BRENNAN CENTER FOR JUSTICE

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New York State Board of Elections, Public Campaign Finance Board
40 North Pearl Street, Suite 5
Albany, New York 12207-2729
[Via email to comments@elections.ny.gov]

Re: Draft of Public Campaign Finance Program Regulations, Part 6221

To the Public Campaign Finance Board:

The Brennan Center for Justice at New York University School of Law[1] appreciates the opportunity to comment on draft regulations published by the Public Campaign Finance Board ("PCFB") as it begins the crucial work of building New York's new small donor public financing program.[2] For more than two decades, the Brennan Center's nonpartisan experts have helped design and implement similar campaign finance reforms in states and cities across the country and at the federal level.

New York State's new system will be a historic step toward achieving a more inclusive and participatory democracy. This program will provide a multiple match on small contributions from New York residents to candidates who opt in. Its innovative design gives candidates the chance to raise competitive amounts based on modest contributions from constituents. It is the most powerful legislative response enacted anywhere in the country to the 2010 Supreme Court decision *Citizens United*, which supercharged big money in politics. The new public financing program will help more New Yorkers to be heard in the political process at a time when the need has never been greater.

[1] The Brennan Center is a non-partisan public policy and law institute that focuses on the fundamental issues of democracy and justice. The Center's Money in Politics project works to reduce the real and perceived influence of money on our democratic values. The opinions expressed in this letter are only those of the Brennan Center and do not necessarily reflect the opinions of NYU School of Law, if any.

[2] Staff Draft of Public Campaign Finance Program Regulation for Public Comment, Part 6221, New York State Board of Elections, https://www.elections.ny.gov/NYSBOE/download/law/PropReg_Part6221reNYSPublicCampaignFinancePgm.pdf.

The Brennan Center offers these comments on the draft regulations in the spirit of ensuring that the public financing program is accessible to and clearly understandable by all candidates, including first-time candidates and campaigns without substantial resources. At the same time, we recognize the need for the program to protect the public fisc and ensure transparency and fairness.

Registration Forms

The draft regulations provide that participating candidates must register "on forms prescribed by the PCFB." § 6221.5(a). This phrase seems to contemplate that participating candidates will register on different forms than the traditional State Board of Elections ("BOE") forms nonparticipating candidates use. We see two issues with this differentiation. First, candidates may not know, at the registration stage, whether they will participate in the program or not. Second, whatever information is required beyond what is on traditional registration forms can be collected during the certification process. We recommend a single registration process with the BOE for all candidates.[3]

Certification and Party Support

The draft regulations require participating candidates to have a single authorized committee.[4] § 6221.5(a). But the draft requires participating candidates to certify they understand "that the use of an entity other than the authorized committee, and/or party and/or constituted committees" is a violation. § 6221.7(b)(6). This phrasing could be read to allow participating candidates to "use" party committees and constituted committees just as they would an authorized committee, which is likely not the PCFB's intention. If the intention is to allow participating candidates to accept transfers from party and constituted committees (which is not prohibited by the statute), we recommend rephrasing the provision to something similar to the following language:

> The candidate understands that the use of an entity other than the authorized committee to aid or otherwise take part in the election(s) that this Certification covers is a violation of Article 14 of the Election Law, provided however that participating candidates may accept transfers from party committees and/or constituted committees; ….

Breach of Certification

The timeline for determining a fundamental breach of certification is, understandably, short. § 6221.8(c)(3). After notice from the PCFB, candidates have three business days to request a hearing. After receiving the preliminary

[3] *See* N.Y. Elec. Law § 14-201(1) (committees "shall register with the state board of elections before making any contribution or expenditure").
[4] In conformity with the statue. N.Y. Elec. Law § 14-201(2).

determination and supporting documents, candidates have five business days to respond. We appreciate the need to resolve certification issues quickly. On the other hand, campaigns may have difficulty meeting these timelines due to unavoidable factors like the need to locate documents, and first-time and under-resourced candidates may be especially burdened by short deadlines. Furthermore, there is little risk of unnecessary delay on the part of the campaigns, since candidates facing loss of certification have a natural incentive to resolve the issue as soon as possible.

We suggest that the candidates' deadlines in this process be pushed back. Consider doubling both deadlines, giving candidates six business days to request a hearing and ten business days to respond to the preliminary determination.

Eligibility and Excess Contributions

The public financing statute provides that candidates are not eligible to participate if they accept contributions in excess of applicable limits, unless they give the excess portion either back to the donor or to the Campaign Finance Fund ("the Fund").[5] It is important context to this rule that accepting over-the-limit contributions is prohibited and punishable by fine.[6] The regulations at § 6221.9(a)(8) should explicitly reference this prohibition to avoid the implication that the only consequence for accepting over-the-limit contributions is that the candidate is ineligible for public financing.

A distinct issue is that the draft regulations place a limit on the amount of excess contributions that candidates can pay to the Fund (as opposed to refunding to the donor). § 6221.9(a)(8)(i)(b). They do this by deeming such payments to be self-funding and thus to be counted against the limit on amounts candidates can give to their own campaigns, which is three times the otherwise applicable limit.[7]

This limit is unnecessary. A candidate who gives excess contributions to the Fund is not enriched by them, since the moneys in the Fund are collectively used to provide public funding to any candidate who is eligible for matching funds. A candidate who has given to the Fund must raise matchable donations to earn public funds, just like any other participating candidate. Furthermore, given the general prohibition on over-the-limit contributions, the amounts in question should never be very large. But if they are significant, we see no reason to limit how much of that money the candidate pays to the Fund.

Qualification Thresholds in Low-income Districts

The statute provides that the thresholds for candidates to qualify for public funding are lower in "districts where average median income ('AMI') is below the AMI as

[5] N.Y. Elec. Law § 14-203(1)(i).
[6] N.Y. Elec. Law §§ 14-114, 14-126(2). Contribution limits are the same for participating and nonparticipating candidates.
[7] N.Y. Elec. Law § 14-203(1)(f).

determined by the United States Census Bureau."[8] The draft regulations repeat this AMI concept. § 6221.11(a)(5), (a)(6), (c). The Census Bureau does not publish a metric called "average median income," but the "median household income" metric it does publish for states and state legislative districts fits the meaning of the statute.[9] We recommend that the regulations explain that the PCFB will use Census data for median household income to determine the "average median income" for the state and each legislative district. Thus, the first sentence of § 6221.11(c) should read:

> The average median income, as described in this section, shall be determined by the median household income published by United States Census Bureau three years before such election for which public funds are sought.

Disclosure of Small Donors and Expenditures

The draft regulations require all contributions, of any amount, for which candidates claim a match to be reported on public disclosure statements, stating that "unitemized contributions are ineligible to be matched." § 6221.13(a)(9).[10] This is a wise policy that, among other things, allows the public and journalists to examine candidates' claims for matching funds. It also follows the practice of established public financing programs in other jurisdictions like New York City and Connecticut.[11]

However, the draft regulations also refer to the preexisting rule for nonparticipating candidates, that only contributions aggregating to $100 or more must be itemized. § 6221.13(a)(1), (b). To avoid potential confusion for participating candidates, we suggest adding a clause such as, "provided, however, unitemized contributions are ineligible to be matched," in each provision referring to the $100 threshold for itemization.

In addition, we recommend that the regulations require participating candidates to itemize all expenditures, of any amount, in public disclosure statements. The public financing statute does not specify an expenditure itemization threshold, but the PCFB has the clear authority to promulgate rules necessary for the public financing system to be successful.[12] Transparency concerning expenditures is important to

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[8] N.Y. Elec. Law § 14-203(2)(c).
[9] *See* Census Reporter, Median Household Income in the Past 12 Months, Table B19013, available at https://censusreporter.org/data/table/?table=B19013&geo_ids=04000US36,620|04000US36,610|04000US36&primary_geo_id=04000US36.
[10] In conformity with the statute. N.Y. Elec. Law § 14-201(3)(c).
[11] New York City Code § 3-703(6)(b)(ii); *Understanding Connecticut Campaign Finance Laws*, Connecticut State Elections Enforcement Commission, 2020, 30.
[12] N.Y. Elec. Law § 14-207(4). The legislative intent in creating the public financing program includes, among other things, "building confidence in government[and] reducing the reality and appearance of corruption." N.Y. Elec. Law § 14-200. Informing the public about candidates' expenditures of public funds furthers these goals.

engender public trust in the public financing program and candidates' appropriate use of public funds to further their campaigns.[13] This is also the practice in New York City and Connecticut.[14]

Preliminary Statement Review

The draft regulations provide for preliminary review of disclosure statements and allow candidates to "have an opportunity to respond to and correct potential violations." § 6221.17. This process is important to the smooth functioning of the program and candidates' ability to use it. Candidates would benefit from a clear understanding of the timeline. The regulation should make explicit that communications from the PCFB regarding questions arising in the preliminary statement review will clearly state the date by which candidates must respond to avoid penalty. The regulations should also provide guardrails for the timeline: we recommend a provision that candidates' time to respond will be no longer than 35 days and no shorter than 5 business days.

Competitive Opponent

The statute provides that only candidates with competitive opponents will be eligible to receive more than 25% of the public funding limit for the office they seek. The draft regulations provide criteria for determining whether a candidate's opponents are sufficiently competitive. § 6221.21(g). These criteria are similar to, but more lenient than, those used in New York City's public financing system.[15]

The New York City Campaign Finance Board ("CFB"), which has a great deal of experience implementing a long-running and successful small donor matching system, has recommended that the City's competitive opponent criteria be strengthened by legislation.[16] The CFB advocates for just three criteria for competitiveness. They are, in summary, that the opponent:

- Has received 25% or more of the vote in prior election in the area;
- Has received endorsements from elected officials or large membership organizations; or
- Has an immediate family member who has held elected office in the area.[17]

We recommend that the state's criteria follow the CFB's recommendations.

Furthermore, we have concerns specific to one of the draft regulations' proposed criteria: the provision that allows the PCFB to determine that an opponent is competitive for partially meeting the other criteria, "based on the totality of the

[13] Permissible uses are restricted by the statute. N.Y. Elec. Law § 14-206.
[14] New York City Rules, Tit. 52, § 4-05(c)(iv)(C); Conn. Gen. Stat. § 9-608(c)(1)(B).
[15] New York City Code § 3-705(7).
[16] New York City Campaign Finance Board, *Keeping Democracy Strong: New York City's Campaign Finance Program in the 2017 Citywide Elections*, 2018, 128-29, https://www.nyccfb.info/pdf/2017_Post-Election_Report_2.pdf.
[17] *Id.*

information provided." § 6221.21(g)(9). Whether a candidate has a competitive opponent is best determined by a bright line rule, which will give candidates clear guidance about what to expect. Rules that allow too much discretion—or even appear to—may give rise to complaints from candidates about unfairness in their application. We recommend that § 6221.21(g)(9) be deleted.

Audit Lottery

The statute requires audits to be performed on legislative campaigns selected by lottery, but it caps the number of candidates to be audited per cycle in two ways.[18] First, the PCFB shall not audit more than "one-third of all participating candidates in covered elections." Second, the lottery selects districts and the PCFB audits every candidate in each selected district, "while ensuring that the number of audited candidates within those districts does not exceed fifty percent of all participating candidates for the relevant office." Thus, the number of audited candidates must be 1) no more than one-third of all participating candidates *in the entire system,* and 2) no more than half of the number of participating candidates *for the relevant office*, i.e., assembly or senate.

We understand these caps are intended to limit the number of audits while ensuring that neither assembly nor senate candidates are over- or under-represented in the pool of audited candidates. That is, for example, the lottery should not result in the PCFB auditing a set of campaigns that are almost all assembly candidates, with very few senate candidates included. The draft regulations have, to some extent, addressed this issue by providing for separate lottery drawings for assembly and senate audits. § 6221.28(a)(3).

We propose a minor clarification. The draft regulations provide that the lottery will select districts until "one third of all participating candidates for the relevant office is reached, or fifty percent of all participating candidates for the relevant office is reached, whichever comes first." § 6221.28(a)(5). The "for the relevant office" language in the first quoted clause should be deleted to conform with the statute. Thus, the sentence should read:

> For each lottery, a bipartisan team shall pick random numbers using the lottery system until one third of all participating candidates is reached, or fifty percent of all participating candidates for the relevant office is reached, whichever comes first.

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New York State's historic campaign finance reform will stand as an example for jurisdictions around the country seeking to address the harms of big money in politics. By boosting community-based fundraising, voluntary small donor public financing enables a closer connection between elected officials and their

[18] N.Y. Elec. Law § 14-208(1)(c).

constituents. The Brennan Center applauds the PCFB's work implementing this program and stands ready to assist.

Respectfully submitted,

Ian Vandewalker,
Senior Counsel, Election Reform
Brennan Center for Justice at NYU School of Law