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BY EMAIL
Bethany Perskie
Deputy General Counsel
New York City Campaign Finance Board
100 Church Street, 12th Fl.
New York, NY 10007

Re: Advisory Opinion Request

Dear Ms. Perskie:

Following up on our telephone conversations, I hereby make the following advisory opinion request on behalf of my client, Stringer for New York. As detailed below, we seek guidance on these questions:

(1) What methodology must "Option A" campaigns follow for determining the portion of contributions that are subject to the refund requirement the City Council enacted in Local Law No. 128?

(2) How should Option A campaigns determine the amount of fundraising expenditures associated with previously raising contributions that must be refunded solely due to the newly enacted refund requirement of Local Law No. 128 that is not subject to 2021 covered election expenditure limits?

(3) How should Option A campaigns determine the amount of compliance expenditures associated with making refunds solely to comply with the newly enacted refund requirement of Local Law No. 128 that is not subject to 2021 covered election expenditure limits?

Summary

Our request arises from the recent City Council enactment of Int. No. 732-b, which has become Local Law No. 128. As you know, on June 10, 2019 the Council Committee on Governmental Operations publicly released new language it was adding to this bill in a proposed "b-print". The b-print was then approved by that Committee and two days later enacted by the Council without inviting public comment on the newly added language.

As discussed in detail below, Local Law No. 128 repeals the "grandfather" provision applicable to contributions Option A campaigns accepted before the January 12, 2019 effective date of NYC Charter amendments that were first adopted by the electorate in 2018. This grandfather provision was then reenacted by the City Council in Local Law No. 1 of 2019. In direct contrast to how Local Law No. 1 treated participating candidates in the February 2019 special election for public advocate, however, Local Law No. 128 contains no retroactive prohibition against the previous acceptance of contributions above the Option A contribution limit. *Compare* Local Law No. 128 §26 *adding* NYC Administrative Code §3-720 *with* Charter §1152(l)(1)(c), *as amended by* Local Law No. 1.[1] Thus, CFB steps to implement the Local Law No. 1 refund requirement for that special election would not inform a methodology for implementing the Local Law No. 128 refund requirement.[2]

Candidate actions and reasonable expectations over the four years of the 2021 covered election cycle present a very different dynamic than special elections to fill vacancies. Indeed, Local Law No. 128 does not follow the approach of earlier local laws that changed contribution limits in the midst of a four-year election cycle (in 1988 and 1998). Instead, the new law takes care to avoid both retroactive limits against acceptance and any restrictions against use of previous contributions, and thereby averts misusing legislative authority to sanction potential opposing candidates for their lawful acceptance and lawful use of previous contributions in full compliance with legal contribution limits.

Unlike its longstanding practice for special elections (*see* fn. 2), the CFB has no rule or practice for regularly scheduled covered elections that would make changes to contribution limits retroactive to previous contributions that were lawfully solicited and accepted for those elections. In other words, Local Law No. 128 creates an unprecedented duty to refund some portion of contributions that: (i) not only were in compliance with the legal contribution limit when these contributions were accepted and used, but (ii) also do not violate any provision against the prior acceptance or use of such contributions because Local Law No. 128 contains no such restriction.

We present this request because Local Law No. 128 directs the CFB to determine how to administer and enforce the replacement of the 2018 Charter revision grandfathering provision by a new refund requirement addressed to previously grandfathered contributions. Especially because the enactment of the b-print was so rushed, CFB steps to administer and enforce the new provisions should be taken with care, deliberation, and due regard to fair application to all potentially affected campaigns.

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[1] Stringer for New York is in receipt of a CFB staff email this morning inaccurately stating that Local Law No. 128 made or authorized the CFB to make contribution limits retroactive to January 12, 2018. Rather, as discussed below, Local Law No. 128 has directed the CFB to require certain contribution refunds without in any way making the pre-January 12, 2019 acceptance or use of legal contributions a violation of the Option A contribution limit.

[2] The CFB has long reserved and exercised authority to address the availability of prior contributions for special elections, to which special election contribution limits are typically made retroactive and either refunds or other disgorgements required as vacancies arise. *See, e.g.,* CFB Rule 1-06 *and* CFB Advisory Opinions Nos. 2000-6, 2007-2, 2008-3, 2009-1, 2009-3 and 2010-2. Consistent with this longstanding CFB approach to special elections, Local Law No. 1 specified that 2018 Charter revision-based contribution limits would be retroactive for the special election and directed the CFB to implement a refund requirement to enforce those retroactive limits. *See* City of New York, Local Law No. 1 §§2 and 3, *amending* NYC Charter §1152(l)(1)(c), (e) and (h).

Changes Made by Local Law No. 128

In November 2018, the City electorate adopted changes to the NYC Charter, which *inter alia*, established two alternative public matching funds programs for the 2021 elections, known as Option A and Option B. These changes took effect on January 12, 2019. *See* Charter §1152(l)(1)(a).

In brief, for Citywide offices, Option A included a $2,000 contribution limit and an 8:1 matching rate for matchable contributions up to $250, whereas Option B maintained the pre-existing $5,100 contribution limit and the pre-existing 6:1 matching rate for matchable contributions up to $175 per contributor. With respect to campaign finance transactions made prior to the effective date of the Charter changes, the 2018 Charter revision preserved the *status quo ante*, with a grandfathering provision at Charter §1152(l)(1)(h):

> The campaign finance board shall promulgate rules necessary to implement the provisions of this paragraph, which shall include provisions addressing contributions made prior to January 12, 2019, provided that: (i) candidates who received eligible contributions prior to January 12, 2019 shall not be required to refund such eligible contributions or any portion thereof solely by reason of electing Option A as set forth in subparagraph (d) of this paragraph; and (ii) eligible contributions received prior to January 12, 2019 shall be subject to the matching formula in effect prior to such date, regardless of whether the participating candidate choses Option A or Option B.

Charter §1152(l)(1)(h), *as adopted by the electorate* in November 2018 general election, *prior to amendment* by City of New York, Local Law No. 1 (2019) (emphasis added.)

Subsequently, the City Council enacted Local Law No. 128 to repeal Charter §1152(l)(1)(h) and give a new directive to the CFB at Administrative Code §3-720(f):

> For participating candidates and their principal committees seeking office in covered elections held prior to the year 2022, the campaign finance board shall administer and enforce the contribution limitations and public matching funds provisions, including those pertaining to the matching formula, qualifying threshold, and public funds cap in accordance with whether the participating candidate has chosen Option A or Option B pursuant to subdivision d, provided that: (i) candidates who received contributions prior to January 12, 2019 shall be required to refund the portion of any contribution received prior to January 12, 2019 that exceeds the limitations set forth in paragraph (f) of subdivision 1 of section 3-703 if such candidate elects Option A; and (ii) matchable contributions received prior to January 12, 2019 shall be subject to the matching formula as described in Option A if a candidate elects Option A.

(Emphasis added.)

While the 2018 Charter Revision directed the CFB to promulgate rules providing that "contributions or any portion thereof" received prior to January 12, 2019 shall *not* be required to be refunded solely by reason of the recipient electing Option A, Local Law No. 128 repeals that direction to the CFB and instead directs the CFB to require Option A campaigns "to refund the portion of any contribution received prior to January 12, 2019 that exceeds the [reduced]

limitations". Because Local Law No. 128 does not make the reduced contribution limits retroactive, Option A campaigns need a methodology for determining the portion of any pre-January 12, 2019 contributions that is subject to refund.

Full and Fair Implementation

The Charter Revision and City Council Grandfathering Provisions

As noted above, in January 2019, the Council enacted Local Law No. 1 which extended the November 2018 Charter revision-created Option A and Option B matching programs to candidates in special elections in 2019. In making Option A available to special election candidates, Local Law No. 1 diverged from the 2018 Charter revision's express grandfathering of pre-January 12, 2019 contributions. Instead, Local Law No. 1 made reduced contribution limits retroactive (Charter §1152(l)(1)(c)) for the special election and provided that under Option A special election candidates "shall be required" to refund contribution portions in excess of those retroactive limits (Charter §1152(1)(1)(e)(i)). *See* Local Law No. 1 (2019) §2. Otherwise, Local Law No. 1 not only expressly maintained the grandfathering of pre-January 12, 2019 contributions for Option A campaigns in the 2021 elections, it also extended these same grandfathering provisions to pre-2021 covered elections, other than special elections held in 2019. *See* NYC Charter §1152(1)(1)(e) and (h), *as amended by* Local Law No. 1 (2019) §§2 and 3.[3]

Changing Contribution Limits in the Course of the 2021 Election Cycle

Thus, for the 2021 covered elections, Local Law No. 128's treatment of pre-January 12, 2019 contributions replaces not only the grandfathering provision enacted by the electorate in the November 2018 Charter revision, but also the grandfathering provision that was re-enacted – and extended – by the City Council in Local Law No. 1. As a result, for the 2021 election cycle with the adoption of Local Law No. 128, participating Citywide candidates have now been subject to a sequence of three different contribution limitation regimes:

Time Period/Law	Universal Limit	Option A Limit	Option B Limit	Grandfathering of Pre-1/12/19 contributions
Pre-Jan. 12, 2019	$5,100	n/a	n/a	n/a
From Jan. 12, 2019, under Charter Revision *and* Local Law No. 1	n/a	$2,000	$5,100	Yes
Local Law No. 128	n/a	$2,000	$5,100	No

No Retroactivity

The new law does not retroactively "freeze" the use of candidates' lawfully accepted contributions (and thereby discourage participation in Option A) by requiring those candidates to refund the "frozen" portion of contributions they lawfully accepted (past tense) before the time that their potential opponents chose to authorize a 2021 election campaign committee. Rather, Local Law No. 128 is expressly effective immediately (as of July 14, 2019), not retroactively. *See*

[3] On its face, the express language of Local Law No. 1 therefore contradicts the explanation given in the City Council Governmental Operations Committee Report (June 11, 2019) at p. 10: "In a final change from the A-version, for candidates who select Option A, any contributions received prior to January 12, 2019 would be treated the same as under Local Law 1 of 2019, with both the lowered contribution limit and eight-to-one matching formula applied to all contributions accepted by such candidates, no matter when received."

Local Law No. 128 at §29. Section 6 of Local Law No. 128 amends Admin. Code §3-703(1)(f) to change the amount of the contribution limit that governs the acceptance (present tense) of contributions. Section 26 adds Admin. Code §3-720(a), which provides that this reduced contribution limit applies to all candidates in the 2021 covered elections. Admin. Code §3-720(e) contains an exception that preserves the former $5,100 contribution limit for Option B Citywide candidates.

As noted above, Admin. Code §3-720(f) directs the CFB to require Option A campaigns to refund the portion of any pre-January 12, 2019 contribution that exceeds the reduced limit. Unlike the law in effect for the February 2019 special election, this refund requirement has no corollary retroactive prohibition against accepting a contribution. Nor does the new duty to refund make the lawful acceptance of a contribution over $2,000 prior to January 12, 2019 a violation of Admin. Code §3-703(1)(f) or any other provision of the Act.

Furthermore, Local Law No. 128 does not contain any restrictions against the lawful use of pre-January 12, 2019 contributions for the 2021 covered elections. No provision of the new law directs any campaign to raise new contributions to refund any portion of any previous contribution that was lawfully accepted and lawfully used. Consider this hypothetical:

> An Option A campaign accepted 10 contributions of $5,100 prior to January 12, 2019. When the refund requirement of Local Law No. 128 is implemented by the CFB, that campaign's cash balance is zero and it also has considerable outstanding liabilities. Because Local Law No. 128 contains no provisions against acceptance or use of these 10 contributions, we submit the new law does not authorize the CFB to require that campaign to raise new contributions for the purpose of refunding these previously used contributions.

Only that portion of a pre-January 12, 2019 contribution that was not lawfully used for the 2021 covered elections would remain subject to refund pursuant to Admin. Code §3-720(f). This conclusion is underscored by the Admin. Code §3-720(f) present tense description of the "portion" of any contribution ("that exceeds") that "shall be required" to be refunded. No provision of the new law makes reference to the original amount of the contribution at the time it was lawfully accepted prior to January 12, 2019.

CFB Rule 1-04(c)(1) is Not Applicable

CFB rules demonstrate that a duty to refund over-the-limit contributions is triggered by the act of accepting a contribution that is over the applicable limit. CFB Rule 1-04(c)(1) provides, in relevant part:

> When a candidate knows or has reason to know that he or she has accepted a contribution, contributions, or aggregate contributions from a single source in excess of the applicable contribution limit, … the candidate shall promptly return the excess portion….

Rule 1-04(c)(1) would therefore not be applicable to contributions accepted prior to January 12, 2019 that were not in violation of the contribution limit applicable at the time of acceptance. Specifically, because the contribution limit applicable to contributions accepted prior to January 12, 2019 is $5,100, a Citywide campaign's acceptance of contributions during that time period of up to $5,100 per contributor did not exceed the Admin. Code §3-703(1)(f) contribution limitation

as then applicable and therefore did not trigger a duty to refund any "excess portion" under Rule 1-04(c)(1).

Unlike Rule 1-04(c)(1), the new refund requirement is neither triggered by unlawful acceptance nor is the new duty to refund applicable "promptly" after the contribution was accepted. Rather, the refund requirement set forth in Admin. Code §3-720(f) arises only because Local Law No. 128 sets new conditions for Option A campaigns long after the contributions at issue were lawfully solicited, accepted and used. Thus, unlike the Rule 1-04(c)(1) duty to refund triggered by unlawful acceptance, prior lawful acceptance and lawful use mitigates the total amount subject to refund under Admin. Code §3-720(f).

Refund Amount

Thus, under each of the four iterations of New York City campaign finance law in effect since the beginning of the 2021 election cycle, participating candidates for Citywide office in the 2021 covered elections were permitted to accept contributions of up to $5,100 per contributor prior to January 12, 2019 and to use those same contributions. The 2018 Charter amendments confirmed this permission for Option A participating candidates for Citywide office in the 2021 elections, and this same permission was expressly reiterated by the City Council in Local Law No. 1. Local Law No. 128 does not purport to revoke the permission each of these three prior laws granted for the acceptance and use of these contributions by Option A campaigns.

As demonstrated above, Local Law No. 128 does not retroactively reduce contribution limits or proscribe the use of these contributions. Rather, the new law merely superimposes a duty to refund that portion of those same contributions that exceeds the $2,000 contribution limit which first took effect on January 12, 2019. This new duty will first take effect only when it is administered and enforced by the CFB. Because the prior acceptance and ongoing use of these contributions is not in any way restricted by Local Law No. 128, the calculation of the refundable amount must take into account that use of contributions accepted prior to January 12, 2019 has, in fact, lawfully reduced the portion of the contribution that remains subject to refund. In other words, the amount of the refund required by Local Law No. 128 would not be greater than the unused portion of the contribution that exceeds $2,000, in the case of an Option A participating candidate for Citywide office in the 2021 elections.

Proposed Methodology (Question 1)

To implement Admin. Code §3-720(f), the CFB should therefore promulgate a standard that enables Option A campaigns to determine the portion of each lawfully accepted pre-January 12, 2019 contribution that was *not* lawfully used for the 2021 covered election and therefore remains to be refunded. Current CFB Rule 1-07(c) contains an analogous standard for attributing surplus funds from prior elections. That rule attributes an account balance to "the last monetary contributions, loans, and other receipts received by" the campaign. Here, rather than determining the specific contributions deemed carried forward from a prior election, the new methodology would determine the portion of pre-January 12, 2019 contributions that remain unused (if any) and therefore subject to refund at the time the CFB implements the new affirmative duty to refund.

Prior Fundraising Expenditures (Question 2)

When an Option A campaign uses pre-January 12, 2019 contributions to make 2021 campaign expenditures those expenditures are generally subject to the expenditure limits of Admin. Code §3-706. Pursuant to Admin. Code §3-720(f), however, a portion of that campaign's prior fundraising expenditures has now become associated with the raising of lawfully accepted contributions that must be refunded either in whole or part. In other words, the portion to be refunded has been deemed by legislative amendment to be unavailable for use in the 2021 elections. Because Local Law No. 128 legally mandates that Option A campaigns be denied the benefit of those contributions in the 2021 elections, the new law negates the efficacy of a portion of prior fundraising expenditures.

This is not the first time the CFB has been confronted with a legislative change in the midst of a four-year election cycle that reversed reasonable expectations about prior campaign expenditures. *See* CFB Advisory Opinion No. 2008-7 (Nov. 3, 2008) (setting new campaign finance law obligations due to a change in the term limits law, including relief from the application of expenditure limits). In analogous circumstances, "in order to ensure as fair and efficient a process as possible", the CFB has attributed fundraising expenditures to a specific contributions total by assessing a 15 percent flat rate against the total funds at issue. *See id.*

Thus, the CFB should make clear that fundraising expenditures attributable to that total refund amount – *i.e.,* the cost of lawfully raising funds Local Law No. 128 require Option A campaigns to refund – is not subject to any expenditure limit of Admin. Code §3-706. Following the formula of the 2008 advisory opinion would result in a deduction from total expenditures subject to the 2021 election expenditure limits equal to: (i) 15 percent of the total refund amount, or (ii) the total amount of expenditures made prior to January 12, 2019, whichever is less.

New Compliance Expenditures (Question 3)

The new law will compel some (but not all) Option A campaigns to incur compliance costs for the purpose of making newly required refunds. Unlike compliance costs that arise from failure to comply with pre-existing contribution limits or other legal requirements, these costs will be a unique tax imposed by legislative amendment on campaigns that chose to raise and in fact legally accepted contributions up to the legal limits in effect before January 12, 2019. Moreover, this unique burden extends to campaigns whose identity, participation status and fundraising success were known to the City Council through public disclosures filed with the CFB at the time the Council enacted Local Law No. 128.[4] The CFB should make clear that Local Law No. 128 does not game the 2021 elections by promulgating advantage or disadvantage for any group of candidates in relation to the pre-existing expenditure limits.

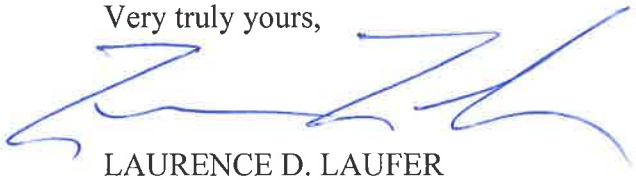
It would set a dangerous precedent and unlevel the Act's expenditure limits for the CFB to subject to the expenditure limits the cost of compliance with mid-cycle amendments designed to compel some (but not all) opposing campaigns to refund a portion of legally raised contributions.

[4] Indeed, it appears that Council members were making or were privy to calculations as to the funding amounts candidates stood to gain or lose under the final version of the bill that became Int. No. 732-b even before that version of the bill was made public.

Pursuant to Charter §§1052(a)(10) and 1057, and Admin. Code §3-706, the CFB should opine that the Act's expenditure limits do not cover compliance costs that stem solely from Local Law No. 128's refund requirement precisely because that new law was known to impose very different compliance burdens on potentially opposing candidates at the time of enactment.

Thank you for your consideration. I would appreciate the opportunity to answer questions or provide additional information as may be requested by the Board or CFB staff.

Very truly yours,



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