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September 12, 2016

BY EMAIL
Sue Ellen Dodell
General Counsel
NYC Campaign Finance Board
100 Church Street, 12 Fl.
New York, New York 10007

Re: Comments on CFB Proposed Rules Amendments

Dear Ms. Dodell:

Enclosed please find written comments on rules amendments recently proposed by the Campaign Finance Board. While I have represented and counseled many candidates and others regarding NYC CFB requirements, the comments I offer are solely my own and not submitted on behalf of any other party. I also request an opportunity to speak at the September 15, 2016 public hearing on this subject.

Thank you for the opportunity to submit comments. Below is a brief summary of my written comments.

I. INDEPENDENT EXPENDITURES

Rule 1-08(f)(1): Rebuttable Presumption Against Independence

This proposal is contrary to the New York City Charter's Administrative Procedure Act (CAPA). All violations of the NYC Campaign Finance Act are subject to CAPA adjudication. *See* Admin. Code §3-710.5(ii). Under CAPA, the party commencing the adjudication (in this case, the CFB) "shall have the burden of proof" "except as otherwise provided by state or local law". *See* NYC Charter §1046(c)(2). Because the Campaign Finance Act does not set forth a rebuttable presumption of violation and does not shift the burden of refuting an allegation of violation in any instance, a local law amendment is a prerequisite for the proposed rule change.

In addition, the proposed presumption against independence is in derogation of First Amendment rights and will chill the making of independent expenditures. To survive the strict scrutiny that attaches to spending limits (here, the contribution limit and prohibitions of the Act function as spending limits on the independent spender), the CFB will need to marshal positive evidence of coordination beyond the burden shifting of a rebuttable presumption.

Further, the proposal is not consistent with Admin Code §3-703(1)(d). That provision merely requires candidates to produce information and documentation as "proof of compliance" as may be requested by the CFB. The only violation of the Act that occurs when a campaign fails to produce a document demanded under Admin. Code §3-703(1)(d) is a violation of Admin. Code §3-703(1)(d) itself. The amendment is an improper attempt to add a burden of proof solely on the basis of a duty of production.

The proposal is also not consistent with CFB Advisory Opinion No. 2009-7. That advisory opinion does not suggest that any one of the Rule 1-08(f)(1) factors will give rise to a rebuttable presumption. To the contrary, that 2009 opinion requires the CFB to consider the "totality of the circumstances" and not presume violation on the basis of any one factor.

Finally, the CFB should carefully consider and explain how the proposed rebuttable presumption relates to the separate multi-factor analysis and burden-shifting described in its recent Advisory Opinion No. 2016-1. That inter-play may unfairly result trigger presumptive violations with respect to many kinds of non-electoral issue advocacy communications.

Rule 13-01: Agent Liability under Independent Expenditure Reporting Law

The proposal is unclear. By defining agents as independent spenders, does the CFB mean to subject agents to the public disclosure obligations that currently apply only to their principals? This would appear to be contrary to the Charter. *See* Charter §1052(a)(15)(b), *supra*. The proposal also creates ambiguity as to whether it is the principal or the agent, or both, who must verify disclosure statements under CFB Rule 13-02(e).

The proposal extends liability to agents without first addressing an agent's prior request to the CFB for guidance on the efficacy of firewalls to avoid violations. It is unclear why the CFB is first proposing to extend liability without also providing the guidance sought specifically for the purpose of avoiding inadvertent liability in the future.

II. CONTRIBUTIONS

Rule 4-01(b): New Documentation Requirements

The proposed rule does not contain a delayed effective date to facilitate transition to new recordkeeping standards. Campaigns will need time to perform various tasks in order to come into compliance with the new requirements, such as: training campaign staff in new protocols; educating consultants, intermediaries and hosts on the new standards in relation to fundraising and events currently in the pipeline; replacing all contribution cards currently in use; and changing campaign websites.

My detailed comments also discuss issues concerning the proposal to require contributors and intermediaries to "fill out" required forms and the revised contributor affirmation statement.

Rule 1-04(c)(2): Prohibition of Discretionary Refunds

The proposal would severely narrow the already limited leeway CFB rules afford public funds recipients for refunding campaign contributions. As a result, unlike their non-participating opponents, publicly financed candidates would, for the first time, be prohibited from refunding contributions to cure numerous potential violations and to address association concerns.

The proposal creates pre-deposit administrative burdens solely for publicly financed candidates. The proposal does not appear to be addressed to any real world problem, as, in my experience, campaigns already do their utmost to preserve funds throughout the CFB post-election audit process since they cannot anticipate their ultimate costs and liabilities. .

What if, hypothetically, George Lincoln Rockwell makes contributions to two opposing candidates, one public financed and the other non-participating. Both contributions are deposited. When both campaigns learn who he is, https://en.wikipedia.org/wiki/George_Lincoln_Rockwell, they immediately wish to disassociate themselves by refunding his contribution. The non-participant may, but under the new proposal, the participant may not. As a result, it becomes an issue in the election when the headline reads "Candidate Keeps Nazi Money." Why does the CFB want to adopt a rule that will create these kind of political headaches for some candidates, but not others? This proposal poses serious concerns under the First and Fourteen Amendments.

Rule 1-04(k): Volunteering

To protect public funds, current CFB rules prohibit paying volunteers for their prior services performed on a voluntary basis. The proposal now seeks to do the opposite: to prohibit individuals who were compensated for campaign services from volunteering the same kind of campaign services in the future, prior to the election. Unlike the existing rule which prohibits only the retroactive conversion of volunteers into paid staff, the proposed amendment does not appear intended to protect public funds.

In fact, the amendment would achieve the opposite. It compels disbursement of funds to pay for services the individual is otherwise willing to volunteer. The irrational result of this coercion is to ensure that campaigns: (i) will incur unnecessary expenditures, reducing future public funds payments to the CFB; (ii) lose flexibility in demonstrating compliance with the spending limit; and (iii) be required to find new volunteers to replace experienced and willing workers late in the campaign (or do without those services altogether). In other words, the amendment will result in intrusion, disruption, and wasted resources.

III. PUBLIC FUNDS PAYMENTS

Rule 5-01(n): Reduction in Public Funds Payments

I applaud the general intent of this amendment to reduce the reduction in public funds payments made on account of enumerated disbursements. Currently, the reduction equals six times the amount of the disbursement. The proposed amendment would reduce the reduction to equal the amount of the disbursement.

As drafted, however, the proposal is directly contrary with the Campaign Finance Act's payment formula. *See* Admin. Code §§3-704, 3-705(2), and 3-710(2)(b). My written comments outline a theory for preserving the current premise of Rule 5-01(n) that would both achieve the proposal's main goal of reducing deductions from public funds payments and also avoid a rule that is contrary to law.

My written comments also address concerns with a proposed deduction from public funds payments on account of civil penalties paid to the CFB for prior elections and with a proposed deadline for closing "segregated accounts."

IV. RECORDS RETENTION

The CFB's rulemaking notice does not fully and accurately describe this proposal. My written comments outline concerns with the lengthy extension of CFB's records retention period that would result from the amendment language as proposed.

Very truly yours,

KANTOR, DAVIDOFF, MANDELKER,
TWOMEY, GALLANTY & KESTEN, P.C.

LAURENCE D. LAUFER

Enclosure

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September 12, 2016

Comments on CFB Proposed Rules Amendments

Thank you for the opportunity to submit comments. While I have represented and counseled many candidates and others regarding NYC CFB requirements, the comments I offer are solely my own and are not submitted on behalf of any other party. I am limiting my comments to four categories.[1]

I. INDEPENDENT EXPENDITURES

Rule 1-08(f)(1): Rebuttable Presumption Against Independence

In addition to adding two new factors for impermissible coordination, the proposed amendment creates a rebuttable presumption shifting the burden of proof to a candidate to refute an allegation of in-kind contribution (i.e., non-independent expenditure), whenever any of what would now be eight factors are present. The CFB Notice states this shift of the "burden of production of evidence" is consistent with Admin Code §3-703(1)(d) and CFB Advisory Opinion No. 2009-7.

I take issue with this proposal for several reasons.

1. The amendment is contrary to the City Administrative Procedure Act (CAPA). All violations of the NYC Campaign Finance Act are subject to CAPA adjudication. *See* Admin. Code §3-710.5(ii). Under CAPA, the party commencing the adjudication (in this case, the CFB) "shall have the burden of proof" "except as otherwise provided by state or local law". *See* NYC Charter §1046(c)(2). Because the Campaign Finance Act does not set forth a rebuttable presumption of violation and does not shift the burden of refuting an allegation of

[1] I am omitting discussion of lesser and technical issues in the interest of brevity. I would be pleased to convey those additional thoughts to CFB staff by telephone, if they are interested.

violation in any instance, a local law amendment is a prerequisite for the proposed rule change.

2. With respect to independent expenditures, presumptions against independence are in derogation of First Amendment rights. This kind of presumption serves to chill the making of independent expenditures by subjecting these expenditures to the Act's contribution limits and prohibitions, which would severely cap or prohibit such expenditures altogether. To survive the strict scrutiny that attaches to spending limits (again, here, the contribution limit and prohibitions of the Act function as spending limits on the independent spender), the CFB will need to marshal positive evidence of coordination beyond the burden shifting of a rebuttable presumption.

3. The amendment is not consistent with Admin Code §3-703(1)(d). That provision merely requires candidates to produce information and documentation as "proof of compliance" as may be requested by the CFB. The only violation of the Act that occurs when a campaign fails to produce a document demanded under Admin. Code §3-703(1)(d) is a violation of Admin. Code §3-703(1)(d) itself. The amendment is an attempt to add a burden of proof solely on the basis of a duty of production.

   Were the CFB correct in its reading of section 3-703(1)(d) every candidate would be presumptively in violation of every requirement of the Campaign Finance Act until the candidate submits such documentation as may have been requested that suffices to rebut that presumption of violation. A good test to highlight the CFB's fundamental misapplication of Admin. Code §3-703(1)(d) in this instance would be to ask: what kind of document will suffice to demonstrate compliance in response to a Rule 1-08(f)(1) allegation?

   Rule 1-08(f)(1) is not a recordkeeping rule under which production of a particular document or submission of an answer to a specific question would suffice as "proof of compliance." For this reason, section 3-703(1)(d) does not support the burden-shifting the CFB proposes in revised Rule 1-08(f)(1).

4. The amendment is not consistent with CFB Advisory Opinion No. 2009-7. That advisory opinion does not suggest that any one of the Rule 1-08(f)(1) factors will give rise to a rebuttable presumption. To the contrary, the opinion requires the CFB to consider the "totality of the circumstances" and not presume violation on the basis of any one factor:

   > "it is very difficult in the abstract to say whether a particular activity would or would not lead to a conclusion that activity is non-independent. Evidence of non-independent activity is usually largely circumstantial and must be evaluated based on the totality of the circumstances." (Emphasis added.)

5. The CFB should consider and explain how the proposed rebuttable presumption relates to the separate multi-factor analysis and burden-shifting described in its recent Advisory Opinion No. 2016-1. That opinion states that in certain instances the presence of some or all of seven different enumerated factors will result in the CFB's presumption that an issue advocacy expenditure was made "in connection with an election." For example, some of the CFB's

factors for determining a "coordinated" issue ad was "made in connection with a covered election" appear to overlap with the factors for determining that an expenditure is coordinated. *Compare* AO 2016-1 (factor "(5) where there is consistent and repeated overlap between campaign staff, the organization's staff, and/or their consultants' staff, or the candidate or his/her agent has raised funds for the organization") *with* Proposed Rule 1-08(f)(1)(vi) and (vii)). Thus, the presence of the same factor may trigger two different presumptions.

The following hypothetical illustrates the problematic sweep of these two inter-related presumptions:

> The candidate committee of Elected Official X hires a fundraising consultant. The fundraising consultant previously raised funds during the same four-year "election cycle" for an incorporated advocacy organization, the Coalition to Regulate Tyrannosaurs, Inc. This advocacy organization subsequently makes expenditures for public communications in the election year that refer to the candidate's past action in its area of substantive focus. The ad reads:
>
> > Elected Official X has signed into law legislation that would move NYC into the national lead on regulating tyrannosaurs. This is a very important step. For more info on how this legislation will affect your life, contact the Coalition to Regulate Tyrannosaurs, Inc.
>
> This hypothetical ad meets at least six of the seven factors in AO 2016-1 and, because it runs in the election year, the CFB will presume the expenditure for the ad to be in connection with the covered election. *See* AO 2016-1. The expenditure also meets factor (vi) of proposed Rule 1-08(f)(1), such that there would be a rebuttable presumption that this corporate expenditure was not independent and was instead an in-kind contribution by a corporation in violation of the Act.

Beyond the substantive overreach comes a procedural problem in how the resulting hypothetical allegation of violation develops. First, if the expenditure is sufficiently large, the CFB may consider this violation to be a breach of certification disqualifying the candidate from receiving any public funds. *See* CFB Rule 2-02. Second, because CFB practice is to not resolve allegations of violation until the end of the post-election audit process, many years after the election, the candidate's sole pre-election remedy will be to seek administrative reconsideration of a public funds payment denial. That remedy will be sought during the peak of the election season, after opposing candidates have been paid, and after all kinds of resulting bad publicity. Then, if the CFB upholds the payment denial, there will be litigation.

And all of this occurs simply because of the intersection of two overlapping CFB presumptions – resulting in the automatic treatment of an issue ad as both in connection with the election and coordinated with the candidate, without regard to whether the allegation has any actual basis in fact.

Rule 13-01: Agent Liability under Independent Expenditure Reporting Law

New York City Charter §1052(a)(15) establishes public disclosure requirements for individuals and entities making independent expenditures. Violators are subject to civil penalties, assessed by the CFB, of up to $10,000. The CFB is authorized to promulgate rules "as it deems necessary to implement, administer, interpret and enforce" these provisions. *See* Charter §1052(a)(15)(b), (d), (e)..

The proposed amendment to Rule 13-01 expands the existing CFB definition of "independent spender" from "an individual or entity that makes an independent expenditure", which is co-extensive with those persons who are subject to the Charter's public disclosure requirements, to also include "an agent of such individual or entity". The CFB Notice says the purpose is to ensure "that such agents are subject to these rules and may be subject to liability for penalties upon a determination of violation."

In contrast to the Charter provisions on independent expenditure disclosure, the New York City Campaign Finance Act subjects agents of candidate's campaigns who commit violations of that law to civil penalty assessment. *See* Admin. Code §3-711(1). The CFB has previously acknowledged the distinction between the potential for agent liability under Charter and under the Act. *See* CFB, Final Board Determination No. 2015-1 ("While the Act subjects a candidate's agent to civil penalties for the agent's violation of the Act or Board Rules, the Charter provisions and Board Rules governing independent expenditures do not provide for similar liability for violations by agents of independent spenders. See Charter § 1052(a)(15); Admin. Code §§ 3-710.5, 3-711(1); Board Rules 1-02, 13-01 et seq.; Final Determination No. 2003-2 (Aug. 26, 2003). For this reason, the Board assessed penalties against TAG only as an agent of the Campaigns, even though TAG also acted as an agent of NYCLASS.").

The proposal raises several concerns:

1. By defining agents as independent spenders, does the CFB mean to subject agents to the public disclosure obligations that currently apply only to their principals? This would appear to be contrary to the Charter. *See* Charter §1052(a)(15)(b), *supra.*

2. Similarly, the amendment creates ambiguity as to whether it is the principal or the agent, or both, who must verify disclosure statements under CFB Rule 13-02(e).

3. With respect to Final Determination No. 2015-1, the independent spender in that case previously had been penalized both for cooperation with candidates and for misrepresenting expenditures as independent. *See* CFB, Final Board Determination (NYCLASS), dated Dec. 11, 2014, http://www.nyccfb.info/reports/IE_FBDs/FBD-NYCLASS.pdf. The agent was, in turn, penalized as an agent of the candidates for cooperation in expenditures reported to be independent, but was not penalized as an agent of the independent spender. *See* Final Board Determination No. 2015-1. Under the proposal, how would liability extend to an agent under the Charter if the agent has no underlying reporting or verification obligation under the Charter? In any event, because the Charter does not extend liability for violations to agents, it is unclear that the CFB has authority to create this new class of potential violators absent authorization by local law amendment.

4. Final Board Determination No. 2015-1 states that the agent in that case (TAG):

> "concedes that its efforts to establish a firewall between the services it rendered to its campaign clients and those it rendered to its third party spender clients may not, in all cases, have been sufficient to overcome the presumptions provided in Board Rules 1-08(f)(1)(v) and (vi). TAG has requested guidance from the CFB about how it and other consultants who may in the future have both campaign clients and third party spender clients can design, document, and implement a firewall that would be sufficient to overcome the presumption provided in Board Rule 1-08(f)(v).

(Emphasis added.) The proposed amendment extends liability to agents without first addressing this prior request to the CFB for guidance on the efficacy of firewalls to avoid violations. It is unclear why the CFB is first proposing to extend liability without also providing the guidance sought specifically for the purpose of avoiding inadvertent liability in the future.

II. CONTRIBUTIONS

Rule 4-01(b): New Documentation Requirements

The proposed rule does not contain a delayed effective date to facilitate transition to new recordkeeping standards, which will create numerous administrative burdens, such as training campaign staff in new protocols, educating consultants, intermediaries and hosts on the new standards in relation to fundraising and events currently in the pipeline, replacing all contribution cards currently in use, and changing campaign websites. At a minimum, if the CFB intends for these new requirements to come into effect in this election cycle, the effective date should be delayed until the beginning of a future reporting period, with some allowance for grandfathering contributions that meet the old standards based on when prior solicitations were made.

The proposal does not make clear that the CFB will provide a universal template for contribution cards. It should.

In every instance the amendments specify that the "contribution card" must be "filled out" by the contributor or by the intermediary, as the case may be. This will be an incredible burden, especially with respect to intermediaries. Of course, all these forms must be signed by the contributor or intermediary, as the case may be, as is required by current rules. But what purpose is served by adding the "filling out" requirement across the board?

For example, why is it problematic if an administrative assistant or spouse fills out a contribution card for his supervisor or her spouse respectively? Why is it problematic if campaign staff facilitate in-take at live events by filling out forms completely and accurately for the contributors to then review and sign at the check-in table as they hand over their contributions? Why is it problematic for a campaign to present a completed draft intermediary form to the intermediary for review and signature?

And how is a campaign to know that it was the contributor who filled out the form when a group of contributions is handed in at the door of an event, or when contributions arrive by mail, or when contributions are intermediated?

At a minimum, these new requirements should be narrowly tailored to address risk of fraudulent matchable contribution claims by: (i) limiting the "filling out" requirement to contribution cards for cash and money order contributions that are claimed to be matchable; and (ii) allowing compliance through supplemental affidavits to explain circumstances where the same person "filled out", but did not sign, contribution cards and/or intermediary statements.

The proposed new universal affirmation statement requires that the contribution be from "my personal account, which has no corporate or business affiliation". (Under current rules, this language applies only to credit card accounts, not bank accounts.) First, this affirmation is contrary to the Act's express permission for contributions by natural persons from their sole proprietor business accounts. *See* Admin. Code §3-703(1)(l). Second, it is unclear what "corporate or business affiliation" means with respect to a bank account. The CFB should clarify that "corporate or business affiliation" does not prohibit contributions drawn from any bank account that does not hold corporate, LLC or partnership funds, including accounts into which a partnership deposits personal compensation paid to individual partners.

Rule 1-04(c)(2): Prohibition of Discretionary Refunds

Under current rules, after a committee receives public funds, its ability to refund contributions is quite limited. The current standard allows refunds only to maintain compliance with applicable law and to address association concerns – that's it. This standard has been in place for decades and appears to work well.

The amendment would severely narrow that already limited permission, limiting permissible refunds solely to maintaining compliance with contribution limits and prohibitions under City law. As a result, unlike their non-participating opponents, the amendment would, for the first time, prohibit publicly financed candidates from refunding contributions to cure other violations and to address association concerns. For example, another proposed amendment would make contribution violations of State or federal law a violation of CFB rules. The publicly financed candidate may not cure those State and federal violations (which now, under the proposal, would also be a CFB rule violation) through a refund, whereas her non-participating opponent may. Likewise, the publicly financed candidate will not have the option of refunding contributions that fail to meet the CFB's newly proposed documentation requirements (discussed above), such as when it discovers a contributor or intermediary has not filled out a contribution form.

One might say campaigns should do better vetting and screening before a contribution is deposited. Vetting and screening pose administrative burdens, especially when extended to contributions as small as $1. Publicly financed candidates, who alone are under spending limits, will need to incur additional costs to institute additional steps for all contributions pre-deposit, which will also delay their ability to access the funds at issue. Their non-participating opponents, who are not under spending limits, will not face these costs or burdens.

One might say that without this rule publicly financed candidates have permission and incentive to refund lots of contributions and, accordingly, reduce post-election public funds repayments. Has that happened? And is the current standard so permissive as to enable wholesale refunding? In my experience, campaigns do their utmost to preserve funds throughout

the CFB post-election audit process since they cannot anticipate their ultimate costs and liabilities. This amendment does not appear to be addressed to any real world problem.

Finally, the worst implications of the proposed amendment concern associational freedoms.

What if the contributor demands his contribution back? The amendment prohibits the refund.

What if the contributor is indicted for embezzlement, raising concerns about whether the contribution is from the contributor's own funds? The amendment prohibits the refund.

What if, hypothetically, George Lincoln Rockwell makes contributions to two opposing candidates, one public financed and the other non-participating. Both contributions are deposited. When both campaigns learn who he is, https://en.wikipedia.org/wiki/George_Lincoln_Rockwell, they immediately wish to disassociate themselves by refunding his contribution. The non-participant may, but the participant may not without violating the proposed rule. As a result, it becomes an issue in the election when the headline reads "Candidate Keeps Nazi Money." Why does the CFB want to adopt a rule that will create these kind of political headaches for some candidates, but not others? This proposal poses serious concerns under the First and Fourteen Amendments.

Rule 1-04(k): Volunteering

The right of an individual to volunteer for a political campaign is protected under the First Amendment, both as speech and association. Both the Campaign Finance Act and State election law recognize this right by exempting from the definition of "contribution": "the value of services provided without compensation by individuals who volunteer a portion or all of their time on behalf of a candidate or political committee". *See* Election Law §14-100(9)(A); Admin. Code §3-702(8)(i). These voluntary services are not in-kind contributions. *See* 9 NYCRR §6200.6(a)(3); CFB Rule 1-02 (defining "in-kind contribution"). This codified right of an individual to volunteer is unconditional. In other words, payment for prior services in no way precludes an individual from volunteering to provide future services.

To protect public funds, current CFB rules prohibit paying volunteers for their prior services performed on a voluntary basis. The proposed amendment now seeks to do the opposite: to prohibit individuals who were compensated for campaign services from volunteering the same kind of campaign services in the future, prior to the election. Unlike the existing rule which prohibits only the retroactive conversion of volunteers into paid staff, the proposed amendment does not appear intended to protect public funds.

In fact, the amendment would achieve the opposite. It compels disbursement of funds to pay for services the individual is otherwise willing to volunteer. The irrational result of this coercion is to ensure that campaigns (i) will incur unnecessary expenditures, reducing future public funds repayments to the CFB; (ii) lose flexibility in demonstrating compliance with the spending limit; and (iii) be required to find new volunteers to replace experienced and willing workers late in the campaign (or do without those services altogether). In other words, the amendment will result in intrusion, disruption, and wasted resources.

With respect to spending limit compliance, the right of a formerly paid individual to volunteer his or her future services without compensation can help campaigns plan and remain in compliance with the Act's spending limit, especially in the closing days of a campaign. For example, a campaign may hire and pay a sole proprietor lawyer to defend a defamation lawsuit brought by an opposing candidate, the fees for which are not exempt from the spending limit. Then, in the closing days of the campaign, as it approaches the spending limit, the campaign may ask and the lawyer may agree to volunteer future services as an individual in the case, which is permissible under CFB AO 1989-8. Under the proposed amendment, the campaign could not ask and the lawyer could not agree to volunteer, such that the campaign could be faced with either violating the spending limit or replacing its current lawyer with a new volunteer lawyer to the detriment of its position in the case.

The CFB Notice and the proposed rule itself erroneously refer to the provision of volunteer services by professional service entities, other than individuals, which is not a right codified in State or City law and would presumably result in in-kind contributions by non-individual service-providers even if CFB rules remain unchanged.

Rule 3-03(e)(5): Candidate Personal Contributions

The amendment would treat certain political contributions made by the candidate to other political committees as contributions to the candidate's own campaign. This may appear to be logical as an extension of the CFB's post-2009 election treatment of such contributions as campaign expenditures by the contributing candidate's campaign.

I am not aware of a precedent, however, for treating the full value of a monetary contribution to recipient A as an in-kind contribution to different beneficiary B. Further, under the Act, a participating candidate's use of personal funds – even for her own campaign – is not literally treated as a "contribution." *See* Admin. Code §3-702(8), §3-703(1)(h). I think this element of the amendment merits further study and explanation.

As long as it is amending Rule 3-03(e)(5), I would urge the Board to also codify that the use of a candidate's personal funds to make contributions does not result in a Rule 5-01(n) deduction, since the source is a candidate's personal account and not an account or entity into which matchable contributions or public funds are deposited.

III. PUBLIC FUNDS PAYMENTS

Rule 5-01(n): Reduction in Public Funds Payments

Reduction Formula. I applaud the general intent of this amendment to reduce the reduction made on account of enumerated disbursements. Currently, the reduction equals six times the amount of the disbursement. The proposed amendment would reduce the reduction to equal the amount of the disbursement.

The current reduction rests on the premise that matchable contributions were diverted from covered election purposes. *See* CFB AO 1997-12. As described in that 1997 opinion, the reduction was intended to avert the risk that public funds would be paid at a 1:0 rate due to the diversion of matchable contributions from covered election purposes. When the matching rate

was increased to 4:1 and now 6:1, the effect of Rule 5-01(n) reduction became inadvertently draconian in an effort to avoid a 6:0 payment rate.

The proposed amendment looks to fix this problem by repealing the original premise for the rule, specifically deleting the opening clause: "The following will be deemed to consist entirely of contributions claimed to be matchable". The problem is that the proposed new approach is simply a change of the Act's repayment formula that is directly contrary to law.

Admin. Code §3-705(2)(a) sets forth the formula for paying public matching funds: "the participating candidate's principal committee shall receive payment for qualified campaign expenditures of six dollars for each one dollar of matchable contributions" (emphasis added). Under the Act, if a principal committee has made sufficient qualified campaign expenditures there is no basis for reducing public funds payments on account of any non-qualified expenditures it has also made, including such disbursements as are enumerated in Rule 5-01(n).[2] The lack of legal justification for the amendment is most obvious in its attempt to reduce the maximum public funds payable, even when the recipient's total qualified campaign expenditures exceed 55% of the applicable expenditure limit. That result directly contradicts Admin. Code §§3-704, 3-705(2) and 3-710(2)(b).

I'd like to suggest a solution. As long as the CFB does not discard its initial (and current) matchable contribution diversion rationale, there is an alternative basis for reducing the 6:1 reduction to a 1:1 reduction. It requires the CFB to change its view of the basis for the reduction formula from one of multiplication to one of addition. Here's how.

The current approach is a 6 X 1 deduction formula. Remove the 1 (the diverted matchable contribution) and the amount payable (6 X 0) would be reduced from 6 to 0.

The new alternative is to view the reduction formula as reducing the ordinary 6 + 1 total payment yield for the campaign. Remove the 1 (the diverted matchable contribution) and the total payment yield (6 + 1 – 1) would be reduced from 7 to 6.

This new "addition rationale" is sufficient for supporting a deduction from the public funds payments of an amount equal to the amount of the matchable contributions that are deemed to have been diverted. This approach will also benefit campaigns by allowing them to continue to make up for "diverted" matchable contributions with new matchable contributions and by have no effect whatsoever on the maximum amount payable.

Reduction on Account of Penalty Payments to CFB. The amendment would reduce public funds payments on account of "payment of penalties owed to the Board for a previous election". I urge the Board to reconsider this amendment.

Under Admin. Code §3-702(21)(a)(9) payment of CFB-imposed penalties, even for a prior election, is a presumptively permissible expenditure. Thus, while the candidate's current campaign committee is free to pay these penalties, it would not have been a party to the adjudication in the prior election and thus would not be subject to penalty liability for that prior election. Moreover, the proposed deduction from the current committee is tantamount to an additional penalty (indeed a public funds surcharge) against the current committee, effectively

[2] Note, Admin. Code §3-705(8) is merely an amelioration of Rule 5-01(n), not a change in the payment formula.

doubling the adjudicated penalty to the extent the penalty was paid by the current committee. Candidates with the financial means to pay assessed penalties from their personal funds do not face this consequence.

In any event, participating candidates who fail to satisfy CFB penalty assessments in prior elections in full are not eligible to receive any public funds for the current covered election. *See* Admin. Code §3-703(1)(n). Thus, this proposed reduction in public funds payments is both unnecessary and unavailable to the CFB as a tool for the collection of penalties for prior elections. The Act's total bar to payment should satisfy the Board that this amendment is not addressed to an actual problem in the real world. The amendment's new basis for withholding is contrary to Admin. Code §3-703(1)(n), irrationally visited on only a subset of current candidates who were previously penalized, and at odds with the generally ameliorative intent of the proposed Rule 5-01(n) amendments in averting multiplication of adverse financial consequences.

By discouraging use of the current campaign committee to pay penalties, all this amendment achieves is additional financial hardship for candidates of lesser means. I cannot discern a rational policy that is being advanced by this proposal.

Segregated Account. The proposed amendment sets a December 31 post-election deadline for closing a segregated account and establishes a requirement that funds remaining in that account be returned to contributors by that deadline. This proposal is contrary to law and counterproductive in several respects.

By definition the Rule 5-01(n)(2) segregated account is an account of a principal committee and it is established for the purpose of maximizing that committee's receipt of public funds payments (*i.e.*, by avoiding Rule 5-01(n) deductions from public funds payments). All contributions deposited into the segregated account are subject to the contribution limits applicable in the covered elections for which the principal committee is authorized and the participating candidate is on the ballot. Because the contributions to the segregated account were received by the principal committee and, under the premise of the amendment, remain in the possession of that committee after the election, these contributions are subject to the requirement that unspent campaign funds be returned to the CFB. *See* Admin. Code § 3-710(2)(c). Mandatory refunds of the segregated account contributions will reduce the amount of funds subject to this CFB repayment requirement. Indeed, mandatory refunds are contrary to the general policy of restricting contribution refunds after public funds are received, a policy the proposed rules otherwise seek to make more restrictive (as discussed above). Why would the CFB adopt an amendment designed to *reduce* potential public funds repayments?

Moreover, segregated accounts may be set up to address costs and potential liabilities arising from CFB audits for prior elections. It bears mentioning that the CFB has not completed all post-election audits for the 2009 covered elections. Further, by December 31, 2017, the CFB may not have completed all post-election audits for the 2013 covered elections. If a committee has established a segregated account to pay costs associated with a CFB audit in a prior election (*e.g.*, 2009 or 2013) and that audit remains open as of the proposed deadline for shutting down the account, what is the committee to do? Return the contributions and then have these re-solicited into a new segregated account opened after December 31 for dealing with the very same prior election audit? What does this proposal achieve other than adding a pointless new administrative burden that will serve to further delay resolution of lengthy CFB audits?

IV. RECORDS RETENTION

Currently, Rule 4-03 sets a six-year record retention period after the last election to which the records relate. In contrast, Election Law §14-118(1) sets a five-year record retention period after the filing of the final disclosure statement for the election to which the records pertain.

The CFB Notice states that the amendment "makes the CFB's retention period the same as the New York State Board of Elections, thus relieving candidates who have completed their audits within five years with both agencies from retaining records and documents for an additional year." The Notice does not accurately summarize the amendment as proposed.

The amendment significantly lengthens the current CFB record retention period for candidates, except in instances in which files a final disclosure statement is filed and the CFB issues a final audit report less than one year after the date of the last election. (Currently, only a small portion of campaigns are so fortunate as to have their audits completed within one year of the election.) The amendment keys the initiation of the retention period to the later of two alternatives: the Election Law trigger (although this is ambiguous, since the CFB and the SBOE have different "final disclosure statement filing" dates) or the CFB's issuance of the Final Audit Report. The CFB's records retention period is not conformed to the Election Law's period because the issuance of the CFB final audit report is a non-event under the Election Law. Were it the CFB's goal to conform the two records retention periods it would key the trigger to the earlier of these two alternatives.

The Notice's implication that CFB final audit reports may not be completed for all candidates "within five years" portends a decade-plus record retention period for candidates in that unfortunate situation.