Public Campaign Finance Board

Report on Amended Proposed Regulations and Public Comments

Last year, the Public Campaign Finance Board authorized staff to publish regulations designed to implement the public campaign finance program. These regulations were published in three sets. The first set (the program regulations) provides the basic groundwork of how the program will operate, including provisions related to: certification and registration; eligibility; the respective duties of the political committees and candidates; audits and the lottery system to determine who gets audited; and the repayment of funds. The second set (the debate regulations) outlines the criteria regarding the requirement that statewide candidates who are participating in the public campaign finance program must participate in a public debate. The third set (the enforcement regulations) outlines the enforcement mechanism of the public campaign finance program, which includes a hearing section and a section that sets out a schedule of fines for penalties the PCFB may invoke.

Since publication, almost 200 unique public comments have been received from a variety of entities and individuals. A summary of these comments, along with responses, are attached to the Appendix of this report. As a result of a thorough review of these comments, along with further review of the regulations, staff is recommending many substantive amendments to the initial published draft regulations. Below are the high-level highlights of these proposed changes.

Legislative Background

On December 1, 2019, the Campaign Finance Reform Commission ("CFRC") established by Part XXX of Chapter 59 of the Laws of 2019, sent recommendations to the Governor and Legislative Leaders outlining the parameters of a public campaign finance system to be created within the New York State Board of Elections. As provided by Chapter 59, the recommendations of the Commission "have the full effect of law" unless "modified or abrogated by statute" on or before December 22, 2019. The Commission's report and recommendations were not modified or abrogated by statute and the recommendations became law on January 1, 2020. However, as a result of a March 12, 2020 Supreme Court Decision & Order, the Commission's recommendations were struck down (*Hurley, et al v. The Public Campaign Financing and Election Commission, et al*, No. E169547/2019).

Subsequently, the Governor proposed the Commission's recommendations as part ZZZ of the 2021 Budget Bill (S7508B/A9508B), which were ultimately passed by the legislature and signed by the Governor on April 3, 2020 (Chapter 58 of the Laws of 2020). The public campaign financing provisions, including the new Title II Public Financing provisions, are now law.

Required Regulations Under Title II of Article 14

The PCFB has broad authority to adopt regulations it deems necessary for the administration of Title II, Article 14 of the Election Law (i.e., the NYS Public Campaign Finance Program). Pursuant to Election Law § 14-207(4), "[t]he PCFB shall have the authority to promulgate such rules and regulations and provide such forms as it deems necessary for the administration of this title." Statute does require that such regulations address, at a minimum, a number of specific areas, including: retentions of funds from past election cycles, determining the threshold of competitive candidates, electronic transfer of funds from the state to the candidate, prompt payment of funds during irregularly scheduled elections, certification of amount of funds payable to a candidate and prompt payments thereof.

Additionally, pursuant to Election Law § 14-211, candidates seeking election to statewide office and that are participating in the PCFB program are required to participate in one debate before each election for

which the candidate receives public funds. Statute requires that the PCFB "promulgate regulations to facilitate debates among participating candidates who seek election to statewide office."

Further, Election Law § 14-207(8) provides that the PCFB shall have sole authority to administer the campaign finance program, including investigation of complaints and enforcement of violations. Furthermore, § 14-209(1) provides that the PCFB "shall promulgate a regulation setting forth a schedule of fines for such infractions including those that it may assess directly on violators."

Criteria in Drafting Regulations

Staff used various tools and methodologies in drafting the proposed regulations.

The most obvious tool used by staff is the statutory language of Title II itself. As indicated above, there are several provisions in Title II where the PCFB must adopt rules and regulations.

In determining the intent of the legislature, staff analyzed the text of the statute. Section 14-200 outlines the legislative intent of Article 14. For example, in enacting Title II of Article 14, the legislative objective was to increase public confidence in elections, amplify the voice of small donor constituent contributors, reduce the possibility or appearance of undue influence of high dollar contributors, and address the high cost of running for office, which could discourage qualified candidates.

In relation to specific provisions of Title II, given that the language in Title II of Article 14 of the Election Law is substantially the same as the recommendations of the CFRC, staff has interpreted the meetings of the CFRC as part of the "legislative history" in creating program regulations and requirements. An archive of the CFRC meetings can be found at https://www.youtube.com/channel/UCRAAVrc34z-NDpWkUHpkQhw. These videos have been useful in determining the meaning and purpose of various provisions of Title II.

In many instances, statute gave broad discretion to the PCFB in designing the public campaign finance program.

As noted in *Nicholas v. Kahn*, 47 N.Y.2d 24, 31 (1979):

"The cornerstone of administrative law is derived from the principle that the Legislature may declare its will, and after fixing a primary standard, endow administrative agencies with the power to fill in the interstices in the legislative product by prescribing rules and regulations consistent with the enabling legislation."

The general standard in drafting such regulations is whether the regulation is rational and fits within the program design of the board. *Matter of Catholic Med. Ctr. of Brooklyn & Queens v. Dept. of Health*, 48 N.Y.2d 967 (1979).

Accordingly, staff drafted regulations weighing the reasonableness of its provisions against the design and needs of the program itself, using the expertise and experience of the State Board of Elections. *Id.* As part of its deliberations, staff engaged in extensive research concerning, consultations and meetings with a number of established Public Campaign Finance Programs, including the New York City Public Campaign Finance Board, the State Elections Enforcement Commission Public Financing Unit for the State of Connecticut, as well as programs in the state of Florida, Maryland and New Jersey. Additionally,

staff reached out to various interest groups for their views on potential regulations. Further, in this most recent draft, staff used public comments received to weigh the reasonableness of its provisions.

Staff believes that the above described process amply complies with current administrative law (s*ee Ostrer v. Schenck*, 41 N.Y.2d 782, 786 (1977); *See also Versailles Realty Co. v. DHCR*, 76 N.Y.2d 325 (1990); *Molina v. Games Management Services*, 58 N.Y.2d 523 (1983); and *New York State Chapter v. N.Y.S. Thruway Authority*, 88 N.Y.2d 56 (1996)) and ultimately resulted in an improved draft of the regulations.

Program Regulations

Registration and Certification

The PCFB received several comments related to how a candidate registers and applies to the public campaign finance program. There was confusion as to where a candidate registers their committee, and where the candidate applies to be in the program (i.e., the interaction by participating candidates concerning these functions with the SBOE and the PCFB) The proposed regulations have been amended to clarify this process.

By way of background, Election Law 14-201 provides that "(b)efore receiving any contribution or making any expenditure for a covered election, each candidate shall notify the PCFB as to the existence of (their) authorized committee that has been approved by such candidate. Each candidate shall have one and only one authorized committee per elective office sought. Each authorized committee shall have a treasurer."

In turn, 14-203(d) provides that in order to be eligible for the program, a candidate must file a certification agreeing to the terms and conditions of the program "at least four months before a primary election and on the last day in which a certification of nomination is filed in a special election pursuant to a schedule promulgated by the PCFB."

Further, 14-201(14) defines participating candidate as "any candidate for nomination for election, or election, to the office of governor, lieutenant governor, attorney general, state comptroller, state senator, or member of the assembly, who files a written certification in the form determined by the PCFB;" and defines nonparticipating candidate as: "a candidate for a covered election who fails to file a written certification in the form of an affidavit pursuant to these recommendation by the applicable deadline."

Accordingly, statute provides that a participating candidate must notify the PCFB of their authorized committee prior to accepting contributions or making expenditures, and must certify to the terms and agreement of the program four months prior to the primary election. Further, a candidate is not considered a participating candidate until a certification is filed.

Staff initially considered requiring candidates to apply and file a certification when they register their committee. However, it is recognized that candidates may not wish to apply to the program until they are sure they want to participate. Perhaps a candidate wants to feel out the process of raising small donor contributions, or measure support in their local community before joining the public campaign finance program. Given this, it appeared unjust to require certifying to the program prior to the deadline of four months prior to the primary as stated in statute.

To facilitate compliance with these statutory requirements, staff determined that the best policy was to require candidates interested in the program to register a new committee. Candidates will accomplish this by registering a new PCFB authorized committee, using a form designed by the PCFB, with the State Board of Elections. This, in effect, will notify the PCFB of the existence of the candidate's sole authorized committee and allow for necessary outreach to interested candidates registering this type of authorized committee.

Participating candidates with legacy committees which were previously created to raise and expend money in relation to seeking the same covered office that the candidate is currently seeking (incumbents) will be instructed to transfer their funds to the new committee and terminate their old committee. If the old committee cannot be terminated due to compliance issues, the committee will be placed on administrative hold while the account of the old committee is rectified.

Subsequently, a candidate will certify to the terms and conditions of the program via an application process. Campaigns will be encouraged to apply for the program as soon as possible; however, per statute, the application deadline is not until four months prior to the primary. A candidate is not considered "participating" until the application and certification is filed.

In instances where a campaign has registered a committee, indicating interest in the program, but has not yet applied, our program is going to reach out to the campaign throughout the election cycle, up until the deadline, reminding them that their campaign is not part of the program until an application is filed.

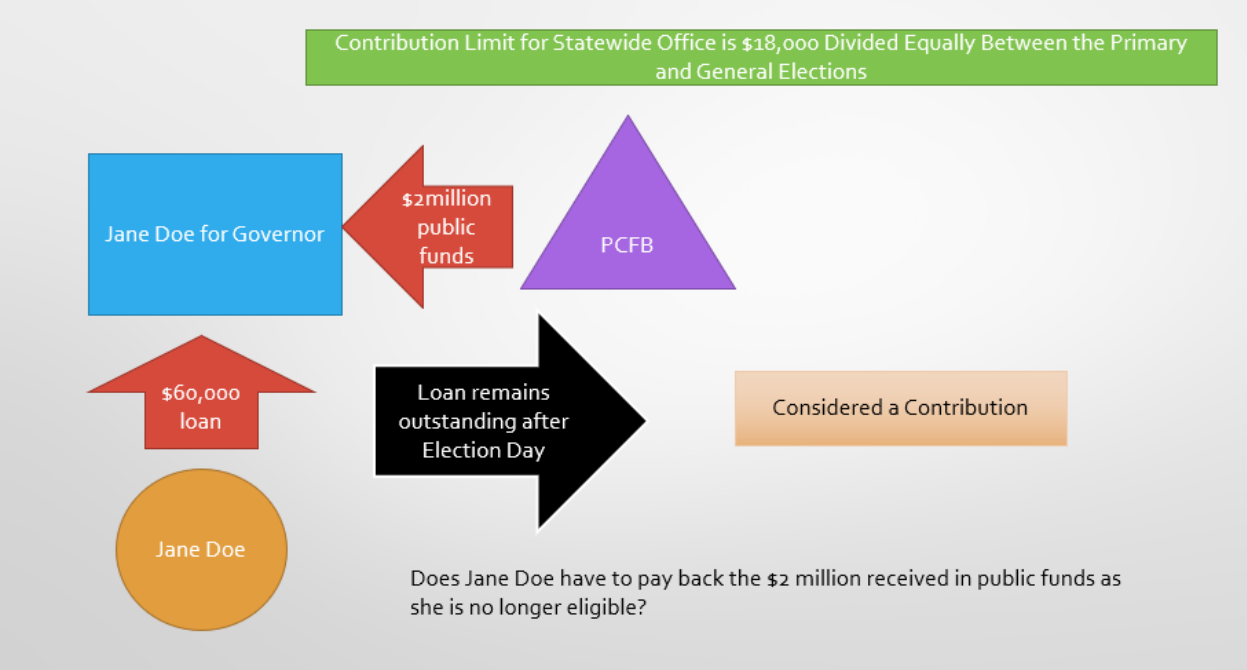
Loans

The PCFB also received comments regarding types of loans a committee may receive.

Election Law 14-203(1)(f) provides in order for a candidate to be eligible for the public campaign finance program, the candidate can “not make, and not have made, expenditures from or use his or her personal funds or property or the personal funds or property jointly held with his or her spouse, or unemancipated children in connection with his or her nomination for election or election to a covered office, but may make a contribution to his or her authorized committee in an amount that does not exceed three times the applicable contribution limit from an individual contributor to candidates for the office that he or she is seeking.”

This provision is challenging with respect to candidates that loan themselves funds, as loans that are not paid back by the date of the election are considered a contribution, for purposes of this program. Chart 1 below, based on a hypothetical, highlights this issue:

Chart 1



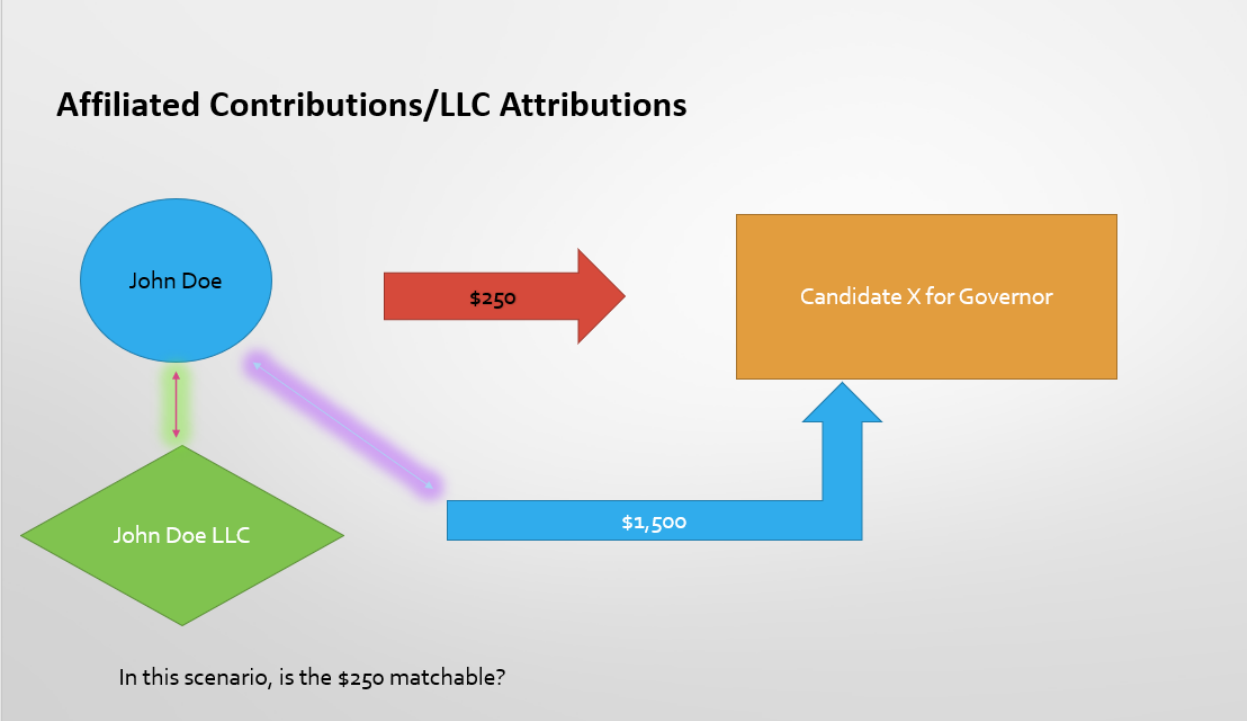
Here, Candidate Jane Doe loaned $60,000 for her campaign for governor. As the contribution limit for governor is $18,000 divided equally between the primary and general elections, this is clearly over three times the individual contribution limit. Further, for purposes of our example, the committee was able to secure $2 million in public matching funds. By the date of the election, the committee failed to pay back the loan. Is the $60,000 loan considered an expenditure under Election Law 14-203(1)(f), or is it considered something else? As the $60,000 is now considered a contribution, rendering Jane Doe ineligible for the program, does Jane Doe need to pay back the $2 million in public funds, or should some other penalty be issued?

In order to keep within the spirit, if not the letter, of Election Law 14-203(1)(f), staff determined the best course of action was to limit the amount of funds a candidate can loan themselves to three times the individual contribution limit. This way, a candidate would not find themselves in the above situation, and the PCFB will not be put in a situation where a candidate that was ineligible to receive funds is given funds which are spent and cannot be repaid.

Affiliated Contributions/LLC Attributions

PCFB staff received several comments related to affiliated contributors, or how Limited Liability Company ("LLC") contributions affect matchable contributions. In other words, what happens when an individual contributes a small level matchable contribution between $5-$250, but also has their LLC make a contribution. Chart 2 below highlights this concern.

Chart 2



Here, John Doe contributed $250 to "Candidate X for Governor." John Doe, who is also a sole principle of John Doe LLC, had his LLC contribute an additional $1,500 to "Candidate X for Governor." Election Law 14-120(h) requires contributions made by LLCs, and certain contributions made by partnerships, to be attributable to an individual. The proposed regulations now provide that any attributable contribution by an individual shall be used to calculate the $250 matchable limit. As such, John Doe's $250 above is not matchable, because the $1,500 LLC contribution is attributable to John Doe, which exceeds the $250 matchable limit.

Competitive Candidate Criteria

Election Law 14-205(4) provides that “Notwithstanding any provision of this section to the contrary, the amount of public funds payable to a participating candidate on the ballot in any covered election shall not exceed one-quarter of the maximum public funds payment otherwise applicable and 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 the participating candidate is opposed by a competitive candidate. The PCFB shall, by regulation, set forth objective standards to determine whether a candidate is competitive and the procedures for qualifying for the payment of public funds.”

New York City has a similar requirement in its program. As such, in our original draft, we emulated the criteria found in NYC's law However, there were several comments indicating that NYC's standards are overly complicated and not entirely objective. Further, commenters have noted that the NYC Campaign Finance Board has advocated for new standards to simplify the process. Accordingly, we have amended the competitive candidate criteria to better reflect the NYC Campaign Finance Board's proposed criteria.

Number of Bank Accounts a Committee Must Have

Several comments were made regarding the number of bank accounts a committee is required to have. Per statute, the use of public campaign funds is more regulated than regular campaign funds. Staff initially thought that public campaign funds cannot be comingled with other funds, as it may be difficult to track how funds were spent.

However, upon further deliberation, staff has determined that the spending of funds can be used via a purpose code in disclosure statements, and would likely be less of a burden on treasurers. Under this proposal, campaigns will have to track their expenditures using three different purpose codes; 1) expenditures made with contributions; 2) expenditures made with public funds; and 3) expenditures made from transferred legacy funds from a previous campaign.

By using these purpose codes, PCFB staff will be better able to audit and enforce statutory requirements on the relevant expenditures.

Repayment of Surplus Funds

Pursuant to Election Law § 14-200-a(19), the term 'surplus' is defined a "those funds where the total sum of contributions received and public matchable funds received by a participating candidate and his or her 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).

Statute does not contemplate use of transferred (legacy) funds in the calculation of surplus. The only funds that would be used to calculate the amount a candidate shall be required to repay is those contributions received during an election cycle and matching funds received from the state. If the total campaign expenditure is less than the sum of the contributions received plus the matching funds received, the candidate/committee must repay such remaining funds to the program fund in an amount not exceeding the total matching funds provided to the candidate.

Debate Regulations

Lieutenant Governor Candidates

The PCFB received a comment stating " the draft regulation does not explain how the debate rules apply to candidates for lieutenant governor, who run on their own in the primary, but on a party ticket in the general election. The debate eligibility threshold is set as a percentage of the public funding limit, and the statute sets that limit for governor and lieutenant governor combined. Therefore, the regulation should clarify how candidates for governor and lieutenant governor in the general election can meet the threshold. The same issue applies to special elections."

Pursuant to this comment, the proposed regulations were amended to reflect that candidates in a general or special election running on a single ticket for governor and lieutenant governor from the same party shall each be deemed to satisfy the criteria if either of them does or if both of them together do.

Translation of Debate Transcripts

The PCFB received several comments stating that the translation of the debate transcripts, which will be available on the PCFB website, should be available in languages other than English and Spanish. Accordingly, the proposed regulations have been amended to require that the transcripts be translated in the twelve most common non-English languages spoken by individuals with limited-English proficiency in the state of New York.

Debate Sponsorship Not a Contribution

The PCFB received a comment that the proposed regulations did not explicitly state that an organization's role as debate sponsor is not a contribution to the candidates at the debate. According to the comment, strict reading of the definition of "contribution" in the Election Law could lead to the interpretation that the debate sponsor, by featuring candidates in a public forum, is contributing a "thing of value." Accordingly, the proposed regulations have been amended to clarify that sponsoring a debate shall not be considered a campaign contribution.

Accessible Debate Locations

The PCFB received several comments requesting a requirement that debate sites be physically accessible to individuals to individuals with disabilities. Accordingly, the proposed regulations are amended to add such requirement.

Enforcement Regulations

Enforcement of the rules and regulations public campaign finance program is of great importance. Rules and regulations are only as effective in so much as they can be enforced. Further, effective enforcement protects the public fisc; assists with compliance; promotes electoral integrity; and promotes confidence in our electoral system.

Jurisdiction

Statute provides that the PCFB shall enforce the provisions of the public campaign finance program and, where warranted, issue fines and penalties. The PCFB received several comments that the jurisdiction of the PCFB in our proposed regulations was not clear on when the PCFB has jurisdiction over candidates. For example, the Brennan Center stated:

> "It is important to make explicit that participating candidates will not face double jeopardy for an alleged violation of Title I by being subject to enforcement from both the PCFB and the State Board of Elections ("BOE"). The draft regulations do not make explicit this division of enforcement powers between the PCFB and the BOE. Yet the structure of the statute contemplates that the PCFB will enforce all campaign finance law against participating candidates (both Title I and Title II of Article 14), while the BOE will continue to enforce Title I against nonparticipating candidates. This means that the BOE will not engage in any enforcement of campaign finance violations with respect to participating candidates, whether related to public financing or not."

For the reasons stated below, PCFB staff agrees that two entities cannot investigate and enforce against the same campaign at the same time.

Statutory Language Gives Sole Authority to the PCFB

Election Law 3-104(1)(a) provides "that the chief enforcement counsel shall have sole authority within the state board of elections to investigate on his or her own initiative or upon complaint alleged violations of (the Election Law) and all complaints alleging violations shall be forwarded to the division of election law enforcement."

However, Election Law 14-207(8) provides for an exception to this authority, providing: "(n)otwithstanding any other provision of law including, but not limited to, subdivision one of section 3–104 of this chapter, the PCFB shall have **sole authority** to investigate all referrals and complaints relating to the administration of the program established hereunder and violations of any of its provisions, and it shall have sole authority to administer the program established in this title and **to enforce such provisions of this program** except as otherwise provided in this title" (emphasis added).

Article 14 consists of two titles; Title I (which entails general campaign finance provisions) and Title II (which establishes the public campaign finance program. Title II of Article 14 requires that a participating candidate comply with all of the provisions of Title I in order to participate in the program. (*e.g.* see Election Law 14-201(3); 14-202; 14-203(f) and (i); 14-208(1); and 14-209(1). Once a violation is found, the PCFB is empowered to directly fine campaigns, including violations found in Title I. *See* 14-209(1). Accordingly, the "provisions" of Title II inherently captures Title I in its entirety.

Legislative History

As indicated above, PCFB staff has used the transcript of Campaign Finance Reform Commission meetings as legislative history.

The clearest explanation of the legislative intent can be found during the November 25, 2019 meeting, where Commissioner Berger stated: "(t)he PCFB shall have sole authority to investigate all referrals and complaints relating to the administration of the program and shall have sole authority to administer the program established here, and if some of such provisions except as otherwise provided here in**, and that deals with the additions that were made a couple years ago about creating an Enforcement Counsel. We're saying this is not part of the Enforcement Counsel's job. It's solely the PCFB's job here."** *See* https://www.youtube.com/watch?v=fbImmIKdzvA&t=1921s at 48:39.

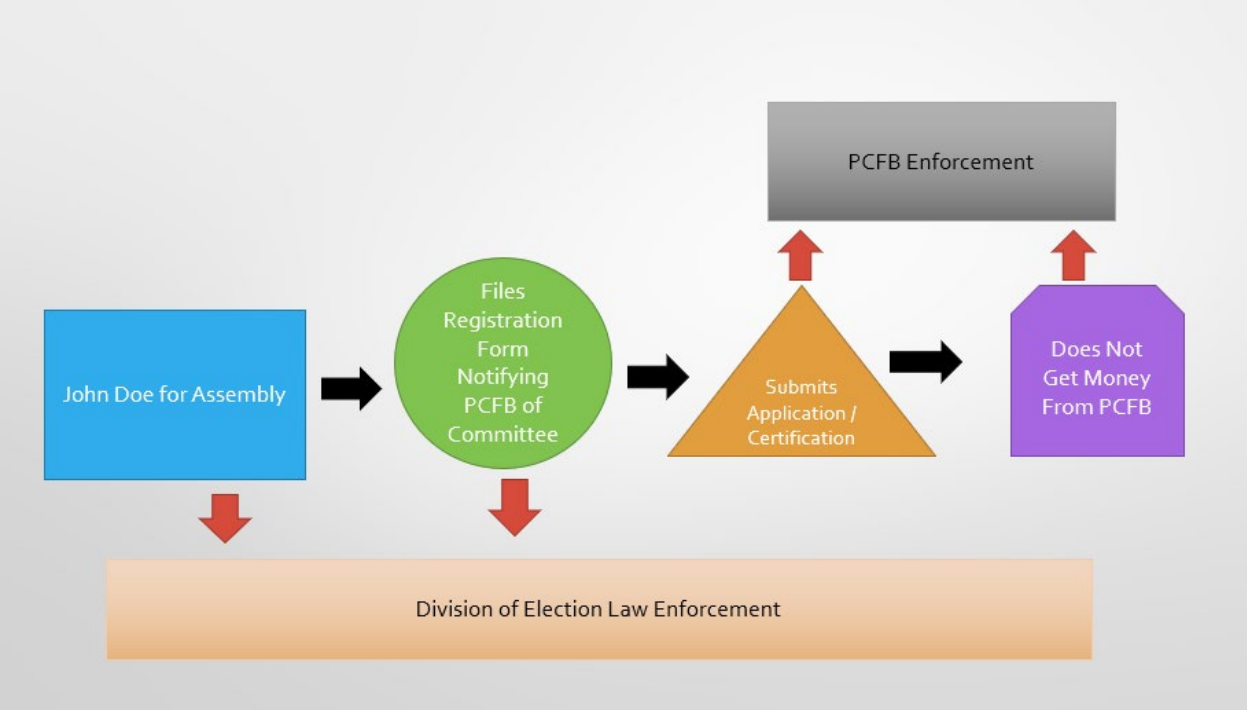
This intent was echoed in an earlier meeting, where Commissioner Berger stated: "(The PCFB) should have the authority to impose and enforce penalties. **That board should not have to rely on the enforcement counsel for anything**. They should have the authority to administer this program and control how it works. The city campaign finance board does that and it works tremendously well." *See* https://www.youtube.com/watch?v=0MTdao0CI6c&t=3953s at 1:06:05.

The above transcripts make it clear that the intent of the commission when drafting the recommendations that ultimately became Election Law 14-207(8) was to provide the PCFB with the sole authority to enforce the entirety of the public campaign finance program.

PCFB Enforcement Only Applies to Participating Candidates

It should be noted that the PCFB only has jurisdiction over participating candidates during the election cycle in which they are running. The CEC would retain jurisdiction over any candidate up until that candidate has filed an application and certification with the PCFB, even if the candidate filed a registration form notifying the PFCB of their sole authorized committee. Chart 3 outlines this jurisdiction.

Chart 3



Additionally, the CEC still has jurisdiction over candidates and committees from previous election cycles, where the candidate was not a participant of the public campaign finance program. Again, staff is recommending a process where candidates with a legacy committee for a covered office must create a new committee if they want to participate in the program. This process will make clear that the CEC continues to have jurisdiction over the former committee, while the PCFB will oversee the new PCFB committee.

Cure Period

The original proposed regulations required the PCFB to notify campaigns of an alleged violation and gave campaigns 45 days to work with the PCFB to cure or explain the alleged deficiency or violation. The goal of this provision was to encourage compliance among the participating campaigns. The PCFB received several comments that the 45-day period is too long. The Brennan Center, for example, recommended: "reducing this to 30 days, with an option to extend the deadline another 30 days if the candidate shows they need more time." According to the Brennan Center, " This change would encourage greater efficiency in the compliance process while enabling more time for lesser-resourced campaigns if they should need it. That is how New York City's Campaign Finance Board's draft audit

review works, for example." PCFB staff also further considered the practical application of the original 45-day period and determined it was impractical and untenable.

Accordingly, the PCFB staff recommends reducing the cure period to 30 days, with an option to extend the deadline another 30 days if the campaign shows they need more time. Staff also recommends that such cure periods should not apply to failure to file a financial disclosure statement; or the repayment of funds where a campaign received funds they were not eligible to receive.

Confidentiality of Complaints

The proposed regulations create a process for the PCFB to receive and act on formal complaints alleging violations of the public financing law. The PCFB received a comment advocating that the regulations should clarify that the PCFB keep such complaints confidential. The comment argues that confidentiality for unsubstantiated allegations is important, to keep the complaint process from being abused as a political weapon and to avoid premature negative publicity for candidates. In response to this comment, the proposed regulations have been amended to provide that the PCFB shall "keep confidential all complaints, notice to candidates, candidates' answers, and facts about investigations related thereto." However, this requirement applies to the PCFB only, it would not prohibit an individual that made a complaint from making such accusations public.

Statute of Limitations for Complaints

In relation to the timing of the filing of a Complaint, the PCFB received a comment stating: "What if a campaign commits a violation worthy of a complaint in January of 2023 and wins in June of 2024, and the loser files a complaint July of 2024 against the winner, is that allowed? How long after the election can one file a complaint? There should be time limits."

Accordingly, the proposed regulations were amended to add the following provision: "(C)omplaints shall be made no later than three years of the alleged conduct."

Appendix

Listing of Public Comments of Program Regulations

NYC Bar Association

COMMENT 1

6221.1 Definitions: Election day should be defined as day the election is certified by a vote of the commissioners in the relevant board of elections. AND Define certification of election.

RESPONSE

Statute defines the date elections shall be held. A primary election must be held on the fourth Tuesday in June before every general election unless otherwise changed by an act of the legislature. *See* Election Law § 8-100(1)(a). The general election must be held annually on the Tuesday next succeeding the first Monday in November. Defining "election day" as the date of certification of a board of elections would be contrary to statute.

COMMENT 2

6221.1(f) Election Cycle

- When does the election cycle begin? Does the election cycle start the day after the election or at the beginning of the disclosure period for the July periodic after the election? Is the January periodic disclosure following an election for reporting activity for the prior election or for the next election?
- Are campaigns allowed to have two open committees for the same office at the same time?
- Are they allowed to have one for the closer election and one for a further away election, or one for the election that just finished and one for the next election?

RESPONSE

Per statute, "'election cycle' means the two-year period starting the day after the last general election for candidates for the state legislature and shall mean the four-year period starting after the day after the last general election for candidates for statewide office." *See* Election Law § 14-200-a(6). As such, the election cycle begins the day after election day in November; not the beginning of the disclosure period for July.

In regard to the timing of the statement, current regulations provide that statements must be filed

> (o)n the 32nd and 11th day before, and on the 27th day next succeeding, the election, other than a primary election, or convention to which the statement relates. If there is a contested primary election, said statements shall be filed on the 32nd and 11th day before such primary election, and also on the 10th day next succeeding such contested primary election, provided however, that the post-primary election report for the June primary shall be the periodic statement filed on July 15th….. In addition…..periodic statements shall be filed no later than the 15th day of January and July of each subsequent year until such time as the candidate or committee terminates activities. At such time, a final statement shall be filed particularizing campaign receipts and expenditures during the filing period. It shall also evidence a complete payment of all liabilities and the expenditure of all funds in the possession of the committee or candidate. The filing of said statement shall terminate the activities of the political committee or candidate. See 9 NYCRR 6200.2.

As such, the post-election report for a primary election would be the July 15th periodic filing; and the post-election report for a general election would be the 27-day post-election filing.

Statute provides that "(e)ach candidate shall have one and only one authorized committee per elective office sought." *See* Election Law § 14-201(2). As such, candidates cannot have two open committees for the same office at the same time.

COMMENT 3
6221.1 (g) Expenditure

- States that expenditures made by contract are deemed made when funds are obligated.
- All expenditures should be deemed made when the benefit is received.
- A contract can be made but then amended or dissolved. Expenditures are not made when a contract is signed. For example, if a campaign makes a contract in December of the year before the election for printing literature to be used in the year of the election, the expenditure should be deemed to be made when the campaign receives the benefit of the expenditure by sending out the literature in the year of the election, even if the printing was paid for in December.
- Strike last sentence.
- Contracts have long history of being defined in the law and defining them differently here is likely to lead to unwanted problems.

RESPONSE
Statute defines ‘‘expenditure’’ as: "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**." *See* Election Law § 14-200-a(7) (emphasis added). Given this statutory language, the PCFB is constrained to interpret and define "expenditures made by contract" as when the funds are obligated.

COMMENT 4
6221.1 (i) Immediate Family

- The term is defined but is not used in this document. Is there a plan to use it elsewhere or to edit existing language in this document to use this term, perhaps in relation to intermediaries and/or advances?

RESPONSE
In response to this comment, the definition of "immediate family" is deleted from the proposed regulations.

COMMENT 5
6221.1 (j) Item with significant intrinsic and enduring value

- It is helpful to have this defined by a dollar value and $25 is a good amount.
- Do we need to say fair market value to avoid arguments about value?

RESPONSE
In response to this comment, the definition of " significant intrinsic and enduring value" is clarified to include items with a fair market value of $25.

COMMENT 6
6221.1 (k) Matchable contribution (1)

- "Not more than $250".
    - Consider adding, "in the aggregate"?
    - It would be best to make this clear here even if there is the explanation in (k)(2)(xii) (any portion of a contribution is not matchable "when the aggregate contributions are in excess of $250 in the election cycle"). Some repetition is not harmful and can be helpful.

RESPONSE
In response to this comment, the definition of matchable contribution is amended to clarify that the $250 limit is in the "aggregate."

COMMENT 7
6221.1(k)

- "Contributed on or before the date of the applicable primary, general, or special."
    - Contributions should be matchable if raised up to Dec 31 of the year of the election. Campaigns may need to raise money for post-election litigation, or to pay staff or consultants to assist with post-election audit, etc.

RESPONSE
Per statute, a contribution is matchable when a contribution is made "for any covered elections held in the same election cycle(.)" *See* Election Law § 14-200-a(11)(a). As noted in the response to comment 2, an election cycle ends the day after election day. Due to this statutory language, contributions cannot be deemed matchable up to December 31st.

COMMENT 8
6221.1(k)

- Last sentence states any contribution determined to be invalid for matching funds may not be treated as matchable for any purpose.
    - What is the meaning of this sentence?

RESPONSE
The term matchable contribution is used in statue for several different purposes. For example, "matchable contributions" is used to determine the threshold of eligibility. *See* Election Law § 14-200-a(17) and Election Law § 14-200. (Notably, there is an exception in statute where nonmatchable funds can be used to achieving the monetary threshold; when a candidate receives a contribution of over $250). It is used to determine eligible payments (*see* Election Law § 14-205(2)). The sentence in question is used to encompass these different uses.

COMMENT 9
6221.1 (i) States that a loan is an unmatchable contribution.

- A loan is not a contribution, but we agree it is not matchable.
- A loan may become a contribution, however, if it is unrepaid.

RESPONSE
N/A

COMMENT 10
6221.1

- (vi) We agree that contributions must be itemized to be matched.
- (vii) Change “gathered” to “received.”

RESPONSE
Election Law § 14-200(11)(b)(vii) uses the term gathered, rather than received. As such, the PCFB has determined that "gathered" is the more appropriate term for the proposed regulation.

COMMENT 11
6221.1 (x)Contributions from vendors unmatchable.

- Other options are to make vendor/employee contributions matchable but do not count them toward the threshold. Another option is to consider modifying vendor to include anyone, including employees, paid by the campaign.
    - States that contributions not matchable include those from a vendor 'hired by candidate or authorized committee.'"
- When a candidate files their forms they are saying that only the committee can act for them.
- Leave out “candidate or authorized committee.”

RESPONSE
Election Law § 14-200(11)(b)(x) provides that: "contributions from vendors for campaigns hired by the candidate for such election cycle" are not matchable. This language does not authorize the PCFB to include employees of such vendors.

Statute uses the language "hired by a candidate or authorized committee." The legislature wanted to include instances where a candidate may have hired a vendor, rather than the committee. As such, the PCFB has determined that it would be more prudent to include the candidate in this definition.

COMMENT 12
6221.1 (xi) Contributions from lobbyists unmatchable.

- Should this include federal, county, or city lobbyists?

RESPONSE
We are interpreting this requirement to include city and county lobbyists.

COMMENT 13
6221.1 (xii) Amount of contribution exceeding $250 in the aggregate

- Unclear. Consider amending language to say that the $250 limit applies to contributions in excess of $250 “in for the entire election cycle.”
- Define affiliated contributors to avoid having contributors using affiliated entities to avoid the contribution or matching limits.

RESPONSE
Election Law 14-120(h) requires contributions made by LLCs, and certain contributions made by partnerships, to be attributable to an individual. The proposed regulations now provide that any attributable contribution by an individual shall be used to calculate the $250 matchable limit.

COMMENT 13
6221.1 (l), (m) Amend to make definitions mirror each other in terms of their descriptions of the applicable offices.

RESPONSE
The PCFB believes the suggested amendment is not necessary and declines making this amendment.

COMMENT 14
6221.1 (n) Definition of "post-election period" must state that it begins after certification of election results.

RESPONSE
There are several functions in the post-election period, including the filing of certain campaign filing statements, where, as stated above, statute clearly mandates the period begins the day after election day. As such, the PCFB declines to make this amendment.

COMMENT 15
6221.1 (p) "Threshold for eligibility shall mean the dollar amount of matchable contributions and the number of contributors that a candidate's authorized committee must…." Consider adding underlined words.

RESPONSE
The PCFB agrees the suggested language clarifies the term "threshold for eligibility" and has made this amendment to the draft regulations.

COMMENT 16
6221.1 (q) Refers to transfers between an entity "and a candidate or any of their authorized committees."

- This is unclear.
- Is more than one authorized committee per election cycle allowed?
- Can transfers be made between old committee and current committee and vice versa?

RESPONSE
Statute provides that "(e)ach candidate shall have one and only one authorized committee per elective office sought." *See* Election Law § 14-201(a). Further, Election Law § 14-203(e)(iii) enables a candidate to retain funds raised from a previous campaign.

To facilitate compliance with these statutory requirements, the PCFB has determined that the best policy is to require candidates interested in the program to register a new committee. Candidates will accomplish this by registering a new PCFB authorized committee, using a form designed by the PCFB, with the State Board of Elections. This, in effect, will notify the PCFB of the existence of the candidate's sole authorized committee and allow for necessary outreach to interested candidates registering this type of authorized committee.

Participating candidates with legacy committees which were previously created to raise and expend money in relation to seeking the same covered office that the candidate is currently seeking (incumbents) will be instructed to transfer their funds to the new committee and terminate their old committee. If the old committee cannot be terminated due to compliance issues, the committee will be placed on administrative hold while the account of the old committee is rectified.

COMMENT 17
6221.1 (r) If definitions are supposed to be in alpha order, move “PCFB” and put “surplus” before “transfer.”

- Should the definition of surplus funds refer to expenditures in an election cycle rather than just “for all covered elections held in the same calendar year”?
- As noted below in the repayment section, do expenditures here only include qualified expenditures that can be made with public funds or all expenditures?

RESPONSE
As covered offices under this program have different election cycles (e.g. four years for governor, and two years for state assembly), amending the language from "calendar year" to "election cycle" would add confusion.

Expenditures, as used in this definition, relates to qualified expenditures.

COMMENT 18
6221.2 (d) States that there will be 7 commissioners, that 4 commissioners constitute a quorum, but that to take any action, the votes of a majority of the total number of commissioners (4) are required.

- A quorum of 4 would have to be unanimous in order to make a decision.
- If there are commissioner vacancies and delays in appointments, the requirement of 4 votes for action could cause the PCFB to be unable to act. This is a problem.

RESPONSE
Election Law § 14-207(1) provides: "Four members of the PCFB shall constitute a quorum, and the PCFB shall have the power to act by majority vote of the total number of members of the commission without vacancy." As such, the regulations cannot provide that actions may be had with a majority of the members present.

COMMENT 19
6221.2 (e) Sets forth requirements for a quorum including electronic meeting methods.

- Isn’t this governed by Open Meetings Law? Does (e) comply with Open Meetings Law?
- Can the PCFB make its own rules in this area?
- Is this a way for them to operate remotely in Executive Sessions only? This seems complex.
- This entire section is confusing and needs to be clarified.

RESPONSE
The draft regulations were drafted in a manner to be consistent with section 41 of the General Construction Law and sections 102, 103, and 104 of the Public Officers Law at the time it was drafted; however, the Open Meetings Law has since been amended. Accordingly, the regulations have been amended to comply with the amended Open Meetings Law.

COMMENT 20
6221.2 (f) States that commissioners are subject Public Officers Law sections 73A (financial disclosure) and 74 (code of ethics).

- Does this echo requirements for NYS BOE?

RESPONSE
Statute requires commissioners to both the State Board of Elections and PCFB must comply with sections 73 and 74 of the public officers law. *See* Election Law §§ 3-100(3) and 14-207(1).

COMMENT 21
6221.3 (a) States that pursuant to Section 14-107(2), the PCFB "and the NYS BOE" may utilize existing NYS BOE staff to carry out duties.

- Consider eliminating reference to "and the NYS BOE" because it implies that the NYS BOE will be supervising PCFB staff. Is this true?
- Check reference to Section 14-107(2); section references independent expenditures.

RESPONSE
The proposed regulation should reference 14-207, not 14-107. Accordingly, the proposed regulations has been amended.

In relation to referencing SBOE staff, the proposed regulations merely mirror statutory requirements. It should be noted that the PCFB is a unit within the SBOE, which this proposed regulation reflects.

COMMENT 22
6221.3 (b) What about approval of the budget requests? How is this handled? If electeds are in charge of the budget, the PCFB may not get the funds it needs to do its work. We recognize that there may be nothing to be done about this at this point.

RESPONSE

There is no mechanism in statute where the PCFB directly requests its budget from entities that are not elected. The Public Campaign Finance Reform Commission did discuss the possibility of the PCFB requesting a budget directly to the legislature, similar to what the New York City Public Campaign Finance Board does in New York City. See https://www.youtube.com/watch?v=0MTdao0CI6c&t=3978s at 1:07:30. However, such a process is likely unconstitutional. Per Article VII of the New York State Constitution, the Governor is the one with responsibility for formulating and proposing the state budget, and the Legislature has responsibility to vote on the budget. *See* Report of State Reorganization Comm'n, 1926 Leg. Doc. No. 72 at 11. Prior to the amendment to Article VII, certain agencies could directly propose a budget to the legislature. However, this process was amended, where responsibility for crafting the budget was conferred upon the Executive branch because, "as the head of the State, [the Governor] is the one who can best explain and defend a given fiscal policy to the people of the State and he is the one who, above all others, is interested in upholding before the people of the State a policy of economy and who should be held responsible to them for the success or failure of such a policy". Report of Comm. on State Finances, 1915 Leg. Doc. No. 32 at 15.

COMMENT 23

6221.4 (a) States that advisory opinions will be issued within 30 days of the question.

- Thirty days is both way too long and way too short. At times, quicker responses will be needed, and some opinions will take more time.
- What is the definition of an Advisory Opinion?
- Is a quick opinion from staff an advisory opinion? Campaigns have many questions that will need to be resolved.
- Getting sign off by Board may take too long.
    - (c) States that "questions of interpretation" will be published.
- Should this say requests for Advisory Opinions will be published?
    - (d) States that identifying information "will be redacted as the PCFB deems appropriate at its discretion."
- Redactions should not be at the PCFB's discretion but rather should be the permissible redactions set forth in the NYS Freedom of Information Law.

RESPONSE

The advisory opinion provision is not designed to address every question received by the PCFB, but is designed to publish opinions that other campaigns and the public may find useful. This provision standardizes this process, which is already utilized by the SBOE. Questions that need to be resolved quickly can be accomplished by contacting staff, who will assist the campaign. In regards to identifying information, the regulation mirrors the SBOE advisory opinion process already in place.

COMMENT 24
6221.4 (e) States that PCFB staff can give advice and may be relied on if candidate's committee has confirmed such advice in writing to PCFB Counsel, by registered or certified mail or by electronic or facsimile transmission with evidence of receipt, describing the action to be taken, etc. and staff has not responded within 7 business days, etc.

- This is way too complicated.
- Staff advice should be given verbally and confirmed in writing or should be given in writing.
- Campaigns should not have to confirm the advice in writing with another person, the PCFB counsel. Campaigns must be able rely on advice given by staff and campaigns cannot wait 7 days after sending staff written confirmation of the advice given.
- End sentence with "should not be subject to penalty or repayment obligation."
- Advice should be confirmed in a writing such as electronic mail.
- Consider whether campaigns will be communicating directly with candidate liaison staff or a staff attorney.
- Reference to certified/registered mail should be stricken. Communication must be by email.

RESPONSE
Election Law § 14-207(7) provides: "Any advice provided by PCFB staff to a participating or non participating candidate with regard to an action shall be presumptive evidence that such action, if taken in reliance on such advice, should not be subject to a penalty or repayment obligation where such candidate or such candidate's committee has confirmed such advice in writing to such PCFB staff by registered or certified mail to the correct address, or by electronic or facsimile transmission with evidence of receipt, describing the action to be taken pursuant to the advice given and the PCFB or its staff has not responded to such written confirmation within seven business days disavowing or altering such advice, provided that the PCFB's response shall be by registered or certified mail to the correct address, or by electronic or facsimile transmission with evidence of receipt."

The process outlined in regulation mirrors this statute. Per the statute, campaigns must confirm advice they received via certified or registered mail in order to use it as presumptive evidence that they are complying with the law. The seven-day requirement is in statute. The purpose of having counsel review the advice is for quality control. The counsel is in the best position to interpret the legal requirements of the program.

COMMENT 25
6221.5 (a) Why are we talking about participating candidates, doesn't this apply to all candidates?

- All candidates file a filer registration and then participating candidates file a certification? Unclear.
- Why reference forms? Will registration be electronic?
- Perhaps this section should just be titled "Registration"?

RESPONSE
The proposed regulations only apply to participating candidates; the PCFB does not have the authority to regulate nonparticipating candidates. The term "forms" mirrors current regulations and statute.

COMMENT 26
6221.5(a) States candidates may have only one authorized committee per elective office in which they seek to participate in the program.

- Does this mean for the current election cycle?
- Does this mean that only one committee can seek matching funds for the current cycle? Not too clear.
- A candidate may have other old committees for same office.

RESPONSE
As indicated in the response to comment 2, statute provides that "(e)ach candidate shall have one and only one authorized committee per elective office sought." See Election Law § 14-201(a). The response in comment 16 outlines the process of a candidate terminating their old committee for the same office, and creating a new committee.

COMMENT 27
6221.5(a) States that committee must be registered prior to receiving contributions or making expenditures.

- What about campaigns that raise or spend $1,000 or less?
- What about campaigns that have to hire staff in order to handle the registration process?
- One option is to allow funds, for example, $1,000 prior to registration, but to make these expenditures unqualified (impermissible to use public funds for these expenditures). This would be enough to get the ball rolling but small enough to avoid mischief.
- Candidate may have to spend funds to get committee going.

RESPONSE
Like all other committees, participants of the program must register with the SBOE when they raise or spend, or expect to raise or spend, over $1,000 in a calendar year. (EL 14-102(4)). Campaigns should refer to the Campaign Finance Handbook, found at https://www.elections.ny.gov/NYSBOE/download/finance/hndbk2019.pdf, to address question of when it is appropriate to file.

COMMENT 28
6221.5 (b) States that “participating” candidate must make a statement that a particular committee is the sole authorized committee for the candidate “for the covered elected office sought.”

- Should this be “elective” office?
- Should there be a reference to the current election cycle? One committee for each office per cycle?
- What if the candidate has previously raised funds for this office? Committees are perpetual until you close them.
- Once you have a newly formed committee to participate in the matching funds program, then cannot transfer from old committee? Does this mean a participant has to close all old committees?
- Does this mean that a non-participating candidate can have more than one committee?

RESPONSE
The proposed regulation is amended to reflect the program is for an "elective" office. The regulation does require that a participating candidate will create a new committee in each election cycle which they will be participating. There is nothing in statute prohibiting non-participating candidates from having more than one authorized committee.

COMMENT 29
6221.5 (c) Required registration information should include employment information for the candidate and the treasurer. Employment can create a conflict of interest so should be disclosed.

- (2) Refers to "candidate's sole authorized political committee." Does this mean the sole committee for this office for this election cycle?
- (5) Refers to "all" bank accounts.
    - The NYC CFB requires one bank account.
    - Will the PCFB require two bank accounts, one for public funds along with contributions submitted for match and another for other private contributions not being submitted for match? This is unclear.
- We understand that campaigns may have multiple merchant accounts, but references to bank accounts in the plural are confusing.
- Need to understand this before we can comment on certain of these provisions.
- Election Law Section 14-204(4) refers to unlimited private fundraising and the ability to use those funds for the current or a future election, this seems to indicate the use of a separate bank account for these private funds? Unclear.

RESPONSE
The regulations have been amended (and these provisions have moved to 6221.7) to address many of these concerns.

COMMENT 30
6221.5 (d)

- States that changed registration information must be submitted in two days.
    - Change this to five business days.
- This section does not discuss process for amending form.
    - Do we need notarized statement? An email? Can the amendment come from the Candidate or Treasurer or other campaign staff? Does an amended CF-O2 have to be filed?
- This section also talks about bank account, merchant account, email address information.
    - How does the process of the amended CF-02 and the PCFB registration amendment process work together? Timing? Which first?

RESPONSE
Section 14-118(1) of the Election Law requires any changes in a registration must occur within 2 days of a change. As such, the draft regulations cannot extend this deadline to five business days.

A candidate would register their committee with the SBOE, not the PCFB. This regulation does not change the current process of amending registration materials.

COMMENT 31
6221.6 Public Website Publication and Searchable Database

- (b) Information in database should be exportable in machine readable format. Should be searchable, downloadable, etc. Need to be able to download data into Excel.
- (b), (c) Why is the cumulative list of committees on the NYS BOE website and the database on the PCFB website?
    - Need to make finding information easy for non-lawyers. The use of multiple websites can make it difficult to find information.
- If there is a delay in creating the PCFB website, in the meantime information should be available on the state board website.
- (c)
    - Refers to posting information about "districts subject to a reduction." It would be helpful to define this term up front.
    - Posting this information two years before primary might not be possible.

RESPONSE
The PCFB is currently working and designing its website and will take these comments into account in its design. The PCFB anticipates that a separate website is necessary, as it intends to use web applications for candidates to file necessary paperwork, and to provide necessary information to the public. The PCFB will endeavor to make the website as user friendly as possible.

In regard to posting information related to districts where the threshold of eligibility is lowered due to the districts average median income; statute requires that such information be posed two years before the primary election. *See* Election Law § 14-203(2)(c). As such, this time period cannot be amended.

COMMENT 32
6221.7 Certification

- It would be helpful to define Filer Registration and Certification above.
- This section should be placed just after Filer Registration.

RESPONSE
This section has been amended, as the application process the PCFB first anticipated has been changed.

COMMENT 32
6221.7 (a)

- States that the filing deadline for a certification is four months before a primary.
- Four months before election is way too long. This is before the first day to circulate designating petitions for the primary and months before the first day to circulate independent nominating petitions for the general. People may not know whether they are running at this point. We suggest two months prior to election maximum. The date should be after the petition deadline.
- What does deadline mean for candidates who don't have a primary, either independent line candidates or those who have no opposition on a party line and thus have no primary?
- Are contributions raised before filing the certification matchable? They should be matchable.
- Needs to be drafted so as not to unfairly advantage either party or independent candidates.

RESPONSE
Funds raised during the election cycle, and prior to the certification deadline, are matchable.

Election Law § 14-203(1)(d) provides that the certification "be submitted at least four months before a primary election(.)" Accordingly, the PCFB does not have discretion in changing this deadline. This deadline applies to all candidates, regardless of party affiliation or primary status.

COMMENT 33
6221.8 (b)(2), (3)
This list of required retention of documentation should be more specific or should reference a more specific definition that is elsewhere in the regulations.

- The lists in (b)(2) and (3) should mirror each other.
- The phrase and “other information PCFB may request” is too unclear, how do campaigns know what to retain?
- Should say “furnish documentation upon request” because the filing requirement has not been set forth so far.

Also need to specify the document retention requirement.

- We recommend 5 years after election certification or one or two years after filing a final statement showing satisfaction of all liabilities and disposition of all assets and payment of penalties and repayment of public funds, unless extended in particular circumstances by the PCFB.
    - Need to give campaigns notice that they must keep all campaign communications.
    - Wherever it says furnish, it should say furnish on request.

RESPONSE
This provision is not designed to list the required documents a campaign must maintain, but outlines terms a candidate must agree to in order to participate in the program. The duty to maintain and keep records is found elsewhere in the proposed regulation.

The five-year retention period is located in section 6221.18 of the proposed rules.

Pursuant to this comment, the proposed regulation is amended to require campaigns to keep campaign communications.

COMMENT 34
6221.8 (b)(5)

- Should specify that "amounts required to be repaid" means repayment of public funds.
- States that "candidate, treasurer and/or political committee, as applicable, shall "pay fines or repay public funds.
- What does "as applicable" mean?
- Where is the legal responsibility set forth? For every fine, will the PCFB decide who is responsible? Could say candidate, treasurer, and political committee jointly and severally liable, unless determined by the PCFB.

RESPONSE
Statute, and the proposed rules, sets out instances where candidates, treasurers, and political committees may be liable for repayment or a fine. The PCFB believes this language gives adequate notice to candidates and campaigns that they may be liable for violations of statute and these rules.

COMMENT 35
6221.8 (c) States that certification is effective when "reviewed, accepted and approved as being complete by the PCFB and the candidate so notified."

- If approved, should be effective as of the date of submission, not approval.

RESPONSE
The PCFB believes that the submission of a Certification form under 14-203(1)(d) does not make one a certified candidate in the program. A certification process is anticipated in 14-203(1)(e).

COMMENT 36
6221.8 (b) Ineligible for public funds if:

- (3) Eliminate first phase, ending "or." Seems repetitive and unclear.
- Also, this section seems to set forth responsibility for repayments and penalties as lying solely with the candidate and committee. What about the treasurer? Can a treasurer who has not paid fines for another campaign serve as a treasurer on a new campaign?
- A candidate who is ineligible for public funds because of outstanding penalties or repayments of public funds must be notified before the certification deadline, for example in the prior election cycle's enforcement notice, or a mass mailing to everyone who owes money at beginning of election cycle.

RESPONSE
Nothing in these proposed rules would prohibit someone acting as a treasurer if they owe outstanding fines.

Candidates are notified of the fines during the audit and enforcement processes. The PCFB does not believe further notification is necessary. Notably, outstanding fines would not preclude a candidate from submitting a certification; rather, it would preclude any claim for matching funds.

COMMENT 37
6221.8 (b)(4) States a candidate is ineligible if they already received the maximum allowed, is this needed?

RESPONSE
The PCFB believes that this provision is necessary to clarify when funds will not be matched.

COMMENT 38
6221.8 (b)(5) States that candidate is ineligible if found by the PCFB to have committed fraud or breached their certification.

- Does this mean in this election cycle or ever?
- Does this apply to the treasurer who committed the fraud?
- A breach may not be as egregious as fraud. For example, a treasurer may have set up a fake consultant who was paid, but the candidate had no idea or found out afterward. It does not seem right that the candidate can never get public funds.
- Are there opportunities for the candidate to participate in the "finding"?
- Why is fraud/misrepresentation equal to breach of certification (which could be a mistake?) Candidates should have an opportunity to overcome the ban.

6221.7 (c) States that in the case of breach, a candidate is ineligible for additional public funds and must repay previously received public funds for the election covered by the certification.

Consider making the language clearer.

- States that the PCFB can consider any of the following to be a fundamental breach.
- Do the listed misdeeds have to have occurred in the current election cycle covered by the certification? Unclear.
    - Is this list definitive, all inclusive? Unclear.
- Fundamental breach should be a defined term above.
- (1)(A), (B), (C), (D) Refers to submission of filings or use of public funds for campaign expenditures that the candidate knew or should have known were fraudulent, a submission that contained the misrepresentation of a material fact.
    - In large campaigns, candidates will never know the details about PCFB filings.
    - Who determines the above and what is the standard?
- What is the burden of proof as to whether something was known or should have been known? Is it the standard of fraud (clear and convincing evidence)?
- Breach is not always intentional. It is very disheartening if they could not run again because of a staffer or third party not doing their job.
- Should the denial of public funds encompass more than one cycle?
    - For example, a 6-year ban and a second strike you are out forever?
    - It would be preferable to give a timeout of one or more state election cycles (2 or more years), rather than a total ban.

- (1)(E) Refers to allegedly independent expenditures which were actually coordinated with the campaign because they were "in fact authorized, requested, suggested, fostered, or cooperated in by the candidate."
    - These terms are too vague. What do they mean? What proof will be required? Who has burden, etc.? We don't know what kind of activity will be captured by this or how to instruct our clients.
    - Does this mean a casual dinner between the candidate and the spender and then they never talked again?
- What about the timing? Is this about communication between a campaign and a spender once the clock of the election cycle starts? That could be long before a particular candidate files petitions.
    - Is there a mechanism to distinguish a campaign suggesting courses of action vs. open ended discussion of options?
- 6221.7 (c)(2) States that this section is not intended to be an enumeration of all circumstances that may constitute a fundamental breach.
    - Too broad, can this be defined further?
- 6221.7 (c)(3) Implies that staff is making the determination of breach
    - Staff sends out the notice, but the PCFB makes the determination.
- States that campaign can request a hearing within 3 business days of the notice and that a hearing officer will be randomly selected in 1 business day, then staff forwards a recommendation within 3 business days, then the campaign responds in 5 business days, and staff may reply in 1 business day
    - The time periods in (c)(3) are all way too short and are completely unworkable.
    - After notice of a breach, a campaign should have 15 business days to request a hearing. The campaign may have to hire a lawyer to evaluate the notice, must have time to gather its own evidence in response to the notice, etc.
    - The other deadlines should be similarly adjusted.

RESPONSE

This provision has been amended that addresses many of these concerns. The investigation and enforcement of these provisions are deleted and will be addressed in the enforcement regulations.

In regard to whether a candidate will be liable for the misconduct of a treasurer; in order to be penalized, including the discontinuance of public matching funds, misconduct by a candidate must be found; misconduct by a treasurer, where the candidate had no knowledge would be insufficient.

Further, the proposed regulations in relation to coordinating with independent committees is amended to clarify that the term "coordination" shall be used in the same manner as it is used in Election Law 14-107.

COMMENT 39

6221.9 Eligibility Criteria

- The prior section was eligibility and ineligibility, and this section pertains to eligibility.
- Organization is a little confusing.
- (5) Refers to prohibition on candidate spending own funds, although it says a candidate can contribute to committee up to candidate contribution limit.
- Candidates must be able to spend their own money to get their campaigns going. They may not have an authorized committee yet because they have to pay someone to set up the committee.

RESPONSE

Election Law § 14-203(1)(f) provides that a candidate is eligible for matching funds if they "not make, and not have made, expenditures from or use his or her personal funds or property or the personal funds or property jointly held with his or her spouse, or unemancipated children in connection with his or her nomination for election or election to a covered office, but may make a contribution to his or her authorized committee in an amount that does not exceed three times the applicable contribution limit from an individual contributor to candidates for the office that he or she is seeking." As such, the PCFB does not have discretion in amending this eligibility criteria.

COMMENT 40

6221.9 (8) States that a campaign will not be eligible for public funds if they have accepted a contribution over the limit.

- What if an over-the-limit contribution was accepted because the person accepting the contribution didn't realize there was an overage due to a previous contribution?
- A campaign should be able to pay a fine for this and not lose eligibility for public funds

RESPONSE

Section 6221.9 (8)(i) and (ii) already provides that a campaign may refund the over contribution, or pay the over contribution to the PCFB fund, and remain eligible for the program. As such, an amendment to this provision is not necessary.

COMMENT 41

6221.9 (i)(a)

- States that the campaign must demonstrate that the refund of the over the limit portion of a contribution cleared the committee account and was cashed or deposited by the contributor.
    - How do you prove a cashier's check was deposited? A bank statement does not show this.
    - It should be sufficient that the campaign can show that the money was taken out of its account, either via a cashier's check or because a campaign check is cashed.
    - End the sentence after "cleared the committee account."

RESPONSE
The proposed regulation does not require that funds be returned via a cashier's check; it merely states that the overage be refunded to the contributor. The PCFB believes a campaign is capable that showing such refund was made.

COMMENT 42
6221.9 (i)(b)

• Refers to returning an over-the-limit portion of a contribution to the PCFB fund.

• Is the Fund defined?

• Why should campaign have to prove receipt by the Fund? Take out sentence about being received by the Fund.

RESPONSE
The fund refers to certain monies set aside by statute, that is used to match contributions. *See* State Finance Law 92-t. The purpose of this section is to ensure that when a check is written to the fund, there are enough funds in the account to compensate for the overage. This eliminates an argument that merely writing a check, regardless of insufficient funds being in an account, is enough to meet this eligibility requirement.

COMMENT 43
6221.9 (ii) Refers to a campaign being unable to return over-the-limit portions of contributions "within a reasonable time of certification" and submitting an affidavit that over-the-limit amounts can be deducted from future public funds payments.

- Prior language referred to the over-the-limit portions being refunded prior to certification.
- Is the unrefunded amount deducted from the total amount of public funds due or from the matchable claims leading to the total amount of public funds due which is a much larger deduction.
- What is a "reasonable time?"
    - (ii)(a) As noted above, a campaign should not have to show money was received by Fund.

RESPONSE
Per Election Law § 14-203(1)(h)(iii), a candidate that has a depleted account may, via an affidavit, agree to pay the fund any overage through reduced public matching funds. This provision is amended to reflect that disbursements shall be reduced to no more than twenty-five percent to reflect statute.

COMMENT 44
6221.10 Retaining Public Funds

- Refers to campaign retaining funds raised for a pervious election cycle
    - What bank account are these funds kept in?
    - Are they transferred into the current election bank account?
    - Can these funds be put into a participating bank account that has matching funds and matchable contributions in it?
    - Or is that bank account, with funds from a previous election cycle, a perpetual separate account which can be used for all future elections?
    - Can you continue to take over-the-limit contributions into other account that is not the matching funds account?

RESPONSE
Our regulations and policies would permit one bank account. The Campaigns would keep track of the category of funds they have (e.g. public matching funds; contributions; and transferred funds). In their disclosure reports, campaigns will indicate which "fund" the expenditure was made, via a purpose code.

COMMENT 45
6221.10 (b) Refers to funds raised prior to effective date of program

- Should these funds be transferred into a participating bank account?
- Should they be kept in a separate account?
- States that unexpended contributions of this type will be “treated the same as campaign surpluses under paragraph a of this section.”
    - This is unclear because the (a) directly above this does not use the term surplus.
    - Does this mean these contributions would be added in to determine the amount of any public funds repayment of surpluses described in Section 6221.31 below? This needs to be clearer.

RESPONSE
Surplus is a simple equation: [the number of all the contributions received (including nonmatchable contributions) + the amount of public funds received] minus [total expenditures]. Any remaining funds from this equation must be paid back to the state.

COMMENT 46
6221.10 (c) States that any “preexisting funds that are intended to be used must be transferred to the sole authorized committee bank account being used by a candidate for a covered election” within 5 business days of the certification being approved. Add the term “bank account.”

- It remains unclear whether a sole authorized committee can have more than one bank account.
- 5 business days is too short a time.
- “Intended to be used” is unclear. What if a campaign intends to use the funds for the covered election but then does not, can it transfer the funds out again (and not repay them as a surplus)?
- Does this mean a campaign can put pre-existing funds into its current covered election bank account, though they would not be matchable and would not count toward threshold?

RESPONSE
The PCFB disagrees that five days is too short a time to transfer funds to an account of the new authorized committee.

Transferred funds would not be subject to repayment of a surplus.

COMMENT 47
6221.10 (d) Refers to matchable contributions raised, but not used because candidate decided not to accept matching funds or candidate was unopposed.

- States that if these funds are used in a future election cycle, they would be treated as surpluses. Same question/comment as in 6221.10(b) above, would they have to be repaid?
- Do you mean that if you don't spend the money in 2024, you can use it in 2026, if you choose not to participate?
- What rules apply to those who don't participate? This is unclear.

RESPONSE
Transferred funds are not subject to repayment as a surplus. If a campaign files a certification, but chooses not to match those funds, they would be able to use those funds in a different campaign; however, those funds would not be matchable, and they would not be used to determine eligibility thresholds.

COMMENT 48
6221.11 Threshold

- It is unclear whether the dollar amount portion of the threshold has to come from in district residents.
    - (3) refers to paragraph (e) of this section which does not exist.
    - (4) refers to paragraph (f) of this section which does not exist.

RESPONSE
The threshold must be met by "matchable" contributions, which, by definition, would mean contributions from within the district.

This provision is amended to address the remaining concerns in this comment.

COMMENT 49
6221.11 (b) States that over-the-limit amounts will not be matched and that any matching funds previously paid on a portion of the now over-the-limit contribution will have to be returned. It further states that although these contributions are over-the-limit, they will count toward threshold.

- Does this mean that the non-over-the-limit amount will count toward threshold, or that the full contribution including the over-the-limit amount will count toward threshold?
- Campaigns need the opportunity to cure overages.
- For example, if contributor made a credit card contribution online and then went to an event and contributed, the campaign would not know about the previous contribution because it might not have received the merchant account statement from the vendor yet. There should not be an ongoing punitive result for overages, they should be curable.
- Amend last sentence beginning with "notwithstanding", it is unclear.
- The purpose here is not consistent with other expressed purposes of the regulations. If you are going to allow people to refund over-the limits for certification, over-the-limit refunds should be allowed throughout the campaign pre and post certification.

RESPONSE
The regulations are amended to address the concerns in this comment, where a campaign would be able to return overages to the contributor.

COMMENT 50
6221.12 Campaign Finance Disclosure statement forms

- We presume this may be an electronic form.
- (b) should refer be "in a form as prescribed by" the PCFB, not the NYS BOE.
    - This is confusing. Do candidates have to do double filing with the NYS BOE and the PCFB? Double filing is burdensome. If you don't mean that, then this is unclear.
    - If the filing system is not yet determined, this section could be left out and added when the technology is confirmed. Certain members would by happy to do beta testing of any programs you develop.

RESPONSE
Participants are required to file disclosure statements with the SBOE, just like all other authorized committees. Participants do not have to file disclosure statements with both the SBOE and the PCFB.

COMMENT 51
6221.13 Reporting Contributions in Campaign Finance Disclosure Statements

- 5), (6) language on bank and cashier's checks should use the language in (6).
- (6) concerns contribution refunds.
    - Need to account for credit card returns. A contributor may just ask their own credit card company for the money back. In that case the documentation would be from the merchant account. This can be a common issue because contributors may accidentally incur a recurring contribution.
- As noted above for 6221.12, is double filing required?

RESPONSE
The PCFB does not believe paragraphs 5 and 6 need more clarity. Further, the PCFB believes that having a campaign request that requiring a contributor to ask a credit card company directly for their money back would be difficult to administer.

COMMENT 52
6221.14 Reporting Expenditures in Campaign Finance Disclosure Statements

- (a)(6) States that campaigns must report the amount of the remaining outstanding liability.
    - Important: What if the amount of remaining liability is contested? This can be common. Should this be a part of reporting? Campaigns do not want to show an outstanding liability they do not agree with. Will this be dealt with on an individual basis? However, campaigns could want to take advantage of it and say every outstanding liability is contested.
    - Why is the amount of the outstanding liability requested? Are you concerned that campaigns may purchase services in excess of the expenditure limit then not pay for them?
    - There should not be a penalty for not disclosing promptly as long as there is some documentation that the matter was contested.
    - May need new procedure for dealing with contested liabilities.
- A lot of employees/vendors are going after campaigns. If vendors have the power to say, "the campaign did not report an amount I say they still owe me," that is a problem. Not all vendors are ethical; they may sign a contract, and then not deliver, and still claim they are owed money.
- Can this be straightened out in a regulation?

RESPONSE
Contracts are considered expenditures at the time of obligation and are thus reportable. The PCFB has determined it is necessary to disclose the amount outstanding liabilities for various reasons, including ensuring that the balances of statements are balanced, and to ensure that expenditures do not eventually lead to impermissible contributions or loans.

In regard to contested liabilities, such matters should be addressed on an individual basis.

COMMENT 53
6221.14 (b) States that when a campaign vendor uses a subcontractor, and the amount reaches the threshold in 6200.8 ($10,000 for statewide office, $5,000 for other offices), certain information needs to be reported.

- It would be helpful if the threshold numbers were included here

RESPONSE
The proposed regulations are amended to reflect this change.

COMMENT 54
6221.14 (c) States that transaction details including vendor name address, purchase price and date of transaction must be provided and refers to PayPal stating, "Simply identifying the credit card company or similar payment method such as PayPal is insufficient."

- Eliminate that sentence.

In first sentence refer to 'other electronic payment methods' and state that the payment method must be identified. As written, it makes it seem as if PayPal is insufficient.

- Campaigns need to provide underlying payment method and regulations need to provide for additional acceptable electronic payment methods, i.e. PayPal, Venmo, Zelle, etc. However, this list should not be exhaustive, since the electronic payment world continues to evolve

RESPONSE
The purpose of this provision is to ensure that expenses paid by credit cards or other similar means be itemized. For example, if a campaign paid Vendor A $1,000 and Vendor B $500 with their Visa Credit Card, the disclosure statement should reflect the payments made Vendor A and Vendor B; the disclosure statement should not merely disclose "Visa Credit Card: $1,500."

COMMENT 55
6221.14 (d) States that "expenditures made by contract are deemed made when such funds are

obligated." As stated above in response to 6221.1(g), this is not the case.

RESPONSE
The PCFB disagrees with this assertion. As indicated earlier, statute specifically provides that contracts are deemed expenditures when such funds are obligated.

COMMENT 56
6221.16 Timing of Campaign Finance Disclosure Statements

- (a)(1) The referenced March 15 disclosure should only be during the election year.
    - Consider adding a disclosure statement in August and/or October of the election year now that there is more time between the primary and the general to allow for additional reporting to support payment.

RESPONSE
The language in the proposed regulation has been amended to provide that the March 15th filing is only applicable during the year of the elections. PCFB declines to provide any additional disclosure statement filing dates.

COMMENT 57
6221.16 (a)(3) The 10-day post primary and the July 15 disclosure have been consolidated. That should be mirrored here.

RESPONSE
The language in the proposed regulation has been amended to provide that the July 15th statement shall be considered the post primary report.

COMMENT 58
6221.16 (b) Refers to campaigns' ability to file additional disclosure statements as often as weekly.

- Why would campaigns file weekly if it not is required? Eliminate.
- This would create a lot of work for staff.
- If you want additional transparency, make filings monthly.

RESPONSE
The cited provision is deleted from the proposed regulation.

COMMENT 59
6221.17 Preliminary Review of Campaign Finance Disclosure statements

- (a), (b), (c)
    - In this section, the required timing of the review by staff should be set, as well as the required timing of campaigns' response to the review.
    - These should be set in the regulations and published in advance for each election cycle so that campaigns can plan ahead to accomplish this important work in a timely manner.
    - What is the timetable? Unfair not to give timeframes.

RESPONSE
The timing of reviews is located in section 6221.22 of the proposed regulations, where the PCFB has two days to determine eligibility. The PCFB will prescribe dates in the future of when claims may be submitted.

COMMENT 60
6221.18 Duty to Keep Records

- (a), (b)
    - Make bullet points, this is very dense material.
    - This is the first time that it says that all back up documentation must be provided for contributions in order for campaigns to receive match.
- How is the documentation provided to the PCFB?
- This requirement must be detailed in the section on matching funds.
- (b) Refers to creating a new record if a record is missing.
    - For contracts, both parties will need to be involved in recreating the document or inaccuracies will occur.
- (c) When does the five-year document retention period start. See comment above at 6221.7.(b)(2), (3)

RESPONSE
Records will be submitted to the PCFB upon request. The proposed regulation already requires that the campaign contact and work with the vendor in correcting a missing invoice or contract. The creation of a new record may be necessary if the vendor does not respond to the campaign.

Per section 14-108(3) of the Election Law, the five year retention period begins at the time of filing; not at the certification of the covered election.

COMMENT 61

6221.19 Records to be Maintained

- Most banks don't have deposit slips
    - What is the purpose of requiring these? Is it to see how much cash was deposited? Is there another way to get this info?
    - A record of the deposit will be on the bank statement.
    - Tell campaigns to not aggregate checks and cash in one deposit.
    - Is it a problem if campaigns aggregate individual cash contributions in one deposit?

RESPONSE

The proposed regulation recognizes that some banks do not use deposit slips. As stated in the regulations: " Where the bank or depository does not provide itemized deposit slips, treasurers must make a contemporaneous written record of each deposit. Such written record must indicate the date of the deposit, the amount of each item deposited, whether each item deposited was a check, a cashier's check, a money order, or cash, and the total amount deposited."

The purpose of this provision is to ensure accuracy in the reporting of financial details of the campaign. As a significant amount of public monies are being used, these measures are essential in ensuring the public fisc is protected.

Campaigns may deposit cash deposits in the aggregate, but it must comply with the disclosure requirements found in section 6221.19(b)(1).

COMMENT 62

6221.19 (b)(1), (2) Refers to requirements for cash contributions: phone and email address

- Is this info being captured by the NYS BOE and will it be placed in an NYS BOE or PCFB database. This info should not be in a public database
- This creates an extra burden for cash.
- Be careful about disadvantaging cash and money order contributions because they may come predominately from poorer communities, which may be communities of color, and may specifically disadvantage the candidates these communities support.

RESPONSE

In order to receive matching funds for a cash claim, a campaign must comply with these provisions. Statute requires that the contributor be in district, and that the name and address of the contributor is disclosed. Further, for contributions in excess of $100, the contributor's occupation and business address must be disclosed. As these are disclosures required by law, such information must be available to the public.

The caution to not disadvantage cash and money order contributions as it may disenfranchise disadvantaged communities is well taken; however, these disclosures are required by statute, and are necessary to ensure compliance with the Election Law.

COMMENT 63
6221.19 (b)(3) For contributions by check, contributor's address does not have to be printed on the check and may be provided to campaign in another way.

- (b)(4) For contributions by credit card, regulations need to anticipate campaigns using multiple credit card processers.
    - Regulations must set the requirements for documentation from these merchant accounts.
- (b) Are there differences in documentation requirements for contributions and matching contributions?

RESPONSE
The proposed regulations are designed to address disclosures of matching contributions.

The proposed regulations are already designed to permit multiple credit card processors, and to deal with instances where the residential address of a contributor is not on a check.

COMMENT 64
6221.19 (c) Bills

- There is a lot in there. Make bullets or make two parts. First talk about what is a normal bill, then etc., then put the information about forgiven bills at the end.
- The date the vendor was retained is not usually put on a bill, eliminate.
- Are attorneys vendors?
- Services are provided on a continuing basis pursuant to a retainer agreement.
  If there is a contract or a retainer agreement which lays out the services to be provided and the fee for the services, that should be sufficient.

There should not be a need for a detailed invoice if there is a contract or retainer agreement. For legal services the contract describes the services that are provided.

- A bill should be acceptable whether it is addressed to the candidate or the committee.
- When are timesheets required? Will the PCFB create these forms for the Campaign's to use?
- May need a definition section here
- Need to be very clear about whether someone is a consultant, a onetime vendor, an hourly or daily or weekly employee, etc.
- Documentation requirements differ for these categories.
- This is important for labor law reasons also.
- Signature on timesheet shows they accepted the payment.
- Employees can shake down candidates seeking money to which they are not entitled.
- Flesh out this section with more detail

RESPONSE
The proposed regulations are amended to simply the readability of this provision, and clarify the records that must be maintained.

COMMENT 65
6221.19 (d) Disbursements

- Change header to add “by Check”

RESPONSE
The proposed regulation was amended to address this comment.

COMMENT 66
6221.19 (e) Credit card/Debit Card

- Change header to read Disbursements by Credit card/Debit card
- Shouldn’t receipts be required? They can show the purpose of expenditure. For example, food charges on a credit card. The receipt should require a notation that the expenditure was for food for volunteers.

Other disbursement issues:

- Need to add a section for disbursements by wire transfer and to refer to alternate methods of payment
- Younger campaigns do not know how to write checks.
- Need to focus on the future of payments.
- Is there a difference in documentation/reporting requirements for disbursements of campaign funds and for disbursements of public funds (qualified expenditures)?

RESPONSE
The proposed regulation was amended to change the header.

Disbursements made by wire transfer are covered under section 6221.19(f), which requires that bank records be maintained.

COMMENT 67
6221.19 (f) Bank records

- Are copies of checks required? Will banks provide these?

RESPONSE
Generally, banks provide copies, or electronic images, of checks that have been issued.

COMMENT 68
6221.19 (g) Loans

- States that the PCFB must be notified of a repayment of a loan and must “sign off.”
- Why is the PCFB signing off on repayment of a loan if the repayment is reported and documented?
- Requiring a sign off makes it sound like the PCFB would have the discretion to say a repayment was not a repayment
- What is the concern?

RESPONSE
The proposed regulation is amended to address this comment.

COMMENT 69
6221.19 (h) Subcontractors

- Need to set forth the procedure here.
- Is there a form that will be signed by the vendor to say there was or was not any subcontractor use? What are the procedures?
- It would be helpful if the threshold for having to disclose subcontractors was printed here, see above.

RESPONSE
The PCFB is currently in the process of creating forms that are required for the program.

COMMENT 70
6221.19 (i) Fundraisers.

- Refers to itemized expenses for an event and who paid for them.
- These procedures should not apply to house parties where under $500 is spent.
- House parties and their requirements need to be defined
- This section needs to be clarified as to difference between campaign fundraising events and fundraising events organized by others, including house parties.

RESPONSE
The proposed regulation provides: " (t)his subdivision does not apply to activities on an individual’s residential premises, including house parties, to the extent that the cost of those fundraisers do not exceed $500." As such, the procedures do not apply.

The PCFB does not believe further clarification is necessary.

COMMENT 71
6221.19 (j) Political Communications

- What does “political communications initiated by a campaign” mean?
- Take it out, should just refer to communications paid for by campaign

RESPONSE
Section 14-106 of the Election Law uses the term "paid" or "under the authority" of the campaign. Solely using the term "paid" would not encompass this requirement. As such, the term "initiated" is appropriate.

COMMENT 72
6221.19 (k) Vendors – this section should be above with the bills section.

(2) States that if no contemporaneously written contract was “entered into” ….

It should say that a contract was entered into with no contemporaneously written record.

- States that the campaign can keep its own contemporaneous records of a contract and, essentially, that the campaign can create a record for the contract by itself without the other party signing it or evidence that the other party agreed to the contract.
- When recreating a record for a contract, both/all parties must be involved.

RESPONSE
The purpose of this provision is not "recreating" a record, but to outline what to do when a contract is not reduced to a written agreement. As not all contracts are written, a process is necessary to accommodate such agreements.

COMMENT 73
6221.19 (3) Refers to retaining evidence that work was done

- How can a campaign prove that an attorney did their work when it cannot/should not provide emails containing attorney-client advice?
- If a client and their attorney agree the work was done and the retainer agreement is detailed, that should be enough.
- In general, the requirement to document that work was done creates a new full time campaign job.
- Why is an affidavit required if campaign agrees work was done?
- How do you determine what someone’s value is? If someone wants to waste their money on their friend who doesn’t do a good job, is it up to the PCFB to police how a candidate chooses to campaign, to micromanage their campaign choices?
- This section in its entirety should be discretionary. The PCFB should not require the documentation for every vendor on every campaign, but rather, should reserve the right to request documentation and should set forth the standards as to when it will do so.

RESPONSE
The PCFB disagrees that providing such records, such as "time records," as being overly burdensome to a campaign. Further, where such information is not available, the proposed rules provide that an affidavit may be submitted by a vendor and campaign representative. This system is necessary to ensure that work as reported was actually performed.

COMMENT 74
6221.19 (l) Travel

- Refers to a mileage log for car travel
- Personal cars are less of an issue in city than state-wide.
- This requirement could be a burden.
- Should mileage be recorded for daily usage?
- Why does the campaign need to provide the name of every passenger in the car? What if the driver brings along a child?
- If a volunteer uses their own car to drive to collect petition signatures, do they have to record the address of every house they stopped at to get a signature? What about volunteers dropping off election day workers or checking on poll sites?

RESPONSE
If a campaign attempts to use public matching funds for travel expenses, the PCFB believes the requirements for car travel are reasonable. Such information is necessary to protect the public fisc from personal use.

COMMENT 75
The most important point is the purpose of the trip.

- Dates are ok.
- Must the mileage be charged to the campaign?
- If a volunteer uses their own car and does not charge for mileage, will it be an in-kind?
- Most volunteers would probably ask the campaign to pay for gas, however.
- What about volunteers using own computer, using own car?

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- It should be the same.
- The mileage requirement seems to be overreach.
- Campaigns should have to pay for gas only, not mileage.

Campaigns should have the option to pay for mileage, but not be required to do so. Volunteer should be able to volunteer the use of their car or computer or cell phone, etc. Ownership of the car should not be looked into. For example, the volunteer's mother may own the car.

- However, if someone gives the campaign the use of a car for 4 months, that would be an in-kind contribution.

RESPONSE
Milage does not have to be reported, but, in turn, the campaign would not be able to use public matching funds to reimburse such travel. If a volunteer uses their own car, and does not charge for milage, it would not be considered an "in-kind" contribution.

COMMENT 76
6221.19 (m) Intermediary contribution statements

- States that records of intermediaries need to be maintained “for each instance” when a committee accepts 3 or more contributions through an intermediary or where the campaign knows of the intermediary’s solicitation.
- This topic is very important, and the section is very vague.
- What does each instance mean? Does this mean that acceptance of 3 contributions on a Friday need to be recorded as intermediated, but 2 contributions from the same intermediary on Monday do not have to be recorded as intermediated?
- Instances should be aggregated
- Change the phrase, “deliver to a fundraising agent,” to deliver to any agent of the campaign.
- Is intermediary defined? There should be an exception for family members.
- Will contributions intermediated by persons doing business with the state and/or lobbyists be matchable?
- In terms of organization of the regulations, first there should be the rules about how to be an intermediary and then how to keep the documents for intermediated contributions. This type of organization should be implemented throughout.

RESPONSE
The proposed regulation would require an intermediary statement whenever three or more contributions are delivered to the campaign in the aggregate; not where contributions are accepted in each isolated event.

The proposed regulation is amended to change “deliver to a fundraising agent,” to deliver to any agent of the campaign.

COMMENT 77

- 6221.20 Payments of Matching Funds
    - (a) States that matching funds will only be paid after campaign is “certified” as having met the eligibility requirements.
    - What does “certified” mean? Is this a formal process? Is it a one-time process or an ongoing process?

RESPONSE
The proposed regulation is amended that addresses this comment.

COMMENT 78
6221.20 (d) States that "Payments shall be used as reimbursement or payment for qualified campaign expenditures actually and lawfully incurred or to repay loans used to pay qualified campaign expenses."

- Does this mean that a campaign has to report and document qualified expenditures in advance and that the PCFB will evaluate these in advance before payment?

RESPONSE
No, a campaign would not have to get preapproved to pay for expenditures.

COMMENT 79
6221.20 (e) States that payment shall be made "for qualified campaign expenditures that are reported and obtained by the PCFB."

- What does "reported and obtained" mean? Does this mean uploaded into the PCFB financial disclosure reporting system?
- What if PCFB computer systems malfunctions?

RESPONSE
Campaigns have a duty to accurately report payments of public matching funds for qualifying expenditures. If there is a long-term computer system problem where campaigns are unable to electronically submit its disclosure, which would be totally unexpected, the PCFB would have to institute an alternate method of filing disclosure statements.

COMMENT 80
6221.21 Limits on Public Financing

- (b) States that no payment will be made to a candidate "who is not opposed by a candidate on the ballot."
    - What is the definition of opposition? Should an opponent be required to raise a certain amount of money to be considered real opposition?

RESPONSE
"Opposed" means having another candidate on the ballot for the same office. The proposed regulations reduces qualified payments for opposition that is not competitive.

COMMENT 81
6221.21 (e) States that a public funds payment will not exceed 25% of the maximum public funds "unless the participating candidate is opposed by a competitive candidate."

- What is a "competitive" candidate?
- Should standards for competitive candidate be higher?

RESPONSE
Criteria for determining whether a candidate is competitive is provided in the proposed regulations.

COMMENT 81
6221.21 (f) States that a participating candidate "seeking to show that they are being opposed by a competitive candidate" shall submit a signed statement certifying that "one or more of the conditions" set forth below applies and that if the PCFB rejects a candidate's assertion that the opponent is competitive, that the candidate may "make one additional attempt" no later than 10 days before the election.

- Additional certifications that an opponent is competitive should not be limited to one and should not be limited to a particular time period.

RESPONSE
The regulations have been amended to clarify that a candidate can attempt to show that they are being opposed by a competitive candidate more than once.

COMMENT 82
6221.21 (g) States that there is opposition by a "competitive candidate" if "any of the following

conditions applies."

- The issues that this section addresses are important and need to be thought through as to how they will work across the state, not just in big cities, but in towns of 1,000 residents.
- Is one condition really sufficient to show competitive opposition?
- Shouldn't it be required that the opponent meet a certain threshold of raising and spending for their campaign?
- Consider revising these factors.
- (3) Refers to "significant media exposure."
- Six appearances by the opponent in "print media."
- Legitimate digital media should not be excluded.
- In addition, not all online New York Times articles, for example, actually appear in the print version of the paper.
- Consider consulting with a media expert to better define rules for media. These rules are based on an older understanding of media.
- Alternatively, you could eliminate this media factor; it creates a lot of headaches.
    - Political clubs have media machines
    - Incumbents have media machines.
    - Media can be bought.
    - This is a loophole for people to get more matching funds.
- Also, there is an upstate/downstate difference in the ability to get media exposure.
    - Upstate may get in paper all the time for cutting ribbon in a Dairy Queen.
    - Downstate it is harder to get more media exposure.
- Does this include lawn signs?
    - Lawn signs can be a significant factor in certain campaigns.
- (6) States that a candidate has a competitive opponent if the opponent receives public funds.

- Appears that a candidate would have to certify that this has occurred.
    - This should be unnecessary because the PCFB has this information and should sua sponte determine that the 25% public funds cap described in (e) above should be lifted for all candidates opposed by a public-fundsreceiving candidate.
- When a single candidate in a race receives public funds at a particular payment, is the 25% public funds cap lifted at that payment for all others in the race, or do the other candidates have to wait until the next payment for the 25% cap to be lifted?
    - What are the implications of a delay for the other candidates?
- (7) States that an opponent is "competitive" if the opponent's name is similar to the name of the certifying candidate.
    - Eliminate.
- (8) States that an opponent is "competitive" if they had a family member who has held elective office "in an area encompassing all or part of the area of the covered election in the past ten years."
    - Ten years is too long.
    - What does it mean "encompassing all or part of"? Does this include higher office?
    - Should we limit the definition of elective office? What about dog catcher, school board, etc.
- (9) States that the cap will be lifted if the opponent "meets part of the qualifications" set forth in 1-8 above and the PCFB determines "based on the totality of the information provided" that the opponent is competitive.
    - It would be better if the factors were made clearer, a financial component was added, and the PCFB did not have to exercise discretion.
- (h) States that "the PCFB, or any designated staff" will determine whether to lift the 25% cap and to pay additional funds.
    - Does the staff determine public funds payments or does the PCFB?
    - Staff should review the information and make a recommendation and the PCFB should make the determination.

RESPONSE
The competitive criteria in the proposed regulations are amended and addresses these comments.

COMMENT 83
6221.21 (i) States that "A candidate who appears as the only candidate on the ballot" will not receive public funds.

- Add that the candidate is the only candidate for that office.
- Eliminate the word "appears" on the ballot. The candidate is simply the only candidate on the ballot for that office.

RESPONSE
The proposed regulations are amended to address these comments.

COMMENT 84
6221.21 (j) States that a candidate who is only a write-in candidate or who is opposed by only a write-in candidate is not eligible for public funds.

▪ What about a "Byron Brown" situation (Buffalo mayoral race)? He is a wellknown candidate, who lost the primary and is running in the general as a writein.

His campaign is very high profile, is spending a good deal of money, and is projected to win.

▪ What if a write-in has raised and spent a lot of money? Under those circumstances should a write-in candidate and a candidate who is opposed only by such a write-in candidate get public funds?

▪ Consider making an exception for highly qualified write-in candidates.

RESPONSE
Election Law 14-203(1)(c) provides: "in the case of a covered general or special election, be opposed by another candidate on the ballot who is not a write-in candidate(.)" As such, write-in candidates are statutorily not eligible for matching funds.

COMMENTS 85
6221.22 Timing of Payment

- States that the PCFB will make payment "as soon as practicable" and that the PCFB "must verify eligibility for matching funds within four days of receiving a matchable fund claim."
    - "As soon as practicable" needs to reference something, is this after a particular disclosure statement? What does this mean?
    - Does verification of eligibility mean a payment will be made in 4 days?
    - Can staff do this 4-day verification and payment year-round after every disclosure statement or amendment whenever a matchable claim is submitted?
    - 4 days too short, should be 4 business days.
    - The 4-business day period does not have to apply to all disclosure statements and payments, only for the claims in disclosure statements submitted closest to the election. Need to clarify this.

RESPONSE
The proposed regulations are amended to address these concerns.

COMMENT 86
6221.22 (1) In the sentence about setting disclosure deadlines (dates to submit matching claims) strike "to be or which will."

- Disclosure deadline for all candidates, not just participating candidates, should be 5 pm not 1 pm.

RESPONSE
The PCFB has determined that a 1 pm deadline would operationally work better than a 5 pm deadline.

COMMENT 87
6221.22 (2) Concerning submitting back up documentation, the term “fully complete contribution card” should refer to a copy of the card that is uploaded through a document submission system.

- What is a “matchable fund claim”?
    - This is unclear. It implies there is a form.
    - Is this a part of a campaign’s regular disclosure statement?
- This section is about uploading documentation. Previous references to documentation referred to maintaining documentation.
    - Need to clarify when each type of documentation must be provided preand post-election and how it is to be provided to the PCFB.
    - Document provision requirements and deadlines need to be very clear and easy to read.

RESPONSE
The regulations have been amended to address these concerns.

COMMENT 88
6221.22 (3) States that the Comptroller will pay the public funds.

- Staff reviews submissions and the Board decides on payment. The Comptroller should not have discretion as to payments.

RESPONSE
Election Law 14-208(3) provides: "(t)he PCFB shall promulgate regulations for the certification of the amount of funds payable by the comptroller from the fund established pursuant to section ninety-two-t of the state finance law, to a participating candidate that has qualified to receive such payment." As such, it is required that the comptroller pay the matching funds.

COMMENT 89
6221.22 (b) States that the PCFB will authorize payment within 2 days of determining eligibility

- Unclear what authorizing payment means, does this mean the Comptroller will make payment 2 days after eligibility is determined which is 4 days after claims are submitted?

RESPONSE
"Authorized payment" means that the matchable funds are authorized to be paid on the next scheduled payment date.

COMMENT 90
6221.22 (c) States that the PCFB and the Comptroller will authorize 3 payments in the 30 days before a primary, general, or special.

- What about payments outside this time period?
- Earlier payments are needed.
- Money is almost useless when you receive it this late.
- Keep in mind that there are 9 days of early voting. Is the 30 days before election day or before early voting?

- Need time to do television and radio. Could barely do a mailing if funds are available only 30 days before the election.
- Consider making payments 60 days before early voting.

RESPONSE
Election Law 14-203 provides: "The PCFB shall schedule at least three payment dates in the thirty days prior to a covered primary, general, or special election." This statute, and the corresponding regulations, sets out the minimum floor; it does not preclude the PCFB from scheduling earlier payments; and, in fact, this section specifically permits schedule dates to be scheduled earlier than 30 days from an election.

COMMENT 91
6221.22 (e) States that payments may not be earlier than 30 days after petitions are due and "not less than 45 days before" the election.

- This is unclear and appears to contradict (c).
- The first primary payment should be 15 days after the last day to file petitions. If a candidate is thrown off the ballot, they will have to repay the public funds not spent on qualified expenditures.
- (f) States that the first general election payment must be after primary day.
    - The election will not be certified at this point, so the only candidates eligible for a general election payment would be candidates running on an independent body line. Is this right?
    - Consider specifying 4 payments in the 90 days before the general election.
    - Consider an early public funds payment which could help pay for petitioning.

RESPONSE
The proposed regulations, as written, permits the PCFB to schedule payment dates consistent with statute, and the needs of the campaigns. The 45-day primary window is reasonable and consistent with statute.

Statute precludes payments to candidates not on the ballot; as such, pre-petition payments are not feasible.

COMMENT 92
6221.24 Limitations on the Use of Matching Funds

- States that funds must further a candidate's nomination for election or election.
    - Consider simplifying to say something like furthering a participating candidate's candidacy in a primary, general, or special or simply to further the participating candidate's election.
- (b)
    - (5) States that public funds may not be used for expenditures in cash.
        - Consider changing this to state that cash expenditures over $100 are not qualified and that cash expenditures under $100 that are not accompanied by a receipt are not qualified.

- (8) States that public funds may not be used for gifts, except for … and “other printed campaign material”
  - Change to other campaign branded material.
- (13) States that public funds may not be used for fines.
  - What about payment for fines for putting up campaign posters or signs?
  - Rules on yard signs can be complex upstate.
- (14) States that public funds may not be used for advances except for purchases under $250.
  - We agree.
  - Candidate and family advances should also be qualified since at the beginning of a race, the candidate and their family are the ones that throw down the money to get things up and running.

RESPONSE
Advisory Opinion 87-1 opines that paying fines related to campaign posters using regular campaign funds is considered a personal use. The standard for public matching funds is higher, so it would not be permissible.

In considering the remainder of the comments, the PCFB do not believe further amendments are necessary.

COMMENT 93
6221.27 Audits

- States that the PCFB or its duly designated representatives will conduct audits.
  - This is an issue throughout these regulations. Who is a “duly designated representative”? This should be rephrased to state that the PCFB shall conduct audits (which can include the meaning that its staff will conduct audits) or state that staff shall conduct audits.

RESPONSE
A "duly designated representative" refers to employees of the PCFB or SBOE.

COMMENT 94
6221.27 (1) States that every candidate for a non-statewide office who receives $500,000 in public funds will be audited.

- $500,000 is much too high, it should be lower.
- Also consider using a different audit threshold for Assembly and Senate.
- Make clear that this is an aggregate amount of public funds for the election cycle including both the funds received for the primary and the funds received for the general.

RESPONSE
Election Law 14-208(1)(b) provides: "(e)very participating candidate for statewide office who receives public funds as provided in this title, and every candidate for any other office who receives five hundred thousand dollars or greater in public funds as provided in this title, shall be audited by the PCFB along with all other candidates in each such race…." Accordingly, the thresholds cannot be amended.

COMMENT 95
6221.27 (2) States that “except as provided in paragraph (a)” that only 1/3 of candidates will be audited.

- This seems to contradict paragraph (1).
- Does this mean that of the candidates who receive less than the audit threshold in public funds, 1/3 will be audited?

RESPONSE
This provision provides that if a campaign for a legislative office received less than $500,000, then they may be subject to an audit, pursuant to a 1/3 lottery.

COMMENT 96
6221.27 (3) States that “the cost of the post-election audit shall be paid by the participating candidate’s authorized committee” using matching funds and/or private funds.

- Does this mean the campaign must pay for its own audit?
- How much does an audit cost? What are the rates?
- Or does this mean that the cost of responding to the post-election audit can be paid for with public or private funds?
    - This makes sense.
    - Amend to clarify.
- (4) States that a participating candidate must maintain a 3% reserve of the public funds it receives for “post-election audit purposes.”
    - What does this mean? Does this mean campaigns pay the PCFB staff for the audit?
    - If only 1/3 of the campaigns are audited, why do they all have to withhold a reserve?
    - This would mean that audited campaigns are penalized twice, once by having to withhold 3% of their public funds for the audit, and twice when they are penalized by staff for issues it finds during the audit.
    - Are penalties assessed only against campaigns that are audited?

It would appear that a campaign could not be penalized without an audit because an audit could provide evidence that the penalty was not warranted.

- Why the amount of 3%?
- Campaigns may prefer to raise additional money to pay for their response to the audit.
- If the PCFB wants 3% withheld for some reason, it should hold the money, do not give it to the campaign.

RESPONSE
Pursuant to section 14-208(1)(d) of the Election Law: "(t)he cost of complying with a post-election audit shall be borne by the candidate’s authorized committee using public funds, private funds, or any combination of such funds. Candidates who run in any primary or general election must maintain

a reserve of three percent of the public funds received to comply with the post-election audit." As such, campaigns are statutorily required to keep a 3% reserve in order to comply with an audit.

Campaigns would use these funds to respond to an audit; they would not have to pay for PCFB staff.

A campaign could be penalized, even though they are not audited. The PCFB may investigate pursuant to a pre-election examination of documents, an audit, a complaint, or on its own initiative.

COMMENT 97
6221.27 (5) States that all audits must be completed within one and a half years of the election.

- This may be a challenge.
- What does a completed audit mean?
    - Does this mean that staff reviews documents and disclosures and submits a draft audit report to the campaign?
    - Campaigns need a chance to respond to staff findings.
    - The audit process needs to be clearly laid out along with standards that will be used by the staff.
- (6) States that a final audit report shall be issued to "each campaign."
    - Does this mean each audited campaign?
    - This should only occur after back and for the with the campaign during which the campaign can respond and resolve what it can resolve.

RESPONSE
An audit is complete once a final report has been completed. The report would be given to the campaign in question, and will be a public record. Campaigns will be given adequate time to cure any defects subsequent to the final report.

COMMENT 98
6221.28 Lottery

o (a)

▪ (4) States that Senate Districts where a participating candidate has received $500,000 or more in public funds will be removed from the lottery.

• What about Assembly Districts where a participating candidate has received $500,000 or more in public funds?

• Does this mean that if one candidate in a district receives over $500,000 in public funds that all candidates in the district are audited?

▪ (5) States that campaigns are selected randomly until a number equal to 1/3 of participating candidates or 50% of participating candidates is reached.

• This is unclear.

• In calculating the percentage, will you include the candidates that are required to be audited because they received over $500,000 in public funds?

RESPONSE
Pursuant to Election Law 14-204, a candidate for Assembly is only eligible to receive up to $175,000 for a primary election, and $175,000 for a general election. As such, it is impossible for an Assembly candidate to receive $500,000 or more in public matching funds. Senate candidates who received $500,000 or would not be used to determine the 1/3 lottery. The lottery would encompass the remaining campaigns who received less than $500,000.

COMMENT 99
6221.29 Repayments of Excess Funds

o The use of the terms "excess" and "surplus" may lead to confusion.

RESPONSE
The PCFB has determined not to make any amendments to this provision.

COMMENT 100
6221.30 Repayments of funds used for an impermissible purpose

o Will there be a potential post-election payment?

o The candidate and committee should be responsible for repayments, not the treasurer.

o The candidate, treasurer and committee should be responsible for penalties.

RESPONSE
Election Law 14-208(2)(b) provides that a treasurer be jointly liable for repayments based on impermissible use. As such, the regulations must mirror the statute.

COMMENT 101
6221.31 Repayments of Surplus funds

o (a) States that if "total payments of matching funds" paid to a candidate exceed the "total campaign expenditures," then the campaign must repay these surplus funds and that, surplus funds must be repaid "no later than 27 days after all liabilities have been paid but not later than the day the PCFB issues its final audit report."

▪ Surplus funds should be further defined.

• Does "total campaign expenditures" include only qualified expenditures (expenditures that can be made with public funds) or all expenditures?

• Is this the final bank balance?

• Does this include the bank balance of a separate account that includes only private contributions that were not submitted for match? The bank account issue remains unclear. Does a campaign have one or two accounts?

• If a campaign is permitted to have two accounts, one for matching claims and public funds and one for other contributions not submitted for match, then they should be considered truly separate accounts.

o If a campaign spent all their matchable contributions and matching funds on qualified expenditures, but in their private account, they have $50,000, they should be able to use the private funds for another election or contribute them to charity.

o Or does repayment of "surplus" funds also include any funds remaining in the private funds account?

• What can you spend post-election money on? This should be clearer.

• Campaigns need to be able to keep money to pay for the post-election audit and would not repay funds until the audit is finished.

o A campaign's liabilities to its staff or consultants who are assisting with the final audit will not be paid prior to the final audit.

RESPONSE
The regulations have been amended to address many of these concerns.

COMMENT 102
6221.31 (1) States that if a campaign "has been found to intentionally delay the postelection audit, they must immediately repay unspent matching funds."

- What does it mean to intentionally delay the audit?
    - This should be eliminated.
    - There can be a penalty for a delay in responding and for not responding to PCFB post-election audit requests.
- What does "unspent matching funds" mean?
    - Campaigns will not have any money left at this point, except for the 3% reserve, if that remains a requirement, though it is difficult to imagine that in the heat of a campaign, that this amount will be retained.
    - How would this be calculated?

RESPONSE
The regulations have been amended to address many of these concerns.

COMMENT 103
6221.31 (2) States that post-election expenditures may be made with public funds but only for "routine activities involving nominal costs associated with closing a campaign and responding to the post-election audit" and must be made within 60 days of election day.

- This should be clarified.
- "Closing a Campaign" and "responding to the post-election audit" should be 2 separate bullets, as they are 2 different aspects of the post election and certainly contain 2 different time requirements. It's fair to give 30-60 days post-election certification to close up a Campaign, but obviously will take years to respond to the post-election audit.
- Costs for responding to the post-election audit are not nominal and the word "nominal" is too subjective. This word should be eliminated.
- 60 days to pay post-election expenditures is not enough time.
- The audit may not be finished for a year and a half or more.

- Campaigns need to hire consultants or staff to help with audit
- This deadline should be extended, perhaps to within 60 days of the issuance of the final audit.
- Also, some campaigns will not have the funds to pay their preelection liabilities within 60 days after the election (or even within 60 days of the final audit). They may need to raise funds.

RESPONSE
The regulation has been amended to provide that this requirement does not apply to the requirement that campaigns must maintain a 3% reserve to comply with an audit.

COMMENT 104
6221.32 Repayment of Funds: Notice

- (a) Add the word "include" so it reads, "shall also include a notification of hearing rights."
- States that a campaign can have a hearing before the PCFB or "any authorized person."
    - What does "any authorized person" mean?
    - Won't the hearing be before the PCFB?
- (b) States that the campaign can request a hearing in three days.
    - This is way too short.
    - This should be 15 business days.

RESPONSE
The regulations have been amended to address these concerns.

COMMENT 105
6221.33 Hearing Officers

- Change language to "shall be assigned pursuant to a request for a hearing."
- States that hearing officers are those appointed by the NYS BOE.
    - How many hearing officers are appointed by the NYS BOE?
    - How are these appointed? Are they nonpartisan?

RESPONSE
This section has been deleted and added to a different set of proposed enforcement regulations.

COMMENT 106

6221.34 Audits, generally

- This section belongs elsewhere.
- (a) States that PCFB determinations are not final.
    - Needs to be clear that the Final Audit is final or the Final PCFB Determination is final.
- (b) States that participating candidates may use "private campaign contributions for otherwise lawful expenditures."
    - What does this mean?
    - This seems to indicate campaigns can have a second bank account for private contributions not claimed for match.
    - This needs to be fully explained above.
- Also, does this complicate reporting? How do campaigns report expenditures out of the private account? Are they reported separately?

RESPONSE

This section has been deleted.

COMMENT 107

- When referring to the date of the "election" consider whether this should instead be the date of the "certification of the election" since this date could be considerably after election day. Remember that by "Election Day," there will be no result in many cases, as absentee ballots will not have been counted.

RESPONSE

As indicated in the response to comment 1, statute defines the "date of the election." The PCFB does not have the discretion in changing the definition of Election Day.

COMMENT 108

- Consider that the regulations will be used by non-lawyers so they must be very simply written and clear.

RESPONSE

Such consideration has been given in amending these proposed regulations.

COMMENT 109

- In our reading, the regulations do not make clear which regulations cover only participating candidates and which cover participating and nonparticipating candidates.

RESPONSE

As these regulations relate to the Public Campaign Finance Program, they only apply to candidates that are participating in the program.

COMMENT 110
In relation to this, the rules about whether a participating campaign can have one bank account for matching claims and public funds governed by the rules and one bank account for private contributions not submitted for match that is not covered by the rules is unclear. Does the PCFB expect to require participating campaigns to have 2 bank accounts? If so, there are many additional comments, questions, and concerns with this route. If not, then the rules need to be much clearer.

RESPONSE
The PCFB will permit campaigns to have one bank account.

COMMENT 111
- Review use of hyphens, for example for the term two hundred fifty. Take out hyphens.
- Consider capitalization throughout, for example for State, Board of Elections, Senate, Assembly.

RESPONSE
Staff undertook this review in drafting amendments to the proposed regulations.

COMMENT 112
Review the use of the "PCFB or its duly designated representative." This should not be used. What is a duly designated representative? Does this mean that the PCFB can delegate work to its chosen political operatives? The PCFB should act by itself and through its staff, not through other entities. Globally it may make sense to have a set number of powers that can be delegated from the PCFB to its staff and a requirement to have those delegations made public.

RESPONSE
The PCFB will not act though other entities, rather, "duly designated representatives" refers to staff of the PCFB and SBOE proper.

COMMENT 113
Review reference to forms. Will these be electronic?

RESPONSE
Most forms will be filed electronically. The application and certification a candidate must file will be on paper form as such form must be notarized per statute.

COMMENT 114

- Review the use of the terms “candidate”, “treasurer”, and “campaign” in defining activity by a person or entity and also in defining who is responsible for that activity. It appears that the Treasurer has a fairly limited liability here, which is surprising since the BOE relies on the Treasurer in many ways.
- Review the use of the term “days.” Deadlines should be expressed not in “days” but explicitly in “business days.” The current draft uses both, which we believe is in error. Needs to be consistent. In general, the deadlines used for PCFB actions and at times for campaign actions are much too short.

RESPONSE
The PCFB underwent such review in drafting amendments to the proposed regulations.

COMMENT 115

- Consider the overall organization of the regulations. Sometimes it seems we get into detail without an understanding of the overall framework of the issue. Sometimes a general issue is addressed with now specifics. Sometimes important details pop up in an area where they could be overlooked, but many times specifics are missing.

RESPONSE
The PCFB rearraigned certain sections of the proposed regulations, along with potential amendments to the enforcement regulations, which addressed this concern.

<u>Comments Made by the New York City Campaign Finance Board</u>

COMMENT 116
We would recommend avoiding rules specifying the method by which correspondence will be sent to campaigns – e.g. 6221.8(c)(3)(A) provides for notice of a preliminary breach determination to be sent by email and certified mail. Maintaining flexibility in the rules is key since those processes often change over time, especially for electronic transmission. Certified mail in particular seems like a requirement you may not want to impose on yourselves if you don’t have to.

RESPONSE
The proposed regulation is amended to address this comment.

COMMENT 117
We think that the phrasing of 6221.22(e) could be more clear; something along the lines of “No matching funds shall be paid to any participating candidates in a primary election before the earlier of 1) thirty (30) days after designating petitions or certificates of nomination shall have been filed or 2) forty-five days before such election.” (We assumed the intention was to make it the earlier of the two, but if not, perhaps a different type of clarification would work.)

RESPONSE
The cited provision in the proposed regulation is amended to read: "No matching funds shall be paid to any participating candidates in a primary election before the earlier of 1) thirty (30) days after designating petitions or certificates of nomination shall have been filed or 2) forty-five days before such election.”

COMMENT 118
There is a slight tension between the statute and the rules regarding the turnaround time for payments, which we think can be resolved just by specifying in 6221.22(a) that the deadline for eligibility determinations is four business days. (6221.22(b) does specify two business days for the actual payment, but the statute says “two days” and does not state that weekends and holidays are excluded, as it does for the four-day eligibility turnaround. However, if the rule specifies business days in both instances, that seems sufficient to resolve the discrepancy.)

RESPONSE
6221.22(a) is amended to read "four business days."

COMMENT 119
6221.5(a) and (b) both state that participants may only have one committee per office sought.

RESPONSE
The proposed regulation is amended to address this concern.

COMMENT 120
6221.8(b)(5) ends with “; or” and there’s no subsection (6) – we weren’t sure whether there’s a missing (6), or (5) should end with a period.

RESPONSE
The proposed regulation is amended to address this concern.

Campaign Legal Center

COMMENT 121
CLC recommends that the PCFB’s final regulations specify that participating candidates must itemize all contributions of $5 or more and all expenditures on their campaign finance disclosure statements (not just matchable contributions).

RESPONSE
The regulations have been amended to address this comment.

COMMENT 122
Next, CLC recommends the PCFB’s final regulations more clearly specify how participating candidates should submit “supporting documentation” to validate their claims for matchable contributions. The draft regulations are not sufficiently clear regarding the requirements for submitting documents to corroborate candidates’ requests for public funds, and the final regulations should clarify exactly how this important piece of the New York program will work.

RESPONSE
Section 6221.20(c) or the proposed regulation is amended to provide that: "Matchable contribution claims shall be accompanied by contribution records as outlined in section 6221.19(b) of these regulations.

COMMENT 123
CLC recommends that the final regulations set forth potential questions and violations that the PCFB could raise in its preliminary review of participating candidates' disclosure statements, and that the regulations explain how and when a candidate can resolve compliance issues during the preliminary review.

RESPONSE
The proposed regulations are amended to add examples of instances where a claim for a matchable contribution may be denied.

COMMENT 124
Because full public financing under New York's program will only be available to a participating candidate who is opposed by another "competitive candidate" in the race, CLC recommends that the PCFB's final regulations use criteria more directly indicative of whether an opposing candidate is "competitive."

RESPONSE
The proposed regulation is amended that addresses this comment.

COMMENT 125
CLC recommends that the PCFB explain in the final regulations how public funds will be paid out to participating candidates in special elections.

RESPONSE
Section 6221.22(e) as amended reads: "The PCFB shall issue, and post on its website, a schedule of payment dates by January 1st of each election year for both the primary and general election. For special elections, the PCFB shall issue a calendar of scheduled payments by the last day to nominate a candidate for such election. No matching funds shall be paid to any participating candidates in a primary election before the earlier of 1) thirty (30) days after designating petitions or certificates of nomination shall have been filed or 2) forty-five days before such election."

COMMENT 126
CLC recommends that the PCFB's final regulations extend the time for candidates to request a hearing upon receipt of a notice of fundamental breach of certification and to respond to the PCFB's preliminary determination regarding the breach.

RESPONSE
The proposed regulations have been amended and addresses this comment.

COMMENT 127
CLC recommends that the PCFB's final regulations calculate a legislative district's "average median income," for purposes of the public financing program's qualification thresholds, using the "median household income" data published by the U.S. Census Bureau.

RESPONSE
The proposed regulations have been amended and addresses this comment.

Brennan Center Comments

COMMENT 128

The draft regulations provide that participating candidates must register "on forms prescribed by the PCFB." § 6221.5(a). This phrase seems to contemplate that participating candidates will register on different forms than the traditional State Board of Elections ("BOE") forms nonparticipating candidates use. We see two issues with this differentiation. First, candidates may not know, at the registration stage, whether they will participate in the program or not. Second, whatever information is required beyond what is on traditional registration forms can be collected during the certification process. We recommend a single registration process with the BOE for all candidates.

RESPONSE

The proposed regulation provides that committee registers with forms prescribed by the SBOE.

COMMENT 129

The draft regulations require participating candidates to have a single authorized committee. § 6221.5(a). But the draft requires participating candidates to certify they understand "that the use of an entity other than the authorized committee, and/or party and/or constituted committees" is a violation. § 6221.7(b)(6). This phrasing could be read to allow participating candidates to "use" party committees and constituted committees just as they would an authorized committee, which is likely not the PCFB's intention.

RESPONSE

The purpose of the wording in this section is to make clear that a candidate cannot use any other committee, other than their sole authorized constituted committee; however, statute does not prohibit a party committee from transferring funds to an authorized committee.

COMMENT 130

We suggest that the candidates' deadlines (in responding to breach of certification)in this process be pushed back.

RESPONSE

The proposed regulations have been amended to address this concern.

COMMENT 131

the draft regulations place a limit on the amount of excess contributions that candidates can pay to the Fund (as opposed to refunding to the donor). § 6221.9(a)(8)(i)(b). They do this by deeming such payments to be self-funding and thus to be counted against the limit on amounts candidates can give to their own campaigns, which is three times the otherwise applicable limit.

RESPONSE

The proposed regulation is amended to delete the provision: " Any such personal payment shall count towards the candidate's personal contribution limit and shall not be allowed in any amount that shall exceed that limit from the candidate or any candidate's family members."

COMMENT 132
The draft regulations repeat the AMI concept. § 6221.11(a)(5), (a)(6), (c). The Census Bureau does not publish a metric called “average median income,” but the “median household income” metric it does publish for states and state legislative districts fits the meaning of the statute.9 We recommend that the regulations explain that the PCFB will use Census data for median household income to determine the “average median income” for the state and each legislative district.

RESPONSE
The proposed regulation in amended to provide: "The average median income, as described in this section, shall be determined by the median household income published by United States Census Bureau three years before such election for which public funds are sought."

COMMENT 133
the draft regulations also refer to the preexisting rule for nonparticipating candidates, that only contributions aggregating to $100 or more must be itemized. § 6221.13(a)(1), (b). To avoid potential confusion for participating candidates, we suggest adding a clause such as, “provided, however, unitemized contributions are ineligible to be matched,” in each provision referring to the $100 threshold for itemization.

RESPONSE
The regulations have been amended to address this comment.

COMMENT 134
The draft regulations provide for preliminary review of disclosure statements and allow candidates to “have an opportunity to respond to and correct potential violations.” § 6221.17. This process is important to the smooth functioning of the program and candidates’ ability to use it. Candidates would benefit from a clear understanding of the timeline. The regulation should make explicit that communications from the PCFB regarding questions arising in the preliminary statement review will clearly state the date by which candidates must respond to avoid penalty. The regulations should also provide guardrails for the timeline: we recommend a provision that candidates’ time to respond will be no longer than 35 days and no shorter than 5 business days.

RESPONSE
The PCFB believes that the proposed Enforcement regulations adequately provides that campaigns have a certain date it must correct deficiencies, and provides for guardrails, of when a candidate must comply.

COMMENT 135
The draft regulations provide criteria for determining whether a candidate’s opponents are sufficiently competitive. § 6221.21(g). These criteria are similar to, but more lenient than, those used in New York City’s public financing system.

RESPONSE
The proposed regulations are amended to address concerns over the competitive candidate provisions.

COMMENT 136
The draft regulations provide that the lottery will select districts until “one third of all participating candidates for the relevant office is reached, or fifty percent of all participating candidates for the relevant office is reached, whichever comes first.” § 6221.28(a)(5). The “for the relevant office” language in the first quoted clause should be deleted to conform with the statute.

Thus, the sentence should read:

"For each lottery, a bipartisan team shall pick random numbers using the lottery system until one third of all participating candidates is reached, or fifty percent of all participating candidates for the relevant office is reached, whichever comes first."

RESPONSE
The proposed regulations are amended as requested by this comment.

Private Citizen 1

COMMENT 137
Matching funding of matchable contributions??? Here’s my public comment: I refuse to ever be forced to pay into anyone’s political campaign.

RESPONSE
The public campaign finance program is required by statute. *See* Title 2 of Article 14 of the Election Law. As such, the PCFB is obligated to promulgate regulations to effectuate the program.

Private Citizen 2

COMMENT 138
As to the proposed rule contained in the Draft Public Campaign Finance Program Regulation labeled "6221.33 Hearing Officers," the text of the first sentence appears to be somewhat confusing.

Perhaps the first sentence could be reworded as follows:

"In the event that a hearing is requested by the committee and/or candidate as specified above, the selection of such hearing officer shall be made under this Part through a random selection process."

The second sentence of this proposed rule seems fine as is.

RESPONSE
The hearing officer section has been deleted and added to a different set of proposed regulations related to enforcement.

Draft Debate Regulations Comments

Brennan Center[1]

Comment 1

6221.38(C)(2)(ii) requires that candidates (program participants and non-participants) meet financial criteria in order to participate in debate. Specifically, as of the last filing date prior to a debate a candidate shall have raised and spent no less than 5% of the applicable limit for public funding as provided for in Election Law § 14-204. This objective fiscal criteria is similar to what is utilized by NYC.

Response

The purpose of the provision is ensure that all those receiving public funds are required to participate in at least one debate, while at the same time providing for other competitive candidates an opportunity to take part in a public debate.

Comment 2

Brennan Center

6221.38 provides for rules and regulations relating to the participation in a debate for statewide officers prior to an election. The regulations provides that statewide candidates raising and spending specific amounts shall be required to participate in public debates. However, the debate rules do not explain how they would apply to candidates for Lt. Governor, who run on their own in a primary, but on a party ticket in a general election.

Response

In response to the comment above, the draft debate regulations have been amended to provide clarification as to application of the objective debate qualifications as applied to Lt. Governor candidates prior to a general election when they are running on a party ticket.

Comment 3

6221.38(C)(1)(ix) requires that the host of the debate provide in their application to host a debate plans for the provision of a debate transcript translated into Spanish for the PCFB. Various State policies and statutes (Chapter 785 of 2021) require information on agency websites be translated into a number of other languages. Translation into more languages than just Spanish would allow more New Yorkers to learn about candidates and their positions. Requiring translation of a debate transcript into the ten most common non-English languages should be required.

Response

The proposed regulations addresses only the duty of the host to provide a transcript translated into Spanish to the PCFB. Notwithstanding such a requirement placed upon a debate host to translate a transcript into Spanish and provide it to the PCFB, other applicable State laws would require that any transcript posted on the PCFB website be translated into various other languages as well. Expanding the requirement that a host provide additional language translations of a debate transcript would be beneficial to the public in accessing the debate and the PCFB in complying with State law.

[1] Reinvent Albany supported the comments and positions of the Brennan Center. For the purposes of this draft, all comments attributed to the Brennan Center shall also be noted as coming from Reinvent Albany as well.

Comment 4
Section 6221.38(k) of the draft debate regulations provides that any broadcast plan submitted by a host shall provide for closed captioning and ASL interpretation. There is no inclusion in the draft regulations that specify a debate location (facility) be accessible for those with disabilities beyond hearing impairments.

Response
Notwithstanding existing requirements in law relating to accessibility, the draft debate regulations have been amended to include a requirement for accessibility for physical and other disabilities.

Comment 5
The draft regulations do not explicitly state that an organization's role as debate sponsor is not a contribution to the candidates at the debate. A strict reading of the definition of "contribution" in the Election Law could lead to the interpretation that the debate sponsor, by featuring candidates in a public form, is a contribution. We recommend additional language explicitly stating that organizers of a debate are not making contributions to candidates due to putting on a debate.

Response
In response to the comment above, the draft debate regulations have been amended to provide clarification that hosting of a debate by an organization is not a contribution to a candidate(s) that participate is said debate.

<u>Disability Rights New York</u>

Comment 6
To ensure greater accessibility, DRNY encourages the PCFB to require that audio descriptions of debates be debates describing the event to create a more inclusive experience for voters with visual disabilities.

Response
The PCFB is currently researching the feasibility of requiring audio descriptions being described during the broadcast.

Comment 8
To ensure greater accessibility for those with hearing disabilities provide closed captioning in multiple languages (10) without charge to the viewer.

Response
The PCFB has determined that such a requirement is not feasible at this time.

Comment 9
To ensure greater accessibility for those with disabilities and impairments, the PCFB should make available a method whereby, upon request, an individual can gain access to additional items, such as large-print materials produced for the debate.

Response
The PCFB expects that any public material available for a debate will be minimal; however, to the extent such material is made available to the public, the PCFB will ensure that such materials will be available in an accessible form.

Public Comments Related to the Enforcement Regulations

New York City Bar Association

Comment 1

6221.39 (a) This states that PCFB may make an investigation based on an audit, complaint, referral, or its own initiative which is fine but investigations should be a part of the enforcement process, rather than enforcement being only a result of an investigation as described in this section? See Section 6221.42.

Response

The PCFB as determined that the regulations adequately provides that investigations are part of the enforcement process.

Comment 2

6221.39(c) The PCFB should have own subpoena authority. Does enabling legislation allow for this? In general, the PCFB should be as independent as possible. Not sure why Election Law § 3-107 investigator provision is the proper model to follow. It includes provisions for arresting people and going behind the guard rail at poll sites, etc. Can there be staff auditors trained to conduct investigations?

Response

The PCFB does not have statutory authority to issue subpoenas; the State Board of Elections is the entity that has subpoena authority. See 3-102(5).

Election Law 3-107 provides that the State Board of Elections may appoint special investigators. Special investigators have "peace officer" status as set forth in section 2.20 of the Criminal Procedure Law. Peace Officer status enables the investigator to use various investigatory tools that would otherwise be unavailable. As such, the PCFB has determined that Election Law 3-107 is the appropriate model to follow.

Auditors will be trained to look for compliance issues in relation to the rules and regulations of the Public Campaign Finance Program. Audit reports will be the basis of enforcement actions. Investigators are needed for instances that need to go beyond audit reports, which may include possible criminal referrals.

Comment 3

6221.39(d) Not sure why the subpoena authority would be granted to the special investigator and not to the PCFB. A special investigator may have (their) own priorities and prejudices and this could cause an unnecessary delay. Shouldn't the PCFB be the one to approve subpoenas?

Response

As indicated above, the PCFB does not have statutory authority to issue subpoenas; that authority lies with the SBOE. The PCFB believes that there is adequate protections and checks and balances with regards to potential abuse of delegated subpoena authority upon an investigator.

Comment 4

6221.39(f) "firearm": clarify that this does not interfere personal license of investigator. Possibly change "possess" to "utilize". Possess has penal law definition.

Response
The purpose of this provision is to ensure that investigators do not carry firearms with them while on duty. The suggested term "utilize" would still permit an investigator to carry a firearm, including on State Board of Elections' offices, which is contrary to the purpose of this provision.

Comment 5
6221.39(g) (g) Clarify, if special investigator process is used, that investigator reports to staff and then staff reports to PCFB. Language giving special investigators the powers of subpoena and arrest, seems to give investigators power to act without staff or PCFB approval.

Response
The PCFB disagrees that the regulations, as drafted, enables a special investigator to act without staff or PCFB approval, nor does this regulation enable an investigator to make recommendations to the commissioners without approval of senior staff.

Comment 6
6221.40(b) The requirements of witnesses and documentation at the commencement of the complaint process is too much. This discovery level of detail should be required later in time, as it is in litigation.

Response
The PCFB disagrees that including any potential witnesses or documents with the complaint is onerous. Such information assists the PCFB in reviewing complaints.

Comment 7
6221.40(c) A complaint should be a letter/online document signed and sworn. The burden to file a complaint, as in litigation, should not be so onerous. Strike (c)(i)(1)(A)(iii). After reviewing the complaint, the PCFB can request more information or say this is not enough to substantiate further inquiry. Many complaints may not deserve a formal agency process. The PCFB may be inundated with complaints and must be allowed to exercise its judgment as to which complaints deserve additional staff time and investigation. Add that the PCFB within certain number of days will communicate with complainant to request more information or to close complaint. The PCFB must have the ability to request documentary evidence from both parties. The way it is written now it is demanding discovery at the point of making the complaint. Discovery comes later on from both parties.

Response
The PCFB has determined that a formal complaint procedure is a useful enforcement tool. The New York City Campaign Finance Board has a similar complaint procedure, and it does not appear to be inundated with complaints. The PCFB disagrees that providing documents, or the name of potential witnesses when filing a complaint is onerous. This information will help the PCFB assess the complaint.

Comment 8
6221.40(e) No fine or enforcement actions within 30 days of election day. This will help ensure that complainants will file their complaints timely and not wait until close to the election to file them. However, what is the statute of limitations? What if a campaign commits a violation worthy of a complaint in January of 2023 and wins in June of 2024, and the loser files a complaint July of 2024 against the winner, is that allowed? How long after the election can one file a complaint? There should be time limits.

Response
In response to this comment, the draft regulations have been amended to provide that formal complaints should be filed within three years of the activity that is subject to the complaint.

Comment 9
6221.42 Does enforcement apply to participants only or to all filers?

Response
Election Law 14-209(1) provides: " **Violations of any provisions regarding public campaign financing stated in** or regulation promulgated pursuant to this title shall be subject to a civil penalty in an amount not in excess of fifteen thousand dollars and such other lesser fines as the PCFB may promulgate in regulation" (emphasis added).

As nonparticipating candidates, by definition, are not regulated by the provisions related to public campaign finance, the PCFB does not have jurisdiction over such candidates.

Comment 10
6221.42 (a) This section states enforcement occurs pursuant to findings made pursuant to 6221.39 Investigations. Wouldn't enforcement also occur based on staff audit findings?

Response
The draft regulations have been to provide that enforcement may occur pursuant to an audit.

Comment 11
6221.42(b) Specify who personal service should be made on: candidate, treasurer, and political committee. The persons/entities who are responsible for responding to enforcement notices and for any resulting penalties need to be served. Political committees will have no money left at the time of the enforcement process.

Response
The draft regulations have been clarified to provide that service shall be made on the candidate, political committee, and treasurer.

Comment 12
6221.42 Is this the first-time campaigns are given notice of these issues? They should receive notices and opportunities to cure throughout the campaign's filling periods. If these opportunities do exist, they should be spelled out clearly someplace other than the regulations for formal enforcement proceedings. Guidance documentation should be provided.

Response
This will not be the first time a campaign will be made aware of enforcement type issues. In most instances, campaigns will be given an opportunity to correct deficiencies prior to it becoming an enforcement matter.

Comment 12a
6221.43(g) Last sentence, "A Hearing Officer may, however, communicate with staff of the PCFB as expressly permitted by subdivision 2 of section 307 of the State Administrative Procedure Act," should be removed because it gives the impression that the hearing officer will be communicating ex parte with agency staff which would be improper. The referenced exception appears to involve public utility licenses and public utility rates, etc. See NYS State Admin. Proc. § 307(2). Can this sentence be left out?

Response
The draft regulation has been amended to read that a Hearing Officer may communicate with staff of the State Board of Elections as expressly permitted under the State Administrative Procedure Act. Certain staff of the SBOE are assigned to facilitate administrative issues that may arise with hearing officers.

Comment 13
6221.44 (c)(1) Notice must be served on all persons/entities with legal responsibility, likely the candidate, treasurer, and committee. This should be clearly specified

Response
The draft regulation provides that a respondent is served, which would include anyone with legal responsibility, which may include that candidate, treasurer, or committee.

Comment 14
6221.44(d) This section states the "respondent" may "appear in person or by or with counsel." Do we need to say in person? Should we eliminate the first "or"? Perhaps the candidate, treasurer, and/or committee should be able to be represented by the person of their choice who may not be an attorney.

Response
The PCFB has determined that a non-attorney should not be able to appear in lieu of a candidate, treasurer or any other person who may be a respondent. Attorneys are bound by certain ethical rules and practices, which a non-attorney is not bound.

Comment 15
6221.44 (e) 10 business days to respond is way too short if this is the first time that the campaign has heard about these issues. The only time a short response time might be needed if it is within the 30 days before an election.

Response
As outlined above, this notice will not be the first time the campaign will be made aware of any enforcement issues.

Comment 16
6221.44(g) States that date of hearing will be not less than 7 business days after receipt of answer. Use term "service of answer" instead of "receipt" because date of receipt is an unknown to the sender. Change time period to 15 business days after service of answer.

Response
As service is accomplished via certified mail, or personal service, the PCFB disagrees that the date of receipt is unknown.

Comment 17
6221.44(q) Eliminate reference to parties submitting proposed findings of fact "typed legibly on plain, white bond, standard weight paper, 8 1/2 x 11 inches in size."

Response
A similar requirement is found in State Board of Elections regulations related to general enforcement matters. See 9 NYCRR 6218.4(e). As such, the PCFB declines to eliminate this provision from the draft regulations.

Comment 18
(t) The PCFB may enter into settlement agreements. How will settlement agreements be made transparent? Consider posting on website. What does settlement here mean? Does it mean negotiation/discussion with staff prior to a hearing before the PCFB and a final determination or does it mean after a hearing where the PCFB agrees to a reduction in penalties/repayment. What are guidelines for settlement so that they may be made "fair, equitable, and uniform"?

Response
Settlement agreements are subject to the approval of the commissioners, and will be made public once finalized. A settlement agreement can be made at any point of the process. The bipartisan structure of the board will ensure that settlement negotiations are fair, equitable and uniform.

Comment 19
6221.45 Staff should not be able to determine a violation. Only the PCFB determines whether a violation has occurred. Need to set forth the procedure for staff finding a violation. Where is this discussed?

Response
The draft regulations have been amended to address the concerns in this comment.

Comment 20
6221.45 Sequencing seems off, this section comes after hearing process but references pre-hearing process. Wouldn't it be that staff proposes a violation and a penalty, the hearing officer makes the determination and then the PCFB determines whether to accept the violation?

Response
Not all matters will be heard by a hearing officer. In order for a matter to referred to a hearing officer, a campaign must request a hearing. If a campaign does not request a hearing, then, by default, a penalty will be set for the consideration of the commissioners. The section in question is designs=ed to be flexible in order to accommodate both scenarios; where a hearing officer makes a determination and where a campaign does not request a hearing.

Comment 21
6221.45 Decertifying candidate and committee from participation. What does this mean? Is this a preliminary staff determination that certain campaign actions make it ineligible for public funds but that the actions can be remedied or corrected? This would come long before a final enforcement hearing.

Response
This language is in reference to a fundamental breach of certification, which has an expedited hearing schedule. Per, 6221.8(c), such candidates are not eligible for the program.

Comment 22
6221.45 (c) Liability is totally unclear. Need to clarify penalties, repayment, legal responsibility for candidates, treasurers, and committees

Response
The schedule of penalties are found, and clarified in, 9 NYCRR 6221.46.

Comment 23
6221.45(d) This concerns a pre-hearing chance to fix things with 45 days to respond. This should be in separate section coming before the hearing section. What does “work with,” to “cure or explain deficiency or violation” mean? What is the format and procedure for staff involvement, reaching out to campaign, and providing the campaign with additional information about how to cure or explain? The notice of violation, must include remedies, instructions on how to cure the problem and should strongly state the potential penalties if issue is not cured. People need to see the potential penalty numbers. Frankly, that is how you scare them and get them to respond. Campaigns need to know the potential financial liability so they can decide whether to hire a lawyer or other staff to help them in their response.

Response
This provision has been amended to address the concerns in this comment.

Comment 24
6221.45(f) Again, the proposal of a $300 or less fine that would be handled through a notice/advisory process prior to or instead of a hearing should be referenced earlier in these regulations. Consider making this a larger number such as $1,000. However, provision is unclear. Does this mean that for aggregate fines of $300 there would be no hearing or does it mean that a campaign could have 10 fines of $300 and there would be no hearing?

Response
The intent of this provision is that penalties of $300 in the aggregate would not immediately incur a penalty. The provision is amended to clarify this.

Comment 25
6221.45(h) Penalty can be above standard amount if violations "appears to be knowing or willful." This is not a good standard. Consider changing from "appears" to "is found to have been." There has to be some limit. What are the standards for going higher? How does a campaign know if it is worth it to hire a lawyer? Is going beyond the penalty guidelines up to the staff or up to the PCFB? Only the PCFB should be able to determine penalties.

Response
Changing the standard to "found to have been" would require a hearing to find such conduct. Campaigns already have an opportunity to be heard under this provision, as it provides: "If a penalty is determined to be above the standard amount, the treasurer, political committee and the candidate will be informed of the reason for the penalty enhancement in the enforcement notice and will be given an opportunity to respond to the allegation that it acted knowingly or willfully with regard to the violation."

Comment 26
6221.46 Standard Penalties Is there a limit on fines, for example, a $10,000 per violation limit? Penalties should be capped unless the violation is egregious and the standards for uncapping are clearly set forth.

Response
The PCFB has declined to cap penalties.

Comment 27
6221.46 (b), (c), (d) Contribution violations. What is the "first deadline provided by the PCFB", is this a deadline provided by an auditor in response to reviewing a filing pre-election? Or is this the post-election notice deadline. Not clear. Allowing campaigns use of corporate funds for this lengthy period is like check kiting. A campaign that would be accepting this otherwise prohibited contribution can hold on to the money and use it for a long time and the penalty is way too low. It is also unfair to other candidates because campaigns violating the law will be able to use these improper additional funds to get ahead in their campaigns.

Response
All campaigns will be notified of when they may cure the deficiencies highlighted in this comment. The proposed regulations have been amended to address the concern the penalties are too low.

Comment 28
6221.46(d) Consider providing better explanation about why anonymous contributions lead to disgorgement. The penalty is extremely low.

Response
A campaign would have to disgorge anonymous contributions because such contributions are prohibited by law. The proposed regulations have been amended to address the concern the penalties are too low

Comment 29
6221.46(e), (f) Do daily penalties for late disclosure statements stop at the deadline of the next disclosure statement at which time the campaign is assessed an additional penalty for failure to file? Or is the campaign assessed simply the failure to file penalty? Unclear.

Response
The proposed regulations are amended to cap the penalty at a maximum of the failure to file penalty, which addresses the concern of this question.

Comment 30
6221.46(g)(1) Does the PCFB mean maintain "records" of all receipts? The requirement to maintain all records of receipts, including bank statements and deposit slips, in order to be able to substantiate reporting is a very important point, but is buried here. Move it up front. How long to records need to be maintained? Propose six years after certification of the election.

Response
9 NYCRR 6221.18(c) provides that records must be kept for five years.

Comment 31
6221.46(g)(2) Likewise, this section on the reporting requirement is very important should be moved earlier in the regulations. This section is more about disclosure than about enforcement. The periods to respond to additional documentation requests (10 days, 2 days) is way too short and should be expressed in business days. Use 20 business days as the deadline for a response. For requests post-election, what is the rush? Losing candidates will not be paying attention. Do these document requests (which will go to some campaigns and not others (?)) replace or augment post-election filing requirements? What does "post-election" mean here. Election should mean after election is certified.

Response
The PCFB disagrees that there is no rush to complete the audit process. Election Law 12-208(1) requires that the PCFB complete all of its post-election audits within one and one-half years after the election. Given this time crunch, time is of the essence. Records must be produced in a timely manner.

Comment 32
6221.46(g)(2) says documents can be requested and (2)(i) says campaigns can amend their reporting. An immediate fine in these circumstances is improper. Allow campaigns the first bite at the apple to try to amend and fix the problems.

Response
The provision in question does permit a campaign to amend its filings within 2 days. This will enable the campaign to attempt to fix the problem.

Comment 33
6221.46(g)(2)(ii) states that a campaign shall be "suspended from further participation in the program." Does this document apply to only participants? If all the penalties and enforcement apply only to participants no one will participate. Participation should not be a walk off the plank situation. Does suspension from participation mean forever or just until compliance? Is the campaign is disqualified from receiving public funds for the current payment, the current election, or forever? Rather than saying suspending from participation, it could be phrased as eligibility for public funds, if that is what is meant. Campaigns should always have the chance to fix things. If candidate has falling out with treasurer, can it try to fix as many things as possible?

Response
As discussed above, per statute, enforcement is limited to participating candidates.

The provision in question states: "In the event that a campaign fails to provide the requested documentation, such campaign shall be suspended from further participation in the program **until such documents are provided, or an adequate explanation of why they cannot be provided is given**." (emphasis added). Hence; the suspension only lasts until compliance is had, or an adequate explanation is given.

Comment 34
6221.46(g)(2)(iii) Procedures for opportunities to cure late filings and insufficient fillings. These cure provisions and communications provisions should be listed separately from regulations governing the enforcement process, preferably earlier in the PCFB's rules. Most campaign staff looking at these rules will not be lawyers. All of this should be before the hearings and notices. It is unclear what the timeframe a campaign has to bring its filings into compliance. A penalty of 10% of what the campaign received or spent during the period (need to add whether the penalty will be the greater or lesser of these) seems very high but does put the emphasis on filing on time and filing correctly.

Response
The PCFB plans to publish extensive training and educational documents that will explain all requirements to campaigns.

Comment 35
6221.46(g)(2)(iv) If incorrect reporting was an error, fine is waived. Wouldn't every campaign claim it was an error? Should staff be making this determination? A mixture of opinion on this. Is the fine waived at the staff or PCFB level? Consider removing. We recognize that the PCFB is trying to give staff some flexibility, but if the issue is not raised in the first penalty notices, then this section should be removed. If the provision is retained, there needs to be some guidelines for the discretion for error. Does a confession of error waive entire discrepancy or only a certain percentage of the discrepancy? maybe include language like it only accounts for XX% of a discrepancy?

Response
The PCFB believes that flexibility is necessary to waive fines for certain errors; specifically, "errors entering the information or another type of minor transcription error." The PCFB does not believe that issuing a percentage of the discrepancy as a penalty is appropriate in this instance.

Comment 36
(h) Employment information for contributors who contribute over $99. Did the PCFB mean to say notice will be given on the first to filings that contain more than 5 of these omissions? Should this only apply to public funds eligibility? $2 per contributor without employment information fine? Consider staff time in processing and collecting $2 fine, this could be very large. Eliminate. Is this the only ongoing notice system. Why not give campaigns ongoing notices of banking discrepancies, over the limit contributions, etc? Why employment info which seems much less important?

Response
The proposed regulation has been amended to address the level of penalty in this provision. Campaigns will be notified of prima facie defects in their disclosure statements, including, failure to state employment information.

Comment 37
(i) What is personal use? This needs to be defined. "Food, etc." is unhelpful and unclear. Food for volunteers can be a substantial legitimate campaign expense. "Household items" is unclear. Campaigns need household items such as cleaning equipment for their offices. Converting campaign funds to personal use is an administrative felony under election law. A finding of conversion could mean a criminal charge. Campaign expenditures on food and household items is far different from a candidate paying their mortgage with campaign funds. Consider removing the "such as" clause and providing any additional explanation as necessary in more explanatory guidance documents.

Response
The proposed regulations are amended to address the concerns from this comment.

Comment 38
(j) What are "campaign related expenditures"? What are "campaign related nonauthorized expenditures"? This needs to be defined in the regulations. Most campaigns have no structure for official authorization for expenditures. Campaigns do need to develop best practices for spending. Consider removing section or if it pertains to another section in the regulations, that should be cited.

Response
The proposed regulations are amended to address the concerns from this comment.

Comment 39
(k) Post-election, pre-repayment of public funds. This section should pertain to postcertification of the election. Routine activities should specifically include hiring staff, including consultants and attorneys if needed to wind up campaign and respond to postelection audit. Why is language "routine expenditures" in quotes? Any litigation in an election may not be able to be brought until after certification. A campaign would need staff to back up claims in any post-election litigation. Need more clarity and specificity about what activity is permitted; include a bullet point list of approved activities, for example, litigation, observing absentee ballot or other counting processes at the BOE. 7 See the CFB post-election guidance on its website, which is a start. If procedures for the post-election audit are set forth in other parts of the regulations, the instructions for candidates should still be repeated here along with the fines. Define post-election as post-primary and post general or just post-general for primary winners.

Response
Election Law 14-208(2)(c) constrains a campaign spending post-election to the cited quoted language. Guidance and training materials will be available to campaigns regarding post-election spending.

Comment 40
(l) This section on the "paid for by" requirement has no exceptions. For example, is the paid for by notice still required if it is impractical to put the notice on, a campaign button, or a sticker, or other item where there is no room. What about Internet advertising? What about digital communications (define)? This section needs more detail.

Response
The proposed regulation is amended to address the concerns in this comment.

Comment 41
(m) What does "separate bank account" mean? Does this mean that a campaign must have two accounts? Is the second account just for matching funds from the state or for contributions submitted for public funds match and for the public matching funds? Does this mean that all corporate contributions can go into other account? What does a separate account for transactions "regarding the matching of funds" mean? Two bank accounts is impractical, confusing, and invites problems. Anything about bank accounts should be mentioned more toward the beginning since opening an account is one of the first things a campaign must do. Are "qualified" expenditures defined (expenditures that can be made with public funds?

Response
This provision has been eliminated from the proposed regulations.

Comment 42
(o) Regulations concerning cash contributions have the greatest impact on unbanked communities, can represent structural racism, and need to be closely examined before implementation. Here, there is no grace period like the one given to corporate contributions (a period of time after PCFB notice in which campaigns can return the contribution). While a person who tried to contribute $105 in cash would be stopped by a campaign, the amount of a contributor's previous cash contributions is not readily accessible, so overages may inadvertently be accepted. Yes, cash is easy to manipulate, but regulations on cash contributions have larger burdens for certain communities and can make people skeptical of the system. Here campaigns relying on contributors from those communities are not being given a chance to cure. Smaller contributions, which are valued in campaign finance regulation, come in cash. Some people don't have bank accounts or credit cards. Cash and money orders are how some communities support their candidates. And money orders. Is there a middle ground where the violation happens only if the cash isn't returned before the next disclosure deadline? This puts the burden on the campaign to run reports and make sure there are no aggregate cash contributions, but also provides them a little relief knowing that if they accept an impermissible cash contribution, they have some time to cure.

Response
The PCFB believes it has struck a balance in relation to the level of the penalty and reducing the penalty if the cash overage is returned. Specifically, "(t)he standard penalty for this violation is 25% of the overage plus the amount of the overage. If the over-the-limit portion is refunded, the penalty is 25% of the overage." As such, an overage of $100 would incur a penalty of $125 if it is not returned, and $25 if it is returned.

Comment 43
(p) When is financial documentation provided "late"? What if Act Blue does not send you a check for a week or a month? The state does not have an online contribution system like NYC Votes Contribute. When is contribution received? Lateness cannot be calculated from the date of a contribution when a campaign may not receive the money from ActBlue for a month. The dates campaigns are required to provide documentation when responses will be required to staff requests should be publicized in advance and should allow reasonable time periods for a response before penalties accrue

Response
In context, this requirement relates to audits performed by the PCFB. At the point of audit, campaigns would have the necessary documents, and are required to maintain them.

Comment 44
(r) This section states that nothing shall preclude a penalty even if it is not discussed in the regulations. Adopting penalties that campaigns have no notice of seems arbitrary and capricious. This section should be eliminated.

Response
As the draft regulation references both violations found in Title 2 of Article 14 of the Election Law and PCFB regulations, the PCFB disagrees that this provision is arbitrary and capricious.

<u>Brennan Center</u>

Comment 45
It is important to make explicit that participating candidates will not face double jeopardy for an alleged violation of Title I by being subject to enforcement from both the PCFB and the State Board of Elections ("BOE"). The draft regulations do not make explicit this division of enforcement powers between the PCFB and the BOE. Yet the structure of the statute contemplates that the PCFB will enforce all campaign finance law against participating candidates (both Title I and Title II of Article 14), while the BOE will continue to enforce Title I against nonparticipating candidates. 3 This means that the BOE will not engage in any enforcement of campaign finance violations with respect to participating candidates, whether related to public financing or not. We recommend the following language be added as a new section to the regulations: The PCFB shall have sole authority to enforce all the provisions of Article 14 of the Election Law with regard to participating candidates. No participating candidate who was penalized by the PCFB shall also be penalized for the same violation by the Board of Elections.

Response
The PCFB agrees with this comment, and has added a modified version of the suggested text to the proposed regulations.

Comment 46
Confidentiality of Complaints The draft regulations create a process for the PCFB to receive and act on formal complaints alleging violations of the public financing law. § 6221.40. Confidentiality for unsubstantiated allegations is important, to keep the complaint process from being abused as a political weapon and to avoid premature negative publicity for candidates. By comparison, federal law prohibits the Federal Election Commission from publicizing complaints until the agency has either disposed of the matter or commenced litigation.

The PCFB draft regulations regarding complaints do not currently contain any consideration of confidentiality. As in the criminal investigation context, ongoing investigations should not be publicized until the PCFB has reached a finding concerning the allegations. Therefore, we recommend adding the following language5 to § 6221.40: The PCFB shall keep confidential all complaints, notice to candidates, candidates' answers, and facts about investigations related thereto until the complaint is dismissed pursuant to paragraph (c)(2) of this section or the PCFB makes a finding of a violation pursuant to § 6221.42(a).

Response
The draft regulations were amended to include this language.

Comment 47
Enforcement Actions Within 30 Days of Election Day The section of the draft regulations concerning complaints contains the following language: "Absent any exacerbating circumstances that may require it, at no time shall the PCFB publicly take an enforcement action or levy a fine against a candidate or committee to be found in violation of a provision of this title, within 30 days of election day." § 6221.40(e). The current placement of this language in the complaints section gives the impression that it would only apply to complaints. We recommend this language be moved and made into a new paragraph in the section on enforcement actions, § 6221.42, to clarify that it applies to all

Response
The section has been moved in the draft regulations as proposed.

Comment 48

The draft regulation requires the PCFB to notify campaigns of an alleged violation and give them 45 days to work with the PCFB staff to cure or explain the alleged deficiency or violation. § 6221.45(d). We recommend reducing this to 30 days, with an option to extend the deadline another 30 days if the candidate shows they need more time. This change would encourage greater efficiency in the compliance process while enabling more time for lesser-resourced campaigns if they should need it. That is how New York City's Campaign Finance Board's draft audit review works, for example.6 In addition, the provision should make explicit that a campaign that cures the issue within the time provided will not have a penalty imposed. Thus, we recommend that § 6221.45(d) read: Prior to any finding of a determination of a violation being found, the Candidate, Committee and Treasurer shall be notified of the alleged violation and shall be given 30 days to work with the PCFB staff to cure or explain the alleged deficiency or violation. The PCFB may grant an additional 30 days upon a showing of need. If an alleged deficiency or violation is cured within the time allowed, the PCFB shall not assess a penalty on the basis of said deficiency or violation.

Additionally, we recommend that § 6221.45 provide some flexibility in cases of de minimis violations. By comparison, the New York City Campaign Finance Board's penalty guidance currently makes clear that staff members may, at their discretion, recommend no violation or a violation no penalty for de minimis violations.7 We thus recommend adding a paragraph granting such discretion to the PCFB: PCFB staff shall have the discretion to recommend no penalty in cases of de minimis violations.

Response

The draft regulations were amended to address the concerns in this comment.

Comment 49

There is an internal and apparently unintentional conflict in the draft's discussion of penalties for anonymous contributions, at § 6221.46(d), between the first sentence in the paragraph and the leftmost column of the table. We recommend resolving the conflict in favor of the first sentence, since the better policy is to allow campaigns to cure violations without penalty. Thus, the bottom left field of the table, concerning campaigns that disgorge violative contributions by the deadline, should read: "No penalty shall be issued."

Response

The draft regulations were amended to address the concerns in this comment.