September 27, 2024

Submitted electronically to Rules@nyccfb.info

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Dear Mr. Gallagher,

Campaign Legal Center (CLC) respectfully submits these written comments to the New York City Campaign Finance Board (Board) in support of the Board's proposed amendments to its rules (Proposed Rule).[1] These comments primarily address the proposed amendments addressing coordinated expenditures and the identification of independent spenders who sponsor online communications.

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 strengthen its coordination rules and its requirements for on-ad disclaimers in online communications. Our comments proceed in two parts: First, we provide an overview of the Proposed Rule's changes to the Board's coordination rules and a summary of U.S. Supreme Court case law concerning coordinated election spending. We then provide recommendations to strengthen the final rule's regulation of a coordination tactic known as "redboxing." Second, we provide recommendations to strengthen the Proposed Rule's requirements for on-ad disclaimers in online communications. Each of our recommendations includes suggested rule text for the Board's consideration.

[1] *See* Notice of Public Hearing and Opportunity to Comment on Proposed Rules (published Aug. 28, 2024), https://www.nyccfb.info/media/2118/notice-of-public-hearing-september-2024.pdf.

I. The Proposed Rule strengthens the Board's coordination rules by addressing increasingly common forms of coordinated spending.

The Proposed Rule revises the Board's rules to explicitly address additional forms of coordinated election spending that outside spenders employ to evade reasonable contribution limits and source restrictions. 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 or outdated coordination laws can enable candidates to evade contribution limits by working 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.

A. Current Coordination Rule

Under the current rule, the Board considers a series of factors to determine whether an expenditure is made independently of a campaign.[3] The current rule provides a non-exhaustive list of factors the Board may consider, including whether:

- The spender, or a person authorized to accept receipts or make expenditures for the spender, is an agent of the candidate; [4]
- A candidate has "authorized, requested, suggested, fostered, or otherwise cooperated in" the formation or operation of the spender; [5]
- The spender has been established, financed, maintained, or controlled by any of the same persons that established a political committee authorized by a candidate;[6]
- A candidate shares or rents space for campaign-related purposes from or with the spender;[7]

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[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] 52 R.N.Y.C. § 6-04(b).
[4] *Id.* at § 6-04(a)(i) and (ii).
[5] *Id.* at § 6-04(a)(iii).
[6] *Id.* at § 6-04(a)(iv).
[7] *Id.* at § 6-04(a)(v).

- The candidate has solicited or collected funds for the spender during the election cycle;[8]

- The candidate, or any public or private office held or entity controlled by the candidate, has retained the services of the spender or officers of the spender during the election cycle;[9] or

- The candidate and the spender each communicate with the same third party, if the candidate knew or should have known the candidate's communications would inform or result in expenditures benefitting the candidate.[10]

Separately, the current rule addresses another common coordination tactic, in which a campaign makes its preferred video footage or campaign materials publicly available and an outside spender republishes the footage or materials in its own political ads.[11] The campaign thus directly helps to create an outside spender's ads supporting the campaign with the campaign's own preferred images and materials. The current rule creates a presumption that an expenditure is "non-independent" if the expenditure finances the "dissemination, distribution, or republication" of campaign materials prepared by a candidate.[12]

Finally, the current rule exempts certain activities from being considered "non-independent," including an entity's "routine interactions" with a campaign, such as an entity requesting publicly available materials or communicating with a campaign regarding the entity's endorsement process.[13]

B. The Proposed Rule

The Proposed Rule identifies additional types of conduct between a campaign and a spender that can result in coordinated expenditures. The Proposed Rule first clarifies that the Board may consider whether an expenditure is made by former staff or consultants who had previously been retained by the candidate or a public or private office or entity controlled by the candidate.[14] The Proposed Rule then provides additional factors, including whether:

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[8] *Id.* at § 6-04(a)(vi).
[9] *Id.* at § 6-04(a)(vii).
[10] *Id.* at § 6-04(a)(viii).
[11] *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; *see also* SAURAV GHOSH ET AL., *supra* note 2, at 31.
[12] 52 R.N.Y.C. § 6-04(c).
[13] *Id.* at § 6-04(g).
[14] Proposed Rule § 6-04(a)(vii).

- The candidate serves, or has served, as a "principal member or professional or managerial employee of the spender during" the election cycle;[15]
- The candidate or a person who previously worked for the candidate conveyed strategic, non-public information to the spender during the election cycle;[16]
- The spender uses strategic information from a non-public source or that a candidate, or person who previously worked for the candidate, made publicly available in a manner the candidate or person knew or should have known would be used by the spender;[17]
- The spender has been established, financed, maintained, or controlled by a family member of the candidate;[18] or
- The candidate's family member holds, or has held, a management position or an ownership interest of ten percent or more in the spender during the election cycle.[19]

C. 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.[20] 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.[21] Because coordinated expenditures are materially indistinguishable from in-kind contributions to candidates, limiting expenditures made in coordination with candidates furthers

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[15] Proposed Rule § 6-04(a)(viii).
[16] Proposed Rule § 6-04(a)(x).
[17] Proposed Rule § 6-04(a)(xi).
[18] Proposed Rule § 6-04(a)(xii).
[19] Proposed Rule § 6-04(a)(xiii).
[20] *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.
[21] 424 U.S. 1, 46-47 (1976).

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."[22]

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.[23] 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.'"[24] Moreover, the Court reiterated that only "wholly independent" spending is constitutionally distinguishable.[25]

Since the Supreme Court struck down the ban on corporate independent expenditures in *Citizens United v. FEC*,[26] coordination rules have become especially critical to enforcing statutory limits on contributions and prohibitions on contributions to candidates, such as New York City's ban on contributions to candidates from corporations.[27] 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,[28] making clear the importance of the distinction between coordinated and independent spending.

The Proposed Rule strengthens the Board's coordination laws by explicitly identifying additional modern tactics candidates and outside spenders use to circumvent contribution limits. For example, the Proposed Rule applies the Board's coordination rules to expenditures made by persons who have access to strategic campaign information through close relationships to the candidate or campaign, including situations in which expenditures are made by spenders for whom the candidate is a principal member or managerial employee; that employ or are owned by a candidate's family members; or who receive strategic campaign information from a candidate's former consultants or staff. Such arrangements are readily identifiable in other races as an avenue for coordination between candidates and

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[22] *Id*. at 455.
[23] 540 U.S. 93, 220-23 (2003).
[24] *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)).
[25] *Id.* at 221.
[26] 558 U.S. 310 (2010).
[27] 52 R.N.Y.C. § 5-03(a)(i).
[28] *Id.* at 357.

wealthy supporters.[29] Further, under the Proposed Rule, the Board may also consider whether an expenditure is made by a person or entity that has been established, financed, maintained, or controlled by a candidate's family members—an increasingly common form of covert coordination.[30]

When candidates and outside groups engage in these kinds of coordinated spending, such spending is clearly not "wholly independent." The Board's explicit inclusion of this conduct in the factors considered for determining coordinated spending will further protect against evasion of contribution limitations by wealthy special interests.

D. Recommendation for Final Rule

Under the Proposed Rule, the Board also would consider whether an expenditure is coordinated by using "strategic information or data" that a candidate, or person who previously worked for the candidate, made publicly available "in a manner the candidate or such individual or entity knew or should have known would facilitate" the making of expenditures. By including information a candidate publicly discloses with the goal of facilitating supportive "outside" expenditures, this provision would appear to help curb a rapidly growing practice known as "redboxing." Redboxing occurs when candidates skirt coordination laws by publicly signaling their desired messaging and advertising strategy to outside spenders—sometimes in a tell-tale, literal red box on their website—knowing the outside spenders will use the information to make ads in support of the campaign.[31] Although redboxing tactics can vary, typical redboxing schemes include cryptic signals and phrasing that, while meaningless to the public, are commonly

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[29] *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 or immediate family members is "coordinated" with such candidate. 2 Cal. Code Regs. § 18225.7(d)(6) and (7). *See also* SAURAV GHOSH ET AL., *supra* note 2, at 45 (noting that federal coordination rules fail to examine whether an independent spender, "by virtue of its leaders' relationship with the candidate, is so connected that it cannot be 'independent' in a meaningful sense.").

[30] Steph Machado and Edward Fitzpatrick, *Critics slam R.I. congressional candidate for family-funded super PAC*, BOSTON GLOBE (August 4, 2023) https://www.bostonglobe.com/2023/08/04/metro/aaron-regunberg-family-funded-super-pac/. *See also* Matea Gold and Tom Hamburger, *Must-have accessory for House candidates in 2014: The personalized super PAC*, WASH. POST (July 18, 2014) https://www.washingtonpost.com/politics/one-candidate-super-pac-now-a-must-have-to-count-especially-in-lesser-house-races/2014/07/17/aaa2fcd6-0dcd-11e4-8c9a-923ecc0c7d23_story.html.

[31] Saurav Ghosh, *Voters Need to Know What "Redboxing" Is and How It Undermines Democracy*, CAMPAIGN LEGAL CTR. (May 13, 2022); *see also* Gabriel Foy-Sutherland and Saurav Ghosh, *Coordination in Plain Sight: The Breadth and Uses of "Redboxing" in Congressional Elections* 23 ELECTION L.J. 149 (2024).

understood by big spenders for identifying a candidate's desired messaging, target audiences, and preferred media channels.[32] Redboxing is simply coordination in plain sight.

Addressing redboxing is a critical component of modern coordination rules. While information provided to the general public for bona fide campaign purposes—such as a campaign speech or other communications aimed at influencing voters—is not indicative of coordination, the coordination of strategic campaign information between campaigns and outside spenders should not be permitted merely because it is done in public.

To provide further clarity in rule, we recommend that the final rule explicitly incorporate common tactics by which campaigns make strategic information public and thereby "facilitate" its use in an outside spender's expenditures. We also recommend amending the rule to create a presumption of non-independence when an outside spender's expenditures are made using these redboxing tactics, similar to the Board's current rule regarding expenditures that republish a candidate's campaign materials. Other jurisdictions, including Philadelphia and Allegheny County, have followed a similar approach to regulating redboxing,[33] and this approach is also reflected in a recently introduced bill in Congress to address redboxing in federal elections.[34] CLC has prepared the following draft rule text for the Board to consider:

Recommended full text for final rule:

§ 6-04. Independent Expenditures.

(a) Factors for determining independence.

…

(xi) the person or entity making the expenditure has utilized strategic information or data that is not from a publicly available source or otherwise available by subscription;

…

(c) Presumed non-independent expenditures.

(i) Financing the dissemination, distribution, or republication of any broadcast or any written, graphic, or other form of campaign materials

[32] *See* SAURAV GHOSH ET AL., *supra* note 2, at 26.
[33] *See* Phila. Bd. of Ethics Reg. No. 1 ¶ 1.37(e), https://www.phila.gov/media/20240506141243/BOE-regulation-1.pdf *and* Allegheny Cty. Code of Ordinances § 220-7 part G, https://alleghenycounty.legistar.com/LegislationDetail.aspx?ID=6170938&GUID=787A6DC4-3D2A-4B19-AEFB-12691C9786B0&Options=Advanced&Search=&FullText=1.
[34] *See* Stop Illegal Campaign Coordination Act, H.R. 9589, 118th Cong. (2024).

prepared by a candidate is presumed to be a non-independent expenditure, unless the candidate can show that the activity was not in any way undertaken, authorized, requested, suggested, fostered, or otherwise cooperated in by the candidate.

(ii) An expenditure that is materially consistent with instructions, directions, or suggestions from a candidate, or an individual or entity who has previously been compensated, reimbursed, or retained by the candidate as a consultant; political, media, or fundraising advisor; employee; vendor; or contractor, regarding the making of expenditures, regardless of whether the instructions, directions, or suggestions are publicly available, is presumed to be a non-independent expenditure. The factors the Board shall consider in determining whether an expenditure is consistent with such instructions, directions, or suggestions include, but are not limited to:

(A) Noticeable placement of instructions, directions or suggestions, such as on a discrete webpage or portion of a webpage containing one or more other factors identified in this paragraph;

(B) Whether the instructions, directions, or suggestions include language indicating that information should be communicated to others, such as "voters need to know";

(C) Whether the instructions, directions, or suggestions include targeted audience information, such as specific demographics or the location of intended or suggested recipients; and

(D) Whether the instructions, directions, or suggestions include suggested methods of communication, such as indicating that recipients need to "see," "hear," or "see on the go" information.

II. The Proposed Rule ensures voters can access information about who is paying for political advertising by providing for modified disclaimers in online communications.

The Proposed Rule amends the Board's rules related to "Paid for by" notices (disclaimers) on communications made by independent spenders, ensuring the disclaimer requirements apply flexibly to different methods of political advertising and providing for modified disclaimers when including the full notice in online communications would be "impracticable." With the increasing prominence of digital advertising in federal, state, and local campaigns, it is imperative that political transparency requirements effectively regulate communications distributed

via both traditional and digital methods.[35]

In addition to supporting the Proposed Rule's approach to on-ad disclaimers, we recommend that the Board clarify the proposed exemption for online communications providing for a modified disclaimer. First, we propose requiring that the sponsor of an online communication establish, at the Board's request, why it was impracticable to include a complete disclaimer on the communication. Second, we recommend specifying guidelines for how an online communication must provide the required disclosure statement through a direct link when the disclaimer cannot be placed on the face of the advertisement.

A. Require sponsors of online communications to establish that particular ads could not include complete disclaimer statements.

The Proposed Rule provides an exemption for online communications for which it is "impracticable to display a clearly readable" disclaimer, allowing the sponsor to provide the "full text of the required notice" through a link to a "location controlled by the independent spender."[36] The final rule should require that sponsors of online communications establish, at the Board's request, that including a complete disclaimer on the face of a particular ad was not possible due to legitimate restrictions, such as size or technological constraints. This addition would help to prevent ad sponsors from abusing the exemption and ensure that full disclaimer statements appear on online communications when possible.

Other jurisdictions have similar exemptions allowing for an alternative method of accessing the disclaimer statement.[37] California's Political Reform Act, for example, permits the sponsor of an "electronic media advertisement" to substitute a complete disclaimer statement on the face of an ad with a hyperlink to the required information when including a complete disclaimer would be "impracticable or would severely interfere with the [sponsor's] ability to convey the intended message due to the nature of the technology used to make the communication."[38] Applying this statutory provision, California's Fair Political Practices Commission requires that a sponsor of an electronic media advertisement who claims inclusion of a full disclaimer on the ad is "impracticable" be able to show

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[35] By one account, at least $1.6 billion was spent on digital advertising in federal, state, and local elections during the 2019-2020 cycle. *See* Howard Homonoff, *2020 Political Ad Spending Exploded: Did It Work?*, FORBES (Dec. 8, 2020), https://tinyurl.com/444rua6c. For the 2023-2024 election cycle, spending for political ads on digital platforms and connected TV—services like Hulu and Netflix—is projected to soar to over $2.6 billion. AdImpact, *Political Projections Report 2023-2024* (June 30, 2024) https://tinyurl.com/2n6536yb.

[36] Proposed Rule § 14-04(a)(v).

[37] *See, e.g.* Wis. Admin. Code Eth. § 1.96(5)(h).

[38] Cal. Gov't Code §§ 84501(a)(2)(G), 84504.3(b).

why it was not possible to include a complete disclaimer on the advertisement.[39]

In the final rule, we recommend the Board include a similar provision requiring sponsors of online communications to demonstrate, upon request by the Board, that it was not possible to include the full disclaimer. This would safeguard against exploitation of the modified disclaimer and ensure New York City voters have immediate access to complete information about the sources of online political communications on the face of those ads whenever technologically possible.

B. The modified disclaimer requirement for online communications should specify that viewers of the communication must be able to access the disclaimer information in one step.

For an online communication for which including a "clearly readable" disclaimer is "impracticable," the Proposed Rule provides that the disclaimer requirements may be met if the communication "contains a link to a location controlled by the independent spender" and the "full text of the required notice" appears at the "redirected location."[40] To ensure New York City voters who view online communications about candidates can easily access all information required by law, we recommend that the Board provide guidelines to clarify the modified disclaimer requirement in the final rule.

In particular, the Board's final rule should make clear that clicking on a link in an online communication must immediately direct the recipients of the communication to a page displaying the required disclaimer information without requiring the recipient to navigate through or view any extraneous material beyond the "full text of the notice." This addition would ensure New York City voters have one-step access to clear and complete disclaimer information when they view online communications supporting or opposing city candidates. Other jurisdictions, including Washington,[41] New York state,[42] and Wisconsin,[43] have promulgated

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[39] Cal. Code Regs. tit. 2, § 18450.1(b); *see also* Cal. Fair Political Practices Comm'n, Advice Letter No. I-17-017 (Mar. 1, 2017), at 4 ("Where character limit constraints render it impracticable to include the full disclosure information specified, the committee may provide abbreviated advertisement disclosure on the social media page . . . . If abbreviated disclaimers are used a committee must be able to show why it was not possible to include the full disclaimer.").

[40] Proposed Rule § 14-04(a)(v).

[41] Wash. Admin. Code § 390-18-030(3) (specifying that "small online advertising" with limited character space may include, in lieu of full disclaimer, "automatic displays" with the required disclaimer information if such displays are "clear and conspicuous, unavoidable, immediately visible, remain visible for at least four seconds, and display a color contrast as to be legible.").

[42] N.Y. Comp. Codes R. & Regs. tit. 9, § 6200.10(f)(2)(ii) (requiring an "adapted attribution" included on a "paid internet or digital advertisement" to "allow a recipient of the communication to locate the full attribution by navigating no more than one step away from the adapted attribution and without receiving or viewing any additional material other than the full attribution required by this [rule].").

[43] Wis. Admin. Code Eth. § 1.96(5)(h) (permitting "small online ads or similar electronic communications" on which disclaimers cannot be "conveniently printed" to include a link that "direct[s] the recipient of the small online ad or similar electronic communication to the attribution

similar regulations for modified disclaimers on certain digital ads, which allow the public to readily obtain key information about the sources of online advertising in elections.

Recommended text for final rule:

§ 14-04. Identification of communications.

(a) Independent spender identification.

…

(v) Impracticability.

(A) If it is impracticable to display a clearly readable notice containing all of the information required by this section in an online communication, the communication may contain the words "Paid for by" followed by the name of the independent spender, provided that the communication contains a link to a location controlled by the independent spender with the full text of the required notice appearing at the redirected location.

(B) The link to a redirected location in an online communication required by subparagraph (A) of this paragraph shall allow the recipient of the communication to immediately view the full text of the required notice with minimal effort and without receiving or viewing any additional material other than the required information.

(C) An independent spender that claims it is impracticable to include the full text of the required notice must be able to establish, at the Board's request, that this exemption has been met.

Conclusion

We respectfully urge the Board to adopt Proposed Rule to clarify and strengthen the coordination and disclaimer provisions of the Board's rules and to incorporate our recommendations. We would be happy to answer questions or

in a manner that is readable, legible, and readily accessible, with minimal effort and without viewing extraneous material.").

provide additional information to assist the Board in promulgating the final rule. Thank you for your time and consideration.

Respectfully submitted,

/s/
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