

William G. Voelp, Chairman
Justin Williams, Vice Chairman
Severn E. S. Miller
Michael G. Summers
T. Sky Woodward



Linda H. Lamone
Administrator

Nikki Charlson
Deputy Administrator

Memorandum

To: Members of the State Board of Elections
From: Melissia Dorsey and Nikki Charlson
Date: April 21, 2023
Re: Proposed Regulations for May 4 Meeting

At the May 4 meeting, we will present proposed changes to existing regulations. The accompanying document includes the proposed changes and explanations for each one.

We are proposing changes to the following regulations:

1. 33.02.03.01 - .05 – Meetings and Training – Judges’ Manuals and Training
2. 33.11.01.04 – Absentee Ballots – Definitions; General Provisions – Ballot Drop Boxes
3. 33.12.02.01 – Recounts – Initiation of Recounts – Petition
4. 33.16.02.01– Provisional Voting – Provisional Voting Documents and Supplies
5. 33.17.04.06 – Early Voting – Early Voting Center Equipment and Materials
6. 33.17.05.03 – Early Voting – Election Judges – Training of Election Judges
7. 33.17.07.01 – Early Voting – Non-Voting Hours Procedures – Voting Equipment Supplies
8. 33.19.01.01 – Same Day Registration and Address Changes – Definitions; General Provisions
9. 33.19.02.01 – Same Day Registration and Address Changes – Public Notice
10. 33.21.03.02 and .03 – Special Elections by Mail – Issuance and Return

If you have any questions before the meeting, please do not hesitate to ask. Otherwise, we are happy to answer your questions at the meeting.

Title 33 STATE BOARD OF ELECTIONS
Subtitle 02 MEETINGS AND TRAINING
Chapter 03 Judges' Manuals and Training

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), and 10-206, Annotated Code of Maryland

.01 Definitions.

A. *In this chapter, the following terms have the meanings indicated.*

B. *Terms Defined*

- (1) *"Training program" means the required course of instruction prepared by the election director to train election judges for each election.*
- (2) *Training Class.*
 - (a) *"Training class" is defined as a class prepared and conducted by the election director to train election judges.*
 - (b) *"Training class" shall:*
 - (i) *Be long enough to cover all of the requirements of the State Administrator's training curriculum through an in person, virtual instruction or online delivery method of instruction as determined appropriate by the election director; and*
 - (ii) *Include a hands-on practice session with any technology that will be used by the election judge in a polling place.*

[.01] .02 - [.02] .03 (text unchanged)

[.03] .04 Use of Training Materials.

Each local board shall use the manual, instruction sheets, and curriculum, *or electronic copies thereof*, approved by the State Administrator:

A.- B. (text unchanged).

[.04 Judges' Training Sessions.

A. Election Director to Conduct.

- (1) Each election director shall prepare and conduct training classes for election judges:
 - (a) Before the primary and general elections in a presidential election year;
 - (b) Before the primary election in a gubernatorial election year; and
 - (c) Before the general election in a gubernatorial election year or before a special primary or general election if the State Administrator considers it necessary.
- (2) The training class shall be long enough to cover all of the requirements of the State Administrator's training curriculum and shall include hands-on practice with any technology that will be used by election judges in a polling place.
- (3) The election director may hold as many training sessions as needed to accommodate all of the election judges.

B. Attendance Mandatory.

- (1) Each election judge shall attend one training class.
- (2) An election director may require an election judge to attend additional classes.
- (3) If an election judge serves on election day, the election judge is entitled to compensation of at least \$20 for each required class the election judge attends.
- (4) Unless appointed under emergency circumstances, an individual may not serve as an election judge unless the individual has attended the required training class.]

.05 Judges' Training Program.

A. Delivery of Training Program.

- (1) Each election director shall prepare a training program for election judges.
- (2) The training program shall include training classes:
 - (a) Before the primary and general elections in a presidential election year;
 - (b) Before the primary election in a gubernatorial election year; and
 - (c) If the State Administrator considers it necessary:
 - (i) Before the general election in a gubernatorial election year; and
 - (ii) Before a special primary or general election.
- (3) The election director shall hold as many training classes and hands-on practice sessions as needed to accommodate all of the election judges.

B. Requirements for Training Program Completion.

- (1) Each election judge shall complete the required training program.
- (2) An election director may require an election judge to attend additional classes.
- (3) Unless appointed under emergency circumstances, an individual may not serve as an election judge unless the individual completes the required training program.

C. Requirements for Training Compensation.

- (1) A local board shall pay \$50 to an election judge who completes the training program.
- (2) If the training program includes a training class that is offered through virtual instruction or online delivery and a hands-on practice session, the election judge must complete the hands-on practice session to be entitled to compensation.
- (3) An election judge who is required to complete a training program prior to both a primary and general election is entitled to compensation for each training program.

Explanation: The new text allows local boards of elections to use electronic copies of the Election Judges Manual, as well as online or virtual Election Judge training. The proposed change to the election judge compensation is to conform the regulations to [HB1200](#) (2023), which increased the minimum compensation for election judge training and provided that local boards must pay election judges for all training classes that they attend.

**Subtitle 11 ABSENTEE BALLOTS
Chapter 01 Definitions; General Provisions**

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 2-304, 2-305, 3-202.1, 9-303, 9-305, 9-306, 11-301, 11-302, and 11-304, Annotated Code of Maryland

.04 Ballot Drop Boxes.

A. - C. (text unchanged)

D. Electioneering Boundary.

- (1) The local board shall post signs delineating an area around each ballot box where a person shall not electioneer. A local board is not required to delineate this area with a physical line on the ground.
- (2) Except as provided in §D(2)(a) of this regulation, the line shall be located as near as practicable to 50 feet from the ballot box after consideration of the placement of the ballot box and the effect of placement on public safety and the flow of pedestrian and vehicular traffic.
 - (a) If the ballot box is placed within the electioneering boundary of a polling place, the line for the ballot box shall be the electioneering boundary of the polling place.
- (3) The signs shall contain the words "No Electioneering Beyond this Point."

E. Electioneering Activities.

(1) *The following activities are not permitted within the electioneering boundary set forth in §D of this regulation:*

- (a) *Electioneering by individuals; or*
- (b) *Observing or recording voter activities by a group of individuals.*

(2) *An individual observing a ballot box or recording activities within the electioneering boundary set forth in §D of this regulation is not electioneering if the person is not communicating with, questioning, or otherwise interfering with voters dropping off materials at a ballot box.*

F. Other Activities.

(1) *Except as provided in §F(2) of this regulation, an individual shall not possess, carry, or brandish a firearm within the electioneering boundary set forth in §D of this regulation.*

(2) *A law enforcement officer or security guard who is on duty or traveling to or from duty may enter the electioneering boundary set forth in §D of this regulation to drop off materials at a ballot box.*

(3) *A person may observe an election official remove materials from the ballot box as long as the person does not interfere with the process.*

Explanation: The new text defines a “no electioneering” zone for ballot boxes and permissive and impermissible activities around ballot boxes. The proposed permissive and impermissible activities were distributed for the 2022 elections.

Subtitle 12 RECOUNTS

Chapter 02 Initiation of Recounts

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), and 12-106(a), Annotated Code of Maryland

.01 Petition.

A. (text unchanged)

B. Contents. The petition shall specify:

- (1) (text unchanged)
- (2) **[Which of the]** The recount method**[s]** authorized by this subtitle the petitioner selects to use;

and

- (3) (text unchanged)

C. - E. (text unchanged)

Explanation: There are currently four recount options¹, and this proposed change limits the number of recount options a candidate may select to one option. Each recount option verifies the different tabulation points, but the most complete - and most expensive - recount option is the manual recount of paper ballots.

This proposed change was identified in the 2022 Primary Election, when at least one candidate initially requested all four recount options. If the candidate proceeded with all four recount options, the local board

¹ The four recount options are: (1) A manual tabulation of printed reports from early voting, election day, and the mail-in and provisional ballot canvasses. Printed reports from precinct tabulators and high speed scanners (if available) are examined and manually tabulated (2) A re-scan of voted paper ballots involved in the recount using precinct tabulators or high speed scanner (if available) to reproduce early voting, precinct or mail-in or provisional ballot canvass totals; (3) A manual recount of voted paper ballots involved in the recount; and (4) A manual recount of ballot images of voted ballots involved in the recount.

would have to prepare for and conduct all four recount options before certifying the local results. This would have delayed the State certification of results.

Subtitle 16 PROVISIONAL VOTING
Chapter 02 Provisional Voting Documents and Supplies

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 3-305(e), 3-306, 9-402, 9-403, 9-404, 9-406, and 11-303(c) and (e), Annotated Code of Maryland

.01 Provisional Ballot Application.

A. Provisional Ballot Application. Except as required in Regulation[s] .02 [and .03] of this chapter, the provisional ballot application shall include:

(1) - (2) (text unchanged)

B - C. (text unchanged)

Explanation: At the February 2023 meeting, we presented the repeal of Regulation .03 (Same Day Registration and Address Change Documents) in this chapter but neglected to present the repeal of a reference to this regulation. This proposed change repeals the reference to the repealed regulation.

Subtitle 17 EARLY VOTING
Chapter 04 Early Voting Center Equipment and Materials

Authority: Election Law Article, §§2-102(b)(4) and 10-301.1(h), Annotated Code of Maryland

.06 Information for Voters at Early Voting Centers.

A. Except as provided in §B of this regulation, a local board shall post at each early voting center:

(1) (text unchanged)

(2) The number of voters who have voted as specified in the election judges' manual [or supplement];

(3) - (4) (text unchanged)

B. (text unchanged)

Explanation: The new text removes the option to provide an early voting supplement. Currently, all necessary information is included in the election judges manual, making a supplement unnecessary.

Subtitle 17 EARLY VOTING
Chapter 05 Election Judges

Authority: Election Law Article, §§2-102(b)(4), 9-102(i), 10-206(g), 10-301.1(h), and 12-106(a), Annotated Code of Maryland

.03 Training of Election Judges.

A. Required Materials. The State Administrator shall develop and issue for the local boards:

(1) A judges' manual [or supplement for early voting] *that includes all information necessary to conduct early voting; and*

(2) Instruction sheets summarizing certain early voting procedures; and

(3) A curriculum for training election judges appointed for early voting].

B. Development of Manual. The State Administrator shall comply with the process established in COMAR 33.02.03 for developing the judges' manual [or supplement for early voting].

C. Use of Training Materials. Each local board shall use the manual [or supplement,] and instruction sheets, [and curriculum,] or *electronic copies thereof*, approved by the State Administrator for early voting

[D. Judges' Training Sessions. Each election director shall:

(1) Prepare and conduct training classes for election judges in accordance with COMAR 33.02.03.04; and

(2) Conduct separate training classes for election judges serving during early voting.

E. Attendance Mandatory.

(1) Each election judge serving during early voting shall attend one training class.

(2) An election director may require an election judge to attend additional classes.

(3) If an election judge serves when the election judge was assigned, the election judge is entitled to compensation of at least \$20 for each required class the election judge attends.

(4) Unless appointed under emergency circumstances, an individual may not serve as election judge unless the individual has attended the required class.]

D. Judges Training Program.

(1) *For an election judge who serves during early voting, each election director shall conduct training in accordance with COMAR 33.02.03.04 and include instruction necessary to conduct early voting.*

(2) *Requirements for Training Program Completion.*

(a) *Each election judge shall complete the required training program.*

(b) *An election director may require an election judge to attend additional classes.*

(c) *Unless appointed under emergency circumstances, an individual may not serve as an election judge unless the individual completes the required training program.*

(3) *Requirements for Training Compensation.*

(a) *A local board shall pay \$50 to an election judge who completes the training program.*

(i) *Attendance at additional classes to train on the conduct of early voting does not entitle an election judge to further compensation.*

(ii) *If the training program includes a training class that is offered through virtual instruction or online delivery and a hands-on practice session, the election judge must complete the hands-on practice session to be entitled to compensation.*

(b) *An election judge who is required to complete a training program prior to both a primary and general election is entitled to compensation for each training program.*

Explanation: The proposed text removes the reference to the early voting supplement and allows local boards to use electronic copies of the election judges' manual to train election judges for early voting, similar to election day provisions. The proposed change to the election judge compensation is to conform the regulations to [HB1200](#) (2023), which increased the minimum compensation for election judge training and provided that local boards must pay election judges for all training classes that they attend.

Subtitle 17 EARLY VOTING

Chapter 07 Non-Voting Hours Procedures

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 10-301.1, and 11-301, Annotated Code of Maryland

.01 Voting Equipment Supplies.

At the end of each night of early voting, the local board shall ensure that:

- A. The election judges have closed all equipment in accordance with the procedures in the election judges' manual [or supplement];
- B. - C. (text unchanged)
- D. Ballot and other reconciliation procedures specified in the election judges' manual [or supplement] are performed; and
- E. (text unchanged)

Explanation: The new text removes the option to provide an early voting supplement polling place, since the supplement will no longer be produced.

Subtitle 19 SAME DAY REGISTRATION AND ADDRESS CHANGES

Chapter 01 Definitions; General Provisions

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 3-305(e), and 3-306(a), (d), and (e), Annotated Code of Maryland

.01 Applicability to Elections.

- A. – B. (text unchanged)
- C. For special primary and general elections[,]:

(1) Same day registration is available on election day; *and*

(2) *Same day registration and address change is available during early voting if the special election is conducted by mail under Election Law Article, Title 9, Subtitle 5 of the Annotated Code of Maryland.*

Explanation: If a special election is conducted by mail, there must be early voting. See Election Law Article, §9-503(c)(4). The proposed changes require that same day registration and same day address changes be offered during early voting for special elections conducted by mail.

At the February 2023 meeting, we proposed changes to this regulation, and the State Board approved them for publication. During the Department of Legislative Services' review of the proposed changes, they noted a conflict between the changes approved at the February meeting and COMAR 33.17.01.02B, which states that early voting is not available for special elections unless the special election is conducted by mail. As a result, we withdrew the proposed changes to this regulation and are re-proposing them to resolve the conflict with COMAR 33.17.01.02B. These proposed changes clarify that if the special election is conducted by mail, same day registration and address changes are available during the early voting period.

Subtitle 19 SAME DAY REGISTRATION AND ADDRESS CHANGES

Chapter 02 Public Notice

Authority: Election Law Article, §§2-102(b)(4), 2-202(b), 3-305(d) and (e), and 3-306(d) and (e), Annotated Code of Maryland

.01 Minimum Requirements.

- A. State Board. After the close of registration for each election, but prior to election day, the State Administrator shall [send a pre-election mailing to each pre-qualified voter, which shall either:
 - (1) Include the correct polling place for the pre-qualified voter's address; or

(2) Instruct the pre-qualified voter how to find the individual's correct polling place.] *take appropriate measures to notify each pre-qualified voter how to find the individual's correct polling place. When feasible, the State Administrator shall send a pre-election mailing to each pre-qualified voter, which shall include the correct polling place for the pre-qualified voter's address.*

B. (text unchanged)

Explanation: There typically is not enough time before a special primary or general election to procure a vendor, obtain the data for this mailing, and produce and send the mailing. The proposed changes provide flexibility on how notice is provided. For a regularly scheduled primary and general election, the notice would be provided by mail, but we would have flexibility on how to provide notice of a special primary or general election.

Subtitle 21 SPECIAL ELECTIONS BY MAIL

Chapter 03 Issuance and Return

Authority: Election Law Article, §§2-102, 9-501, 9-502, and 9-504—9-506, Annotated Code of Maryland; [42 U.S.C. §1973ff-1] 52 U.S.C. § 20302

.02 Envelopes.

A. - C. (text unchanged)

D. Postage Paid. *If a vote-by-mail ballot is sent by mail, [The] the return envelope shall include prepaid postage.*

E. (text unchanged)

Explanation: Chapter 20 of Title 42 of the U.S. Code has been transferred to Title 52 of the U.S. Code. The proposed change in the authority line updates the reference.

At the February 2023 meeting, we proposed changes to this regulation, and the State Board approved them for publication. During the Department of Legislative Services' review of the proposed changes, they noted that current law requires free postage to return ballots delivered to the voter by mail. (The free postage does not extend to voters who receive their ballots electronically.) This proposed change incorporates that distinction for a special election conducted by mail.

William G. Voelp, Chairman
Justin Williams, Vice Chairman
Severn E. S. Miller
Michael G. Summers
T. Sky Woodward



Linda H. Lamone
Administrator

Nikki Charlson
Deputy Administrator

Memorandum

To: State Board Members
From: Jared DeMarinis
Date: April 20, 2023
Re: Proposed Changes to Regulations

At the next board meeting, I will propose changes to the following COMAR provision¹ (see enclosure):

- 33.13 -Campaign Financing
 - .10 (Prohibitions)
 - .05 (*Contribution Conversion*)
 - .13 (Administrative Accounts)
 - .06 (Permissible Uses)

Campaign Financing (Subtitle 13)

.10 Prohibitions

.05 Contribution Conversion

The proposed regulation codifies existing State Board policy on the reporting on contributions. The proposed regulation prevents any circumventions of the contribution limit and surplus funds requirements for pro-rata return of contributions. Additionally, the Office of the State Prosecutor is in support of the codification.

.13 Administrative Accounts

.06 Permissible Uses

The proposed regulation allows for administrative account funds to be used for fundraising activities exclusively for the administrative account. Currently, the regulations do not allow for such a type of disbursement of administrative funds. As such, a central committee or legislative party caucus committee would have to make expenditures from the electoral account for fundraising activities into the administrative account. Expenditures from the electoral account must be made to promote or assist in the promotion of a candidate, political party or question. Therefore, it is prohibited for the use of electoral funds in this manner. The proposed regulation corrects this situation.

Attachment: Proposed Regulations

¹ Italicized text is new section or language.

**Title 33 State Board of Elections
Subtitle 13 Campaign Financing
Chapter 10 Prohibitions**

Authority: Election Law Article, §§1-101(o), 1-101(aa), 2-102(b)(4), 13-218, 13-220.1, 13-221, 13-225—13-237, 13-239, 13-245, 13-306, 13-307, and 13-309.1 and Title 13, Subtitle 3, Annotated Code of Maryland

.05 Contribution Conversion

Thirty days after the filing of a campaign finance report for an applicable transaction period, the campaign finance report may not be amended in a way that alters a reported contribution in that applicable transaction period into a loan.

**Title 33 State Board of Elections
Subtitle 13 Campaign Financing
Chapter 13 Administrative Accounts**

Authority: Election Law Article, §§ 2-102(b)(4) and 13-220.1, Annotated Code of Maryland

.06 Permissible Uses

A. [text unchanged]

B. Permissible Activities. The following activities are permissible non-campaign related activities and may be paid with administrative funds:

(1) – (9) [text unchanged]

(10) Bank charges, accounting fees, tax preparation fees, or costs associated with the filing of campaign finance reports; [and]

(11) Legal fees or similar professional or service fees[.]; *and*

(12) *Fundraising activities for soliciting donations to the administrative account only.*

STATE BOARD OF ELECTIONS

P.O. BOX 6486, ANNAPOLIS, MD 21401-0486 PHONE (410) 269-2840

William G. Voelp, Chairman
Justin Williams, Vice Chairman
Severn E. S. Miller
Michael G. Summers
T. Sky Woodward



Linda H. Lamone
Administrator

Nikki Charlson
Deputy Administrator

Memorandum

To: State Board Members
From: Jared DeMarinis
Date: April 20, 2023
Re: Final Adoption of Regulations

At the next board meeting, I will present for final adoption proposed changes to the following COMAR provision¹ (see enclosure):

- 33.13 – Campaign Financing
 - .02 (Campaign Finance Report)
 - .03 (*Final Report*)
 - .10 (Prohibitions)
 - .01 (Definitions)
 - .04 (Coordinated Expenditures)
 - .20 (Contributions by Employee Membership and Membership Entities)
 - .03 (*Recurring Contributions*)
 - .22 (Legal Expenses)
 - .01 (Scope)
 - .02 ([Establishment])
 - .03 (Management)
 - .05 (Applicability of Contribution Limits)
 - .06 ([Permissible Uses])
 - .07 ([Prohibitions])
 - .23 (*Exploratory Committee*)
 - .01 (*Definitions*)
 - .02 (*Applicability*)
 - .03 (*Candidate Prohibition*)
 - .04 (*Scope*)
 - .05 (*Permissible Disbursements*)
 - .06 (*Prohibition*)
 - .07 (*Receipt of Funds*)
 - .08 (*Authority Line*)
 - .09 (*Bank Account*)

¹ Italicized text is new section or language.

- .10 (*Transfer Allowed*)
 - .11 (*Surplus Funds*)
- 33.18 – Violations
 - .01 (Civil Penalties)

The proposed changes to the regulations were adopted at the October 26, 2022 meeting. They were published in the March 10, 2023 edition of the *Maryland Register* (Vol. 50, Issue 5), and the public comment period closed on April 10, 2023.

One public comment was received. The public comment was from the Campaign Legal Center (CLC). The public comment was regarding the firewalls in the proposed regulation for 33.13.10.04C. The comment wanted to strengthen the proposed rule with more specific firewall requirements to prevent strategic campaign information from being passed between candidates, parties, and outside spenders. The current proposed regulation was the codification of the issuance of a declaratory ruling by the State Board regarding the use of a shared vendor between an independent expenditure entity and a candidate. The guidance has been in effect since 2017. Therefore, it is recommended to proceed with the adoption of the proposed regulation as drafted.

No other public comments were received about the other proposed regulations.

If you have any questions before the next meeting, please contact me. I will, of course, be available at the board meeting to answer any questions.

Attachment.

William G. Voelp, Chairman
Vacant, Vice Chairman
Severn E. S. Miller
Justin Williams
T. Sky Woodward



Linda H. Lamone
Administrator

Nikki Charlson
Deputy Administrator

Memorandum

To: State Board Members
From: Jared DeMarinis
Date: October 12, 2022
Re: Proposed Changes to Regulations

At the next board meeting, I will propose changes to the following COMAR provision¹ (see enclosure):

- 33.13 – Campaign Financing
 - .02 (Campaign Finance Report)
 - .03 (*Final Report*)
 - .10 (Prohibitions)
 - .01 (Definitions)
 - .04 (Coordinated Expenditures)
 - .20 (Contributions by Employee Membership and Membership Entities)
 - .03 (*Recurring Contributions*)
 - .22 (Legal Expenses)
 - .01 (Scope)
 - .02 ([Establishment])
 - .03 (Management)
 - .05 (Applicability of Contribution Limits)
 - .06 ([Permissible Uses])
 - .07 ([Prohibitions])
 - .23 (*Exploratory Committee*)
 - .01 (*Definitions*)
 - .02 (*Applicability*)
 - .03 (*Candidate Prohibition*)
 - .04 (*Scope*)
 - .05 (*Permissible Disbursements*)
 - .06 (*Prohibition*)
 - .07 (*Receipt of Funds*)
 - .08 (*Authority Line*)

¹ Italicized text is new section or language.

- .09 (*Bank Account*)
 - .10 (*Transfer Allowed*)
 - .11 (*Surplus Funds*)
- 33.18 – Violations
 - .01 (*Civil Penalties*)

Campaign Financing (Subtitle 13)

.02 Campaign Finance Report

.03 Final Report

The proposed regulation codifies existing practice that a political committee is officially closed upon receipt and State Board approval of a submitted final report.

.10 Prohibitions

.01 Definitions

The proposed regulations codify the definition of a firewall from an issued declaratory ruling.

.04 Coordinated Expenditures

The proposed regulations modify the existing regulation to conform with Election Law Article §13-249 by changing terms from an in-kind contribution to coordinated expenditure and substantial to non-incident for republication. Finally, it set the parameters regarding the use of the same vendor by a candidate and an independent expenditure entity supporting the candidate.

.20 Contributions by Employee Membership and Membership Entities

.03 Recurring Contributions

In 2022, the General Assembly passed House Bill 15 which requires political committees to seek authorization from donor for recurring contributions. Payroll deductions are governed by Election Law §13-241 and 242. This regulation clarifies the requirements for payroll deductions are solely governed by the provisions exclusively for payroll deductions.

.22 Legal Expenses

The 2022 Legislative Session of the General Assembly completely changed the payment of legal expenses relating to maintaining or contesting the results of elections. SB 101 repealed the provisions allowing for individuals to pay reasonable legal expenses without the payment counting towards a contribution limit. The regulations repeal outdated provisions.

.01 Scope

It is clarifying provision that the applicability of the regulation for contesting election results are for political committees.

.02 Establishment

The proposed regulation repeals outdated requirements.

.03 Management

The proposed regulation repeals unnecessary provisions. All expenses are reported on a campaign finance report.

.05 Applicability of Contribution Limits

The proposed regulation repeals outdated requirements. The proposed regulation codifies contributions received by a political committee towards the payment of a legal expense are subject to the contribution limit.

.06 Permissible Uses

The proposed regulation repeals outdated requirements.

.07 Prohibitions

The proposed regulation repeals outdated requirements.

.23 Exploratory Committee

These proposed regulations codify existing State Board policies regarding exploratory committees. The policies have been published in the Summary Guide since 2014. The policy is based upon past advice from the Office of the Attorney General.

.01 Definitions

The proposed regulation defines terms for a draft and exploratory committee.

.02 Applicability

The proposed regulation codifies who may establish a draft and exploratory committee.

.03 Candidate Prohibition

The proposed regulation codifies that a candidate may not establish an exploratory committee.

.04 Scope

The proposed regulation codifies the purpose of an exploratory committee.

.05 Permissible Disbursements

The proposed regulation codifies that an exploratory committee may make certain disbursements.

.06 Prohibition

The proposed regulation codifies that an exploratory committee may not pre-purchase services or items for use once the candidate establishes an authorized candidate campaign committee.

.07 Receipt of Funds

The proposed regulation codify that contribution limits are not applicable to draft or exploratory committees.

.08 Authority Line

The proposed regulation codifies that an exploratory and draft committee are subject to the authority line requirements.

.09 Bank Account

The proposed regulation codifies that an exploratory and draft committee need a designated bank account.

.10 Transfer Allowed

The proposed regulation codifies that an exploratory committee may make a transfer up to \$6,000 to a political committee.

.11 Surplus Funds

The proposed regulation codifies how an exploratory committee disposes of surplus funds.

Violations (Subtitle 18)

.01 Civil Penalties

In 2022, the General Assembly passed SB 15 (departmental legislation) which increased the civil penalties to a maximum of \$1,000 for certain violations. The proposed regulations increase the civil penalties commensurate with the increase in the statutory authority. Additionally, it codifies the civil penalties for new infractions under the enforcement authority of the State Board.

Attachment: Proposed Regulations



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

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