State of Minnesota

Campaign Finance & Public Disclosure Board

Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

RE: Independence of expenditures when a consultant performs services for both a candidate and a political entity intending to make independent expenditures for the same candidate.

ADVISORY OPINION 400

SUMMARY

A consultant providing political services to a candidate may also provide political services to a political committee or fund or a party unit making independent expenditures affecting that same candidate if sufficient policies and procedures are in place to isolate the work being done for the candidate from that being done for the organization making independent expenditures.

FACTS

As the representative of a company that provides campaign consulting and other services to candidates and political organizations in Minnesota ("the Consultant"), you ask the Campaign Finance and Public Disclosure Board, ("the Board") for an advisory opinion based on the following hypothetical facts conveyed in your request and further clarified in communication with Board staff:

1. The Consultant is a political consulting company that provides services to candidates and to political committees, political funds, and party units as defined in Minnesota Statutes Chapter 10A. The latter three types of organizations are hereinafter referred to collectively as "political organizations".

2. During an election year, the Consultant expects to provide services to candidates related to the candidates' elections and also to political organizations related to independent expenditures to influence the election of those same candidates.

3. The Consultant, the candidates, and the political organizations want to be sure that the Consultant's provision of services to both a candidate and a political organization making expenditures to influence that candidate's election will not prevent the political organization's expenditures from being independent expenditures under Minnesota Statutes, Section 10A.01, subd. 18.

4. For the purpose of this advisory opinion the term “candidate” means a candidate as defined in Minnesota Statutes Chapter 10A and includes the candidate’s principal campaign committee.

Introduction

You state that you are aware of the Board’s opinion issued in Advisory Opinion 338 and seek to further clarify that opinion.

In Advisory Opinion 338, the Board indicated that a political organization may, under certain circumstances, make independent expenditures in support of a candidate even if one of the political organization’s consultants is also a political consultant to the candidate who would benefit from the expenditures.

The Board stated that in order to maintain the independence of the political organization’s expenditures the consultant must maintain an environment totally isolating the work for the candidate from the work on the independent expenditures.

You pose two scenarios and ask whether the conditions of each are sufficient to maintain the independence of an expenditure made by a political organization affecting a candidate to whom the Consultant is also providing services.

Scenario One

Would the independence of the political organization’s expenditures be maintained if (1) the Consultant is required to sign a confidentiality agreement with the candidate ensuring that work done for the candidate is not to be coordinated and/or communicated with any political organization and (2) the Consultant is required to sign a confidentiality agreement with the political organization ensuring that work done for the political organization is not to be coordinated and/or communicated with any candidate?

Opinion

An independent expenditure is:

> “an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent.”

The distinction of independent expenditures is that they may be made by political organizations without limit as to their total cost and they do not constitute contributions to the affected candidates. Thus, they do not apply to a candidate’s spending limits. For those reasons, it is necessary to ensure that such expenditures are truly independent from the affected candidates. Minnesota Statutes, Section 10A.01, subd. 18, quoted above, states the broad criteria for independence that an expenditure must meet to be considered an independent expenditure.

The stated facts make it clear that the Consultant is the candidate’s agent for the purpose of designing and preparing material to influence the candidate’s election. It is also clear that the Consultant intends to be the political organization’s agent for that same purpose.

Limited to the facts of this opinion, the restricting clause of §10A.01, subd. 18, could be re-stated as follows:

> In order to be an independent expenditure, the political organization's expenditure must be made without the cooperation of, and not in concert with, any candidate's agent.

The Board stated in Advisory Opinion 338 that there may be situations in which a candidate and a political organization can use the same consultants without defeating the independence of expenditures made by the political organization. In that opinion, the Board referred to the need to maintain a "high wall of separation" in such a situation. Courts and other agencies have used the term "firewall" to convey the same meaning. Regardless of the term selected, the principle is that there must be a degree of separation between a consultant's work for the candidate and the same consultant's work for the political organization sufficient to ensure that the political organization's expenditures on behalf of the candidate are independent.

The confidentiality agreements proposed in Scenario One are not sufficient to provide the requisite degree of separation between the two components of the consultant's work. It 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.

Where the same individual or consultant team works on both candidate materials and political organization materials, the political organization materials will not meet the requirements of an independent expenditure.

Scenario Two

Would the independence of the political organization's expenditures be maintained if the Consultant takes the steps listed below in situations where the consultant does work simultaneously for a candidate and a political organization doing independent expenditures for that candidate?

1. Creates a "candidate division" that will work only with candidates;

2. Creates a separate "political organization division" that will work only with political organizations;

3. Assigns separate employees to each division;

4. Establishes policies and procedures that prohibit communication between the employees of each division related to the work being done for the clients of each division;

5. Establishes policies and procedures for the maintenance of physically separate files, computer records, and documents for the two divisions, with employees of one division having no access to the files, records, or documents of the other division;

6. Establishes policies and procedures that preclude sharing of any client information between the two divisions.

Opinion

In this scenario the Consultant proposes to take steps that result, essentially, in the establishment of multiple organizations, each isolated from the other. Such an organizational structure, consistently maintained, would create the requisite separation between candidate work and political organization work required for the political organization work to retain its independent expenditure characterization. The structure proposed by the Consultant prevents information flow between individuals performing candidate work and those performing political organization work.

The requester limits the scope of Scenario Two to periods when the Consultant is simultaneously working on both candidate materials and political organization materials related to the same candidate. Limiting the proposed isolation measures to periods of simultaneous work is not sufficient to overcome the requirement that independent expenditures not be in coordination with or in concert with an agent of the candidate.

The period of time within which to examine whether there is sufficient isolation between the work being done for two clients begins when the work for the first client commences and ends at the later of (1) the date that the consultant's work for both clients ends or (2) the end date of the election cycle.

Use by one of a consultant's clients of material produced by the consultant for another client does not result in cooperation or coordination between the clients if the material has been published by the producer and the second client obtains the material from public sources.

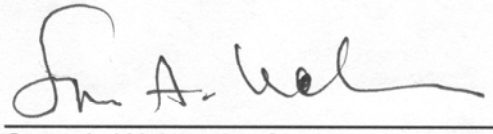
In addition to the listed criteria, the employees of the two divisions should not be permitted to share client identities.

The Board also recommends that a consultant performing work as described in this opinion establish and follow retention policies for electronic and other records in order to better document compliance with its information isolation procedures.

Any policy implemented to prevent coordination of expenditures should be embodied in a written document that is distributed to all relevant employees, consultants, and clients affected by the policy, and strict adherence to the policy by all concerned should be enforced.

If the Consultant designs, implements, and adheres to written policies set forth in this opinion, and if the facts in the real world are not different from the hypothetical facts in any substantial way, the Consultant's work for the political organization will qualify for independent expenditure treatment.

Issued July 22, 2008



Sven A. Wehrwein, Chair
Campaign Finance and Public Disclosure Board

Cited Statutes and Rules

10A.01 DEFINITIONS.

Subdivision 1**. Application**. For the purposes of this chapter, the terms defined in this section have the meanings given them unless the context clearly indicates otherwise.

. . .

Subd. 18. **Independent expenditure**. "Independent expenditure" means an expenditure expressly advocating the election or defeat of a clearly identified candidate, if the expenditure is made without the express or implied consent, authorization, or cooperation of, and not in concert with or at the request or suggestion of, any candidate or any candidate's principal campaign committee or agent. An independent expenditure is not a contribution to that candidate.

Advisory Opinion 401

This advisory opinion is not available to the public.

State of Minnesota

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THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

RE: Gifts by a political subdivision's employee-lobbyist to an official of the same political subdivision

ADVISORY OPINION 402

SUMMARY

A lobbyist may provide an official with transportation of insignificant value without violating Minnesota's prohibition on gifts from lobbyists to officials. A lobbyist may pay for food and beverage for an official of a political subdivision if the lobbyist is a full-time employee of the same political subdivision and the lobbyist is reimbursed in full by the political subdivision for the cost of the official's food and beverage. A lobbyist is prohibited from paying for food and beverage for an official with the lobbyist's unreimbursed personal funds.

FACTS

As the representative a political subdivision you ask the Campaign Finance and Public Disclosure Board, ("the Board"), for an advisory opinion based on the following facts:

1. The political subdivision has within its organizational structure individuals who are public officials or local officials of a metropolitan governmental unit under Minnesota Statutes, Section 10A.071, commonly referred to as Minnesota's gift prohibition statute.

2. The political subdivision employs various staff, including some individuals who lobby for the political subdivision. These individuals register with and report to the Board as lobbyists under Minnesota Statutes, Sections 10A.03 and 10A.04.

3. The lobbyists who are the subject of this opinion are not contract lobbyists, but regular full-time employees of the political subdivision. These staff members do not provide lobbying services for any entity other than the political subdivision.

4. In the course of their employment, the staff lobbyists may meet with the officials of the political subdivision that employs them to seek input, to advise as to the status of various lobbying efforts, or for other purposes.

5. A meeting between a staff lobbyist and an official of the employer may occur during a meal. In this case, the staff lobbyist may provide transportation to the location of the meeting and may pay for the meal.

6. The staff lobbyist may be reimbursed for costs of the meal and transportation by the political subdivision employer or may treat those costs as a personal expense and not seek reimbursement.

You ask whether the lobbyist's provision of transportation or payment for food and beverages under the stated facts violates the gift prohibition provisions of Minnesota Statutes, Section 10A.071.

Issue One

Does providing an official with transportation to a meeting under the stated facts constitute a prohibited gift?

Opinion

Providing transportation is a service, which is included in the definition of a gift. Thus, a lobbyist providing transportation to an official is prohibited unless it falls within one of the exceptions provided in §10A.071.

Minnesota Statutes, Section 10A.01, subd. 3(1) includes an exception for "services to assist an official in the performance of official duties . . .". The statute lists examples of services that are included, such as "providing advice, consultation, information, and communication . . .".

The list of examples in §10A.071, subd. 3(1) is not exclusive. However it suggests that the type of services that are to be included relate directly to the official's duties. The exception does not lend itself through reasonable interpretation to extend to the provision of transportation to allow an official to reach the place where official duties may take place. Thus, this exception does not provide a basis to remove the transaction from the gift prohibition.

Section 10A.01, Subd. 3(3) provides an exception for "services of insignificant value". This is a blanket exception limited only by the value of the services. Providing a ride in a lobbyist's personal vehicle from an office to a nearby local eatery would likely fall within the scope of this exception and would be permitted. Trips by other means or of longer distances would likely have more than insignificant value and would be prohibited.

Without specific information regarding the proposed transportation, the Board is unable to provide a more definite opinion.

Issue Two

Does paying for food and beverages for an official at a meeting under the stated facts constitute a prohibited gift if the lobbyist who makes the payment is reimbursed by the political subdivision that employs the lobbyist and in which the official serves?

Opinion

Nothing in Minnesota Statutes Chapter 10A prohibits a political subdivision from paying expenses of its officials. If an employee of the political subdivision pays certain expenses of an official and is fully reimbursed for those expenses by the political subdivision in the regular course of business, the payment is attributed to the political subdivision. Thus, there is no gift from the lobbyist and the transaction is not governed by §10A.071.

The Board does not express an opinion regarding the legality of the reimbursement policy of any political subdivision. Such policies are not under the Board's jurisdiction.

Issue Three

Does paying for food and beverages for an official at a meeting under the stated facts constitute a prohibited gift if the lobbyist who makes the payment does so with his or her own personal funds?

Opinion

Minnesota Statutes, Section 10A.071 provides very limited and specific exclusions to its general prohibition of gifts. There is no exception that would apply to a lobbyist paying for a meal for an official if payment is made with the lobbyist's personal funds. The fact that the lobbyist is an employee of the political subdivision in which the official serves does not give rise to any applicable statutory exception. Thus, a prohibited gift would result.

The situation presented in this request may not have been contemplated when §10A.071 was enacted. However, there is no basis in the language of the statute to establish an exception based on the fact that a lobbyist and an official serve the same political subdivision.

Issued March 3, 2009

A. Hilda Bettermann, Chair
Campaign Finance and Public Disclosure Board

Cited Statutes and Rules

10A.071 CERTAIN GIFTS BY LOBBYISTS AND PRINCIPALS PROHIBITED.

Subdivision 1. **Definitions**. (a) The definitions in this subdivision apply to this section.

(b) "Gift" means money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return.

(c) "Official" means a public official, an employee of the legislature, or a local official of a metropolitan governmental unit.

Subd. 2. **Prohibition**. A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal.

Subd. 3. **Exceptions.** (a) The prohibitions in this section do not apply if the gift is:

(1) a contribution as defined in section 10A.01, subdivision 11;

(2) services to assist an official in the performance of official duties, including but not limited to providing advice, consultation, information, and communication in connection with legislation, and services to constituents;

(3) services of insignificant monetary value;

(4) a plaque or similar memento recognizing individual services in a field of specialty or to a charitable cause;

(5) a trinket or memento costing $5 or less;

(6) informational material of unexceptional value; or

(7) food or a beverage given at a reception, meal, or meeting away from the recipient's place of work by an organization before whom the recipient appears to make a speech or answer questions as part of a program.

(b) The prohibitions in this section do not apply if the gift is given:

(1) because of the recipient's membership in a group, a majority of whose members are not officials, and an equivalent gift is given to the other members of the group; or

(2) by a lobbyist or principal who is a member of the family of the recipient, unless the gift is given on behalf of someone who is not a member of that family.

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RE: Treatment of telephone survey costs as campaign expenditures or noncampaign disbursements.

ADVISORY OPINION 403

SUMMARY

Where a telephone survey does not clearly provide a service to the voters who are called and where the survey provides the candidate who conducts it with information about voters positions on issues, as well as information by which to gauge the potential for obtaining contributions from those voters, the costs of the survey must be reported as campaign expenditures on the candidates periodic Reports of Receipts and Expenditures.

FACTS

As an incumbent state legislator, who is a candidate under Minnesota Statutes Chapter 10A, you ask the Campaign Finance and Public Disclosure Board, ("the Board"), for an advisory opinion based on the following facts:

1. Beginning in the spring of 2009 and continuing through the summer of 2010 you intend to retain a consultant or consulting firm to make telephone survey calls to your constituents on your behalf. These calls will involve various legislative issues.

2. You intend to treat the costs of these calls as noncampaign disbursements for constituent services through adjournment sine die of the 2010 legislature. For the 60 days following adjournment sine die, you intend to report these costs as 50% noncampaign disbursements for constituent services and 50% campaign expenditures. Thereafter, if the calls continue, you would report the costs as 100% campaign expenditures.

3. Your treatment of the costs as noncampaign disbursements for constituent services is based in part on the statutory definition of a noncampaign disbursement, which includes the cost of preparing and distributing a suggestion or idea solicitation to constituents.

4. During a call it is possible that a constituent may offer to make a contribution to your principal campaign committee.

5. At the end of a call, if the person being called by the firm or consultant has not offered to make a contribution, the person making the call may have a reasonable belief based on the conversation that the person may be inclined to make a donation, if asked to do so.

6. You ask whether under the described facts a contribution volunteered by the constituent may be accepted and, if so, how the cost of the call must be reported.

7. You also ask whether a contribution solicited by the consultant may be accepted and, if so, how the cost of the call must be reported.

Issue

May the costs of a series of telephone survey calls made to constituents regarding legislative issues be reported as noncampaign disbursements when each call will generate information about the constituent and each call has the potential to result in a contribution to the candidate?

Opinion

The requester begins by assuming as fact that the series of telephone calls proposed are constituent services and, thus, may be reported as noncampaign disbursements with some possible exceptions. However, the question of whether a particular activity is a constituent service is one that can only be addressed in the context of the specifics of the activity itself. Thus, to answer the requester's questions about reporting the costs involved, it is necessary first to determine whether the described activity constitutes a constituent service.

The concept of services for a constituent arises in Minnesota Statutes, Section 10A.01, subd. 26, which lists categories of spending that are considered noncampaign disbursements. Noncampaign disbursements are reported separately from campaign expenditures and do not count toward the candidate's campaign spending limit. Because they do not count toward the spending limit, candidates are typically careful to classify as noncampaign disbursements every item that is appropriately so classified.

Likewise, because noncampaign disbursements do not count toward the spending limit, the Board has exercised care in monitoring the extension of their use to categories of spending that do not closely fit within the limits of the specified noncampaign disbursement definitions.

When construing statutes, the Board is required to follow established rules of statutory interpretation. Among these is the concept that words mean what they say. In the case of the noncampaign disbursement under review, it applies to "services for a constituent". Key to application of the definition is that the activity under review must provide a "service".

The Board clarified the requirement that the act of an incumbent must provide a service in Minnesota Rules 4503.0100, subp. 6 which states:

> "'Services for a constituent' or 'constituent services' means services performed or provided by an incumbent legislator or constitutional officer for the benefit of one or more residents of the official's district . . . ".

A typical definition of what is a "service" is found in *Merriam-Webster's Collegiate Dictionary*, which includes among the definitions "help, use, benefit"; "contribution to the welfare of

another"; and "a helpful act". The dictionary definition matches common usage in which a service consists of doing something for the benefit of another.

Typical services performed by legislators include helping constituents with problems with state agencies or state benefits. The Board has extended the concept of constituent services to cover annual reports of legislators to their constituents. While such a service is not requested by the recipient, there is a long tradition and expectation that part of what a legislator does for his or her constituents is to keep them informed.

The Board previously expressed its opinion that the costs of printing and distributing idea or suggestion cards for constituents' use did not provide a service to the constituent and should be reported as campaign expenditures. Subsequently, the legislature added language of specificity to §10A.01, subd. 26(6) stating that noncampaign disbursement treatment may be given to constituent services, "including the costs of preparing and distributing a suggestion or idea solicitation to constituents".

The Board understands that providing an easy way for constituents to provide feedback to a legislator may be a constituent service and defers to the legislature on this determination. However, the facts of the immediate request go farther than any previously recognized scope of constituent services and farther than the language of the statute and rule.

Minnesota Statutes Chapter 10A, as it relates to campaign finance, starts with the proposition that all principal campaign committee spending is for campaign expenditures. It then carves out a number of specific exceptions. Under the rules of statutory interpretation where there is a general provision – that campaign spending is to be reported as campaign expenditures – and there are limited exceptions – the specifically listed noncampaign disbursements – the administrative agency interpreting the statute is to apply the general provision broadly and the exceptions narrowly. Thus, the Board is required to guard against expansion of the noncampaign disbursement categories unless the legislature makes it clear that such expansion is intended. Noncampaign disbursements for constituent services, in particular, must be narrowly drawn because this category of spending is available only to incumbents rather than to all candidates.

The facts of this request present several reasons to distinguish the proposed survey plan from other activities that have been properly classified as constituent services.

First, an unsolicited telephone call from a candidate to a constituent would not generally be considered to be a service to that constituent, even if during the course of the call the constituent is given an opportunity to express his or her opinion on selected issues. Thus, the activity does not meet the common meaning of providing a service.

The telephone survey is different from distribution of cards or running of small advertisements that the constituent may clip out and send to a legislator with suggestions. The suggestion cards provide an easy way for the constituent to contact the legislator *should the constituent wish to do so.* They do not impose a contact from the legislator's agent on the constituent.

The more significant problem with calling the telephone survey plan a constituent service activity is demonstrated by the very different nature of a survey call from a distributed suggestion card that will presumably be returned only in limited cases.

A telephone call gives the caller valuable information about the constituent; a potential voter. The facts strongly suggest that the caller will identify the legislator on whose behalf the call is made. The caller will likely be able to ascertain whether the voter already knows the legislator. The caller will be able to ascertain whether the voter is willing to discuss issues with this particular legislator's agent, or simply hangs up. If the voter participates in the survey, it will be possible to classify the voter's positions on issues, giving the candidate a base of information that will indicate whether the voter's positions are similar to or different from those of the candidate. While the project is referred to as a survey, the Board sees little to distinguish it from polling; a typical campaign activity.

The facts suggest that the calls will be structured in a way that may lead the voter to suggest a donation to the candidate's principal campaign committee. If that does not occur, it is expected that by the end of the call, the candidate's agent will have enough information about the voter to determine whether the voter is a potential donor. Whether the donation is solicited in the same call, or data recorded during the call is used later for fundraising solicitations, or other campaign purposes is not relevant. The relevant fact is that the call provides a body of information about the voter that the candidate can use for election purposes. If there is an element of service to the voter who is called during the proposed survey, it is far outweighed by the benefit to the candidate in obtaining information about a potential voter and donor.

It is important that use of noncampaign disbursements not be extended beyond the narrow bounds provided by the legislature. In the immediate case, the facts presented take the proposed telephone survey project outside the definition of a constituent service. If the calling project is undertaken, its costs should be reported as campaign expenditures.

Issued March 3, 2009

A. Hilda Bettermann, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes and Rules

10A.01 DEFINITIONS.

Subd. 26. **Noncampaign disbursement.** "Noncampaign disbursement" means a purchase or payment of money or anything of value made, or an advance of credit incurred, or a donation in-kind received, by a principal campaign committee for any of the following purposes:

. . .

(6) services for a constituent by a member of the legislature or a constitutional officer in the executive branch, including the costs of preparing and distributing a suggestion or idea solicitation to constituents, performed from the beginning of the term of office to adjournment sine die of the legislature in the election year for the office held, and half the cost of services for a constituent by a member of the legislature or a constitutional officer in the executive branch performed from adjournment sine die to 60 days after adjournment sine die;

. . .

4503.0100 DEFINITIONS.

Subpart 1. **Scope**. The definitions in this part apply to this chapter and Minnesota Statutes, chapter 10A. The definitions in chapter 4501 and Minnesota Statutes, chapter 10A, also apply to this chapter.

. . .

Subp. 6. **Services for a constituent; constituent services**. "Services for a constituent" or "constituent services" means services performed or provided by an incumbent legislator or constitutional officer for the benefit of one or more residents of the official's district, but does not include gifts, congratulatory advertisements, charitable contributions, or similar expenditures.

. . .

State of Minnesota

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THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

RE: Costs of candidate recruitment and education

ADVISORY OPINION 404

SUMMARY

Costs of candidate recruitment do not fall under the jurisdiction of Minnesota Statutes Chapter 10A. The value of a candidate school or a training clinic is a campaign contribution if provided to a candidate, but is not under the jurisdiction of Chapter 10A if provided to an individual who is not already a candidate.

FACTS

As the representative of a Minnesota membership-based association ("the Association"), you ask the Campaign Finance and Public Disclosure Board, ("the Board"), for an advisory opinion on behalf of the Association and its members (which are also associations) based on the following facts:

1. The Association is a Minnesota-based nonprofit corporation.

2. The Board takes notice of the fact that the Association supports members who share common interests and that it engages in lobbying activities to further the interests of its members.

3. The Association wishes to engage in the political process in Minnesota by recruiting and training candidates for local and state offices.

4. The Association has an associated political committee or fund that is registered with and reports to the Board. The Association is a supporting nonprofit corporation for this committee as permitted under Minnesota Statutes, Section 211B.15, subd. 17.

5. The Association has submitted three hypothetical situations, presented in the sections below, and asked the Board to issue its opinion regarding treatment of financial transactions associated with each hypothetical situation.

Hypothetical Number 1

A candidate for the Minnesota legislature is invited to, and attends, an event sponsored by the Association and referred to by the Association as a "candidate school". The event is promoted as an opportunity for candidates to hone public speaking, campaign organization, and other skills for the express purpose of aiding the candidate in a run for office. The value of attendance at the candidate school exceeds $100. However, the school is offered free of charge and is open to the public.

Issue One

What is the value of the campaign school described in the hypothetical for the purposes of Chapter 10A?

Opinion One

A "contribution" is "money, a negotiable instrument, or a donation in-kind that is given to a political committee, political fund, principal campaign committee, or a party unit". Minnesota Statutes, Section 10A.01, subd. 11. A donation in-kind is "anything of value that is given, other than money or negotiable instruments . . ." Minnesota Statutes, Section 10A.01, subd. 13.

Minnesota Statutes, Section 10A.20, subd. 3(b) provides that the recipient of a donation in-kind must report that donation at "its fair market value". Minnesota Rules, Part 4503, subp. 3a, defines "fair market value" as "the amount that an individual would pay to purchase the same or similar service or item on the open market."

The value of the subject campaign school is important both with respect to the threshold for reporting donations in-kind and with respect to determining whether the subject contribution may be made consistent with the requirements of Chapter 10A by an entity not registered with the Board.

The question is whether the proposal of the Association to make the campaign school "open and free to the public" results in the school having a fair market value of zero. In other words, has the Association placed this event "in the open market" in such a way that it is free and available to anyone?

The facts presented are insufficient to establish that the campaign school will be widely publicized and conducted with sufficient frequency or class sizes to conclude that it is being offered free in the open market. Based on the stated facts, the cost of the school exceeds $100. For the purposes of this opinion, the Board considers the value of the school to be more than $100. The requester may seek another opinion on the question of value of the school. Such a request should detail the advertising and promotion plan for the school; the dates it would be offered, and the number of people that can be accommodated as well as any other relevant details.

Thus, the Board assumes that, for the purpose of Chapter 10A and this opinion, admission to the campaign school has a value of more than $100.

Issue Two

Is the value of admission to the school described in the hypothetical a contribution to the principal campaign committee of the candidate who attends?

Opinion Two

A “contribution” is “money, a negotiable instrument, or a donation in-kind that is given to a political committee, political fund, principal campaign committee, or a party unit”. Minnesota Statutes, Section 10A.01, subd. 11. A donation in-kind is “anything of value that is given, other than money or negotiable instruments . . .” Minnesota Statutes, Section 10A.01, subd. 13.

Based on the applicable statutes the provision of a campaign school is a donation in-kind and thus, a contribution, to the candidate. While the Board recognizes that there may be items, such as personal gifts, that could be given to a person who is a candidate and not be reportable under Chapter 10A, any item or benefit that may directly or indirectly influence the candidate’s ability to be nominated or elected falls within the scope of Chapter 10A. A campaign school is such an item.

In Issue One, the Board concluded that the value of attendance at the school exceeds $100. Since the candidate is not paying for the school, the amount of the contribution is the value of attendance.

The Association is not registered with the Board and, thus, is prohibited from making a contribution of more than $100 to a candidate. To avoid a violation of Minnesota Statutes, Section 10A.27, subd. 13, the candidate must pay for the campaign school or a political committee or fund, such as the Association’s affiliated political committee or fund, must pay the Association for it. In the latter case, the contribution is from the political committee or fund that paid the Association for the cost of the school.

Issue Three

If an attendee of the campaign school is not a candidate at the time the individual attends the school but subsequently registers a principal campaign committee with the Board, does the value of attendance at the campaign school then become a contribution to the individual’s principal campaign committee?

Opinion Three

Since the person receiving the benefit is not a “candidate” at the time of the transaction, the question is whether receipt of admission to the campaign school causes the recipient to become a candidate under Chapter 10A. If so, the recipient would be required to register with the Board and report the contribution on the candidate’s next Report of Receipts and Expenditures.

Minnesota Statutes, Section 10A.01, subd. 10, defines “candidate” as “an individual who seeks nomination or election as a state constitutional officer, legislator, or judge”. The statute goes on to say that “[a]n individual is deemed to seek nomination or election if the individual . . . has received contributions . . . in excess of $100 . . . for the purpose of bringing about the individual’s nomination or election”.

The receipt of admission to a candidate school by an individual who might at some future time run for office, but is not already a candidate, is sufficiently remote in the process of "seek[ing] nomination or election" that it will not cause a non-candidate to become a candidate by operation of Section 10A.01, subd. 10.

Likewise, if the attendee himself or herself pays the cost of the campaign school, that payment will not make the attendee a candidate under Chapter 10A.

Hypothetical Number 2

One or more of the Association's members sponsors an event, which may or may not be co-sponsored by the Association itself. The event is a one-day clinic with sessions aimed at encouraging local activism on issues of concern to the Association and its members. The value of attendance at the clinic is more than $100, however there is no cost to attendees.

Among the skills taught by the clinic's faculty are public speaking, grassroots organizing, and fundraising. The clinic's leaders expressly encourage attendees to get involved in local, state, and national political campaigns as volunteers or candidates for office. Faculty members do not expressly encourage attendees to file for a specific office. Following the clinic, an attendee decides to file as a candidate for the Minnesota Legislature.

Issue Four

The attendee is not a candidate at the time of attendance at the clinic. Does the attendee's subsequent registration of a principal campaign committee with the Board, even in close proximity to the date of the clinic, result in the value of the clinic being treated as a contribution to the subsequently formed principal campaign committee?

Opinion Four

For the reasons stated in Opinion One, the Board considers the value of the clinic to be in excess of $100.

The receipt of admission to the described clinic by an individual is sufficiently remote in the process of "seek[ing] nomination or election" that it will not cause a non-candidate to become a candidate by operation of Section 10A.01, subd. 10.

Likewise, if the attendee himself or herself pays the cost of the clinic, that payment will not make the attendee a candidate under Chapter 10A.

The fact that the attendee registers a principal campaign committee with the Board shortly after attending the clinic does not change the status of transactions that were not within the scope of Chapter 10A when they occurred.

The Board notes that the request does not seek advice under Hypothetical Two for the case where the attendee is already a candidate at the time of attending the clinic. The result in such a case would be the same as described in Opinion Two above.

Hypothetical Number 3

An employee of the Association or one of its members is a registered lobbyist for her employer. As part of her job, the employee travels to many Minnesota communities. On one of her business trips, the employee, acting on behalf of her employer, meets with a person who was recommended to her as a potential candidate for the Minnesota legislature. The employee buys lunch for the potential candidate and expressly recruits the individual to run for the state legislature.

The Association's employee also makes trips for the sole and specific purpose of recruiting the potential candidate.

The individual is not a candidate at the time of the recruitment activities, but subsequently becomes a candidate.

Issue Five

Are the costs of the Association's candidate recruitment governed by or reportable under Chapter 10A?

Opinion Five

Costs associated with candidate recruitment are not within the scope of Chapter 10A.

This opinion is based on the hypothetical facts that the Association's efforts are solely directed at recruiting the candidate and do not involve any expenses for activities that would influence the candidate's nomination or election should the recruit decide to run for office.

Caveat

The Association is a corporation that is also lobbyist principal. The employee in Hypothetical Three is a lobbyist.

If the transactions described in this advisory opinion are campaign contributions, they may be prohibited under Minnesota Statutes, Section 211B.15, which prohibits most corporate political activity.

To the extent that campaign contributions attributable to the Association exceed $100 in value, they are prohibited under Minnesota Statutes, Section 10A.27, subd. 13, which prohibits contributions in excess of $100 from an association not registered with the Board.

If the transactions, including the purchase of meals, do not constitute campaign contributions, they would be prohibited gifts under Minnesota Statutes, Section 10A.071 if the recipient is an official as defined in that section.

Issued April 7, 2009

A. Hilda Bettermann, Chair
Campaign Finance and Public Disclosure Board

Statutory Citations

10A.01 DEFINITIONS.

. . .

Subd. 10. **Candidate.** "Candidate" means an individual who seeks nomination or election as a state constitutional officer, legislator, or judge. An individual is deemed to seek nomination or election if the individual has taken the action necessary under the law of this state to qualify for nomination or election, has received contributions or made expenditures in excess of $100, or has given implicit or explicit consent for any other person to receive contributions or make expenditures in excess of $100, for the purpose of bringing about the individual's nomination or election. A candidate remains a candidate until the candidate's principal campaign committee is dissolved as provided in section 10A.24.

. . .

Subd. 11. **Contribution.** (a) "Contribution" means money, a negotiable instrument, or a donation in-kind that is given to a political committee, political fund, principal campaign committee, or party unit.

. . .

Subd. 13. **Donation in-kind.** "Donation in-kind" means anything of value that is given, other than money or negotiable instruments. An approved expenditure is a donation in-kind.

10A.071 CERTAIN GIFTS BY LOBBYISTS AND PRINCIPALS PROHIBITED.

Subdivision 1. **Definitions.** (a) The definitions in this subdivision apply to this section.

(b) "Gift" means money, real or personal property, a service, a loan, a forbearance or forgiveness of indebtedness, or a promise of future employment, that is given and received without the giver receiving consideration of equal or greater value in return.

(c) "Official" means a public official, an employee of the legislature, or a local official of a metropolitan governmental unit.

Subd. 2. **Prohibition.** A lobbyist or principal may not give a gift or request another to give a gift to an official. An official may not accept a gift from a lobbyist or principal.

10A.20 CAMPAIGN REPORTS.

. . .

Subd. 3. **Contents of report.**

. . .

(b) . . . A donation in-kind must be disclosed at its fair market value.

. . .

10A.27 CONTRIBUTION LIMITS.

. . .

Subd. 13. **Unregistered association limit; statement; penalty.** (a) The treasurer of a political committee, political fund, principal campaign committee, or party unit must not accept a contribution of more than $100 from an association not registered under this chapter unless the contribution is accompanied by a written statement that meets the disclosure and reporting period requirements imposed by section 10A.20. This statement must be certified as true and correct by an officer of the contributing association. The committee, fund, or party unit that accepts the contribution must include a copy of the statement with the report that discloses the contribution to the board. This subdivision does not apply when a national political party contributes money to its affiliate in this state.

(b) An unregistered association may provide the written statement required by this subdivision to no more than three committees, funds, or party units in a calendar year. Each statement must cover at least the 30 days immediately preceding and including the date on which the contribution was made. An unregistered association or an officer of it is subject to a civil penalty imposed by the board of up to $1,000, if the association or its officer:

(1) fails to provide a written statement as required by this subdivision; or

(2) fails to register after giving the written statement required by this subdivision to more than three committees, funds, or party units in a calendar year.

(c) The treasurer of a political committee, political fund, principal campaign committee, or party unit who accepts a contribution in excess of $100 from an unregistered association without the required written disclosure statement is subject to a civil penalty up to four times the amount in excess of $100.

4503.0100 DEFINITIONS.

. . .

Subp. 3a. **Fair market value**. "Fair market value" means the amount that an individual would pay to purchase the same or similar service or item on the open market.

State of Minnesota
Campaign Finance & Public Disclosure Board
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA under Minn. Stat. § 10A.02, subd. 12(b)

ADVISORY OPINION 405

SUMMARY

A "political committee" is an association whose "major purpose" is to influence the nomination or election of candidates. Determination of an association's major purpose is made on a case-by-case basis and may consider the association's public statements of its purpose. A political committee must register with the Board once it has received contributions of more than $100 or has made contributions or expenditures of more than $100.

FACTS

As an attorney for the a national association ("the National Association") which is a political organization registered with the Internal Revenue Service under Internal Revenue Code section 527, you ask the Campaign Finance and Public Disclosure Board, ("the Board"), for an advisory opinion on behalf of the National Association based on the following facts:

1. In 2002, the National Association registered with the Internal Revenue Service its election of tax status as a political organization under Section 527 of the Internal Revenue Code. It has maintained that status to the present.

2. The National Association receives donations from individuals and corporations across the country.

3. The donations to the National Association are not made with any specification as to how they must be used.

4. The National Association proposes to use some of its funds to broadcast communications in Minnesota that include the names of Minnesota state candidates.

5. The communications will not expressly advocate the election or defeat of the named candidates.

6. The expenditures will be made solely by the National Association without the authorization or expressed or implied consent of, not in cooperation or in concert with, and not at the request or suggestion of a candidate, a candidate's principal campaign committee or agent.

7. The National Association maintains a Web site at which it publishes information about itself and its activities.

8. The home page of the National Association web site states that its mission is to elect candidates at the state level who support its political agenda.

9. An "About Us" page at the National Association web site states that its mission is to elect state candidates and that it does this by recruiting candidates and providing them with support.

10. In a response to a question from Board staff regarding the major purpose of the National Association, an attorney for the National Association stated:

    "The first and foremost purpose of [the National Association] is to promote and incorporate our principles in public policy debates. This is most efficaciously accomplished by electing more like-minded candidates at the state level in various states. But this purpose is also accomplished by issue advocacy communications for which [the National Association] engages its resources as it deems them appropriate."

11. The National Association also states that it has not determined if it will become active in Minnesota and if it does, what its mission will be.

Issue
(as stated by the requester)

If the National Association were to broadcast communications that mention the name of Minnesota state candidates without expressly advocating their election or defeat, would the National Association be required to register as a political committee or a political fund or be otherwise regulated under Minnesota Statutes Chapter 10A?

Opinion

The National Association frames its request in terms of hypothetical political messages that it may broadcast in Minnesota. It asks if the broadcast of those messages would require it to register a political organization and be regulated by the provisions of Minnesota Statutes Chapter 10A.

While the National Association's emphasis on the content of its intended messages may be relevant in examining whether registration with the Board is required, an analysis of the association itself must be completed first in order to determine which of two very different statutory schemes requiring registration is applicable.

Political committees and political funds

Minnesota law recognizes two types of associations other than party units and candidates' principal campaign committees. Those organizations are (1) a political committee and (2) any other association involved in the political process that is not a political committee. Since the two types of organizations are mutually exclusive, the requester must, as a matter of law, fall within one of the categories.

In Minnesota, a political committee is defined as an association whose "major purpose" is to influence the election of a candidate or candidates. Minnesota Statutes, Section 10A.01, subd. 27. Any association that does not meet the "major purpose" test is not a political committee.

The state's interest in regulating the political activity of an association whose major purpose is to influence the state's elections is significantly stronger than the state's interest in regulating intermittent political activity of an association that exists for other purposes. As a result, the registration requirements applicable to the two types of associations under Minnesota Statutes Chapter 10A are significantly different from one another.

An association that is a political committee must register itself with the Board; that is, the organization is the registered entity. The threshold for registration of a political committee is the receipt or expenditure of more than $100.

An association that is not a political committee, but engages in specified regulated spending in Minnesota must establish a fund, typically a bank account with a treasurer, and that fund, rather than the entire association, registers with the Board. The association then reports on the activities of its political fund, but not on the financial activities of the entire association. The threshold for registration of a political fund by an association that is not a political committee is the making of more than $100 in contributions to or approved expenditures on behalf of a candidate, or the making of more than $100 in independent expenditures expressly advocating the election or defeat of a candidate.

Determining whether an association must register with and report to the Board begins with an examination of whether the association is a political committee or not. Once that determination has been made, the association's political activities are examined in the context of the applicable statutes to determine whether a registration threshold has been met.

The Definition of a Political Committee

In construing statutes, the Board is bound by the statutory Canons of Construction and by common law. Minnesota Statutes, Section 645.08 (1) provides the most basic rule of statutory construction:

> "words and phrases are construed according to rules of grammar and according to their common and approved usage".

The Board also looks to legislative intent, and is guided by the statutory presumptions provided in Minnesota Statutes, Section 645.17. Among those presumptions are the following:

> "the legislature does not intend to violate the Constitution of the United States or of this state" and;
>
> "when a court of last resort has construed the language of a law, the legislature in subsequent laws on the same subject matter intends the same construction to be placed upon such language"

With the rules of construction and legislative intent in mind, the Board must determine whether the National Association is a political committee.

A “political committee” is “an association whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question, other than a principal campaign committee or a political party unit”.

Clearly the National Association is not a principal campaign committee, which is a candidate’s election committee, and it is not a party unit. It will not be involved in actions to promote or defeat ballot questions. The question then becomes:

> Is the National Association’s major purpose to influence the nomination or election of candidates?

Under federal law, a “political committee” is required to register and report if it makes expenditures or raises contributions exceeding a specified level. Expenditures and contributions under federal law, are defined based on whether they are “for the purpose of . . . influencing” a nomination or election.

The U.S. Supreme court found the language impermissibly broad since the phrase “political committee” could apply to any group and the “for the purpose of influencing” language could include speech that would be protected by the First Amendment. However, the Court noted that the lower courts had construed the words “political committee” more narrowly. The Court said that “to fulfill the purposes of the [federal] Act, [the words “political committee”] need only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of candidates.”

The Court went on to say that:

> “Expenditures of candidates and of ‘political committees’ so construed can be assumed to fall within the core area sought to be addressed by congress. They are, by definition, campaign related.” *Buckley v Valeo*, 424 U.S. 1 at 79.

In Minnesota, no such construction of the term “political committee” is required since the legislature included the narrowing “major purpose” language into the statutory definition.

The Minnesota Supreme Court considered the definitions of political committee and political fund in *MCCL v Campaign Finance and Public Disclosure Board*, A04-2376, 2005. The matter was before the Court on a certified question from the United States District Court.

In reviewing construction of the Minnesota definition of a “political committee”, the Minnesota Supreme Court, commenting on the federal district court opinion said:

> “Therefore, consistent with *Buckley*, the federal district court construed the definitions of ‘political committee’ to require that an organizations major propose be the nomination or election of a candidate . . . “

The Minnesota Court continued by recognizing that the *Buckley* construction of a “political committee” as an organization whose “major purpose” was to influence the nomination or election of a candidate results in an assumption that all spending by such an organization is, by definition, campaign related.

Specifically, the Minnesota court stated:

> ”Thus, as to expenditures, *Buckley* held that *all* expenditures of political committees (groups under the control of a candidate or the major purpose of which is the nomination

or election of a candidate) are subject to regulation because they are campaign-related by definition . . ." *MCCL*, Supra.

Because of the similarity of Minnesota's statutes to those construed by the Supreme Court in *Buckley*, the Minnesota Court indicated that it considered the *Buckley* court's construction to be controlling with respect to the Minnesota definitions of political committee and political fund.

Having recognized the difference between a political committee and an organization whose major purpose is other than to influence the nomination or election of candidates, the Minnesota Court answers the certified question by stating that the phrase "to influence the nomination or election of a candidate . . . *may* be narrowly construed" [emphasis added] to limit application of the phrase where necessary to avoid constitutional problems of vagueness and overbroad application.

While the Board recognizes that a narrowing construction is necessary when applying the "to influence" language to an association whose major purpose is something other than to influence the nomination or election of candidates, both *Buckley* and *MCCL* make it clear that such a narrowing construction is not constitutionally required when the association under consideration is one whose major purpose is to influence the nomination or election of candidates.

Application of the Definition of a Political Committee

In Minnesota, only an association "whose major purpose" is to influence the nomination or election of candidates is a political committee. The plain language of the Minnesota definition suggests that an association will have only one major purpose and other purposes will be subordinate to that purpose.

The determination of an association's major purpose requires the flexibility of case-by-case analysis. This analysis may take place through the advisory opinion process prior to the time that the association engages in political activities or through the investigatory process of a compliance action after the association's political activities have commenced. For an example of an investigative determination, see *The Matter of the Complaint of Richard V. Novack Regarding Minnesota Majority* (http://www.cfboard.state.mn.us/bdinfo/investigation/120208MN_Majority.pdf) in which this Board found that the association's major purpose was something other than to influence the nomination or election of candidates and registration with the Board was not required.

An analysis of an association's purpose may begin with statements that the association makes about itself. In the immediate case, the Board finds those statements to be determinative. The Association's statement of its mission, as reproduced in item number 8 of the facts and further explained in item 9, makes it clear that the this is a single purpose association. It may achieve its purpose by various means, but its major purpose is to influence state elections for offices below that of governor.

Further examination of the Association's strategy from its "About Us" page explains that by electing state officials the Association helps build a group of candidates who can move on to national office. The page further details the process the Association uses to determine which candidates to help and the types of assistance it can provide.

The Association's attorney, in response to a Board inquiry stated that "[t]he first and foremost purpose of the National Association is to promote and incorporate our organization's principles

in public policy debates." However, this statement is not convincing given the extensive public statements the Association makes about itself outside the context of an advisory opinion request.

The Political Committee's Registration Requirement

Having determined that the Association is a political committee under Minnesota statutes, the Board next examines the registration requirements applicable to it. Consistent with *Buckley* and *MCCL*, the Board is entitled to assume that all spending by the Association in Minnesota is for political purposes.

A political committee in Minnesota is required to register with the Board if it makes a contribution of more than $100 to an entity registered with the Board, receives contributions in excess of $100, or makes expenditures in excess of $100. Minnesota Statutes, Section 10A.14, subd. 1.

A "contribution" is any money or item of value given to or by a political committee. Minnesota Statutes, Section 10A.01, subd. 11. An "expenditure" is a purchase or payment to influence the nomination or election of candidates. Since a political committee, by definition exists for the purpose of influencing the nomination or election of candidates, all of its spending is assumed be for at purpose.

Minnesota's registration threshold amounts suggest that if the National Association begins activities in Minnesota, it will almost immediately be required to register a Minnesota political committee and comply with the requirements of Minnesota Statutes Chapter 10A.

The National Association's election of Section 527 tax status also constitutes evidence of its major purpose. An association electing Section 527 tax status is voluntarily self-identifying itself as a "political organization". A political organization is an association "organized and operated primarily for the purpose of . . . directly or influencing or attempting to influence the selection, nomination, election, or appointment" of a person to federal, state, or local office. Since the National Association limits its activities to state level elections, its election of Section 527 status places it squarely within the definition of a political committee under Chapter 10A.

The Registration, Disclosure, and Limits Provisions of Minnesota Statutes Do Not impose a Significant Burden on the Association's First Amendment Rights

It is important to recognize that the requirements of Minnesota Statutes Chapter 10A with which the National Association will be required to comply include only minimal limitations on its freedom to act in the political arena.

To assist the National Association in complying with Chapter 10A, the Board provides the following summary of requirements with which the National Association must comply if it begins activities in Minnesota.

To function as a political committee in Minnesota, the National Association will be required to open a separate bank account for its Minnesota operating entity and establish recordkeeping that separates Minnesota financial activities from those undertaken in other states.

Only contributions specifically designated for the Minnesota political committee may be placed in its separate depository account.

The Minnesota political committee may accept contributions from individuals and from party units or other political committees or funds registered with the Campaign Finance Board without limit as to time or amount.

Corporations are prohibited from donating to political committees in Minnesota. Minnesota Statutes, Section 211B.15. A Minnesota political committee is prohibited from accepting contributions aggregating more than $100 from an association not registered with the Board without significant statutorily prescribed disclosure by the donor. Minnesota Statutes, Section 10A.27, subd. 13).

Because of the limit on transfers from unregistered associations, the National Association (which itself will not be registered with or reporting to the Board) may not directly transfer more than $100 and may not provide free services (a donation in kind) valued at more than $100 to the Minnesota political committee. Since the National Association's funds include corporate contributions, it is possible that *any* transfer of money or services from the National Association to the Minnesota political committee would be prohibited by §211B.15. Minnesota Statutes Chapter 211B is not within the jurisdiction of the Board to interpret; however, §10A.02, subd. 6, permits the Board to provide information about the limits impose by §211B.15.

Solicitation of donations to the Minnesota political committee may be made by the National Association as long as the Minnesota political committee reimburses the National Association for its proportionate share of the cost of the solicitation. The National Association may solicit directly for the Minnesota political committee (subject to the requirement that it be paid for the cost of doing so). Donors should be directed to make their donations payable to the Minnesota committee. The National Association could also include the Minnesota committee in a general solicitation as long as donors direct their donations to the Minnesota committee.

It is not permissible for the operators of the National Association to decide which undesignated funds go to the Minnesota committee and which go to the National Association's general treasury. In that case, the Board would consider the undesignated donation to be a donation to the National Association which then further donates it to the Minnesota committee in violation of Minnesota Statutes, Section 10A.27, subd. 13.

The National Association may provide administrative and other support to the Minnesota committee as long as it is reimbursed for the fair market value of any support or services provided.

The Minnesota committee will have no limits on the amount it can spend on independent expenditures, issues ads, or for general purposes. It will be limited on the amount it can donate in money or support directly to candidates, but may contribute without limit to party units and other political committees or funds registered with the Board (except that it may not donate to a political party legislative caucus committee while the legislature is in session).

The Minnesota committee will be required to file periodic reports disclosing all of its receipts and spending, itemizing transactions that exceed $100.

Issued June 2, 2009

_____

A. Hilda Bettermann, Chair
Campaign Finance and Public Disclosure Board

Statutory Citations

10A.01 DEFINITIONS.

. . .

Subd. 27. **Political committee.** "Political committee" means an association whose major purpose is to influence the nomination or election of a candidate or to promote or defeat a ballot question, other than a principal campaign committee or a political party unit.

Subd. 28. **Political fund.** "Political fund" means an accumulation of dues or voluntary contributions by an association other than a political committee, principal campaign committee, or party unit, if the accumulation is collected or expended to influence the nomination or election of a candidate or to promote or defeat a ballot question.

U.S. Code, Title 26, Section 527. Political organizations

(a) **General rule.** A political organization shall be subject to taxation under this subtitle only to the extent provided in this section. A political organization shall be considered an organization exempt from income taxes for the purpose of any law which refers to organizations exempt from income taxes.

. . .

(e) **Other definitions**

For purposes of this section—

(1) **Political organization**

The term “political organization” means a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.

(2) **Exempt function**

The term “exempt function” means the function of influencing or attempting to influence the selection, nomination, election, or appointment of any individual to any Federal, State, or local public office or office in a political organization, or the election of Presidential or Vice-Presidential electors, whether or not such individual or electors are selected, nominated, elected, or appointed. Such term includes the making of expenditures relating to an office described in the preceding sentence which, if incurred by the individual, would be allowable as a deduction under section 162 (a).

State of Minnesota

Campaign Finance & Public Disclosure Board

Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603

THIS ADVISORY OPINION IS PUBLIC DATA
pursuant to a consent for release of information signed by the requester

Issued to: Mr. David Oxley
ACEC/MN Executive Director
10201 Wayzata Blvd., Suite 240
Minnetonka, MN 55305

RE: Creation and operation of conduit funds

ADVISORY OPINION 406

SUMMARY

A "conduit fund" organized and administered in accordance with the express and implied provisions of Minnesota Statutes, Section 211B.15, subd. 16, is not a political committee or political fund under Minnesota Statutes Chapter 10A and is not required to register with the Board. A corporation may contract with an individual or another corporation for the administration of its sponsored conduit fund. An individual or a corporation may administer multiple conduit funds as long as the assets and records of each fund are separately maintained.

FACTS

As the representative of the American Council of Engineering Companies of Minnesota (ACEC/MN), you ask the Campaign Finance and Public Disclosure Board (Board) for an advisory opinion based on the following facts:

1. ACEC/MN is a Minnesota non-profit corporation that is a trade association representing 150 consulting engineering firms and affiliate members. The member firms provide a broad range of engineering and related services to both public and private clients.

2. Some of the member firms of ACEC/MN may wish to establish "conduit funds" as recognized under Minnesota Statutes, Section 211B.15, subd. 16.

3. It is the desire of the ACEC/MN member firms that the conduit funds they establish not be political committees or political funds that would be required to register and report under Minnesota Statutes Chapter 10A.

4. Each member firm that desires to do so would set up its own separate conduit fund. Deposits to a corporate-sponsored fund would not be commingled with deposits to any other corporation's conduit fund.

5. A firm establishing a conduit fund may wish to contract with an outside individual to perform the administrative functions associated with the conduit fund including solicitation of the corporation's employees, receiving and recording employee deposits, and making transfers to candidates at the direction of the contributing employees.

6. As an alternative to contracting with an individual to perform the services described in paragraph 5, a member firm may wish to contract with ACEC/MN for those same services.

7. Since more than one of ACEC/MN's member firms may establish conduit funds, it is possible that the same individual, or ACEC/MN itself, may be contracted by more than one firm to perform the administrative services described in paragraph 5.

Issue One

Is a conduit fund established under Minnesota Statutes, Section 211B.15, subd. 16, a political committee or a political fund that is required to register and report under Minnesota Statutes Chapter 10A?

Opinion One

The question of corporation-sponsored employee contribution programs was first addressed by the Board in Advisory Opinion number 6 in 1974. At that time, Minnesota Statutes, Section 211B.15, subd. 16, had not been enacted, but the concept of a "conduit fund" existed in federal law. In Advisory Opinion number 6, the Board concluded that a corporation may establish a nonpartisan conduit plan to solicit voluntary contributions from employees if the individual employee making the contribution retains sole control over the disposition of the employee's accumulated funds.

The Board concluded in Opinion number 6 that if the conditions for a nonpartisan conduit fund were met, the fund did not constitute a political committee or a political fund that was required to register with and report to the Board because the corporate sponsor had no control over which candidates would receive contributions from the fund.

In 1996, the legislature enacted Minnesota Statutes, Section 211B.15, subd. 16, which codified the concept of and right to establish a "conduit fund" and, for the first time in statute, used the term "conduit fund". The enactment of this section strengthens the Board's 1974 conclusion that a properly formed and administered conduit fund is not a political committee or political fund under Chapter 10A.

While Chapter 211B is not within the Board's specific jurisdiction to interpret, it is necessary to review the conduit fund provisions in conjunction with the definitions of a political committee and a political fund under Chapter 10A in order to determine whether the conduit fund is something *other than* a political committee or a political fund.

Section 211B.15, subd. 16, sets forth the requirements for a conduit fund. The key requirements that separate such a fund from a Chapter 10A political committee or political fund are:

1. All solicitations for contributions to a corporate conduit fund that are directed to employees by the corporation "must be in writing, informational and nonpartisan in nature, and not promotional for any particular candidate or group of candidates"
2. "The solicitation must consist only of a general request on behalf of [the conduit fund] and must state that there is no minimum contribution, that a contribution or lack thereof will in no way impact the employee's employment".

3. The solicitation must also state that "the employee must direct the contribution to candidates of the employee's choice, and that any response by the employee shall remain confidential and shall not be directed to the employee's supervisors or managers".

The statutory requirements, when read as a whole, suggest some additional implicit requirements.

First, the concept of a conduit fund is embodied in a section regulating corporate participation in the political process. Implied in this fact and the language of the statute is the condition that a conduit fund may be established only by a corporation as defined in Minnesota Statutes, Section 211B.15, subd. 1. Also implicit is the condition that a conduit fund must be established by a single corporation. Multiple corporations may not participate in a single conduit fund. Each conduit fund must maintain its own depository and financial records.

Second, the section consistently refers to employee[s]. This reference implies that contributions to a conduit fund may be solicited and accepted only from the corporate sponsor's employees.

Third, the section refers to the content of a solicitation to an employee, indicating that the solicitation must state that that the employee must direct the distribution of that employee's contributions to the conduit fund. Implicit in this provision (which specifies terms of the written solicitation) is the substantive requirement that the employee must, in fact, direct the distribution to candidates of his or her contributions to the conduit fund. The corporate sponsor may not be involved directly or indirectly in the determination of the recipients of an employee's contributions to the fund.

Finally, the section refers only to contributions to candidates. Implicit in these references is the condition that a conduit fund is a fund that does not make contributions to political committees or political funds or party units registered with the Board.

If a conduit fund meets the explicit requirements of §211B.15, subd 16, as well as the implicit requirements described above, the conduit fund is not a political committee or a political fund under Chapter 10A and is not required to register with or report to the Board.

Issue Two

May a corporation that has a properly organized and administered conduit fund retain and pay with corporate funds an individual, who is not an employee of the corporation, to handle some or all of the administrative aspects of the fund, including solicitation of the corporation's employees, receiving and recording employee deposits, receiving direction from employees as to the beneficiary of the employee's contributions, and making the transfers to candidates at the direction of the contributing employees?

Opinion Two

If a corporate conduit fund meets the requirements set forth in Opinion One, the fund's status with respect to Chapter 10A is not altered by the corporation's decision to pay an outside individual to administer the fund rather than undertaking that administration with corporate employees. Even if administration of the fund is contracted to another entity, the corporation retains the responsibility for compliance with applicable statutes.

Issue Three

May a corporation that has a properly organized and administered conduit fund retain and pay with corporate funds another corporate entity, such as the trade association of which the corporation is a member, to handle some or all of the administrative aspects of the fund, including solicitation of the corporation's employees, receiving and recording employee deposits, receiving direction from employees as to the beneficiary of the employee's contributions, and making the transfers to candidates at the direction of the contributing employees?

Opinion Three

If a corporate conduit fund meets the requirements set forth in Opinion One, the fund's status with respect to Chapter 10A is not altered by the corporation's decision to contract with another corporation, including the trade association of which the corporate employer is a member, to administer the fund rather than undertaking that administration with corporate employees. Even if administration of the fund is contracted to another entity, the corporation retains the responsibility for compliance with applicable statutes.
Caveat: The Board expresses no opinion as to whether undertaking such administrative tasks may affect the tax-exempt status of the nonprofit corporation assuming those responsibilities.

Issue Four

Does the Board's opinion change if the individual or corporate entity contracted to administer the conduit fund also administers conduit funds established by other corporate employers?

Opinion Four

The fact that an individual or corporate administrator may administer multiple corporate conduit funds does not make the administered funds political committees or political committees or funds as long as each conduit fund independently meets the requirements of Opinion One.

Board Note

In order to avoid confusion by the recipient of a contribution made through a conduit fund, the Board advises that the fund include with each contribution a letter explaining that the contribution is made through an employee conduit fund established under Minnesota Statutes section 211B.15, subd. 16, and that that the contribution(s) should be reported as being from the individuals and in the amounts listed.

Issued May 5, 2009

A. Hilda Bettermann

A. Hilda Bettermann, Chair
Campaign Finance and Public Disclosure Board

Statutory Citations

211B.15 CORPORATE POLITICAL CONTRIBUTIONS.

Subdivision 1. **Definitions.** For purposes of this section, "corporation" means:

(1) a corporation organized for profit that does business in this state;

(2) a nonprofit corporation that carries out activities in this state; or

(3) a limited liability company formed under chapter 322B, or under similar laws of another state, that does business in this state.

. . .

Subd. 16. **Employee political fund solicitation.** Any solicitation of political contributions by an employee must be in writing, informational and nonpartisan in nature, and not promotional for any particular candidate or group of candidates. The solicitation must consist only of a general request on behalf of an independent political committee (conduit fund) and must state that there is no minimum contribution, that a contribution or lack thereof will in no way impact the employee's employment, that the employee must direct the contribution to candidates of the employee's choice, and that any response by the employee shall remain confidential and shall not be directed to the employee's supervisors or managers. Questions from an employee regarding a solicitation may be answered orally or in writing consistent with the above requirements. Nothing in this subdivision authorizes a corporate donation of an employee's time prohibited under subdivision 2.