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To: Commissioners of Elections in the City of New York

From: Steven H. Richman, General Counsel 
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RE: **SECTION 11 of ELECTION REFORM AND MODERNIZATION
ACT OF 2005 AND THE CONDUCT OF ELECTIONS AFTER
SEPTEMBER 1, 2007**

Pursuant to your direction at the July 11, 2007 BOE meeting to research the following issues, the staff of the Office of the General Counsel finds the following:

Issue 1 - Must paper ballots be used for all elections after September 1, 2007, to comply with the requirements of Section 11 of Chapter 181 of the Laws of 2005, the Election Reform and Modernization Act of 2005 [ERMA] as currently enacted?

Issue 2 - If paper ballots are required, can the Board's centralized count optical scanners be used to recanvass such votes?

ISSUE 1

The Election Reform and Modernization Act of 2005 requires the replacement of lever machines with new voting systems or machines that meet the requirements of Section 7-202 of the New York State Election Law by September 1, 2007. [Section 11 of Chapter 181 of the Laws of 2005]. As of this date no such replacement system or machine has been certified for use within the State by the State Board of Elections and that will be the case on September 1 and for the foreseeable future.

New York State Election Law Section 7-120 (1) provides: "If any voting machine for use in any election shall become out of order during an election, it shall, if possible, be repaired or another machine substituted as promptly as possible. In case such repair or substitution cannot be made, emergency ballots ... may be used for the taking of votes".

In our opinion, under Section 11 of ERMA, the present lever machines will effectively "be out of order" for any election held after September 1, 2007, the use of emergency paper ballots is required under Section 7-120(1). Under Section 7-120(3), the Board has the duty to "cause a sufficient number of emergency ballots to be placed at each polling place" to be used in the event of a voting machine "breakdown".

Therefore, in the event that Section 11 of ERMA is not modified in the immediate future, it is our opinion that, for the September 18, 2007 Primary Election and all subsequent elections (until such time as a new voting system or machine is certified by the State Board of Elections as meeting the requirements of Section 7-202 of the Election Law), EMERGENCY BALLOTS will be used by all voters and the Board has the duty to provide a sufficient number to enable all voters to cast their ballots.

Please note that in a 1948 opinion of the Attorney General of the State of New York that office concluded that if local officials neglect to replace antiquated, obsolete and defective voting machines, the board of elections may direct the use of paper ballots [NYS Attorney General's Opinion No. 209(1948).]

ISSUE 2

Title 1 of Article 9 of the Election Law establishes the statutory procedures for the canvass of ballots at the poll site upon the close of the polls. [See Election Law § 9-100; § 9-102 (3) (b)]. Emergency ballots cast on Election Day must be cast and canvassed by the Board of Inspectors for each Election District and entered on the unofficial return of canvass.

The conduct of the recanvass of votes cast at the polls is governed by Title II of Article 9 of the Election Law. The Board of Elections in the City of New York, pursuant to the authority vested in it by Section 7-121 of the Election Law, has determined that all paper ballots utilized by voters within the City of New York (including emergency, absentee, affidavit, military and special) shall be either canvassed or recanvassed by a SBOE-authorized and approved system/machine, specifically the Teamwork System used with the Sequoia centralized paper ballot scanners. [Note: This procedure has also received preclearance from the Attorney General of the United States under the Voting Rights Act, as amended.] [See: Section 4 of the Board's Policies and Procedures, captioned: Canvass Procedures".]

Under the circumstances envisioned (pursuant to Section 11 of ERMA), with all votes cast on "emergency" ballots, said ballots can and should be recanvassed by the Teamwork/Sequoia system, pursuant to the authority contained in the New York State Election Law and codified in our Policies and Procedures.

We trust that the foregoing is useful in your deliberations as to how the Board of Elections in the City of New York should proceed. The staff of the Office of the General Counsel is available to answer any questions you may have.