February 6, 2004

Hon. William Perkins
Chair
City Council Committee on Governmental Operations
City Hall
New York, New York 10006

Dear Chairman Perkins:

The Special Committee on Election Law of the Association of the Bar of the City of New York has reviewed Intro. No. 382-a, a bill to amend the New York City Campaign Finance Act (the "Act"). We commend the City Council for moving forward on important legislation to improve the City's landmark campaign finance reforms.

We strongly support what we believe to be the bill's central goal: to direct public matching funds to election contests in which the funding will help promote fair competition among candidates for City office, rather than to candidates with little need for public dollars to wage an effective campaign. We also find considerable merit in other provisions of the bill, suggest several modifications, and have a few technical comments (see attachment).

In October 2003, the Association published the Committee's report, *The New York City Campaign Finance Program in the 2001 Elections: To Make a Good Program Better* (copy enclosed). We have attached for the Council's particular consideration the report's recommendations for improving the Act. Representatives of our Committee look forward to an opportunity to discuss these recommendations with the Council and its staff, and are available to assist in developing appropriate amendments to the bill.

We are aware of speculation in press reports about the intent and process of the Campaign Finance Board in recommending the bill now before the Council. As we note in our report, the CFB has long been a non-partisan bulwark resistant to political pressure. We consider it vital to the program that the CFB maintain its reputation for independence on a continuing basis. In the absence of any hard evidence to support speculative charges that the CFB's proposals were intended to help or harm any particular candidate, our comments focus on the substance of the proposed bill.

The City Council has repeatedly taken the lead in ensuring that the City's campaign finance law remains at the forefront of reforms adopted across the nation. The Committee is very supportive of the Council's ongoing attention to this issue.

Sincerely yours,

Henry T. Berger
Chair

cc: Members of the City Council

Multi-Tier "Bonus" Formula (§6: Ad. Code §3-706(3))[i]

The bill recalibrates the Act's existing provisions for making increased public matching funds available to participating candidates opposed by well-financed non-participating opponents. The amount of additional funding available under this "bonus" provision will vary according to the level of the non-participant's financing.

This provision will help promote candidate participation in the City's reform program and foster competitive contests. Other provisions of the bill help offset the risk of an increased outlay of public funds.

"Limited Participation" (§§3, 4, 15: Ad. Code §§3-703(1), (2), (5) – (12); 3-718)

The bill would permit self-funded candidates to opt-in to the City's reform program, by agreeing to abide by its disclosure requirements and spending limits. This provision will improve public disclosure of campaign expenditures and reduce public funding costs by making "bonus" funding unavailable against such candidates. The extension of the spending limits will also promote more competitive races.

This proposal has considerable merit. We recommend that in refining this provision, the Council consider the following:

- When is a candidate's spending from his or her own funds "in furtherance of" his or her election, such that the spending limits are applicable? Are the Charter §1136.1 restrictions on public servants' use of government resources to promote a candidacy, discussed below, relevant for framing comparable standards for self-funded candidates?
- The provision permits self-funding to be from joint property held by a candidate with his or her spouse, domestic partner, or children. To encourage self-funded candidates to become limited participating candidates, we recommend that this opportunity be extended to candidates financed by a spouse or domestic partner, to the extent permitted by New York Election Law.

Non-Participating Candidates (§§3, 16: Ad. Code §§3-703(1); 3-719)

The bill would extend the Act's contribution limits, disclosure requirements, and other provisions to non-participating candidates for City office. Consistent with *Buckley v. Valeo*, non-participants would remain free from spending and self-financing limits. The Committee supports state legislation to achieve this result. See Committee Report Recommendations B. 3 c) and 4, at p. 92, copy enclosed.

These amendments raise questions about whether the City has the authority to adopt *mandatory* campaign finance requirements by local law and whether such local requirements would be preempted by existing state campaign finance laws. The ultimate resolution of these questions is uncertain.

For example, state law sets contribution limits for City candidates that, in general, are significantly higher than the limits set in City law. State law also permits political parties to give virtually unlimited financial support to candidates in general elections. Courts have not yet considered whether these state campaign finance rules would preempt different limits made mandatory by local law.

The Committee is also concerned that a successful challenge against local mandatory requirements could conceivably undermine the longstanding *voluntary* reform. No court has ever formally ruled on the City's authority to adopt the existing Act. Given that non-participants have been a relatively small portion of City candidates, and an even smaller proportion of competitive candidates, is it worth taking the risk of potentially exposing the successful voluntary program to a likely aggressive challenge to the City's authority to extend the local law to non-participants?[ii]

To effectively implement the proposed multi-tier bonus, however, the City's Campaign Finance Board (CFB) will need campaign finance reports from non-participants on a regular basis. Currently, the CFB relies on non-participant compliance with Board of Elections disclosure requirements and often is faced with making determinations in the absence of these reports. Also, including campaign finance information about every City candidate, participant and non-participant, on the CFB's website would, for the first time, give the public a comprehensive searchable financial disclosure database covering every candidate for City office.

Unlike other elements of state campaign finance regulation, the Election Law requires electronic disclosure only for those candidates running for statewide and state legislative office, and for Supreme Court Justice. See Election Law §§3-102(9-A); 14-102(4); 14-104(2). State law does not require electronic disclosure (and its publication on the Web) for local candidates.

Because the Election Law has clearly not occupied this field, we recommend the following alternative: (1) extending the Act's electronic disclosure requirements to all City candidates for all filings required under the Act; and (2) directing that the CFB's disclosure software be made compatible with current State Board of Elections specifications. Candidates for statewide and state legislative office, currently in compliance with state electronic disclosure requirements, will need compatible software to seamlessly adapt to the City's electronic disclosure regime should they become candidates for City office. Further, we agree that the non-participants should be required to disclose to the CFB the same information the Act currently requires of participants.

This approach is also consistent with current local law requirements for personal financial disclosure by all City candidates, participants and non-participants. Administrative Code §12-110. Because there is no provision for non-participant "opt-in," we recommend that non-participants make their initial electronic submissions, covering all relevant time periods, to the CFB no later than July 15 in the election year.

Restrictions on Public Servants' Use of Government Funds and Resources (§19: Charter §1136.1)

The bill would broaden current protections against the misuse of governmental resources for election campaign purposes. This is appropriate to curb potential abuses.

The proposed enforcement provisions are unclear, however. For example, the bill would authorize the CFB to determine:

> whether any use of governmental funds or resources . . . constitutes a contribution or expenditure under [the Act] . . . or any rule promulgated thereunder (regardless whether the expenditure is otherwise proper under this section).

This seems to encompass all uses of governmental funds or resources by all public servants of the City of New York. Every use of City, state, and federal funds by these public servants would be subject to review under this provision, regardless whether it is otherwise proper. The Committee recommends instead that the approach of current law be continued: only uses that actually violate Charter §1136.1 would receive additional review to determine whether the use also constituted a contribution or expenditure under the Act. See CFB Advisory Opinion No. 2000-4 (September 14, 2000).

Prohibition Against Use of Surplus Campaign Funds (§4: Ad. Code §3-703(14))

The proposed change has merit because the exclusion of accumulated "warchests" will help promote a "level playing field" among opposing candidates. We recommend that the following areas be clarified in order to facilitate implementation:

- If this provision retroactively covers funds transferred to principal committees prior to its effective date, it may prove to be a significant disincentive to participation in the short-run. Therefore, we recommend grandfathering of pre-effective date transfers.
- The bill should make clear what uses candidate committees may make of surplus campaign funds that are not subject to repayment to the CFB. For example, could these be used to make purchases for the office the candidate holds, without violating the transition/inauguration financing law (Ad. Code §§3-801, *et seq*.)?
- When a candidate decides to run for a different office than that initially sought, does this provision require the candidate to establish a new principal committee?
- The bill should clarify what is meant by prohibiting the use of funds "in furtherance of the election(s)." This standard does not appear in current law.

Reducing Public Funding in Non-Competitive Circumstances (§5: Ad. Code §3-705(7))

The Committee supports this proposal in principle and believes the proposed objective financial test is fair and reasonable for each office. The Committee also agrees with the sense of the bill that there must be an alternative to the objective financial test.

The problem lies in assigning to the CFB the *discretionary* determination of "extenuating circumstances" without clear standards for the making and review of such determinations. Gauging the potential competitiveness of an election is an onerous and questionable role for a government agency. The CFB's months-long delay in declaring an "anticipated runoff" in the 2001 race for public advocate underscores the problem.

High name recognition, by itself, is not a sufficient proxy for a competitive campaign. Examples from the 2001 election include mayoral candidates Bernhard Goetz and Kenny Kramer.

The problem in administering this provision is greater in non-mayoral races, where the historic lack of media coverage will likely give the CFB little "objective" information. Finally, in multi-candidate fields, opposing candidates may take different positions on whether a third candidacy has created "extenuating circumstances." How is the CFB supposed to handle that minefield?

This provision requires more study, and the development of detailed standards to facilitate determinations that are as objective as possible and subject to expeditious judicial review.

Spending and Contribution Limit Changes (§§4, 6: Ad. Code §§3-703(7); 3-706(1), (2))

The Committee supports the bill's consolidation of the separate spending limits that apply in the first three years of the four-year election cycle into a single limit. Because the consolidated limit for borough president and Council races would be lower than the total of the current separate limits, the Committee recommends that the bill make clear that pre-effective date expenditures are "grandfathered" to the extent these would cause the campaign to exceed the newly lowered limits. In this way, the bill would avoid creating a disincentive to participation.

A potential technical problem in the revisions to the spending limit is the addition of the phrase "in furtherance of the nomination for election or election covered by the candidate's certification." This could be read to create a new category of exempt expenditures for campaign expenditures permitted under Election Law §14-130 that are arguably not "in furtherance of" the candidate's nomination or election. Contributions to other candidates or expenditures related to holding office are two examples.

To avoid this inadvertent loophole, the intent of the new language should be clarified or it should be deleted from the bill.

The bill permits the CFB to lower or reject quadrennial Consumer Price Index adjustments to the Act's contribution and spending limits. This assignment of discretionary authority makes no provision for the public hearings and debate afforded by the legislative process. The appropriate level of contribution and spending limits should continue to be set by legislation.

Finally, we urge the Council to carefully evaluate whether the proposed spending limits are sufficient to enable all serious candidates to run competitive campaigns. See Association of the Bar of the City of New York, *Towards a Level Playing Field – A pragmatic Approach to Public Campaign Financing*, 52 *Record* 660, 667 – 674, 678 – 679 (1997).

New Requirements for Matchable Contributions (§§2, 4: Ad. Code §§3-702(3); 3-703(2), (6)(b)(iii))

Under the bill, contributions from individuals to whom the committee makes an expenditure will not be matchable. The Committee supports curbing the potential abuse that public funds could be recycled as vendor payments to reimburse contributors. The provision could be read, however, to also prohibit the matching of contributions received from persons (often the candidate) reimbursed for other funds advanced on behalf of the campaign. The bill should make clear that contributions by "advancers" receiving reimbursements remain matchable.

The bill limits the contributions that apply toward the threshold for public financing to $250 per contributor, rather than $1,000 per contributor. This change would make it much harder for some campaigns to qualify for public financing, raising the qualification bar higher than at any time since the Act was first adopted in 1988.

The interaction of this more challenging threshold with another proposed new hurdle is of special concern to the Committee. The bill would require participating candidates to obtain full employment information (employer, business address, and occupation) for every contribution; otherwise, the contribution will not be matchable and will not count toward the threshold. These provisions require very careful examination to ensure the threshold remains attainable by serious campaigns and that the bill's significantly increased restrictions on candidates' ability to qualify for public funding will not have a retrogressive effect under the federal Voting Rights Act.

Debate Law Reforms (§8: Ad. Code §§3-709.5)

The Committee supports these changes, long recommended by the CFB. See Committee Report Recommendation B. 10, at p. 98, copy enclosed.

Candidate Personal Liability for Penalties and Public Funds Repayments (§9: Ad. Code §3-710(2))

In New York, the well-established general rule is that individuals (including candidates) are not personally liable for the debts of political committees, which are private associations or corporations. See, e.g., Richmond Advertising/Reinhold Associates v. Del Giudice 66 A.D.2d 701 (1st Dept 1978) and Xerox Corporation v. Rinfret 153 Misc. 2d 310 (Civ. Ct. NY Co. 1992). Moreover, the Act generally limits a participating candidate's use of his or her personal funds in connection with his or her

nomination or election. See NYC Administrative Code §3-703(1)(h).[1] The CFB is currently in litigation with candidates, and the courts may determine whether candidates may be personally liable for public funds repayments in circumstances in which the Act does not expressly provide for such liability. See Administrative Code §3-710(2)(a), (b).

We urge the Council to carefully examine the circumstances in which strict and vicarious liability for public funds repayments should apply to candidates, and other individuals, without regard to fault. Should the Council choose to address this issue at this time, we urge that special care be taken not to prejudice the ongoing litigation.

The bill also proposes a new eligibility criterion for public financing: if the CFB determines that a candidate (or his or her authorized committee) owes penalties or repayment of public funds from a previous election, that candidate's new campaign will not be eligible for public funds until the CFB's claim is satisfied. Litigation was recently brought concerning this issue.

The CFB makes penalty determinations by formal vote of the Board in a public meeting, following presentation by CFB staff and those candidates who avail themselves of the opportunity. The CFB does not provide for an administrative adjudication or appeal of a formal Board penalty determination.

The CFB asserts claims for public funds repayments in final audit reports, which are issued without formal vote or public Board discussion. Candidates have a right, under current CFB rules, to file an administrative petition challenging the repayment claim.

As we noted in our Report, "[t]he 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." See Committee Report at p. 4, copy enclosed. Thus, we recommended administrative and procedural reforms to promote fairness and ensure due process for candidates, including: (i) administrative adjudications, (ii) creation of an ombudsman position to report candidate concerns directly to the Board; (iii) advance written notice of payment suspensions; (iv) provision that payment reductions not be disproportionate to proposed penalties. See Committee Report Recommendations C. 1 and 2, at pp. 99 - 102, copy enclosed.

We urge the Council to consider these recommendations.

Increased Civil Penalties (§11: Ad. Code §3-711)

The Committee recommends two technical clarifications:

- Delete the cross-reference to §3-710.5 in the penalty section, because there does not appear to be any way a candidate can violate that provision (which requires

[1] A recent CFB advisory opinion on this subject, Advisory Opinion No. 2003-3 (November 13, 2003), did not address this case law or this provision of the Act.

the CFB to make determinations of violations and infractions, and to provide written notice and an opportunity to be heard to a respondent before it assesses a penalty).

- The bill should clarify the meaning of "failing to respond" to "a draft audit report" before creating a new civil penalty. Moreover, the provision could be read to impose a separate penalty for each violation resulting from such "failure to respond." Is that the intent? Given the enormous potential liability, these provisions must very clearly drafted.

Notes on Committee member participation

Kenneth Moltner, Jordan Stern,* Matthew Tollin,** and Tova Wang abstained from the vote approving the Committee's comments.

*Deputy General Counsel, New York City Campaign Finance Board.
**Counsel to the New York City Council Committee on Governmental Operations.

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[i] Joel Gora does not agree that the multi-tiered bonus and limited participation provisions will make elections more competitive, and opposes extension of the local law's contribution limits and disclosure requirements to non-participating candidates. Peter Hein dissents from these comments in general. Paul Wooten dissents from comments supporting extension of the local law to non-participating candidates.
[ii] Deborah Goldberg did not participate in the formulation of the concern reflected in this paragraph.