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REPORT BY THE GOVERNMENT ETHICS AND STATE AFFAIRS COMMITTEE

MOVING BACKWARDS ON REFORM: HOW THE LATEST AMENDMENTS TO RESTRICTIONS ON PERSONAL USE OF CAMPAIGN FUNDS MAY EXACERBATE THE PROBLEM OF MISUSE

While the 2015-2016 New York State Executive Budget included provisions that were touted as proposing the most rigorous ethics restrictions in the nation, the new provisions governing personal use of campaign contributions strongly suggest otherwise.[1] The prior law that aimed to limit personal use of campaign contributions was problematic in that it was ambiguous; the new, lengthened version of the law does not address the problem of ambiguity, but instead exacerbates it. In providing an expanded yet equally vague definition of "personal use" and a list of prohibited uses of campaign contributions accompanied by vague descriptions of circumstances when such uses are permitted, the New Ethics Law may be read to establish more uses as permitted and not questionable. We are concerned that the result may be that virtually any personal use of campaign contributions can be justified. Thus, while the additions and amendments to the law may appear to strengthen the restrictions on personal use of campaign contributions, in actuality they may not.

Prior to the New Ethics Law's passage, the law prohibiting the personal use of campaign contributions was concise but ambiguous, and therefore required substantial interpretation. Enacted in 1985, Section 14-130 was New York's first law to focus on personal use of campaign contributions.[2] It read:

> Contributions received by a candidate or a political committee may be expended for any lawful purpose. Such funds shall not be converted by any person to a personal use which is unrelated to a political campaign or the holding of a public office or party position.[3]

[1] The provisions regarding use of campaign funds amend Election Law §14-130 and were enacted into law as Chapter 56 of the Laws of 2015 (the "New Ethics Law").

[2] *United States v. Pisani*, 773 F.2d 397, 410 (2d Cir. 1985).

[3] L. 1985, c. 152 § 1 (codified at N.Y. Elec. Law § 14-130).

The law thus precluded expenditures of campaign contributions that were not connected to a "political campaign" or the "holding of public office" or a "party position." However, the statute failed to describe the necessary strength of the connection between the expenditure and the political purpose, which meant that almost any expenditure, even one with a weak or indirect relationship to a political purpose, could be permitted. Thus, the law on its face was insufficient to restrict personal use of campaign funds and required interpretation to limit such use.

While at first the Board of Elections assumed the responsibility for interpreting this predecessor law, through issuing "formal" and "advisory" opinions,[4] it eventually lost momentum, and failed to release any opinions relating to personal use of campaign funds after 1997.[5] This failure left the legality of many uses of campaign contributions undetermined. Consequently, candidates and officeholders appear to have taken advantage of the broad law and used campaign contributions for purposes that were largely personal and only minimally, if at all, related to political purposes. The problems of the ambiguity of the law and its subsequent abuse by candidates and public officials was even recognized by a former spokesperson for the Board of Elections, Lee Daghlian, who stated that unless candidates "out-and-out stick" campaign contributions into their "pocket and walk away, everything's legal."[6]

The New Ethics Law purportedly prevents continued exploitation of the campaign contribution law by including an amended Section 14-130 as a part of what was described as a broad ethics reform intended to restore public trust.[7] However, a close look at the new Section 14-130 reveals that it may not be able to deliver on its promise of barring the use of campaign contributions for personal use. In fact, the new law appears to *expand* on the definition of "personal use":

> For the purposes of this section, contributions "converted by any person to a personal use" are expenditures that are exclusively for the personal benefit of the candidate or any other individual, not in connection with a political campaign or the holding of a public office or party position….[8]

[4] *See* N.Y. Elec. Law § 3-102(1) (stating that the state board of elections shall have the power and duty to "issue instructions and promulgate rules and regulations relating to the administration of the election process, election campaign practices and campaign financing practices consistent with the provisions of the law").

[5] A review of the Board of Elections' formal and advisory opinions reflects that there have not been any opinions relating to personal use of campaign contributions since 1997. *See* New York State Board of Elections, Formal Opinions: 1974-Present (2014), *available at* http://www.elections.ny.gov/NYSBOE/download/law/Opinions06112014.pdf; New York State Board of Elections, Advisory Opinions (1986-1997), *available at* http://www.elections.ny.gov/NYSBOE/download/law/advisory.pdf.

[6] Jennifer Medina, *State Campaign Finance Rules Need Tightening, Study Says*, N.Y. Times, May 26, 2006, *available at* http://www.nytimes.com/2006/05/26/nyregion/26lobby.html?pagewanted=print&_=0.

[7] Press Release, Office of the Governor, Governor Cuomo Announces Highlights from the Passage of the 2015-2016 State Budget (April 1, 2015), https://www.governor.ny.gov/news/governor-cuomo-announces-highlights-passage-2015-16-state-budget; Press Release, Office of the Governor, Governor Cuomo, Majority Leader Skelos, and Speaker Heastie Announce Agreement on 2015-16 budget (March 29, 2015), https://www.governor.ny.gov/news/governor-cuomo-majority-leader-skelos-and-speaker-heastie-announce-agreement-2015-16-budget.

[8] N.Y. Elec. Law § 14-130(3).

As noted earlier, the law previously stated that campaign funds could not be used for "any personal use" "unrelated" to a campaign or the holding of public office or a party position.[9] However, under the New Ethics Law, only expenditures that are "**exclusively** for the personal benefit" (emphasis added) and unrelated to a campaign or to the "execution of his or her duties of public office or party position" are prohibited.[10] The word "exclusively" arguably imposes a whole new meaning: any expense that is **only** for the benefit of the individual and has zero connection to political purposes is prohibited, but any expense that arguably served both purposes, even if the political purpose is miniscule, is a permitted use of campaign contributions.

The law also now lists examples of purportedly prohibited uses of campaign contributions,[11] but the list provides many exceptions that serve as loopholes, thereby potentially establishing more uses as acceptable and legitimate. For example, two of the newly-listed "prohibited" uses of campaign contributions focus on household/property-related expenditures. The use of campaign contributions for "any residential or household items, supplies or expenditures, including mortgage, rent or utility payments for any part of any personal residence of a candidate or officeholder or a member of the candidate's or officeholder's family" is now forbidden unless these expenses are "incurred as a result of, or to facilitate, the individual's campaign, or the execution of his or her duties of public office or party position."[12] Similarly, the new law also prohibits the use of campaign funds for a non-residential property "to the extent that the payments exceed the fair market value of the property's usage for campaign activities."[13]

Before the New Ethics Law was passed, it was uncertain as to whether campaign contributions for property expenditures constituted personal use, since neither the law nor the opinions of the Board of Elections addressed this topic. Now, by stating that the aforementioned expenses cannot be paid using campaign contributions unless it is "as a result of" or "to facilitate" the campaign or the holding of office or a public party position, the New Ethics Law actually suggests these uses may be lawful if they "facilitate" a campaign (itself a vague standard) or are expended while the beneficiary holds office or a public party position.

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[9] N.Y. Elec. Law § 14-130.

[10] N.Y. Elec. Law §14-130(3).

[11] *Id.*

[12] *Id.* § 9(3)(I). Section 9(3)(I) states:

> Any residential or household items, supplies or expenditures, including mortgage, rent or utility payments for any part of any personal residence of a candidate or officeholder or a member of the candidate's or officeholder's family that are not incurred as a result of, or to facilitate, the individual's campaign, or the execution of his or her duties of public office or party position. In the event that any property or building is used for both personal and campaign use or as part of the execution of his or her duties of public office or party position, personal use shall constitute expenses that exceed the pro-rated amount for such expenses based on fair-market value.

[13] *Id.* § 9(3)(II). Section 9(3)(II) states:

> Mortgage, rent, or utility payments to a candidate or officeholder for any part of any non-residential property that is owned by a candidate or officeholder or a member of a candidate's or officeholder's family and used for campaign purposes, to the extent the payments exceed the fair market value of the property's usage for campaign activities[.]

Take the case of an officeholder who is running for reelection and wants to use his campaign contributions to pay the mortgage on his primary home. Would the new law permit this, given that the expenses are incurred while the person is holding office and having a place to live would seem to "facilitate" the person's ability to campaign? The same holds true for non-residential property, so long as the expenditures are related to a campaign or facilitate the execution of the duties of public office and do not exceed the fair market value of the use of such property for campaign activities. The new law even includes properties of the candidate's or officeholder's family members, thereby arguably authorizing campaign fund payment of these expenses for them too. The statute also fails to describe how direct the connection between the property-related expense and the campaign must be, meaning that even the weakest of connections may justify paying property expenses with campaign funds.

Comparisons to Federal law are telling. By contrast to New York's New Ethics Law, Federal law effectively restricts the use of campaign funds for personal housing expenses. Federal law prohibits the use of campaign funds for "household food items or supplies,"[14] and "mortgage, rent or utility payments" for "any part of any personal residence of the candidate or a member of the candidate's family."[15] While the New Ethics Law incorporates almost these same phrases, the effects of the two laws are different because Federal law imposes its prohibitions with no exceptions, and therefore little opportunity to evade the law, while the New Ethics Law adds ambiguous exceptions that may effectively swallow the rule.

The New Ethics Law also prohibits the purchase with campaign funds of "[c]lothing, other than items that are used in the campaign or in the execution of the duties of public office or party position."[16] As with the use of campaign contributions for rent and household items, the use of campaign contributions to purchase clothing was neither expressly permitted nor prohibited until the New Ethics Law was passed, but now such expenses appear to be allowed as long as they are connected to a campaign or facilitate the execution of duties of public office or a party position. Since the provision lacks a description of how direct the connection between the clothing and the campaign or the holding of a public office or party position must be, almost any wardrobe purchase could be justified, save, perhaps, pajamas. Anything else, whether business suits for legislative sessions, tuxedos for gala benefit events, or jeans and flip flops for a fundraiser clam bake, arguably may now be justified because the clothing is used in a campaign or in the course of holding office.

Federal law, too, prohibits clothing purchases, but its exception allows only for the purchase of items of nominal value that promote a campaign, such as t-shirts or baseball caps that bear a campaign logo or slogan.[17] Thus, whereas the Federal law offers a much narrower

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[14] 11 C.F.R. § 113.1(g)(1)(i)(A).

[15] *Id.* § 113.1(g)(1)(i)(E)(1-2).

[16] N.Y. Elec. Law § 14-130(3)(iii). Section (3)(iii) states:

> Clothing, other than items that are used in the campaign or in the execution of the duties of public office or party position[.]

[17] 11 C.F.R. § 113.1(g)(1)(i)(C).

exception and adequate details for its application, the New Ethics Law does not, potentially allowing for much broader interpretation of the types of clothing purchases that can be made with campaign funds.

The New Ethics Law also precludes the use of campaign contributions for "[a]dmission to a sporting event, concert, theater, or other form of entertainment, unless such event is part of, or in connection with, a campaign or serves to facilitate the execution of duties of public office or a party position."[18] Like the bars on the use of campaign contributions for household and clothing expenses, the legality of this use was previously unclear, but the new language suggests it may be permitted. The law once again does not describe the strength of the relationship necessary for the exception to apply, which may allow for almost any entertainment-related expense to be lawful as long as a tenuous link to a political purpose can be established.

Federal law, by contrast, prohibits using campaign funds for tickets, etc., except in connection with a specific campaign event.[19] While both statutes include exceptions, then, the Federal law's inclusion of the word "specific" creates a significant limitation, since it requires a *direct* connection to a particular event. Under the New Ethics Law, a candidate might justify spending campaign funds on tickets to a sporting event by claiming that the purpose was meeting and mixing with constituents; under Federal law, this expenditure would be prohibited.

Finally, New York claims to bar the use of campaign contributions for "travel expenses including automobile purchases or leases," but the New Ethics Law allows such use if the automobile is "used for campaign purposes or in connection with the execution of the duties of public office or party position and usage of such vehicle which is incidental to such purposes or the execution of such duties."[20] As with the other new prohibitions, this provision fails to describe how strong the connection to the duties of public office or party position must be in order for the expense to be a legitimate use of campaign funds. Furthermore, the word "incidental" begs for lax interpretation, since almost any personal use could be arguably considered "incidental" to a campaign or the holding of a public office or party position. One could envision travel expenses such as purchasing or leasing a car being justified as a legitimate use of campaign funds because a car was needed for a few campaign errands, while an office holder could claim his car was "connected" to the "execution" of the duties of public office. The New Ethics Law also arguably establishes that personal use of an automobile is permitted by allowing "incidental" uses.

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[18] N.Y. Elec. Law § 14-130(3)(vii). Section (3)(vii) states:

> Admission to a sporting event, concert, theater, or other form of entertainment, unless such event is part of, or in connection with, a campaign or is related to the holding of public office or party position[.]

[19] 11 C.F.R. § 113.1(g)(1)(i)(F).

[20] N.Y. Elec. Law § 14-130(3)(x).

> Travel expenses including automobile purchases or leases, unless used for campaign purposes or in connection with the execution of the duties of public office or party position and usage of such vehicle which is incidental to such purposes or the execution of such duties.

New York's ethics law on travel expenses now appears to be less stringent than the Federal regulations. Although Federal law states that whether a travel expense is personal is to be decided on a case-by-case basis, the individual must reimburse the campaign account for the personal use unless it is of *de minimis* value.[21] In an advisory opinion, the Federal Election Committee determined that for automobile use, *de minimis* value constitutes less than 5% of total use.[22] The New Ethics Law, unlike its federal counterpart, omits any mention of reimbursement to the campaign for personal use.

These apparent authorizations of use for those holding public offices raise significant questions: while contributors may believe their money is helping to further an individual's candidacy, such funds actually might be used for extensive purposes well beyond the campaign, for personal benefits mentioned above, and by individuals other than the candidate. In addition, another provision of the New Ethics Law emphasizes such use specifically for officeholders, stating that nothing in the law "shall prohibit an elected public officeholder from using campaign contributions to facilitate, support, or otherwise assist in the execution or performance of the duties of his or her public office."[23] Once elected to office, a candidate could argue that almost any use of surplus campaign contributions remotely connected to execution of the duties of office would now be justified. Although technically the law always provided for the use of surplus campaign funds by officeholders since it stated that campaign contributions could be used for a purpose relating to the "holding of public office,"[24] the New Ethics Law now seems to imply that officeholders can also benefit from the new uses established by the extended definition and the exceptions to the prohibitions. Therefore, the law may result in greater abuse of campaign contributions by officeholders in addition to such abuse by candidates. The notion that "campaign contributions" will be used in a manner relating to an actual campaign is thus not at all assured.

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Despite the promises with respect to the recent amendments to New York law, we are concerned that these amendments increase opportunities for using campaign funds for personal purposes, by an even wider range of individuals than just candidates. Ironically, the newly permitted uses mainly stem from the New Ethics Law's list of "prohibited" uses. Throughout these provisions, the New Ethics Law does not fix the ambiguity that plagued the original Section 14-130, but instead exacerbates it by following prohibitions with vaguely worded exceptions. In doing so, the law may be read to convert the list of "prohibited" uses to one of permitted uses.

Of course, the New York State Board of Elections has yet to issue opinions interpreting the New Ethics Law provisions, and we remain hopeful that the Board will interpret the new

[21] 11 C.F.R. § 113.1(g)(1)(ii)(C-D).

[22] Federal Election Commission Advisory Op. 2001-3 (2001).

[23] N.Y. Elec. Law § 14-130(5).

[24] N.Y. Elec. Law § 14-130.

provisions so as to restrict, not expand, instances of improper use of campaign funds.[25] However, the recent amendments may not give the Board the ammunition it needs to effect real change in how public officials use campaign funds. The New Ethics Law may end up doing very little to ensure that campaign funds are spent as the name suggests: to directly support the election of a candidate to office.

Government Ethics & State Affairs Committee
Benton J. Campbell, Chair

April 2016

[25] The Board of Elections has issued one opinion since the New Ethics Law went into effect. On June 10, 2015, the Board released an Advisory Opinion (Opinion 15-1) finding that a public official may use campaign funds to pay for travel expenses for a trade mission taken in his official capacity at the invitation of other governmental officials, but this opinion contained no analysis or interpretation of the New Ethics Law language.