



October 16, 2018

Submitted electronically to Michael.Cooke@phila.gov

Michael H. Reed, Chair
City of Philadelphia Board of Ethics
One Parkway Building
1515 Arch Street, 18th Floor
Philadelphia, PA 19102

Re: Proposed Amendments to Regulation No. 1

Dear Chair Reed:

Pursuant to Philadelphia Home Rule Charter § 8-407, the Campaign Legal Center (“CLC”) respectfully submits these public comments to the Philadelphia Board of Ethics (“Board”) regarding the Proposed Amendments to Board Regulation No. 1: Campaign Finance (“Regulation”).

CLC is a nonpartisan, nonprofit organization dedicated to protecting and strengthening the democratic process across all levels of government. Since the organization’s founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court as well as numerous other federal and state court cases. Our work promotes every citizen’s right to participate in the democratic process and to know the true sources of money spent to influence elections.

I. CLC Recommendations for the Proposed Amendments

CLC supports the Board’s decision to update the Regulation. We make the following recommendation for the Proposed Amendments to ensure the Regulation continues to provide sufficient clarity to city campaigns and other filers in covered elections.

The Proposed Amendments would prohibit a candidate’s control over expenditures made to influence a covered election, other than expenditures made by

the candidate's own campaign or litigation fund committee.¹ The proposal describes three situations in which a candidate may be found to "exercise control" over an expenditure, including if "the candidate's campaign provides the money to cover the specific expenditure," "the candidate's campaign selects the recipient of the expenditure," or "the candidate's campaign approves the expenditure or directs that it be made." These changes would supplant existing Paragraph 1.30, which determines when a candidate controls another political committee's expenditures.

The new paragraph seems intended to complement the requirement that city candidates use a single political committee for receiving contributions and making expenditures in covered elections.² The proposed changes appear to overlap with Subpart H ("Coordinated Expenditures") of the Regulation, making their operation somewhat unclear. If a city candidate were to "exercise control" over a third party's expenditure to support the candidate's own election by "approv[ing]" or "direct[ing]" the expenditure, this conduct likely would qualify as coordination under Subpart H of the Regulation.³ If the Proposed Amendments are meant to broaden coordination rules, we suggest incorporating these changes into Subpart H, rather than adding them as a separate paragraph elsewhere in the Regulation.

Similarly, a city candidate's control over third-party expenditures to influence the outcome of another candidate's covered election likely would qualify as a contribution to the beneficiary candidate.⁴ Further, if a candidate had "provided the money" for a third-party expenditure in order to obscure the candidate's identity as the funds' source, then the contribution would likely constitute an illegal "straw donor" transaction.⁵ In sum, it is unclear how these changes would interact with other parts of the existing Regulation, and we recommend clarifying their intended effect.

II. Additional Recommendations

In addition to our recommendation regarding the Proposed Amendments, we have several suggestions for strengthening other parts of the Regulation related to incidental expenditures for internet activity and coordination. We hope the Board

¹ Proposed Amendments ¶ 1.29.

² Philadelphia Code § 20-1003; Board Reg. 1 ¶ 1.25.

³ Board Reg. 1 ¶ 1.38 ("An expenditure is coordinated with a candidate's campaign if it is . . . made at the request or suggestion of the candidate's campaign" or "[a]n agent of the candidate's campaign directs, places, or arranges the expenditure").

⁴ See *id.* ¶ 1.1(q) (defining "in-kind contribution" to include any "payment or agreement to pay a third party to provide goods or services to a candidate's candidate political committee, if the goods and services are in fact provided"); *id.* ¶ 1.4(a)(i) ("[A] contribution is made through a political committee when . . . [a] person or political committee makes a contribution to a political committee and directs, suggests, or requests, whether in a direct, indirect, express, or implied manner, that the recipient political committee use all or part of the contributed money to make an expenditure to support a specific candidate.").

⁵ "It shall be unlawful for any person to make any contribution with funds designated or given to him for the purpose by any other person, firm or corporation. Each person making a contribution shall do so only in his own name." 25 Pa. Stat. § 3254(a).

will consider these recommendations as it evaluates potential changes to the city's campaign finance rules.

a. Paragraph 1.11(f): Incidental Expenditures Related to Internet Activity

Currently, the Regulation does not impose contribution limits on “incidental expenditures made by persons other than candidates’ campaigns that are related to internet activity . . . that advocates or influences the election of a candidate.”⁶ Neither the City Campaign Finance Law nor the Regulation describes the range of this exemption. Due to the growing importance of digital activity in political campaigns,⁷ we advise that the Board clarify the parameters of this exception to prevent its possible use as a loophole around disclosure of online campaign advertising.

Both the Federal Election Commission and the California Fair Political Practices Commission (“FPPC”) have promulgated regulatory exceptions for “uncompensated Internet activity” by individuals that is not considered to be a contribution or expenditure.⁸ The intent behind these exceptions is to promote the internet’s use as a forum for public discussion of candidates and elections. However, these exceptions are *not* meant to exempt paid digital advertising from regulation.⁹ The Board should look to these existing regulatory provisions as frameworks for promulgating a comparable exemption for certain internet activity in Philadelphia elections.

In California, the FPPC rule generally excludes from the definitions of “contribution” and “expenditure” an individual’s “uncompensated personal services related to Internet activities,” as well as an individual’s “use of equipment or services for uncompensated Internet activities.”¹⁰ Under the California rule, “Internet activities” include sending emails, social networking, and creating or

⁶ Board Reg. 1 ¶ 1.11(f).

⁷ In 2016, over \$1 billion was spent on digital advertising in local, state, and federal elections, a nearly eightfold increase over the \$159 million expended for online ads during the 2012 election cycle. BORRELL ASSOCIATES, THE FINAL ANALYSIS: POLITICAL ADVERTISING IN 2016, Jan. 3, 3017, <https://www.borrellassociates.com/shop/the-final-analysis-political-advertising-in-2016-detail>. According to one projection, digital advertising in the 2018 midterm elections will reach \$1.9 billion, a 2,539% increase over digital spending in the 2014 midterms. Megan Janetsky, *Low transparency, low regulation online political ads skyrocket*, OPENSECRETS.ORG (March 7, 2018), <https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/>. This upward trend is likely to continue in future elections as campaigns and PACs increasingly capitalize on digital media’s ubiquity and unique capacity for targeting voters.

⁸ 11 C.F.R. § 100.155 (“Uncompensated Internet activity by individuals that is not an expenditure”); 2 Cal. Code Regs. § 18215.2 (“Uncompensated Internet activity by individuals that is not a Contribution or Expenditure”).

⁹ See 11 C.F.R. § 100.155(e)(1) (“This section does not exempt from the definition of expenditure . . . [a]ny payment for a public communication”); 2 Cal. Code Regs. 18215.2(d).

¹⁰ 2 Cal. Code Regs. § 18215.2(b).

maintaining a website.¹¹ Importantly, this regulation does not exempt from coverage either a “general or public advertisement” or a “payment for a communication supporting or opposing a candidate or ballot measure placed for a fee . . . on another person’s website.”¹²

We suggest that the Board clarify the exemption in subparagraph 1.11(f) by specifying the scope of online activities exempted from limits on contributions. The exemption also should explain that internet communications that qualify as “electioneering communications” or “expenditures” do *not* fall within the exception under the Board’s rules.¹³

b. Subpart H: Coordination

Subpart H of the Regulation sets forth the Board’s rules for determining when an expenditure is “coordinated” with a city candidate and subject to limits as an in-kind contribution. Generally, the Regulation treats an expenditure as “coordinated” if it is made “in cooperation, consultation or concert with the candidate’s campaign.”¹⁴ Likewise, the rule provides that republication of any material originally prepared by a candidate’s campaign typically will constitute an in-kind contribution to that candidate.¹⁵

We recommend expanding Paragraph 1.38 to ensure candidates and their supporters do not circumvent contribution limits through collaborative activities that are not expressly covered under the current Regulation. As the volume of independent spending in elections has increased at all levels of government, the legal lines differentiating “independent” and “coordinated” expenditures have become critically important.¹⁶ Our recommendations are meant to assure the Board’s effective regulation of coordinated spending and the meaningful enforcement of contribution limits under the City Campaign Finance Law.

In particular, we advocate further development of subparagraphs 1.38(a),(c), and (d) to cover additional exchanges of campaign and fundraising information between candidates and their supporters. At the federal level, candidates and outside groups have become more and more brazen in their willingness to share campaign strategy and align fundraising efforts.¹⁷ By explicitly encompassing a broader range of communications and fundraising activities in the Board’s

¹¹ *Id.* §18215.2(a)(1).

¹² *Id.* §§ 18215.2(d)(1),(2).

¹³ See Philadelphia Code § 20-1001(8.1) (defining “electioneering communication” to include “Internet” communications);

¹⁴ Board Reg. 1 ¶ 1.38.

¹⁵ *Id.* ¶ 1.39.

¹⁶ See Jason Harrow, *Super PACs driving the midterms unsurprisingly*, THE HILL (Oct. 16, 2018), <https://thehill.com/blogs/congress-blog/politics/411613-super-pacs-driving-the-midterms-unsurprisingly>.

¹⁷ See, e.g., Matea Gold, *Now it’s even easier for candidates and their aides to help super PACs*, WASH. POST (Dec. 24, 2015), https://www.washingtonpost.com/politics/now-its-even-easier-for-candidates-and-their-aides-to-help-super-pacs/2015/12/24/d8d1ff4a-a989-11e5-9b92-dea7cd4b1a4d_story.html?utm_term=.61ec0aa22b9f.

coordination rules, these recommendations would serve to clarify Subpart H's application to different tactics that campaigns and their supporters have increasingly employed to evade coordination restrictions.¹⁸

Similarly, we suggest adding two new subparagraphs within Paragraph 1.38. These recommendations also are meant to address common strategies used by campaigns and outside spenders in recent elections to circumvent contribution limits.¹⁹ Specifically, the two additions would cover (i) a candidate's creation or control of an entity that subsequently makes expenditures to benefit the candidate's election, and (ii) certain overlap in personnel between a candidate's campaign and an entity making expenditures to benefit that candidate. We believe the inclusion of these two new subparagraphs would substantially strengthen the Board's regulation of coordination in covered elections.²⁰

Suggested text:

"1.38 An expenditure is coordinated with a candidate's campaign if it is made in cooperation, consultation or concert with the candidate's campaign, including the following:

- a. The expenditure is made ~~at the request or suggestion of~~ pursuant to any express or implied agreement with, or any general or particular understanding with, or pursuant to any request by or communication with, the candidate's campaign;
- b. A person suggests making an expenditure and the candidate's campaign assents to the suggestion;
- c. The person making the expenditure communicates with the candidate's campaign concerning the expenditure or about the candidate's needs or plans

¹⁸ See Lisa Hagen, *Watchdog groups to file complaint against Montana candidate alleging coordination with NRA*, THE HILL (Sept. 14, 2018), <https://thehill.com/homenews/campaign/406740-watchdog-groups-to-file-complaint-against-montana-candidate-alleging>.

¹⁹ See, e.g., Scott Goss, *Democrats file election complaint against prominent Republicans*, DELAWARE ONLINE (Oct. 15, 2018), <https://www.delawareonline.com/story/news/politics/2018/10/15/dems-file-election-complaint-against-prominent-republicans/1646741002/>; Paul Blumenthal, *How Campaigns and Super PACs are Coordinating in 2016*, HUFFINGTON POST (Nov. 14, 2015), https://www.huffingtonpost.com/entry/super-pac-coordination_us_56463f85e4b045bf3def0273.

²⁰ Other election agencies have interpreted coordination laws to cover expenditures made by groups that share common vendors with a candidate's campaign or that are closely affiliated with a candidate or the candidate's staff. For example, California's Fair Political Practices Commission has adopted a presumption that an expenditure made by an entity employing "common consultants" with a candidate's campaign is coordinated with that candidate. 2 Cal. Code Regs. § 18225.7(d)(3). Similarly, the California rule includes a presumption that an expenditure made by an entity "established, run, or staffed" by a candidate or the candidate's former staff is coordinated with such candidate. *Id.* § 18225.7(d)(6).

before making the expenditure, including communications about campaign messaging, strategy, fundraising, planned expenditures, or polling data;

d. Within the 12 months before the election that the expenditure seeks to influence. ~~The~~ the candidate's campaign has solicited funds for, provided non-public fundraising information or strategy to, or otherwise directed funds to the person making the expenditure, or the candidate has appeared as a speaker or featured guest at a fundraiser for the person making the expenditure ~~but only if the solicitation occurred within the 12 months before the election that the expenditure seeks to influence; or~~

e. An agent of the candidate's campaign directs, places, or arranges the expenditure; or

f. The person making the expenditure uses information obtained from the candidate's campaign to design, prepare, or pay for the specific expenditure at issue, unless the person has obtained that information from a public source or from a communication the candidate made to the general public. This subparagraph does not apply to the republication of campaign communications or materials, which is covered by Paragraph 1.39;

g. During the two years preceding the expenditure, the person making the expenditure was directly or indirectly established, maintained, controlled, or principally funded by the candidate, the candidate's campaign, or an immediate family member of the candidate. For purposes of this paragraph, an 'immediate family member' means a parent, child, sibling, spouse, domestic partner, father-in-law, or mother-in-law; or

h. During the two years preceding the expenditure, the person making the expenditure employed or otherwise retained the services (other than legal or accounting services) of a person who during that two-year period:

i. Had executive or managerial authority for the candidate's campaign;

ii. Was authorized to raise or expend funds for the candidate or candidate's campaign and who had access to non-public information regarding the candidate's campaign plans or needs; or

iii. Provided the candidate or candidate's campaign with professional services (other than legal or accounting services) related to campaign or fundraising strategy."

III. Conclusion

CLC commends the Board's decision to review and update the Regulation. We appreciate the opportunity to submit these comments, and we would be happy to answer questions or provide additional information to assist the Board's review process.

Respectfully submitted,

/s/

Catherine Hinckley Kelley
Director, Policy & State Programs

/s/

Austin Graham
Legal Counsel