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March 31, 2009

By Hand Delivery

Joseph P. Parkes, S.J.
 Chairman
 New York City Campaign Finance Board
 40 Rector Street, 7th Fl.
 New York, New York 10006

Re: New Yorkers for Thompson - Request for Advisory Opinion

Dear Chairman Parkes:

This firm represents New Yorkers for Thompson. We write to ask for an advisory opinion to confirm the standard for lifting the cap on expenditures in the Democratic primary for Mayor of the City of New York this year.

Promoting fair competition for public office is a foundation of the New York City Campaign Finance Act (the "Act"). Because large campaign expenditures by non-participating candidates are contrary to this goal of a level playing field, the Act was designed to encourage all candidates in the same race to agree to the same limitations and to dissuade any one candidate from placing himself or herself above and beyond the rules that apply to his or her opponents.

Thus, as you are well aware, the Act includes incentives for participation or limited participation in the voluntary campaign finance program (the "Program"), which contains campaign expenditure limitations. Prominent among these incentives is New York City Administrative Code §3-706(3)(b), which states in pertinent part:

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If any candidate in any covered election chooses not to file a certification as a participating or limited participating candidate pursuant to this chapter, and where the campaign finance board has determined that such candidate and his or her authorized committees have spent or contracted or have obligated to spend, or received in loans or contributions, or both, an amount which, in the aggregate, exceeds three times the applicable expenditure limit for such office fixed by subdivision one of this section, then:

(i) such expenditure limit shall no longer apply to participating candidates and limited participating candidates in such election for such office....

When a candidate refuses to participate, the CFB must evaluate whether that non-participating candidate's campaign financing triggers the lifting of the "applicable expenditure limit".¹ With respect to a non-participating incumbent mayoral candidate's campaign receipts or expenditures that occur prior to the date of a mayoral primary election in 2009, we believe the applicable expenditure limit under section 3-706(3)(b) is the primary election expenditure limit. On behalf of New Yorkers for Thompson, we seek an advisory opinion to confirm this conclusion.

Background

Each candidate has the option of running either as a participating, limited participating or non-participating candidate. A self-funded candidate may avoid triggering the removal of expenditure limits by becoming a limited participating candidate. *See* Admin. Code §3-706(3)(b). Limited participating candidates agree not to make expenditures that exceed the "applicable expenditure limitations". Admin. Code §3-718(1)(e).

The option of limited participation is meant to preserve the expenditure limits as a condition of fair competition. Non-participants threaten the viability of the Act by subverting fair competition under expenditure limits.

The issue we raise is therefore of extraordinary importance to the integrity of the Program. When a self-financed candidate spurns the spending limits that apply to participants and limited participants, the spending limits no longer serve the goal of fostering fair competition. Rather, the spending limit begins to devolve into an irrational constraint -- all the more so as the non-participant's expenditures increase while spending by participating candidates seeking the same office is simultaneously limited.

¹ In addition, a Board determination would increase the level of public financing available for participating candidates. *See* Admin. Code §3-706(3)(b)(ii).

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Excessive spending by non-participants warps the playing field: think of a high jump competition under a seven foot ceiling, where one contestant gets to compete by pole vaulting without any ceiling. How can that possibly be fair?

Fortunately, Admin. Code §3-706(3)(b) avoids this circumstance. As discussed below, the law, legislative history, and public policy all make clear that the Board must avoid a hyper-technical interpretation that would retain the \$6,158,000 primary election spending limit when a non-participating incumbent simultaneously makes campaign expenditures that exceed \$18,474,000 during the primary election period.

In addressing the recent term limits change, the Board sought to make it practical for candidates to join the Program and to encourage competitive races for all offices covered by the Program. See Advisory Opinion No. 2008-7. The CFB has recognized that non-participation can be a threat to the level playing field that is a fundamental goal of the Act. *Id.* This threat is well illustrated by experience in the last mayoral election.

In 2005, Mayor Bloomberg ran as a non-participant. He invested over \$40,000,000 of his personal funds in his re-election campaign prior to the primary election and spent nearly \$40,000,000 during the same pre-primary period, although he was not on the primary election ballot. These amounts account for nearly one half of Bloomberg's total fundraising and spending in the 2005 race. The level of spending by mayoral candidate Bloomberg was \$84.6 million in 2005.² In contrast, the 2005 primary election spending limit was only one-seventh as much, \$5,728,000.

Mayor Bloomberg can avoid triggering the removal of the Act's expenditure limitations simply by joining the Program and running as a limited participant subject to those same expenditure limitations. Unfortunately, Mayor Bloomberg appears to have decided that he is running in 2009 as a non-participating candidate once again.

Analysis

Because he is an incumbent seeking re-election, Mayor Bloomberg looms as an opponent for every other candidate for the office of mayor. Although they were once contenders for an open seat, all other mayoral candidates have now been recast as challengers

² CFB, *The Impact of High-Spending Non-Participants on the Campaign Finance Program* (Sept. 2006), *infra*, at p. 4.

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to the incumbent due to the term limits change.³ Mr. Bloomberg's campaign expenditures will clearly have the purpose of promoting or facilitating his re-election as against the campaigns of any and all of these challengers. Moreover, the Bloomberg campaign expenditures will, in effect, reinforce the status of all other mayoral candidates as challengers to the incumbent.

- I. If the Board determines that a non-participating candidate's fundraising or spending exceeds three times the "applicable expenditure limit", such expenditure limit no longer applies to participating candidates in a covered election for that office.

The three conditions precedent under Admin. Code §3-706(3)(b) are: (1) a candidacy in "any covered election", (2) non-participation, and (3) a CFB determination as to the candidate's level of fundraising or campaign expenditures. The Mayor becomes a candidate in a covered election when he has made or authorized expenditures "with a view to bringing about" his re-election. *See* N.Y. Election Law §14-100(7); CFB Rule 1-02 (defining "candidate"). The Mayor may self-finance his campaign without any consequence under Admin. Code §3-706(3)(b) by becoming a limited participating candidate.

If, however, he refuses to participate it remains only for the CFB to determine whether his campaign fundraising or expenditures exceed three times the "applicable expenditure limit for such office." If the Board makes that determination, "such expenditure limit" no longer applies to participating candidates "in such election for such office."

- II. The Board has long held that the primary election expenditure limit is applicable to expenditures made by a general election candidate during the primary election period, regardless whether he or she is on the primary election ballot.

Pursuant to Admin. Code §3-706(1)(c), the expenditure limit applicable to expenditures by participating and limited participating candidates in a primary election made prior to or on the date of the primary election is the primary election expenditure limit. *See also* Advisory Opinion No. 2005-1 (Apr. 29, 2005). Likewise, the CFB has long held that if there is a contested primary election in any party for an office, expenditures made by a general election candidate for that same office are attributable to the applicable primary election expenditure limitation "in the manner provided in Administrative Code §3-706(1)(c)." *See* CFB Advisory Opinion No. 1988-4 (Dec. 30, 1988) *and* CFB Rule 1-08(c)(2)(ii). It is the timing of the

³ Because of his or her election to the office in the most recent previous election and current tenure in office, the position of an incumbent seeking re-election is unique and distinguishable from that of any other candidate.

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expenditure, not the candidate's ballot status in the primary election, which therefore controls whether the primary election expenditure limit is applicable.⁴

Indeed, it is significant that were Mayor Bloomberg to join the Program as a limited participant, Rule 1-08(c)(2)(ii) would expressly permit his campaign to make expenditures up to the \$6,158,000 primary election expenditure limit during the primary election period, if there is a mayoral primary election in any party and regardless whether he is on the ballot in that primary election. After the primary election, the same rule would permit a limited participant to spend an additional \$6,158,000 under the general election expenditure limit.

The Board has recognized that the same standards apply under the Act in evaluating expenditures made by participating, limited participating and non-participating candidates: "it is appropriate that the same standards apply to all classes of candidates in determining what expenditures are campaign related because the Act makes no such distinction." Advisory Opinion No. 2007-3 (Mar. 7, 2007). Thus, the term "applicable expenditure limitation", as used in section 3-706(3)(b), must have the same meaning when applied to participating, limited participating, and non-participating candidates. *See also* Admin. Code §3-706(1)(c) and Rule 1-08(c)(2)(ii).

III. Expenditures by a non-participating incumbent during the primary election period will have a negative effect on the competitiveness of challengers constrained by the primary election expenditure limit.

In making the primary election expenditure limit applicable to pre-primary expenditures by general election candidates, as it has since the Program's inception in 1988, the Board has

⁴ While CFB Rules 1-08(c)(1) and 7-03(c) create presumptions that expenditures are attributable to a particular election, neither rule addresses which expenditure limit is applicable for evaluating such expenditures. Rather, only Rule 1-08(c)(2)(ii) provides guidance for determining which expenditure limit is applicable "[i]f there is a contested or write-in primary in any party for an office." (Emphasis added.)

The Act makes ballot status relevant to Admin. Code §3-706(3)(b) determinations only in one instance. Admin. Code §3-705(3) provides that in the case of a *participating* candidate "seeking or obtaining nomination for election by more than one party...", the expenditure limit will not be eliminated under §3-706(3) for a "candidate who is opposed for the nomination of at least one party solely by participating candidates." This provision is intended to forestall a public financing, contribution limit or spending limit advantage for participating candidates seeking more than one party nomination. There is no similar restriction against the Board issuing an Admin. Code §3-706(3)(b) determination that a non-participating candidate's fundraising or spending for an office has triggered the removal of the primary election expenditure limit in a primary election for the same office that is contested solely by participating candidates.

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recognized that a general election candidate's spending does not occur in isolation from the primary election but may have an impact on the result of the primary election and the identity of the eventual nominee. Here, the incumbent mayor controls the timing of his campaign expenditures and it is his decision whether or not to participate (as a limited participant) in the Program. If he chooses not to participate, but instead decides to make large campaign expenditures during the primary election period, the reality is that those expenditures will have a negative effect on the competitiveness of mayoral challengers participating in the Program, an effect that would be greatly exacerbated by retention of the primary election expenditure limit.

IV. The Board may not construe Admin. Code §3-706(3)(b) in a manner that exacerbates fundraising and spending disparities between participants and non-participants.

Pursuant to the legislative history of Admin. Code §3-706(3)(b), the Board may not construe that provision in a manner that would diminish any participating candidate's ability to compete against a non-participating re-election campaign that makes multi-million dollar campaign expenditures during the primary election period. Admin. Code §3-706(3)(b) is intended to induce Campaign Finance Program participation, or, at a minimum, to help counter the unfair competitive advantages of a high-spending non-participant.

Thus, in adopting this provision in 2004, the Council directed the CFB not to interpret or apply it in a manner that "exacerbates fundraising and spending disparities between participants and non-participants":

Under both tiers, the spending limit would be increased or lifted The Council finds that promoting fair competition and a level playing field are overriding goals of the City's campaign finance program. Since large, unregulated expenditures by non-participating candidates, including self-financed candidates, are contrary to the goals of reform, it is the intent of the Council that the New York City Campaign Finance Act not be interpreted or applied in a manner that exacerbates fundraising and spending disparities between participants and non-participants.

Report of the Committee on Governmental Operations (Oct. 26, 2004) at pp. 9 - 10. Retaining the primary election expenditure limit for participants, while the incumbent mayor simultaneously spends in excess of three times that expenditure limit would improperly exacerbate fundraising and spending disparities between participants and non-participants.

V. Removal of the primary election spending limit will put participating candidates in a better position to be competitive against a self-financed non-participating incumbent making large expenditures during the primary election period.

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Subsequent to the 2005 election, the CFB issued a special report on *The Impact of High-Spending Non-Participants on the Campaign Finance Program* (Sept. 2006). That report concluded:

it will clearly be important to support and strengthen the Program by fostering its values and re-educating the public on its benefits. It remains true that candidates who choose to participate in the Program are in a better position to be competitive than if they had chosen not to participate and receive public funds.

At p. 25. But participating candidates are in “a better position to be competitive” against a self-financed non-participating incumbent only when the removal of the spending limit pursuant to Admin. Code §3-706(3)(b) is made meaningful at the very time that the self-financed incumbent is making a large amount of re-election campaign expenditures. When the incumbent is making large campaign expenditures during the primary election period, retention of the primary election expenditure limit for participating candidates will exacerbate campaign expenditure disparities between the participant and non-participant, undermine the ability of the participating candidate to address or react to the incumbent’s campaign expenditures, diminish the effectiveness of the participating candidates’ campaign expenditures, and undermine the core value of fair competition the Program was intended to serve. Such a result would be directly contrary to the Board’s desire to support and strengthen the Program.

VI. Removal of the primary election expenditure limit will not create any disparities among primary election candidates vis-a-vis each other.

Finally, all participating candidates in the primary election have the same opportunity to raise and spend campaign funds under the same contribution limits and the same public financing eligibility criteria. All are similarly situated in seeking to win the primary election in a manner that would enable them to be competitive against the self-financed non-participating incumbent. Unlike the fundraising expenditures at issue in Advisory Opinion No. 2005-1, all participating candidates in the primary election will benefit in precisely the same way if the Admin. Code §3-706(3)(b) “bonus” is triggered in the primary election. It is not relevant that some primary candidates currently have raised more total contributions than others, because “the Act was not intended to equalize the amounts opposing candidates in fact spend in an election.” Advisory Opinion No. 1993-4 (June 9, 1993).

Removal of the primary election expenditure limit pursuant to Admin. Code §3-706(3)(b) will not create any disparities among primary candidates vis-à-vis each other. Such disparities as do exist arise solely from the different efforts each campaign has made to date. Rather, removal will give all participating candidates in the primary election an equal

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opportunity to make expenditures to reduce or eliminate pre-existing disparities in fundraising, while also equally helping all such candidates to run a competitive campaign against the non-participating incumbent. Moreover, current disparities in fundraising among primary candidates do not provide a legal basis for retaining the primary election expenditure limit in circumstances in which Admin. Code §3-706(3)(b) requires its removal.

If, as it seems apparent, the Mayor runs as a non-participant, it is necessary and proper for the CFB to determine that the primary election expenditure limit will no longer apply to mayoral candidates if his pre-primary campaign contributions or expenditures exceed three times the amount of the primary election expenditure limit. To conclude otherwise would be contrary to the Act, as discussed above, and greatly tilt the playing field in favor of a non-participating incumbent making unlimited expenditures during the primary election period.

Thank you for your consideration.

Very truly yours,

GENOVA, BURNS & VERNIOIA



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