

ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

Special Committee on Election Law

Henry T. Berger, Chair

Comments on Rules Proposed by the Campaign Finance Board

July 7, 2004

The Campaign Finance Board (CFB) has proposed for public comment amendments to its rules. The Special Committee on Election Law offers the following comments.

As a preliminary matter, we believe that any changes in the rules made now should not affect the 2005 election. We are now more than two-and-one-half years into the City election cycle and less than one year prior to the circulation of petitions. Campaign decisions have been made and many campaigns have already conducted extensive activities and have filed several reports with the CFB, including necessary back-up documentation. Changing the rules may cause unfair disruptions to the campaign. Although a campaign can opt not to participate, it is desirable that all campaigns participate. In addition, some decisions, such as the level of campaign contribution to accept, cannot be easily changed as we move further into the campaign cycle.

1) Reimbursement of an Advance is Not an Exempt Expenditure

One proposed rule would prohibit claiming certain expenditures as exempt from the Campaign Finance Program spending limits based solely on the form of the expenditure. Specifically, “the reimbursement of an advance shall not be considered an exempt expenditure.” Proposed Rule 1-08(1). The stated reason for this proposal is:

“[t]he Board has encountered obstacles in assessing whether such underlying advances have exempt purposes. The funds used to make an advance do not pass through the bank account of the participant’s principal committee, thus interrupting the audit trail between the participant and the vendor from whom the goods or services are actually purchased. This interruption makes it difficult for the Board to confirm that an expenditure claimed as the reimbursement of an exempt advance actually was used to reimburse such advance, or that the advance itself properly had an exempt purpose, or even that the advance had a proper campaign purpose.”

Currently, CFB Rules contain detailed recordkeeping requirements for advances and their reimbursement. CFB Rule 4-01(e)(4), (m). In addition, an advance is considered an in-kind contribution and expenditure from the time the goods or services

are purchased. *See, e.g.,* CFB, *New York City Campaign Finance Handbook 2003*, at p. 5-10. Advances are thus considered expenditures prior to the act of reimbursement.

The proposed rule raises several questions and concerns. First, it is not apparent that the CFB has authority to deny candidates an opportunity to establish that an expenditure had a NYC Administrative Code §3-706(4) exempt purpose (*e.g.*, legal compliance, ballot petitioning) solely on the basis of the expenditure's form. Notably, the NYC Campaign Finance Act's provisions on spending limits and exempt expenditures apply to all "expenditures," without distinction according to form. *Cf.* Administrative Code §3-702(3) (defining "matchable contributions" as excluding certain contributions according to their form).

Indeed, the rationale for the proposed rule appears to be inconsistent with the safe harbor of Administrative Code §3-706(4)(b) and (c), added to the law in 2003, which expressly allows participating candidates to support exempt expenditure claims up to 7.5 percent of the applicable expenditure limitation without providing detailed documentation, except when the CFB has reason to believe the exempt claim was erroneous or false. Moreover, this overall cap on exempt expenditure claims, coupled with improvements in public disclosure (discussed below), seems a sufficient curb against excessive exempt claims for advance reimbursements.

The rulemaking notice does not explain why passing through the committee's bank account may now be seen as essential for substantiating an exempt purpose. Often advances are made because a campaign check is not a practical alternative. For example, the Board of Elections requires cash payments for photocopies of petitions. A Board of Elections receipt for petition photocopying should be a sufficient record to prove an exempt expenditure made by advance. Likewise, in the event court fees are paid by personal credit card and later reimbursed by the campaign committee, a court receipt should be sufficient to show an exempt expenditure for ballot petition litigation.

There also appears to be no rational reason why the CFB would disallow exempt claims for expenditures made by advance but continue to accept exempt claims for expenditures reported as in-kind contributions, which likewise do not pass through the committee's bank account. Indeed, the proposed rule, as written, creates an incentive to not reimburse advances, such that these expenditures could continue to be claimed as exempt in-kind contributions.

Finally, because the CFB's disclosure software, CSMART, does not permit campaigns to make contemporaneous exempt claims for expenditures made by advance (regardless whether these are reimbursed), there is no public record of transactions that would have been affected had this rule been in effect in previous election cycles. Likewise, the CFB's rulemaking notice does not indicate the kinds of advance reimbursements for which exemptions have been claimed, which would help make clear whether abusive claims have been made or whether reimbursed advances tend to be expenses for which a campaign check was not a convenient or practical alternative.

The record of exempt claims made for in-kind contributions in the 2001 and 2003 elections¹ suggests that relatively few transactions may be implicated by the proposed rule. Without evidence of significant abuse, this record argues against adoption of the proposed rule, in light of the questions about legal authority and inconsistency with existing law, noted above.

As discussed below, the Committee recommends improvements in public disclosure, including changes to the CFB's disclosure software to enable campaigns to make contemporaneous exempt expenditure claims for advances, as may now be made for in-kind contributions.

2) Advances Must be Itemized in Disclosure Statements

The Committee supports the proposed amendment to Rule 3-03(c)(3). To implement this change, the Committee recommends that the CFB's disclosure software be modified to conform to current State Board of Elections requirements that already require public disclosure of all the information covered in the proposed new rule. See New York State Board of Elections, *Handbook of Instructions for Campaign Financial Disclosure 2003* at pp. 42 – 43.

The Committee has previously urged that the CFB's disclosure software be made compatible with current State Board of Elections specifications. Candidates for statewide and state legislative office, currently in compliance with state electronic disclosure requirements, need compatible software to seamlessly adapt to the City's electronic disclosure rules should they become candidates for City office. This is especially important in light of the CFB's legislative proposals to extend the Act's disclosure requirements to all candidates for City offices, regardless whether they join the public financing program.

3) Prohibit the Use of Public Funds for "Expenditures in Connection with Legal Matters"

The proposed rules would prohibit the use of public funds to pay "expenditures made in connection with any action, suit, or proceeding before any court, quasi-judicial entity, government agency, or arbitrator." Proposed Rules 5-01(f); 1-08(g)(2)(xv). The stated reason for this proposal is that:

"[p]articipating candidates should not be able to subsidize legal matters with public funds, and legal expenses are not qualified campaign expenditures. The proposed rule would ensure that public funds, which are distributed for a specific public purpose and public benefit, are not spent for purposes other than those defined in the law, or for private use or private gain."

The Act, however, permits the use of public matching funds "for expenditures by a principal committee to further the participating candidate's nomination for election or

¹ 2001 election: 25 in-kind contributions claimed as exempt by 18 candidates totaling \$19,666.
2003 election: 31 in-kind contributions claimed as exempt by seven candidates totaling \$5,106.

election, either in a special election to fill a vacancy, or during the calendar year in which the primary or general election . . . is held.” Administrative Code §3-704(1). The Act enumerates purposes for which public funds may not be used including expenditures in violation of any law and expenditures to challenge or defend ballot petitions. Administrative Code §3-704(2)(a), (h). Amendments to the original Act adopted in 1990 considerably broadened the permissible uses of public matching funds and did not authorize the CFB to take a different tack by adopting rules to establish new prohibited purposes.

The Committee is concerned that this proposed rule is contrary to current law, unnecessary, unclear, and at odds with the general goals of the Act.²

First, the Act does not prohibit the use of public funds for expenditures incurred in legal matters, other than ballot petition defense and challenges. If an expenditure in connection with a legal matter is made in the election year to further the participating candidate’s nomination or election, that expenditure would be a permissible use of public funds pursuant to Administrative Code §3-704(1).

In the 2001 elections alone, participating candidates brought or intervened in lawsuits to, *inter alia*, challenge witness residency regulations issued by a county committee, secure public matching funds for their campaigns, as provided by law, and address Board of Elections procedures relating to the administration of polling sites and the counting of ballots. *See, e.g., Yassky v. Kings County Democratic Committee*, 01 Cv 3372 (EDNY filed May 24, 2001), as referenced in CFB Advisory Opinion No. 2001-8 (July 11, 2001) at en. 2; *City of New York v. New York City Campaign Finance Board*, No. 400550/01 (Sup. Ct. N.Y. County May 8, 2001), as referenced in CFB Advisory Opinion No. 2001-8 (July 11, 2001) at en. 2; *Smith v. New York City Board of Elections* (EDNY 2001); *People for Ferrer v. Board of Elections in the City of New York*, No. 23368/01 (Sup. Ct. Queens County 2001).

It seems clear that expenditures incurred by participating candidates in connection with these and similar civil actions were intended to further the candidate’s election.

Second, current law and CFB rules already prohibit the use of the public matching funds for private use or private gain, *see, e.g.,* Administrative Code §3-704(1), (2)(a), (b), (c), (g); CFB Rule 1-08(g)(2)(i). *See* Administrative Code §3-704(1), CFB Rule 1-08(g)(2)(ii).

Third, it is unclear whether the enumerated “legal matters” include matters before the Campaign Finance Board, such as advisory opinions, audits, complaints and investigations, public funds payment decisions, petitions for administrative review, and notices of violation and proposed penalties. Which, if any, of these “legal matters” are within the scope of the proposed rule? To the extent these or other matters are intended to be covered by the proposed rule, the implicit judgment that election year expenditures

² The effect of the proposed rule is limited to expenditures made in the election year. Under current law, pre- and post-election year expenditures do not qualify for the use of public funds.

in connection with such legal matters are never for the purpose of furthering a participating candidate's nomination or election seems unwarranted.

Finally, the Act, including the provision of public matching funds, is intended to help level the playing field among opposing candidates. The proposed rule is contrary to this goal because it creates a new disadvantage solely for participating candidates with limited private resources. It would in no way constrain spending by participating candidates with sufficient private funds, non-participating candidates, and independent entities.

For example, the proposed rule would appear to encourage formal and informal complaints before the election against participating candidates who lack sufficient private funds to cover expenditures in connection with these matters. This burden would fall most heavily on insurgents without access to voluntary lawyers associated with county organizations. The Board's proposal could also spur independent expenditures to fund legal challenges against candidates with limited private resources.

The Committee strongly recommends against adoption of these proposed rules. To the extent that the Board believes new restrictions on the use of public funds are warranted, it should seek appropriate local law amendments.

4) Submission of Documentation or Factual Information in Support of Matchable Contribution Claims and Administrative Petitions for Review of Public Financing Determinations

Two proposed amendments (to Rules 5-01(b)(ii) and 5-02(a)) would generally prohibit the submission of documentation or factual information to the Board unless the participating candidate can demonstrate good cause for "the previous failure to submit such documentation or information." The stated goal of these proposed amendments is to "discourage poor record-keeping and creation or dating of records after the fact, and to re-enforce the importance of timely submission of documentation in response to deadlines set by the Board."

It is unclear how proposed Rule 5-01(b)(ii) relates to the CFB's currently flexible procedures for "invalid matching claims reports." To the extent the proposed rule is intended to eliminate the opportunity of, or raise the bar for, submitting documentation and factual information responsive to "invalid matching claims" listed in these CFB reports, the proposal would undermine a commendable administrative procedure.

We are very concerned that the changes proposed for Rule 5-02(a), which creates an administrative appeal for public funding determinations, could do a great disservice to the Board and to participating candidates. Currently, Rule 5-02(a) is an efficient safety valve for the Board. It enables the Board to initially defer to CFB auditor judgments, based on the auditor's review of the record. The current rule appropriately gives the Board a "second bite of the apple" for confirming or modifying the audit determination, when a candidate has objected, after consideration of all arguments that can be made at

the administrative level. Rule 5-02(a) proceedings are also the only formal opportunity for participating candidates to address the Board directly on payment issues, without the filter provided by CFB staff while the audit is conducted.

In the CFB's post-election audit, many payment determinations turn on the documentation candidates submit for qualified campaign expenditures in response to CFB staff requests. The proposed rule truncates the Rule 5-02(a) administrative remedy and thereby exposes these CFB staff requests for documentation to judicial review. Without an adequate administrative remedy before the Board, candidates could show detrimental reliance on the clarity and comprehensiveness of these requests as a basis for overturning a CFB public funds payment or repayment determination.

If the proposal is intended to limit the post-decision proceeding to an argument that the decision was incorrect based on the record before the Board at the time the decision was made, additional concerns come to the fore:

- Were all the relevant documents submitted by the campaign actually before the Board (and not just CFB staff) when the Board decision was made?
- Who determines the relevance of documents and how is this argued before the Board?
- Was the candidate afforded an opportunity before the Board to make a case for the conclusions to be drawn from the "record?" Or was the Board simply presented with the staff conclusions and recommendations?

Subordinating Rule 5-02(a) proceedings to the goal of recordkeeping enforcement, as proposed, suggests that new administrative procedures will become necessary to ensure that the Board is properly carrying out the local law's directives in making payment and repayment determinations – separate and apart from enforcing recordkeeping requirements. For example:

- 1) The Board's deference to its auditors' conclusions would invite much greater scrutiny if candidates are not granted a similar opportunity to argue for different conclusions.
- 2) Alternatively, if the rule implies that candidates now would be given a similar opportunity to make their case before the Board's initial decision, the pace of both pre- and post-election payment determinations would be much slower.
- 3) Every campaign would have an incentive to submit a legal brief as its response to a draft audit report, presenting arguments why the records submitted support payment of a particular amount or prove eligibility for all payments previously received. Each campaign would have a similar incentive to request an opportunity to be heard by the Board before the final audit report is adopted.

In effect the proposed rule threatens to replace a limited post-decision proceeding created for campaigns that actually question the Board's decision with a pre-decision proceeding that would be pursued by every campaign that fears it may not obtain the result it is seeking.

- 4) Board decision-making would also become more cumbersome because the Board would actually have to review the full record before its auditors in every case, in order to gain judicial deference for Board decisions.

The rule creates an incentive for participating candidates to hire attorneys as early as possible in the post-election audit, and perhaps even before the first pre-election payment determinations are made. If a candidate waits to hire a lawyer until after the payment determination, upon learning that she has a problem, it may be too late to make an effective case given the proposed preclusion of "any documentation or factual information not submitted to the Board prior to the determination under review."

The Committee believes the CFB can achieve its stated goals of improving recordkeeping practices and spurring timely submissions and avoid these significant administrative problems through a more precisely tailored alternative. Thus, the Committee supports adoption of a CFB rule that makes clear that participating candidates carry a heavier burden in demonstrating the probative value of documentation and information: (a) that was created or dated after the fact, or (b) that was specifically requested by the CFB and available to the participating candidate when requested, but not submitted in a timely manner.

5) Notices of violation and penalty

Local Law No. 12 of 2003 added Administrative Code §3-710.5, establishing local law authority and due process requirements for the CFB's administrative assessment of civil penalties. The proposed amendment to Rule 7-02(c), permitting notices of violation and opportunity to contest to be sent by facsimile or electronic mail, as an alternative to postal mail, appears sufficient for providing the written notice required by law, provided that the CFB maintains and uses up-to-date fax numbers and email addresses. The Committee appreciates that this can be a difficult task, especially after the election when many campaign committees shut down.