

Baker Hostetler

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Baker & Hostetler LLP

666 Fifth Avenue
New York, NY 10103-0001

T 212.589.4200
F 212.589.4201
www.bakerlaw.com

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BY HAND

John Siegal
direct dial: 212.589.4245
jsiegal@bakerlaw.com

Hon. Frederick A. O. Schwarz, Jr., Esq.
Chair
New York City Campaign Finance Board
40 Rector Street
New York, N.Y. 10006

Re: Request For Advisory Opinion & Preapproval Submission

Dear Chairman Schwarz:

I write on behalf of Congressman Anthony D. Weiner to request an advisory opinion to clarify the interplay between federal and city campaign finance laws and to make a preapproval submission regarding proposed recordkeeping methodologies.

Mr. Weiner is a strong supporter of campaign finance reform and of the City's model reformed campaign finance program. In a fundamental sense, he owes his public life to it. Mr. Weiner is a product of New York's middle class. He is neither a millionaire nor a legacy; he runs for public office without personal money or family political connections. He was originally elected as a neighborhood candidate to the City Council due to public financing and he was able to run strongly in last year's mayoral primary against better-known and better-funded citywide and borough-wide officials because of the CFB's public financing program. Indeed, as the CFB's 2005 post-election report documents, the Weiner 2005 mayoral campaign was largely funded by contributions from outer borough neighborhoods that are not typically where political money comes from in this town.* Thus, Mr. Weiner is a product and a promoter of the leveled-playing field that is our campaign finance system's greatest promise – and so he certainly seeks to play by its rules, as evidenced not only by the highly-compliant campaign he ran in 2005 (as reflected in the preliminary audit report) but also by this advisory opinion request to ensure that he follows the letter of the law.

* The 2005 post-election report shows, for example, that for the first time Brooklyn zip codes 11223 and 11230 were among the ten-highest donating areas in the City, supplanting two Manhattan neighborhoods on that list. Those zip codes were each among the highest contributing areas to the Weiner campaign.

As the Campaign Finance Board and its staff will recall, issues regarding the interplay of the Federal Election Campaign Act (the "FECA") and the New York City Campaign Finance Act (the "Act"), and the respective federal and municipal regulations, arose during the late summer days of the 2005 mayoral primary campaign. Rather than engaging in an administrative proceeding before the CFB in the midst of a competitive primary, Mr. Weiner's campaign voluntarily made a sizeable payment to the New York City campaign fund in order to eliminate any possible doubt that every expenditure that could possibly have been deemed to have been made in furtherance of the Weiner mayoral campaign was charged to and reported by the Congressman's municipal campaign committee. By making this voluntary payment, Mr. Weiner's committees in effect paid twice for certain expenditures; they were paid originally by the congressional committee, as required under the FECA, and they were paid for again through the mayoral committee's voluntary payment to the City's campaign finance fund. This was an expedient but unsatisfying solution; it was fully protective of the City's campaign fund, but was a fundamentally unfair outcome to the Weiner committees and did not resolve the legal issues.

For example, in the 2005 settlement, Mr. Weiner's mayoral committee made duplicate payments for the time of fundraising staff whose work had supported and been paid for by his Congressional re-election; his mayoral committee made a payment to the City's campaign fund in the amount of political contributions that had already been made and paid for by the Congressional committee; and Mr. Weiner's mayoral committee paid the City for the costs of a television commercial supporting his re-election to Congress to the extent it was broadcast outside of his Congressional District even though his Congressional campaign committee had already paid the actual costs of producing and broadcasting the ad.

Now, without the immediate pressure of an impending election complicating the matter, we ask that the CFB issue an advisory opinion to clarify the interactions between federal and city law when a federal official is running for city office so that campaigns will know how they are to be handled in the future. We respectfully request that a complete and specific advisory opinion be issued on this subject now, including the specific factual scenarios set forth below, so that Mr. Weiner (and other similarly situated candidates) has clear guidance on how to deal with the dual regulatory regimes on a going forward basis.

Mr. Weiner is planning to run for re-election to the House of Representatives from the ninth congressional district in Brooklyn and Queens in the 2008 election. This re-election campaign will necessarily require him to maintain a campaign committee and political organization to support his efforts within the ninth congressional district throughout his term and to conduct an active 2008 re-election campaign, as is standard practice for incumbent members of congress who face a re-election cycle every two years.

At the same time, early next year, Mr. Weiner will be forming a new committee under city law to explore a potential candidacy for mayor in the 2009 election. This will require him to maintain an active municipal campaign committee to raise funds in

support of a potential candidacy and to support his citywide political efforts beyond the ninth congressional district in 2007 and 2008 and then, potentially, to wage an active campaign for mayor in 2009.

Moreover, the realities of modern politics are such that Mr. Weiner will need to simultaneously solicit contributions to finance both committees, and those contributions will necessarily be solicited from persons within the ninth congressional district, throughout New York City, and beyond.

Because this situation presents potential conflicts between federal and city law, as specifically set forth below, Mr. Weiner has asked me to seek an advisory opinion from the Campaign Finance Board so that his municipal campaign committee has clear and definitive guidance on these matters from the start of its operations.

Legal Analysis

Mr. Weiner's congressional campaign committee, Friends Of Weiner, is represented by the law firm of Perkins Coie LLP, which is a leading Washington, D.C. practitioner before the Federal Election Committee. Indeed, Mr. Weiner's principal counsel at the Perkins Coie firm, Karl J. Sandstrom, was himself formerly a member of the Federal Election Commission.

Perkins Coie has advised Friends of Weiner that every expenditure in furtherance of his congressional re-election campaign or his district political operation must be made and disclosed by Friends Of Weiner. Specifically, Perkins Coie has advised that "Federal Election Commission regulations make clear that *a candidate for Federal office must make all expenditures in connection with that election* from a principal campaign committee that is registered with and reports to the commission." Memorandum from Karl J. Sandstrom to John Siegal, August 1, 2005 (emphasis added).¹

This analysis is very plainly supported by the FEC's regulations covering the political activities of federal candidates and individuals holding federal office, 11 CFR § 300.60 (a) and (b), and during the relevant period through 2008, Mr. Weiner will be both. Thus, according to Perkins Coie's memorandum: "A Federal candidate may not defray any portion of a disbursement with non-Federal funds" and "a Federal candidate may not allocate the cost of an activity between Federal and non-Federal funds even if there is arguably some non-Federal election benefit to the expenditure."

Federal election law includes only a very narrow and limited exception to the requirement that a federal office holder or federal candidate may utilize only federal campaign funds that do not exceed the contribution limits and other prohibitions contained within federal law. That exception applies to "a Federal candidate or

¹ Perkins Coie's analysis of the governing Federal law is offered for the CFB's use and consideration and shall not be construed as a waiver of Friends Of Weiner's attorney/client privilege.

individual holding Federal office who is a candidate for State or local office,” and it permits the use of non-federal election funds only:

If the solicitation, receipt or spending of funds is permitted under State law; and refers only to that State or local candidate, to any other candidate for that same State or local office, or both.

11 CFR 300.63 (emphases added). Thus, only expenditures solely and exclusively referencing the candidacy for non-federal office may be paid for using non-federal campaign funds. Emphasizing the narrowness of this exception, and the absence of any exception for political activities that arguably mix federal and non-federal purposes, the FEC regulation expressly emphasizes in the following mandatory language that:

If an individual is simultaneously running for both Federal and State or local office the individual must raise, accept, and spend only Federal funds for the Federal election.

Id.

The foregoing federal law is consistent with the general thrust of city law because the CFB rules require an expenditure to be *presumed* to be in support of the principal's next successive election. Rule 1-08(c)(1) provides in this regard:

An expenditure is presumed to be made for the first election (in which the participant ... is a candidate) following the day it is made, except: (i) in the case of a State or local election, expenditures made before the first January 12 after an election will also be presumed to be made for that election; (ii) in the case of a federal election, expenditures made before the first January 1 after the election will also be presumed to be made for that election, except as may otherwise be provided under federal law and regulations.

Applying this Rule, before January 1, 2009, Mr. Weiner's first election will be his congressional re-election campaign. Accordingly, under city law his expenditures through December 31, 2008 will be presumptively made and disclosed by Friends of Weiner, the federal committee.

In practice, however, federal and city law are not so easily reconciled, and experience dictates that there might be expenditures that the CFB claims, notwithstanding the presumption, should be made and disclosed by a municipal campaign committee. The fundamental question of law presented by this advisory opinion request, therefore, is how the CFB will reconcile the rebuttable presumption under its rules that expenditures are for the candidate's "first election" with the federal requirement that expenditures can be made from non-federal funds when they "refer[] only to that State or local candidate,

to any other candidate for that same State or local office, or both.” 11 CFR 300.63 (emphasis added).

We submit, respectfully, that the only way to harmonize the governing federal and city rules is to read the federal standard into the presumption set forth under the city rule, such that the rebuttable presumption can be overcome only when an expenditure is referable solely to a non-federal election. Any other application of the city’s rebuttable presumption would place a federal office holder in the untenable situation of having to violate federal law by using non-federal political funds for a purpose that is prohibited by FEC regulation.²

This analysis of the interplay between the relevant federal and city rules is consistent with prior CFB authority pertaining to situations in which participating candidates were also candidates for other non-covered elections during a particular city election cycle.

In Advisory Opinion 1999-5, the CFB reviewed spending by then-Speaker Peter Vallone’s 1997 campaign committee that occurred during the 2001 city election cycle in which Mr. Vallone ran for Mayor. During that election cycle, Mr. Vallone was also a candidate for Governor in the 1998 election. The Board held that all of Mr. Vallone’s spending prior to January 12, 1999 was presumed to be on behalf of his 1998 gubernatorial campaign and not his 2001 mayoral campaign. The presumption that all spending was for Mr. Vallone’s first election was applied to such expenditures as “buying advertisements in community newspapers and political journals, making contributions to political and community organizations and paying expenses of maintaining and operating the committee.” AO 1999-5. The Board opined that even with respect to expenditures made after January 12, 1999, they would be treated as expenditures on behalf of the 1998 campaign so long as they were “solely for the purpose of satisfying the obligations of the 1998 gubernatorial election’ (and thus) not presumed to be for the 2001 mayoral election.”

Under the Vallone precedent, all of Mr. Weiner’s expenditures prior to January 1, 2009 must be treated as being made on behalf of his 2008 congressional re-election campaign unless they are made “solely for the purpose of satisfying the obligations” of a 2009 city campaign. Applying CFB Rule 1-08(c)(1) and AO 1999-5 in this manner is the only way in which they can be compatible and not in conflict with the FEC’s requirement that all expenditures prior to the next congressional election be paid for from federal campaign funds unless they are solely referable to a subsequent city election. See 11 CFR § 300.63.

² We are aware that the CFB’s rules treat the rebuttable presumption under Rule 1-08(c)(1) as an issue of fact, and require a participating campaign to bear the burden of proving that expenditures made by other committees controlled by the candidate “were not made in connection with such election.” Applying the legal standards explained above, a campaign would meet its burden of proof by demonstrating that an expenditure is not solely referable to the covered city election.

Specific Requests

Applying these governing laws and regulations, we respectfully submit that the following is an appropriate typology to be followed in determining whether expenditures are federal or referable only to a potential Weiner mayoral campaign, and we ask the CFB to specifically approve our proposed approach with respect to each of these categories of expenditures.

Federal Expenditures

We propose to treat each of the following types of expenditures as federal expenditures to be made and reported by Mr. Weiner's federal campaign committee:

- Expenditures made within the confines of the ninth congressional district, including without limitation:
 - contributions to community civic and political organizations
 - tickets to community events
 - political support for candidates for offices that overlap with the ninth congressional district;
- Expenditures in support or furtherance of Mr. Weiner's official congressional duties or staff that are not paid for by the U.S. government, including without limitation:
 - travel and expenses incurred in commuting to and from Washington
 - travel and expenses incurred in connection with congressional duties within the ninth congressional district
 - travel and expenses incurred in connection with congressional duties outside of the ninth congressional district
 - political support for candidates for Congress outside of the ninth congressional district
- Expenditures in support of advocacy work relating to Mr. Weiner's congressional duties, including without limitation:
 - contributions to national advocacy organizations
 - contributions to statewide or citywide advocacy organizations
 - contributions to national political action organizations

-- contributions to statewide or citywide political action organizations

- Expenditures in support of the fundraising operations of the Weiner congressional campaign committee.
- Expenditures for campaign activities expressly advocating Mr. Weiner's re-election to the House of Representatives to voters within the ninth congressional district.³

City Expenditures

We propose to treat each of the following types of expenditures as city expenditures to be made and reported by Mr. Weiner's exploratory mayoral campaign committee:

- Expenditures in support of the fundraising operations of the Weiner mayoral exploratory campaign committee.
- Expenditures made within New York City but outside the confines of the ninth congressional district and that do not relate to or support Mr. Weiner's duties and responsibilities as a member of congress or expressly advocate his re-election to the United States Congress, and thus may be deemed to be solely referable to his mayoral exploratory efforts, including without limitation:
 - contributions to local community civic and political organizations
 - tickets to local community events
 - political support for candidates for non-congressional offices that do not overlap with the ninth congressional district
 - travel and expenses relating to appearances before local community, civic and political organizations or on behalf of candidates for non-congressional offices that do not overlap with the ninth congressional district.
- Expenditures for campaign activities solely referencing and expressly advocating Mr. Weiner's election to city office.

Other Expenditures

³ Certain typical campaign communications activities cannot be technologically limited to residents of the ninth congressional district. Thus, internet, radio, and television advertising for Mr. Weiner's congressional re-election campaign will necessarily reach some people, including New York City residents, living outside of the ninth congressional district. These expenditures should nevertheless be made and reported by Mr. Weiner's federal campaign committee as required under federal law. *See* 67 F.R. § 300.61.

Other types of expenditures do not so clearly fall within the rubric of existing legal authorities. These include the following:

- Website. Mr. Weiner may launch a policy website — essentially, a virtual think tank — that will include policy-oriented material on a wide-variety of governmental and civic topics. Much if not all of the material will be germane both to a candidate for a New York City congressional seat and for Mayor, and all of the material will be policy-oriented, without any express electoral advocacy. Our inclination is that the costs of such a website should be paid by the Congressional re-election campaign through Mr. Weiner's next election (the 2008 Congressional re-election) and then by a mayoral committee thereafter, but we seek the CFB's guidance on this matter.
- Research. Mr. Weiner's political operation will also need to commission research, both policy research and public opinion polling. Much of this research will also be fungible as between a congressional re-election and a mayoral election campaign, as both congressional candidates and mayoral candidates deal with many of the same issues whether it be the cost and accessibility of health care, housing, homeland security, public safety, or transportation. By what standards are the allocation of costs for policy research and polling research to be allocated in these circumstances?

* * *

We appreciate the CFB's attention to this advisory opinion request, and will be available to the staff to provide any other or further information required for the Board to issue an opinion. Mr. Weiner anticipates forming a mayoral exploratory committee and commencing fundraising activities on or about February 1, 2007, and thus we would appreciate receiving the CFB's guidance before that date.

Preapproval Submission Regarding Recordkeeping Methodologies

Mr. Weiner's congressional campaign committee and his exploratory mayoral committee will be separate organizations, having different treasurers, and maintaining accounts at different banks. As both committees will support the same individual's political activities, they will share certain facilities and personnel, as permitted pursuant to *inter alia* Advisory Opinion 1996-2 and Federal Election Commission Advisory Opinion 1994-37.

Pursuant to AO 1996-2: "For expenditures for shared personnel, the allocation shall be based on the actual time worked on each campaign. Contemporaneous time records [will] be maintained, detailing the time spent by personnel on the City campaign and the work completed for the City campaign."

For non-personnel expenditures, such as office space, equipment, supplies, and telephones, we propose to allocate the expenses in the same ratio as the personnel

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allocation based on the time worked, which logically will reflect the usage of the facilities and equipment.

The allocation account approach discussed in AO 1996-2 will not be utilized for reasons of convenience and minimizing the number of transactions and the amount of paperwork involved. Instead, the city committee and the federal committee will each pay directly their respective portions of any shared expenses. In this manner, shared employees/consultants will receive two checks, as will the landlord, and equipment vendors, etc. So that the CFB will be able to track and audit the allocations, we propose to file the federal committee's FEC disclosure statements with the CFB.

Please let us know if you need other or further information in order to assess this preapproval submission. We await direction on whether this is an acceptable recordkeeping methodology, and we respectfully request a determination on this matter on or before February 1, 2007.

Please let the staff know that they may call me at any time during the process of reviewing these issues if I can be helpful in terms of providing information or clarification regarding these requests.

Respectfully submitted,


John Siegal

cc: Hon. Anthony D. Weiner
Amy Loprest
Sue Ellen Dodell