



CITY OF PHILADELPHIA

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**Philadelphia Board of Ethics
Non-Public Board Opinion No. 2018-002**

May 29, 2018

Re: Coordination with a Candidate’s Campaign under the City Campaign Finance Law

Dear Attorney:

You represent an entity in its request for a non-public advisory opinion regarding its potential activities related to the 2019 municipal election. This request presents many different scenarios, each requiring an analysis of whether coordination between the entity and a candidate’s campaign would be present such that City contribution limits would apply to the related expenditures by the entity in support of the candidate.

I. Jurisdiction

The Philadelphia Home Rule Charter (“Charter”) grants the Board of Ethics jurisdiction to administer and enforce all Charter provisions and ordinances pertaining to ethical matters, which includes campaign finance matters. Charter § 4-1100. The Charter and The Philadelphia Code (“Code”) authorize the Board of Ethics to render advisory opinions explaining the application of laws under the Board’s jurisdiction, including the City Campaign Finance Law found at Code Chapter 20-1000. *See* Charter § 4-1100; Code § 20-1008 (citing Code § 20-606); Board Reg. 4 ¶ 4.1(a). An authorized representative of a person, such as an attorney, may submit a request for an advisory opinion on behalf of the person. Board Reg. 4 ¶ 4.7. Board Regulation 4 describes the procedures related to seeking an advisory opinion and for requesting reconsideration of an advisory opinion issued by the Board of Ethics. Board Reg. 4 ¶¶ 4.0, 4.26.

II. Information Provided by the Requestor

In your request letter, you describe your client as “an entity which has done independent expenditures on behalf of endorsed candidates in past City elections and may do so in the future.” Your client (the “Entity”) is contemplating certain activities related to the 2019 municipal election.

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III. Discussion

You have presented many different scenarios that are organized into five sets of questions. Each scenario requires a fact-specific analysis of whether coordination would be present between the Entity and the candidate's campaign.

A. Overview of Coordinated Expenditures

An expenditure¹ that advocates or influences the nomination or election of a candidate² and that is coordinated with that candidate's campaign³ is an in-kind contribution⁴ to the candidate that is subject to contribution limits under the City Campaign Finance Law. *See* Board Reg. 1 ¶ 1.1(q) & Subparts B, H. An expenditure is coordinated with a candidate's campaign if it is made in cooperation, consultation, or concert with the candidate's campaign. Board Reg. 1 ¶ 1.38 & Subpart H. Under certain circumstances, an in-kind contribution arises from an expenditure made to reproduce, republish, or disseminate campaign communications or campaign materials prepared by a candidate's campaign. *See* Board Reg. 1 ¶ 1.39. In contrast to coordinated expenditures, independent expenditures are not subject to contribution limits. An independent

¹ An "expenditure" is:

The payment, distribution, loan, or advancement of money or things having a monetary value by a candidate, political committee, or other person for the purpose of influencing the outcome of a covered election, including: (i.) For the provision of a service or other valuable thing for the purpose of influencing the outcome of the nomination or election of a candidate; (ii.) For the payment or provision of money or other valuable thing to compensate any person for services rendered to a candidate or candidate political committee; (iii.) For an electioneering communication; or (iv.) To obtain, defend, or challenge a candidate's place on the ballot, including payments to workers to circulate nominating petitions.

Board Reg. 1 ¶ 1.1(n).

² A "candidate" is "[a]n individual who (i) files nomination papers or petitions for City elective office, or (ii) publicly announces his or her candidacy for City elective office, including a former candidate who receives post-candidacy contributions or makes post-candidacy expenditures." Board Reg. 1 ¶ 1.1(d).

³ The term "candidate's campaign" encompasses "[a] candidate, the candidate's political committee (or litigation fund committee), or an agent of any of the foregoing." Board Reg. 1 ¶ 1.1(e).

⁴ An "in-kind contribution" is:

(i.) The provision of any goods or services directly to a candidate's campaign without charge or at a charge that is less than the usual and normal charge for such goods or services; (ii.) The 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; or (iii.) Any expenditure that advocates or influences the nomination or election of a candidate that is coordinated with that candidate's campaign, as provided in Subpart H of Board Regulation 1.

Board Reg. 1 ¶ 1.1(q).

expenditure is an expenditure to influence the outcome of a covered election that is not made in cooperation, consultation, or concert with any candidate's campaign. *See* Board Reg. 1 ¶ 1.1(p).

B. Five Sets of Questions

The questions below, which are taken verbatim from your request letter, raise the issue of whether coordination would be present in many different scenarios. Whether a particular expenditure is coordinated and made in cooperation, consultation, or concert with a candidate's campaign requires a highly fact-specific analysis.

Question Set 1: "Given that Regulation 1.38 refers to coordination with a 'candidate's campaign,' can [the Entity] meet with individuals prior to any declaration of candidacy and discuss in full the kind of support [the Entity] would be willing to provide should he or she decide to run for a particular office, including a specific electioneering communications plan? Similarly, can [the Entity] meet with individuals prior to any declaration of candidacy and discuss the kind of support that [the Entity] has provided to endorsed candidates in the past in similar races?"

Response: The City Campaign Finance Law does not prohibit the Entity from engaging in the proposed behaviors presented in this question. Rather, the issue under the City Campaign Finance Law is whether the proposed behaviors would constitute coordination with the candidate's campaign such that subsequent related expenditures would be considered an in-kind contribution made by the Entity to the candidate that is subject to City contribution limits.

This question presents two different fact patterns. The first fact pattern involves the Entity meeting with an individual who is not yet a candidate and discussing in full the kind of support, including a specific electioneering communications⁵ plan, that it will provide should the individual become a candidate. It is implicit in the question that the individual subsequently becomes a candidate for City elective office and that the Entity makes expenditures as discussed at the meeting. Whether coordination occurs before or after an individual becomes a candidate is immaterial. The key issue is whether coordination between the Entity and the candidate's campaign, which includes the candidate, occurred at all prior to the expenditures being made by the Entity. *See* Board

⁵ An "electioneering communication" is:

Any broadcast, cable, radio, print, Internet, or satellite communication (a) that promotes, attacks, supports, or opposes a candidate, or (b) that, within 50 days of a covered election, names, refers to, includes, or depicts a candidate in that covered election; provided that, however, the term shall not include: (i) sponsorship or organization of a candidate debate or forum; or (ii) any news story, commentary, or editorial by any broadcasting station, newspaper, magazine, or other periodical publication, including any Internet periodical publication, unless the station, newspaper, magazine, or publication is owned or controlled by a candidate, political committee, or political party.

Board Reg. 1 ¶ 1.1(k).

Reg. 1 ¶ 1.1(e) (defining the term “candidate’s campaign”). In this case, at the time the Entity makes these expenditures, it has previously communicated and consulted with the candidate concerning the expenditures. *See* Board Reg. 1 ¶ 1.38. Accordingly, these expenditures by the Entity would be coordinated with the candidate’s campaign.

The second fact pattern presented in this question involves the Entity meeting with a future candidate for City elective office and discussing the expenditures that the Entity has previously made in support of candidates it endorsed in similar races. Such a discussion would jeopardize the independence of expenditures made by the Entity in support of the candidate. It is implausible that a discussion about this topic would occur without any communication between the Entity and the future candidate regarding expenditures that the Entity will make in support of the future candidate. Indeed, it is assumed that the Entity subsequently makes expenditures that mirror those conveyed during this in-person meeting or that are otherwise informed by the meeting. As such, discussion of this topic would likely lead to coordinated expenditures as it would presumably involve: (1) the Entity conveying information about expenditures that it plans to make in support of the future candidate; (2) the future candidate assenting to those expenditures; and/or (3) the Entity and the future candidate exchanging information during the meeting that informs subsequent expenditures by the Entity in support of the candidate. *See* Board Reg. 1 ¶ 1.38(b), (c).

Question Set 2: “Even after an individual has become a candidate as a matter of City law, can candidates meet with [the Entity] prior to its making an endorsement without violating Regulation 1.38? Can they discuss a general electioneering communications strategy by [the Entity], so long as no specific expenditures would be discussed? Can [the Entity] tell a declared candidate the kind of support that it has provided to endorsed candidates in the past in similar races? Can [the Entity] at a minimum indicate its budget for an electioneering communications plan, while avoiding any discussion of the content of such a plan for that candidate?”

Response: The City Campaign Finance Law does not prohibit the Entity from engaging in the proposed behaviors presented in this question. Rather, the issue under the City Campaign Finance Law is whether the proposed behaviors would lead to coordination between the Entity and the candidate’s campaign such that related expenditures made by the Entity would be considered an in-kind contribution to the candidate that is subject to City contribution limits.

The mere fact of a meeting between the Entity and a candidate prior to the Entity endorsing that candidate would not necessarily cause subsequent expenditures made by the Entity in support of the candidate to be considered coordinated expenditures. *See* Board Reg. 1 ¶ 1.40(a), (b). Rather, the existence of coordination between the Entity and a candidate’s campaign would depend on the nature and content of the discussion between the Entity and the candidate at the meeting. *See* Board Reg. 1 ¶ 1.38.

A meeting at which the Entity and the candidate discuss a general electioneering communications strategy by the Entity would lead to coordinated expenditures. This is because subsequent electioneering communication expenditures made by the Entity in support of the candidate pursuant to the strategy it had discussed with the candidate would have been made in consultation with the candidate. *See* Board Reg. 1 ¶ 1.38.

For the reasons stated in the Response to Question 1 above, coordinated expenditures would likely also arise from a meeting between the Entity and the candidate in which the Entity describes expenditures that it has previously made in support of candidates it endorsed in similar races. *See supra* Response to Question 1 at p. 4.

Similarly, coordinated expenditures may arise from a meeting at which the Entity and the candidate discuss the Entity's budget for an electioneering communications plan if the parties exchange information that informs the subsequent expenditures by the Entity in support of the candidate. *See* Board Reg. 1 ¶ 1.38. Although it is theoretically possible that coordinated expenditures would not result if the Entity stated only the total dollar amount for a budget for its electioneering communications plan, it is unrealistic that no additional information would be exchanged during an in-person meeting once the topic is broached.

As a general matter, it is inadvisable for the Entity and a candidate to meet to discuss information, strategy, or budget related to future expenditures by the Entity in support of the candidate if the Entity wishes to avoid potential coordination with the candidate's campaign. Such discussions would jeopardize the independence of expenditures made by the Entity and, at a minimum, would invite scrutiny regarding potential coordination between the Entity and the candidate's campaign.

Question Set 3: "Can [the Entity] republish in its electioneering communications a candidate photograph taken by the candidate's committee and placed on his or her own website without violating Reg. 1.39(c)(ii), so long as the image also appears on any other site (including a news media website) not controlled by the candidate committee?"

Response: The City Campaign Finance Law does not prohibit the Entity from engaging in the proposed behavior presented in this question. Rather, the issue under the City Campaign Finance Law is whether the proposed behavior would involve the republication of campaign communications or materials so that related expenditures would be considered an in-kind contribution made by the Entity to the candidate that is subject to City contribution limits.

The source of the photograph used by the Entity in its electioneering communications is central to the question of whether the related expenditures would be considered an in-kind contribution. If the Entity's electioneering communication republishes a candidate photograph that it obtained from the candidate's website, then the expenditure for the electioneering communication would be considered an in-kind contribution made by the Entity to the candidate for purposes of the

contribution limits provided that two conditions are satisfied: (1) the total for these expenditures is \$100 or more in the aggregate per reporting period; and (2) the electioneering communication that republishes the photograph does not advocate for the defeat of the candidate. *See* Board Reg. 1 ¶ 1.39(a), (c)(i), (iii).

By contrast, if the Entity's electioneering communication republishes a candidate photograph that it obtained from a news website or other public source not controlled by the candidate, then the Entity's expenditure for the electioneering communication would not be considered an in-kind contribution from the Entity to the candidate for purposes of the contribution limits. *See* Board Reg. 1 ¶ 1.39(c)(ii).

Question Set 4: "Can [the Entity] run digital ads promoting and linking to a candidate's website or Facebook page? Can its ads republish the candidate's website by pulling it up onto the same screen without violating Reg[.] 1.39?"

Response: The City Campaign Finance Law does not prohibit the Entity from engaging in the proposed behaviors presented in this question. Rather, the issue under the City Campaign Finance Law is whether the proposed behaviors would involve the republication of campaign communications or materials such that related expenditures would be considered an in-kind contribution made by the Entity to the candidate that is subject to City contribution limits.

If the Entity pays for digital ads that promote and link to a candidate's website or Facebook page without the ads displaying the content of the website or Facebook page, then this activity would not constitute an in-kind contribution in the form of the republication of campaign communications or materials. By contrast, if the Entity pays for digital ads that republish the candidate's website by displaying it on the same screen and the related expenditures are \$100 or more in the aggregate per reporting period, then this activity would entail the republication of campaign communications or materials and would be considered an in-kind contribution made by the Entity that is subject to City contribution limits. *See* Board Reg. 1 ¶ 1.39(a), (c)(iii).

Question Set 5: "Can [the Entity] announce on its website and social media platforms a detailed field canvassing plan on behalf of its preferred candidates, including the dates, modes, and locations of canvassing, thus alerting said candidates (along with the general public) as to avoid duplicative efforts, without running afoul of the coordination rules? Similarly, can it announce its electioneering communications plan via those channels?"

Response: Coordination with a candidate's campaign would not result solely from the Entity conveying the details of its field canvassing plan on behalf of candidates and its electioneering communications plan in public announcements on its website and social media platforms in a manner that is understandable to and accessible by the general public. *See* Board Reg. 1 ¶ 1.38(f). Coordination, however, may well result from related communications between the Entity and the candidate's campaign, such as the Entity directing the attention of a candidate's campaign to the public announcements.

* * * * *

Thank you for your concern about compliance with the City Campaign Finance Law and for seeking advice. Application of the City Campaign Finance Law is fact-specific. The Entity is entitled to act in reasonable reliance on this Opinion and not be subject to penalties under the laws within the Board's jurisdiction unless material facts differ from those presented here, including through omission or misstatement in the request. Code § 20-606(1)(d)(ii); Board Reg. 4 ¶ 4.12.

Since the Entity requested a non-public opinion, the original Opinion will not be made public. As required by the City Code, this version of the Opinion that has been redacted to conceal facts that are reasonably likely to identify the Entity is being made public. Please let Board Staff know if you have any questions.

BY THE PHILADELPHIA BOARD OF ETHICS

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