



April 7, 2023

Submitted electronically to traceye.hartman@maryland.gov

William G. Voelp, Chairman
Maryland State Board of Elections
151 West Street, Suite 200
Annapolis, MD 21401

Dear Chairman Voelp and Members of the Board,

Campaign Legal Center (“CLC”) respectfully submits these comments to the Maryland State Board of Elections (“Board”) regarding the Notice of Proposed Action (“Proposed Rule”) to provide guidance on the use of firewalls to prevent strategic campaign information from being passed between candidates and parties and independent spenders.¹

CLC is a nonpartisan, nonprofit organization that advances democracy through law at the federal, state, and local levels of government. Since its founding in 2002, CLC has participated in every major campaign finance case before the U.S. Supreme Court, and in numerous other federal and state court cases. Our work promotes every American’s right to an accountable and transparent democratic system.

CLC supports the Board’s rulemaking to provide guidance on the use of firewalls. To strengthen the proposed rule, CLC recommends that the Board adopt specific firewall requirements that ensure vendors create meaningful separation of staff and clients to prevent strategic campaign information from being passed between candidates, parties, and outside spenders.

As the U.S. Supreme Court has long recognized, “expenditures made after a ‘wink or nod’ often will be ‘as useful to the candidate as cash.’”² Coordination rules thus are critical to enforcing contribution limits and contribution source prohibitions—such as Maryland’s video lottery operator contribution ban³—to candidates and political parties. These laws—including provisions that prohibit campaigns and independent spenders from sharing strategic campaign information through common vendors—play a crucial role in our democratic process by preventing wealthy special interests from using their ability to engage in unlimited fundraising and spending to directly underwrite a candidate’s campaign expenses, a practice that raises obvious corruption concerns.

¹ State Bd. of Elections, Notice of Proposed Action 22-332-P, 50:5 Md. R. 173-204 (Mar. 10, 2023), https://2019-dsd.maryland.gov/MDRIssues/5005/Assembled.aspx#_Toc129078023.

² *McConnell v. FEC*, 540 U.S. 93, 221 (2003) (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 442, 446 (2001)).

³ Md. Code, Elec. Law § 13-237.

As explained below, our comments are intended to help the Board promulgate a final rule that ensures firewalls relied upon by outside spenders provide meaningful separation between firewalled staff of common vendors and those vendors' clients, thereby preventing strategic campaign information from passing between them.

I. The safe harbor for Maryland's coordination law regarding common vendors should apply only if the vendor has established a firewall that effectively prevents the sharing of strategic campaign information.

Under Maryland law, a coordinated expenditure is "presumed to have occurred" when a person making a disbursement, during the 18 months preceding the disbursement, "has retained the professional services of a vendor, an advisor, or a consultant that during the election cycle has provided professional services to the candidate or political party that is the beneficiary of the disbursement" and the "vendor, advisor, or consultant has not established a firewall to restrict the sharing of strategic campaign information between individuals who are employed by or who are agents of the person and the candidate or political party that is the beneficiary of the disbursement."⁴ In other words, if a person establishes a firewall to prevent the sharing of strategic campaign information through the common vendor, advisor, or consultant, the disbursement does not give rise to the presumption of a coordinated expenditure.

While the proposed rule generally defines the term "firewall," it provides only minimal conditions to ensure that relevant information is not passed between an independent spender and a candidate's campaign or a political party. Additionally, the proposed rule is silent as to whether an entity relying on a firewall bears the burden of proving the firewall is effective at accomplishing its purpose. Finally, the proposed rule is also silent as to whether a single individual acting as a common vendor could establish a firewall to qualify for the safe harbor. We recommend the Board address these issues in the final rule.

First, the final rule should establish specific requirements to ensure such firewalls are effective. In particular, the final rule should require that a firewall implemented by a common vendor include the following features:

- A. Separate staff who provide a service related to any person or entity's expenditure benefitting a candidate or party from other staff who provide services to that candidate or party.
- B. Prohibit leadership or management from simultaneously supervising the work of staff members who are separated by the firewall.
- C. Prohibit the flow of strategic campaign information between the staff separated by the firewall and between the spender and beneficiary candidate or party.
- D. Provide for physical and technological separation to ensure that strategic campaign information does not flow between the staff separated by the firewall and between the spender and the beneficiary candidate or party.

⁴ Md. Code, Elec. Law § 13-249(d)(4).

- E. Be in writing and distributed to all relevant staff before relevant activities and expenditures are undertaken, and be provided to the Board upon request.

These requirements would establish objective standards that both provide clear guidance to regulated entities and facilitate enforcement of the firewall requirement by the Board.

Other states have adopted and considered similar firewall requirements to determine whether they are sufficient to prevent the sharing of strategic campaign information and, thus, ensure the relevant expenditures are truly independent.⁵ In an illustrative advisory opinion, the Minnesota Campaign Finance and Public Disclosure Board considered a consultant's two proposals to prevent the flow of strategic campaign information between staff and clients, in an effort to ensure the resulting expenditures would remain independent: the first proposal would have established confidentiality agreements to prevent the consultant's staff from passing information between a political organization making independent expenditures and a beneficiary candidate, and the second proposal would have provided both physical and managerial separation of the consultant's staff.⁶ The agency's advisory opinion rejected the proposal that relied on confidentiality agreements and approved a robust firewall separating staff physically and managerially, noting that in the case of a spender employing the same consultants as a candidate, there must be a "high wall of separation" to avoid "defeating the independence of expenditures made by the political organization."⁷ As the agency explained, the proposed confidentiality agreements would not "provide the requisite degree of separation between the two components of the consultant's work."⁸ Instead, the physical and managerial separation of staff was required because "[i]t is not possible for an individual, or a group of individuals working as a team, to do work that is not coordinated with themselves or in concert with themselves."⁹

Following that advisory opinion, Minnesota enacted firewall requirements reflecting the guidelines approved by the Minnesota Campaign Finance Board. Under Minnesota's law, an expenditure made with the services of a common consultant qualifies for the safe harbor only under the conditions that (1) a consultant's firewall separates personnel assigned to the spender and a candidate; (2) the firewall includes a written policy describing measures taken to prohibit the flow of information between firewalled personnel; (3) the consultant distributes the written policy to relevant personnel and clients; (4) the consultant implements the measures described in the written policy; and (5) no information has been shared between firewalled personnel and clients.¹⁰

Second, the final rule should make clear that an entity relying on a firewall bears the burden of proving that the firewall is effective. This requirement is crucial to ensuring that a firewall policy actually functions to prevent the flow of strategic campaign information between firewalled staff and clients at all relevant times. Just as a true

⁵ See, e.g., W.Va. Code R. § 146-3-14.7.1-3; see also Tx. Ethics Comm'n Op. 503 (Feb. 8, 2012), <https://www.ethics.state.tx.us/opinions/partV/503.html>.

⁶ Minn. Campaign Fin. & Pub. Disclosure Bd., Advisory Op. 400, 2 (Mar. 1, 2016), https://cfb.mn.gov/pdf/advisory_opinions/AO400.pdf?t=1680641916.

⁷ *Id.* at 3.

⁸ *Id.*

⁹ *Id.*

¹⁰ Minn. Stat. § 10A.176 subd. 4.

firewall is only useful if it actually inhibits the spread of fire, a firewall policy for staff and clients must actually inhibit the flow of strategic campaign information between them. If a firewall policy fails to accomplish this objective, the resulting spending should be considered coordinated.

Third, the final rule should clarify that the safe harbor is available only for expenditures made with the services of common vendors, advisors, or consultants that are entities, and not where the common vendor, advisor, or consultant is a single individual. The reason for this clarification is straightforward: It “is not possible for an individual ... to do work that is not coordinated with themselves or in concert with themselves.”¹¹ Moreover, requiring a firewall to have the features described above would be—appropriately—functionally impossible for a single individual to comply with, as that single individual would necessarily be working on both sides of any supposed “firewall.”

II. Recommendations for final rule.

We have provided recommended text for the final rule below that specifies the guidelines and restrictions described above. The recommended text also incorporates minor technical corrections for consistency with the coordination law and to ensure the rule maintains its proper scope: first, by ensuring the rule covers disbursements related to parties, in addition to those coordinated with candidates; and second, by specifying that the firewall applies to “strategic campaign information,” and not to information, generally, that may pass between firewalled staff or clients.¹²

Recommended text for final rule:

Proposed text for 33.13.10.04C

C. Use of a Vendor.

(1) A person or entity subject to Election Law Article, §§13-306, 13-307, and 13-309.1, Annotated Code of Maryland, is presumed to have made a coordinated expenditure if during the 18-month period preceding the disbursement, the person or entity has retained the professional services of a vendor, an advisor, or a consultant that has provided professional services to the candidate or political party that is the beneficiary of the disbursement unless the person or entity employing the vendor, advisor, or consultant implements, or causes the common vendor, advisor, or consultant to implement, an effective firewall. A person or entity relying on a firewall bears the burden of proof of showing the firewall was effective.

(2) A firewall relied upon under subsection (1) shall:

(a) separate staff who provide a service to the person or entity making the expenditure from other staff who provide services to the candidate or party supported by the person’s or entity’s expenditures;

¹¹ *Supra* note 6, at 3.

¹² If the Board adopts the firewall requirements as recommended, the Board may also determine that the definitions for the term “firewall” are no longer necessary and may be removed in the final rule, as the substance of the definitions is incorporated into the proposed amendments to Subsection 33.13.10.04C. To the extent the Board retains the firewall definitions, we recommend two similar technical revisions to ensure the final rule is consistent with Elec. Law § 13-249(d) and maintains the proper scope: the definition under paragraph (b) should be amended 1) to explicitly include communications related to parties; and 2) to prohibit only the flow of *strategic campaign* information, as opposed to prohibiting the flow of information, generally.

(b) forbid an organization's owners, executives, managers, and supervisors from simultaneously overseeing the work of staff separated by a firewall;

(c) prohibit the flow of strategic campaign information between the spender and the candidate or party supported by the covered expenditure, and between specific staff who are separated by the firewall;

(d) provide for physical and technological separation to ensure that strategic campaign information does not flow between the spender and the candidate or party, and between the specific staff separated by the firewall; and

(e) be documented in writing and distributed to all relevant employees and consultants before any relevant work is performed regarding both the general firewall policy and any specific firewall created pursuant to such a policy, and provided to the Board upon request.

(3) The safe harbor under subsection (1) applies only if the vendor, advisor, or consultant implementing the firewall policy is an entity.

Conclusion

Thank you for your consideration of CLC's comments and recommendations for this important rulemaking. We would be happy to answer questions or provide additional information to assist the Board in promulgating its final rule regarding firewalls.

Respectfully submitted,

/s/ Aaron McKean

Aaron McKean

Legal Counsel