



**New York City
Campaign Finance Board**

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September 6, 2005

ADVISORY OPINION NO. 2005-3

Re: N.Y. Election Law §§ 6-134(4), 6-136(2), 6-138(2), 6-138(4), 6-142(2), 6-154(2), 6-158(1); Administrative Code §§ 3-706, 3-711(2); Campaign Finance Board Rules 1-08(j), (l); Advisory Opinions Nos. 1996-1, 2001-5, 2005-1; Final Board Determinations No. 2003-1, 2003-3; Op. No. 2005-3.

This Advisory Opinion responds to a request from the Miller for New York Campaign (the “Miller Campaign”), Gifford Miller’s 2005 mayoral campaign, for written guidance from the New York City Campaign Finance Board (the “Board”) with respect to:

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.¹

On the day the request was received, it was posted on the Board’s website, inviting “interested parties” to provide written comments on the questions raised by 10:00 a.m., September 6, 2005, the next business day after the request was received.²

¹ The request was made by letter from Treasurer Marshall Miller dated September 2, 2005. This Opinion does not address any broader issues relating to petitioning. (*See* n. 2 below). This Opinion does not evaluate other exempt expenditure claims by the Miller Campaign for petitioning or otherwise.

Attached to this Opinion as Exhibit A is a sample of the literature, provided by the Miller Campaign with its request, that was distributed by petition-gatherers for Miller’s Smaller Class Size party. *See* Conclusion below at pp. 9-10. Also attached is a Separate Opinion of Board member Dale C. Christensen, Jr. (*see* n. 20, below).

² Comments were received by mayoral candidate Christopher V. Brodeur on September 4, 2005, mayoral candidate Anthony Weiner on September 6, 2005, mayoral candidate C. Virginia Fields on September 6, 2005, and Ralph Andrew on September 6, 2005. These comments have been posted on the Board’s website. Additionally, the Board has received supplemental materials from the Miller Campaign, which have also been posted to the Board’s website. This Opinion does not reach claims, such as those raised by Anthony Weiner for New York, that questioning voters during the petitioning process should not be considered exempt. (*See* p. 10 below, directing the Miller Campaign to submit a response to the Weiner and Fields submissions.)

A. Exempt Expenditures and the Spending Limit

Participants in the New York City Campaign Finance Program (the “Program”) must limit their expenditures to an amount set by the New York City Campaign Finance Act (New York City Administrative Code §§ 3-701, *et seq.* (the “Act’’)). With respect to expenditures made between January 1, 2005 and this year’s primary election for the Democratic Party’s nomination for mayor on September 13, 2005, that amount is \$5,728,000. Administrative Code §3-706(1), as adjusted pursuant to Administrative Code §3-706(1)(e).³

Certain expenditures are exempt from the expenditure limitations, including expenditures incurred “for the purpose of complying with the provisions of [the Campaign Finance Act] or the election law, including legal fees, accounting fees, the cost of record creation and retention, and other necessary compliance expenditures...”. Administrative Code §3-706(4). The burden is always on the candidate to substantiate exempt expenditures. Rule 1-08(1).

As the Board stated in Final Determination No. 2003-3 (September 12, 2003), the expenditure limitations serve the important purpose of “leveling the playing field,” and indeed may be the most important factor in overcoming a disparity of resources between serious candidates. Violations of the expenditure limit are particularly harmful: the opponents of a candidate who exceeds the expenditure limit have no recourse to level the playing field, especially when a candidate exceeds the limit in the final days prior to an election. Similarly, while the benefits obtained from other violations of the Program’s requirements may be eliminated or cured (such as by refunding an impermissible corporate contribution), the benefits of exceeding the expenditure limit, which can be substantial, may not be undone or otherwise corrected. For this reason, the Board consistently has enforced the expenditure limitations rigorously and construed the exempt expenditure provisions narrowly. *See, e.g.*, Advisory Opinions Nos. 1996-1 (April 4, 1996), 2001-5 (May 17, 2001), 2005-1 (April 29, 2005); Final Determinations Nos. 2003-1 (July 31, 2003), 2003-3 (September 12, 2003); October 18, 1996 Board publication “*Exempt Expenditures*” (“[p]rovisions exempting expenditures from spending limits are narrowly construed...”).

The importance of the expenditure limitations to the Program is further reflected in the Board’s authority to assess penalties. Although for nearly all other violations this authority is limited to \$10,000, Administrative Code §3-711(2) provides the higher

³ Additional expenditure limits are applicable to the calendar years prior to the year of the election. While campaigns that exceed these out-year expenditure limits are not in violation of the expenditure limits, the amount in excess of the out-year expenditure limits is used to reduce the gross spending permissible from January 1, 2005 through the primary election below \$5,728,000. Administrative Code §§ 3-706(2), 3-706(2-a), Rule 1-08(j). On August 26, 2005, without benefit of any of the Miller Campaign’s documentation of its exempt expenditures, Board staff notified the Miller Campaign that its out-year spending reduced the campaign’s effective primary election spending limit to \$5,068,798. Final review of exempt expenditure documentation will most likely change this number.

maximum penalty of up to three times the amount by which a participant exceeds the applicable expenditure limit.⁴

Campaigning is itself never an exempt activity – it is an inherently public activity. To the extent that any potentially exempt activities threaten the Act’s limits because they are carried out in a public manner, they will be closely scrutinized by the Board. *Cf.* Advisory Opinion No. 2005-1, issued in April 2005 at the request of the Miller Campaign. When the form of the exempt expenditure has a public impact, as opposed to expenditures on items like attorneys’ fees, which have a private impact, it is particularly important that there be a narrow construction of the exempt activity because such public activity could benefit the candidate with useful publicity. Candidates should not seek to engage in campaign activity through their exempt expenditure claims.

B. Prior Application of the Exempt Provisions to Petitioning

The validity of exempt claims only becomes vital to the integrity of the spending limit when a candidate's total spending, including those expenditures claimed as exempt, exceeds the spending limit. In many campaigns this does not happen. But when it does, exempt claims must be scrutinized carefully because if they are not valid, the spending limit will have been exceeded. The Board’s consistent practice in thousands of analogous instances, as well as in two cases in which the issue presented here was before the Board, has been to require campaigns to make an allocation between exempt and non-exempt activities performed by the same people.

Prior Practice Generally

The Board has a longstanding practice that a campaign making expenditures for goods and/or services that are used both for exempt and non-exempt purposes may claim a portion of the goods and/or services as exempt in proportion to their usage for exempt activities. For example, where the campaign office is used in part for exempt compliance activities and in part for non-exempt activities, that portion of the campaign’s expenditures for overhead (*e.g.*, rent, utilities, office equipment, and supplies) which corresponds to the portion of time the office is used for exempt purposes, may be claimed as exempt. The Board has applied this principle to literally thousands of campaigns over the past decade. Guidance regarding how to allocate expenditures for goods and services used for both exempt and non-exempt activities was provided to campaigns as far back as 1996, with the Board’s 1996 publication “*Exempt Expenditures*” and Advisory Opinion No. 1996-1 (April 4, 1996) (in part discussing exempt expenditure allocations for expenditures that have both an exempt and a non-exempt purpose).

⁴ Heightening the importance of the expenditure limitations, in the 2005 elections, for the first time, New York City’s taxpayers are expending public funds in exchange almost exclusively for compliance by participating candidates with the Program’s expenditure limitations, as all candidates for offices covered by the Act in New York City elections are now required to abide by nearly all the Act’s contribution limitations and disclosure requirements, whether or not they choose to participate in the Program.

The costs of producing campaign literature to be distributed by petition-gatherers may not be claimed as exempt. *See* the Hevesi matter, discussed below; Final Board Determination No. 2003-3 (September 12, 2003), upheld in *Letitia James, et al. v. New York City Campaign Finance Board*, N.Y. Sup. Ct. Index No. 100397/04 (May 26, 2004) (Wetzel, J.) (specifically affirming the Board's determination that the James campaign's expenditures for producing palm cards used in the petitioning process were not exempt from the spending limits, and stating that such a result was consistent with the Board's decision in the Hevesi matter).⁵ Indeed, the Miller Campaign does not claim as exempt the costs of producing the literature distributed by its petition-gatherers.

As a general matter, since the costs of producing literature used in petitioning are not exempt, consistent with the practice of the Board with regard to the allocation of other exempt and non-exempt activities, the corresponding costs of distributing that literature should not simply be assumed to be 100% exempt.

2001 Alan Hevesi Campaign

In September 2001, the Board addressed the issue whether certain petition expenditures by then mayoral candidate Alan Hevesi should be exempt from the spending limit. Among these expenditures were certain payments for literature used in connection with Hevesi's attempt to secure a position on the Democratic Party ballot for the primary election. At least one piece of this literature was in substance exactly the same as the Hevesi campaign's regular campaign literature, except for the addition of text exhorting individuals to sign Hevesi's petitions.⁶ Hevesi also had undertaken an independent nominating petition drive, although the Board did not have before it any evidence that any literature had been produced or distributed in relation to that petition drive. Hevesi reported a total of approximately \$430,000 in petitioning costs, of which approximately

⁵ The Miller Campaign seeks support from prior campaigns, including the James matter, the 2001 election campaign of Eva Moskowitz, and the 2003 election campaigns of Hiram Monserrate and James Gennaro, in support of its arguments. None of these prior matters is apposite here. With respect to the James matter, the campaign cites a single \$75 payment to one campaign worker claimed by the James campaign as having been exempt from the expenditure limits. The documentation submitted in support of this single claim - - worker time sheets - - made no mention of literature distribution, and the Board in the course of its consideration of the James matter did not consider or opine on the single \$75 claim. The absence of a statement by the Board regarding this payment provides no guidance for this or any other case. *See* Final Board Determination No. 2003-3 (September 12, 2003). In Gennaro, as in the James matter, only \$1,950 in payments, again to a single petition coordinator, was involved, and the Board in the course of its consideration of the Gennaro matter did not consider or opine on this single petition coordinator. As in James, the absence of a statement by the Board on this matter provided no guidance for this or any other case. Because the Board declared a bonus situation in the 2003 Council District #21 Democratic Party primary, neither the Monserrate campaign nor any other campaign in that race was subject to the expenditure limit, and so this case is irrelevant. Administrative Code §3-706(3). In the 2001 election campaign of Eva Moskowitz, the Board did not have evidence before it that volunteer petition-gatherers also distributed literature. Further, to the extent that the Moskowitz campaign did claim expenditures for literature as exempt, that literature was used solely to solicit the volunteer petition-gatherers themselves.

⁶ Unlike the Miller Campaign's literature, neither piece distributed by the Hevesi campaign for the petition drive referred to the date of the Democratic Party primary election. *See* discussion of the Miller Campaign literature in Section C, below, at pp. 7-8.

45% were attributable to the Democratic Party primary petition drive and approximately 55% were attributable to the independent petition drive. The Board determined that the payments for the production and distribution of the literature by the petitioners were not exempt, and therefore would be counted towards the primary election expenditure limit.⁷

2005 Stephen Kaufman Campaign

At its recent meeting on September 1, 2005, the Board ruled that Stephen Kaufman's 2005 City Council election campaign could not claim the paid staff time of petition-gatherers as wholly exempt when the campaign's own records demonstrated that the scope of the petition staff's work in fact included distributing literature as well as gathering petition signatures.⁸

C. Circumstances of the Miller Campaign's Claims

The Petitioning Process

To be included on the ballot as a candidate for mayor in the 2005 Democratic Party primary requires 7,500 signatures on valid designating petitions. N.Y. Election Law §6-136(2)(b). The 7,500 signatures must be valid signatures from enrolled members of the Democratic Party living in New York City. N.Y. Election Law §6-136(2). The first day to sign designating petitions was June 7, 2005. N.Y. Election Law §6-134(4); "Calendar of Dates 2005 & 2006" (Board of Elections in the City of New York). Candidates could file designating petitions from July 11, 2005 to July 14, 2005. N.Y. Election Law §6-158(1); "Calendar of Dates 2005 & 2006" (Board of Elections in the City of New York).

To be included on the 2005 general election ballot by independent nomination, a candidate also needs 7,500 valid petition signatures.⁹ N.Y. Election Law §6-142(2)(b). Here, however, the signatures can come from any voter registered in New York City, without regard to party. N.Y. Election Law §6-142(2). The first day to sign independent nominating petitions was July 12, 2005. N.Y. Election Law §6-138(4); "Calendar of Dates 2005 & 2006" (Board of Elections in the City of New York). Candidates could file independent nominating petitions from August 16, 2005 to August 23, 2005. N.Y.

⁷ It is important to note that at the time in question the Hevesi campaign had not exceeded the primary expenditure limit, nor has the Board ever found that the Hevesi campaign exceeded the 2001 primary spending limit. The Board allowed the Hevesi campaign's expenditures related to its independent nominating petition drive to be exempt from the spending limit in the absence of any evidence of actual campaigning. The allowance of this exemption brought the Hevesi campaign below the spending limit for the primary election.

⁸ The Board determined that an allocation of 50% to exempt petition-gathering and 50% to non-exempt literature distribution was appropriate, based on the facts presented. The description of the petitioners' scope of work was "Lit. Distribution and petition-gathering."

⁹ Candidates collect these signatures under the name of an independent body making the nomination, in this case, "Smaller Class Size." N.Y. Election Law §6-138(2).

Election Law §6-154(2); “Calendar of Dates 2005 & 2006” (Board of Elections in the City of New York).

The rules concerning whether a signature is “valid” are quite technical. Frequently, in New York City, there have been legal challenges to the validity of signatures made by an opponent. Because of the technical nature of the rules and the possibility of legal challenges, it has become conventional wisdom, and the advice of election lawyers, that the number of signatures that should be obtained be a multiple of the legal requirement. Multiples that have been suggested are three, or four, or perhaps five or, it is suggested, six in the case of independent nominating petitions.¹⁰

It has been reported that Miller collected approximately 158,000 signatures on his designating petitions, or more than twenty times the number required.¹¹ According to the campaign, however, only 40,000 signatures (or more than 5 times the amount required) were collected by the campaign itself. The others were said to have been collected by groups supportive of Miller’s candidacy.¹² The Miller Campaign states that it collected 59,000 signatures for the “Smaller Class Size” line, or almost eight times the number required.

The Petition Literature

The Miller Campaign provides two pieces of literature that were distributed during the petition process. The first is a roughly legal-size, four-color, glossy piece that contains photographs of Miller, introduces his background and campaign philosophy, asks for petition signatures to put him on the Democratic Party primary ballot, and contains the date for the Democratic Party primary in larger print than the request for signatures. The second piece (attached as Exhibit A) is a roughly letter-size, four-color, glossy piece that includes photographs of Miller with school children,¹³ describes Miller’s plan for reducing class size, asks for petition signatures to add a “Smaller Class Size line to the ballot,” and contains the date for the Democratic Party primary, again, in larger print (in all capitals and bold face) than the request for signatures.

Petition Signature Collection

The Miller Campaign in its request states that “[d]uring the interaction with the voter, the carrier distributed the literature, asked the voter whether he/she had a

¹⁰ See, e.g., letter to Frederick A.O. Schwarz, Jr., from Henry Berger dated September 5, 2005.

¹¹ It has been reported that Fernando Ferrer collected 100,000 signatures, or more than 13 times the required number; C. Virginia Fields collected 60,000 signatures, or eight times the required number; and Anthony Weiner collected 40,000 signatures, or more than five times the required number. No objections were filed against Miller’s, Ferrer’s, Fields’, or Weiner’s designating petitions.

¹² See letter of Laurence Laufer to Frederick A.O. Schwarz, Jr. dated September 5, 2005 at p. 6.

¹³ These same photographs appear in a subsequent piece of campaign literature mailed to potential Democratic Party primary voters in the past week.

preference¹⁴ 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.”¹⁵ The Miller Campaign states that voter preference data were used to generate petitioning volunteers and to target petitioning efforts. It states that the information has been “quarantined” since the end of the petitioning process.¹⁶ The Campaign further states that “[i]n 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 Amount Spent on Petitioning

The Miller Campaign has claimed approximately \$1 million in exempt expenditures exclusively for petitioning.¹⁷ Of the approximately \$730,000 the Miller Campaign apparently spent on petition-gatherers, approximately \$170,000 appears to have been spent on the designating petition process and approximately \$560,000 on the independent nominating process.¹⁸

D. Analysis

While the law does not set a limit on the total amount a campaign can claim as exempt, there is some point at which petitioning, an inherently public activity (unlike

¹⁴This information was entered into a computerized database. The use of computer equipment and a voter database informs the Board’s decision about whether the work performed by petition workers is properly 100% exempt. The specific claims to exempt the cost of the equipment are beyond the scope of this Opinion.

¹⁵It seems to be well established that face-to-face contact is the most effective kind of contact, increasing the chance that voters will go to the polls. *See, e.g.*, Alan S. Gerber and Donald P. Green, “The Effects of Canvassing, Telephone Calls, and Direct Mail on Voter Turnout: A Field Experiment”, The American Political Science Review, Vol. 94, No. 3 (Sept. 2000), 653-663, p. 661.

¹⁶This Opinion notes the representations made by the Miller Campaign, including the representation made by the campaign that it “quarantined” the information it gathered about voter preference since the end of the petitioning effort. The Weiner letter raises issues about this subject which need to be addressed by the Miller Campaign in its response.

¹⁷Of this amount, approximately \$730,000 was paid to individual petition workers and reported in the Campaign’s disclosure statements with a purpose code “Wages.” (It also includes payments for related employment taxes.) The remaining approximately \$280,000 in petition expenditures are (1) payments to a consultant to coordinate the petition drive, (2) payments for an office from which the petition drive was coordinated, (3) payments for equipment including computers for the petition drive, (4) payments for the printing of petition forms, (5) payments to some political clubs for petitioning, and (6) various other payments for supplies and attendant materials for the petition drive.

¹⁸The Miller Campaign has claimed approximately 20% of its total primary expenditures as exempt. (This amount includes claims for compliance work unrelated to petitioning which is outside the scope of this Opinion.) Fernando Ferrer has claimed approximately 4.9% of his primary expenditures as exempt, C. Virginia Fields has claimed 1.3%, and Anthony Weiner has claimed 1.9%. The Act provides a “safe harbor” for exempt expenditure claims under 7.5%, for which the documentation requirements are less rigorous.

other compliance work, which is primarily a non-public activity) merges with campaigning, another inherently public activity. *Cf.* Administrative Code §3-706(4), Advisory Opinion No. 2005-1.

At some point, the sheer volume of expenditures can demonstrate a divergence from costs associated with complying with New York State Election Law, which are exempt, and campaigning, which is not. Allowing unlimited exempt claims for “petitioning expenses”¹⁹ would potentially create a gaping hole in the principles underlying the Campaign Finance Act. It blinks away the possibility that under all the facts and circumstances, what was labeled petitioning was in reality campaigning. Thus, to make the point by using an extreme example, if an automatic 100% exemption were the rule, a candidate could visit every voter registered in the party and give them a piece of literature extolling the candidate. For example, in the case of the Democratic Party in 2005, this automatic 100% exempt position would have justified leaving literature with the more than 2.5 million people who are active registered Democrats in the City of New York. In such an extreme case, one would have to conclude that while done in the guise of petitioning, the expenditures were in reality campaign expenditures, and thus, while perfectly lawful, could not be exempt.

Avoiding an overly broad construction of exempt petition expenditures is also important because, by definition, an overly liberal construction of exempt petitioning expenditures—particularly those such as the distribution of literature that also, by definition, serve a campaign purpose—favors candidates with more money and thus would undercut the objective of the Act to help to level the playing field among candidates.

E. Conclusion

To the extent that petition-gatherers were clearly distributing campaign material while they attempted to get signatures both for the Democratic Party primary and for an independent line, the Board will treat these two activities separately.

The Board declines at this time to respond to the Miller request with respect to the Democratic Party petitioning activity in light of allegations by the Weiner and Fields campaigns that activities presented as petitioning by the Miller Campaign in fact should be treated as part of a campaign field operation, which would not be exempt. The Board is treating the Weiner and Fields letters as informal complaints. The Board directs the Miller Campaign to respond in writing to these campaigns’ statements by 10:00 a.m., Thursday, September 8. In doing so, the Miller Campaign should treat the allegations as relevant to the rationale for its allocation on the independent nominating petitions, as well as to issues concerning the Democratic Party primary activities.

In the case of the independent nominating petitioning, the Board concludes that this effort appears disproportionate to any petitioning purposes, and the Board cannot

¹⁹ There is no question that these activities are legal. The only issue before the Board is whether expenditures for these activities are exempt from the spending limit.

accept a 100% exempt allocation for these expenses, for three reasons that illustrate how otherwise exempt expenditures could in reality and upon analysis be campaign activity which is not exempt.

First, the gross magnitude of the costs involved;

Second, the timing of the petition drive, which, although controlled by State law, comes close to the date of the primary, thus creating a greater opportunity for undermining the expenditure limits of the Campaign Finance Act; and

Third, the fact that the literature in question demonstrates its purpose as campaigning, by prominently displaying the date of the Democratic Party primary, which in the context of a petition process for inclusion on the general election ballot, is entirely irrelevant.

In addition to its submission responding to the Weiner and Fields letters, the Board directs the Miller Campaign to submit an allocation, and a rationale for such an allocation, between exempt and non-exempt costs, for its petition-gathering for independent nominating petition signatures by Thursday, September 8, 2005, by 10:00 a.m.

**NEW YORK CITY
CAMPAIGN FINANCE BOARD²⁰**

²⁰ Board member Dale C. Christensen, Jr., issued a Separate Opinion, attached to this Opinion. This Board Opinion was approved for issuance by three Board members present at the Board's meeting of September 6, 2005: Chairman Frederick A.O. Schwarz, Jr., and Board members Joseph Potasnik and Dale C. Christensen, Jr., to represent the conclusions of a majority of the Board members. The Chair announced that Board member Katheryn C. Patterson, although not present because of a last-minute conflict, supports the conclusions of this Opinion, and that Board member Alan N. Rechtschaffen, also not present, would abstain. As a courtesy to the Board, Board member Christensen voted to issue the Opinion although he does not agree with the Opinion and read into the record his Separate Opinion.



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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 **mill**er
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 **mill**er
MAYOR

DEMOCRATIC PRIMARY SEPT. 13

SEPARATE OPINION OF DALE C. CHRISTENSEN, JR.

The Miller campaign has properly sought guidance from this Board on issues related to the exemption from relevant campaign expenditure limits of: 1) petitioning expenses (which included literature distribution) incurred by them in connection with the Democratic primary; and 2) petitioning expenses (which included literature distribution) incurred in connection with getting a new party on the ballot for the general election.

Governance of such petitioning processes is essentially a matter of state law. For example, state law proscribes the precise time frames for petitioning to get on the ballot of the Democratic Party (i.e., June 7 to July 14) and for adding a new party to the ballot for the general election (i.e., July 12 to August 23).

There is no issue raised here that the Miller Campaign did anything at variance with state law. It did not. Rather, the guidance sought by the Campaign is a consequence of this Board's oral decision of September 1 in the Stephen Kaufman matter, which found that the expenses of distributing literature in connection with the petitioning process there was not exempt from the primary expenditure limits applicable to the Kaufman campaign. The essential factual premise on which that holding was founded was that the Kaufman campaign had described in its disclosure statements that it had expended funds for both the "distribution" of literature and "petitioning."

In light of the further elucidation of the law prompted by the Miller Campaign request for guidance, it is this Board Member's view that the Kaufman decision was wrongly decided or, at the very least, should be limited to the essential distinctive facts presented there.

After a thorough review of the decisions, rules and applicable law submitted by both the CFB staff and the Miller Campaign, I am compelled to conclude that that there is

no prior rule or decision directly on point rendered by this Board, nor statute enacted by the legislature that can reasonably be construed to have defined as non-exempt the distribution (as contrasted with the printing) of literature used in the petitioning process. Arguments to the contrary do not withstand scrutiny.¹ They also have the wholly unfair effect in the absence of a clear holding of changing the rules in midstream

Consequently, if the distribution of literature was done as an integral part of the petitioning process, then the expenses of that distribution must be exempt. Campaigns such as Miller's which made a careful effort² to effect compliance by the petitioners with the law are entitled in the absence of clear precedent to deem the distribution of such literature as an exempt expenditure.

As a consequence, this Board in my view must recognize as exempt the distribution of literature used in connection with a petitioning process. If it is determined that this is an area for refinement or new legislation, that can only be fairly done prospectively, not in the middle of an election campaign.

With regard to the timing of the Miller Campaign's petitioning expenses, the record is not troubling, since it accorded with the time frame prescribed by state law.

Regarding the amount spent petitioning, on the record before us, this Board knows that about \$197,083 was spent on petitioning expenses up to July 11, 2005, and \$613,424 was spent thereafter. In fact, some of the post July 11 money may be allocable to the Primary, as that petitioning continued for three more days, to July 14. The new party petition effort for the general election began on July 12, but overlapped for three

¹ The Handbook's statements regarding the non-exempt status of campaign literature can be interpreted either way. The Board's actions in the Hevesi Campaign matter, likewise are subject to different interpretations. What is clear is that there is no plain statement saying that the "distribution" of campaign literature in the petitioning process renders the time incurred in connection with that distribution as non-exempt. Mere arguments cannot be the basis for enforcement by this Board and it seems just that campaigns were entitled to rely on the conclusion that they could safely distribute literature in connection with the petitioning process and characterize that distribution as non-exempt.

² See letter of MFNY dated September 2, 2005 pages 3 to 6.
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days. The number of executed petitions filed for the primary numbered 158,000, and the number of petitions for the general election's new party registration ranged from 50,000 to 94,500 by estimates of Board staff. We are also told that 7,500 signatures were required for each petition effort.

It is this Board member's view that while multiples of the signatures required may be evidence of campaigning that should be non-exempt, this Board cannot fairly choose at this juncture to make law on what is an appropriate multiple (e.g., the Ferrer campaign got 100,000 signatures for the primary). State Law sets no maximums. Moreover, This Board has never before opined on this issue and should not do so now after the fact and in the eleventh hour of a campaign.

We are also told that multiples are required to defend challenges to the signatures and we are in no position at this time to say what multiple is too high, even if it is a proper basis for future prospective Council or Board action.

The Board admittedly has the ability however to evaluate the reasonableness of the size of any group of exempt expenditures.

Thus the total number of petition expenditures incurred by the Miller campaign in the primary petition process (a number somewhat above \$197,083) is likely properly exempt based on the analysis discussed here.

The issue is more complicated in the context of the general election's new party petition. First, if, as reasonably expected, the victorious primary winner's campaign were ultimately to be against a non participant in the CFB program, there would be no expenditure limit and whether the expenditure were exempt or non-exempt would not matter. The new party petitions are intended to get Miller on the ballot for the general election on more than one party line. His opponent in a general election is already likely to have more than one party line. Thus, the petitioning itself for a new party line and the

ultimate amount spent would likely not matter as a matter of law, since there would be no expenditure limit in the general election.

The only basis on which such expenditures can be challenged as non-exempt is whether their monetary size demonstrates that they were fundamentally designed to advantage the Miller campaign against his primary opponents, as opposed to his likely non-participating opponent in the general election. In that case, some of the expenditures for new party petitioning might possibly be deemed to be for the benefit of the primary campaign and would have to be returned and reallocated to that campaign's primary expenditure limit. In that instance the petition costs of the New Party would have to be allocated on some rational basis between the primary and general. The standard regarding the exempt status of literature distributed would still apply. The costs of printing such literature would, however, have to be reallocated to the primary campaign.

The record before this Board at this juncture does not permit us to make the necessary reallocation to the primary campaign at this time. Factors that would be important in triggering such a reallocation would include, inter alia, for example: the real value of another party line in a general election; the extent to which such a party line was promptly effectuated with the Board of Elections; the breadth of solicitation of new party signatures by party registration; and the lack of criticism of the positions of primary opponents in the literature, as opposed to the criticism of the positions of the likely opponent in the general election.

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