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November 24, 2009

BY FACSIMILE (212-306-7144) & REGULAR MAIL

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

Re: **Request for Advisory Opinion**

Dear Chairman Parkes:

In Advisory Opinion No. 2008-7 (Nov. 3, 2008), the Campaign Finance Board addressed the effects of the term limits repeal on the Campaign Finance Program. Specifically, the CFB permitted candidates who had been running an active 2009 campaign to "use the same committee that was originally intended for a 2009 election for the 2013 election."[1] Advisory Opinion No. 2008-7. Pursuant to that advisory opinion, these 2009/2013 committees will next submit disclosure statements to the CFB when "the first [CFB] disclosure statement of the 2013 election cycle" is due. *Id.*[2]

In each instance, the committee would previously have been identified to the CFB on a 2009 election filer registration form as the principal or primary committee authorized for the 2009 election. *See* CFB Rule 1-11 *and* CFB Filer Registration – 2009 Elections at sec. 3. The 2009 filer registration form also required candidates and treasurers to verify that committee's compliance with the Campaign Finance Program requirements applicable to contributions

[1] The 2008 advisory opinion permitted two classes of candidates to use their original 2009 authorized committee for the 2013 election: (1) those authorizing a new 2009 committee for re-election to the office they currently held; and (2) those choosing not to run for City office in 2009.

[2] According to Advisory Opinion No. 2009-8 (Oct. 29, 2009), *discussed infra*, the due date would be July 15, 2010.

accepted for the 2009 election and to verify "that the information on this document is true and complete to the best of my knowledge and belief." CFB Filer Registration – 2009 Elections at sec. 17 and 18. Based on Advisory Opinion No. 2008-7 and these factual submissions in the filer registration form, it is fair to characterize these committees as originally authorized for and involved in an election other than the 2013 election.

This is precisely why, in Advisory Opinion No. 2009-8 (Oct. 29, 2009), the Board interpreted the Act's requirement that participating candidates not authorize a principal committee that was "otherwise active for any election prior to the election(s) covered by the candidate's certification" to be a prohibition against authorizing a committee that "has been 'active' for [a prior] election cycle." *See* NYC Admin. Code §3-703(1)(e). Activity in the 2009 election cycle, covering January 12, 2006 to January 11, 2010, is demonstrated if the candidate filed a filer registration form for the 2009 election or received contributions or made expenditures in that time period. Advisory Opinion No. 2009-8. Pursuant to Admin. Code §3-703(1)(e), a participating committee in the 2013 election may not authorize a committee active in the 2009 cycle for the 2013 election and maintain eligibility for public financing in the 2013 election. Advisory Opinion No. 2009-8.[3]

The new advisory opinion, No. 2009-8, prohibits the use of limited liability company (LLC) and partnership contributions raised by some (but not all) 2009 committees in the 2013 election cycle. *See* Advisory Opinion No. 2009-8 at fn. 11. It also denies public matching funds in the 2013 election for contributions received in the 2009 election cycle by some candidates (but not all). *See, e.g., id.* at fn. 8. We maintain that Advisory Opinion No. 2009-8 does not go far enough and does not achieve a fair and equitable result. That opinion's proscriptions pertain only to those classified as "Other Candidates." The new opinion leaves untouched the LLC and partnership contributions and matching claims of the 2009/2013 committees discussed in the prior Advisory Opinion No. 2008-7.

Taken together, Advisory Opinions Nos. 2008-7 and 2009-8 do not treat opposing candidates fairly, and do not encourage competitive races, because they allow some candidates to use LLC and partnership contributions in the 2013 election cycle, but deny such permission to their opponents. This disparate treatment of opposing candidates is contrary to the intent of the Act.

Similarly, these two opinions exacerbate fundraising disparities among opposing participating candidates in the 2013 election. It is contrary to fair competition and the intent of the Act to invalidate matching claims for all contributions some candidates raised in the 2009

[3] Yet Advisory Opinion No. 2008-7 seems to intend precisely that result for the two classes of candidates it describes.

election cycle, while continuing to pay public matching funds for contributions other candidates raised in the 2009 election cycle

We therefore have two questions.

1. May limited liability company and partnership contributions be used in the 2013 election?

We urge the Board to answer this question in the negative. The 2008 advisory opinion is silent on whether the 2009/2013 committee may use contributions accepted from LLCs and partnerships in the 2013 election. The 2009 advisory opinion prohibits the use of such contributions by "Other Candidates" only. *See* Advisory Opinion No. 2009-7 at fn. 11, *supra*.

Local Law No. 34 of 2007 prohibited the acceptance of contributions from LLCs and partnerships in future elections. *See* NYC Administrative Code §3-703(1)(l). Contributions from these sources for the 2009 election were "grandfathered" for the 2009 election, if received by December 31, 2007, because the 2007 amendment took effect in the midst of the four-year 2009 election cycle. *See* City of New York, Local Law 34 (2007) at §40, *as amended by* Local Law 67 (2007).

Unlike the 2009 election cycle, however, acceptance of LLC and partnership contributions is prohibited from the start of the 2013 election cycle. The use of contributions from such prohibited sources in the 2013 election cycle is therefore contrary to the intent of the 2007 legislation. Permission for some candidates to use such funds would grant a windfall at odds with the legislation's purpose and would be unfairly available to only a select few candidates. Such a result is contrary to "the Program's goal of promoting fair competition among the candidates competing in the same election." *See* Advisory Opinion No. 2009-4 (Apr. 14, 2009).

LLC and partnership contributions may be readily excluded from use in the 2013 elections pursuant to the CFB's rules governing the use of surplus funds. *See* Rule 1-07(c) (candidates have the burden of demonstrating that surplus funds "do not derive from ... contributions from sources prohibited by the Act or the Charter"); *see also* Advisory Opinion No. 2009-8 (requiring two committees and then prohibiting inclusion of prohibited contributions in transfers from the 2009 committee to the 2013 committee). Finally, imposing a uniform standard for all candidates and contributions in the 2013 election cycle is consistent with the Board's approach in implementing other changes made by the 2007 legislation. *See, e.g.*, Advisory Opinion No. 2008-1 (Mar. 13, 2008) (imposing a uniform $175 cap on matchable contributions, including those received prior to the effective date of the 2007 legislation).

2. Are contributions originally accepted for the 2009 election matchable with public funds in the 2013 election?

We urge the Board to answer this question in the negative.

Advisory Opinion No. 2008-7 states:

> contributions in the "frozen" committee would be eligible for matching funds for a 2013 election. *See* Rule 1-07(a).[4]

Rule 1-07(a) states, in its entirety:

> Funds Originally Received for Other Elections.
>
> (a) Use. Funds originally received by a committee not otherwise involved in a covered election may be used in a covered election subject to the requirements of this rule, but may not be claimed as matchable contributions for that election.

We respectfully submit that Rule 1-07(a) is not authority for the proposition that any contributions are matchable.

In contrast, CFB Rule 5-01(d)(8), which is not referenced in Advisory Opinion No. 2008-7, appears to be a clear and definitive basis for not matching contributions originally received for a 2009 election with public funds in a 2013 election. Rule 5-01(d)(8) states, in its entirety:

> (d) Validity of matchable contribution claims and projected rate of invalid claims. The Board shall not make payment for any matchable contribution claim it determines or projects to be invalid. The Board shall consider the following factors in determining that matchable contribution claims are invalid and in projecting a rate of invalid matchable contribution claims:
>
> * * *
>
> (8) contributions originally received for elections other than the election in which the candidate is currently a participant, as described in Rule 1-07....[5]

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[4] The quoted statement pertains to candidates seeking re-election in 2009. This notion is later reiterated in the 2008 advisory opinion for candidates who decide not to run in the 2009 election, but without any citation to legal authority: "[f]unds in the [2009/2013] committee will be eligible for public matching for a 2013 election."

[5] Advisory Opinion No. 2009-8 also cites Rule 1-07 as a basis for not matching 2009 election cycle contributions

Contributions that were originally received – and claimed as matchable – for the 2009 election therefore do not appear to be matchable for the 2013 election.

This result is consistent with the New York City Campaign Finance Act's definition of "matchable contribution." NYC Administrative Code §3-702(3). The definition encompasses contributions "for all covered elections held in the same calendar year...." *Id.* (emphasis added). Thus, the law does not appear to contemplate that a matchable contribution for a covered election held in one calendar year could also be matchable for a covered election held in a later calendar year.

Further, as discussed above, the Board's most recent opinion, No. 2009-8, denies public matching funds in the 2013 election for contributions received in the 2009 election cycle by those it classifies as "Other Candidates." *See, e.g.*, Advisory Opinion No. 2009-8, at fn. 8, *supra*. There is no explicable or rational basis for invalidating 2013 election matching claims on all 2009 election cycle contributions for some, but not all, participating candidates.

The purposes of and public policies reflected in the Act overwhelmingly support not paying public funds in the 2013 election on the basis of any contributions originally received for the 2009 election.

First, matching such contributions would exacerbate financial disparities between participating candidates in the same election, contrary to the fair competition and level playing field intended by the Act. The Board has consistently found this policy to trump competing considerations. *See, e.g.*, Advisory Opinions No. 2001-12 (Sept. 20, 2001), No. 2005-1 (Apr. 29, 2005) *and* No. 2009-4, *supra*.

Second, public campaign financing was not designed as an entitlement; rather, the Act directs the Board not to make payment unless the candidate demonstrates eligibility. *See* Admin. Code §3-705(1). Indeed, there are no countervailing "reliance" considerations on the part of the 2009/2013 committees. These contributions were raised during the time the candidate was seeking to establish public funding eligibility for the 2009 election, as is demonstrated by the 2009 filer registration form and CFB disclosure statements submitted by the candidate and his or her campaign committee. Those disclosure statements included matchable contribution claims for the 2009 election. Most of the contributions at issue were raised prior to the change in the term limits law, the issuance of Advisory Opinion No. 2008-7,

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in the 2013 election.

and any inkling that these contributions could or would be used in the 2013 election.[6]

Third, the Board is trustee of taxpayer dollars held in the New York City Campaign Finance Fund. NYC Charter §1110; Admin. Code §3-709(1). These public funds must be administered in a responsible and fiscally prudent manner. Disbursing public funds to match (at a 6:1 rate) contributions originally received for a different election (2009) than the election (2013) for which funds will be appropriated in the annual City budget raises serious concerns, especially in the absence of clear legal authority and direction to the Board that it pay public matching funds on such a basis.

We understand that the Board has found it necessary to take a somewhat different approach in identifying matchable contributions for special elections to fill vacancies. Those circumstances are distinguishable, however, due to the irregularity and brevity of special election campaigns. Indeed, CFB rules expressly reserve to the Board authority to provide for "special requirements and procedures" in a special election, including "a standard for determining the total amount of surplus funds from previous elections." Rule 1-06. The Board's exceptional approach to special elections, however, does not provide authority or guidance in setting the rules of the road for a regular, four-year election cycle.[7]

As it stands, Advisory Opinion Nos. 2008-7 and 2009-8 provide an extraordinary benefit for some participating candidates: relief from the enforcement of Admin. Code §3-703(1)(e). This allows these select candidates to authorize committees active in the 2009 election as their principal committees for the 2013 election without losing their public financing eligibility entirely. The Board then denies this permission to their participating opponents (the "Other Candidates" described in Advisory Opinion No. 2009-8, as well as other candidates not

[6] Moreover, the Board has made clear that arguable reliance considerations will not restrain the Board from issuing a superseding advisory opinion. *See* Advisory Opinion No. 2009-8 at fn. 7 ("To the extent candidates believe they were given advice by Board staff in contravention of this Opinion [No. 2009-8], this Opinion supersedes any such advice").

[7] Likewise, Rule 1-04(f), which sets forth a presumption that contributions are "presumed to be accepted for the first election in which the participant ... is a candidate following the day that it is received", is not helpful in answering our question. (Advisory Opinion No. 2009-8 certainly suggests as much by containing no citation to this rule.) CFB rules define "candidate" to mean a candidate as defined in New York Election Law Article 14, Rule 1-02. Election Law Art. 14 defines candidate as including an individual who has "received contributions or made expenditures ... with a view to bringing about his nomination for election, or election, to any office...." N.Y. Election Law §14-100(7). Neither obtaining a place on the ballot nor making a public declaration of candidacy is necessary to make an individual a candidate. Thus, the CFB provides for the submission of a Verification of Terminated Candidacy form for candidates who are not on the ballot or have ceased campaigning. *See* Rule 2-09. Advisory Opinion No. 2008-7, in fact, directed candidates "who have been running an active 2009 campaign, but now choose to delay running until 2013" to submit a termination of candidacy form in order to "receive the benefits" of the opinion.

described in either advisory opinion). To then go further by matching the 2009 election cycle contributions of select candidates with public funds in the 2013 election, but not matching such contributions of other candidates, would create an extreme benefit available only to these select candidates, a result utterly inconsistent with the fundamental goals of public financing under the Act.

The CFB must ensure fair ground rules for the 2013 election cycle before it commences. We therefore urge the CFB to clarify and, to the extent necessary, supersede Advisory Opinion No. 2008-7 so that (1) no candidate may use contributions received from LLCs and partnerships in the 2013 election, and (2) no contributions originally received by a 2009/2013 committee in the 2009 election cycle will be matched with public funds in the 2013 election.

Thank you.

Very truly yours,

GENOVA, BURNS & VERNOIA

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