I will be submitting a full report at the proper time, but in essence the proposed campaign spending rules, which amount to a "do over," are in violation of precedents set by advisory opinions 1993-7 and 1997-6, and also a violation of NYC Administrative Code 3-703(1)(e).

The argument that Council members affected by this rule change did not know, when they spent the money, that running for a third term to the Council was going to be an option is false, since they created that option themselves.

The only people who might require a new ruling would be the four Borough Presidents who are currently serving their second term. In that case, however, any new ruling must still comply with the precedents and law cited above; the proposed rule changes do not.

Sincerely,
Dan Jacoby

Statement regarding proposed rules changes
by the NYC Campaign Finance Board
following adoption of an extension of term limits
by the City Council

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Introduction

With the passage of a bill extending term limits from two to three full terms, some people who had been subject to term limits and were planning to run for higher office may now choose to run for a third term in their current office. Under the city's campaign finance system, however, they could have a problem. Since the spending limits that accompany partial public funding are lower for the office they currently hold than for the office they had planned to seek, some people have already exceeded, or are close to exceeding, the lower spending limits.

There are two consequences of exceeding spending limits. First, candidates who exceed spending limits are not eligible for partial public funding. Second, and more importantly, opponents of such candidates are eligible for extra public funding and are granted higher spending limits. In other words, the advantages enjoyed by high-spending candidates are greatly diminished.

In an attempt to restore those advantages, the Campaign Finance Board (CFB) has promulgated rules designed to allow those high-spending candidates to "freeze" the campaign committees they created to run for higher office, and create new committees in order to run for a third term to their current office.

These new rules are in violation of New York City Administrative Code, and must be thrown out.

Specifics

The New York City Charter establishes the CFB and lists its powers. Among those powers is the power to "promulgate ... rules ... as it deems necessary" to administer the matching funds system.

> NYC Charter, Chapter 46, §1052, subsection 8:
>
> The board shall have the authority to promulgate such rules and provide such forms as it deems necessary for the administration of any voluntary system of campaign finance reform established by local law. The board shall promulgate regulations concerning the form in which contributions and expenditures are to be reported, the periods during which such reports must be filed and the verification required. The board shall require the filing of reports of contributions and expenditures for purposes of determining compliance with any contribution or expenditure limitations provided in any local law establishing a voluntary system of campaign finance reform, provided that the schedule established by the board for such filings shall be in accordance with the schedule specified by the state board of elections for the filing of campaign receipt and expenditure statements.

Under that subsection, the CFB has promulgated rules concerning how candidates for City Council who had been planning to run for "higher office" and had spent money in excess of spending limits in place for candidates for City Council who want to get public funds. Under the CFB's new rules, these candidates can "freeze" their campaign committee, and in effect get a "do over."

The problem is, the CFB may not be allowed to promulgate such rules. Here's why:

There are two precedents, "advisory opinions" released by the CFB. They are 1993-7 and 1997-6. These precedents demonstrate the narrow limits under which a partial "do over" might have been granted in the 1990s.

In the first precedent[1], the CFB was asked to determine what, if any campaign spending City Council President Andrew Stein could exempt from his run for Public Advocate. He had originally planned to run for Mayor, but changed his mind in April of 1993. By the time the advisory was released in July, Stein had dropped out of all races, but the CFB chose to release the advisory so that future candidates would understand the circumstances should they change their minds in the middle of a campaign season.

The CFB stated that all expenditures made by Stein prior to "switching" from running for Mayor to running for Public Advocate counted as expenditures made as a candidate for Public Advocate. The CFB cited the fact that both elections are for citywide office, and appeal to the same set of voters. Furthermore, the CFB stated (see footnote 1) that:

> To rule otherwise would encourage non-participants to make unlimited "exploratory" expenditures for one office that would incidently (sic), or even intentionally, benefit the non-participant in his or her ultimate run for an office covered by the Program to the detriment of participants for whom protection is mandated under Administrative Code §3-706(3). To find the presumption inapplicable in the case of a non-participant would also invite similar claims from participants as well, thus eviscerating existing campaign finance expenditure and contribution limits applicable to participants who say they have changed the office they seek as the election approaches.

In other words, if the CFB allowed a "do over" for Stein, just because he had "changed his mind" about which office to run for, other candidates could spend a fortune on "exploring" which office to run for, and in effect spend unlimited amounts of money on their campaigns.

In the second precedent[2], Bronx Borough President Fernando Ferrer had contemplated running for Mayor, and had spent money on that campaign, before deciding to run for another term as Bronx BP. Before changing his mind, Ferrer's campaign had spent a lot of money on his mayoral campaign.

In this case, the CFB stated that since the Bronx Borough President campaign has a more limited voter set than that for a campaign for Mayor, if the Ferrer campaign can demonstrate that a particular expenditure would not benefit his Borough President campaign it would be exempt from spending limits under the campaign finance rules. To this end, the CFB provided a list of types of expenses that might be exempt. In addition, however, the CFB stated that all expenditures would carry the presumption that they were for the Borough President campaign, thus putting the burden of proof on the Ferrer campaign.

Essentially, the CFB stated that the Ferrer campaign would not be allowed a "do over," but could exempt certain expenditures that clearly were not beneficial to his final decision to campaign for Bronx Borough President.

In both cases, there are references to NYC Administrative Code, Title 3, Chapter 7. This is the section that deals with campaign finance law, a long, intricate set of rules that has changed many times over the years.

One such change, enacted in 2003 (Public Law 2003-012[3]), made a significant change to campaign finance law that is applicable here. In part, the law amends "Paragraph ... (e) ... of subdivision 1 of section 3-703 of the administrative code of the city of New York" to read as follows:

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[1] The advisory opinion is available online at http://www.nyccfb.info/act-program/ao/AO_1993_7.htm.
[2] The advisory opinion is available online at http://www.nyccfb.info/act-program/ao/AO_1997_6.htm.
[3] The law is available online at http://www.nyccouncil.info/pdf_files/bills/law03012.pdf.

NYC Admin. Code, §3-703, subdivision 1:

To be eligible for optional public financing under this chapter, a candidate for nomination for election or election must:

(e) notify the board in the candidate's written certification as to: (i) the existence of each authorized committee authorized by such candidate that has not been terminated, (ii) whether any such committee also has been authorized by any other candidate, and (iii) if the candidate has authorized more than one authorized committee, which authorized committee has been designated by the candidate as the candidate's principal committee for the election(s) covered by the candidate's certification; provided, that such principal committee (i) shall be the only committee authorized by such candidate to aid or otherwise take part in the election(s) covered by the candidate's certification, (ii) shall not be an authorized committee of any other candidate, and (iii) shall not have been authorized or otherwise active for any election prior to the election(s) covered by the candidate's certification. *The use of an entity other than the designated principal committee to aid or otherwise take part in the election(s) covered by the candidate's certification shall be a violation of this section and shall trigger the application to such entity of all provisions of this chapter governing principal committees.* (Emphasis mine.)

The key here is the last sentence. Any "frozen" committee, as proposed by the CFB, would be "an entity other than the designated principal committee" and the money spent by that committee would definitely have "take[n] part in the election(s) covered by the candidate's certification."

Note that this new law does not differentiate between offices, or make a determination as to whether a candidate "changes his/her mind" in the middle of the campaign. It merely covers the entire election cycle during which a candidate runs. In other words, this change to the law negates the exception provided under Advisory Opinion 1997-6, the second precedent cited above.

An argument may be made that the key phrase, "election(s) covered by the candidate's certification" only refer to the specific office for which the candidate finally runs. If that were the case, however, then there would be no purpose to this particular phrase. Since it is basic to legal theory that all laws, and all parts of all laws, have a purpose, only an interpretation that gives purpose to this key phrase is valid.

Another argument that may be made is that the elected officials who choose to run for a third term in their current office did not have that choice prior to the enactment of the term limit extension. For Council Members, this argument fails on the ground that the Council itself passed the law. The more general response is that the law as written does not provide for any exception, therefore no exception can be made.

Conclusion

While the CFB does have power to promulgate rules covering the administration of the city's voluntary public campaign financing system, their power does not extend to allowing a "do over" for candidates who have exceeded, or a close to exceeding, the spending limits that accompany participation in the voluntary system.