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Submitted electronically to Jordana.Greenwald@phila.gov

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Chair
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Dear Chair Reed, Vice Chair McCormick, and Members of the Board,

Campaign Legal Center (CLC) respectfully submits these written comments to the Philadelphia Board of Ethics (Board) in support of the Board's proposed amendment to Regulation No. 1, Campaign Finance (Proposed Rule).[1] These comments primarily address the amendments to Subpart I, regulating coordinated expenditures.

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 proposed amendments to clarify and strengthen the coordination provisions of Regulation No. 1. Coordination laws play a crucial role in our democratic process: 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. As outside spending in elections has exploded in the wake of *Citizens United*, weak coordination laws have allowed candidates to evade contribution limits by working

[1] *See* Amendment to Phila. Bd. Ethics Reg. No. 1 ("Campaign Finance") (filed February 26, 2024), https://www.phila.gov/departments/department-of-records/regulations/board-regulation-proposed-amendments-approved.pdf.

with ostensibly "independent" groups, effectively permitting groups that can raise unlimited funds to bankroll candidates' campaigns.[2] Without effective regulation of coordinated spending between candidates and outside spenders, wealthy special interests can easily sidestep existing limits on direct contributions.

The Proposed Rule would clarify and expand the types of conduct that constitute coordination, thereby preventing outside groups from circumventing contribution limits. As the U. S. Supreme Court has recognized, regulating coordinated expenditures advances the same anti-corruption interests as limits on contributions, and "prevent[s] attempts to circumvent the [limits] through prearranged or coordinated expenditures amounting to disguised contributions."[3]

In these comments, we first summarize the coordination rules in Regulation No. 1 and the changes made by the Proposed Rule. Second, we provide an overview of the U.S. Supreme Court's case law concerning coordinated election spending and its application to the types of coordination regulated by the Proposed Rule. Finally, we provide recommendations intended to strengthen the Proposed Rule, including proposed language to implement our recommendations.

I. The Proposed Rule expands Regulation No. 1's coverage of coordinated spending to include common forms of coordination.

The Proposed Rule revises Regulation No. 1's coordination standards to clarify their application to candidates—regardless of whether a person has declared their candidacy under Philadelphia law—and address additional forms of coordination that outside spenders employ to evade reasonable contribution limits and source restrictions.

A. Coordination under existing Regulation No. 1

Currently, Regulation No. 1 provides that an expenditure is coordinated with a campaign, and thus subject to applicable contribution limits, "when made in cooperation, consultation, or concert with a campaign."[4] Regulation No. 1 further delineates conduct constituting coordination under this general definition, including the following activities:

- A person makes an expenditure at the request or suggestion of the campaign; [5]

[2] *See generally* SAURAV GHOSH ET AL., CAMPAIGN LEGAL CTR., THE ILLUSION OF INDEPENDENCE: HOW UNREGULATED COORDINATION IS UNDERMINING OUR DEMOCRACY, AND WHAT CAN BE DONE TO STOP IT (2023) https://perma.cc/4VC9-KZKG.
[3] *FEC v. Colo. Republican Fed. Campaign Committee*, 533 U.S. 431, 456 (2001).
[4] Phila. Bd. Ethics Reg. No. 1 ¶ 1.33.
[5] *Id.* at ¶ 1.33(a).

- A person makes an expenditure after suggesting it to the campaign and the campaign assents to the suggestion; [6]
- The person making the expenditure communicates with the campaign concerning the expenditure before making the expenditure;[7]
- The campaign fundraises for the person making the expenditure in the 12 months before the relevant election;[8]
- The campaign directs, places, or arranges the expenditure;[9] or
- The person making the expenditure does so using information obtained from the campaign to design, prepare, or pay for the expenditure.[10]

Recently, the Board amended Regulation No. 1 to address "redboxing," an emergent campaign practice designed to evade traditional coordination laws. Redboxing occurs when a campaign publishes detailed instructions regarding campaign strategy and messaging on its website or digital media channels and an outside spender uses those instructions to make political ads to support the campaign.[11] Under Regulation No. 1, a person who makes an expenditure based on the campaign's instructions is presumed to have made an expenditure in coordination with the campaign.[12]

Separately, Regulation No. 1 addresses another common coordination tactic, in which a campaign makes their preferred video footage or campaign materials publicly available and an outside spender republishes the footage or materials in its own political ads.[13] Campaigns thus directly help to create an outside spender's ads. Regulation No. 1 provides that a person makes a coordinated expenditure when the person pays to "reproduce, republish, or disseminate a campaign communication …or campaign material…prepared by a campaign" and the person obtained the campaign materials "directly from the campaign or from another source with the consent of the campaign.[14]

Finally, Regulation No. 1 exempts certain activities from its coordination rules, providing that "an expenditure will not be considered a coordinated

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[6] *Id.* at ¶ 1.33(b).
[7] *Id.* at ¶ 1.33(c)
[8] *Id.* at ¶ 1.33(d).
[9] *Id.* at ¶ 1.33(e)
[10] *Id.* at ¶ 1.33(f)
[11] Saurav Ghosh, *Voters Need to Know What "Redboxing" Is and How It Undermines Democracy*, CAMPAIGN LEGAL CTR. (May 13, 2022) https://campaignlegal.org/update/voters-need-know-what-redboxing-and-how-it-undermines-democracy,
[12] Phila. Bd. Ethics Reg. No. 1 ¶ 1.33(g).
[13] *See, e.g.,* Brendan Fischer, *CLC Complaint Alleges Super PAC Illegally Republished Trump Ad in Swing States*, CAMPAIGN LEGAL CTR. (Dec. 21, 2020) https://campaignlegal.org/update/clc-complaint-alleges-super-pac-illegally-republished-trump-ad-swing-states,
[14] Phila. Bd. Ethics Reg. No. 1 ¶ 1.34.

expenditure merely because" a spender, among other things, uses "the same vendor, attorney, or accountant" as the candidate's campaign.[15]

B. Additional coordination activity regulated by the Proposed Rule.

The Proposed Rule clarifies Regulation No. 1 by ensuring its application to all candidates and any related candidate political committees.[16] Specifically, the Proposed Rule makes explicit that expenditures are considered coordinated with a candidate regardless of whether the coordinating conduct occurred prior to the person declaring their candidacy.[17] The Proposed Rule also makes explicit that conduct constituting coordination that results in an expenditure before an individual declares their candidacy is a pre-candidacy in-kind contribution subject to Regulation No. 1's existing pre-candidacy contribution rules.[18]

The Proposed Rule also expands on the types of conduct between a campaign and a spender that would result in a coordinated expenditure. In addition to the conduct already included in Regulation No. 1, the Proposed Rule would consider an expenditure coordinated if a candidate or candidate political committee "directly or indirectly establishes, maintains, or controls the spender, including by establishing, maintaining, or controlling the principal funder of the spender."[19] Further, coordinated conduct by a "principal funder" of a spender—defined to mean a person providing 50% or more of the spender's funds in the 12 months before an election[20]—is attributed to both the principal funder and the spender for the purpose of determining whether an expenditure by the spender is coordinated.[21]

Finally, the Proposed Rule provides further guidance concerning expenditures made by a spender for whom a candidate or candidate political committee raises funds. If a candidate or committee "directs or donates funds to, solicits funds for, or otherwise provides funds" directly or indirectly to the spender in the 12 months before an election, the spender's subsequent expenditures are considered coordinated with the candidate or committee.[22] The Proposed Rule provides a safe harbor for certain nonprofit organizations that are membership organizations, specifying that paying "bona fide membership fee[s] or dues," which are also paid by similarly situated members, and which comprise 5% or less of the

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[15] *See* Phila. Bd. Ethics Reg. No. 1 ¶ 1.35. The regulation provides additional exemptions for interviewing or endorsing a candidate, making an expenditure using publicly available information about a candidate, and inviting a candidate to appear before an organization's members, employees, or shareholders. *Id*.
[16] Proposed Rule ¶ 1.36.
[17] Proposed Rule ¶¶ 1.34, 1.36(b) and (c).
[18] Proposed Rule ¶ 1.34(a).
[19] Proposed Rule ¶ 1.37(c).
[20] Proposed Rule ¶ 1.35(b).
[21] Proposed Rule ¶ 1.40.
[22] Proposed Rule ¶ 1.39.

total funds received by the nonprofit "in the relevant twelve-month period," will not be considered coordination.[23]

II. Comprehensive regulation of coordinated electoral spending is necessary to prevent quid pro quo corruption and the appearance of such corruption.

The Proposed Rule addresses an ever-growing issue in contemporary elections by helping prevent wealthy special interests from directly financing candidates' campaigns by coordinating their electoral spending with their preferred candidates.[24] As decades of U.S. Supreme Court precedent has established, regulating coordinated spending between candidates and outside spenders is both constitutional and essential for reducing political corruption.

Beginning with its seminal decision in *Buckley v. Valeo*, the U.S. Supreme Court has consistently maintained that outside expenditures "controlled by or coordinated with a candidate" may be constitutionally limited in the same manner as direct contributions to the candidate's campaign.[25] Because coordinated expenditures are essentially in-kind contributions to candidates, limiting expenditures made in coordination with candidates furthers the same anti-corruption interests served by limits on direct monetary contributions to candidates and, critically, "prevent[s] attempts to circumvent the [limits] through prearranged or coordinated expenditures amounting to disguised contributions."[26]

In *McConnell v. FEC*, the Supreme Court upheld BCRA's expansion of federal coordination rules to cover coordinated expenditures made in the absence of "an agreement or formal collaboration" with a candidate.[27] The Court in *McConnell* noted that the existence of a formal agreement did not establish "the dividing line" between coordinated and independent spending, and explained that "expenditures made after a 'wink or nod' often will be 'as useful to the candidate as cash.'"[28] Moreover, the Court reiterated that only "wholly independent" spending is constitutionally distinguishable.[29]

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[23] *Id.*

[24] *See, e.g.*, Maia Cook, *Super PACs raise millions as concerns about illegal campaign coordination raise questions*, OPENSECRETS (Aug. 18, 2023), https://www.opensecrets.org/news/2023/08/super-pacs-raise-millions-concerns-illegal-campaign-coordination-raise-questions/. *See also* SAURAV GHOSH ET AL., *supra* note 2.

[25] 424 U.S. 1, 46-47 (1976).

[26] *Id.* at 455.

[27] 540 U.S. 93, 220-23 (2003).

[28] *Id.* at 221 (quoting *FEC v. Colo. Republican Federal Campaign Committee*, 533 U.S. 421, 446 (2001)); *see also id.* at 222 ("A supporter could easily comply with a candidate's request or suggestion without first agreeing to do so, and the resulting expenditure would be virtually indistinguishable from a simple contribution." (internal quotation marks and brackets omitted)).

[29] *Id.* at 221.

Since the Supreme Court struck down the ban on corporate independent expenditures in *Citizens United v. FEC*,[30] coordination rules have become especially critical to enforcing statutory limits on contributions. Indeed, the majority opinion in *Citizens United* heavily relied on the assumption that *independent* expenditures, unlike direct campaign contributions, do not create a risk of "quid pro quo" corruption because they are made without "prearrangement and coordination" with candidates,[31] making clear the importance of the distinction between coordinated and independent spending.

The Proposed Rule strengthens the Board's coordination laws by explicitly addressing additional tactics candidates and outside spenders use to circumvent contribution limits that are key to preventing corruption in our democratic process. Clarifying that the coordination rules apply regardless of whether a person has officially declared their candidacy guards against candidates gaming the system to engage in conduct that would unquestionably be considered coordination—and shatter the applicable contribution limits—once they officially declare their candidacy.[32] The Proposed Rule applies to situations where a candidate or a candidate's agent or officer "establishes, maintains, or controls" an outside spender,[33] or otherwise fundraises for or principally funds the spender,[34] both increasingly common forms of covert coordination between candidates and spenders.[35] The Proposed Rule also prevents an outside spender from evading coordination rules by outsourcing its coordination with candidates to its principal funder. When candidates and outside groups engage in these kinds of coordinated spending, such spending is clearly not "wholly independent."

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[30] 558 U.S. 310 (2010).
[31] *Id.* at 357.
[32] *See, e.g.,* John DiStaso, *New Hampshire Primary Source: Kasich backers say he filmed super PAC ads before becoming a candidate*, WMUR (Sept. 10, 2015), https://www.wmur.com/article/new-hampshire-primary-source-kasich-backers-say-he-filmed-super-pac-ads-before-becoming-a-candidate/5203789#.
[33] *See, e.g.,* Michael Scherer, et al., *DeSantis Group Plans Field Program, Showing the Expanding Role of Super PACs*, WASH. POST (Apr. 19, 2023), https://www.washingtonpost.com/politics/2023/04/19/desantis-super-pac-campaign. Other state agencies have interpreted coordination laws to cover expenditures made by entities with close connections candidates and their former staffers. For example, California's Fair Political Practices Commission has adopted a rebuttable presumption that any expenditure made by an entity "established, run, or staffed" by a candidate's former senior staff is "coordinated" with such candidate. 2 Cal. Code Regs. § 18225.7(d)(6).
[34] *See e.g.*, Minn. Campaign Fin. & Pub. Disclosure Bd. Advisory Op. 437, at 5 (Feb. 11, 2014), https://cfb.mn.gov/pdf/advisory_opinions/AO437.pdf?t=1525448588 (concluding that a candidate fundraising on behalf of an independent expenditure PAC "destroys the independence of any subsequent expenditures made by the IEPC to affect the Candidate's election").
[35] *See* SAURAV GHOSH ET AL., *supra* note 2, at 40.

III. Recommendations for the final rule.

By clarifying the application of the coordination rules to candidates engaging in coordinated conduct before declaring their candidacy and regulating additional common coordination practices, the final rule will more comprehensively address coordinated election spending in Philadelphia elections. To further strengthen the final rule, we recommend four changes: First, the Proposed Rule should be amended to make clear that a spender coordinating with a benefiting candidate makes an in-kind contribution to that candidate. Second, we recommend strengthening the Proposed Rule by specifying that expenditures made by spenders and principal funders established, maintained, or controlled by a candidate's immediate family are expenditures coordinated with the candidate. Third, we recommend removing current law's exemption for expenditures made by a spender who employs the same vendor as the candidate's campaign and ensuring that expenditures made using common vendors or former staff of a candidate are covered by the coordination rules. Finally, we recommend clarifying the Proposed Rule's provision that attributes expenditures coordinated by a spender's principal funder to both the spender and the principal funder. Each part of our recommendations also includes proposed text for the final rule.

A. Coordinated expenditures benefiting a candidate.

The Proposed Rule clarifies that coordination "is not itself prohibited," and that expenditures "resulting from coordination are deemed in-kind contributions subject to the applicable contribution limits." CLC recommends making explicit that such coordinated expenditures are in-kind contributions to the candidate benefiting from the coordinated expenditure. Although it may be implicit in the Proposed Rule, it should be made clear that electoral spending coordinated with a candidate is an in-kind contribution only when the spending benefits that candidate.[36]

Recommended full text for final rule:

1.33 Coordination generally. Coordination as described in this Subpart is not itself prohibited. Expenditures resulting from coordination <u>between a spender and the benefiting candidate</u> are deemed in-kind contributions <u>to the benefiting candidate</u> subject to the applicable contribution limits.

[36] *See, e.g.*, R.I. Gen. Laws §§ 17-25-23, 17-25.3-1 (coordinated conduct between a candidate and a person resulting in an expenditure by the person "to directly influence the outcome of the electoral contest involving the candidate shall be considered a contribution received by or an expenditure made by the candidate"); *see also* 2 Cal. Code Regs. § 18225.7(e)(7) (an "expenditure is not considered to be coordinated…based solely" on the circumstance that the expenditure is made at the request or suggestion of a candidate for the benefit of another candidate).

B. Coordination through spenders established, maintained, or controlled by immediate family members of a candidate.

The Proposed Rule specifies, in relevant part, that expenditures are considered coordinated if a candidate, the candidate's political committee, or an agent or officer of the candidate or committee "establishes, maintains, or controls the spender" or "the principal funder of the spender." CLC recommends amending the Proposed Rule to include expenditures made by spenders and principal funders established, maintained, or controlled by the candidate's close family members, in addition to agents and officers.[37]

CLC also recommends amending the Proposed Rule to specify that expenditures by such spenders will be considered coordinated only if the spenders were established, maintained, controlled, or principally funded by the candidate's agents, officers, or close family members during the two-year period prior to the relevant election. Specifying a period during which such conduct is considered coordinated will provide more clarity to the regulated community and ensure that the final rule addresses election spending coordinated by individuals with meaningful campaign information.[38]

Recommended full text for final rule:

1.37 Conduct constitutes coordination when a person listed in Paragraph 1.36(a) through (f):

…

c. ~~Directly~~ In the two years preceding the covered election, directly or indirectly establishes, maintains, or controls the spender, including by establishing, maintaining, or controlling the principal funder of the spender. A spender or principal funder that is established, maintained, or controlled by an immediate family member of a candidate shall be considered established, maintained, or controlled by the candidate under this subparagraph;

C. Coordination through common vendors and former staff.

The Proposed Rule maintains Regulation No. 1's exemption for spenders who make expenditures using the same vendors as a candidate's campaign. CLC recommends strengthening the Proposed Rule by removing this exemption and establishing that expenditures made by a spender who employs common vendors or a candidate's former staff are coordinated expenditures subject to contribution limits. Candidates and outside groups have increasingly taken advantage of

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[37] *See, e.g.*, Md. Code, Elec. Law § 13-249(d)(5) (defining "coordinated spender," in relevant part, to mean "a person established, financed, directed or managed by a member of the immediate family of the candidate").

[38] *See, e.g.*, N.Y. Elec. Law § 14-107(1)(d)(i) (expenditures considered coordinated if made by an independent expenditure group established by a candidate's agent within two years of the relevant election).

schemes to share strategic campaign information through common vendors and consultants.[39] Like other coordinated activity, election spending conducted through these covert schemes should be treated the same as an in-kind contribution to the candidate's campaign.[40]

Rather than wholly exempting the use of a common vendor from coordination rules, the Board should provide a safe harbor for a spender that shares a common vendor with a candidate or employs the candidate's former staff if the spender establishes an effective firewall to provide meaningful separation between staff working for a campaign and staff working for outside spenders. Other jurisdictions have adopted objective firewall requirements to prevent the sharing of strategic campaign information between firewalled staff and clients, thus ensuring the relevant expenditures are truly independent.[41]

Recommended full text for final rule:

1.XX Coordination through common vendors and former employees.

a. An expenditure made by a spender that, during the two years preceding the covered election, employed the services of a person who during the same period had executive or managerial authority for the candidate or candidate political committee, was authorized to raise or expend funds for the candidate or candidate political committee, or provided the candidate or candidate political committee with professional services (other than accounting or legal services) related to campaign or fundraising strategy shall be considered a coordinated expenditure.

b. Expenditures involving common vendors or former employees of a candidate or candidate political committee as described in subparagraph (a) will not be considered coordinated if the spender implements an effective firewall. A person who relies upon a firewall bears the burden of proof of showing that the firewall was effective. A firewall must do all of the following:

i. Separate staff who provide a service to the spender in relation to its covered expenditures from other staff who provide services to a candidate supported by the spender's expenditures;

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[39] *See e.g.*, Jill Colvin, *Donald Trump allies create a new super PAC called MAGA Inc.*, PBS NEWSHOUR (Sept. 23, 2022) https://www.pbs.org/newshour/politics/donald-trump-allies-create-a-new-super-pac-called-maga-inc. *See also* Mike Spies, *Documents Point to Illegal Campaign Coordination Between Trump and NRA*, THE TRACE (Dec. 6, 2018) https://www.thetrace.org/2018/12/trump-nra-campaign-coordination.

[40] See, e.g., N.Y. Elec. Law § 14-107(1)(d)(iii) and (viii) (expenditures considered coordinated when made by a committee employing the same vendor as a candidate or a candidate's former staff). *See also* 2 Cal. Code Regs. § 18225.7(d)(3) and (6).

[41] *See, e.g.*, Minn. Stat. § 10A.176 subd. 4. *and* W.Va. Code R. § 146-3-14.7.1-3.

ii. Forbid an organization's owners, executives, managers, and supervisors from simultaneously overseeing the work of staff separated by a firewall;

iii. Prohibit the flow of strategic non-public information between the spender and the candidate supported by the covered expenditure, and between specific staff who are separated by the firewall;

iv. Provide for physical and technological separation to ensure that strategic non-public information does not flow between the spender and the candidate, and between the specific staff separated by the firewall; and

v. Be 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.

…

1.41. An expenditure will not be considered a coordinated expenditure merely because:

…

c. The spender and the candidate's campaign use the same ~~vendor,~~ attorney~~,~~ or accountant;

D. Coordinated conduct by the principal funder of a spender.

Under the Proposed Rule, when a spender's principal funder engages in coordinated conduct, the coordinated conducted is attributed to the spender. The Proposed Rule then specifies that "[e]xpenditures resulting from coordination between the principal funder and the spender shall be attributable to both." Our understanding is that this provision is intended to ensure that expenditures made by a spender pursuant to the principal funder's coordination with a candidate (or the candidate's political committee or agents) are attributable to both the spender and the principal funder. With this understanding, we recommend revising the provision to clarify its application to spenders and their expenditures that are coordinated by the principal funder.

Recommended full text for final rule:

1.40 Coordination by principal funders. Conduct of the principal funder of a spender shall be attributed to the spender, regardless of whether the principal funder is an agent or officer thereof. ~~Expenditures resulting~~ For the purposes of this paragraph, expenditures by the spender that result from coordination ~~between~~ by the principal funder ~~and the spender~~ shall be attributable to both the spender and the principal funder.

Conclusion

We respectfully urge the Board to adopt the Proposed Rule to clarify and strengthen the coordination provisions of Regulation No. 1 and to incorporate our recommendations. We would be happy to answer questions or provide additional information to assist the Board in promulgating the final rule. Thank you for your time and consideration.

Respectfully submitted,

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