Statement of Irvin B. Nathan
Attorney General for the District of Columbia

Before the

Committee on Government Operations
Kenyan McDuffie, Chair

Regarding Bills 20-03 and 20-37

Office of the Attorney General for the
District of Columbia

March 21, 2013

John A. Wilson Building
1350 Pennsylvania Avenue, NW
Room 412
Washington, D.C.

INTRODUCTION

Good afternoon, Chairman McDuffie, and Members and Staff of the Committee on Government Operations. I am Irv Nathan, Attorney General for the District of Columbia. On behalf of the Executive Branch of the District, I am pleased to testify before the Committee today regarding the Mayor's proposed legislation to preserve and protect the integrity of our elections process, including the Mayor's proposals to combat pay to play, which is the stated topic of today's hearing and is at the core of the Mayor's comprehensive campaign finance proposal.

As we have discussed in each of this Committee's hearings on campaign finance reform, the Mayor's bill, the "Comprehensive Campaign Finance Reform Amendment Act of 2013," [Bill 20-03] contains a systematic, carefully balanced series of reforms, based on the study by our Office of the Attorney General of best practices of other jurisdictions, and on a thorough assessment by the administration of the perceived vulnerabilities in the District's current campaign-finance law.

In the prior two hearings held by the Committee this month on campaign finance, we addressed the Committee's chosen hearing topic and focused on the Mayor's proposed aggregated contribution rules, and proposals to ban bundling, as well as our proposals to strengthen and clarify the rules concerning the use of money orders, and to improve the District's campaign finance disclosure rules to increase transparency. We have also focused on strengthening candidate accountability through tougher attribution and enforcement provisions, increased penalties for non-compliance, and proposals for a more robustly funded Office of Campaign Finance to allow that office to perform its important work more vigorously. We also previously addressed this Committee's questions on constituent service funds and campaign

finance training. Today we come to what in our view is the core issue in the District's campaign finance reform debate: ending pay to play.

One of the most serious vulnerabilities the District faces is the perception that in our local government access and financial rewards are tied to political contributions. Those who have observed the District's political scene over the last several decades have ample reason for concern that those who want a District contract or grant are well advised to make generous political contributions to prospective decision-makers, *i.e.*, that aspiring contractors and grantees must "pay to play." Animated by those concerns and to assure our citizens that contracts and grants are awarded solely on the merits and not on political considerations, this hearing and the Mayor's bill focus on what political contribution restrictions should apply to those who seek to contract with the District or to receive a grant.

The core of the Mayor's pay-to-play proposal is a simple proposition: those who seek or receive large contracts or grants from the District should not be able to enrich the political campaigns of those who can award them. Such contributions only feed cynicism and the perception of corruption, even when there is none. Like other provisions in the Mayor's bill, our proposed pay-to-play reforms seek a careful balance. On the one hand, those who seek to contract with the District have a right to express their political views and to lend support to politicians who share their concerns and policy goals. At the same time, however, contractors or those aspiring to one should not be able to enhance their chances of receiving a contract or be perceived as enhancing their chances by donating to those in a position to award or reject it. The District's system of public contracting should not be stained with even a remote appearance of corruption. The Mayor's systematic proposals would bring the District in line with jurisdictions across the country, including New York City, Philadelphia, Houston, West Virginia, South

Carolina, and New Jersey, who have taken steps to protect the integrity of their public contracting systems.[1] We carefully examined those laws and modeled the Mayor's proposals on the best and most successful features of them.

Under current District law, individuals or corporations seeking large government contracts or grants can donate to the campaign or constituent service funds of those elected officials who can directly influence whether the contract is awarded. This status quo is a source of major appearance problems and an invitation to abuse. We believe the Council must have the courage to change it. As you have heard from the national experts at Public Citizen, if enacted, the Mayor's pay-to-play proposals would be among the strongest in the nation. I will discuss the details of our proposal and am happy to answer the Committee's questions. After your extensive series of hearings, we urge the Committee to move forward with this proposal and the rest of the Mayor's comprehensive campaign finance reform bill, make any necessary improvements, and send it to the full Council for a vote.

I'll address for our pay-to-play proposal (i) who is covered; (ii) who are prohibited recipients; (iii) when the coverage begins and ends; and (iv) the enforcement penalties and a safe harbor. I will also discuss the pay-to-play provisions in Bill 20-37, proposed by Councilmembers Wells and Grosso.

[1] *See, e.g.*, S.C. Code Ann. § 8-13-1342 (barring contributions to public officials who were "in a position to act on the contract's award"); W. Va. Code. § 3-8-12(d) (incorporating political parties, political committees, and candidates into its list of prohibited recipients); Philadelphia Code § 17-1402 (impact of an entity's prior contributions on eligibility for contracts with the city).

I. WHO IS COVERED?

The law needs to be changed so that reasonable observers do not conclude that those who receive contracts or grants from the District obtained these benefits as a result of contributions to a political campaign of those who were able to influence the decision. Accordingly, our bill designates as a "covered contractor" any individual or company that seeks or holds contracts or grants with the District (and throughout my testimony, I will use the word "contractor" as a useful shorthand for "someone seeking or holding a contract or grant").

Limits on contractor contributions guard against perceived as well as actual corruption. However, like numerous other jurisdictions that have adopted pay-to-play laws, we do not believe every person or company receiving contracts or grants from the District should face restrictions on the political contributions and expenditures they can make.[2] The risks associated with perceptions of pay to play for those with relatively small contracts or grants do not justify sweeping limitations on the First Amendment rights of every person with a District grant or contract. Large contracts or grants, on the other hand, pose a significant appearance risk. The Mayor's bill protects against the possibility or perception of pay-to-play corruption in a focused way by targeting its restrictions toward contractors who seek or hold large contracts or grants, *i.e.*, those of $250,000 or more. Our proposal bars those seeking contracts or grants in excess of $250,000 from making political contributions to any candidate for any office which can play a part in the selection of the winning bidder.

Putting strict limits on these large prospective contractors is important, but, as many states and cities have realized, this is not enough. A company's officers and directors might all

[2] *See, e.g.*, Conn. Gen. Stat. § 9-612(g)(1) (restrictions apply only to those with a single contract valued at $50,000 or more or multiple contracts cumulatively valued at $100,000 or more); L.A. Charter art. IV, sec. 470(c)(12)(A) (restrictions only apply to those bidding on contracts valued at $100,000 or more); 30 Ill. Comp. Stat. 500/20-160(c) (pay-to-play restrictions apply to those with contracts annually totaling $50,000 or more).

make (or be persuaded to make) contributions to a prospective decision-maker, confident that a public official or candidate will notice the company for whom these these officers and directors work. An individual who wants a large contract from the District could simply encourage his or her spouse or other immediate family members to contribute, which could present the same perceptions of corruption as a direct contribution.

To address this and to ensure that there is not even a perception that this is occurring in the District, the Mayor's bill also puts limits on officers and directors of corporate contractors, and on the family members of individual contractors and corporate officers. Like pay-to-play provisions in Connecticut, New Jersey, and New York City,[3] the Mayor's proposed ban would not be limited to contractors themselves. Officers and directors of a company that seeks or holds large contracts with the District would not be allowed to contribute to a prohibited recipient either.

On the other hand, family members of an individual contractor, or family members of a corporate contractor's officers and directors, should not be completely barred from making political contributions. They have a basic First Amendment right to support candidates and causes of their choosing, and the fact that they have a contractor or a contractor's officer in their family should not undermine the exercise of that right. We therefore have *not* followed the example that Colorado set when it completely banned the family members of contractors from making political contributions to candidates and political parties, a sweeping restriction that the

[3] *See, e.g.*, NYC Campaign Finance Bd. Rule 1-04(h) (2001) (cited in Paul S. Ryan, *A Statute of Liberty: How New York City's Campaign Finance Law is Changing the Face of Local Elections*, The Center for Governmental Studies (2003)) (rule prohibits certain contractor contributions to political parties); NYC Code § 3-702-20 ("doing business database" includes persons with 10% or greater ownership of a corporate contractor); *id.* § 3-702-3.1-b (contribution limits apply to anyone "doing business with the city"); Conn. Gen. Stat. § 9-612(g)(2) (restrictions apply to "principals" of current and aspiring state contractors); N.J. Stat. Ann. 19:44A-20.17 (restrictions apply to principals, subsidiaries, controlled PACS, and family members of individual contractors).

Colorado Supreme Court found unconstitutional.[4] At the same time, we recognize that contractors, officers, and directors who cannot make contributions to a political campaign might try to do so indirectly through members of their immediate family, and that this could give rise to the perception of possible corruption. Our bill minimizes this risk by drawing a clear line, one that is similar to a provision in New York City law. Just as New York City contractors can contribute only $250 to City Council candidates and $400 to Mayoral candidates,[5] the Mayor's bill would leave immediate family members free to contribute up to $300 to a prohibited recipient. This balanced approach protects the First Amendment rights of family members by letting them contribute freely, and it minimizes the risk of an appearance of corruption because no reasonable observer would believe that a modest contribution by a corporate officer's spouse or child would influence the award of so major a contract or grant.

II. WHO ARE THE PROHIBITED RECIPIENTS?

Under the Mayor's bill, a large contractor may not make political contributions to elected officials or candidates who could influence whether or not they receive a contract or grant. This obviously includes candidates for Mayor and for the Council, at least for contracts that extend beyond one year or are worth more than $1 million, since under present law, such contracts must be approved by the Council. If the Council were to decide to eliminate its role in the approval process (and restrict its role to oversight, as is the case in the federal government and many other jurisdictions), then the political contribution ban would not apply to candidates for the Council.

Since direct political contributions to an official are not the only way a contractor could seek to influence a decision-maker, the Mayor's bill also provides that large contractors cannot give to an elected official's constituent-service program, they cannot give to a political party

[4] *Dallman v. Ritter*, 225 P.3d 610, 630 (2010) (ban on family member contributions "unconstitutionally chills protected speech" by family members).
[5] NYC Code § 3-703.1-b.

whose candidates may end up in a position to influence the award, and they cannot make large monetary donations to an entity or organization that is controlled by a candidate, by a public official, or by a candidate or official's immediate family. Officials and candidates, constituent-services programs and other entities they control, and political parties are collectively designated as "prohibited recipients" under our bill.

III. WHEN DO THE RESTRICTIONS BEGIN AND END?

Based on the input we received from experts, and the best practices we gleaned from states across the country, we concluded that our proposed restrictions should start when a potential contractor knows that a contract award is impending. If, for instance, a contractor learns that the District is preparing to accept bids on a $1 million contract, that contractor should be forbidden from making any political contributions to any sitting or prospective Mayor or member of the Council. Certainly, from the time an RFP is issued, all potential contractors need to refrain from political contributions.

The Mayor's proposed restrictions on contractor contributions would end one year after the contract or grant does. The endpoint of a ban on contributions would, in turn, depend on whether or not the contractor receives the contract or grant that it seeks. If they do, the contract or grant ends when the final payment on the grant is made, and the ban on contributions extends for one year from that final payment. If they do not, the period of their preclusion from making contributions ends one year after they are notified that they were unsuccessful.

IV. ENFORCEMENT AND SAFE HARBOR PROPOSALS

Restrictions are only as good as the consequences someone faces for violating them. Accordingly, our proposed bill provides enhanced penalties for any contractor that knowingly violated the rules. If a covered contractor solicited or made a political contribution or

expenditure to a prohibited recipient, while knowing that the contribution or expenditure was unlawful, the contractor would face fines up to three times the amount of that unlawful contribution or expenditure. Even stiff fines, however, may not deter holders of especially large contracts. In the eyes of a contractor, even a $50,000 fine may be a reasonable price to pay for the chance to win a $5 million contract. To address this problem, a knowing violation of the pay-to-play rules would also be considered a breach of the applicable contract or grant. Although at least one jurisdiction goes so far as to automatically debar contractors for certain violations,[6] we believe that this approach is unnecessarily rigid. Under the Mayor's proposals, if a contractor knowingly breaks the rules, the District would have the discretion, but not be required, to terminate that contractor's existing contracts or grants. The District could also, in particularly severe cases, bar the contractor from receiving any new contracts or grants for up to four years.

Our enforcement provisions also extend to recipients, making it less likely that they will solicit or accept contributions from contractors. Under the Mayor's bill, any prohibited recipient who knowingly solicits or accepts an unlawful campaign contribution or expenditure from a contractor would face fines up to three times the amount of the unlawful contribution, and if any candidate's campaign knowingly solicits or accepts an unlawful contribution or expenditure from a covered contractor, the name of that candidate would be prominently displayed on OCF's website. In addition, prohibited recipients that unlawfully solicit or accept contributions from large contractors may face criminal penalties.

At the same time, the Mayor's bill also helps protect officials and covered contractors from inadvertently violating the law. Covered contractors and campaign officials can make sure

[6] *See, e.g.*, Philadelphia Code § 14-1407(3) (contractor's material misstatement or omission on mandatory pre-contract disclosure forms punishable by automatic debarment).

they comply with the law by seeking an advisory opinion from the Office of Campaign Finance. As long as they provide accurate facts and follow that advisory opinion, their actions would be presumed lawful. Additionally, a contractor that inadvertently or unknowingly made an unlawful contribution could cure the violation by promptly asking for and obtaining a return of their money.[7] Through these rules, our proposal provides for strengthened accountability, as well as a mechanism to avoid unfairly tripping up candidates and contractors who are attempting in good faith to comply with the law.

V. COMPARISON WITH BILL 20-37

The Mayor's bill is not the only proposed legislation before the Committee today. The "Campaign Finance Reform, Transparency and Accountability Amendment Act of 2013" [Bill 20-37], proposed by Councilmembers Wells and Grosso and introduced on January 8 of this year, adopts all of the Mayor's proposed restrictions on current and prospective District contractors and grantees. We are pleased to see this support for the Mayor's proposals, but believe that this bill falls short in two crucial ways. It leaves out the Mayor's proposed enforcement and safe harbor provisions, making it more difficult both to promote lawful behavior and to deter unlawful conduct. It also addresses only some of the District's campaign-finance vulnerabilities, while the Mayor's bill offers a comprehensive package of reforms. We therefore urge this Council to adopt the carefully-balanced, systematic improvements that the Mayor's bill offers.

[7] New Jersey has a similar provision. *See* N.J. Stat. 19:44A-20.20.

CONCLUSION

The reforms to stop pay-to-play and the other reforms in the Mayor's bill, if adopted, would dramatically improve the appearance and reality of integrity of the District's public contracting system and would help reassure the public that government contracting and grant awards are based exclusively on merit. We look forward to working with this Committee and this Council to enact robust, comprehensive reforms to the District's campaign finance system, including but not limited to these pay-to-play provisions. Thank you. I would be pleased to answer any questions the Committee may have.