ADVISORY OPINION NO. 2019-1 (August 15, 2019)

SUMMARY

Local Law No. 128 of 2019 amended the New York City Campaign Finance Act to require Option A candidates in the 2021 election cycle to refund the excess portion of any contributions received prior to January 12, 2019 that exceed the Option A contribution limits. It is clear from both its plain meaning and legislative history that the statute should be interpreted to apply the Option A limits to contributions received prior to January 12. Fundraising expenditures associated with previously-raised contributions that are required to be partially refunded as a result of this legislative change will not be deducted from the 2021 expenditure limit calculation. However, the cost of obtaining bank checks for the purpose of making such refunds will be deducted from the 2021 expenditure limit calculation, provided that the refunds are issued on or before January 15, 2020.

FULL TEXT

Re: Local Law No. 128 of 2019; Administrative Code of the City of New York ("Admin. Code") §§ 3-703(1)(f), 3-720; Board Rule 1-04(c)(1); Advisory Opinion No. 2008-7 (November 3, 2008); Op No. 2019-1.

The New York City Campaign Finance Board (the "Board") has received a request for an advisory opinion[1] from Laurence D. Laufer, Esq., on behalf of Stringer for New York, a campaign for citywide office in the 2021 elections (the "Campaign"), requesting clarification on several issues related to the implementation of Local Law No. 128 of 2019 ("Local Law 128"). The Campaign raises the following 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 [raised] contributions that must be refunded solely due to the newly enacted refund requirement of Local Law 128 that is not subject to the 2021 covered election expenditure limits?

[1] *See* Advisory Opinion Request ("AO Request"), available at https://www.nyccfb.info/media/1504/aor-072219.pdf.

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 128 that is not subject to the 2021 covered election expenditure limits?

Applicable Statutes, Board Rules, and Advisory Opinions

Section 3-703(1)(f) of the Administrative Code of the City of New York (the "Administrative Code") provides that candidates may not accept contributions in excess of the limits applicable to the office sought.

Section 3-720 of the Administrative Code, as created by Local Law 128, provides that Option A candidates in elections held prior to 2022 must refund the excess portion of any contribution received prior to January 12, 2019, that exceeds the Option A limits as stated in Admin. Code § 3-703(1)(f).

Board Rule 1-04(c)(1) provides that, when a candidate accepts an over-the-limit contribution, the candidate must refund the over-the-limit portion by bank check or certified check made out to the contributor.

Advisory Opinion No. 2008-7 ("A.O. 2008-7") established procedures for candidates who had already begun their 2009 election campaigns when the law was amended to extend term limits for covered offices.

Analysis

In November 2018, New York City voters approved a ballot measure to amend the New York City Charter (the "Charter") to reduce contribution limits and increase the amount of public funds available to candidates in local elections. The Charter revision provided that candidates in the 2021 elections would have the option to choose whether to run under the old rules ("Option B") or the new rules ("Option A"). That choice was deemed to begin on January 12, 2019, meaning that contributions received by Option A candidates prior to that date would be subject to the old contribution limits and matching rate. The Charter amendments included a "grandfather" provision, which explicitly stated that Option A candidates would not be required to refund the

excess portion of any contribution received prior to January 12, 2019 that exceeded the Option A limits.[2]

On June 13, 2019, the City Council passed Local Law 128, which incorporates the amendments made by the 2018 Charter revision into the Campaign Finance Act (the "Act"), with some technical and substantive modifications, including making the choice of Option A or Option B retroactive to January 12, 2018, the first day of the 2021 election cycle. Option A candidates are required to refund the excess portion of any contributions received during the current election cycle that exceed the reduced limits, even if the contributions were received before January 12, 2019, and such contributions will be eligible to be matched at the increased rate of $8-$1 rather than $6-$1.

The Campaign inquires as to 1) what portion of contributions received by Option A candidates prior to January 12, 2019 are subject to the refund requirement, 2) whether fundraising expenditures associated with previously-raised contributions now required to be refunded will be subject to the expenditure limits applicable to the 2021 elections, and 3) whether compliance expenditures associated with such refunds will be subject to the expenditure limits applicable to the 2021 elections. The Board will address each of these inquiries in turn.

1. Refund Methodology

Question 1 addresses the portion of each over-the-limit contribution received prior to January 12, 2019 that must be refunded. The Campaign asserts that, while Local Law 128 provides for the mandatory refund of the excess portion of any contribution received by an Option A candidate prior to January 12 that exceeds the reduced contribution limits, it does not render the acceptance of such contributions a violation, as "the refund requirement has no corollary retroactive prohibition against accepting a contribution."[3] Noting that Local Law 128 is explicitly effective prospectively rather than retroactively, the Campaign contends that Board Rule 1-

[2] "[C]andidates 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[.]"

[3] *See* AO Request, p. 5.

04(c)(1)[4] is not applicable to contributions received before January 12, because those contributions "were not in violation of the contribution limit applicable at the time of acceptance."[5] The Campaign also draws a distinction between Local Law No. 1 of 2019 ("Local Law 1")[6] and Local Law 128, arguing that only the former results in the retroactive application of the new contribution limits. The Campaign notes that Local Law 1 includes a section explicitly providing for retroactive application of the reduced limits to contributions received before January 12, while Local Law 128 does not.[7] Therefore, according to the Campaign, the amount required to be refunded should not be the excess portion of any contribution accepted prior to January 12 that exceeds the new limits, but rather the portion of such a contribution "that was not lawfully used for the 2021 covered elections."[8] The Campaign proposes that the CFB adopt a standard allowing Option A candidates 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[,]" and notes that Board Rule 1-07(c)[9] contains a methodology for the attribution of surplus funds to contributions received.[10]

Local Law 128 states, in relevant part:

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[4] "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[.]"

[5] *See* AO Request, pp. 4-5.

[6] The 2018 Charter revision applied to elections beginning in the year 2021. Local Law 1 applied the Charter amendments to special elections held in 2019, and required that Option A candidates in such special elections refund the over-the-limit portions of contributions that were accepted prior to January 12, 2019. Local Law 128 extended the requirement to refund the over-the-limit portion of contributions received before January 12 to Option A candidates in any election held prior to the year 2022, including the 2021 primary and general elections.

[7] Local Law 1 states: "With respect to candidates seeking office in any special election to fill a vacancy held in the year 2019, [the Charter revision's] amendments shall apply prior to January 12, 2019[.]" Local Law 128 contains no directly analogous provision.

[8] *See* AO Request, p. 5.

[9] "For purposes of enforcing the contribution limit and contribution prohibitions, the Board shall attribute surplus funds and such transfers to the last monetary contributions, loans, and other receipts received by: 1. the candidate on or before the date of the cash balance described in subdivision (b), in the case of surplus funds; or 2. the transferor committee before making the transfer."

[10] *See* AO Request, p. 6.

> 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 . . . in accordance with whether the participating candidate has chosen Option A or Option B . . . , 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[.][11]

The law further provides that "the contribution limitations . . . pursuant to this section shall apply to all candidates seeking office in covered elections held prior to the year 2022."[12] The plain language of the statute directs the CFB to administer and enforce the contribution limits for all candidates in elections held prior to 2022 in accordance with whether they have chosen Option A or Option B, and indicates that any Option A candidate who has received contributions that exceed the limits set forth in the new law must refund the excess portion of each such contribution. The statute imposes no limit on the duty to refund based on prior use of the funds derived from such contributions. Candidates who wish to avoid that duty may choose Option B, which imposes the contribution limits that existed prior to the new law.[13]

The treatment of contributions received before January 12 under Local Law 128 is analogous to the treatment of contributions received before a candidate has declared either an office sought or an option choice. Undeclared candidates, and candidates who have declared for citywide office, are permitted to raise up to the citywide contribution limits. If such a candidate later declares for borough president or City Council member, that candidate will be required to refund the excess portion of any previously-raised contributions that exceed the lower limit of the office ultimately sought. Similarly, if a candidate has not yet chosen between Option A and Option B, or has made a non-binding Option B choice, that candidate is permitted to accept contributions up to the Option B limits. If the candidate subsequently chooses Option A, that candidate will be

[11] Admin. Code § 3-720(f)(i).

[12] Admin. Code § 3-720(a).

[13] Candidates are not required to choose between Option A and Option B until September 15, 2019, and the choice remains non-binding until the certification deadline applicable to the candidate (15 business days before the first public funds payment sought, for any candidate seeking to receive a payment in December 2020 or January, February, March, April, or July 2021; April 26, 2021 for all other candidates). *See* Admin. Code §§ 3-703(1)(c), 3-705(4), 3-720(c).

required to refund the excess portion of any previously-raised contributions that exceed the Option A limits. In both instances, the duty to refund exists regardless of whether the candidate has already used the funds derived from those contributions, and regardless of the fact that the contributions did not exceed the applicable limit at the time they were received.

The fact that Local Law 128 does not include an explicit statement that the Charter amendments apply to the pre-January 12 period does not negate the only logical interpretation of the provision requiring the refund of the excess portion of any contributions received during that period that exceed the Option A limits: that the Option A limits should be applied to the contributions in question. Indeed, if the Option A limits were not applicable to contributions received prior to January 12, it would not have been necessary for the Charter amendments to include a "grandfather" provision in the first place. The purpose of that provision was to permit candidates to retain the excess portion of contributions received before those amendments took effect; without the provision, the duty to refund exists as it does for all over-the-limit contributions.

This interpretation of the plain language of the statute is supported by the legislative history. The City Council considered two versions of Introduction 732, which became Local Law 128. The first was Introduction 732-A ("732-A"). The bill was referred to the Council's Committee on Governmental Operations, which held a hearing on April 15, 2019. The hearing included a colloquy among the committee Chair, Fernando Cabrera; the sponsor of the bill, Council Member Benjamin Kallos; and CFB Executive Director Amy Loprest. During the exchange, all of the participants agreed that 732-A would not apply the contribution limits retroactively to candidates choosing Option A.[14] Council Member Kallos and Executive Director Loprest agreed that lack of retroactivity would make the law less equitable and more confusing for candidates, and more difficult for the CFB to administer.[15] Chair Cabrera stated that he planned on "speaking with the sponsor of the bill to see if we could work in adding" a clause that would make the contribution limits and matching rate retroactive to include the entire election cycle.[16]

[14] *See* New York City Council Committee on Government Operations, Hearing on Int. No. 732-A, Hearing Transcript, 30-33 (April 15, 2019).

[15] *See id.* at 30.

[16] *Id.* at 30-31.

After the April committee hearing, an amended bill, Introduction 732-B ("732-B"), was introduced. 732-B deleted the following text:

> for any covered election held prior to the year 2022, other than a special election to fill a vacancy held in the year 2019, candidates who received contributions prior to January 12, 2019 *shall not be required to refund* such contributions or any portion thereof solely by reason of electing Option A.[17]

That text was replaced with the following:

> For participating candidates and their principal committees seeking office in covered elections held prior to the year 2022, . . . 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.[18]

The Committee on Government Operations held a hearing regarding 732-B on June 11, 2019. In that hearing, Chair Cabrera stated:

> In a change from the A version, the bill would mirror the approach of Local Law 1 of 2019 by requiring that candidates who [select] Option A should have both the contribution limit and matching formula of such option applied to all contributions received by such candidate no matter when received.[19]

That statement, which makes clear that 732-B applied the Option A limits to all contributions regardless of date of receipt, was unchallenged in the hearing, and the committee report stated that "[f]or the 2021 primary and general election, candidates selecting Option A would abide by the new contribution limits, matching formula, and qualifying thresholds."[20] Accordingly, it is reasonable to infer that the addition of the refund requirement to 732-B was the manifestation of a legislative intent to apply the contribution limits retroactively, as stated by Chair Cabrera and Council Member Kallos during the April 15 hearing and reiterated by Chair Cabrera during the June 11 hearing.

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[17] New York City Council Int. No. 732-A, § 13, proposing amendment of Admin. Code Ch. 7 (April 2, 2019) (emphasis added).

[18] New York City Council Int. No. 732-B, § 26, proposing amendment of Admin. Code Ch. 7 (June 17, 2019) (emphasis added).

[19] New York City Council Committee on Government Operations, Hearing on Int. No. 732-B, Hearing Transcript, 4-5 (June 11, 2019).

[20] Committee Report of the Committee on Governmental Operations, Proposed Int. No. 732-B, 9 (June 11, 2019).

On June 13, 2019, Executive Director Loprest sent a letter to City Council Speaker Corey Johnson expressing support for the provision in question. That letter stated, in relevant part:

> In the interest of both public policy and administrative efficiency, the CFB strongly recommended that the Council include this retroactivity provision in the bill.
>
> The overall purpose of the Charter revision . . . was to magnify the influence of small contributions from New York City residents by reducing the amount of private funds donated to candidates, and replacing those private funds with additional public funds. That purpose is best served if the new rules apply throughout the duration of the election cycle. Without retroactivity, Option A candidates who began their campaigns later in the election cycle would be disadvantaged by facing opponents who had the ability to raise significantly larger contributions between January 2018 and January 2019. Moreover, it would be unfair for certain contributors to have their contributions make less of an impact than others – by being matched at $6-$1 rather than $8-$1 – simply based on the time at which their contributions were made.

The legislative history and the text of Local Law 128 thus indicate that the Option A contribution limits apply to all contributions received by Option A candidates, including those received prior to January 12.

Even if the statute were ambiguous, the CFB's interpretation of the text would control. Under New York law, an agency's interpretation of a statute that it administers should be given deference when the interpretation involves specialized expertise.[21] Such an interpretation is invalid only if it fails a four-part test to determine whether the interpretation was impermissible policy-making:[22]

1) Did the agency engage in the balancing of societal costs and benefits?
2) Did the agency create its own comprehensive set of rules without the benefit of legislative guidance?
3) Is this an area where the legislature has previously attempted legislation without success?
4) Did the regulation require any special agency expertise?

This interpretation does not require a balancing of societal factors, as the policy decisions underlying the legislation have been made and explained by the City Council. The CFB has not

[21] *See People v. Francis*, 30 N.Y.3d 737, 746 (2018); *Trump-Equitable Fifth Ave. Co. v. Gliedman*, 62 N.Y.2d 539, 545 (1984).

[22] *See Boreali v. Axelrod*, 71 N.Y.2d. 1, 12-15 (1987).

yet promulgated rules regarding the implementation of Local Law 128, but it will rely on the City Council's legislative guidance when doing so. The Council has not unsuccessfully attempted to legislate this area. Finally, the CFB's expertise is required due to the complexities associated with the administration of the Campaign Finance Program.

In light of the foregoing, for Option A candidates in the 2021 elections, the excess portion of any contribution that exceeds the limits set forth in § 3-703(1)(f) of the Act must be refunded, regardless of when the contribution was received or whether the funds have been used.

The CFB will promulgate rules and issue guidance to provide additional clarity to campaigns regarding the implementation of the 2018 Charter amendments and Local Law 128. The rules will explicitly provide for retroactive application of the Option A contribution limits to contributions received prior to January 12, 2019, thus resolving any perceived ambiguity regarding whether acceptance of over-the-limit contributions during that period constitutes a violation. In the interest of fairness, and in recognition of the uncertainty and confusion associated with several complex legislative amendments having been enacted in the middle of an election cycle, the CFB will provide campaigns with ample opportunity to make any required refunds without incurring a violation or penalty. Specifically, the reviews of Disclosure Statement #3, which were issued on August 14, 2019, will be considered the first notification of over-the-limit contributions received before January 12, even if the candidate was previously notified of the implications of Local Law 128. Accordingly, refunds of these contributions issued on or before January 15, 2020, the deadline to respond to the Disclosure Statement #3 review, will be considered timely and thus not subject to penalties.

2. Fundraising Expenditures

Question 2 addresses expenditures related to fundraising for contributions received before January 12, 2019, a portion of which are now required to be refunded. The Campaign compares this scenario with the circumstances underlying AO 2008-7, which established procedures for candidates who had already begun their 2009 election campaigns when the law was amended to extend term limits for covered offices. AO 2008-7 gave candidates the option to "freeze" their 2009 committees and reopen them for the 2013 election cycle. Because the funds in those frozen committees would benefit the candidates' 2013 campaigns, the Board determined that the costs associated with raising those funds should count toward the 2013 expenditure limit. Those

fundraising costs were calculated to be the lesser of 1) 15 percent of the total amount of funds in the frozen committee as of a date certain, or 2) the amount of the campaign's total spending prior to the issuance of the AO. The Campaign posits that a similar methodology should be applied to candidates in the 2021 elections who are required to refund a portion of previously-raised contributions, thus, in the Campaign's assessment, nullifying the effect of the fundraising expenditures associated with those contributions. Specifically, the Campaign proposes that the expenditure limit calculation for candidates required to issue such refunds be reduced by the lesser of 1) 15 percent of the total amount refunded, or 2) the total amount of expenditures made prior to January 12, 2019.[23]

The situation at hand is meaningfully distinguishable from the situation in 2008. AO 2008-7 was, as stated by the Board, a response to an "unprecedented change in the electoral landscape less than one year prior to the primary elections[.]" The Opinion repeatedly references the late point in the election cycle at which the change was made and notes that, by the point of its issuance, "many candidates [had] spent well over the total expenditure limits for" a lower office than the one they had sought before term limits were extended. Conversely, Local Law 128 was enacted in June 2019, two full years before the 2021 primary elections, and the change in question applies only to conduct that occurred prior to January 12, 2019. Whereas AO 2008-7 addressed a circumstance in which virtually all candidates were forced to choose, quickly and unexpectedly, whether to run for a different office than the one they had sought for the first three years of the election cycle, the current circumstances relate only to financial considerations – rather than electoral ones – and affect only those candidates who raised large contributions during the first year of the cycle.

Additionally, to deduct a portion of the affected candidates' fundraising expenditures from the expenditure limit calculation would confer upon those candidates a benefit not available to candidates who began fundraising later in the election cycle. The purpose of the expenditure limit adjustments created by AO 2008-7 was to account for the benefit that a candidate's 2013 campaign would receive from funds raised by such candidate's 2009 committee, thus minimizing the advantage held by candidates who chose to freeze their committees. The purpose of Local Law 128's retroactive application of contribution limits is to ensure that all candidates in the 2021

[23] *See* AO Request, p. 7.

elections are subject to the same set of rules, regardless of when they began fundraising. Accordingly, the Campaign's proposal runs directly contrary to the intent of both AO 2008-7 and Local Law 128.

Moreover, the Board does not grant the premise that the duty to refund a portion of a contribution renders all fundraising costs associated with that portion of the contribution meaningless. In most cases, soliciting and accepting a $5,100 contribution would cost, at most, marginally more than soliciting and accepting a $2,000 contribution from the same contributor. A percentage of the excess portion of a contribution likely would not be an accurate reflection of the fundraising costs associated with that portion of the contribution.

As a result of Local Law 128, any matchable portion of the contributions in question will be matched at a rate of $8-$1 rather than $6-$1, and the total public funds payable to the affected candidates is approximately 89% of the expenditure limit ($6,476,444 for mayoral candidates), rather than the 75% stated in the Charter revision ($5,464,500 for mayoral candidates) or the 55% available to Option B candidates ($4,007,300 for mayoral candidates). Option A candidates will thus receive the benefit of additional public funds as a trade-off for forgoing larger private contributions.

Campaigns are routinely required to refund over-the-limit and prohibited contributions pursuant to the Act and Board rules. This requirement may arise long after the contributions were received – for example, if a candidate plans to run for an office with a higher limit and ultimately chooses one with a lower limit, or if a candidate initially chooses Option B and subsequently switches to Option A. The Board has never deducted the fundraising expenditures associated with fully or partially refunded contributions from the expenditure limits. While the mid-cycle reduction in limits and retroactive application undoubtedly present an unusual challenge for some candidates, the implications are not sufficiently consequential to warrant a departure from this long-established policy.

3. Compliance Costs

Question 3 notes that Option A candidates who accepted contributions exceeding the Option A limits prior to January 12 may incur compliance costs associated with refunding the excess portion of those contributions, and that such costs will not be incurred by candidates who do not fall within that category. The Campaign proposes that, in order to avoid placing a unique

burden on a small subset of campaigns, the Board deduct those compliance costs from the affected candidates' expenditure limit calculations.[24]

Contribution refunds are required to be made by bank or certified check.[25] The Board recognizes that substantial fees may be associated with procuring bank or certified checks for the refunds required by Local Law 128. Accordingly, in the interest of fairness, such fees will not be included in the 2021 expenditure limit calculation, provided that the corresponding refunds are issued on or before January 11, 2020. CFB staff will issue guidance to campaigns regarding the methodology for reporting and documenting such fees.[26]

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[24] *See* AO Request, pp. 7-8.

[25] *See* Board Rule 1-04(c)(1).

[26] Candidates may choose not to request this deduction if, for example, they incur relatively few fees or do not anticipate spending an amount that approaches the expenditure limit. Candidates will not be required to adhere to the new procedures for reporting or documenting such fees if they do not wish to avail themselves of this option.