

2020-3: Reasonable Anticipation of and Application of Out-Year Expenditure Limit to Special Elections

November 19, 2020

Summary

Candidates may establish special election committees beginning when a special election is reasonably anticipated, and may simultaneously maintain an active committee for a reasonably anticipated special election and an active committee for the subsequent primary and general elections, provided that expenditures made by both committees prior to the special election are presumed to be for the special election unless the candidate demonstrates otherwise. The out-year expenditure limit, which limits expenditures made in the three years preceding the year of a covered election, is applied to a candidate's next election, regardless of whether such election is a special election.

Full Text

Re: N.Y.S. Election Law §§ 8-100(1), 8-600; N.Y.C. Charter §§ 10(c), 24(c), 25(b), 81(e), 94(c); Administrative Code of the City of New York ("Admin. Code") §§ 3-703, 3-705, 3-706(2), (2a), 3-709, 12-110; Board Rules 5-10(a), 6-01(h), 7-10(a), 15-03(b), (c), (e)(ii), 15-04(b), (d), (g); Advisory Opinion Nos. 2010-2 (February 4, 2010), 2009-3 (March 19, 2009), 2009-1 (January 8, 2009), 2008-3 (April 10, 2008), 2007-2 (March 6, 2007), 2000-6 (November 16, 2000), and 1992-3 (December 16, 1992).

Given the significant changes to the election and campaign finance calendars over the last two years – specifically, Local Law No. 128 for the year 2019,¹ amendments made pursuant to the recommendations of the 2019 Charter Revision Commission,² and amendments made to the New York State Election Law by section 14 of chapter 5 of the laws of 2019³ and section 8 of chapter 6 of the laws of 2019⁴ – it is appropriate to revisit certain of the Board's policies regarding special elections. This Opinion will detail the circumstances under which a special election is reasonably anticipated, clarify the Board's policy regarding registration of special election committees, and confirm the application of the out-year expenditure limit to special elections.

Reasonable Anticipation of a Special Election

Consistent with long-standing Board policy, a candidate with an existing primary/general election committee who decides to run in a special election occurring prior to the primary must convert the existing committee into a special election committee. This policy is based on the presumption that all contributions and expenditures are for the candidate's next election, pursuant to Board Rules

¹ Providing for public funds payments beginning in December in the year before the election; codified in sections 3-703, 3-705, 3-709, and 12-110 of the Administrative Code.

² Restructuring the scheduling of special elections; codified in sections 10(c), 24(c), 25(b), 81(e), and 94(c) of the New York City Charter.

³ Rescheduling primary elections from September to June; codified in section 8-100(1) of the New York State Election Law.

⁴ Providing for early voting beginning ten days before the election; codified in section 8-600 of the New York State Election Law.

5-10(a), 6-01(h), and 7-10(a).⁵ Until recently, the Board advised candidates that they could only maintain one active committee at a time, and so a candidate in this position was not permitted to open a new committee for the primary and general elections until after the special election was held. Candidates were also required to wait until after the special election had been officially proclaimed before establishing a special election committee or converting their existing committee to a special election committee, as applicable. However, given the changes to the election calendar, the proximity in time between special and primary elections often necessitates fundraising and spending for the primary – most notably, for petitioning – prior to the special election, and activity in furtherance of the special election may need to begin earlier as well.

Accordingly, the Board has modified its policy to allow candidates to establish special election committees when the special election is reasonably anticipated, and to maintain both an active committee for a reasonably anticipated special election and an active committee for the subsequent primary and general elections, provided that expenditures made by both committees prior to the special election are presumed to be for the special election unless the candidate demonstrates otherwise. Expenditures from the primary/general committee made prior to the special election should be limited to activities such as petitioning that, by their nature, can only occur before the special is held and are in furtherance only of the primary. Fundraising expenditures incurred by the primary/general committee prior to the special will be presumptively attributed to the special election expenditure limit unless the committee demonstrates fundraising costs unique to the primary or general election. For example, a solicitation made to a single individual that results in contributions to both the special committee and the primary/general committee is unlikely to cost more than a solicitation to the same individual solely for a special election contribution. However, if the candidate does document a marginal difference in cost between the solicitations, that difference may be attributed to the primary election expenditure limit.

The majority of special elections are triggered by vacancies that arise from a sitting officeholder being elected to a different office in a November general election. Traditionally, the officeholder vacates their position at the end of December before they are sworn in to their new position in early January. A special election is subsequently proclaimed and scheduled, usually for March. However, a sitting officeholder being elected to a different office – which can occur weeks or months before said proclamation – is sufficient to establish that a special election for that officeholder’s seat is reasonably anticipated. The Board acknowledges that candidates may want to begin raising and spending funds for the anticipated special before it has been proclaimed, and public policy dictates that financial activity for a special election should be conducted within the confines of a committee designated for the special election.⁶ Accordingly, if an incumbent mayor, public advocate, comptroller, borough president, or City Council member wins a special election or an off-year general election for a different office than the one held by the incumbent, or is unopposed on the ballot in such an election, then a special election for that incumbent’s seat will

⁵ Contributions and expenditures are presumed to be for a special election beginning when the special election is reasonably anticipated. *See* Board Rules 15-03(b), 15-04(b).

⁶ Board Rule 15-04(g) prohibits receipts accepted for a special election from being commingled in any account with receipts accepted for another election, thus precluding the use of a primary/general election committee for special election fundraising.

be considered reasonably anticipated. A candidate with an existing committee who chooses to run in the anticipated special election will be required to convert their committee to a special election committee and may establish a new committee for the primary and general elections.

For special elections arising from other types of vacancies, the determination of reasonable anticipation will be fact-specific and the Board will consider the totality of the circumstances. Board Rules 15-03(c) and 15-04(d) provide that candidates may present evidence to the Board to demonstrate the date on which a special election was first reasonably anticipated.

Because Admin. Code § 3-705(4), as amended by Local Law No. 128 of 2019, provides for public funds payments beginning six months before the primary election, the Board must also consider the possibility that a candidate will receive an early payment and subsequently choose to run in a special election occurring prior to the primary, which was not anticipated at the time the payment was made. As noted above, the majority of special elections occurring prior to the primary are triggered by vacancies that will be reasonably anticipated prior to the first early payment on December 15, since they arise from elections held in early November. Pursuant to Admin. Code § 3-709(5), if a special election is reasonably anticipated, candidates in the primary election for the seat that is the subject of the special election will not receive public funds payments for the primary any earlier than 30 days after the special is held, regardless of whether they choose to run in the special. Accordingly, in most cases there will be no opportunity for a candidate who has already received public funds for the primary to subsequently register for the special. However, in the event that a vacancy becomes anticipated between mid-December and late March, and one or more candidates for that office has already received an early public funds payment, any candidate wishing to run in the special election will be required to convert their existing committee to a special election committee and may create a new committee for the primary and general elections. Any public funds previously received will be presumed to be for the special election and will count against the special election public funds maximum. Alternatively, candidates who choose not to run in the special election may use the public funds for the primary, but may not receive additional public funds any earlier than 30 days after the special is held.

Out-Year Expenditure Limit

Admin. Code § 3-706(2) states that the out-year expenditure limit applies “to all expenditures made by a participating or limited participating candidate and his or her principal committee in the three calendar years preceding the year of the election for which such candidate chooses to file a certification[.]” Admin. Code § 3-706(2a) states that the amount by which the out-year limit is exceeded will be deducted from “the amount of the expenditure limitation which next applies to such candidate or his or her principal committee, pursuant to subdivision one of this section[.]” Subdivision one states that the expenditure limit applies to expenditures made “in each primary election, in each special election to fill a vacancy, and in each general election[.]” By its terms, § 3-706(2a) does not distinguish between election types, and it incorporates by reference a provision that applies to special elections.⁷ The plain language of the Campaign Finance Act thus indicates

⁷ Expenditures made in the year prior to the year of the special election may be qualified, pursuant to Board Rule 15-03(e)(ii).

that the out-year expenditure limit should apply to the first election in which the participant is a candidate following that three-year period. This interpretation is consistent with the presumption that all expenditures are for the candidate's next election, pursuant to Board Rules 6-01(h) and 7-10(a).

Accordingly, CFB Advisory Opinions No. 2010-2 (February 4, 2010), 2009-3 (March 19, 2009), 2009-1 (January 8, 2009), 2008-3 (April 10, 2008), 2007-2 (March 6, 2007), 2000-6 (November 16, 2000), and 1992-3 (December 16, 1992) are hereby overruled and superseded, to the extent that they state that the out-year expenditure limit is not applicable to special elections. The 2019 Charter Revision Commission increased the time period between the declaration of a vacancy and the date of the resulting special election from 45-60 days to 80 days. Additionally, the 2019 Election Law amendments moved the primary election three months earlier and instituted early voting. The result is that the six-month period between most special elections (previously held in February) and the primary (previously held in September) has been reduced to three months (March and June, respectively). The combined effect of these changes is to make the special election more competitive and consequential relative both to the subsequent primary election and to past special elections, including those held at the time the Opinions in question were issued.

Moreover, the application of the out-year expenditure limit is most likely to be of significance in a scenario in which a candidate had established a committee in anticipation of a primary and/or general election, and converted that committee when an intervening special election was called. It would defy logic to conclude that any expenditures made by that candidate during the three-year period preceding the special election would not benefit the candidate's special election campaign, just as they would have benefited a primary or general election campaign. Pursuant to Board Rule 15-03(b), expenditures incurred before a special election was reasonably anticipated may be presumed to be subject to the special election expenditure limit beginning when a candidate has already registered for the covered office that is the subject of the special election, or has begun raising or spending funds. Therefore, expenditures made in the three years prior to the year of the special election are properly considered in furtherance of the special election.

Accordingly, from both the legal and policy perspectives, it is appropriate to adapt the Board's policy to accommodate the new calendar. The out-year expenditure limit will be applied to the candidate's next election after the three-year period, whether or not such election is a special election.