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October 28, 2008

BY E-MAIL AND REGULAR MAIL

New York City Campaign Finance Board
Attn.: Sue Ellen Dodell, General Counsel
40 Rector Street
New York, New York 10006

Re: *Comments On Draft Guidelines In Response To Extension Of Term Limits*

Dear Ms. Dodell:

I write on behalf of Weiner '09, Congressman Anthony Weiner's principal committee for the 2009 mayoral election, in response to the Campaign Finance Board's ("CFB") request dated October 23, 2008 for comments on its draft guidelines dated October 17, 2008 for a framework to provide guidance to candidates as a result of the passage of Intro 845-A extending term limits (the "Draft Guidelines").

Preliminary Statement

This is a crucial moment for the future of campaign finance reform in New York City.

The CFB has taken an extraordinary action, floating proposed "Draft Guidelines" to reverse a long-standing CFB Rule and Advisory Opinions even before the City Council voted on changing term limits, before Intro 845-A has been signed, before the United States Justice Department conducts its mandatory review of Intro 845-A under the Voting Rights Act, and before litigated challenges to the statute are heard and determined. By floating the Draft Guidelines before the City Council voted on the legislation, the CFB sent a big and broad wink-and-a-nod to term limited Council members that the campaign finance rules would be changed to advantage them if they choose to run for re-election.

The only purpose of the proposed "Draft Guidelines" stated by the CFB has been a vague allusion to the need to "make it practical for candidates who wish to join the

Campaign Finance Program to do so."[1] The CFB has made no findings, held no hearings or rulemaking proceedings, and offered no rationale for why any change in the law is required to accommodate Intro 845-A. Sadly, as proposed, the Draft Guidelines will do nothing to encourage participation among mayoral candidates and will eviscerate the purpose and intent of the Campaign Finance Program with respect to all lower ballot offices in this year's elections. If designed to encourage participation in the system, the Draft Guidelines can only fairly be described as destroying the system in order to save it.

For both these substantive reasons explained in detail below, and for the following procedural reasons as well, we urge the CFB not to approve the Draft Guidelines:

- The Draft Guidelines will reverse CFB Rule7-03(c). This cannot be done by issuance of an Advisory Opinion. It requires a rulemaking proceeding.
- The Draft Guidelines will also reverse Advisory Opinions 1993-7 and 1997-6. The Board should follow proper juridical procedure and apply the fundamental principle of *stare decisis* instead of reversing its prior decisions for momentary political expedience.
- The Board should make findings to articulate a rationale for changing the rules late in the third year of the election cycle simply because the Mayor decided to extend term limits and convinced a City Council dominated by term-limited incumbents to go along.
- The Board should explain why it intervened in the legislative debate by floating the Draft Guidelines before the City Council even voted on Intro 845-A.
- The Board should disclose how and why it decided to take up this issue, including whether any elected officials or their staffs requested that the Board take such a step.

In sum, we urge the Board not to approve the Draft Guidelines and, instead, to undertake a more deliberative and transparent process to assess the impact of Intro 845-A and to determine if any changes are in fact needed to the Campaign Finance Act, Rules, Advisory Opinions and audit procedures. In so doing, the Board should aim not to relieve formerly term-limited incumbents of the consequences of their political decisions but instead to further the original purpose and intent of the Campaign Finance Act – namely, to level the playing field of New York City politics and to reduce the advantages brought by incumbency and by unlimited campaign spending by those who elect not to participate in our model reformed campaign finance system.

[1] Statement Of New York City Campaign Finance Board Chairman Father Joseph P. Parkes, S.J. On Extending Term Limits, dated October 2, 2008.

Background Of The Problem

In the last two elections, one mayoral candidate spent more than $158 million -- grossly more than any other candidate could spend or has spent not only in New York City but in the history of American mayoral politics.[2] This campaign spending has dwarfed the spending of Governors and Senators across the country and is tantamount to waging Presidential-level national campaign spending within the five boroughs of New York City.[3] The fact is that New York City, with its progressive-minded laws and rules, has seen the most one-sided campaign spending ever with the reformed campaign finance system the casualty. Even before the passage of Intro 845-A, Mayor Bloomberg's staff has already informed *The New York Times* that the Mayor intends to spend at least another $80 million on the upcoming election.[4] Indeed, on Yom Kippur, the Mayor's staff informed the *Times* that $20 million alone would be spent on dirtying the reputation of Congressman Weiner.[5]

Sadly, the Campaign Finance Act and Rules hamper mayoral challengers facing nonparticipating, free-spending general election opponents by, among other things, counting all or nearly all campaign spending against the primary spending cap until after the primary election is held, thereby restricting opponents of the Mayor from spending to campaign against him until September 2009 -- barely 60 days before the election.[6] Meanwhile, of course, there is nothing preventing the Mayor's campaign from unleashing its unlimited arsenal of campaign spending long-before completion of the Democratic primary.

The Draft Guidelines will replicate a form of this problem for non-incumbents planning to run next year for seats that are occupied by incumbents who would have been term-limited but for the passage of Intro 845-A. By permitting incumbents who were running for higher office but will now run for re-election to open new committees for which "[c]ampaign spending made prior to the date of the advisory opinion would not count against the candidate's spending limit for the 2009 election,"[7] the CFB will be allowing incumbents to lawfully spend substantial amounts more than their challengers during

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[2] *See* "Public Dollars for the Public Good; A Report On The 2005 Elections," New York City Campaign Finance Board at 4 (Mayor Bloomberg spent $85 million on his 2005 re-election campaign); "An Election Interrupted . . . The Campaign Finance Program And The 2001 New York City Elections," New York City Campaign Finance Program at xii (Mayor Bloomberg spent $73 million on his 2001 campaign).

[3] The 2008 general election spending limit for President of the United States for candidates receiving Federal matching funds is $84.1 million. *See* http://www.fec.gov/pages/brochures/pubfund_limits_2008.shtml.

[4] David W. Chen and Raymond Hernandez, "Mayor Plans An $80 Million Campaign," *The New York Times*, October 9, 2008.

[5] *Ibid.*

[6] *See e.g.* Advisory Opinion 2005-1.

[7] Draft Guidelines at 2.

this election cycle. If adopted, as at the Mayoral level, New York City politics will be characterized by nothing but an unlevel playing field favoring incumbents. Such a result will mean that the City's reformed campaign finance system as we have known it since 1989 will no longer be in force and effect in most election campaigns in the City in 2009.

Congressman Weiner is a passionate supporter of campaign finance reform, knowing from experience that it makes it possible for a challenger to compete and have his views heard. Mr. Weiner was able to get elected originally to the City Council as a community-based candidate due to New York City's model reformed campaign finance system, and he wishes to see that same opportunity perpetuated and enhanced for community-based candidates in every community seeking to start out in electoral politics. That opportunity will be eradicated by the "guidelines" the CFB proposes. If so, the future of New York politics may be a succession of wealthy individuals and entrenched incumbents grossly overwhelming middle class opponents with negative ads and high-spending campaigns that cannot effectively be answered. In other words, the CFB is poised to adopt "guidelines" that will ensure exactly what the Campaign Finance Act was designed to prevent.

Legal Analysis

A. Existing Law Governs The 2009 Elections

The passage of Intro 845-A extending term limits to three terms does not create a novel or undecided situation under the Campaign Finance Act. The CFB has previously been called on to decide how to deal with situations where candidates switch the offices they are running for during the course of an election cycle. The CFB has been very clear about how these situations are to be dealt with under the Act and Rules.

Rule 7-03(c) provides that:

> The Board will presume that contributions and loans are accepted, disbursements are made, and liabilities are incurred by a candidate for his or her next following election.

In Advisory Opinion 1993-7 (July 20, 1993), the CFB applied this Rule to a situation in which then-City Council President Andrew Stein discontinued his campaign for Mayor and sought instead to run for re-election (to the renamed office of Public Advocate). The Board's ruling regarding Mr. Stein was clear and unequivocal:

> Because Stein would have been on the ballot only in the election for public advocate, it would be extraordinary for the Board to reach a conclusion that would both overlook

> this fact and override the Rule 7-03(c) presumption, as though an election for mayor had actually occurred in the interim.

As applied now, to paraphrase the Board's own opinion, because previously term-limited incumbents will be on the ballot only for re-election, it would be extraordinary for the Board to reach a conclusion that would both overlook this fact and override the Rule 7-03(c) presumption, as though an election for higher office had actually occurred in the interim.

In 1993, the Board clearly understood how destructive it would be to the purpose and intent of the Campaign Finance Act to permit Mr. Stein to have done that which previously term-limited incumbents will now be permitted to do if the Board adopts the "Draft Guidelines":

> To rule otherwise would encourage [incumbents] to make [] "exploratory" expenditures for one office that would incidentally, or even intentionally, benefit the [incumbent] in his or her ultimate run for an office covered by the Program to the detriment of participants for whom protection is mandated under [the Act's spending cap]. To find the presumption inapplicable in the case of [such an incumbent] would also invite similar claims from participants as well, thus eviscerating existing campaign finance expenditure and contribution limits applicable to participants who say they have changed the office they seek as the election approaches.[8]

The only difference between the Stein situation and the current situations of previously term-limited incumbents is that most of those affected now voted to change the law to permit themselves the opportunity to run for re-election after having spent from January 1, 2006 through October 23, 2008 running campaigns for higher office. That is a difference that provides this Board with no rationale for overturning the clear precedent of its opinion in the Stein case.[9]

Four years after the Stein ruling, the Board was again called on to apply Rule 7-03(c) to another situation in which an incumbent decided late in the election cycle to abandon a campaign for higher office and to run instead for re-election. In Advisory Opinion 1997-

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[8] AO 1993-7 at 3.

[9] We note that none of the Board's communications on this issue to date have explained any reason or purpose for issuing the Draft Guidelines or considering the adoption of any new ruling. Certainly, the Board has issued no findings with regard for the need to take action.

6 (June 24, 1997), the Board again applied the plain language of Rule 7-03(c) to Borough President Fernando Ferrer's spending for an abandoned mayoral campaign, albeit to a situation in which the incumbent dropped back to run for re-election in a smaller geographic constituency than the citywide race that he had been waging. Due to this geographic difference, the Board permitted the incumbent office holder an opportunity to make a showing to overcome the Rule 7-03(c) presumption with respect to spending that was beneficial only to the citywide race and not to the re-election campaign. That is the existing CFB precedent that governs previously-term limited Councilmembers and Borough Presidents who now drop back from campaigns for larger constituencies to run for re-election.

In the Ferrer opinion, the Board again highlighted the unfairness that would occur to non-incumbent challengers if incumbents were allowed to wipe the slate clean of spending during the election cycle once they fix on running for re-election:

> To the extent that the Act or the Board's rules permit any flexibility in accommodating a change in a participating candidate's choice of office sought, the Board must also protect against unfairness to other participating candidates for the same office, who do not have the opportunity to argue that any of their spending was for different election and should therefore be excluded from the borough president spending limit.

This precise problem will occur if the Draft Guidelines are adopted. Community candidates who have been planning to run for City Council under the existing contribution and spending caps will suddenly be running for office against incumbents whose spending for most of the election cycle – two years and ten months – will be exempt from the 2009 spending cap. This would work a profound unfairness. To highlight just one example of the problem, most of the incumbents' spending would have been to cultivate a fundraising base that, under the Draft Guidelines, the incumbent would be free to return to in order to raise funds for re-election without the fundraising development costs counting against the incumbents' campaign.

A similarly profound unfairness will occur at the mayoral level. Congressman Weiner has been planning a campaign for two years and ten months on the assumption – because it was the law – that there would be a open mayoralty in 2009. This fact led to important strategic decisions; for example, Mr. Weiner ceased fundraising activities when he had raised all the money he will be permitted to spend under the primary spending cap because it was not worth spending money under the primary spending cap to continue to raise money for the general election. Had he known that the incumbent Mayor would be permitted to run for re-election, he obviously would have made a different strategic decision and organized his campaign differently in anticipation of a general election against the largest spending candidate in American history.

If the CFB is going to permit incumbent officeholders to start anew at this late date in the election cycle, then fairness dictates that all candidates be permitted to do so as well. Otherwise, non-incumbents will be terribly disadvantaged and the CFB will have stacked the rules in favor of incumbents.

B. The CFB's Flawed Process For Adopting The Draft Guidelines

If the Draft Guidelines are adopted, Rule 7-03(c) will exist no more, for this will be the exception that swallows the rule that "[t]he Board will presume that . . . disbursements are made . . . by a candidate for his or her next following election." Indeed, under the Draft Guidelines, the Board in fact will create a presumption available to all previously term-limited incumbents that their disbursements prior to adoption of the Draft Guidelines were *not* for the next following election, but instead were for a 2013 election (if the candidate chooses to run that year). Whatever the Draft Guidelines would do, they would not leave Rule 7-03(c) in tact and it would be improper procedure for the Board to gut one of its own Rules without a rulemaking proceeding. The Board *may* issue Advisory Opinions "interpreting the Act and . . . rules," Rule 7-04, but it *must* "promulgate rules and regulations" in order to amend or repeal its own rules. Campaign Finance Act §3-708(8). Here, the Board must desist from acting by Advisory Opinion and must engage in a rulemaking proceeding if it is going to effectively repeal Rule 7-03(c) in the manner proposed in the Draft Guidelines.

The Board must also desist from adopting the Draft Guidelines by Advisory Opinion because it will undermine the rule of law by which the Board has always conducted itself. There simply is no way to square the Draft Guidelines with Advisory Opinions 1993-7 and 1997-6. By adopting the Draft Guidelines, the Board would be jettisoning *stare decisis* and would be engaged in an act of pure results-oriented law-making. At least when the United States Supreme Court decided *Bush v. Gore* it had an actual case or controversy before it. Here, the Board would be undermining its prior rulings without even disclosing why it feels compelled to act or who, if anyone, asked it to act.

Under the Chairmanships of Father Joseph O'Hare and Frederick A.O. Schwarz, Jr., the Campaign Finance Board has earned a reputation over the past 19 years as an independent arbiter of this City's political process. It is vital to our municipal democracy that the Board remain politically independent and committed to the rule of law. When the Board intervened in the legislative process by floating the Draft Guidelines while Intro 845-A was under consideration by the Council, the Board called into question its independent, nonpolitical status. By approving the Draft Guidelines before Intro 845-A has been signed into law or reviewed by the Justice Department or the courts, the CFB would continue this unwarranted rush to aid the incumbents who just voted to exempt themselves from the term limits that the voters twice approved at referenda elections.

The CFB would be acting here on a super-expedited basis without any articulation of a need to change the rules, without any public hearings, without a rulemaking proceeding and, frankly, without any apparent consideration for the real unfairnesses created by the Mayor's last-minute extension of term limits and his announcement that he will once again flout our City's model campaign finance system. It is on the verge of not only again sitting by powerlessly while the Mayor utilizes both his incumbency and personal resources to spend his electoral opponents into oblivion, but this time allowing all of the formerly term-limited incumbents to do the same by exempting them from Rule 7-03(c) and allowing them to start anew with the benefit of the nearly-three years of fundraising and political organizing that they have already conducted during this election cycle. By enabling this conduct, the CFB would be undermining the values it was create to protect.

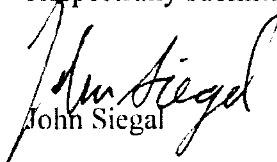
The CFB should instead be looking at additional steps to blunt the overwhelming electoral advantages of incumbents and free-spending billionaires. Such steps should include:

- Requiring candidates to declare at the beginning of the election year whether they will be participating in the campaign finance system and, if not, whether they will be a "limited participating candidate" under § 3-718 of the Campaign Finance Act.
- Ruling that candidates who publicly announce that they will not be participating in the campaign finance system and that they will be spending in excess of the spending cap set forth in the Act are immediately deemed to be nonparticipating high-spending candidates so as to immediately relieve their competitors of the spending cap restrictions.
- Liberalizing the rules regarding general election campaign spending prior to the primary election so that candidates participating in the campaign finance system will not be disadvantaged against free-spending general election rivals. This includes, among other things, reversal of Advisory Opinion 2005-1 so that candidates may raise general election money without any of the costs of fundraising counting against the primary spending cap.
- Ruling that any negative campaigning or express advocacy of the defeat of a putative general election opponent by a nonparticipating candidate prior to the primary election will immediately permit the attacked candidate to spend general election funds not subject to the spending cap in order to defend himself and respond in like kind.
- Advocating for the City Council to take appropriate steps to level the playing field by further raising the amount of matching funds provided to participating candidates facing free-spending, nonparticipating candidates. Given that the amount of public funds claimed by candidates will be greatly reduced as a result of the passage of Intro 845-A, the CFB ought to seek to reallocate its already-budgeted funds for the purpose of increasing the rate of matching funds paid to participating candidates facing self-funding nonparticipating candidates.

- Rallying a civic consensus to save our vital reformed campaign finance system from a third election in a row in which campaign finance reform will be a dead letter.

First of all, though, the CFB should do no harm by declining to approve the Draft Guidelines because, for the substantive and procedural reasons set forth above, they are entirely unnecessary and unwarranted.

Respectfully submitted,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