



September 2, 2005

Hon. Frederick A. O. Schwarz, Jr.
Chairman
NYC Campaign Finance Board
40 Rector Street
New York, NY 10006

**Re: Miller for New York – Exempt Petitioning Costs
Application for Immediate Guidance**

Dear Chairman Schwarz:

As requested by the Campaign Finance Board, by letter of Julius Peele, dated August 26, 2005, Miller for New York (the "Committee") has today submitted comprehensive detailed documentation for exempt expenditure claims it has made through CFB disclosure statement #11. Our Committee has worked extraordinarily hard to meet all the requirements of the Campaign Finance Act and CFB rules to substantiate all exempt expenditure claims we have made.

We are very concerned that, yesterday, in an unprecedented decision, the Board may have reversed longstanding practices regarding exempt expenditures for paid ballot petition workers, which have always been treated as 100 percent exempt from the CFB spending limits. I hereby request immediate clarification of the standards the Board intends to apply in reviewing exempt expenditures incurred in connection with the circulation and filing of designating and nominating petitions.

We respectfully request immediate written guidance from the Board, by 12 noon today, clarifying the new standard it appears to have adopted for determining whether expenditures for ballot petitioning carriers are 100% exempt, when those carriers have used literature as an aid in persuading voters to sign ballot petitions. We further urge the Board to clarify that its new pronouncement will not be applied retroactively.

Yesterday's Board pronouncement has not been explained in writing and its significance remains unclear. Because the pronouncement appears to mark a radical departure from the

NYC CFB RECEIVED

Board's precedents and historic practice, and is at odds with the manner in which political campaigns traditionally conduct ballot petitioning activities and claim exempt expenditures for those activities, the Committee has unexpectedly found that its ability to conduct a campaign disrupted and potentially severely compromised at the most critical and inopportune moment. Decisions must be made immediately regarding whether numerous planned advertising and voter contact activities will continue. For example, immediately prior to the Board's pronouncement, the Committee had wired \$1,035,300 to its media buyer for a final television time purchase. The Board's pronouncement has now jeopardized the execution of this ad buy.

Only 11 days remain before the primary election. Without immediate clarification, the potential harm to the Committee will increase exponentially, given that the next CFB business day is Tuesday, September 7, which is only one week before the primary.

I. Ballot petitioning expenses are costs of complying with New York election law requirements and therefore exempt from the Campaign Finance Act's spending limits.

Among the exempt expenditures reported by the Committee are ballot petitioning costs incurred to comply with New York Election Law requirements for: (1) designating candidates for the primary election ballot and (2) independently nominating candidates for the general election ballot. See, generally, N.Y. Election Law §6-100, et seq. Long ago the Board definitively and conclusively established that such costs are exempt from the Campaign Finance Act spending limits pursuant to NYC Administrative Code §3-706(4). See CFB Advisory Opinion No. 1996-1 (Apr. 4, 1996). Indeed, the 1996 opinion follows an interpretation of the Act from which the Board has not deviated since its inception in 1988.

II. The Act and CFB rules were recently modified to simplify and facilitate demonstrations that exempt expenditure claims are proper.

Following amendments adopted in the Campaign Finance Act in 2003, the demonstration required for proving an exempt claim has been simplified, largely and commendably at the CFB's initiative. Indeed, the intent of the 2003 amendments was to make the Campaign Finance Program "more fair and attractive to candidates." See Proceedings of the Council of the City of N.Y., Int. No. 171-A of 2003, enacted as Local Law 12 of 2003 (codified as Admin. Code title 3 section 706 (4)), at p. 5. As stated by the CFB's executive director, Nicole A. Gordon, in testimony before the City Council Committee on Governmental Operations:

The Board very much favors simplifying reporting and disclosure requirements, where possible.... [O]n balance the new provisions are an administrative plus for candidates and the Board.

Testimony of Nicole A. Gordon, Executive Director, NYC Campaign Finance Board before the NYC Council Committee on Governmental Operations, December 12, 2002, at p. 4 (emphasis added).

The new law gave principal committees two choices: 1) limit exempt expenditure claims to 7.5 percent of each applicable spending limit, or 2) provide “detailed documentation substantiating all exempt expenditure claims” made pursuant to Administrative Code §3-706(4). See Administrative Code §3-706(4)(b), (c). Because the Committee’s exempt expenditures have exceeded 7.5 of the amount of each of the expenditure limitations applicable under Administrative Code §3-706, the Committee has chosen to provide detailed documentation.

Similarly, in repealing its former exempt expenditure “methodology approval” rules, the Board explained:

This amendment is intended to simplify candidate reporting and Board auditing of exempt expenditures. . . .The Board will also provide examples of documentation needed by those not choosing the [7.5 percent] option. The Board intends to provide this guidance and these examples in the Campaign Finance Handbook. The Board anticipates that the rule will simplify candidate recordkeeping and reporting and Board auditing of exempt expenditures.

See NYC Campaign Finance Board, Notice of Final Campaign Finance Board Rules, effective December 19, 2002, at p. 3.

In sharp contrast, yesterday’s Board pronouncement portends a vague and fluctuating standards which would ultimately result in quite a rude awakening for all participating candidates employing paid carriers and an auditing nightmare for the CFB.

III. The Committee has maintained detailed documentation to substantiate its exempt expenditure claims precisely as the Act and CFB rules require.

The effort to maintain the required detailed documentation for all exempt expenditure claims has proven to be extraordinarily time-consuming and labor intensive. Nevertheless, we believe the simplification intended by the 2003 amendments is reflected in the fact that the CFB instructional guidelines for “detailed documentation” are relatively straightforward. See 2005 New York City Campaign Finance Handbook (June 2005) at p. A-12. (“This Appendix explains the extra documentation you need for your exempt expenditures if your total exempt claims exceed 7.5% of the applicable expenditure limit.”)

In the case of campaign consultants, the Board’s Handbook requires:

consulting agreements or invoices that include a detailed description of services provided or to be provided, time periods covered, amount and payment dates.

Id. at A-13. For campaign workers, the Handbook requires “earning records that must include the worker’s name, address, social security number, signature, detailed description of the tasks performed, hours worked, and the rate and amount of pay.” Id. at A-12.

The Handbook’s requirements for detailed documentation made clear to the Committee exactly what detailed records it needed to maintain to satisfy the CFB. This is the precisely the simplicity that the local law amendments and the CFB rule changes intended.

IV. The cost of the Committee’s ballot petitioning efforts were 100 percent exempt from the Act’s spending limit.

The Committee leased and incurred costs for equipment, supplies and utilities for a separate office at 150 Broadway which, prior to the conclusion of petitioning activities on August 23, was dedicated exclusively to the Committee’s petitioning effort: “Sign for Change.” The petitioning services were performed by consultants and employees hired exclusively for performing services in connection with the circulation and filing of ballot petitions. Their services were documented by contracts containing provisions such as the following:

Sample Excerpt: Petition Carrier Contract

Services. _____ shall serve as a Petition Carrier. Carrier shall devote the time and resources provided pursuant to this Agreement solely to ballot petitioning responsibilities, which include but are not limited to the following activities:

- Collecting petition signatures;
- Submitting petition signatures to a Petitioning Organizer on a daily basis; and
- Compiling and submitting time sheets to a Petitioning Organizer on a daily basis.

No services unrelated to petitioning will be provided.

Sample Excerpt: Petition Organizer Contract

2. Services. Employee shall serve as a Petitioning Organizer for MFNY. The Employee shall devote the time and resources provided pursuant to this Agreement

solely to ballot petitioning responsibilities, which include, but are not limited to, the following activities:

- Recruiting carriers and volunteers to carry petitions;
- Conducting training sessions for all carriers and volunteers;
- Managing door-to-door and street-level petitioning activities;
- Receiving completed petitions from carriers and volunteers;
- Cleaning and binding petitions; and
- Administering all aspects of time record-keeping for paid petition carriers.

No services unrelated to petitioning will be provided.

Separate contracts were obtained for the Democratic designating petition effort and the Smaller Class Size independent nominating petition effort. In every instance in which a Democratic designating petition worker was rehired for the subsequent Smaller Class Size independent nominating petition effort, a new contract was executed.

These contracts, together with the time sheets obtained for the carriers, demonstrate that the services provided by these consultants and employees during the time period of these contractual engagements were solely in connection with the circulation and filing of designating and nominating petitions.¹ Thus, these expenditures are 100 percent exempt from the spending limit pursuant to Administrative Code §3-706(4) and CFB Advisory Opinion No. 1996-1, supra.

- V. The petition carriers used literature, purchased with non-exempt expenditures, solely for persuading voters to sign the ballot petitions they carried.**

The Committee purchased literature that was used by its designating and nominating petition carriers. The literature includes an express request that the recipient sign the petition and describes the petitioning process. Pursuant to CFB precedent and the guidance in the CFB Handbook, the Committee has not made any exempt expenditure claims for the production of this literature. Copies of this literature are enclosed.

¹ In several instances, petitioning consultants and employees were subsequently re-hired by the Committee to perform other services, again under newly executed contracts. The Committee has not made any exempt expenditure claims for services provided under these post-petitioning contracts.

The petition organizers trained the carriers to use this literature to acquaint each registered voter with the candidate in order to persuade that voter to sign a designating or nominating petition. During the interaction with the voter, the carrier distributed the literature, asked the voter whether he/she had a preference in the Mayoral race, engaged the voter in a conversation regarding putting Gifford Miller on the ballot, and solicited a signature on the ballot petition. The information regarding voter preference was used to generate petitioning volunteers and to target petitioning efforts; since the end of the petitioning effort, that information has been quarantined and will not be used in post-petitioning efforts. The literature was also intended to expedite training of carriers and to facilitate the one-on-one communication that is an essential element of successfully collecting signatures, which, in turn, enabled the Committee to collect more signatures.

In instances when a voter was not at home, the literature was left at the door, merely as a prelude to a follow-up visit by a carrier seeking that voter's signature on the petition - that same day, if possible, and a future occasion, if necessary. The petition carriers were not employed to distribute literature or to "leaflet." Neither the carrier contracts, nor the carrier timesheets suggest, in any way, that the carriers were employed to distribute literature. They were not.

- VI. The statutory ballot petition circulation period concluded on August 23. It is far too late in the 2005 election cycle for the Board to erect new barriers to substantiating that the cost of paid ballot petition workers is anything less than fully exempt from the Act's spending limit.**

Yesterday's Board pronouncement marks the first time the Board has ever suggested - after 17 years - that the Campaign Finance Act authorized it to micromanage retroactively the content and manner of speech between a petition carrier and a potential petition signer in deciding whether to sustain an exempt expenditure claim for workers circulating designating and nominating petitions.

The Campaign Finance Act contains no such authority. Indeed, we hold it highly dubious under the First Amendment for an agency of government to deny a statutory exemption from a spending limit solely on speculation that using literature as a tool for seeking signatures must necessarily cross some invisible line into something other than ballot petitioning.

Until yesterday, CFB rulings and administrative practice were clear. The use of printed material has had no relevance for determining whether a petition carrier's compensation is fully exempt. See, e.g., Advisory Opinion No. 1996-1, supra; CFB Administrative Determination No. 2003-3 (Sept. 12, 2003) and CFB Final Audit Report of the Committee to Elect Letitia James (Sept. 25, 2003). In addition, the CFB general counsel emphatically rejected a 2001 mayoral campaign attorney's advocacy of different standards for evaluating whether the circulation of designating petitions and of independent nominating

petitions are exempt, including arguments based on “literature distribution” in the context of petitioning. See letter of Sue Ellen Dodell to Henry T. Berger, dated July 24, 2001.

Likewise, the CFB Handbook makes no suggestion that an exempt expenditure for petitioning labor would be reduced or rejected if the carrier used written material to persuade voters to sign ballot petitions. Only the cost of generating the literature itself is made non-exempt. See Handbook at pp. 3-4 - 3-5; also Administrative Determination No. 2003-3, supra.

These were the standards that were in effect when the deadline for joining the voluntary Campaign Finance Program passed on June 1, 2005, when designating petitions were collected in June and July, and when nominating petitions were collected in July and August. These standards comport with the common practice of participating candidates, since the inception of the Program in 1988, in making 100 percent exempt claims for the cost of paid petition carriers, again without regard to whether literature was used as a tool in collecting signatures.

Never has the Board evaluated the validity of exempt expenditure claims based on whether comparable claims have been made on behalf of other candidates seeking the same office. Nor may it do so under current law.

Never has the Board made the number of signatures collected and submitted to the Board of Elections, to satisfy the Election Law requirements, a relevant factor in assessing the validity of exempt expenditure claims. Nor may it do so under the Act.

For 17 years the Board has audited the campaigns of participating candidates. Thus, it has long been aware that it is a standard practice in New York for political campaigns to conduct large scale ballot petitioning campaigns, often staffed with paid carriers, in which literature is used to persuade voters to sign the petitions.

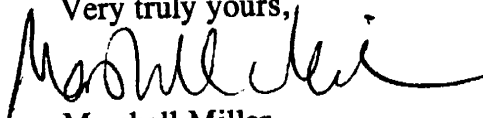
VII. Retroactive application of a new standard for evaluating the validity of exempt expenditure claims for ballot petitioning workers will not withstand scrutiny.

To first announce and to then apply retroactively a new standard on September 1 would be a violation of due process and unenforceable given the voluntary nature of the Campaign Finance Program. Moreover, in seeking to expand the reach of the Act’s spending limits (and thereby impermissibly narrow the local law’s express allowance for exempt petitioning expenditures) after candidates have irrevocably opted into Act’s voluntary program, the Board has effectively created a mandatory spending limit (in addition to unconstitutional content and manner restrictions on ballot petitioning speech). Such an assertion will not withstand scrutiny under the First Amendment.

Once again, in light of the imminent and likely irreversible adverse consequences to the Committee's campaign, we respectfully request the Board's immediate attention to this inquiry and a response to our question by noon today.

Thank you for your consideration.

Very truly yours,

A handwritten signature in black ink, appearing to read "Marshall Miller". The signature is fluid and cursive, with a long horizontal stroke at the end.

Marshall Miller
Treasurer

Enclosures



They said he was too young to lead the City Council.
Gifford Miller proved them wrong.

He took charge, stood up to Mayor Bloomberg and fought for Democratic priorities—protecting schools, seniors, libraries and healthcare from the Mayor's slashing cuts. Gifford Miller has always been impatient about getting results. Now—at 35—his drive, energy and new ideas may be just what New York City needs.

GIFFORD **milller**
MAYOR

Sign Gifford's Petition! Volunteer! Get More Information @ (212) 587-8087 or www.aiffordmiller.com

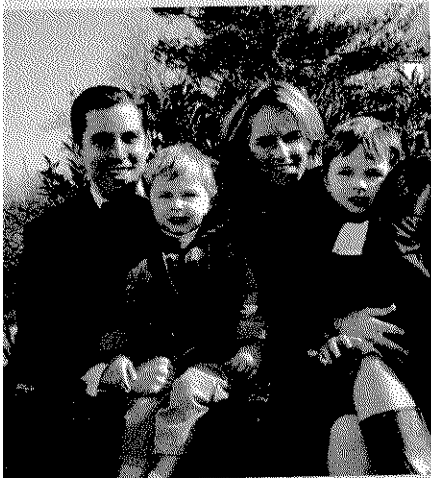
Help Gifford Help New York

How will Gifford get on the ballot?

- NY law requires candidates for Mayor to gather signatures
- Signatures must be from registered NYC Democrats
- We will build teams in every neighborhood to gather signatures

How can you help?

- Sign the petition to place Gifford on the ballot
- Join our grassroots team—Sign for Change—and gather signatures in your neighborhood



Gifford with his wife, Pamela, and sons Addison and Marshall

About Gifford

Gifford Miller has called New York City home his entire life. He loves New York, the people, the City's energy—and he and his wife, Pamela, would never think about raising their two sons anywhere else. Gifford was first elected to the City Council in 1996. And in 2002—at age 32—he was the unanimous choice of his colleagues to become Speaker. Now he's running for Mayor to continue getting results for the City he loves, and because he believes New York's best days are still ahead of us.

“Several Democrats are weighing the possibility [of running for Mayor]...but so far only one, Council Speaker Gifford Miller, is seriously engaged.”

— **The New York Times** (12/12/04)

A New Direction for New York City's Future.

Gifford Miller is tired of excuses—and refuses to settle for a City that he knows can be much better. He has an agenda for change that will take New York in a new direction.

Getting Our Fair Share: Each year, New York City taxpayers send \$24 billion more to Washington and Albany than we get back. Schools, healthcare, affordable housing—they're all shortchanged. As Mayor, Gifford Miller will do something this Mayor hasn't. He'll stand up to the Republican leadership in Washington and Albany and demand our fair share. Because until we start getting it, we'll never be able to solve the City's problems and invest in the future.

No to the West Side Stadium: Gifford Miller knows there are better uses and more pressing needs for our tax dollars—from reducing class sizes to repairing our subways—than a stadium on Manhattan's West Side. That's why he's taken more than just a strong stand against the stadium. He's taken action to stop it—blocking Mayor Bloomberg's plan to use \$300 million in public funds for the project.

Better Schools for Our Kids: It's clear what our kids need: smaller classes, more quality teachers, safer schools and stronger afterschool programs. No part of Miller's agenda will be more important than these investments in our children's future.

Fixing Our Subways: Miller has a specific plan to fix the subways, repair and modernize existing lines, and pay for needed expansion—like the 2nd Ave. Subway.

Strengthening Homeland Security: Miller will create a new city Homeland Security Office to focus on protecting New Yorkers 24/7. And he'll make sure first responders get the resources they need.

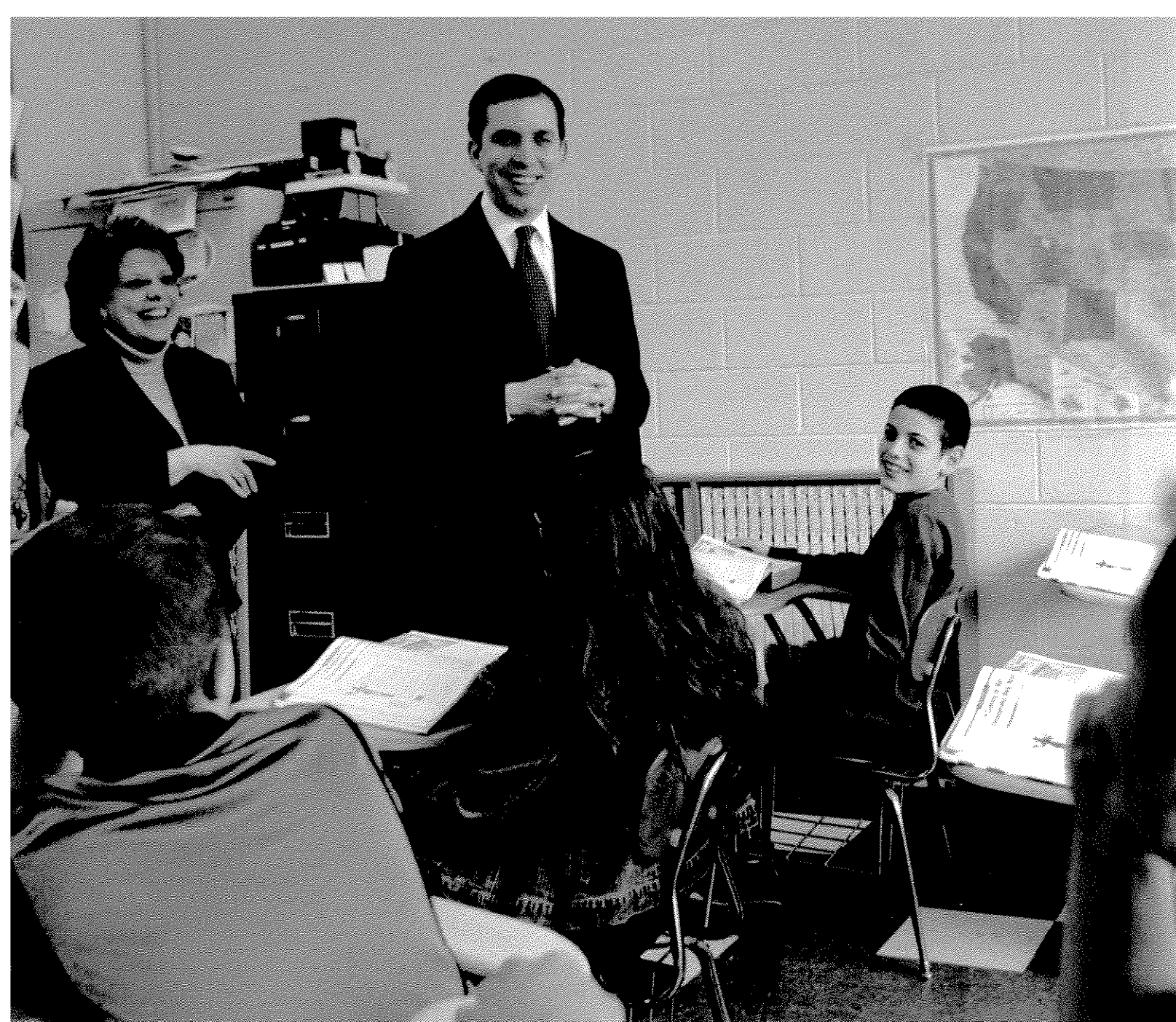
Growing the City's Economy: Miller has a plan to bring high-tech jobs to the City—including tax credits for emerging growth sectors and a stronger focus on training. As Mayor, he'll continue to advance policies, like the Earned Income Tax Credit, that help lift families out of poverty and into prosperity.

Results for New York.

As Speaker of the City Council, Gifford Miller has been an innovator, taking strong stands on progressive issues and getting results. He stood up to Mayor Bloomberg to protect New Yorkers and Democratic priorities in the City budget—restoring hundreds of millions for healthcare, child care, college scholarships, programs for seniors, and HIV/AIDS prevention. And he delivered on a number of important firsts: creating New York City's first Earned Income Tax Credit to help lift thousands of families out of poverty...protecting children from the dangers of lead paint...requiring hospitals to provide emergency contraception to sexual assault victims...bringing a living wage to 50,000 workers. On issue after issue, Gifford Miller has already proven he can get results. Now he's ready to prove it again...as Mayor.

“We can't afford to waste tax dollars on a stadium when our schools are overcrowded and our subways are falling apart. We need a Mayor with different priorities—and one who won't shy away from standing up to the Republicans in Washington and Albany to get New York City our fair share.”
— **Gifford Miller**

GIFFORD **miller**
MAYOR



“The best way to improve our schools is to reduce class sizes.

My plan will lower class size to just 17 students per class by not giving a planned tax cut to those earning over half a million dollars a year. It's simple, it's fair, and it will work.”

GIFFORD **milller**
MAYOR

Sign Gifford's Petition! Volunteer! Get More Information @ (212) 587-8087 or www.GiffordMiller.com



A Plan to Take Our Schools in a New Direction

- ▶ **Smaller Class Sizes:** Kids learn better in smaller classes. Gifford Miller will reduce class size by 20% across the board. That means no more than 17 kids to a class in grades K-3. And he has a realistic plan to pay for it.
- ▶ **Quality Teachers:** Under Mike Bloomberg, New York has lost more than 8,000 teachers. Gifford Miller will retain our best teachers by linking salary and advancement to performance, not just seniority. And he'll give good teachers bonuses for moving to underperforming schools.
- ▶ **Safer Schools:** Gifford Miller will make all our schools safe havens. He'll have safety agents report directly to principals and eliminate quotas on the number of students a principal can discipline.
- ▶ **Universal After-School:** Gifford Miller will give every student the opportunity to go to a strong after-school program—including one hour of homework assistance and two hours of art/sports.
- ▶ **Check out the Miller Plan for Schools:** www.GiffordMiller.com

Getting Real Results for Real Problems

As head of the City Council, Gifford Miller stopped Mike Bloomberg from making devastating cuts to our schools. This year, Miller forced the Mayor to reverse course and invest **\$1.3 billion in new school construction**. Miller led the Council to override the Mayor's veto to provide **more school nurses** in all public and non-public schools. He stood up to the Mayor and passed the Dignity for All Students Act to **protect students against violence** and ensured schools have the security cameras and safety agents they need. And Miller launched an innovative pilot program to **connect parents and teachers** and required the City to provide school safety information to parents.

Gifford Miller is the youngest Speaker ever chosen to lead the City Council. Some said he was too young. But he got results: Protecting children from lead paint, lowering taxes for working families, stopping Mike Bloomberg from making devastating cuts to our schools. And it was Gifford Miller who cut off funding for the Mayor's West Side stadium boondoggle.

As Mayor, he'll lower class sizes to 17 kids, get our subways moving again by fixing their ancient infrastructure, and fight to get New York its fair share from Washington and Albany. **Gifford Miller for Mayor: The ideas, the energy and the results we need.**

SIGN FOR SMALLER CLASSES!

Gifford Miller feels so strongly about small classes that in addition to running as Democrat he is asking New Yorkers to sign a petition to help him add a Smaller Class Size line to the ballot.

GIFFORD **millier**
MAYOR

GENOVA, BURNS & VERNOIA

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REBECCA MOLL FREED+
MYUNG KIM +
PETER J. CAMMARANO, III+
NICHOLAS D. BLIABLIAS++
JISHA S. VACHACHIRA+
DINA C. KERMAN+
KEITH A. REINFELD++
YAACOV BRISMAN+

PLEASE REPLY TO:
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+ ALSO MEMBER OF NEW JERSEY BAR
++ MEMBER OF NEW JERSEY BAR ONLY

September 5, 2005

By Email and Hand Delivery

Hon. Frederick A. O. Schwarz, Jr.
Chairman
NYC Campaign Finance Board
40 Rector Street
New York, NY 10006

Re: Miller for New York – Ballot Petitioning Expenditures

Dear Chairman Schwarz:

On Friday, September 2, 2005, Miller for New York (“MFNY”) submitted an application for immediate guidance to the Campaign Finance Board. According to information conveyed to me by telephone by the CFB general counsel and a subsequent CFB press advisory that afternoon, the Board has chosen to treat MFNY’s application as a request for an advisory opinion, post MFNY’s application for guidance on the CFB website, and solicit public comment. The CFB press advisory states that the Board anticipates issuing an advisory opinion on Tuesday, September 6, which is one week before the primary election.

Because the CFB press advisory invites written comments, I write to supplement MFNY’s request of September 2, 2005.

I. The Campaign Finance Act exempts the cost of circulating and filing ballot petitions from spending limits.

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In 1988, the New York City Campaign Finance Act was adopted by local law. The Act created spending limits and a corollary exemption from these limits for election law compliance expenditures, which currently states:

Expenditures made for the purpose of complying with the provisions of this chapter or the election law, including legal fees, accounting fees, the cost of record creation and retention, and other necessary compliance expenditures . . . shall not be limited by the expenditure limits of this section.

NYC Administrative Code §3-706(4)(a). Participating candidates voluntarily assume the obligation to comply with the Act's spending limits, the scope of which has always been narrowed by this exemption as set forth in the Act.

New York Election Law requires that ballot petitions be circulated in order to place candidates on the primary and general election ballots. See, generally, N.Y. Election Law §6-100, et seq. This year, for the primary ballot, designating petitions were required to be circulated between June 7 and July 14. Election Law §§6-134(4); 6-158(1). The statutory period for circulating independent nominating petitions was fixed between July 12 and August 23 this year. Election Law §§6-138(4); 6-158(9). The Campaign Finance Board has always held that "[t]he cost of circulating and filing designating and nominating petitions as required by State Election Law is an exempt compliance cost." See, e.g., CFB Advisory Opinion No. 1996-1 (Apr. 4, 1996).

The CFB has published a Handbook to guide candidates in the 2005 election. The 2005 CFB Handbook states:

Exempt expenses are expenses that do not count against your spending limit. These include any spending to comply with the Program or New York State election law; [and] expenses related to circulating and filing designating and nominating petitions . . .

CFB, 2005 Handbook at p. 3-3.

II. Petition carriers use both oral and written speech to persuade voters to sign ballot petitions. The labor cost of these communications is part and parcel of the circulation and filing of ballot petitions.

Since the adoption of the law in 1988, campaigns of participating candidates have used literature as a necessary aid in circulating and filing designating and nominating petitions. But for the election law ballot petitioning requirements, no campaign would be required to undertake

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circulating ballot petitions, for which written and/or oral communications to persuade voters to sign such petitions are a necessity.

The labor cost of such written and oral communications in the course of circulating ballot petitions for signature is incidental to compliance with the election law ballot petitioning requirements. Because such communications are necessary and incidental to ballot petitioning, the labor costs of such communications fall squarely within the scope of the “ballot petitioning” exemption as it has been described and applied by the Campaign Finance Board.

Put simply, without such communications, no candidate would be able to satisfy the Election Law requirements for obtaining a place on the ballot.

III. The CFB has improperly initiated a rulemaking without following NYC Charter requirements.

The Board should not hesitate to confirm its longstanding application of the ballot petitioning exemption. Enclosed is a summary of how the Board has consistently applied the ballot petitioning exemption to the cost of petitioning personnel in cases in which petition carriers used literature in the course of circulating ballot petitions. The summarized cases also shed light on instructions included in the 2005 CFB Handbook.

The Board has initiated a rulemaking. The fact that the new standard the CFB promises to announce tomorrow afternoon will be based, at least in part, on the public comments the CFB is soliciting underscores a fundamental and fatal problem in the manner in which the CFB has chosen to address MFNY’s request for guidance. The Board is not adhering to the New York City Charter requirements for:

any statement or communication of general applicability that: (i) implements or applies law or policy, . . . [including] any statement or communication which prescribes (i) standards which, if violated, may result in a sanction or effect. . . .

See NYC Charter §1041(5), 1043 (including requirements for publication, a minimum of 30 days for public comment, a public hearing, and Corporation Counsel review of statutory authority). The CFB has undertaken to announce a new rule later tomorrow. As a matter of fundamental fairness, as well as administrative and constitutional law, the Board should not – and cannot – apply any newly announced standard retroactively. See, e.g., Charter §1043(e).

IV. It is too late in the 2005 election to impose new standards for making exempt expenditure claims.

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Moreover, seeking public comments on this issue months after petitioning process began, weeks after that process concluded, and only one week before a primary election is unfair and prejudicial to campaigns that relied on the statutory language and the Board's decision-making history. If the Board wishes to reverse course and parse through petitioning interactions to separate out "electioneering" from petitioning, the prudent and fair way to do so is through a rulemaking process conducted in the manner required by the Charter.

Likewise, pursuant to Administrative Code §3-713, the Board has regularly conducted post-election hearings on issues arising in the course of an election, resulting in post-election reports to the mayor and City Council, including recommendations for legislative changes. Many of these recommendations have been well received, and have frequently resulted in City Council enactments that have kept the City's campaign finance reforms at the forefront as a national model.¹

The Board has traditionally followed these time-honored and legally sanctioned procedures for reshaping the law and its implementation prospectively, a practice that has served the Board, the Program, and the public well.

V. Retroactivity would result in chaos and would threaten the voluntary program.

In stark contrast, the very notion of retroactive application, long after the June 1 "opt-in" deadline and the conclusion of ballot petitioning this year, and just a week before a primary election, threatens to throw the voluntary Campaign Finance Program into chaos. The reasonable expectations of many candidates will be undermined.

In failing to uphold the statutory text, and in suggesting it may dramatically change course after the petitioning period has ended and only one week before the primary election day, the CFB is perhaps irreparably undermining confidence in the voluntary program. In order to attract candidates into the system, the CFB has successfully built a regime of stability and predictability, enabling candidates to understand, predict and comply with the system *ex ante*. Changing the rules of the game in the proverbial ninth inning will undermine confidence in the

¹ CFB Ethical Guideline No. 3(d) prohibits the signing of a designating or nominating petition by Board members and CFB staff. This ethical obligation necessarily limits CFB "real world" experience of the ballot petitioning process. This consideration further underscores that it would be wise for the CFB to first solicit public comments, in the manner prescribed by the Charter and/or Administrative Code, compile a record based on a broad range of real world experience, and give careful consideration to that record, before undertaking to impose a new standard.

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administration of the Campaign Finance Act, without which the voluntary program could implode.

When coupled with the potential civil penalties that the CFB may assess, such uncertainty would deter candidates (and treasurers) from participating. In a mayoral campaign, a candidate and – in the CFB’s view, a treasurer – could be personally liable for hundreds of thousands, even millions of dollars. If the CFB sends the message that it will change the rules after a commitment to opt in has been made and at the very end of a primary election campaign, and without notice, that message will almost certainly chill and deter participation.

VI. The CFB should confirm that the Act makes no distinction between the labor cost of oral and written speech to voters in the course of circulating ballot petitions.

To the extent the Board is seeking suggestions for the prospective application of a new standard in future elections, we believe the CFB should clearly confirm that the Act makes no distinction between the labor cost of an oral communication to persuade a voter to sign to place a candidate on the ballot and the labor cost of handing the voter a written communication for precisely the same purpose.

The Board’s September 1, 2005 decision regarding Kaufman for Council is of no relevance to MFNY’s petitioning efforts. On September 1, in “Kaufman,” the Board reviewed petition carrier timesheets describing a “scope of service” as “Lit. Distribution and petition gathering.” Apparently, based on the time sheets, the Board chose to accept only 50 percent of these expenditures as exempt.

There is no such pretext for disallowing or reducing MFNY’s 100 percent exemption for petition carrier costs. MFNY’s paid carriers worked pursuant to signed contracts that specified: “No services unrelated to petitioning will be provided.” MFNY’s contracts and petitioner time sheets, which were submitted to the CFB on September 2, 2005, fully satisfy the detailed documentation requirements for workers exclusively performing ballot petitioning services that are fully exempt from the Act’s spending limit. See 2005 CFB Handbook at pp. A-12 – A-13. As stated in MFNY’s September 2, 2005 submission, MFNY leased a separate office and set up a separate infrastructure dedicated exclusively to petitioning. The literature used by the MFNY petition carriers, the production of which was not claimed as an exempt expenditure, was merely incidental to the performance of their ballot petitioning duties, the only duties for which the MFNY carriers were paid.

Every petitioning interaction involves a one-on-one communication between a petition carrier and a voter that, if successful, requires a minute or more of the carrier’s time. It is a slow,

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painstaking process. In contrast, the act of general literature distribution is either a mass activity (“leafleting”) or, to the extent it occurs one-on-one, a virtually instantaneous interaction (e.g., handing out literature near a subway entrance). No such general literature distribution services were performed by MFNY’s petition carriers.

The CFB’s press advisory requesting public comment suggests that the Board may be considering parsing through the petitioning interaction to identify instants of “electioneering” that are somehow distinguishable from petitioning. We maintain that such a distinction is simply untenable.

A written or oral communication made to a voter in the course of persuading that voter to sign a ballot petition is made solely in order to comply with election law requirements. It bears no resemblance to any other campaign activity. Not only would such a parsing be administratively and logically difficult, but it would undermine the predictability of the law and the exempt expenditure simplification reforms that were adopted into the Act and the CFB rules in 2002 – 2003.

VII. MFNY’s petitioning efforts were limited to meeting election law compliance objectives.

To the extent the CFB is considering announcing a granular approach, MFNY suggests consideration of the letter of Henry T. Berger, dated September 5, 2005, enclosed herewith, which demonstrates that literature distribution is a common, infinitesimal and *de minimis* aspect of petitioning.

Mr. Berger is MFNY’s attorney for ballot access. His letter also addresses how the scope of MFNY’s paid petition carrier operations was limited to meet election law compliance objectives, first, for the filing of designating petitions, and subsequently, for the filing of independent nominating petitions by the deadlines specified in the election law. There is no distinction between how MFNY carriers used literature in the course of collecting signatures on designating petitions and, subsequently, on independent nominating petitions.

Through the efforts of the petitioning operation it created, MFNY gathered and submitted to the Board of Elections petitions containing approximately 40,000 signatures for the Democratic primary and approximately 59,000 signatures for the Smaller Class Size line. The additional signatures submitted to designate and nominate Gifford Miller were collected by outside organizations, upon which Mr. Berger advised MFNY not to rely.

In using literature as an incident of its petitioning efforts to get on the ballot in accordance with election law requirements, MFNY followed the CFB’s 2005 Handbook

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precisely. MFNY did not claim the cost of the literature as an exempt expenditure. It merely provided petition carriers with its regular literature to use as an aid in collecting signatures.

The Handbook does not, in any way, suggest that the use of literature in ballot petitioning efforts will invalidate the exemption for the cost of circulating and filing ballot petitions. Quite the contrary: the Handbook illustrates how non-exempt literature may be used in the course of petitioning without any implication that such use would compromise exempt expenditures for petitioning activity. See CFB 2005 Handbook, at p. p. 3 – 5.

VIII. In the 2001 mayoral election, the CFB rejected legal arguments advocating a distinction between designating and independent nominating petitions, for purposes of applying the compliance cost exemption.

In 2001, the CFB general counsel made clear that the Board would not countenance arguments seeking to distinguish between designating petitions and independent nominating petitions in determining the applicability of the Administrative Code §3-706(4) exempt expenditure claims. See letter of Sue Ellen Dodell to Henry T. Berger, dated July 24, 2001. Should the CFB now choose to revisit this issue, it cannot do so retroactively.

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Thank you, as always, for your consideration and courtesy.

Very truly yours,

GENOVA, BURNS & VERNIOIA

LAURENCE D. LAUFER

Enclosures

GENOVA, BURNS & VERNOIA

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September 5, 2005

Miller for New York – Ballot Petitioning Expenditures Addendum: Relevant CFB Rulings, Writings and Case Histories

CFB Advisory Opinion No. 1996-1 (Apr. 4, 1996)

Concluded that “[t]he cost of circulating and filing designating and nominating petitions as required by State Election Law is an exempt compliance cost.”

CFB Notice of Final Amendments to Campaign Finance Board Rules (October 1996) (p. 13)

In repealing former CFB Rule 1-08(e), the Board stated that repeal did not override the Advisory Opinion No. 1996-1 interpretation of the Act’s expenditure limit exemption for compliance costs.

Instead, the rulemaking notice made clear that repeal reflected the Board’s conclusion that prior statutory interpretation finding exemptions for constituent services and ballot proposal advocacy was not warranted under current law.

The Board stated: “The effect of the rules is to eliminate such exemptions prospectively.” (Emphasis added.) **This precedent illustrates that even when the Board had concluded that previously promulgated exemptions were not warranted under current law, it withdrew such exemptions only in a prospective manner.**

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The due process and prudential considerations reflected in the CFB's 1996 decision not to act retroactively, in an action taken prior to the election year, are even more compelling in the case of a long standing exemption that is well founded in the Act, CFB precedent, and CFB administrative actions.

2001 Election

I. Hevesi:

- a) **July 24, 2001 letter of CFB general counsel rejects an argument urging the use of different legal standards for determining whether designating and nominating petitions are exempt compliance costs, including arguments based on "literature distribution" in the context of independent nominating petitions. The CFB general counsel stated:**

"As you know, most campaign expenditures related to independent nominating petitions are exempt from the Program's limitations on expenditures [citing to Administrative Code §3-706(4) and CFB Advisory Opinion No. 1996-1]. Thus, most expenditures that are related to independent nominating petitions will not count toward a campaign's primary or general election spending limits."

- b) The Hevesi campaign made approximately \$390,000 in exempt expenditures for petitioning personnel and ancillary petitioning costs, for both designating and independent nominating petitions. These costs were claimed as fully exempt from the spending limit (i.e., no apportionment was made between exempt and non-exempt services). These exempt claims were apparently accepted by the CFB because \$390,000 far exceeds the margin by which the Hevesi campaign's total non-exempt expenditures were below the primary election spending limit. The CFB's final audit report does not include any finding that the Hevesi campaign exceeded the spending limit. See CFB, Final audit report of the Friends of Hevesi, dated December 19, 2003.
- c) Recent press reports have suggested that in September 2001 the CFB rejected Hevesi exempt claims for the cost of printing literature used by petition carriers. If such a decision was made in September 2001, it did not establish a precedent because it was not reflected in a contemporaneous published CFB determination or in the final audit report for Hevesi. If bases were asserted in September 2001 for rejecting some of the Hevesi campaign's exempt expenditure claims, the CFB did not consider these to be relevant for future campaigns because such bases were not described in the Handbooks it issued for the 2003 and 2005 elections (discussed below).

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II. *Moskowitz:*

- a) This campaign claimed approximately \$23,000 in expenditures for paid petition supervisors and related costs as fully exempt from the spending limit. The supervisors ran a volunteer petitioning operation in which the carriers used literature. These exempt claims were apparently accepted because \$23,000 far exceeds the margin by which the Moskowitz campaign's total non-exempt expenditures were below the primary election spending limit.
- b) The CFB's final audit report does not include any finding that the Moskowitz campaign exceeded the spending limit. See CFB, Final audit report of Eva's Election Committee, dated June 16, 2003.

III. *James*

- a) The CFB draft audit report found the committee had exceeded the primary election spending limit.
- b) In response, the committee substantiated, with time sheets, exempt expenditure claims for a paid petition carrier, and separately asserted exempt expenditure claims for payments to two printing companies for "palm cards identifying candidate – distributed by petition carriers to petition signers."
- c) The CFB final audit report, dated September 25, 2003, accepted the 100% exempt claim for the paid carrier, but rejected the exempt claim for expenditures to Branford Communications and Astoria Graphics for the printing of palm cards.
- d) CFB Final Determination No. 2003-3 (Sept. 12, 2003) explains the conclusion reached in the final audit of the Committee to Elect Letitia James, as follows:

Branford Communications (\$1,578) and Astoria Graphics (\$1,013): The Committee asserts that these expenditures are exempt because they were made to produce literature used in connection with petitioning. However, an expenditure for literature related to petitioning is not a required compliance expenditure, and thus is not an exempt expenditure pursuant to Administrative Code §3-706(4).
- e) Thus, under the CFB decision in James, an exempt claim for printing literature will not be sustained, while a 100% exempt claim for a paid petition carrier was sustained, regardless of the express representation by the James campaign that the literature was given by petition carriers to petition signers.

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- f) The Board's conclusion is clear: no exempt expenditures may be claimed for printing literature, but the use of literature by petition carriers does not reduce a 100% exempt claim for the petition carrier's labor.

2003 Election

The description in the CFB Handbook for the 2003 election of expenditures that are not exempt is limited to the six categories of expenditures expressly described as not exempt in Advisory Opinion No. 1996-1. Because the 2003 Handbook was issued prior to the Sept. 2003 decision regarding the 2001 James campaign, the 2003 Handbook did not describe the holding of the James decision. See CFB, 2003 Handbook, at pp. 3-4 – 3-5.

I. Gennaro

- a) The CFB draft audit report found the committee had exceeded the primary election spending limit.
- b) In response, the committee substantiated a 100 percent claim for a petition coordinator, with a signed contract detailing services provided, and withdrew, in light of the James decision, two exempt claims for literature purchased from Manifestation-Glow Press, which were reported to the CFB with an explanation that is reiterated in the CFB draft audit report:

“Lit Handout4Petition.”

- c) In its final audit report, dated November 12, 2004, the CFB accepted the labor cost of the petition coordinator as 100% exempt, notwithstanding that the committee reported it had used literature in the course of circulating ballot petitions.
- d) The Gennaro result is consistent with the conclusion reached by the CFB in James, supra: the use of literature by carriers circulating ballot petitions does not result in the reduction or rejection of a 100% exempt claim for labor costs incurred for petitioning.

II. Monserrate:

- a) This campaign claimed over \$30,000 in expenditures for petition carriers and supervisors and related costs as fully exempt from the spending limit. These exempt expenditures far exceed the margin by which the Monserrate campaign's total non-exempt expenditures were below the primary election spending limit. Also, it is

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evident on the face of CFB disclosure reports that literature was purchased for use by the petition carriers.

- b) The CFB's final audit report does not include any finding that the Monserrate campaign exceeded the spending limit, demonstrating that most, if not all, of the 100% exempt claims for petitioning labor were sustained. See CFB, Final audit report of Monserrate 2003, dated February 18, 2005.

2005 Election

Because the CFB Handbook for the 2005 election was issued after the September 2003 decision regarding the 2001 James campaign, it is the first CFB Handbook to reflect the conclusion reached in James. To the list of six categories of non-exempt expenditures listed in the 2003 Handbook, the 2005 Handbook adds a seventh: "campaign literature connected with petitioning besides the petitions themselves." See CFB, 2005 Handbook, at pp. 3-4. This is precisely the holding of the James case, no more.

Neither than James decision, nor the 2005 Handbook at p. 3-4, nor the "example" given in the 2005 Handbook at p. 3-5 suggests that petitioning labor costs are not exempt if literature is used in the course of circulating ballot petitions.

Indeed, the implications of the innovations in the 2005 Handbook are precisely the opposite. First, the non-exempt purpose is described as "campaign literature," not the labor costs incurred in petitioning. Second, the 2005 Handbook is merely a reflection of the conclusion reached in the September 2003 audit of the 2001 James campaign: the cost of printing literature is not exempt, but the labor costs incurred in petitioning remain 100% exempt, regardless of the use of literature.

The comparison the Handbook draws between "campaign literature" and "the petitions themselves" further underscores that it is the printing of literature that is the relevant non-exempt purpose. Likewise, CFB disclosure requirements have long contained separate "purpose codes" for "literature" and "wages."

Finally, the example given in the 2005 Handbook at p. 3-5 illustrates only that the cost of producing a palm card and flyer is non-exempt. The Handbook example has no bearing on the exempt status of petitioning labor. Had that been the intent of the CFB, it would certainly have created an example that includes a labor cost. Instead, the Handbook example involves no labor cost (because it is the candidate who is circulating the petitions).

**HENRY T. BERGER
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September 5, 2005

Hon. Frederick A. O. Schwarz, Jr.
Chairman
NYC Campaign Finance Board
40 Rector Street
New York, NY 10006

Dear Chairman Schwarz:

I am an attorney and have been retained by Miller for New York ("MFNY") to assure that they attain ballot access in the primary and general elections. I have been involved in petitioning efforts at all levels for 35 years as a petitioner, field coordinator, campaign manager and election lawyer and am fully familiar with the process of gathering, filing, challenging and defending petitions.

Generally, the distribution of literature in the course of petitioning is merely incidental to the petition gathering process. In most cases, when a potential petition signer is approached and asked to sign a petition, the potential signer asks whether the petition gatherer has any information, including literature, about the candidate. Therefore, a piece of literature about the candidate is essential to the petition process and to any successful petitioning effort. The giving of a piece of literature takes a second or two, while the process of asking a person to sign, getting the signature and filling in the other information required on the petition may take a couple of minutes.

I advised MFNY on how to train its petition carriers. In particular, I advised MFNY to have its carriers use literature particularly designed for petitioning, which included a description of the petitioning process, in the manner described above.

This incidental distribution of literature must be distinguished from the more generalized distribution that general campaign canvassers may perform, including the generalized distribution of literature to passers-by on a street corner or the "stuffing" of a building by putting literature under every door in the building. While the former is an integral and necessary part of the petitioning process, the latter is simply message distribution and does not merit the exempt status of petitioning activity. MFNY's petition carriers did not engage in generalized distribution of literature.

The number of signatures gathered is also a complex matter that deserves some comment. Because of the possibility of challenges and the highly technical nature of the election law, it is necessary to gather many times the legally required number of signatures to assure ballot access. In Molinari v. Powers, 82 FS2d, 57 (EDNY, 2000), the Court noted and accepted the concession by the New York State Republican chairman (and defendant in that matter) that a candidate needed to gather six times the legally required number of signatures to withstand a challenge under New York's arcane election law. I have been involved in petition challenges in which candidates with more than six times the legally required number of signatures have been successfully challenged.

In gathering designating petitions for the Democratic primary, based in large part on the considerations discussed above, I recommended that MFNY not rely on signatures gathered by outside organizations. Based on extensive experience, I have determined that relying on outside organizations is simply too chancy. Because it is impossible to determine how many signatures would be filed by an organization, if any, I advised the campaign to collect enough signatures to assure the candidate's place on the ballot without counting on any outside help. I felt comfortable recommending that the campaign get approximately four times as many signatures on their own to assure Gifford Miller a place on the Democratic primary ballot, and that goal was achieved. It turned out that the signatures obtained directly by MFNY were less than a quarter of the signatures ultimately filed by the campaign and all of the organizations supporting this effort.

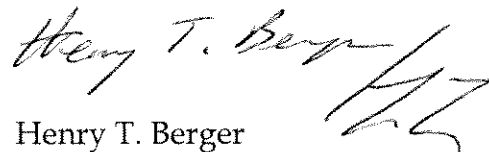
In the Miller campaign, the effort to acquire a second line for the general election (to match Mayor Bloomberg's second line) entailed the creation of the Smaller Class Size party. Mayor Bloomberg had retained excellent counsel as his election lawyer and had unlimited resources to support his election lawyer. He had also demonstrated a willingness to use those resources to remove one opponent from the ballot. I recommended to the campaign that they obtain six times the required number of signatures or 45,000 signatures on the nominating petition for the Smaller Class Size party so that we could withstand any challenge to our petitions from the Mayor. One week prior to the filing

deadline the campaign had obtained only 32,000 signatures. I insisted that the effort be intensified and in the last week more signatures were gathered and other signatures that we had been unaware of were turned in so that we ultimately obtained, and somewhat exceeded, our goal.

Finally, it is vitally important to note that under the Election Law, the time for gathering petitions is strictly regulated, so that designating petitions for party primaries must be gathered in June and July and nominating petitions for independent lines must be gathered in July and August. Signatures gathered outside these limited times are invalid.

I hope that these comments are useful to you in your deliberations.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Henry T. Berger". The signature is written in dark ink and is positioned to the right of the typed name.

Henry T. Berger