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April 8, 2020

BY EMAIL

Hillary Weisman
General Counsel
NYC Campaign Finance Board
100 Church Street, 12th Fl.
New York, NY 10007

Re: Supplemental Comments on CFB “Notice of Final Rules”, dated Apr. 2, 2020

Dear Ms. Weisman:

On April 3, 2020, the CFB issued revised proposed rules, for which it announced a second 30-day public comment period, ending May 4. The revised proposed rules are published as a “Notice of Final Rules” and contain changes responsive to comments I submitted to the CFB on March 2. These responsive changes:

- 1) set a final deadline for stating or changing a declaration of office sought in the candidate certification to join the public financing program (Proposed Rule 2-03(b));
- 2) create a narrow exception for candidates to subsequently change their declaration of office sought in response to a CFB declaration of extraordinary circumstance (Proposed Rule 2-03(b)(i));
- 3) specify that, after a candidate has received public funds, an amendment to the candidate certification to change the office sought does not rescind participation in the program, but rather triggers ineligibility for further public funds payments and a duty to repay all public funds previously received (Proposed Rule 2-03(b)(ii));
- 4) prohibit the use of public funds for write-in campaigns (Proposed Rule 6-02(a)(ii)(F) and (G));
- 5) declare that a public funds recipient who is neither on the ballot nor opposed by a non-write-in candidate in a primary election is ineligible to receive additional public funds for the general election “unless the candidate demonstrates they will appear on the ballot for the general election” (Proposed Rule 7-01(e));

- 6) cap the use of public funds in a small primary election at \$5,000 (Proposed Rule 6-02(a)(ii)(X)); and
- 7) require the return of public funds payments exceeding \$5,000 received by a candidate in a small primary election, except if the candidate is on the ballot for the general election for the same office (Proposed Rule 7-05(c)).

With respect to these responsive changes, I offer two supplemental comments.¹

First, a discrepancy exists between the explanation and text of proposed Rule 2-03(b)(ii). The explanation states: “any candidate who changes their office sought after receiving public funds...” The text states: “a candidate who amends the Certification with regard to the specific office sought after receiving public funds...” The CFB Notice is therefore ambiguous as to which of these two different actions, campaigning for a different office versus amending the certification to declare a different office, would trigger public funds ineligibility and a duty to repay all previously received public funds. The trigger for these potentially dire consequences merits clarification.

Second, after final ballot status determinations are made for a primary election, proposed Rule 7-01(e) appears to contemplate public funds eligibility for candidates who “demonstrate[] that they will appear on the ballot in” the general election. This proposal is contrary to NYC Administrative Code §3-703(5) for candidates who are ineligible for payment because they appear as the only candidate on the ballot for the office sought in the general election. This problem could be corrected by specifying that such candidates additionally demonstrate that the name of an opposing candidate will also appear on the ballot in the general election.

Finally, I return to my initial comments and the question I posed with respect to early public funds payment eligibility: *Who are Opposing Candidates?* The revised proposed rules do not appear to address this issue.

The NYC Campaign Finance Act sets two eligibility requirements for early public funds payments: 1) the candidate must “certify that he or she intends to meet all the requirements of law to have his or her name on the ballot for the primary or general election” (Admin. Code §3-703(1)(a)) and 2) the candidate must be “opposed”, as set forth in Admin. Code §3-705(7)(a)(1), (2) or (3). The proposed rules expressly reference only the former as an eligibility condition. *See* Proposed Rule 3-01(b).

Rather than specifying “opposition” as a separate condition of eligibility for early payment, a proposed amendment addresses “opposition” in Rule 7-02(a)(ii) solely in the context of payment “timing”, not eligibility. The proposed new language in Rule 7-02(a)(ii) states:

For a candidate to receive an optional early public funds payment, the Board must determine that one of the conditions set forth in §3-705(7)(a)(2) or (3) of the Code is satisfied, or the candidate must submit a certified signed statement attesting to the need for such public funds and demonstrating that at least one of the conditions set forth in §3-705(7)(a)(1) of the Code is satisfied. The statement must be accompanied by supporting documentation and must be

¹ The comments and observations in this letter are solely my own and not submitted on behalf of any other person or organization.

submitted to the Board at least 15 business days before the optional early public funds payment is scheduled to be made.

Does this drafting choice have a substantive effect? On the one hand, Rule 3-01(d)(ii)(A) lists: “the candidate has failed to meet one of the eligibility criteria of the Act or these rules” as a basis for an ineligibility determination. On the other hand, the proposed amendment to the provision now re-numbered Rule 9-02(j)(iii) alters that reason for repayment to read:

the candidate has failed to demonstrate eligibility for the public funds paid [and/or] or compliance with Program requirements, including the requirements to appear on the ballot and to be opposed by at least one other candidate on the ballot....

This proposed additional language creates ambiguity as to whether the Board rules also consider “opposition” to be an eligibility condition/basis for repayment claim for early public funds payments, without regard to this proposed narrow reference to the separate “on-ballot opposition” eligibility condition/basis for repayment claim that is applicable only for later payment determinations.

In contrast, Admin. Code §3-705(7)(a) is not ambiguous: “no participating candidate shall be eligible to receive a disbursement of public funds prior to two weeks after the last day to file designating petitions for a primary election, unless” one of three alternative “opposition” conditions are met. (Emphasis added.) Somewhere, at the very minimum, I recommend that CFB rules should contain clear and unambiguous references to opposition as both an eligibility condition for early public funds payment and as a basis for ineligibility and/or repayment determinations if the recipient has failed to meet this condition.

I believe that should be the starting point. The larger problem is that the proposed rules are entirely silent on *how* the Board intends to determine whether a prospective early payment recipient is “opposed” within the meaning of Administrative Code §3-705(7)(a)(1), (2) or (3). The challenge for the Board is to explain how it will make these determinations during a time in which the candidates’ ballot status is not only unknowable but also expressly irrelevant.

The early payment legislation removed ballot status as a condition of eligibility. That new law made no changes to the Act’s provisions governing when candidates are treated as opposing, however. Each primary for nomination to the same office is defined as a separate “covered election”, as is the general election. *See* Admin. Code §3-702(10). Putting aside special elections, to be eligible for any public funds payment a candidate must be opposed either in a primary or in the general election (other than by a write-in candidate). *See* Admin. Code §3-703(5). The Board has rejected pre-primary arguments that primary and general election candidates ultimately seeking election to the same office could be treated as opponents in the same covered election. *See* CFB Advisory Opinion No. 2009-4 (“Because Mr. Bloomberg is not a candidate in the same primary election as Mr. Thompson and the other Program participants who are seeking the Democratic Party nomination, his campaign spending prior to the primary election date does not trigger the bonus provisions for that election. Thus, there is no statutory basis for the Board to lift the primary election expenditure limit and provide Mr. Thompson and other participants with additional public matching funds for the primary election based on Mr. Bloomberg’s expenditures or contributions.”).

For these reasons, the mere fact that two or more candidates have declared for the same office will not be a sufficient basis for making an early public funds payment to any of those candidates under Admin. Code §3-705(7)(a)(1), (2) or (3). Rather, either:

- (1) The candidate must submit a “Statement of Need” demonstrating that he or she “is opposed by” a candidate who meets one or more specified criteria; or
- (2) The candidate is “opposed in a primary or special election for an office” for which no incumbent is seeking re-election; or
- (3) The “candidate is opposed by any candidate who has received public funds payments for the covered election.”

See Admin. Code §3-705(7)(a)(1), (2), and (3) (emphasis added).

For example, if one candidate seeks the Democratic party nomination and a second candidate seeks the Republican party nomination to the same office, under what circumstances would they be treated as opposing for purposes of an early payment? Here are some possible scenarios and resolutions:

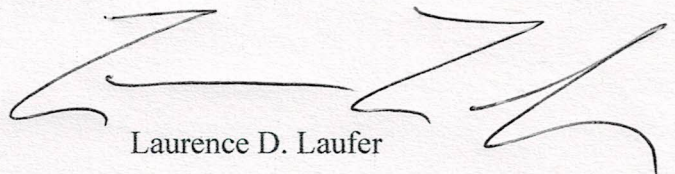
- *The Democrat identifies the Republican as the opponent in his statement of need. The Republican does not file a statement of need. No other Democrat or Republican has declared for the same office. Arguably, the CFB could treat the Democrat and Republican as opponents in the same covered election and issue an early payment to the Democrat under Admin. Code §3-705(7)(a)(1) and to the Republican under Admin. Code §3-705(7)(a)(3), if no other candidates for that office have emerged.*
- *Next, a second Democrat declares for the same office:*
 - o *If no candidate is seeking re-election for the same office, the first Democrat may receive an additional early payment under Admin. Code §3-705(7)(a)(2), but the Republican would not be eligible for a further early payment at that time (since the Democrat primary contest is unresolved).*
 - o *If an incumbent is seeking re-election for that office, the first Democrat would not receive an additional early payment under Admin. Code §3-705(7)(a)(3), unless and until the second Democrat receives an early payment. Regardless, the Republican would not be eligible for an additional early payment.*
- *Next, the first Republican drops out and a new Republican declares for the same office. A total of three Democratic candidates have now declared for this open seat. The new Republican files a statement of need identifying all three Democratic candidates as her opponents. Each Democrat is eligible and receives an early public funds payment under Admin. Code §3-705(7)(a)(2). The Board rejects the Republican’s statement of need because, until the primary is resolved, none of the Democrats may be treated as her opponent. For the same reason, the Board denies the Republican an early payment under Admin. Code §3-705(7)(a)(3). Additionally, the Republican does not merit an early payment under Admin. Code §3-705(7)(a)(2) since she is not opposed in a primary election.*

These scenarios are relatively simple and straightforward. None concerns, for example, other facts or evolving facts over time with respect to undeclared candidates, timely changes in the office sought (including by a non-term-limited incumbent), alleged opponents disputing a statement of need, the seeking of an independent or minor party nomination, the obtaining of a Wilson-Pakula certificate, collusion between candidates, prospective opportunity to ballot or write-in campaigns, extraordinary circumstances, failures to actively campaign, deviations between the office declared in a candidate's certification and that candidate's actual campaign activities, the naming of candidates in ballot petitions without their consent or acceptance, or other possible complications, such as the outcome of potential litigation against recent state law amendments to the definition of political party. While it is not reasonable to suggest that CFB rules would anticipate and answer *every* possible scenario, the problem is the proposed rules contain *no* apparent guidance or standards for deciding *who are opposing candidates* when making early public funds payment determinations.

The sad recent passing of the CFB's founding chairman, Joseph A. O'Hare, S.J. brought back memories of his wisdom when the Board first initiated rulemakings in 1988-1989. As public comments were received, Father O'Hare would repeatedly intone that the Board's rules needed to be "as simple as possible, but as complete as necessary." In that spirit I urge the CFB to promulgate rules to provide simple and complete guidance for identifying "opposing candidates" for the purpose of making early public funds payment determinations.

Thank you again for the opportunity to comment. Stay healthy, well and strong.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Laurence D. Laufer', with a stylized flourish at the end.

Laurence D. Laufer