

Minnesota Campaign Finance and Public Disclosure Board

Explanation of proposed expedited rules governing complaints, staff reviews, summary proceedings, audits, and investigations, Minnesota Rules chapter 4525; Proposed repeal of Minnesota Rules parts 4525.0100, subparts 5 and 6; and 4525.0500, subpart 2. Revisor's ID Number RD4279

INTRODUCTION

The Campaign Finance and Public Disclosure Board is charged with the administration of Minnesota Statutes Chapter 10A and three provisions in Chapter 211B that have been brought under the Board's jurisdiction for state-level elections. The Board's four major programs are campaign finance registration and disclosure, public subsidy administration, lobbyist registration and disclosure, and economic interest disclosure by public officials.

The Board has the authority to initiate audits and investigations related to the requirements of Chapter 10A and the three provisions in Chapter 211B that are under the Board's jurisdiction. Until the past legislative session, Minnesota Statutes section 10A.02, subdivision 11, paragraph (a), required the Board to conduct a full investigation of every violation alleged in a complaint regardless of the amount or seriousness of the alleged violation. Under Chapter 10A, the Board is required to make findings and conclusions and to issue an order in every investigation.

Board meetings must be open to the public under the Open Meeting Law, Minnesota Statutes Chapter 13D unless otherwise provided by statute. In addition, under the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, all government data collected by the Board is public unless another statute makes the data not public. Pursuant to Minnesota Statutes section 10A.02, subdivision 11, paragraph (d), Board audits and investigations are confidential until the Board issues findings, conclusions, and orders or conciliation agreements.

In 2014, the legislature repealed the directive to the Board to investigate every complaint and gave the Board more flexibility to allocate its investigatory resources to match the seriousness of an alleged violation. The legislature also added additional requirements to the process used by the Board to investigate complaints. The legislature directed the Board to adopt rules governing its audit and investigation procedures using the expedited rulemaking process.

On April 22, 2014, the Board chair appointed a rules committee to draft the proposed rules. The committee met four times between April 28, 2014, and June 26, 2014. The committee also held a public hearing on the proposed rules on June 19, 2014. The Board approved the proposed rules at its July 8, 2014, meeting. The anticipated effective date for the proposed rules is December 1, 2014, and the rules would be effective for audits, investigations, and staff reviews and other summary proceedings initiated after that date.

ALTERNATIVE FORMAT

Upon request, this information can be made available in an alternative format, such as large print, braille, or audio. To make a request, contact Jodi Pope at the Campaign Finance and Public Disclosure Board, 190 Centennial Office Building, 658 Cedar Street, St. Paul, MN 55155-4114; (651) 539-1183 (telephone); (651) 539-1196 (fax); (800) 357-4114 (toll free fax); jodi.pope@state.mn.us. TTY users may call (800) 627-3529 and ask for (651) 539-1183.

STATUTORY AUTHORITY

The Board's general statutory authority to adopt rules is in Minnesota Statutes section 10A.02, subdivision 13. This source of statutory authority was adopted and effective before January 1, 1996. It has not been substantively revised by the legislature since then. Minnesota Statutes section 14.125 therefore does not apply.

The statutory authority to adopt these proposed rules under the expedited rulemaking process is in 2014 Minnesota Laws, chapter 309, section 6, paragraph (b) (to be codified at Minn. Stat. § 10A.02, subd. 10 (b)), which provides:

The board shall issue rules, using the expedited rulemaking process in section 14.389, setting forth procedures to be followed for all audits and investigations conducted by the board under this chapter and other provisions under the board's jurisdiction pursuant to subdivision 11. The rules regarding the board's investigative procedure shall set forth:

- (1) the process for the board initiating and overseeing an investigation;
- (2) when summary proceedings may be available;
- (3) dedication of staff resources in taking witness testimony and conducting discovery;
- (4) parties' rights and opportunities to be heard by the board; and
- (5) board hearings and disposition of complaints, audits, and investigations.

Under these statutes, the Board has the necessary statutory authority to adopt the proposed rules.

RULE-BY-RULE ANALYSIS

Part 4525.0100 defines the terms "complaint," "complainant," and "respondent;" repeals the definitions of the terms "party" and "person;" and amends the definition of "contested case."

The changes to part 4525.0100 are within the statutory directive given to the Board because all of the terms affected are integral to the audit and investigation process.

Although the term "parties" is used in the statutory rulemaking directive, this single term has been replaced in the proposed rules with new, more precise terms that specifically refer to each participant in the audit and investigation process. Further, the use of the term "party" in the rules sometimes created confusion because in the Board's regulated community, this term is more commonly understood to mean a political party rather than a party to an investigation. In addition, part of the definition of "party" was incorrect because the Minnesota Supreme Court has held that the complainant is not a party in a contested case under Chapter 10A. See *In re Complaint against the Sandy Pappas Volunteer Comm.*, 488 N.W.2d 795, 798-799 (Minn. 1992) (complainant lacked standing to appeal Board dismissal of complaint).

Similarly, the term "person" has been replaced by more precise terms that specifically refer to each participant in the audit and investigation process. In addition, the term "person" is defined in Minnesota Statutes section 10A.01, subdivision 26a, and the statutory definition is different from the rule definition. This contradiction provides further justification for repealing the rule definition of "person."

Finally, clarifying that Minnesota Statutes Chapter 14 applies to contested cases arising out of audits and investigations brings the rules into conformity with an Office of Administrative Hearings decision on this matter issued in 2005. See *In re Petition for Review of the Campaign Finance*

and Public Disclosure Board Notice and Order for Hearing regarding the Matter of 21st Century Democrats (National Association) and 21st Century Democrats (Minnesota Committee), OAH Docket No. 11-4450-16542-2 (June 30, 2005) (holding that “contested case” in Minn. R. 4525.0100, subpart 3, meant case held under Minnesota Statutes Chapter 14 before Office of Administrative Hearings). In addition, although the Board can investigate a public official’s failure to file an economic interest statement, the Board can no longer suspend the official if the investigation were to show that the official had failed to file. See 2014 Minn. Laws ch. 309, § 25 (repealing Board’s authority to suspend public official who has not filed economic interest statement).

Part 4525.0150 contains general provisions that apply to all audits and investigations, including staff reviews and other summary proceedings. It specifies where the Board must send notices and the circumstances under which the Board is permitted to continue a matter to its next meeting. The part also clarifies what rights are included when a statute or rule gives someone the opportunity to be heard by the Board.

Reading the provisions in the new legislation that grant the opportunity to be heard and reviewing the statements made when the legislature adopted these provisions shows that the legislature intended for this phrase to mean a chance to speak directly to the Board rather than the right to conduct an evidentiary hearing before the Board. Enacting this legislative intent into rule ensures that it is enforceable and makes complainants and respondents aware of what the opportunity to be heard entails.

Part 4525.0200 concerns complaints filed with the Board. The minor amendments to this part improve its clarity by specifying matters implicit in statute or rule. For example, in 2013, the Board was granted jurisdiction over three provisions in Minnesota Statutes Chapter 211B for state-level elections. The Board’s jurisdiction includes the right to accept and investigate complaints alleging violations of those three provisions. Adding a reference to these other statutory provisions to subpart 1 ensures that the rule lists every provision under the Board’s jurisdiction. Similarly, the amendments to subpart 4 clarify that someone taking advantage of the opportunity to be heard by making an argument to the Board does not need to argue under oath because arguments are not evidence.

Part 4525.0210 concerns the determinations that the Board must make before undertaking the formal investigation of a complaint. Most of the rule provisions are derived directly from the new language added to Minnesota Statutes section 10A.02, subdivision 11, paragraph (a), in 2014. The new statute provides a definition of prima facie determination, that the Board must determine whether a complaint states a prima facie violation before proceeding, that the Board must determine whether probable cause exists to believe that a violation warranting a formal investigation has occurred, the time frames for making the prima facie and probable cause determinations, who must make these determinations, that the determinations must be in writing, and when a party has an opportunity to be heard.

In addition to implementing the new statutory requirements, part 4525.0210 also includes several provisions intended to clarify and protect a respondent’s due process rights. The part specifies when notice must be sent to a respondent and what information must be included in the notice. The rule also clarifies what information the Board can consider when making the prima facie and probable cause decisions. Finally, the rule specifies what the Board must do if it finds that a violation has occurred but does not order a formal investigation.

Part 4525.0220 implements the legislative directive to specify when summary proceedings are available to resolve a matter. The part allows a respondent to propose a summary proceeding at

any time. Because the Board anticipates that each request for a summary proceeding will be unique, the part does not attempt to list the types of summary proceedings available. Instead, the part creates flexibility by giving the Board and the respondent the opportunity to propose actions that fit the matter and that are agreeable to both sides.

Part 4525.0320 describes one type of summary proceeding, the staff review. This part states that a staff review is an informal process involving the respondent and the executive director that can be used to determine whether a violation has occurred and, if so, how best to resolve the violation. The Board can direct a staff review into a matter. The executive director also must initiate a staff review when information submitted on a report filed with the Board suggests that there has been a violation of the campaign finance laws. Part 4525.0320 describes two methods for resolving staff reviews: by amendment and by agreement.

In general, the Minnesota Government Data Practices Act makes all matters before the Board public unless another statute makes a matter not public. Minn. Stat. § 13.03, subd. 1. Minnesota Statutes section 10A.02, subdivision 11, paragraph (d), provides that “[a] hearing before the Board or action of the Board concerning a complaint or investigation other than findings, conclusions, and orders or a conciliation agreement is confidential.” Until the Board makes public findings in an investigation or enters a conciliation agreement, information about the investigation cannot be disclosed except as required to carry out the investigation or to take action in the matter. *Id.* A conciliation agreement is a special type of agreement that must be used to resolve excess spending and excess contribution violations. Minn. Stat. § 10A.28, subd. 3.

Because a staff review is not a formal investigation, it does not have the statutory confidentiality protections reserved for audits and investigations. Board discussions related to staff reviews will be held in open meetings and government data collected in staff reviews will be public data unless otherwise classified by the Data Practices Act.

Part 4525.0330 explains how the Board will handle matters under staff review that are resolved by agreement. This part specifies that no agreement is final until approved by the Board. The part also contains several provisions that protect a respondent’s due process rights in a matter under staff review such as notice provisions, an opportunity to be heard by the Board, and the right to a continuance if the Board does not approve the agreement. The rule also protects respondents by specifying that any admissions made or remedial steps taken cannot be used as evidence against the respondent if the Board rejects the agreement.

Part 4525.0330 clarifies that a matter under staff review that is resolved by agreement is public. Under the proposed rules, a matter under staff review would not be an investigation and would not result in findings and conclusions and the issuance of an order. In addition, an agreement resolving a matter under staff review would not be a conciliation agreement. There is no other provision in Minnesota Statutes that would make a matter under staff review not public. Consequently, matters under staff review and the agreements resolving them must be public.

Part 4525.0340 explains how the Board will resolve matters under staff review that are not resolved by agreement. Because the Board has the authority to investigate any matter on its own initiative, there also could be situations where, absent a staff review or complaint, the Board would order a formal investigation on its own or be asked to do so by the executive director. Part 4525.0340 specifies how the Board must handle these decisions. The part again contains provisions to protect the respondent’s due process rights, such as notice provisions, an opportunity to be heard by the Board, a list of the type of factors that the Board must consider when making its determination, and a description of the information that must be in the Board’s determination order.

To comply with the data privacy provisions in Minnesota Statutes section 10A.02, subdivision 11, paragraph (d), the part specifies that if the matter submitted to the Board includes a recommendation for a formal investigation, the matter must be considered in a meeting closed to the public.

Part 4525.0500 contains current and new rule provisions that apply generally to all audits and investigations. Subpart 2 relating to the conduct of investigations is being repealed because it has been superseded by the requirements in Minnesota Statutes section 10A.02, subdivision 11, paragraph (a), and the proposed rule parts. A reporting requirement is being added to subpart 5 to ensure that the Board is actively involved in overseeing investigations and audits.

Subpart 6 concerning subpoenas fulfills the legislative directive to promulgate rules governing the use of staff resources in taking witness testimony and conducting discovery. Subpart 7 specifies that respondents have the right to submit material to the Board in any audit, investigation or staff review or other summary proceeding.

Part 4525.0550 concerns formal audits conducted by the Board. The rule clarifies that a Board audit does not imply that the respondent has violated the campaign finance laws. The rule specifies a respondent's due process rights in an audit, including the right to respond to any findings in the audit report and an opportunity to be heard. The provisions in subpart 3 are taken from Minnesota Statutes section 10A.02, subpart 10, and section 10A.09, subpart 10.

CONCLUSION

Based on the foregoing, the proposed rules are within the statutory authority granted to the Board and are both needed and reasonable.

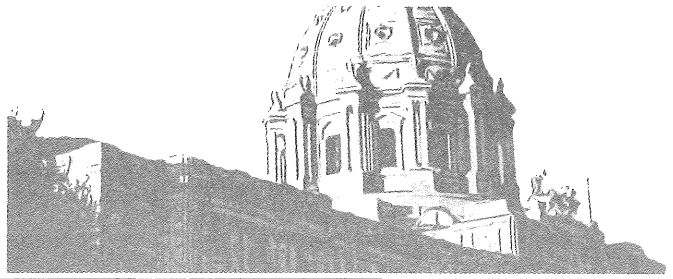
July 8, 2014



Gary Goldsmith
Executive Director

Minnesota

***Campaign Finance and
Public Disclosure Board***



July 21, 2014

Legislative Reference Library
645 State Office Building
100 Constitution Avenue
St. Paul, Minnesota 55155

Re: In The Matter of the Proposed Expedited Rules of the Campaign Finance and Public Disclosure Board Governing Complaints, Staff Reviews, Summary Proceedings, Audits, and Investigations; Revisor's ID Number RD4279

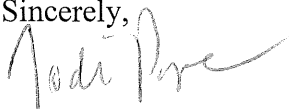
Dear Librarian:

The Minnesota Campaign Finance and Public Disclosure Board intends to adopt expedited rules governing complaints, staff reviews, summary proceedings, audits, and investigations. The Board plan to publish a Notice of Intent to Adopt Expedited Rules without a Public Hearing in the July 28, 2014, State Register.

Although a Statement of Need and Reasonableness is not required for expedited rules, the Board has prepared an explanation of the proposed expedited rules. In the interests of public access, the Board is sending you these copies of the explanation of the proposed rules. The Board also sent the Library an electronic copy of the explanation.

If you have questions, please contact me at 651-53911183.

Sincerely,



Jodi Pope
Legal/Management Analyst

Enclosure: Statement of Need and Reasonableness