

Supplemental Report on Amended Proposed  
Regulations and Public Comments

August 15, 2022

## **Purpose and Intent**

The purpose of this document is to update our report related to PCFB’s draft regulations: “Report on Amended Proposed Regulations and Public Comments,” published on May 2, 2022. Since this report, the Public Campaign Finance Board published Notices of Revised Rule Making in relation to the three sets of proposals that outline the rules and regulations of the New York State public campaign finance program: 1) Program Regulations duly published in the New York State Register on June 22, 2022 (SBE-33-21-00010-RP), 2) Debate Regulations, duly published in the New York State Register on May 25, 2022 (SBE-39-21-00003-RP), and 3) Enforcement Regulations, duly published in the New York State Register on May 25, 2022 (SBE-46-21-00001-RP).

Since the publication of the Notices of Revised Rule Making, the PCFB received five public comments from the following entities: the Brennan Center; staff from the Office of State Comptroller (“OSC”); a private citizen and two private election law attorneys. (It should be noted that PCFB staff has reached out to several entities regarding these regulations, including the New York City Bar Association. The comments from the two private election law attorneys were in response to a Power Point presentation given to the New York City Bar Association).

In response to these public comments, PCFB staff recommends several minor non-substantive changes to the proposed regulation.

Below is a summary of the public comments received, and the changes staff is recommending.

## **Comments**

### **Brennan Center**

#### **Fundamental Breach**

Section 6221.8(c) of the revised draft regulations defines what qualifies as a fundamental breach of certification and states that a participating candidate found in breach will be ineligible for public funds and forfeit all public funds previously received. The initial draft regulations provided a detailed process for candidates to contest a finding of a fundamental breach. Subsequent to the publication of the initial draft, the PCFB published draft enforcement regulations, which mirrored this process to contest findings. Accordingly, the process was deleted from 6221.8(c) as superfluous in the revised draft.

The Brennan Center expressed concern of whether the due process from the initial draft still applied to a finding of a fundamental breach by a candidate. To address this concern, staff is recommending clarifying that candidates have an opportunity to contest a finding of a fundamental breach consistent with the hearing provisions found in the enforcement section of the PCFB regulations.

## Enforcement Provision

The revised enforcement regulations explicitly state the PCFB has authority to enforce all of Article 14 of the Election Law with regard to participating candidates. The Brennan Center supports this addition, stating that this provision “accurately reflects the statutory design Section 14-207(8) gives the PCFB ‘sole authority . . . to enforce’ the provisions of the public financing program. Since Title II of Article 14 requires candidates to comply with Title I, among other things, in order to participate in the program and receive public funds, the PCFB necessarily enforces both titles in order to administer the program.”

## Staff from OSC

### Definition of “Business Day”

The revised regulations references the term “business days” several times throughout the regulations, including when opinions from staff must be confirmed from counsel’s office, when disclosure statements and claims must be made, when overages from a contribution must be returned, and in measuring the response time in the hearing process.

The General Construction Law does not contain a definition of "business day." Courts have held that, in examining how the term is defined in different statutes, “business day” generally means any calendar day except Sunday or a legal holiday. (*See Jesa Medical Supply, Inc. v. American Transit Ins. Co.*, 28 Misc. 3d 827, 905 N.Y.S.2d 842 (N.Y. City Civ. Ct. 2010); *Miuccio v. Puppy City, Inc.*, 22 Misc. 3d 1132(A), 881 N.Y.S.2d 364 (N.Y. City Civ. Ct. 2009)). However, there are some statutes that exclude Saturdays from the term “business day.” *Id.*

To address this concern, PCFB staff recommends defining “business day” as having the same meaning as “filing” days under section 1-106 of the Election Law.

### Committees Registering with the Statewide Financial System

Under the draft regulations, a participating committee must register with the Statewide Financial System (“SFS”) in order to receive funds. The regulations provide that: “(t)he candidate and treasurer shall, upon direction from the PCFB staff, register with (SFS) to create a vendor profile and obtain a vendor ID for the purpose of allowing the transfer of public matching funds payments to the bank account of the candidate’s authorized committee.”

OSC staff commented:

Please note that the addition of a bank account is a secondary step in vendor registration. First, the agency requests that a vendor be added to SFS. Then the vendor profile is created, at which point only check payments will be authorized. The vendor’s primary contact (per the vendor add request) receives an email with steps to register in the vendor portal. Banking details may then be added through the vendor portal. Banking details require additional review by OSC before authorized for use.

PCFB does not believe that this comment necessitates a change to the revised regulation. The regulation requires a committee to register with SFS for purposes of receiving payments. Outlining the step-by-step SFS process for registration is not necessary.

### Maintaining Business Records

The draft regulations provide that bank, contribution, and other relevant records must be kept for five years. OSC staff commented that it was unclear how to measure the five years; starting from the date of filing of the relevant financial disclosure record, or at the conclusion of the election.

Section 14-202 of the Election Law requires that records be maintained: “(i)n compliance with section 14-108 of this article, authorized and political committees shall maintain copies of such records for a period of five years.” Section 14-108 requires a five-year retention of the actual disclosure reports starting at the date of filing; however, section 14-118 of the Election Law provides: that underlying documents: “shall be retained by a treasurer for a period of five years **from the date of the filing of the final statement with respect to the election**, primary election, or convention to which they pertain” (emphasis added).

Accordingly, PCFB staff recommends that the draft regulations be clarified to provide that the retention period for campaign records be five years from the date of the election.

## Private Citizen

### Spending Public Funds Post Election on Treasurer

The draft regulations provide that a participating committee may only make post-election expenditures with public matching funds “for routine activities involving nominal cost associated with closing a campaign and responding to the post-election audit. Such post-election expenditures shall be made as soon as practicable but no later than 60 days after election day unless specifically authorized by the PCFB.” A private citizen commented that such an exception should be made in retaining the committee treasurer, who will be needed to close out the committee.

PCFB staff believes that there is already flexibility to retain a treasurer via the audit provisions, and the fact that the PCFB could approve such spending 60 days after an election.

### Spending Public Funds 60 Days After an Election

To the extent the regulations limit spending after an election, a private citizen questioned spending of public funds would be limited after a “primary” election, or whether “election” refers to the “general” election.

As the audit process does not begin until after the general election, and as the election cycle does not end until after the general election, the PCFB staff is interpreting the 60-day limitation to occur after the general or special election day. Accordingly, PCFB staff is suggesting new language to clarify this interpretation.

# Campaign Legal Center

## Contribution Card

### Comment

"Clarify the format of and information collected in "contribution cards" in § 6221.16(c)(ii)."

"(N)either the 2022 Election Law nor the revised draft regulations define or describe the 'contribution card' required or the specific information and format it must follow.

Without further description or guidance as to the format and required information for contribution cards, the affirmative requirement for campaigns to provide "a fully completed contribution card with each contribution reported" in § 6221.16(c)(ii) may result in confusion for campaign treasurers seeking to comply with the law. CLC recommends the PCFB's final regulations align the required content of contribution cards with the information participating.....

Other jurisdictions implementing similar programs provide models for the PCFB to consider. For example, both New York City and the District of Columbia require contribution cards as a part of their public financing programs and provide clear requirements for each card in their regulations....

CLC recommends the PCFB's final regulations align the required content of contribution cards with the information participating candidates already are required to collect for contributions and further that the contribution cards include a signed affirmation from the contributor that the contribution is from the contributor's personal funds and is being made voluntarily without any reimbursement or receipt of anything of value in exchange for the contribution."

### Response

The regulations have been amended to include information that is required to be on the contribution card, along with a required affirmation signed by a contributor.

## Clarify the attribution requirements in § 6221.33

### Comment

CLC recommends clarifying § 6221.33 in the PCFB's revised proposed regulations. The section constitutes a single line, which reads "Political communications shall comply with the attributing requirements," without further context or elaboration.... Without clarification, there may be confusion for participating candidates as to what is required by this provision.

## Response

PCFB staff has recommended amendments to the draft to clarify this provision by stating: "Political communications shall comply with the attribution requirements in Election Law 14-106."

## Two Private Election Law Attorneys

### Process of Registering a Campaign

#### Comment

Registration (slides 4-6)

There is still a problem as to what comes first, the chicken or the egg?

Why can't the bank be the last stop? o A better procedure would be for campaigns to enroll, then open bank account. Banks often require documentation showing a Campaign is registered with their respective board.

- Are the application and the certification two different things?
- Do campaigns still have to file the CF-02? o Is the Type 1P form a replacement for the CF-02?
- o Does it constitute an amended registration for current campaigns?

#### Response

The state process is derived from Election Law § 14-118(1) which states that a committee must first register with the Board and identify, amongst other things, the name and address of the depository to be used. This process is outlined in section 14-118 of the Election Law:

No officer, member or agent of any political committee shall receive any receipt, transfer or contribution, or make any expenditure or incur any liability until the committee shall have chosen a treasurer and depository and filed their names in accordance with this subdivision. There shall be filed in the office in which the committee is required to file its statements under section 14-110 of this article, within five days after the choice of a treasurer and depository, a statement giving the name and address of the treasurer chosen, the name and address of any person authorized to sign checks by such treasurer, the name and address of the depository chosen and the candidate or candidates or ballot proposal or proposals the success or defeat of which the committee is to aid or take part.

As such, a committee can first register, identifying the name and address of the bank, and then open the bank account. The issue is one of what activity can take place before registering and opening the account. The statute states what is prohibited before doing so. It should be noted

that the registration form does not require the disclosure of a bank account number (that will be disclosed when a committee applies to the program). If a committee cannot open a bank account because the bank requires the committee to register with SBOE first; then a committee may first register and indicate the bank it intends to use, then open the bank account once the committee is registered.

The application and certification are technically two different things but are contained in the same form. As to the CF-02, the participating candidate's committee is required to file a derivative form (PCF-21 Type 1P) which will serve the same function. It would not constitute an amended registration. The former committee for the same office would need to be terminated and legacy funds transferred to the new authorized committee to be used for the program.

## Self-Loans

### Comment

Election Law 14-203(1)(f) says in order to be eligible for the public campaign finance program a candidate "May not make and not have made expenditures."

- o Does this mean candidates can never make a loan to the Campaign?
- o What if they made a loan to themselves two months before they joined the program and got private contributions and paid themselves back, what is wrong with that?
- o When candidates are starting out and unsure about whether their campaign is viable, they often may advance a little money for petitions, for a dinner for exploring a run, and/or perhaps a survey
- o This seems to unnecessarily and unconstitutionally restrict candidate spending before they join the campaign finance program.
- Can the spouse of the candidate loan the campaign money?
- o What is "jointly held" property? Can a spouse with their own bank account loan the campaign money?
- Why can't you give the candidate an option to pay themselves back if under three times the contribution limit?
- o If a candidate doesn't necessarily want to give their campaign that much money, but decides to "loan" their campaign 3x the contribution amount to make sure the Campaign stays afloat, but then they are able to repay themselves some or all of the loan, and then treat the rest as a contribution--- what's wrong with that?, and is able to repay themselves
- Any loan outstanding on day of the election becomes contribution and may be penalized for being over the limit, therefore why can't a Candidate self-loan, knowing the penalties after election day

### Response

First, it should be noted that the expenditure prohibition is not a discretionary provision found in the draft regulations; rather it is an eligibility criteria found in statute. In other words, if a candidate uses their own funds to further their campaign, they are ineligible for the program.

Statute does provide an exception, where a candidate may make a contribution to their authorized committee in an amount that does not exceed three times the applicable contribution limit from an individual contributor for the office. (14-203(1)(f)). It is the Board's interpretation that a candidate may loan their committee funds; but such loan cannot exceed three times the individual contribution limit. Loans greater than that would make the candidate immediately ineligible to receive public funds. Public funds cannot be used to repay such loans, and any outstanding amount could be forgiven and would be deemed a contribution to the campaign, subject to applicable contribution limits.

As the candidate would need to register a brand-new committee for purposes of participating in the program, the committee that received the loan would need to pay the loan off before terminating. It would be the obligation of the prior committee.

As to the advance of funds for petitioning etc., the candidate can either make a direct or in-kind contribution or deem the expenditures as an outstanding obligation of the committee to be repaid or forgiven as the case may be at a later date, as long as such is properly documented.

In relation to spouses, statute provides a candidate may not make an expenditure from: "(their) personal funds or property or the personal funds or property jointly held with (their) spouse, or unemancipated children in connection with (their) nomination for election or election to a covered office(.)" Accordingly, if there are funds that are not jointly held by a spouse or unemancipated children, such funds would not be subject to this expenditure limit. So, the spouse could make a loan from such funds, subject to the loan repayment provisions of 14-114(6). Again, this is a statutory requirement, where the PCFB has no discretion.

## Claiming Matching Funds

### Comment

(In a presentation) you mentioned PayPal, Apple Pay, Venmo and ActBlue, in relation to being a hurdle to overcome in accepting contributions. We understand PayPal, Apple Pay and Venmo, but why ActBlue?

- o ActBlue, WinRed, Stripe, etc. all have the capability of confirming that the contributor's information matches theirs (the CFB has had this requirement for quite some time now).

Therefore, what's the ActBlue issue?

- o We would like to help to overcome the other providers (PayPal, Venmo, ApplePay), but aside from getting special affirmations from the contributors, we are unsure of ways to accept these payments.

- o How are you going to deal with Zelle and other providers similar to that platform?

### Response

The PCFB has been in contact with ActBlue and is confident that ActBlue will be able to provide required information related to the identification of contributors. Subsequent meetings will be



had to finalize a process in getting this information. The PCFB also plans on reaching out to similar third-party platforms (e.g., WinRed and Stripe).

In relation to other platforms, (Venmo, PayPal, etc.), a contribution card will be required when accepting these contributions.

## Sources of Funds

### Comment

#### Buckets

- People are not going to get this, especially not the treasurers.
  - One bank account is going to cause bookkeeping to be too complicated for lay treasurer. Keeping tracking of which money from which imaginary bucket is being spent will be next to impossible and will cause confusion and inadvertent violations.
  - Generally this needs to be fleshed out and explained much better if anyone on a campaign is going to understand, since this appears to be a very big part of the program.
- Relying on purpose codes will not work. For example, a purpose code for petitioning could mean paying for a petitioning operation, paying petitioners, printing petitions, or even attorney/consultant fees related to petitioning, etc.
  - Some of the “petitioning” process might be a qualified expense and some not be, so how do you distinguish if you rely on the purpose code.
  - One purpose code could legitimately be assigned to more than one bucket.
  - Some retainers could be assigned to different buckets and some have multiple parts that will belong in different buckets. Some contingencies in agreements won’t be activated at all, or until much later in a campaign.
- While a lot of this will rely on what purpose codes are used, generally, we do not believe that heavily relying on purpose codes to ultimately decide where a campaign can spend its money, is realistic.
- Enforcement
  - The legacy funds—old campaign account is under NYS BOE enforcement division
  - The contributions and public matching funds are in new account and under PCFB enforcement.
  - This creates problems. Without two bank accounts it will be very difficult to comply with proper use of funds. There will be great confusion that the imaginary “buckets” concept does not solve.
    - Yet with two bank accounts, you are setting the campaign up for accusations of comingling funds.
  - The best solution is to have campaigns agree that, if they are a participant, legacy accounts are under the review of the PCFB. Keep the legacy funds separate.
- The NYCCFB method where old legacy funds are transferred into single current account and are checked for compliance with all rules is better for participants. Then all the money is treated the same.

- Please explain or elaborate on how you see these funds being used. How will campaigns know which bucket to properly use? (This is unnecessary if the bucket concept is eliminated under either of the above suggestions).
  - Will there be audits to make sure the buckets are being properly allocated?
- This entire bucket system is going to raise a lot of questions by campaigns, and those questions will need quick responses.
  - Who is going to answer these questions and when?
  - NYCCFB has candidate services/liaisons. Will PCFB have a similar program?

## Response

This comment’s discussion of “buckets” is a reference to a graphic contained in a PCFB informational slideshow designed to illustrate the function of Election Law 14-203(1)(i)(iii), 14-206(1), and regulations 6221.10, 6221.14, and 6221.24. It may be helpful to disregard the “buckets” metaphor for a moment and illustrate here the interplay between this statute and these rules.

Election Law 14-203(1)(i)(iii) provides that participating candidates can keep funds raised in previous election cycles, which funds the PCFB has referred to as “legacy funds.” A second source of funds is contributions raised in the election cycle in which the candidate is participating in this program, whether matchable or not. And finally, a third source of funds, assuming the candidate qualifies, is the public matching funds paid to the candidate.

This commenter identifies an issue considered by the PCFB in drafting these regulations: should the committee be required to keep all its funds in one bank account, or to keep public funds segregated from the other two types of funds, in a separate bank account? On one hand, this might be easier for a treasurer to manage, because they would not be required to keep two separate tallies—one of their contributions and legacy funds, and one of the public matching funds they receive. On the other hand, as the commenter points out, having two accounts may in fact complicate matters by introducing the danger of comingling funds.

The PCFB weighed these two approaches and chose the latter approach—to permit a committee to have one bank account (however, a committee could choose to have more than one bank account). For one thing, accounting by the treasurer is not as complicated as it might seem at first glance. As far as the first source of funds, legacy funds, this number would not change over time. The treasurer would merely note the amount and would not be required to tally any further additions. For contributions, the treasurer would be required to tally and account for all of the committee’s contributions, which is not an overly burdensome task and is an acceptable expectation of a treasurer. Finally, the treasurer would have to account for the public matching funds the campaign receives—a task that was decided is not too burdensome given the importance of carefully handling public funds.

Another consideration that weighed in favor of permitting one bank account was the relative ease of administration for PCFB and NYSBOE staff compared to requiring multiple accounts, based on those staffers’ past experiences with administering campaign finance compliance.

Because there are limitations on how each source of funds can be spent—public matching funds can only be spent on “qualified campaign expenditures,” **and the “surplus” equation makes it such that one would want to separately track non-campaign expenditures, such as transfers to other committees**—a system for tracking the use of each source of funds was decided upon. This system has been referred to by staff and in this comment as “purpose codes.” This system is not yet articulated in the regulations, nor does it have a basis in statute. Rather, this requirement would fall under 6221.14(7), “such other information as the PCFB may require,” and further guidance would be provided to campaigns prior to the start of the program.

“Purpose code” as it has been used by PCFB staff must be distinguished from the requirement in 6221.14(3). Subsection three would require all of the details that the commenter points out in this comment. “Purpose codes” under subsection seven would entail only three codes, each of which would indicate only one thing—which source of funds (“bucket”) the expenditure was made from. So “purpose code” could also and perhaps more accurately be called “source code.” This comment also expresses concern about the potentially complicating matter of legacy funds being under the jurisdiction of NYSBOE’s Enforcement Division, while new funds are under the jurisdiction of PCFB enforcement. 6221.10(a) specifies that contributions from past election cycles become “legacy funds” on the date of the election for the election cycle in which those contributions were raised. So, if the conduct occurred in the election cycle prior to their participation in the program, the conduct would not concern legacy funds, and it would be within the Enforcement Division’s jurisdiction. The focus for enforcement jurisdiction, in other words, is the timing of the conduct underlying the violation. If the conduct occurs in the election cycle in which the candidate applies to the program, it will fall under PCFB Enforcement’s jurisdiction.

“Please explain or elaborate on how you see these funds being used.”

Campaigns must use public funds only for “qualified campaign expenditures.” *See* Election Law section 14-206. Given the effect of the surplus repayment requirement, a campaign would likely want to use their public matching funds for these expenses. So, any time the campaign makes an expenditure for a qualified item, they can mark it with a “purpose” or “source” code as coming from public matching funds.

Likewise, candidates are incentivized to make expenditures using contributions and legacy funds and mark them accordingly in a manner that will result in the lowest surplus repayment.

There will be auditors reviewing committee disclosure statements and guiding committees on proper compliance as necessary.

## Copies of Checks

### Comment

Staff may have a misunderstanding about bank policies. Not all banks provide copies of canceled checks. Some provide copies upon special request and others do not provide them at all. This will have to be made clear to campaigns.

It is not common for all banks to provide copies of cancelled checks either online and/or on the statements. PCFB needs to make sure that Campaigns know of this requirement and pre-clear their bank of choice. This may be a problem if the only local bank that will open a campaign account does not routinely provide check copies.

## Response

The PCFB understands the concern; however, copies of canceled checks are necessary for the PCFB to perform its review and audits of the committees. Notably, this is a similar requirement in New York City's Campaign Finance Program (*See Campaign Finance Handbook, 2021 Election Cycle, Version 3, January 2021, Chapter 1, Page 2*, stating: "Make sure the bank will give you the front and back of canceled checks"—this is a basic CFB requirement. Either a physical canceled check or a scanned image of the front and back of the canceled check is acceptable). Additionally, campaigns are required to keep copies of all checks upon receipt for record keeping purposes.

The PCFB will take great efforts in trainings, guidance documents, and in its handbook to inform campaigns of this requirement.

## LLC Attributions/Affiliated Contributions

### Comment

- (h) “within 7 business days of receipt” ..... “receipt” of what?
- This should be within 7 business days of receipt of PCFB notice.

### Response

The regulations have been amended to provide that an over contribution that is attributable to an LLC may be returned within seven business days of receipt of notice by the PCFB.

## Competitive Candidate Criteria

### Comment

What if I don't have an opponent in the primary and there no other primary in another party. However, the candidate in the other party has a ton of money and is already campaigning and spending. Under this plan, a candidate could be outspent by their general election opponent in June.

- The competitive candidate criteria currently do not include an opponent's spending volume or self-funding in advance of a general election.
  - o The criteria should include an opponent expenditure threshold.
  - If my opponent is a billionaire who has already spent three times the expenditure limit, I should be able to access all my matching funds

- Criteria #7 should be eliminated. Or should not be applicable to incumbents.

## Response

Per section 92-t of the State Finance Law: "(n) no public funds shall be paid to any participating candidates in a general election any earlier than the day after the day of the primary election held to nominate candidates for such election." Accordingly, the PCFB does not have the authority to make payments for the general election prior to the primary election; even if the general election opponent is outspending the candidate.

While using an opponent's expenditure threshold could be useful in determining the competitiveness of an opponent; current case law precludes using an opponent's expenditures as a trigger to receive public matching funds. (*See Arizona Free Enter. Club's Freedom Club PAC v Bennett*, 564 US 721 [2011] (Arizona's public campaign finance law included a provision that provided matching funds for participating candidates who were outspent by traditional candidates, essentially guaranteeing a level playing field. The Supreme Court's eliminated this incentive by striking down Arizona's triggered matching fund provision)(*see also* Order Pursuant to Fed. R. Civ. P. 54(b) Regarding New York City Administrative Code §§ 3-706(3)(a)(ii), (iii), 3-706(3)(b)(ii), (iii), *Ognibene v. Parkes*, No. 08-CV-1335(LTS)(THK) (S.D.N.Y. Dec. 16, 2011)(Following the Supreme Court's ruling in *Bennett*, the parties entered into an agreement stipulating that the Act's "bonus provisions," which had provided for additional public funds to be awarded to participating candidates opposed by non-participants who spent above a certain threshold, were unconstitutional and would not be enforced).

Regarding Criteria #7, which provides that a candidate is entitled to one hundred percent of public matching funds if their opponent is eligible to receive funds, the PCFB believes this provision is equitable and is keeping this criteria.

## Lottery

### Comment

When a campaign has already once been audited, is their "bingo ball" removed, or is your 1 bingo ball always in the machine, it's just if you aren't audited, you get an extra bingo ball put into the machine?

o Therefore, is it possible that a campaign can be audited back to back?

o For the record, we agree with keeping the bingo ball in the machine and just add other bingo balls to it. This way, a campaign will always be at risk, albeit a lower risk, of being audited and won't slack off.

### Response

The purpose of the lottery system is to ensure districts where campaigns receive less than \$500,000 in public matching funds are selected randomly for an audit. Statute requires that the PCFB weigh the lottery to ensure districts that have not previously been selected for a lottery have an increased chance of being selected. A district that is selected for an audit will not have its corresponding number removed in a subsequent lottery; rather, districts that have not been

selected will have an increased chance of being selected. Under this system, every district has some risk in being audited, which, as a public policy, helps remove the incentive to violate the program provisions as there will always be a chance of being selected for auditing.

## Repayments

### Comment

- When calculating campaign expenditures and what should be repaid, are these actual campaign expenditures or proper campaign expenditures?
- Is the repayment what is actually left in the bank account or a calculation of what should be left in the bank account?

### Response

Pursuant to Election Law § 14-200-a (19), the term ‘surplus’ is defined as “those funds where the total sum of contributions received, and public matchable funds received by a participating candidate and (their) authorized committee exceeds the total campaign expenditures of such candidate and authorized committee for all covered elections held in the same calendar year or for a special election to fill a vacancy.” Statute further requires that a candidate having surplus funds must reimburse the program fund any such surplus (Election Law § 14-208(2)(c)).

Ultimately, the surplus can be reduced to the following equation: [(all contributions) + (public matching funds received)] – [total campaign expenditures] = Surplus.

For purposes of the public campaign finance program, "expenditure" is defined as follows: “The term ‘expenditure’ shall mean any gift, subscription, advance, payment, or deposit of money, or anything of value, or a contract to make any gift, subscription, payment, or deposit of money, or anything of value, made in connection with the nomination for election, or election, of any candidate. Expenditures made by contract are deemed made when such funds are obligated.” Election Law 14-200-a (7).

Accordingly, for purposes of calculating the surplus that a campaign has to pay back to the fund, expenditures must relate to the candidate's campaign. Spending funds for purposes of holding a public office (e.g., constituent services, furniture for the district office, etc.) will not offset the surplus payment; neither will contributions to another candidate. Public funds cannot be used for such purposes.

## Credit Card Contribution Refunds

### Comment

We believe the PCFB staff isn't understanding the volume of credit card contribution refunds that happen

- o Many times, a contribution themselves will ask for a refund straight from the credit card company
- o Other times, especially if it was an erroneous recurring contribution, the contributor will request the refund back to their card
- o Lastly, due to timing and contributor's requests, Campaigns have no choice but to refund back through the credit card
- These types of refunds do happen, especially on larger campaigns, and the PCFB should set a procedure for these types of refunds

## Response

The draft regulations have been amended to include a process of campaigns making refunds electronically.

## Verbal Contracts

### Comment

- Agreements require a meeting of the minds of two or more parties
- How can the PCFB allow a one-party consent contract and allow public funds to be used for such an agreement?
- o You cannot have an agreement that's not memorialized and agreed upon by both parties
- A campaign could make a contract with an individual with no requirement for performance and just give the money to the individual. Contract documentation does not have to be complicated, but both parties must sign off.

### Response

The purpose of the section in question (9 NYCRR 6221.19(k)(2)) is to outline a process when a campaign enters into a verbal contract with a vendor. There is no requirement that agreements must be reduced in writing unless it falls within the Statute of Frauds (see generally General Obligations Law §§ 5-701, 5-703, 15-301).

The PCFB disagrees that the section in question permits "one party consent" agreements or permits agreements where "performance" is not required.

Generally, an "agreement" is a manifestation of mutual assent by two or more persons (Restatement Second, Contracts § 3). To the extent the comment expresses concern over unilateral contracts, generally, a unilateral contract consists of an offer or promise to do something in exchange for an act. The acceptance of such offer or promise is affected by the performance of the act in accordance with the offer. *Huntington Pennysaver, Inc. v. Tire Supply Corp. of Long Island*, 59 Misc.2d 268 (1969). Accordingly, some performance is required for the contract to be binding. Using funds to pay a vendor for no performance would be a violation

of the program and would result in repaying the program the amount of the expenditure along with an appropriate penalty.