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I hate to have to say it, but after five election cycles, New York City's model campaign finance system is in some significant trouble. It's a voluntary system; to succeed, it requires consensus buy-in from the political class, opinion leaders, funders and, ultimately, the voting public at-large. Despite its great success in leveling the political playing field, opening access to the political process and combating corruption in political funding, there is no longer a civic consensus that the system is operating fairly and efficiently. Candidates and their advisors hate the overly legalistic compliance and audit processes; political parties and labor unions feel singled out in enforcement; others are questioning the use of public funds by incumbents without real electoral opposition and campaign consultants; and the Mayor, with his means, simply avoided the whole thing in two successive electoral victories.

Trust in the system needs to be restored. This requires some significant reforms in the way the campaign finance system operates. If the problems are not addressed effectively, by the time the 2009 elections roll around, our reformed campaign finance system may have become yet another progressive reform that failed operationally because good intentions are not good enough.

At the highest level, the campaign finance system has already failed. Through no fault of this Board, for two mayoral elections in a row, the system's paramount goal of leveling the political playing field to neutralize the advantage of big moneyed candidates has been destroyed. At these hearings four years ago, the former

Chair of this Board pooh-poohed this concern, but the inequity only got worse this year, and it is an inarguable fact that in two straight mayoral elections we have not had effective campaign finance reform.

What killed campaign finance reform at the mayoral level was not simply Mayor Bloomberg's superlative self-made wealth and his willingness to spend it without regard for custom or what those of us with less consider common sense. It was not even the rule failures that required the unmoneyed candidates and their supporters to comply with strict limits on contributions despite the limitless realm in which their opponent conducted his campaigns.

No, campaign finance reform finally failed at the Mayoral level when even the staunchest supporters of the system – the reformers, the editorialists, the good government groups – failed to care about the inequity. They saw no shame in a man spending in excess of $150 million to become and remain Mayor. Nearly all of them endorsed him. There was no social opprobrium, let alone outrage, at his opting out of the system. He had the money and no one really cared, so why should we have expected Mayor Bloomberg to limit the use of his wealth? Apparently, there is no longer a civic consensus that candidates ought to participate in the campaign finance system. Next time, what will keep others who can raise or spend big bucks from breaking the spending limits?

As an advisor to Citywide Democratic campaigns in every election since enactment of the Campaign Finance Act, I can attest that opting out of the system was never before a viable political option. It was not even thinkable; the political costs were just too high. Next time, though, I have no doubt that some Citywide candidates will

seriously consider it. The political arguments against opting out of the campaign finance system have been very severely weakened by what has occurred in the past two Mayoral campaigns, most especially by the silence of many of the supporters of this system as it has been overwhelmed by unprecedented spending by the Republican campaigns. Again, I hate to say it, but the significance of this situation cannot be overstated: Unless the system is fixed and a new consensus forms about its overriding value for the civic welfare of our City, campaign finance reform at the Mayoral level may well be dead.

At the same time, among the rank and file of New York's political community, there is open revolt and endless outrage at the way the campaign finance system is regulated. At the recent debate of the City Council members seeking to become Speaker, the candidates competed to outdo each other in denouncing the Campaign Finance Board and in promising to bring it under control. Again, there appear to be few political constraints against attacking this system.

This Board ought not minimize the extent of the unrest about the way it operates. True, proprietors of small businesses often hate regulations and regulators, and there is some irony to the fact that the same elected politicians who usually tax and regulate New Yorkers suddenly, when their campaigns face financial regulations, start railing against government regulation. It would be a mistake, though, to dismiss the anger simply as self-interest. For there are real inequities and outrages in the way the campaign finance system is administered – and they are threatening to undermine all the good work the Campaign Finance Board has done since it was created as part of the 1989 revision of the City Charter.

Before I try to speak for those who have these concerns, let me say that

again this year, beyond the Mayoral general election, the campaign finance system worked wonders on the way politics is played in this City. Because of the campaign finance system, our elected leadership is again more diversely reflective of the City as a whole. The role of big money was again both abated and made more transparent in our elections. And, at least in competitive elections without candidates of stupendous personal wealth, campaign spending was again equalized at relatively reasonable levels. The Campaign Finance Board deserves great credit for these achievements, particularly its pre-election regulatory action that prevented unlawful gaming of the system by claims that large amounts of expenditures that were not required for election law compliance were exempt from the spending limits. The Board and its staff again proved vigorous, highly competent, and they operate with complete integrity.

Yet, despite its very real and important successes, a consensus has formed among the practitioners of electoral politics in New York City that the CFB has immersed New York campaigns in a bottomless quagmire of regulations, audits and litigiousness. During election years, campaigns face a bewildering maze of regulations, are frequently threatened with public pronouncements of noncompliance over the most meager of purported violations, and have to constantly calibrate their tactical decision making against the possibility that the Campaign Finance Board will retroactively find their activities to violate the rules.

I have spent a lot of time with candidates, election lawyers, union officials, party officials and others trying to understand the true causes of the anger at this Board. These feelings are widespread, intense and, often, extreme. They are literally threatening the future of the system. The prospects of legislation and litigation going to

the core of this system are very real. Reform is required to restore trust in the system.

I think the solutions are essentially three-fold.

First, and speaking frankly, there are some procedural issues about the way the Board and its staff operate that we need to address. There is a widespread belief in the political community that the CFB presumes guilt and that its procedures shift the burden of proof to campaigns to demonstrate that they have not violated the law. Nearly all candidates are just trying to comply with the law, but they do not believe the CFB grants them this good faith; instead, they feel as if they are at all times suspected of crimes of political corruption by a staff that simply does not understand the temporary and unstructured nature of political campaign organizations.

The Board's staff requires nearly all interactions, no matter how ministerial, to be conducted in writing, and nearly every letter it sends contains threats that the corresponding campaign will be fined or found to have violated the law. Senior staff routinely refuse to discuss issues with campaigns and their counsel, and instead insist only on communicating through formal processes. Queries are usually stated as accusations.

The practice of requiring sworn "certifications" by campaigns is also posing problems. Often it is not clear that the CFB is requiring sworn statements, and campaigns are being fined for fully answering Staff inquiries but doing so in the wrong form. It also instills great mistrust into the process. I know elected officials, who are smart and experienced lawyers, who believe that the CFB's practice of requiring sworn statements regarding specific compliance items early in the regulatory process is nothing but a perjury trap. These things set a litigious tone -- and a lot of it is unnecessary and

counterproductive.

This confrontational culture extends as well to the way issues are presented to the Board. When dealing with the Board, we know we're dealing with regulators. But, until an issue reaches the Board, we're dealing with prosecutors, not regulators. Then, when we get to the Board, issues are decided in "Executive Session," without any public presence and without the allegedly offending campaign, but with the staff lawyers who are recommending enforcement action. Certainly, there is no other forum that I deal with in my practice where I have to explain to clients that they are, essentially, on trial before Judges who routinely seal the courtroom, exclude them and their lawyers and meet privately with the very same people who are bringing the charges up for decision in the first place.

Some of what is required is a change in attitude – more communication and less confrontation would go a long way. After some considerable efforts by several in the Weiner campaign and at the Campaign Finance Board, I personally found some of the typical communications and process problems to have been ameliorated during the course of this summer. I especially note the positive role that Amy LoPrest played in this process.

Some rules and procedures should be changed as well. The CFB ought to have an enforcement bureau and the Board should have the benefit of counsel who is not simultaneously an enforcement officer. And, it would really help if there were some people on the Board and the senior staff who had worked in and around political campaigns and know how they really operate.

Second, the CFB seems at times to be reaching beyond the purpose and

intent of the Act and the Rules -- to regulate not just campaign finance but the political process itself.

The prohibition on transferring funds from non-municipal campaign committees is a good example. This prohibition serves no useful campaign finance regulatory purpose. The Board's audit staff is perfectly capable of determining what money can and cannot lawfully be transferred in. The allocation rules are logical and perfectly clear. Yet the CFB participated in the enactment of this restriction, in the middle of the election cycle, without any legitimate regulatory need and with the effect of making life more difficult for only one candidate in this year's mayoral race. The purpose and intent of the Campaign Finance Act are not furthered by preventing State and Federal legislators from transferring qualified contributions into campaign committees for municipal election campaigns. This rule is not required either for disclosure or leveling the playing field. It has the effect only of protecting City incumbents from political competition and it ought to be repealed.

Political parties and unions are especially enraged by the way the campaign finance rules are being enforced. Political organizing rights that are protected under Federal law and that are in no way inconsistent with the purposes of campaign finance reform, including the right of political parties to actively support their nominees and the right of unions to organize their members in support of candidates, appear to be of continuing interest in the CFB's enforcement activities even though the rules are less than clear. The unions and political parties don't ask for clarification because they assume that the Board will rule against them. The Board doesn't seek clarifying legislation, I suspect because it knows the City's legislators will reject its proposals. As a

result, rulemaking and legislating is being done haphazardly, selectively and retroactively through enforcement proceedings. This is a recipe for confusion – and ultimately it will foment litigation that we should all want to avoid.

There is no good reason for the CFB to take enforcement actions against internal political organizing within membership organizations. Strong and active citizens groups, political parties and labor unions are not inconsistent with campaign finance reform and it should not be the objective of this Board to regulate their internal activities. If the Board is convinced that the Act or the Rules regarding coordination between campaigns and third party organizations require such enforcement activities, then the Board ought to ask for the Act to be amended, or it ought to change the Rules, to put itself out of the business of investigating and taking enforcement action against the internal activities of membership organizations.

The Weiner campaign was cited this year because a supporting organization sent an email fundraising solicitation to its own members, at no incremental cost, that raised no money. This sort of thing goes on all the time without drawing CFB attention – and it is entirely appropriate for political clubs, citizens groups, labor organizations, political parties and other associations to actively advocate among their members for candidates they support without these activities being charged against campaigns, regardless of whether they are "coordinated" or not. This type of activity is no different than an internal email within a law firm or investment bank soliciting partners to meet with a candidate or make contributions. The Board would never and should never take action against such firms even if their efforts are coordinated with campaigns, and it should not do so against political or other voluntary organizations

either. The Board's efforts in this area are necessarily unfairly selective, prompted largely by complaints made by opposing campaigns, appear to be targeted only against political party organizations and labor unions and are not necessary for the system's legitimate purposes. Trying to determine what is and is not coordinated is a hornet's nest the CFB should wish to avoid.

The Campaign Finance Act is supposed to open the political process to citizen participation. It does not require regulatory efforts aimed at weakening the ability of organizations to motivate their own members. If this is not clearly the law, then let's make it the law.

Third, we need to address the problems in the post-election audit process. Election Day should be the end of the ordeal, not just the beginning. Campaigns are short-term enterprises: They literally go out of business on election day; offices are shut, staff goes on to other things, files are boxed up and stored. Yet the CFB's post-election audits routinely last years, in some cases exceeding the four year term of office for which the candidate was competing. Campaigns cannot reasonably be asked two and three years later to explain in detail line item transactions that they cannot possibly remember, let alone recreate. The Board's capable but beleaguered auditors are not given the resources they need during election years, have no incentive to wrap up their work quickly in the off years, and are subject to complicating legal oversight.

This process needs to be fixed. The CFB should staff up and complete audits quickly – by borrowing auditors from other City agencies or hiring temps if necessary. Auditors ought to meet with campaigns within one month of Election Day to review recordkeeping. Preliminary audit reports ought to be issued within six months.

Audits ought to be completed within one year.

These should be firm, fixed deadlines – and there should be strict statutes of limitations on campaign finance violations. If campaigns don't cooperate, the deadlines should be tolled. But, if the CFB fails to meet these deadlines, then it ought to be deemed to have waived its audit rights. The Board appropriately holds campaigns to strict deadlines; the Board ought to have them too. There simply is no reason for the audit process to last longer.

I urge the CFB to present a legislative package to the Council that includes reform of the audit process. If it does not do so, the Council should mandate such changes. The Campaign Finance Board should get the resources, especially the audit resources, it needs in election years and, in exchange, it ought to commit seriously to getting audits done quickly, protecting the public fisc against theft but with a minimum of post hoc accusations and micromanaging. This would go a long way to alleviating the anger at the CFB within the political community.

These and other procedural changes ought to be adopted quickly, as part of a package including steps to safeguard against the abuse of matching funds by incumbents in noncompetitive elections, clear protections for intra-organization activities and additional steps to equalize the playing field when moneyed candidates opt out of the system. If the Board, the City Council and the Mayor can't agree quickly on a reform package – tightened regulations together with streamlined enforcement – then a commission of practitioners and reformers ought to be created to review the system and recommend fixes to be implemented in time for the next elections.

In 2009, we should have an election that is tailor made for campaign

finance reform. A new generation of leaders will vie for high office. There will be no citywide incumbents. Among the leading potential candidates are middle class New Yorkers without inherent access to great wealth who don't even live in Manhattan. This will be an election that should take place on a fair playing field, with strict contribution and spending limits, public matching funds and all the reforms that the campaign finance system promises. But, unless faith is restored in the campaign finance system – unless the procedures become as good as the intentions of those who enacted and administer them and unless the good government community and opinion leaders recommit themselves to eradicating big money from elections – our politics may not achieve the promise that the law provides. This reformed political system must now itself be reformed because good intentions are not good enough.