Gifford Miller for New York

February 23, 2005

Campaign Finance Board
40 Rector Street
New York, NY 10006

Dear Campaign Finance Board Members:

Miller for New York ("the committee") intends to make expenditures to raise contributions, subject to the $4,950 limit of the New York City Campaign Finance Act ("the Act"), that will be set aside for use after the primary election. The committee's specific plan for raising these general election funds is described in greater detail below.

We write to request the Campaign Finance Board's confirmation that the primary election expenditure limit of the Act does not apply to such expenditures, because these are being made to prepare for a general election campaign ("general election expenditures") against an opponent who refuses to participate in the voluntary Campaign Finance Program and thus is not constrained by the spending limits of the Program. **We seek this confirmation not just for Miller for New York, but for the principal committee of every candidate who decides to run for the Democratic Party's nomination for mayor.**

We understand that the Board next meets on March 11. Because time is of the essence, we ask that the Board address this request at that meeting.

Introduction

In 2001, Michael Bloomberg spent approximately $75 million to run for mayor, far in excess of the approximately $10.73 million total spending limit applicable to a participating candidate in both the 2001 mayoral primary and general elections. Observers at the time described Mr. Bloomberg's use of his personal fortune as an unprecedented threat to New York City's campaign finance reform. For example:

> "Mr. Bloomberg's flood of dollars into the mayor's race has begun to warp the fair and open campaign financing system that New York City has worked so hard to establish over the past decade. . . . [Voters] are getting double-barreled damage in the form of more expensive elections and a weakened public finance system."

Editorial, The Bloomberg Factor, N.Y. Times, July 21, 2001, at A27. After the 2001 election, the New York Times again posed the question of what such a "tidal wave of money" has done to "New York City's excellent campaign finance program." Editorial,

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The $69 Million Mayor, N.Y. Times, Dec. 5, 2001, at A28. It predicted that despite the successes of the Program,

> "future mayoral candidates, fearing another billionaire on the horizon, may decide to stay outside the system and attempt to raise enough money from special interests to match any self-financed opponent. One of the challenges over the next few years will be to improve the system to take into account what is already being called 'the Bloomberg factor.'
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> * * *
>
> "Now that Mr. Bloomberg has established how much money a truly wealthy man might be willing to spend to win an election, the campaign finance system should be adjusted to help level the playing field."

Id. Mr. Bloomberg now seeks re-election and will likely be a candidate in the 2005 general election. Mr. Bloomberg has made public his intent not to join the Program and not to abide by the Act's expenditure limits.

The Issue

In an election, like any other competition, time and money are essential for enabling a candidate to run a winning campaign. The Act was not intended to place participating candidates in a primary election at a competitive disadvantage on both counts. It is unreasonable to construe the Act's primary election expenditure limit as imposing an eight-and-one-half month ban (January 1 through primary day, September 13, 2005) against making expenditures to prepare for a general election campaign against a high spending non-participating candidate. To do so would turn the Act on its head, making it, first and foremost, aid, comfort and incentive for candidates who spurn expenditure limits.

Several candidates are now reported to be seeking the Democratic Party's nomination for Mayor. Each of these Democrats likely plans to join the Campaign Finance Program and to abide by the Act's expenditure limitations. For each of these candidates, the prospect of winning the primary election and then facing a self-financed free-spending candidate in the general election must not pose the following "Hobson's Choice:"

(1) If the Campaign Finance Act's primary election expenditure limit were construed to cover general election expenditures made before the primary election, the law would effectively direct these primary election candidates to disregard preparing to compete effectively against Mr. Bloomberg's free spending in the general election. This would leave the primary election

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winner with no more than eight weeks (and as few as six weeks, in the event of a run-off primary election) to raise funds to compete in the general election.

(2) The other alternative is equally dim: the principal committee of a primary election candidate could make general election expenditures now that would count against the primary election expenditure limit, and therefore sharply reduce his or her capacity to compete effectively in the primary election.

Either way, application of the primary election expenditure limit to general election expenditures would undermine the primary candidate's ability to campaign effectively for both nomination and election. Such an overbroad application of the primary election expenditure limit would infringe on the right of primary election voters to choose a candidate to carry their party's banner in the general election.

The Law

We believe the Act avoids this dilemma. Because the Act was designed to foster fair competition between participating candidates subject to expenditure limits and non-participating candidates who spend without limitation, in these circumstances, the Act makes the general election expenditure limit the more appropriate limitation for general election expenditures that are made before the primary election.

This conclusion is essential for upholding the integrity of the Act's separate primary and general election expenditure limits, and assuring that these are applied fairly to all opposing candidates. As required by the Constitution, the Act's expenditure limitations are narrowly drawn to serve the Act's dual objectives of promoting fair competition between participating opponents, and fostering fair competition between participating and non-participating candidates. We have enclosed a memorandum of law that contains additional detail.

Consistent with the requirements and intent of the Act, the committee is planning to make general election expenditures in the manner described below. **Again, we seek confirmation that every participating candidate in a 2005 mayoral primary election may make general election expenditures in this same manner.**

(1) The principal committee would disclose to the Campaign Finance Board when it begins to raise funds for the general election.

(2) The funds raised for the general election would be set aside in a separate account of the principal committee. No disbursements may be made from the general election account (except for payment of bank fees and refund

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of contributions) until after the primary election has taken place.[1] This would be similar to the accounts now provided for an anticipated run-off primary election, but more strictly regulated since the $4,950 contribution limit would continue to apply.

(3) To ensure that all prospective primary election opponents are treated in the same manner, these general election funds must be raised using fundraising materials expressly stating that the funds are for use in the general election.

(4) Beginning in the disclosure period in which funds are first received into the dedicated general election account, the participating candidate may allocate a portion of expenditures made to the general election. The expenditure amount attributed to the general election for each disclosure period must be disclosed to the Campaign Finance Board in a cover memorandum submitted with the applicable disclosure statement.

(5) The allocation would apply only to expenditures attributable to the general election effort (fundraising personnel, communications and events to raise funds, and associated overhead costs), which would be listed in the disclosure statement cover memorandum. For these expenditures, the committee would apply an allocation ratio of General Election Contributions Received in Disclosure Period/Total Contributions Received in Disclosure Period to determine the portion attributable to the general election for that disclosure period.

(6) The allocation would not apply to any other pre-primary election expenditures, such as for television, radio and print advertising, mailings for purposes other than raising funds, media consultants, primary election ballot petitioning expenditures, campaign manager, field operations, and website.

The committee strongly believes that every participating candidate in the Democratic Party mayoral primary election has the right under the Act to prepare for a possible general election campaign against a free spending incumbent and therefore to make general election expenditures, as described herein. Indeed, candidates should

[1] In other words, the committee does not contemplate making pre-September 14, 2005 disbursements from the general election account to pay general election expenditures or to make the primary election account "whole" for general election expenditures made from the latter account, unless this is expressly permitted by the Campaign Finance Board.

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recognize that such preparations are a duty they owe to their Party and to their Party's members. The Act must not be construed in a manner that thwarts the ability of primary election voters to choose a nominee who will be prepared to compete effectively in November's general election.

Thank you for your consideration.

Yours truly,

Marshall Miller
Treasurer

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Gifford Miller for New York

MEMORANDUM

TO: CAMPAIGN FINANCE BOARD

FROM: MILLER FOR NEW YORK

DATE: February 23, 2005

RE: General Election Expenditures Made Prior to September 14, 2005

QUESTION PRESENTED

Does the primary election expenditure limit of the New York City Campaign Finance Act constrain the right of a principal committee of a participating candidate in a primary election to make expenditures before the primary election to raise and set aside funds for a general election campaign against a self-financed non-participating candidate?

BRIEF ANSWER

No. Under the New York City Campaign Finance Act the primary election expenditure limit would not be applicable to general election expenditures made before September 14, 2005 to raise and set aside funds for a general election campaign against a self-financed non-participating candidate. This conclusion rests on the language of the law, legislative intent and history, Constitutional principles, and Campaign Finance Board rules. Further, this conclusion is not inconsistent with any prior CFB advisory opinion; indeed, it furthers public policy goals expressed in prior opinions.

DISCUSSION

Introduction

The New York City Campaign Finance Act follows the federal model upheld by the U.S. Supreme Court in *Buckley v. Valeo*, 424 U.S. 1 (1976): public financing conditioned on the acceptance of expenditure limitations. Because unlimited expenditures by non-participating candidates create a disincentive to participation in the voluntary City program and undermine conditions for fair competition, the Campaign Finance Act has long included safeguards providing additional public financing and removal of expenditure limits when non-participating candidates raise or spend funds in excess of one-half the expenditure limit that applies to a participating opponent. *See* NYC Administrative Code §3-706(3).

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The Act's protections against unlimited expenditures by a non-participating candidate were tested as never before in the 2001 election. Michael Bloomberg's $75 million self-financed campaign was perceived to be an unprecedented threat to New York City's widely-regarded campaign finance reforms.

New York City Campaign Finance Act and Campaign Finance Board Rules

The City Council responded by adopting a series of amendments to the Campaign Finance Act intended to preserve the viability of the public financing system against the phenomenon of "billionaire" candidates, by establishing new conditions for fair competition between participating and non-participating candidates. *See* City of New York, Local Laws Nos. 58, 59, and 60 (2004). As amended, the Act's expenditure limits remain as a ceiling that promotes fair competition among opposing participating candidates but may not be interpreted or applied in a manner that exacerbates fundraising and spending disparities between participants and non-participants.

As amended, Administrative Code §3-706(1)(c) states:

> Expenditures by participating or limited participating candidates in a primary election made prior to or on the date of such primary election shall be deemed to have been made for such primary election.[1]

In adopting this and other amendments to Administrative Code §3-706, the City Council found:

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

Report of Council Committee on Governmental Operations, October 26, 2004, at p. 10.

As discussed below, previous CFB interpretations of §3-706(1)(c) never addressed this newly stated "overriding goal" of the Act to promote fair competition between participating and non-participating candidates. In addressing the future interpretation and application of the Act, the City Council has now made clear that it must not be construed in a manner that

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[1] This provision deems the expenditures to have been made "for such primary election," but does not state that such expenditures shall therefore be subject to the primary election expenditure limit. As discussed below, Campaign Finance Board rules treat this "deeming" as a rebuttable presumption.

"exacerbate[s] fundraising and spending disparities between participants and non-participants." It would be unreasonable and contrary to legislative intent to construe Administrative Code §3-706(1)(c) as torpedoing the right and ability of a participating candidate to prepare to compete effectively against a self-financed non-participating candidate in the general election.

Other provisions of the Act and current Campaign Finance Board rules further underscore the flexibility inherent in the application of the Act's 2005 primary and general election expenditure limits to particular expenditures.

Candidates participating in the Campaign Finance Program must designate a single principal committee for all elections (primary, run-off primary, general) covered by the candidate's certification. Admin. Code §3-703(1)(e). Separate expenditure limits apply "in each primary . . . and in each general election" to expenditures made by the principal committee. Admin. Code §3-706(1)(a). In setting the expenditure limits that apply to expenditures made after January 1, 2005, section 3-706(1)(a) does not make timing the overriding factor for determining which expenditure limit (primary or general election) will be applicable. This flexible treatment of expenditures made in the election year contrasts with the Act's rigid application of pre-2005 expenditure limits to expenditures made prior to the election year. *See* Admin. Code §3-706(2), (5).

Consistent with Admin. Code §3-706(1)(c), CFB Rule 1-08(c)(1) states:

> An expenditure is presumed to be made for the first election (in which the participant is a candidate) following the day it is made . . .

(emphasis added); *see also* CFB Rule 1-08(b) (describing that an expenditure is considered to be "made when the goods or services are received, used or rendered, regardless when payment is made"). Administrative Code §3-706(1)(c), as reflected in CFB Rule 1-08(c), establishes a rebuttable presumption that expenditures made before the primary election are considered to have been made for the primary election.

Like Admin. Code §3-706(1)(a), CFB Rule 1-08(d)(1) makes the purpose of an expenditure, not its timing, the ultimate test for determining the applicable expenditure limit:

> All expenditures made by a participant for the purpose of promoting or facilitating his or her nomination or election, including expenditures made for the purpose of promoting or facilitating the defeat of an opponent or prospective opponent, are subject to the expenditure limit applicable under the Act . . .

(emphasis added). When the purpose of an expenditure is to facilitate a candidate's election (not nomination) or the defeat of a prospective opponent in the general election (and not an opponent in the primary election), Rule 1-08(d)(1) indicates that the general election expenditure limit would be applicable.

CFB Rule 1-08(c)(2)(ii) suggests a further problem with interpreting Admin. Code §3-706(1)(c) as subjecting all pre-primary expenditures to the primary election expenditure limit. A participating candidate is free not to file disclosure statements for a primary election in which he or she is not a candidate, in which case the primary election expenditure limit would not apply to that candidate.

Usually, participating candidates not in a primary election have an incentive to file these primary disclosure statements because these enable them to make additional expenditures by using the primary election expenditure limit. The presence of a self-financed non-participating general election opponent turns the intent of this rule on its head, however. The incentive would now be for these participating candidates to not file primary election public disclosure statements in order to gain the ability to make unlimited expenditures throughout the election year, pursuant to Admin. Code §3-706(3).[2] Clearly, the Act did not intend this inappropriate result: diminished public disclosure, increased campaign expenditures, and discrimination against candidates seeking their party's nomination in a primary election.

Constitutional Principles

The general constitutional standard applicable to expenditure limitations requires the government to prove the existence of a compelling state interest to support the restriction and that the restriction is narrowly tailored to advance that interest. *See Buckley v. Valeo*, 424 U.S. 1, 20 (1976); *see also McConnell v. Federal Election Comm'n*, 540 U.S. 93, 134 (2003) ("[i]n *Buckley* and subsequent cases, we have subjected restrictions on campaign expenditures to closer scrutiny than limits on campaign contributions"). Additionally, in order to satisfy the narrow tailoring standard, the government must prove that the mechanism chosen is the least restrictive means of advancing that interest. *See Austin v. Mich. Chamber of Commerce*, 494 U.S. 652, 657 (1990).

In *Buckley*, the United States Supreme Court found that expenditure ceilings in federal law imposed "direct and substantial restraints on the quantity of political speech" and invalidated three expenditure limitations as violations of the First Amendment. *See id.* at 38. The Court rejected the argument that expenditure limitations served a public interest by equalizing the financial resources of candidates. *Id.* at 56. Indeed, the Court emphasized that the "concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . .." *Id.* at 48-49. The Court determined that the amount of money spent in particular campaigns must necessarily vary, depending on the "size and intensity" of the support for individual candidates. Furthermore, expenditure ceilings "might serve not to equalize the opportunities for all candidates but to handicap a candidate who lacked substantial name recognition or exposure of his views before the start of the campaign." Id. at 57.

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[2] Pursuant to Admin. Code §3-706(3), the general election expenditure limit may be increased or eliminated based on the level of a non-participating candidate's financing, as was dramatically demonstrated in the 2001 mayoral election.

Importantly, the Court severed its invalidation of expenditure limitations in general from that of expenditure limitations with regard to the public financing of presidential elections. *See id.* at 109. The expenditures limitations for presidential candidates and political party conventions receiving public funds were upheld because the acceptance of public funds was voluntary. *Id.* at 95. Therefore, with regard to publicly financed candidates and political committees, the societal and governmental benefits weighed more heavily in favor of expenditure limitations.[3]

Nonetheless, in a public financing context, *Buckley* has been cited as authority for striking down an impermissibly overbroad application of expenditure limits. *See Friends of Governor Tom Kean v. New Jersey Election Law Enforcement Comm'n*, 203 N.J.Super. 523 (1985). In *Kean*, campaign committees challenged Election Law Enforcement Commission advisory opinions requiring allocation of a portion of all combined advertising campaign expenses of Assembly candidates and candidates for county and other local offices to statutory gubernatorial campaign expenditure limits. The Appellate Division found that "although campaign expenditure limits may be validly imposed upon a gubernatorial candidate concomitant with that candidate's receipt of public financing, there is no question that such limits implicate First Amendment rights." *Id.* at 535-536 (citing *Buckley*, 424 U.S. at 14). The court followed the *Buckley* standard applicable to expenditure limitations: a "limit on campaign expenditures directly and substantially affects the quantity of political speech, (internal citations omitted) and thus freedom of speech is to some extent restrained." *Id.* at 536.

While the *Kean* court acknowledged that the expenditure limit was justified by the state's "interest in avoiding corruption or the appearance of corruption in the electoral process and by the policy of enabling qualified persons to seek the State's highest office despite a relative lack of wealth . . ., the First Amendment right of free speech is a fundamental right and an infringement of that right, though justified, should be accomplished through the least restrictive means available." *Id.* at 536 (citing *Anderson v. Celebrezze,* 460 U.S. 780 (1983)). Accordingly, the court held the advisory opinions to be unconstitutional because these violated the candidate's First Amendment freedoms of speech and association. *Id.* at 534.

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[3] In *Landell v.Sorrell*, 382 F.3d 91 (2d. Cir. 2004), in an amended decision, the Second Circuit found that *Buckley* did not operate as a *per se* bar against campaign expenditure limits because of: (1) the constitutional standard applicable to expenditure limits; and (2) because "such a static approach to *Buckley's* import would require us to ignore not only *Buckley's* own language, but also over three decades of experience as to how the campaign funds race has affected public confidence and representative democracy." *Id.* at 110. As such, the court held that *Buckley* permits spending limits that are narrowly tailored to secure clearly identified and appropriately documented compelling governmental interests, including those identified by Vermont: 1) preventing the reality and appearance of corruption; and 2) protecting the time of candidates and elected officials. The court remanded the matter for further fact-finding on the question of whether the Act's expenditure limits provision was the least restrictive means of furthering the State's compelling anti-corruption and time protection interests. *Id.* at 97.

In *Rosenstiel v. Rodriguez,* 101 F.3d 1544 (8th Cir. 1996), the court rejected a nonparticipating candidate's First Amendment challenge to a public financing law that released publicly funded candidates from the expenditure limit when a privately funded opponent received contributions or made expenditures exceeding specified levels. The court noted that the expenditure limitation waiver was intended to avert a "powerful disincentive" for participation: "being grossly outspent by a privately financed opponent with no expenditure limit." *Id.* at 1551. In dicta, the court noted that the state law was "narrowly tailored" to serve the state's compelling interest in promoting "a reduction in the possibility for corruption that may arise from large campaign contributions and a diminution in the time candidates spend raising campaign contributions, thereby increasing the time available for discussion of the issues and campaigning." *Id.* at 1553. The public financing program in general, and the expenditure limitation waiver in particular, therefore both satisfied strict scrutiny. *Id.* at 1553-54; *see also Wilkinson v. Jones,* 876 F.Supp. 916 (W.D.Ky.1995) ("Kentucky has a compelling interest in encouraging candidates to accept public financing and its accompanying limitations which are designed to promote greater political dialogue among the candidates and combat corruption by reducing candidates' reliance on fundraising efforts").

Thus, even in a public financing context, expenditure limits are subject to strict scrutiny to ensure these have been narrowly tailored to serve a compelling governmental interest. This Constitutional standard would accordingly inform interpretation of the New York City Campaign Finance Act. Narrow tailoring to serve a compelling governmental interest is indeed emphatically reflected in the City Council's recognition that "promoting fair competition and a level playing field are overriding goals" and the "Act not be interpreted or applied in a manner that exacerbates fundraising and spending disparities between participants and non-participants." Report of Council Committee on Governmental Operations, *supra*, at 10.

Campaign Finance Board Advisory Opinions

As discussed above, the legislative intent of the 2004 amendments to the Act is now a primary frame of reference for the proper interpretation and application the expenditure limitations of Administrative Code §3-706. The remainder of this memorandum reviews previous CFB interpretations of Admin. §3-706(1)(c). Our conclusion that the primary election expenditure limit would not be applicable to general election expenditures made before September 14, 2005 to raise and set aside funds for a general election campaign against a self-financed non-participating candidate is not inconsistent with these prior interpretations. Indeed, we believe this conclusion furthers public policy goals expressed in prior CFB opinions.

Advisory Opinion No. 1988-4. The origin of Rule 1-08(c)(2)(ii), *supra*, is CFB Advisory Opinion No. 1988-4 (December 30, 1988). In that opinion, the Board held that if there is a contested primary election for an office, a participating candidate "who is either unopposed for party nomination or not entered in a primary election" may make expenditures "in the contested primary election" up to the amount of the applicable primary election expenditure limit. Expenditures by these candidates "will be attributed to the applicable primary or general election limitation in the manner provided in Administrative Code §3-706(1)(c)."

This opinion is notable in several respects. First, Admin. Code §3-706(1)(c) is construed to allow participating candidates not in contested primary elections to make greater expenditures in compliance with both primary and general election expenditure limits. Second, the statement that §3-706(1)(c) provides for an attribution to the primary or general election limitation does not extend to participating candidates actually in a contested primary election.

Therefore, Advisory Opinion No. 1988-4 does not provide support for construing §3-706(1)(c) to restrict the right of principal committees to make expenditures for the general election. Indeed, the opinion clearly enables participating candidates without primaries to nonetheless use the additional primary election expenditure limit to make expenditures to raise funds that are set aside for the general election.

Advisory Opinion No. 1989-22. CFB Advisory Opinion No. 1989-22 (June 8, 1989) addressed hypothetical facts superficially similar to the issue at hand. Specifically, it answered the following questions:

> whether a candidate in a primary election may 1) expend contributions accepted for the general election to raise funds for that election, if the event is held before the date of the primary election;[4] and 2) attribute the cost of the event to the fundraising allowance associated with the general election.

The opinion analyzed the second question as follows:

> Each fundraising allowance is associated with a particular expenditure limit. Each expenditure limit, and associated fundraising allowance, applies to expenditures made within the same time period. Administrative Code §3-706(5)(b) [subsequently repealed]. Expenditures by candidates in a primary election made prior to or on the date of the primary election are deemed to have been made for the primary election. §3-706(1)(c).
>
> Because the fundraising event is held in August, the expenditure is made during a time period in which the primary election expenditure limit and the associated fundraising allowance is applicable. [Footnote: The general election limit would apply to expenditures made in August only in circumstances in which there is no contested primary for the office sought by the candidate.] No exemption may be

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[4] In 1989, the NYC Campaign Finance Act provided separate contribution limits for the primary and general elections. These separate contribution limits drove the opinion's conclusion that general election contributions could not be used to pay for an event held before the primary election. Because a single contribution limit now applies to both the primary and general elections, this question simply does not arise under current law.

claimed for fundraising costs in the primary election expenditure period under the fundraising allowance associated with the general election.

The advisory opinion request sought to charge pre-primary election fundraising expenditures to the general election campaign, notwithstanding that, in 1989, the law included special allowances for fundraising expenditures. These fundraising cost allowances were explicitly created as limited exemptions from the expenditure limits for both the primary and general elections. These special fundraising cost allowances were repealed in 1990. Advisory Opinion No. 1989-22 is therefore not a binding precedent for determining which expenditure limit would apply under current law.

First, unlike the expenditure limits currently set forth in Admin. Code §3-706(1)(a), the former fundraising cost allowance applied to specific expenditures solely on the basis of when the expenditure was made, without regard to the election for which the expenditure was made. Former Admin. Code §3-706(5)(b) stated:

> Expenditures in connection with the solicitation of funds shall not be limited by the expenditure limits of this section, except that if such expenditures by a candidate and his or her authorized committees, made within the period during which an expenditure limitation is applicable pursuant to [§3-706(1) or (2)], exceed twenty percent of the applicable expenditure limitation or twenty thousand dollars, whichever is greater, such expenditures in excess of such amount shall be subject to the limitation applicable at the time such amount is exceeded.

(Emphasis added.) This treatment of an election year expenditure's timing as the sole basis for determining which expenditure limit applied was unique to the fundraising cost allowance, which has since been repealed.

Second, the opinion follows the former law in treating the fundraising allowance as an additional "exemption" from the expenditure limit. In contrast, current law does not distinguish fundraising expenditures from other expenditures subject to the expenditure limits. There is no question of exemption from both primary and general election expenditure limits under current law, only the question of which limit is applicable to particular expenditures.

Third, the conclusion stated in Advisory Opinion No. 1989-22's footnote must be read as limited to the law and facts of that case, since it is not an accurate statement under current CFB rules. *See* CFB Rule 1-08(c)(2)(ii), *supra* (a general election expenditure limit would apply to any participating candidate who chooses not to file disclosure statements associated with a primary election in which he or she is not a candidate).

Finally, Advisory Opinion No. 1989-22 is distinguishable because it did not address how the separate primary and general election expenditure limitations would be applied to establish a fair playing field against a self-financed non-participating general election opponent.

Advisory Opinion No. 1989-24. In Advisory Opinion No. 1989-24 (June 8, 1989), the Board construed Admin. Code §3-706(1)(c) to support subjecting expenditures made before the primary election to the primary election expenditure limit in the narrow circumstances specified therein. This opinion addressed which expenditure limit would apply to a participating candidate in a contested primary election who had also received the nomination of a second party without opposition and prior to the primary election:

> Administrative Code §3-705(3) provides that "a candidate seeking or obtaining nomination for election by more than one party shall be deemed one candidate, and shall not . . . make additional expenditures by reason of such candidate seeking or obtaining" more than one nomination. Expenditures by a candidate in a contested primary election, made before the date of the primary, are deemed to have been for the primary election. Administrative Code §3-706(1)(c). Therefore, any expenditures made before the primary by a candidate in a contested primary election (whether or not the candidate receives nominations from other parties), are deemed to be for the primary election and are subject to the expenditure limit applicable to that primary election under Section 3-706(1). In such a case, the candidate may not allocate expenditures made before the primary election to a general election expenditure limit.

(Emphasis added.) *See also* CFB Rule 1-08(c)(2)(v), codifying this opinion.

This opinion makes clear that nomination by a second political party is not a sufficient basis for accelerating the availability of the general election expenditure limit, a conclusion that is required by Admin. Code §3-705(3). As emphasized above, this conclusion is expressly limited to the issue of multiple nominations, leaving an open question for other circumstances. Like Advisory Opinion No. 1989-22, *supra*, this opinion simply does not address how the two expenditure limits apply when a primary participant is also working to raise funds for a general election campaign against a self-financed non-participating opponent.

Advisory Opinion No. 1993-4. Once a primary election is no longer reasonably anticipated, expenditures count against the general election expenditure limit, notwithstanding a disparity in total expenditures previously made by opposing participating candidates when a primary election had been anticipated. *See* Advisory Opinion No. 1993-4 (June 9, 1993). Thus, the Board denied a request for an additional allowance to exempt from the general election limit an amount equal to the amount by which one participating candidate had been outspent by the other participating candidate during the primary anticipation period. The opinion details the Board's view of how the expenditure limits serve to promote fair competition between participating candidates.

In denying a special additional expenditure allowance for one participating candidate against another participant, the Board stated, "it is irrelevant that the funds raised [by the opposing participating candidate in the general election] are set aside for general election use." Advisory Opinion No. 1993-4 at footnote 1. The Board reasoned:

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> Finally, it should be clear that the Act was not intended to equalize the amounts opposing candidates in fact spend in an election. The expenditure limits are mandatory ceilings that participating candidates must adhere to. In abiding by these limits candidates may make any number of strategic decisions, including decisions on the timing of expenditures and how much to spend within the limits.
>
> As a matter of logic and fairness, Advisory Opinion No. 1993-3, issued today and noted above, concludes that all candidates who anticipate a primary election in any party for the office they seek have the same flexibility to make expenditures under a primary election limit during the time period in which they demonstrate that anticipation was reasonable. Whether those candidates in fact choose to make any expenditures, equal expenditures, or greater or fewer expenditures during this time period is simply a matter of strategic choice.

(Emphasis added.)

The Board concluded that both participating candidates are subject to the same general election expenditure limit, notwithstanding that one candidate previously outspent the other during the primary anticipation period. The fact that one participating candidate previously made fundraising expenditures that resulted in funds accumulated for use in the general election does not justify increasing the other participating candidate's general election limit, because both participating candidates were free to make that choice in making expenditures within the primary election limit.

This opinion establishes the following principles:

1. The expenditure limits are ceilings. Equalizing the amounts actually spent by participating candidates is not a goal of the Act.
2. Participating candidates are free to make strategic choices about the expenditures they make as long as they stay within both expenditure limits. Fundraising expenditures made to accumulate funds for the general election campaign is a strategic choice that participating candidates are free to make during the primary election period.
3. Fair competition requires that all participating candidates be subject to the same expenditure limits, regardless of the strategic spending choices some of these candidates may make. No participating candidate will receive an exemption from the general election expenditure limit on account of a disparity in previous expenditures among participating candidates.
4. This opinion is especially significant for what it did not address: how the Act must also be construed to promote fair competition between participating and non-participating candidates.

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CONCLUSION

The time has come for the Campaign Finance Board to answer this question. For the reasons stated above, we believe that the Act, legislative intent and history, Constitutional principles, and Campaign Finance Board rules require the conclusion that the primary election expenditure limit does not restrict the right of participating candidates to make general election expenditures before September 14, 2005 to raise and set aside funds for a general election campaign against a self-financed non-participating candidate. We ask the Board to confirm this conclusion for every candidate seeking the Democratic Party's nomination for Mayor.

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