaign has qualified to receive, the amount or number of contributions it needs to raise to meet the threshold requirement, or expenditures the Board considers problematic and will lead to deductions from payments. Indeed, during the election, CFB staff generally did not answer campaign inquiries on whether the staff intended to recommend that the Board approve a request for payment.

CFB payment determinations. The Act directs the CFB to make “possible payment within four business days after receipt of reports of matchable contributions, or as soon thereafter as practicable.”¹¹¹ Under the Act, the first payments for a primary election may not be released any earlier than two weeks after the deadline for filing designating petitions or for a runoff primary or general election any earlier than the day after the primary election.¹¹² CFB rules further restrict the first release of public funds for a primary election until after the Board of Elections conducts hearings on ballot petitions, to ensure that payments are made only to candidates on the ballot and opposed on the ballot.¹¹³ As a result, public funds payments are concentrated in a five-week period preceding the primary and a one-and-one-half month period preceding the general election.

Each public funds payment follows the submission of a disclosure statement, the only forum under CFB rules and procedures for presenting matchable contribution claims. There are

¹¹⁰ These letters also required campaigns to submit copies of matchable contribution checks with their next filing, regardless of the rule relieving campaigns of this duty once the CFB confirms the threshold has been met. See former CFB Rule 3-04(a). In 2002, the CFB repealed the rule that had permitted campaigns to stop submitting backup documentation with disclosure statements once the CFB had confirmed the campaign had met the threshold. See amendment to CFB Rule 3-04(a), effective September 6, 2002.

¹¹¹ Admin. Code §3-705(4).

¹¹² Admin. Code §3-709(5), (6).

¹¹³ CFB Rule 5-01(i)(2).

three disclosure statements before the primary election and another three before the general election that precede the dates the CFB schedules for payment determinations. In 2001, the Act's direction to make payment within four business days was triggered twice before the primary election and twice again before the general election. The first public funds payment was made three weeks after the most recent preceding disclosure statement deadline.

The pre-election disclosure statements do not include all matchable contributions received before an election. In addition, the CFB's review process necessarily delays payment on other matchable contributions received before the election.¹¹⁴ Therefore, since 1989, the CFB had permitted campaigns to receive pre-election "bridge loans" in anticipation of the post-election payment of public funds earned before the election.¹¹⁵

In 2002, the CFB repealed the bridge loan exception to the Act's contribution limit, maintaining that the exception was inconsistent with the Election Law and unnecessary given changes in the Program's matching formula and schedule of disclosure statements. The Committee disagrees.¹¹⁶ The need for the bridge loan exception is actually more compelling today than when it was first adopted by the Board.

The bridge loan exception has been a key feature of the CFB's post-election audit process. It strikes precisely the right balance between helping participating candidates obtain access to funds before the election and giving the CFB additional time to protect public tax dollars against

¹¹⁴ One aspect of this administrative delay was challenged by mayoral candidate Herman Badillo. The Board denied the Badillo campaign's request that it perform a pre-primary election threshold review of matchable contributions received after August 27, 2001. The Board's ruling was upheld in two judicial decisions. *Badillo v. New York City Campaign Finance Board*, Index No. 117171/01 (N.Y. Sup. Ct., September 10, 2001); *Badillo v. New York City Campaign Finance Board*, Index No. 117595/01 (N.Y. Sup. Ct., September 24, 2001). Committee member Laurence Laufer served as a consultant to the Badillo campaign in these cases.

¹¹⁵ See CFB Advisory Opinion No. 1989-42 (September 5, 1989), *codified in* former CFB Rule 1-05(f).

¹¹⁶ See Committee testimony dated October 25, 2002.

misuse. The Board's original reasoning remains compelling today: "[c]andidates would be unfairly penalized, and the voter education purposes of the Campaign Finance Act significantly undermined, if the Board determined that the delay in payment necessitated by the Board's review of matching funds claims compelled candidates to forego using loans for qualified campaign expenditures in the period immediately preceding election."¹¹⁷

¹¹⁷ Advisory Opinion No. 1989-42, *supra*, note 115.

Over the years, as the Board has gained experience in dealing with invalid or fraudulent matching claims, it has tightened the associated record keeping requirements. The Board has noted many different administrative reasons for delaying the release of public funds earned on matchable contributions received before the election.¹¹⁸ The allowance for bridge loans should be restored to ease the tension between the need for these various administrative delays and the Act's goal of providing financing at a meaningful time to candidates who qualify. The bridge loan exception remains necessary, regardless of the increase in the matching funds formula, precisely because the exception exists only for those campaigns that do not receive the maximum payment allowable before the election.¹¹⁹

¹¹⁸ *See id.*

¹¹⁹ The additional basis the Board asserted for repeal, after the public comment period, was the need to maintain consistency with the Election Law. The Committee also finds this new reason unpersuasive. Under NYC Administrative Code §3-714, the CFB's longstanding bridge loan exception could never have been administered in a manner that was inconsistent with state law. The Election Law permits unlimited loans from candidates and their spouses to remain outstanding after an election. It also permits loans from other contributors to remain outstanding up to contribution limits that generally exceed, sometimes by a substantial amount, the voluntarily assumed contribution limits of the City's law. The Election Law also would not preclude participating candidates from receiving large loans from political party committees that are not repaid until after the election. *See* Election Law §§14-100(1); 14-114(1)(b), (3), (6).

In its notice of this final rule, the CFB suggested that it may exercise its discretion to reduce penalties for some loans that exceed the contribution limit. The Committee does not believe that tempering punishment is an adequate substitute for the safe harbor that has been eliminated.

After the election, it is CFB policy to complete its audit of the candidate's campaign before releasing any further public funds payments.¹²⁰ Payments are generally made following a formal vote of the Board at a public meeting.¹²¹ The first Board meeting following a disclosure statement deadline is considered a "regular" payment date. Payments made at subsequent meetings before the next disclosure deadline are styled "interim" payments for those campaigns that did not receive public funds on the most recent regular payment date, but have since met the CFB request for information or proof of compliance that had initially delayed payment.

During the 2001 elections, CFB staff always presented payment recommendations to the Board during an executive session of its public meeting. The staff's recommendations were then modified in light of the executive session discussion and ultimately presented for a *pro forma* Board vote of approval in public session. During 2001, the vote was conducted without any public announcement of the recipient-candidates and amount of public funds each were to receive. At times in 2001, CFB staff declined to make this information available to persons in attendance who requested it immediately after the Board vote at the conclusion of the public meeting. While the Committee understands that CFB staff must attend to many administrative matters, during and immediately after Board meetings, and appropriately must give priority to carrying out all Board decisions with dispatch, it creates an unfortunate impression for candidates, their representatives and the general public in attendance, when no Board staff are made available to answer questions about a public vote that has just taken place.

¹²⁰ See CFB Rule 5-01(m).

¹²¹ Sometimes the Board votes to release a payment contingent on a campaign's meeting a requirement or request subsequent to the vote. Also, from time to time, the Board has delegated to the Chair, or another Board member, authority to approve public funds payments in between regularly scheduled CFB meetings.

Payment delays. In the days leading up to the first scheduled public funds payment, many campaigns were telephoned by CFB staff and alerted for the first time to possible violations (corporate contributions, contributions from unregistered political committees, over-the-limit contributions), which, if not remedied, would result in a payment delay.¹²² The amount of public funds payments placed at risk due to the violations alleged far exceeded the relatively modest civil penalties the CFB later assessed after the election for these and comparable infractions. If proof of cure or that the transaction was not a violation was not received by the deadline given (often, the next day or later the same day), the payment was delayed.¹²³ For these candidates, the first public funds payment was delayed by at least ten days.

The perception that public funds payments were unduly delayed before the 2001 primary election, while widespread,¹²⁴ contrasts with the Board's ultimate record of disbursing payments to the vast majority of campaigns that demonstrated meeting the threshold before the primary election. Yet the effect of any delay in payment can be catastrophic on the operations of a campaign. While the facts are necessarily different for each campaign, we urge the Board to re-examine this situation closely and modify its procedures to facilitate the making of timely payments to qualifying candidates as proposed below. Several determinations that resulted in payment delays raise questions of whether delay of the *entire* payment was the most appropriate decision under the Program and proportionate to the conduct at issue.

¹²² In contrast to the notice of possible violations given by telephone, CFB rules state that the CFB "shall notify the participant by mail whenever the CFB has reason to believe that a violation has been committed." See CFB Rule 7-02(c).

¹²³ In 2002, the CFB proposed a new rule to codify its practice of approving a public funds payment, contingent on a candidate's satisfactory demonstration of compliance, "notwithstanding that the [candidate] has been determined to be ineligible to receive public funds because of minor, easily corrected compliance issues." The Committee submitted comments on the proposed rule in testimony dated December 19, 2002. The CFB adopted the new rule in 2003. Rule 5-01(s).

¹²⁴ *New York Times*, August 30, 2001 at A1.

In the Hevesi matter, discussed above, the Board delayed the release of over \$2.5 million in public funds for ten days, while it sought additional information and explanations from the campaign. Because the Board did not announce a finding of violation or assess any penalty at the time the matter was resolved, the justification for this initial, highly publicized delay is certainly not clear. If the conduct at issue was not a violation, the delay in payment of *all* public funds otherwise due appears excessive. On the other hand, if the conduct at issue was a violation, the absence of a contemporaneous finding of violation and penalty assessment is problematic, given the amount of public funds implicated. The Committee believes that a formal written determination should have been issued in this high-profile matter because the issue decided, concerning in-kind contributions and personal services, is of significance in many campaigns. We commend the Board for its past practice of issuing such determinations and urge it to continue to do so in the future.

During the 2001 elections, when the CFB suspected that matching claims had been made on the basis of fraudulent contributions, often money orders, the Board suspended all public funds payments to the campaign. In one such case, after the campaign had appeared before the the Board to address its concerns regarding the nine \$20 money order contributions in question, the Board, at its next meeting one week later, decided to continue to delay the first payment to this Council campaign based on its stated intent to review a *future* disclosure statement before releasing any payment.¹²⁵ The campaign then brought suit. After several hours in court, the CFB asked additional questions about the contributions originally at issue, which the campaign answered, apparently to the CFB's satisfaction, because it agreed to release the \$74,825 at issue that same

¹²⁵ The Board believes that fraud was admitted in how these contributions were obtained, a view the campaign disputes. Even granting the Board's assertion, however, this case is discussed solely to illustrate administrative delay in payment determinations. The Committee does not question the Board's right and duty to investigate credible allegations of fraud vigorously.

day.¹²⁶ This result raises the question whether *continuing* a payment suspension is the most appropriate policy when the Board has not also advised the campaign of its additional questions concerning a matter in dispute.

¹²⁶ *Crowley v. N.Y.C. Campaign Fin. Bd.*, Sup. Ct., N.Y. Cty., Index No. 22910/01. Committee member Laurence Laufer served as a consultant to the Crowley campaign in this case.

In one prominent case, the question was how the CFB would determine whether the campaign had qualified to receive any payment. The Badillo mayoral campaign asked the CFB to review matchable contributions reported in a July 2000 disclosure statement toward the \$250,000 threshold eligibility requirement, without appealing the CFB's previous determination to deny matching funds for these contributions.¹²⁷ The CFB denied this request.¹²⁸

The campaign then filed an emergency petition in State Supreme Court. Justice Nicholas Figueroa required the CFB to review the matchable contributions at issue for purposes of the threshold requirement, holding "the impact of respondent's determination so disproportionate in these circumstances as to be deemed arbitrary as a matter of law"¹²⁹

After the CFB and Justice Figueroa denied the Badillo campaign's further requests for a threshold review of matchable contributions received after August 27, 2001¹³⁰ and after the Badillo campaign lost the primary election, the CFB concluded that the campaign had in fact met the threshold on the basis of contributions received *before* the primary election. Justice Figueroa's decision to require the CFB to review the matchable contributions reported in July 2000 proved to be critical because it accounted for the margin by which the campaign was able to show it had met the threshold. The campaign received over \$350,000 in public funds at the conclusion of the CFB's audit in April 2002.

In this case, the CFB was successful in defending administrative procedures and cutoffs in the public funds payment process. The result was to deny a pre-election payment for a candidate

¹²⁷ See footnotes 99-102, *supra*, and associated text.

¹²⁸ See Advisory Opinion No. 2001-9 (August 2, 2001).

¹²⁹ *Badillo v. New York City Campaign Finance Board*, Index No. 116367/01 (N.Y. Sup. Ct., August 30, 2001) at 3. Committee member Laurence Laufer served as a consultant to the Badillo campaign in this case. Issues concerning the CFB's desire to appeal this decision are discussed below.

¹³⁰ See footnote 114, *supra*.

who it ultimately concluded had qualified for public funds on the basis of contributions received *before* the primary election - all in the context of a non-participating opponent, Michael Bloomberg, who set a primary election record by spending over \$20 million. The Committee believes it a fair question whether this was the most appropriate approach given the overall goals of the Program.

In another 2001 case, the Board did not make any pre-primary election payment to a Borough President candidate based on a staff recommendation concluding that his campaign was not in compliance with Program requirements.¹³¹ The campaign responded to a Board request for additional information, but the Board did not consider the response sufficient to resolve its questions. Justice Martin Schoenfeld found that the Board had acted within its authority in denying payment.¹³² In this case also, a formal Board determination could have given useful guidance to other campaigns and practitioners.

¹³¹ CFB staff noted “questionable campaign activity, including a high percentage of contributions from employees of the Soundview Health Center, of which [the candidate] is the president, the unreported use of a campaign van, the publication of a newsletter . . . , which appeared to be unreported campaign material funded through corporations under [the candidate’s] control, and joint campaign activities between” the candidate and his son, who was a candidate for City Council. *An Election Interrupted* at 137.

¹³² *Espada 2001 v. New York City Campaign Finance Board*, Index No. 115778/01 (N.Y. Sup. Ct., September 7, 2001).

Payment formula. Before the election, the CFB calculates payment based on the amount of valid matchable contributions it finds or projects multiplied by the applicable matching rate up to the maximum permissible under the Act for the election.¹³³ The CFB also deducts from payments amounts based on non-compliance, penalties and certain expenditures (*e.g.*, contributions to other candidates and political committees, as described above).

After the election, the final public funds payment is capped further, at the lesser of: (i) total qualified campaign expenditures minus total public funds received; or (ii) total outstanding debt. This ultimate cap is intended to ensure that public funds will not have been used for impermissible purposes and that the campaign receives no more than is necessary to retire its outstanding obligations.¹³⁴

The Act's formula for paying public funds does not limit payment to those candidates in genuine need or in competitive elections. Although this has been the subject of some editorial criticism,¹³⁵ we believe that the onus should lie on the candidates to make good-faith determinations whether they need public funding.¹³⁶

Regulation of Campaigning

Spending Limits. In New York City, like every other jurisdiction offering public funding

¹³³ Generally, the matching rate is 4:1, with a maximum payment equal to 55% of the spending limit. When the Board determines that a non-participating opponent has raised or spent more than one-half of the spending limit, as discussed below, the matching rate is increased to 5:1 and the maximum payable is increased to two-thirds of the spending limit. See Admin. Code §3-706(3). In 2002, the CFB proposed reducing the regular matching rate to 3:1, increasing the "bonus" matching rate to 6:1 (up to 100 percent of the spending limit) against non-participating candidates who raise or spend 1 1/2 times the spending limit, and lowering the maximum amount of public funds payable to Council candidates. See *An Election Interrupted* at 146 - 149.

¹³⁴ In 2002, the CFB proposed, but did not adopt, a new rule to change how it calculates post-election public funds payments. The Committee submitted comments urging the Board not to adopt the proposed in testimony dated December 19, 2002.

¹³⁵ See Editorial, "Campaign Fund Sham", *N.Y. Daily News*, October 29, 2001.

¹³⁶ See Recommendation B 7(c) below.

(whether full or partial) for political campaigns, the right to receive public funds is contingent upon acceptance of a limit on campaign spending. Those who want the opportunity to spend without limit may do so by financing their campaigns with strictly private funds – their own or those contributed by others. In 2001, the City’s matching funds formula was sufficiently generous to persuade the vast majority of candidates to accept the expenditure caps.

In 2001, a mayoral candidate refused to accept the Program's voluntary spending limit, used vast personal funds to finance his campaign, and – for the first time in the history of the Program – won the election as a non-participating candidate.¹³⁷ Michael Bloomberg spent nearly \$74 million of his own money – more than any previous non-presidential candidate – in the Republican primary and the general election battle to defeat Democratic candidate Mark Green. The expenditures and success were certainly unprecedented, but so were the events surrounding the election: some would argue that no amount of money could have secured Green the win after the terrorist attack on September 11, 2001 – which hugely magnified the value of former Mayor Rudolph Giuliani's endorsement and Bloomberg's strengths as a financial manager – and the self-destructive infighting among Democrats. It therefore remains to be seen whether Bloomberg's campaign carries any implications for the future of public funding in general or the City's Program in particular.

¹³⁷ In 1989, Ronald Lauder sought the Republican and Conservative Party nominations for Mayor through a \$14 million campaign that was largely self-financed. After being defeated in the Republican primary, Mr. Lauder did not campaign actively on the Conservative line. *Dollars and Disclosure* at 35.

The 2001 elections as a whole, including the mayoral campaign, do nicely illustrate the practical consequences of current campaign finance jurisprudence. The Supreme Court's decision in *Buckley v. Valeo* has consistently been interpreted to mean that no mandatory ceiling may be placed on candidate spending.¹³⁸ Given that constitutional constraint, the Program performed precisely as the *Buckley* Court intended: public funds helped participating candidates to communicate their message to the voters, while voluntary spending limits tempered the influence of private money on politics; but a candidate with virtually bottomless resources and the willingness to use them, could use them, and did.

The Act anticipated the possibility of wealthy, non-participating candidates. When a candidate opts out of the Program and spends more than half the spending limit applicable to a participating opponent, the opponent's spending limit is removed and public funds are provided at an accelerated rate - \$5 for every \$1 of contributions up to \$250 from City residents, until public funds reach two thirds of the otherwise applicable limit, instead of the usual 4:1 match up to 55 percent of the limit. This mechanism both ensures that participating candidates are not disadvantaged by their initial willingness to limit spending and assists them (up to a point) in competing with candidates who prefer not to play on a level field. The Act's contribution limit, \$4,500 per contributor for the 2001 mayoral election as discussed above, remains in effect.

Availing himself of this opportunity, Mark Green's net expenditures exceeded \$16 million (millions more than the combined limit for the primary, runoff, and general elections). He could

¹³⁸ See *Homans v. City of Albuquerque*, 264 F.3d 1240, 1244-45 (10th Cir. 2001) (reversing denial of preliminary injunction against enforcement of mandatory spending limits for mayoral candidates); *Suster v. Marshall*, 149 F.3d 523 (6th Cir. 1999) (upholding a preliminary injunction against the enforcement of mandatory spending limits in judicial elections); *Gable v. Patton*, 142 F.3d 940, 951-53 (6th Cir. 1998) (striking down a ban on candidates' contributions to their own campaigns within the last 28 days of an election); *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir. 1998) (striking down mandatory spending limits enacted by the City of Cincinnati for members of its City Council); *Landell v. Sorrell*, 118 F. Supp. 2d 459, 481-83 (D. Vt. 2000) (invalidating mandatory spending limits for legislative and statewide candidates in Vermont) (appeal pending following the Second Circuit's withdrawal of its original opinion upholding the

have spent even more if he had raised more or had qualified for more public funds. Under these circumstances, it is impossible to attribute his loss to the spending limit.

More significantly, 353 candidates for city-wide or borough-wide office and City Council joined the Program, and most of them received public funds. The City saw an unprecedented number and diversity of candidates. While term limits unquestionably promoted competition, the public financing system opened the process to candidates without access to wealth or the fundraising capacity of established political organizations. Although there is certainly room for improvement in the Program, as we discuss, the core elements of the Program, including the spending limits, remain sound.

Whether or not the Bloomberg campaign offers an argument for or against abandoning the City's public financing system, the Program has enjoyed almost universal participation and continues to serve the profoundly important goals of limiting the influence of money on politics and promoting more competitive elections. Under these circumstances, the Program should be vigorously defended, and candidates should be strongly encouraged to participate.

The Bloomberg campaign may offer a better argument for revisiting the jurisprudence that precludes mandatory spending limits. We long ago abandoned the idea that only wealthy property owners were qualified to serve in government. Mandatory spending limits ensure that wealthy candidates do not monopolize the political arena, facilitating healthy competition among diverse perspectives and promoting full and fair participation in democratic self-government. If the City sees a trend toward self-financing candidates in the wake of the 2001 elections, its continued ability to uphold the basic values now served by its public funding program may depend upon its willingness to enact such limits and to invite Supreme Court reconsideration of *Buckley*.

limits).

Exempt Expenditures. Under the Act, expenditures made for the purpose of complying with the Program's requirements and the Election Law, and for bringing and defending ballot litigation, are exempt from the spending limit.¹³⁹ CFB rules governing the 2001 elections included various requirements for substantiating that expenditures are exempt, including "pre-approval" submissions to the CFB and alternative record keeping requirements.¹⁴⁰ The extent to which the CFB advised campaigns whether their pre-approval submissions were approved is unclear. We commend the Board for issuing new rules intended to simplify procedures for proving exempt expenditure claims.¹⁴¹

¹³⁹ Administrative Code §3-706(4). In 2001, some "pushed the envelope" in claiming that certain expenditures were exempt from limitations. For example, in the Democratic mayoral primary, one candidate claimed that expenditures incurred in the course of circulating independent nominating petitions for the general election were exempt as Election Law compliance costs. The CFB has not published a ruling on whether such exempt expenditure claims are sustainable under the Act.

¹⁴⁰ See former CFB Rule 1-08(l).

¹⁴¹ See amendments to Rule 1-08(l) in 2002. The Committee made recommendations for changes in the amendments as proposed in testimony dated October 25, 2002. The final rules adopted by the CFB included changes that appeared to be responsive to some, but not all, of the Committee's comments.

Primary Election Spending after September 11. After the attack on the World Trade Center, the state legislature rescheduled the September 11 primary election for September 25.¹⁴² On September 14, the CFB announced that September 11 was the “final date for primary election expenditures” and that for participating candidates “there can be no further campaign spending in the primary” with limited exceptions.¹⁴³ Over the next few days CFB staff, who were dislocated from their offices due to the September 11 attack, attempted to contact participating campaigns by telephone to advise them of the spending ban. Ultimately, the Board adopted the spending ban by advisory opinion.¹⁴⁴

The Board reasoned:

all participating candidates assumed that spending for the primary election would end on September 11 and that after the primary election they were required to repay to the Board unspent campaign funds . . . if they were not on the general election ballot. A substantial number of primary election candidates can be assumed to have spent the maximum amount of campaign funds permitted by [the Act’s spending limit] and did not elect to hold any campaign funds in reserve for additional primary election expenses.

To permit additional spending by participating candidates who had not reached the spending limit as of September 11, while other candidates were restricted by the spending limits “from making further expenditures,” the Board maintained, would be contrary to the Act’s “primary public policy objective leveling the playing field among candidates” The Board concluded that the

¹⁴² 2001 N.Y. Laws 298.

¹⁴³ Statement of Chairman Joseph A. O’Hare, S.J., Campaign Finance Board (September 14, 2001). The exceptions were for “[c]osts associated with Election Day activities on September 11[to] be replicated for the September 25 Election Day, and costs associated with the replacement of campaign facilities that were destroyed or rendered inaccessible by the destruction caused by the World Trade Center tragedy” *Id.* The September 14 announcement also stated that the spending limits, with the stated exceptions, and the contribution limits, remained in effect, and that no additional public funds would be provided for the primary election.

¹⁴⁴ CFB Advisory Opinion No. 2001-12 (September 20, 2001). The advisory opinion extended the exceptions to the ban to include spending for “continuing overhead expenses” and the cost of telephone banking on September 24 if such telephone banking had been scheduled for September 10.

spending ban was the “only legal, practical, and fair course of action.”¹⁴⁵

¹⁴⁵ *Id.*

Given the Board's good intentions in attempting to deal with the extraordinary circumstances prevailing at the time the CFB announced the spending ban, and given the voluntary decision by many campaigns to suspend activities after September 11, we might not have commented on this issue. But the Board has recently begun to cite and sanction campaigns for violations of this spending ban as it issues final audit reports.¹⁴⁶ Because the Committee believes that the Board's imposition of the spending ban was *ultra vires* (and consequently its enforcement by sanction not justified under the Act), we offer this brief analysis.

In joining the Program, candidates give up their constitutional right to make unlimited campaign expenditures, but only to the extent specified by the Act and CFB rules. Participating candidates have a duty to abide by the spending limits enumerated in the law *and* a concomitant right to make expenditures up to those limits. This right does not vary according to the date of an election or the timing or level of an opponent's spending. We see no CFB authority to abrogate this right by advisory opinion or to effectively lower the primary spending limit for those candidates who had not reached it by the date of the primary election as originally scheduled. Most importantly, the Act does not authorize a finding of violation or the imposition of penalties for conduct that is not in violation of any provision of the Act or any Board rule.¹⁴⁷ The spending ban is embodied only in a Board pronouncement and an advisory opinion; it is not in any provision of the Act or in any duly promulgated CFB rule.

The CFB could have avoided unfairness to participating campaigns by either adhering to

¹⁴⁶ On November 12, 2002, the Board assessed a \$100 civil penalty against Ed Roberts, a City Council candidate in Brooklyn, for violation of the spending ban. According to data published by the CFB this campaign spent less than \$76,000 for the primary election. *An Election Interrupted* at Appendix B. The primary election spending limit was \$137,000.

¹⁴⁷ See Administrative Code §3-711.

the pre-existing spending limits (with the exceptions noted above) or by ruling that the pre-existing spending limit would not apply to primary election expenditures made after September 11. Either alternative would have maintained a level playing field without doing violence to the intent of the Act.¹⁴⁸

PACs and Independent Spending. Under City law, participating candidates may accept contributions only from political committees (including political action committees or “PACs”) that choose to register with the CFB. PACs are subject to the same contribution limits as individuals. Contributions from PACs may not be matched with public funds, but many PACs do register and offer financial support to candidates.

¹⁴⁸The CFB’s decision to ban most campaign spending was the subject of editorial criticism. Editorial, “A New Election Day”, *The New York Times*, September 19, 2001; Editorial, “A Time for Campaigning”, *New York Post*, September 19, 2001. Additional problems arise because the ban was imposed in an uneven manner, depending on when and if CFB staff were able to notify campaigns. Also, Board staff were not consistent in explaining the scope of the ban. For example, Board staff advised at least one candidate whose primary spending limit had been removed by the Board pursuant to Administrative Code §3-706(3) (due to spending by a non-participating opponent) that his campaign was subject to the ban, whereas in the *Badillo* case, discussed at footnote 117, *supra*, an attorney for the CFB stated before Justice Figueroa that the ban would not apply in such circumstances (although no such exception is indicated in the Board’s advisory opinion). Further, the Board’s decision to ban spending was not submitted to the U.S. Justice Department for preclearance under the federal Voting Rights Act, as is required for legal changes affecting voting in Bronx, Kings, and New York counties. (Changes in the City’s campaign finance laws have routinely been submitted to the Justice Department for preclearance.)

Although PAC contributions may be limited, independent expenditures by PACs (or any other entity, for that matter) may not be. In some jurisdictions with PAC contribution limits, funds that might otherwise have been donated directly to candidates have been rechanneled into reportable independent expenditures or sham issue ads that escape disclosure requirements. Such spending on a large scale - especially when the financial source is not disclosed, but sometimes even when it is - may be perceived as a threat to public funding systems, because it undermines efforts to create fair competition, and the prospect of major independent expenditures may act as a disincentive to acceptance of spending limits.¹⁴⁹ New York City has not seen substantial independent spending, perhaps because the contribution limits are sufficiently high to permit PACs and other political players to participate meaningfully in elections without it.

¹⁴⁹ See Patrick McGreevy, "Campaign Finance Reform Tops Ethics Panel's Agenda," Los Angeles Times, Oct. 13, 2001, at B6.

Notwithstanding this history, the four major Democratic mayoral candidates agreed in April 2001 to urge their supporters not to run independent campaigns on television or by direct mail. Teachers union head Randi Weingarten announced that she would avoid independent spending unless a candidate proposed “a crazy, maniacal, tyrannical idea” that demanded a response.¹⁵⁰ If a political culture that disfavors independent spending can be developed, New York City may be able to avoid the problems that have plagued the federal system and some other jurisdictions.

In the period leading up to the 2001 elections, the CFB issued several advisory opinions on whether and how the Act’s requirements apply to political committees and political clubs in which participating candidates “exercise authority” or are otherwise actively involved, but which are not authorized to take part in the candidate’s own election campaign.¹⁵¹ The CFB also imposed restrictions on a participating candidate’s ability to assist another candidate or political committee in raising funds.¹⁵² Most restrictions in this area have not been codified.¹⁵³ The CFB formal and informal rulings have posed concerns for candidates and elected officials who seek to be actively engaged in political activities, including by supporting other candidates for federal, state and other local offices, political parties, and local political clubs. Participating candidates should not be prohibited from engaging in a wide range of political activities with other candidates and organizations, so long as such engagement does not result in unreported or excessive in-kind

¹⁵⁰ *N.Y. Daily News*, Apr. 3, 2001 (available at 2001 WL 17946115).

¹⁵¹ See CFB Advisory Opinions Nos. 1999-10 (August 5, 1999), 2000-1 (March 7, 2000), 2001-4 (May 17, 2001).

¹⁵² See CFB Rule 1-04(p) and Advisory Opinion No. 2001-2 (May 17, 2001).

¹⁵³ In 2002, the CFB replaced some restrictions on participating candidates’ fundraising assistance to other candidates and political committees with new standards governing the political activities of participating candidates. The Committee submitted comments on the proposed rules in testimony dated December 19, 2002. See discussion in footnote 54, *supra*.

contributions to their City campaigns.¹⁵⁴

¹⁵⁴ A new law adopted in 2003 adds detailed standards for determining whether certain political activities (communication of endorsements, fundraising assistance to other candidates, political club communications) will or will not result in in-kind contributions to participating candidates. *See* N.Y.C. Local Law 12 (2003), *amending* Administrative Code §3-716.

Debates. Mandatory debates for participating candidates who run for citywide office (Mayor, Public Advocate, and Comptroller) have been in place since the 1997 elections.¹⁵⁵ The debates are sponsored by media, educational, and civic groups that are not affiliated with any political party, candidate, or public official and that, prior to the debate, have not endorsed any candidate in the election for which the debate is being held. The purpose of the debates, which have been televised, is to ensure that citizens have some opportunity to hear candidates engaged in substantive discussions of the issues.

Under the law in effect in 2001, when there were at least two participating candidates for citywide office who were on the ballot for the primary election, they were required to take part in two debates prior to that election, in another two debates if there was a runoff, and in at least one debate prior to the general election. A second general election debate was also mandatory for the participating candidates who were leading contenders for each office. A candidate who failed to appear at a mandatory debate (except in extraordinary circumstances) forfeited all public funding.¹⁵⁶

Objective, non-partisan, non-discriminatory criteria for identifying “leading contenders” must be set in advance of the debates by the debate sponsors. In 2001, leading contenders had to reach a fixed threshold in a certain number of public opinion polls, or, in the absence of polling data, meet a financial threshold of \$500,000 for Mayor and \$250,000 for Public Advocate and Comptroller. Non-participating candidates who were deemed to be leading contenders would be invited, but were not required, to take part in this second general election debate. If a non-participating leading contender declined to participate, or failed to appear, the “debate” was to proceed anyway. If only one candidate qualified for leading contender status, there was to be no

¹⁵⁵ Other jurisdictions that condition receipt of public funds upon participation in candidate debates include the states of Kentucky and New Jersey and the City of Los Angeles.

¹⁵⁶ See N.Y.C. Campaign Finance Board letter dated Jan. 10, 2002, to Willie Colon (fining candidate \$2,500 for failure to appear at debate).

leading contender debate, but that candidate was authorized to participate in an alternative voter education forum, which had to be provided for participating candidates who were not leading contenders.

In 2001, the Campaign Finance Board carried out the debate program as scheduled, notwithstanding the dislocations caused by the events of September 11. The television audience for the leading contender debate between mayoral candidates Michael Bloomberg and Mark Green ranked second in size for its time slot; only “Seinfeld” attracted more viewers. The debates – including those for primary and runoff elections – also attracted significant newspaper coverage.

Prior to the 2001 elections, the CFB had recommended legislative changes in the debate requirements, which were not adopted by the City Council. In its most recent report the CFB reiterated these proposals: (1) require debate participants to show a minimum of public support; (2) limit the second primary election debate to “leading contenders”; (3) eliminate the alternate voter education forums the law requires for general election candidates who are not leading contenders; (4) eliminate one of the two runoff debates; (5) repeal the requirement that sponsors indemnify the City and instead require the City to indemnify sponsors for liability arising from the acts or omissions of the sponsor or the City in connection with the debates.¹⁵⁷

Post-election regulation

¹⁵⁷ See *An Election Interrupted* at 155 - 156.

The Act requires that recipients of public funds return these to the City, up to the full amount received, to the extent the campaign has unspent funds leftover after the election.¹⁵⁸ To preserve unspent funds for repayment, CFB rules restrict the purposes for which campaign funds may be spent after the election.¹⁵⁹ In 2001, the CFB narrowed the range of permissible post-election “winding up” expenditures to expressly exclude bonuses or gifts to staff and volunteers and any post-election event, including meals and parties.¹⁶⁰

After the election, participating candidates submit their last disclosure statement to the CFB on January 15. This coincides with the CFB’s presumption that one election cycle ends on January 11 (the last day covered by the January 15 disclosure statement) and that the next cycle begins on January 12. Political committees that have not terminated by January 11 (by complete payment of all liabilities and expenditure of all funds in their possession) must continue filing disclosure statements with the Board of Elections. CFB rules require candidates to maintain their records for six years following the date of the election.¹⁶¹ The CFB’s procedures for post-election audit and public funds payments are discussed below.

CFB Administration

¹⁵⁸ Administrative Code §3-710(2)(c).

¹⁵⁹ See CFB Rule 5-02(e)(2). In 2001, CFB rules were amended to assert a right to question pre-election expenditures pursuant to the Administrative Code §3-710(2)(c) requirement that unspent campaign funds be returned. See CFB Rule 5-03(e)(1). The Committee expressed its disagreement with the rule change in testimony, dated March 7, 2001, maintaining the change was at odds with state and City law and unnecessarily intrusive.

¹⁶⁰ In 2002, additional changes in Rule 5-03(e)(2) were adopted, including a change to clarify that the spending prohibition applies only to post-election day events, indicating that traditional election night parties would not be subject to the prohibition. The Committee commented on the changes, as proposed, in testimony dated October 25, 2002.

¹⁶¹ CFB Rule 4-03(a).

The City Charter requires the CFB to “conduct all [its] activities in a strictly non-partisan manner.”¹⁶² The CFB has earned a reputation for even-handed, non-partisan decision-making. The CFB also strives for regularity in its administrative procedures. It is unquestionable that, in general, this emphasis has served the Program well.

To date, nine civil actions have been brought by candidates challenging CFB determinations in administering the Program for the 2001 elections.¹⁶³ This represents an increase from previous elections. As noted above, in three of those cases CFB action followed judicial intervention: a modification of the CFB’s decision, an accelerated a public funds payment and/or a payment that otherwise would not have been made.¹⁶⁴ This record reflects both a greater willingness on the part of the candidates to bring cases against the CFB and a greater likelihood of judicial intervention than had been the case in previous elections.

¹⁶² NYC Charter §1057.

¹⁶³ Six of these cases are discussed *supra* at footnotes 114, 125-32, and associated text. In two other cases, courts upheld the CFB’s determinations. *Marchant v. New York City Campaign Finance Board*, Index No. 23813/2001 (Sup. Ct., Queens C’ty, Sept. 14, 2001) (Dollard, J.); *Herschaft v. New York City Campaign Finance Board*, 127 F. Supp.2d 164 (S.D.N.Y. 2000), *aff’d*, 2001 WL 533590 (2^d Cir. 2001). According to the CFB, one other civil case was mooted by CFB action. *Ariola v. The Board of Elections*, Index No. 24772/2001 (Sup. Ct., Queens C’ty, Sept. 25, 2001) (Dye, J.).

¹⁶⁴ The Board takes a contrary position in *An Election Interrupted* at 135 (“None of the lawsuits filed against the Board, however, resulted in additional funds being paid to any candidate any faster than through the Board’s routine process.”).

The CFB has expressed concern that the City's Corporation Counsel did not permit an appeal of Justice Figueroa's decision in the first *Badillo* case.¹⁶⁵ This concern is especially significant because Corporation Counsel had represented OMB in litigation brought *against* the CFB earlier in the year.¹⁶⁶ This appearance is certainly troubling; however, the Corporation Counsel's office maintains the decision was made pursuant to a standard review by its Appeals Division. The Committee believes that the Board, as an independent, non-mayoral agency, must be afforded maximum discretion in deciding whether to appeal adverse determinations.

CFB Audits and Enforcement. The CFB audits the campaign of every candidate who joins the Program, regardless whether the campaign receives public funds.¹⁶⁷ The primary goals of these audits and the CFB enforcement efforts are:

to uphold the contribution and spending limits and prohibitions, ensure timely disclosure of campaign finance activity, and ensure that the distribution of public funds is made only to those candidates who qualify for them on the basis of legitimate contributions.¹⁶⁸

CFB reviews begin with the disclosure statements and backup documentation submitted in the pre-participation period. During that time, the CFB begins to conduct "compliance visits" of campaigns, at which records are reviewed and campaign staff are interviewed about their procedures for ensuring compliance with the Act and CFB rules. The CFB issues reports of invalid matching claims and letters noting disclosure problems and potential violations, giving campaigns an opportunity to address these matters before joining the Program. The pre-

¹⁶⁵ Discussed *supra* at footnote 129 and associated text. See *An Election Interrupted* at 136. Under a longstanding designation by Corporation Counsel, Board attorneys act as special assistant corporation counsel in litigation brought by and against the CFB. As is the case for other City agencies receiving such designations, Corporation Counsel reserves full authority to determine whether an appeal will be taken.

¹⁶⁶ See discussion *supra* at footnote 67 and associated text.

¹⁶⁷ See Admin. Code §3-710(1).

¹⁶⁸ *An Election Interrupted* at 131.

participation reviews are not comprehensive, however, in that not all pre-participation filers receive visits and that some compliance issues arising from financial transactions reported in the pre-participation period are not raised by the CFB until after the candidate has joined the Program.

The audit process intensifies after the opt-in deadline. The CFB seeks to conduct a compliance visit of every campaign before the first deadline for paying public funds. The CFB has only three weeks to review transactions reported in the July 15 election year disclosure statement, covering a six-month period, before public funds payments are first due. As discussed above, suspected violations are first brought to the campaigns' attention just days before the first payment is due to be released, resulting in delays in public funds payments for some candidates until these questions are resolved to the CFB's satisfaction.

In 2001, the CFB did not initiate any formal proceedings to determine findings of violation and assess civil penalties until after the primary election. Such proceedings are initiated by letter of the CFB's general counsel, setting forth the alleged violation and recommended penalty, and giving campaigns an opportunity to respond in writing and/or to appear before the Board. At the conclusion of the proceeding, the Board first deliberates in executive session, in the presence of the CFB's general counsel and other CFB attorneys, to determine if the violation has occurred and, if so, whether to accept or modify the staff penalty recommendation. Then the Board conducts a *pro forma* vote in public session.¹⁶⁹ Because these proceedings are not adjudications, the finding of violation and penalty may be vulnerable for failure to comply with due process

¹⁶⁹ The Committee recommends that Board votes on alleged violations and penalties be explained in public session in each instance in which a campaign has appeared before the Board in response to the allegations and recommended penalties. The Committee notes that in the fall of 2002 the Board instituted procedures whereby CFB staff explain recommended findings of violations and proposed penalties in public session.

protections set forth in the City Charter.¹⁷⁰

When penalties are not paid, these are collected by deduction from public funds payments. The CFB issues press releases announcing findings of violations and penalties and posts outstanding penalties on its website.

¹⁷⁰ An adjudication requires, at a minimum, *inter alia* that:

No *ex parte* communications relating to other than ministerial matters regarding a proceeding shall be received by a hearing officer, including internal agency directives not published as rules.

Findings of fact shall be based exclusively on the record of the proceeding as a whole.

[T]he person presiding at a hearing shall be assigned solely to adjudicative and related duties.

NYC Charter §1046. CFB Rule 7-03(f) suggests that the Board believes that it has the authority to conduct an adjudication, but, to date, it has not done so.

For the 2001 elections, the CFB has made findings of violation and assessed penalties for late or missing disclosure statements, over-the-limit contributions, prohibited (corporate and unregistered political committee) contributions, failure to participate in a debate as required by the Act's debate provisions, failure to report financial transactions, and failure to respond to requests for documentation or information.¹⁷¹ In all, as of September 25, 2003, 203 candidates (or more than 70 percent the number of participating candidates on the ballot (280)) have been cited for violations, for which approximately \$270,000 in penalties have been imposed.¹⁷²

In 1990, the CFB acknowledged that it lacked authority to assess penalties under the Act. At the same time it recommended legislation "to authorize the Board to initiate an administrative penalty determination by notifying candidates of violations. An administrative penalty assessment procedure would avoid costly litigation for both candidates and the Board."¹⁷³ Legislation for this purpose was not adopted until 2003, however.¹⁷⁴ Nonetheless, the CFB has been able to collect most of the penalties it has assessed, either by deductions from public funds payments or by payment from the affected campaigns, without bringing civil actions. The Board's policy of posting overdue penalties on its website, established pursuant to a statutory direction that it publicize violations,¹⁷⁵ has been particularly useful in collecting penalties.

¹⁷¹ As CFB audits have been completed, the list of penalized violations has grown to also include, for example: spending limit violations, failure to deposit cash contributions, failure to respond to a complaint, failure to document a loan, making excessive cash disbursements, failure to report contributor employment information, failure to respond to a draft audit report and expenditures in violation of the CFB's ban on post-September 11, 2001 expenditures, discussed above.

¹⁷² In 2002, the Board published guidelines for staff recommendations on penalty assessments for disclosure statement and contribution violations and infraction policy. These guidelines establish and explain baseline penalties for certain violations, subject to adjustment based on aggravating and mitigating factors, some of which are enumerated.

¹⁷³ *Dollars and Disclosure* at 123.

¹⁷⁴ See N.Y.C. Local Law 12 (2003), *adding* Administrative Code §3-710.5.

¹⁷⁵ NYC Charter §1052(a)(6); Admin. Code §3-708(6).

In a departure from its practice in previous elections, in 2001, the CFB did not issue any written determinations explaining the conclusions it reached in its investigations of campaigns' compliance or regarding the verified formal complaints it received. This omission was most notable in the complex Hevesi matter, described above.

With the advent of the 4:1 matching rate came increased concern that some campaigns would submit claims for public funds on the basis of fraudulent matchable contributions and improperly use public funds for purposes other than election campaign expenses. As of this writing, it remains unclear to what extent fraud was a problem during the 2001 elections, and to what extent the CFB was successful in uncovering such schemes before public dollars were improperly received or used. The CFB routinely refers evidence of possible criminal conduct to local prosecutorial authorities, but such matters rarely come to public attention before indictment.¹⁷⁶ Until such allegations are resolved, the CFB is likely to suspend further public funds payments and delay the completion of its post-election audit for the campaign that is implicated.

The CFB audits continue after the election and, to a large degree, this is when the most in-depth reviews take place. As of September 25, 2003, the CFB has issued post-election payments to thirty-eight 2001 candidates upon completion of the final audit. As of September 26, 2003, the CFB Website showed 213 post-2001 election audits completed, but the CFB had not published information on how many draft audit reports, offering candidates an opportunity to address the CFB staff's questions, have been issued to date.¹⁷⁷

¹⁷⁶ To date, only one pending prosecution pertaining to the 2001 elections has been made public. See Robbins, "Someone Else's Money", *Village Voice* (August 28, 2002); Cardwell, "Indictment Says Leffler Broke Rules in '01 race," *The New York Times*, January 10, 2003, at B3.

¹⁷⁷ In 2002, the CFB adopted a new Rule 4-05(b) stating, "to the extent practicable," that it would issue all draft audit reports no later than the end of the calendar year after the election.

Open government. Like all government agencies, the CFB is subject to the requirements of New York's Freedom of Information and Open Meetings laws.¹⁷⁸ In May 2001, CFB staff implemented a new policy of redacting from public disclosure the following information required in the sworn certifications by which candidates join the Campaign Finance Program: home address, employer name and employment address, telephone and fax numbers of the candidate, committee treasurer, and campaign liaison, and the committee's bank account numbers. The Board's stated reason for the redactions was that disclosure would constitute "an unwarranted invasion of personal privacy," a statutory exception to disclosure under the Freedom of Information Law.¹⁷⁹

The privacy concern cited in support of the redactions appears to be overstated. The new policy contrasts with the Act's public disclosure requirements for contributor's addresses and employment information. Moreover, the Board of Elections regularly publishes lists of candidates with their home addresses. Records including treasurers' home addresses, home telephone and business telephone numbers are published by the Board of Elections without redaction. The CFB itself publishes the political committee bank account numbers in campaign finance disclosure statements that it is redacting from certification forms. The Committee therefore recommends that the CFB review its redaction policy to ensure its consistency with the goals of the Act, election law requirements in general, and the Freedom of Information Law.

¹⁷⁸ Public Officers Law §§84 - 90 and 100 - 111.

¹⁷⁹ *Id.* §87(2)(b); *see also* §89(2).

In the past, the CFB generally did not publish agendas for its meetings in advance or make these available to the public who attend; recently it has begun to do so. When it votes to go into executive session, the Board is required to identify the general area(s) of the subject(s) to be considered.¹⁸⁰ Other than in cases of proposed, pending and current litigation or the investigation of criminal offenses which would imperil effective law enforcement if disclosed, the Board's legal basis for discussing audit matters, public funds payments, findings of violation and civil penalty, and other Program administrative matters in executive session is unclear.¹⁸¹ There has been generally little discussion of proposed advisory opinions in public session before the Board votes to approve draft opinions prepared by its staff. During the 2001 elections, the Board's votes on public funds payments took place in public session but were *pro forma* and vague. In 2002 and 2003, Board votes have generally included an announcement of the recipient-candidates and the amounts approved for payment. The Committee commends the Board for this improvement.

IV. Recommendations and Observations of the Committee

In 1998, the City's campaign finance reform was effectively re-invented by the City Council's introduction of a 4:1 matching funds rate, among other changes. With this new payment rate and the term limits law, candidate participation and the level of public funding skyrocketed in the 2001 elections. Recognizing that 2001 was the first regularly scheduled election subject to both term limits and the 4:1 matching program, it is now appropriate to consider how rules, procedures and practices that have evolved in the course of administering a 1:1 matching program, which never yielded more than \$7 million in public grants to candidates in a city-wide election year, are

¹⁸⁰ *Id.* §105.

¹⁸¹ *Id.* §105(c), (d).

well-suited for meeting the challenge of a law that saw a six-fold increase in public funding in 2001.

A. Observations

1. The Committee believes that changes in the Program must, first and foremost, serve the public's interest in campaign finance reform by effectively reducing the potentially pernicious influence of large campaign contributions and in fostering fair competition among serious candidates. Because New York City's program is voluntary, this requires taking the candidate's perspective into account to ensure that the Program continues to attract the huge majority of candidates. Moreover, because campaign finance regulations are directed to activities in the political arena, these must be crafted with appropriate sensitivity to First Amendment principles. Improving administrative efficiency is also an important consideration. The recommendations we make for changes in the Program are informed by these general objectives.¹⁸²

2. The Program's requirements should be made simpler to the extent possible. Indeed, the goal must be a Program in which campaigns need not hire a lawyer or other specialist to show they are meeting their obligations. The burden of compliance should be made commensurate with the risk of serious violation and should enable the Board to monitor compliance with the core requirements of the Program efficiently.

a) CFB auditing should be conducted on an ongoing and expeditious basis. Requests for documentation from campaigns are much too concentrated (in significant part due to the abbreviated election period caused by the September primary date, a cause beyond the CFB's control) in the period shortly before public funds payments are first due. Much of the CFB's review takes place after the elections are over. Reviews and audits should not include duplicative requests for information already provided to the CFB.

b) The CFB should complete comprehensive compliance and matching funds reviews of "contemporaneous" disclosure statements filed by candidates before they join the Program.

¹⁸² *Campaign Finance Legislation*, 41 *Record* at 762, 764 - 766; *Toward a Level Playing Field*, 52 *Record* at 691.

“Pre-participation” audits would provide ongoing instruction and improve candidate compliance with Program requirements in a context that precludes resort to civil sanctions, help deter and expose serious abuses, give prospective candidates more complete information about their campaign's compliance and potential eligibility for public funds payments, and bring post-election audits to a much more rapid conclusion, enabling the CFB and candidates to move on to preparation for the next election.

- c) The Board should endeavor to tailor incentives for compliance to the gravity of the potential infraction, imposing the most serious sanctions only with extreme care. The possibility that most or all public funds will be withheld at the peak of the campaign season gives the CFB enormous leverage in its dealings with campaigns. This threat should never be wielded when it is disproportionate to the alleged infraction or oversight. The CFB's leverage should be tempered by procedures that assure campaigns are treated fairly.
- d) The CFB should, as a matter of due process, give clear written notice to campaigns of material compliance problems it detects.¹⁸³ After notice, the campaign should be afforded a reasonable opportunity to explain and/or correct the problem. Questions of violation should be brought to a clear resolution in an expeditious manner. Final CFB determinations should be in writing and should clearly explain the factual and legal basis for any adverse findings.
- e) In making determinations to release public funds to qualifying campaigns, CFB procedures should aim for fairness, frequency and flexibility. In most cases, payment

¹⁸³ In the interest of making prompt payments, written notice should not, however, be required during the four payments (two pre-primary and the two pre-general election) that must be made within four business days of filing, when the issue pertains to the most recent disclosure statement and advance written notice would have the effect of delaying the payment determination.

determinations appear to be non-discretionary actions based on standard CFB staff reviews.

Cloaking *all* payment decisions with the formality of a Board vote, the procedure adopted in 1989 when matching payments to campaigns were novel, unnecessarily delays release of funds to campaigns that have demonstrated eligibility. Direct Board involvement should be reserved for those payment decisions that pose new or complex issues.

f) When campaigns appeal a denial of payment or finding of violation, the administrative tribunal must follow procedures that assure fairness and reinforce its role as an independent appellate body.¹⁸⁴ Limiting the Board's role in the payment process to non-routine matters may help improve its capacity to act as an independent hearing panel.

3. Experience shows that the vast majority of candidates and contributors are honest and that the vast majority of contributions and matchable contribution claims are legitimate. But in the chaotic world of political campaigns, minor, honest errors often occur. In administering the Program, the goal must be to facilitate the correction of honest errors, discourage the repetition of errors that have previously been called to a campaign's attention and penalize fraud. Efforts to penalize isolated infractions should not divert CFB staff from actively working to deter, expose and punish fraud and other serious violations before the election. It is often not easy to strike the right balance between zealous enforcement and ensuring that legal requirements are reasonable in light of how political campaigns actually operate. Each new proposed reform, rule, interpretation and administrative procedure must be carefully evaluated to determine its "user-friendliness" for Program participants.

B. Substantive Recommendations

¹⁸⁴ In 2002, the CFB adopted an amendment to Rule 5-02(a) setting deadlines for issuing written decisions on candidate petitions for review of payment determinations. The Committee commented on the proposed amendment in testimony dated December 19, 2002.

1. *June Primary.* Many of tensions in the CFB's payment and enforcement process are the product of the brief time period between the deadline for joining the Program and the first public funds payment date, during which period "catch-up" disclosure statements are due on June 21 and semi-annual disclosure statements are due on July 15. The Committee agrees with the CFB's recommendation that primary elections be rescheduled from September to June to ease strains the limits of time now create for the CFB and participating candidates. If the state legislature amends the Election Law to set a June primary, the City Council would in turn need to enact conforming changes, including changing the opt-in deadline and adjusting the Act's spending limits.

2. *Extend Deadline for Joining the Program.* The Committee believes that the deadline for joining the Program should be the last date to qualify for the ballot.¹⁸⁵ Candidates often decide to seek election at the last minute, especially in races that are not deemed likely to be competitive. The Committee believes that all candidates who run for office should have the opportunity to join the Program and seek to qualify for matching funds. [CFB Rules]

¹⁸⁵ A new law authorizes the CFB to set a later deadline for candidates to join the Program. N.Y.C. Local Law 12 (2003), amending §3-703(1)(c). **We therefore urge the CFB to adopt this change by rule.**

3. *Public Disclosure.* a) As the CFB had recommended, the City Council recently amended the Act to require City Council campaigns to file semi-annual pre-participation CFB disclosure statements in order to preserve their matchable contribution claims, as had been required for all other offices covered by the Program.¹⁸⁶

b) To permit the CFB to accommodate a later opt-in deadline, pre-participation disclosures should be made more frequently. Between January 15 and July 15, disclosure statements should be due on a monthly basis as a condition of preserving claims for matching funds. The State Board of Elections should amend its regulations to require these additional filing deadlines for all City candidates, so that statements satisfying Election Law and City law requirements can continue to be filed on the same dates. Alternatively, the City's law can be amended to require these early monthly filings, in which case the CFB would reconfigure its software to separately produce a cumulative semi-annual statement for filing with the City Board of Elections on July 15 of the election year. The CFB has taken some initial steps in this direction: in 2002, it amended its rules to create two additional "voluntary" pre-participation disclosure statements, due on March 15 and May 15, beginning in 2005.¹⁸⁷

¹⁸⁶ N.Y.C. Local Law 12 (2003), amending §3-703(12)(a). This new requirement takes effect in 2004.

¹⁸⁷ Rule 3-02(i)(2) (as amended).

c) The Committee believes that the Election Law requirements for the filing of electronic disclosure statements by state-wide and state legislative campaign committees in Albany should be extended to the City Board of Elections for city offices. The CFB and Board of Elections disclosure regimes should be integrated – incorporating the City requirements as applicable to candidates – and coordinated such that campaigns need only submit one filing at one agency in order to satisfy both State and City law requirements.¹⁸⁸ With these changes, campaign finance information for *all* City candidates could be included in the searchable database published on the CFB’s website. [state legislation]

4. *Contributions.* The Committee recommends that only individuals and registered political committees be permitted to make campaign contributions. This would require an amendment to the Election Law. In addition to corporations, contributions from unions, limited liability companies, partnerships, and other organizations should be prohibited to both participating and non-participating candidates.¹⁸⁹ This recommendation does not address the Act’s application of contribution limits to donations by political party committees. [state legislation]

¹⁸⁸ The CFB has been a proponent of such state legislative changes. See *An Election Interrupted* at 157; N.Y. Assembly A. 6680 (2001); N.Y. Senate S. 1029 (2001).

¹⁸⁹ The CFB has made a similar proposal for prohibiting participating candidates’ acceptance of contributions from organizations. See *An Election Interrupted* at 144. - 92 -

5. *Loans.* The bridge loan exception from the contribution limit, which the CFB repealed in 2002, should be restored. To improve access to bridge loans and ensure compliance with requirements, the CFB should: provide clear instructions to campaigns about the loans that qualify for the exception and the loans that do not; give detailed information to campaigns and potential lenders about the amount of post-election public funds payments a campaign may receive based on pre-election matching claims; require pre-election disclosure that a loan falls within the bridge loan exception; and advise campaigns immediately if it believes that a reported bridge loan does not fall within the exception. Most importantly, the Committee urges the CFB to take steps to reduce administrative delays in its payment procedures, which will alleviate the need for bridge loans. The ultimate goal should be an expedited process for confirming eligibility for payment and releasing payments as quickly as possible before the election.¹⁹⁰ [CFB rules]

6. *Matchable contributions.* a) Rules changes are desirable for eliminating bases for invalidating matchable contribution claims that are inconsistent with the Act's definition of "matchable contribution." Checks written on individuals' accounts, including individuals who are sole proprietors, should not be invalidated unless it appears the check was drawn from a corporate, limited liability company or partnership account. Likewise, errors in how a payee's name is written on the contribution check should not be a basis for invalidation unless there is credible evidence that the check was not intended to be a contribution to the participating candidate's campaign committee. In addition, CFB staff should review all computer-generated invalidations for "non-residential addresses" to obviate recurrence of incorrect invalidations due to computer error. [CFB rules]

¹⁹⁰ See Committee testimony on proposed CFB rules amendments, dated October 25, 2002.

b) The presumption that matchable contributions were used for contributions to other candidates and political committees, resulting in a four-fold reduction in public funds payments (Rule 5-01(n)), should be replaced with an aggregate fundraising test.¹⁹¹

Specifically, participants should be able to satisfy the CFB and avoid a deduction from public funds payments by simply showing that the total non-matchable contributions raised equals or exceeds all expenditures covered by Rule 5-01(n). This simplification will ensure that the candidate has raised sufficient non-matchable contributions to fully account for such expenditures without need of excessive withholding from public funds payments.¹⁹²

This change will benefit most those campaigns that lack the fundraising capacity to raise matchable contributions well in excess of the amount needed to “max-out” and thereby avoid a deduction from public funds under current CFB rules.¹⁹³

7. *Public funding.* a) The Committee recommends that participating candidates should be granted some public funds before qualifying for the ballot. Qualifying for the ballot in New York remains a difficult and costly burden for many campaigns, especially those not backed by established political organizations. While laudably protecting the public fisc from paying out matching funds on a 4:1 basis to campaigns that never are waged, the current system unduly limits the ability of candidates to gain access to the ballot by withholding payment of matching funds until after candidates have qualified for the ballot.

¹⁹¹ A new law partially reflects this proposal. Political contributions up to specified aggregate caps will not result in reductions from public funds payments, if the contributing committee has raised non-matchable contributions that equal or exceed such spending. N.Y.C. Local Law 12 (2003), *amending* Administrative Code §3-705(8). **The Committee recommends that the law be amended further, to remove these aggregate caps.**

¹⁹² See Committee testimony on proposed CFB rules amendments, dated June 14, 2002.

¹⁹³ Rule 5-01(n) is not among the bases for reducing the maximum public funds payable in an election. See Rule 5-01(r).

The Committee recommends that candidates who have qualified for matching funds receive a preliminary grant on a 1:1 basis shortly after the January 15 statement is filed in an election year. Such funds would, of course, be returnable if not spent on campaign activities under the Program's rules.

b) For primary elections in which the number of eligible voters is very small, the Committee agrees in principle with the CFB proposal to impose a lower cap on the maximum amount of public funds payable to candidates therein.¹⁹⁴

c) In New York City, it is often the case that the general election fails to generate a competitive contest. The Committee is supportive of limiting the amount of public funds payable to participating candidates in a general election where only one candidate on the ballot has qualified for public funding. Participating candidates who certify that they believe that they are nevertheless involved in a competitive general election should not be subject to this lower cap.¹⁹⁵ [city legislation]

8. *Expenditures.* a) The CFB has proposed legislation to repeal exemptions from the spending limit for the costs of complying with the Act, CFB rules, and the Election Law (including the cost of collecting and filing ballot petitions). The exemption for the cost of ballot petition litigation would be retained under the CFB proposal. We endorse the CFB proposal and note that the commensurate increase in expenditure limitations should reflect

¹⁹⁴ The CFB had proposed capping public funds payments at \$5,000 for participating candidates in a primary election in which the total number of eligible voters is less than 1,000, with certain exceptions based on the financing of opposing candidates. See *An Election Interrupted* at 150. A new law has authorized the CFB to adopt such caps by rule. N.Y.C. Local Law 12 (2003), adding Administrative Code §3-705(6). A new CFB rule adopts these caps. CFB Rule 5-01(a)(3).

¹⁹⁵ Under a new law, the maximum public funds payment is reduced by 75% in a primary or general election, with exceptions based on the financing of opposing candidates or when the participating candidate has attested to the need for the additional funding. See N.Y.C. Local Law 12 (2003), adding Administrative Code §3-705(7). The new law goes beyond the Committee's proposal and applies to primary, as well as general, election contests.

the realistic cost that Program compliance poses for participating campaigns.¹⁹⁶ [city
legislation]

¹⁹⁶ Simplification of Program requirements would help reduce the costs campaigns incur in demonstrating compliance. In any event, as the Board has recommended for ballot petition litigation, an exemption should be retained for the cost of defending against allegations of violations and of appealing denials of or deductions from public funds payments.

b) In the meantime, the Committee urges the CFB to institute safe harbors in its exempt expenditure claims process. Campaigns whose total exempt expenditure claims do not exceed a reasonable portion of the spending limit, based on historic levels of exempt claims, should not be required to substantiate such claims with additional detailed record keeping and explanatory submissions.¹⁹⁷

c) The Committee urges the CFB to examine whether primary election candidates may treat expenditures for independent nominating petitions as exempt compliance costs. The Committee is concerned that such tactics, especially by candidates who have already secured a place on the general election ballot, open the door to serious abuse of the spending limit. [CFB advisory opinion]

9. *Political Activity.* Candidates for City office do not run in a vacuum. Every day, politicians work to build support for a range of policy and political objectives through interaction with other politicians. This is not just political reality; it is a core value of American government under the First Amendment. This arena is one where government regulation must tread very lightly, if at all. It is appropriate, and often of importance to constituents and the City as a whole, that participating candidates, like other politicians, interact and work with other candidates, political clubs, political parties, and other groups. The Campaign Finance Act should be amended to make clear that such activities do not presumptively result in in-kind contributions that are subject to the Program's contribution and spending limits.¹⁹⁸ [city legislation]

¹⁹⁷ See Committee testimony on proposed CFB rules amendments, dated October 25, 2002. A new law provides that exempt expenditure claims up to 7.5% of the spending limits may, in general, be supported without additional detailed record keeping. See N.Y.C. Local Law 12 (2003), *amending* Administrative Code §3-706(4)(b). As discussed in testimony dated October 25, 2002, the Committee would go further: a 10% "safe harbor" and additional changes not reflected in current law and CFB rules.

¹⁹⁸ In 2003, the CFB adopted new rules on political activity by participating candidates, on which the Committee has

10. *Debates.* The Committee supports the CFB's recommended changes to the debates program as set forth above at the text accompanying footnote 153. [city legislation]

C. Administrative and Procedural Recommendations

submitted comments in testimony dated December 19, 2002 (*see* discussion above in footnote 54). *See also* Administrative Code §3-716, as amended by N.Y.C. Local Law 12 (2003). The new law generally follows the approach the CFB initially adopted by rules issued in early 2003. In testimony dated December 19, 2002, the Committee commended the CFB approach as a well-intentioned step toward clarification, but urged instead increased public disclosure and more narrowly-tailored regulations.

1. *Due Process and Enforcement.* a) Authorization for the CFB to make findings of violation and assess civil penalties should be codified in the Act, together with due process protections for participating candidates.¹⁹⁹ The CFB should conduct adjudications pursuant to the City Charter, affording participating candidates a meaningful public hearing before an independent hearing officer, in all cases in which serious violations of the Act are alleged, such as violations of the spending limit, serial violations of contribution limits and/or prohibitions, concealment of large in-kind contributions, and extensive fraud in claims for and use of public matching funds.
- b) The CFB should issue written determinations, including findings of fact and an explanation of the law and rules relevant to its decision, in a timely manner for every formal complaint, investigation of alleged major violations, and candidate petition challenging reductions, delays or denials of public funds payments. To enable the public to monitor the work of the CFB and to help deter serious misconduct by participating campaigns, the CFB should regularly report on the number of matters it has referred for criminal prosecution and on the outcome of those referrals.
- c) Isolated, minor and unintentional infractions should not be subjected to civil penalty, unless the campaign has a significant level of overall non-compliance.

¹⁹⁹ A new law authorizes the CFB to assess civil penalties for findings of violation and infraction, and requires that candidates be given notice and opportunity to appear at the Board before the penalties are assessed. See N.Y.C. Local Law 12 (2003), *adding* Administrative Code §3-710.5. **The new law does not expressly direct the CFB to conduct adjudications, as we recommend.**

d) The Committee recommends that the Board create an ombudsman position that reports directly to the Board. Campaigns having due process concerns would be able to share those concerns with the ombudsman, who could either work out a consensual resolution with the CFB staff or report on the matter to the Board itself. The ombudsman would serve an especially important function in matters where the Board was functioning in a quasi-judicial capacity and candidates and the CFB staff occupy adversarial positions.²⁰⁰ Not only would the ombudsman provide independent judgment to the Board, he or she would also assist the Board by performing legal or factual analysis as requested by the Board.²⁰¹

2. *Payments and Audits.* a) *Invalid Matching Claims Reports.* The invalid matching claims reports generated by C-SMART are a useful tool for candidates to measure their progress toward qualifying for payment. The CFB should continue to issue invalid matching claims reports at regular intervals, beginning in the pre-participation period. Every effort should be made to ensure that these reports are clear and accurate. Campaigns need to be told exactly what information the CFB needs in order to validate each claim. If a campaign has previously submitted information in support of a claim, subsequent reports should acknowledge the previous submission and explain why it was not found sufficient to validate the claim.

b) *Payment Status Reports.* During the pre-participation period, the CFB should give campaigns regular reports on their progress toward meeting the threshold and the amount

²⁰⁰ We do not make this suggestion as a criticism of the CFB staff in any way whatsoever. Nevertheless, when the staff is acting in an adversary capacity, the inherently partisan nature of an adversary process turns its concomitant duty to serve the Board acting in a quasi-judicial capacity into an almost impossible burden.

²⁰¹ Since members of the Board are only compensated on a *per diem* basis, it is hardly reasonable to expect them to volunteer their time to conduct their own legal and factual analyses of any matter.

of public funds for which they have qualified to date. (These reports can be integrated with the invalid matching claims reports, described above.) In effect, these reports would “pre-certify” candidates for receipt of a specified amount of public funds on a specified future date, provided that they join the Program, meet the additional eligibility requirements of a place and opposition on the ballot, and maintain their compliance with Program requirements.

c) *Auditing.* Accelerating the pace of the CFB auditing in the pre-participation period and expediting the completion of the post-election audits is essential.²⁰² The goal should be for CFB auditing to become more efficient and instructive, less repetitious and adversarial.

The Committee is especially concerned that the CFB has had trouble recruiting auditors in recent years. We note that significant CFB staff attrition generally occurs between elections. For the 2001 elections, CFB audits were performed mostly by recent hires and an outside firm under contract. This contributed to some degree of inefficiency and error. We believe that a greater emphasis on performing thorough pre-participation reviews will not only benefit campaigns and the Program overall, but also help the CFB to retain experienced staff by providing meaningful work throughout the election cycle. Regardless, the CFB should, if necessary, train and temporarily reassign staff to ensure that its auditing function is always supported by a sufficient complement of experienced CFB personnel.

d) *Frequency of payment determinations.* The CFB should strive to release public funds payments earlier and more frequently during the last month of the election. One step to help bring this about would be to delegate authority to approve payments to the Board’s executive director, except in circumstances in which novel issues or allegations of serious

²⁰² A new law gives additional direction to the CFB in conducting pre-participation reviews of disclosure statements. See N.Y.C. Local Law 12 (2003), *amending* Administrative Code §3-703(12)(b). **It remains to be seen how this new law is implemented.**

violation necessitate referrals to the Board.

e) *Payments and noncompliance.* The CFB should issue written notice to campaigns explaining any and all deficiencies found in their compliance or matching claims, giving a reasonable opportunity for these to be addressed *before* a payment determination will be made. The Committee recognizes that advance written notice listing deficiencies pertaining to the most recent disclosure statement may not be practicable in those instances when the “four business day” payment deadline applies. In those instances, notice about specific deficiencies in the most recent disclosure statement should be given first by telephone and then confirmed in the letter that accompanies the CFB’s payment or non-payment determination under existing CFB procedures. In any event, payments should not be reduced by an amount that is disproportionate to penalties the Board would consider imposing for alleged violations pursuant to its published penalty standards. In the event there is a basis for suspending payment altogether or for delaying the completion of an audit pending the outcome of an investigation, campaigns should be informed in writing.

f) *Post-election payments.* After the election, the CFB should continue to give priority to completing audits of those campaigns that appear to be in a position to qualify for additional or first-time public funds payments. Given that these campaigns have outstanding liabilities, it is appropriate to expedite these audits. We also urge the CFB to implement procedures for releasing a portion of payments due prior to issuance of the final audit report, for those campaigns which have demonstrated both a large amount of outstanding liabilities and qualification for payment.

3. *Information for Candidates.* a) The CFB should strive to finalize changes in Program requirements and issue campaign training materials as early as possible in the election

cycle. These materials should include clear and compelling warnings designed to deter fraud, including examples of relevant past criminal prosecutions and civil actions. When asked CFB staff should answer whether a payment is being recommended and inform the campaign of the anticipated payment amount.²⁰³

b) After the election, campaigns often will find it more difficult to maintain staff and devote time to meeting ongoing Program obligations. To reasonably plan for their obligations during the post-election audit, campaigns need a clear sense of what will be required of them and when requests for information will be made. Therefore, the Committee urges the CFB to issue a written reminder and calendar to all participating campaigns before the post-election audit begins detailing: their ongoing responsibilities under the Program; a schedule for the CFB's upcoming request for required records that will be made during a field visit or by mail; the possibility of subsequent additional requests for information; the upcoming issuance of invalid matching claims reports and of draft and final audit reports; the possibility of further public funds payments or required repayments to the Public Fund; and the anticipated timeframe in which the CFB expects to complete each of these tasks.

4. *Documentation for matchable contribution claims.* The Committee believes that civil penalties for failure to include "backup documentation" for matchable contributions with disclosure statements are unnecessary. We believe that the fact that these contributions will not be matched with public funds until the backup documentation is submitted is a sufficient incentive for

²⁰³ For example, CFB staff could inform the campaign that (i) a payment of a specified amount would be recommended for release on a date certain, or (ii) no payment would be recommended at this time with an indication of the reason(s) why, or (iii) he or she does not yet know whether a payment would be recommended, but would undertake to find out and call back. In each instance, it should be sufficient that the answer be accompanied by the caveat that payment determinations are ultimately made by the Board (or executive director, as proposed above) and are subject to modification based on ongoing compliance reviews.

compliance and are unaware of a record of non-compliance that would suggest otherwise.

5. *Open Government.* a) When an advisory opinion is requested, the CFB should post the request on its website, together with an announcement of the Board meeting at which the request will be considered.²⁰⁴ The Board should discuss possible advisory opinions in public session. These procedures will help facilitate candidate and public understanding of matters discussed during the CFB's public meetings.

²⁰⁴ A new law requires the CFB to post on its website questions to be addressed in advisory opinions. See N.Y.C. Local Law 12 (2003), *amending* Administrative Code §3-708(7).

b) The Board should discuss all matters before it in open public meetings, except for those for which an executive session is expressly permitted under the Open Meetings Law.³⁰⁵ We recommend that the CFB seek an opinion from the Committee on Open Government to clarify the matters that it may and may not discuss in executive session.³⁰⁶ Specifically, we believe that when public funds payment questions are before the Board these should be discussed and decided in public session, including an announcement of the recipient-candidates and the amounts to be paid either by the Board in taking a vote or by CFB staff assigned to answer questions immediately at the conclusion of the public meeting. The Committee recommends that the CFB publish a clear and detailed agenda for its meetings on its website.

c) All filer identification forms, certifications, and disclosure statements filed on behalf of candidates should be made available without redaction subject to the right of all filers to claim applicable exemption under the Freedom of Information Law. As election day approaches, there is heightened public interest in immediate access to information concerning candidates on the ballot. Thus, when “FOIL” requests are made, the CFB should work to expedite the release of requested information as soon as possible within the five-business-day period the law sets for a response.³⁰⁷

6. *Resources.* The Committee continues to support the Board’s Charter authority to propose its own budget because the Board should have sufficient resources to support its responsibilities, including the modifications we recommend in this report. As former

³⁰⁵ Public Officers Law §105.

³⁰⁶ *See id.* §109.

³⁰⁷ *Id.* §89(3).

Association President Evan A. Davis has testified: "the Campaign Finance Board must have the proper budgetary support to fulfill its dual function . . . of auditing participants and enforcing the law as well as educating the public and helping candidates by providing the information they need to get the full benefit of the program."²⁰⁸

²⁰⁸ Testimony of Evan A. Davis, Dec. 11, 2001, *supra* note 12.

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