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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: Campaign finance laws applicable to specific form of political fund

ADVISORY OPINION 427

SUMMARY

An association may accept contributions from individuals into its political fund for the purpose of making its own contributions to Minnesota candidates. The association may permit donors to its political fund to indicate their preferences for candidates that the association should support. If donor preferences are not a direction or the equivalent of a direction to the association as to the candidates to whom it should donate, earmarking does not occur.

FACTS

As the attorney for an association (the Association), you ask the Campaign Finance and Public Disclosure Board for an advisory opinion. Your request included a number of statements of assumed facts. Only those assumed facts that are necessary to answer your questions are included in this opinion.

1. The Association is a corporation that is has been granted tax exempt status under IRC section 504(c)(4).

2. The Association plans to register a Minnesota political fund.

3. A separate association, which is a political organization that has registered with the Internal Revenue Service under Internal Revenue Code section 527 operates a website where it provides services through which candidates and associations can solicit and accept contributions.

4. The Association will use the section 527 organization's website to allow individuals to make contributions to its political fund.

Question One

Does Minnesota law permit the Association to establish and register a political fund to accept contributions from individuals for Minnesota state candidates, but not earmarked for any particular Minnesota candidate?

Opinion

According to the assumed facts, the Association is a 501(c)(4) nonprofit corporation. By definition, the major purpose of a 501(c)(4) association cannot be to influence the nomination or election of candidates.

In Minnesota a political committee is an association whose major purpose is to influence the nomination or election of candidates or to promote or defeat a ballot question. Thus, under the assumed facts, the Association is not a political committee.

An association that is not a political committee, a party unit, or a candidate's principal campaign committee, may accept contributions and make donations to influence the nomination or election of candidates in Minnesota. If it does so, the accumulation of money raised or spent for that purpose is referred to as the association's political fund.

You should note that the Association does not "establish" a political fund. The Association's political fund is simply the pool of money raised or spent to influence the nomination or election of candidates. The political fund exists without the Association doing anything other than raising or spending money to influence the nomination or election of candidates. Registering the political fund means notifying the Board that the Association is raising or spending money to influence the nomination or election of candidates or to promote or defeat a ballot question and will be disclosing the receipt and use of that money.

Your request states that contributions to the Association's political fund will not be earmarked for any particular candidate. Minnesota Statutes section 10A.16, reproduced at the end of this opinion, prohibits the solicitation or acceptance of earmarked contributions.

Question Two

Does Minnesota law permit the Association's political fund to solicit undesignated contributions from contributors, while permitting contributors to indicate the candidates they would prefer the Association's political fund to support by selecting one or more Minnesota state candidates from a list of candidates? These choices would be considered mere preferences for support, but would not be binding on the Association's political fund.

Opinion

The question is posed in a way that suggests that the Association's political fund is an entity separate from the Association itself. An association's political fund is an accumulation of money that the association tracks through an accounting mechanism. It is not an entity separate from the association itself.

The Board recognizes that disclosure by an association with a political fund is typically done in the name given by the association to its political fund and, further, that associations often refer to themselves by their political fund name when communicating about contributions or expenditures that will be part of their political fund. This shorthand form of reference is a common and accepted practice. However, it is important for associations themselves to understand that referring to the political fund as if it were a separate entity is simply an alternative form of reference to the association itself and to the accounting mechanism that the association uses to keep track of the money that constitutes its political fund account.

Thus, the question in this section actually asks if the Association, disclosing its activities through its political fund, may engage in the specified actions.

If the Association solicits contributions to support Minnesota candidates, those contributions become a part of its political fund and must be reported on its political fund report. Contributions to candidates made by the Association and reported through its political fund account are contributions from the Association, not from the underlying donors to the political fund account.

The Association may solicit donor preference information from its Minnesota donors without a resulting earmarking violation if donor preference indications do not result in donors directing their contributions to specific candidates.

If examination of the facts in the real world results in a conclusion that donor preference indications are the equivalent of directives to make contributions, an earmarking violation would result.

Question Three

May the Association's political fund make contributions to Minnesota state candidates guided by the preferences indicated by individual contributors?

Opinion

The Association may make contributions to Minnesota state candidates without violating Minnesota's prohibition on earmarking if the expression of preferences by contributors to the Association's political fund is merely a guide and does not constitute a direction by donors as to where their money should be used. Whether the donors' preferences are merely a guide or are a direction of spending will depend on the facts in the real world and cannot be determined conclusively in the context of a hypothetical question.

Question Four

In addition to the questions reproduced above, your request includes a section titled "What does Minnesota law require?" This section purports to describe Minnesota campaign finance law and includes a summary that you have complied of registration and reporting requirements for political funds in Minnesota. Your fourth question asks if the summary contains any errors.

Opinion

Minnesota Statutes section 10A.02, provides that the Board may issue advisory opinions based on real or hypothetical fact situations that provide information to guide an individual or association's conduct. The advisory opinion process is not used by the Board to edit and correct legal summaries that others have produced.

The Board has developed a handbook of campaign finance law applicable to political committees and funds and has published that handbook on its website. The handbook will answer most of your questions. Additionally, Chapter 10A speaks for itself. To the extent that you ask whether the statute says what it says, you should rely on the statute. With respect to contribution limits and disclosure dates, the Board publishes annual limits documents and calendars which you may consult.

From time to time, the Board also provides additional guidance with respect to the application of Chapter 10A. For example, the Board has provided guidance stating that the administrative rule requiring associations that have political funds to maintain a separate bank account for those funds will not be enforced.

To the extent that your summary includes references to Minnesota Statutes Chapter 211A or to Minnesota Statutes Chapter 211B, the Board advises that those chapters are not under the Board's jurisdiction and its published materials do not relate to those chapters.

Issued August 7, 2012 /s/ Greg McCullough

Greg McCullough, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

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.

10A.16 Earmarking contributions prohibited

An individual, political committee, political fund, principal campaign committee, or party unit may not solicit or accept a contribution from any source with the express or implied condition that the contribution or any part of it be directed to a particular candidate other than the initial recipient. An individual, political committee, political fund, principal campaign committee, or party unit that knowingly accepts any earmarked contribution is guilty of a gross misdemeanor and subject to a civil penalty imposed by the board of up to $3,000.

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RE: Definition of express advocacy

ADVISORY OPINION 428

SUMMARY

Under Chapter 10A an association other than a principal campaign committee, party unit, or political committee, is not required to register and provide disclosure of communications naming candidates unless those communications use words of express advocacy.

FACTS

As the attorney for an association (the Association), you ask the Campaign Finance and Public Disclosure Board for an advisory opinion. Your request is based on the following assumed facts, which you have provided:

1. The Association is a nonprofit corporation that is exempt from federal income taxation under section 501(c)(4) of the Internal Revenue Code (IRC).

2. The Association engages in activities, including public communications, to promote its positions on various federal public policy issues.

3. The Association relies on voluntary donations from others to support its activities.

4. The Association is considering conducting similar activities in Minnesota that will focus on state public policy issues.

5. The Association is considering whether to engage in Minnesota communications itself or to form a separate corporation for that purpose, which it assumes would also be exempt from federal taxation under IRC section 501(c)(4).

6. The Association or the new association intends to communicate with members of the Minnesota general public through mass media communications to advance state public policy issues.

7. These communications may refer to incumbent officeholders or candidates for state office.

8. The communications will not use words such as "vote for," "defeat," or "reelect."

9. The communications will not be coordinated with any of the identified candidates or their opponents.

Based on the above assumed facts, you ask for an advisory opinion addressing the following question:

Question

If an association avoids using in its communications the explicit words of express advocacy such as "vote for," "elect," "vote against," "defeat," and similar words, and avoids coordination with candidates, is the association excluded from classification as a political committee or as an association with a political fund and, thus, exempt from the registration and reporting requirements of Chapter 10A?

Opinion

The hypothetical facts state that both the existing association and a new association formed to engage in communications in Minnesota would be a 501(c)(4) tax exempt organizations. Based on Internal Revenue Code provisions, this means that the major purpose of either association is something other than to influence the nomination or election of candidates in Minnesota. Therefore, the Association will not be a political committee regardless of its communications because a political committee is, by definition, an association whose major purpose is to influence the nomination or election of candidates or to promote or defeat a ballot question.

If the Association is required to provide disclosure, it will be through a political fund account. A political fund is defined in Minnesota Statutes section 10A.02, subdivision 28, as

> 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.

Under both U.S. Constitutional law in *Buckley v. Valeo* 424 U.S. 1 (1976) and under Minnesota law in *Minnesota Citizens Concerned for Life v. Kelley*, 698 NW2d 424 (Minn. 2005), the phrase "to influence" has been narrowly construed in the case of associations that are not political committees to be limited to communications that expressly advocate to influence the nomination or election of candidates.[1]

Subsequent to *Buckley*, the U.S. Supreme Court opinions, including those of *McConnell v. FEC* 540 U.S. 93 (2003) and *FEC v. Wisconsin Right To Life (WRTL)* 551 U.S. 449 (2007), have held that communications that were the "functional equivalent" of express advocacy could also trigger disclosure requirements as communications to influence the nomination or election of candidates. Communications that are the functional equivalent of express advocacy are those that are subject to no reasonable interpretation other than that their purpose is to influence the nomination or election of candidates or to promote or defeat a ballot question.

In Minnesota, both independent expenditures, as a type of communication, and political funds, as an accumulation of money, are defined in terms of express advocacy.

[1] The Board recognizes that an association that advocates to promote or defeat a ballot question may also be required to provide disclosure through a political fund account. However, questions concerning registration and disclosure of ballot question political funds are not before the Board in this request.

The question, then, is whether express advocacy relative to candidates includes only communications using the magic words of *Buckley* (or similar words) or does it also include communications that are subject to no reasonable interpretation other than that their purpose is to influence the nomination or election of candidates?

The Board reviewed the relevant Chapter 10A provisions in detail in the *Matter of the Complaint of Novack Regarding Minnesota Majority* (*Minnesota Majority*) (Board Findings and Order, December 3, 2008). In that matter, the Board concluded that under Chapter 10A, "[e]xpress advocacy requires use of specific words such as “vote for”, “elect”, “defeat” or similar words.

At the time the Board considered *Minnesota Majority*, the FEC rule was being challenged in Federal Court in a matter titled *The Real Truth About Obama v. FEC*. That matter was eventually heard on its merits by the United States District Court for the Eastern District of Virginia which upheld the constitutionality of the FEC rule. A three judge panel of the U.S. Court of Appeals for the Fourth Circuit recently upheld the District Court's ruling. (Court file 11-1760, Opinion issued June 12, 2012.) However, the three-judge appellate court ruling is still subject to possible review by the full panel of the Court of Appeals or by the Supreme Court.

In any event, an expanded interpretation of express advocacy should be promulgated through the rulemaking or legislative process rather than through the advisory opinion process. Minnesota Statutes section 10A.02, subdivision 12a states that if the Board wishes a principal of law to be of general application, it must adopt that principal through administrative rulemaking.

In view of the legal uncertainty and the limits of its advisory opinion authority, the Board will not modify the conclusion that it reached in *Minnesota Majority*. A communication naming candidates that is made independently from the candidates and does not use words of express advocacy is not subject to disclosure under Chapter 10A and will not trigger a registration requirement for the association publishing the communication.

Dated: August 7, 2012 /s/ Greg McCullough

Greg McCullough, Chair
Campaign Finance and Public Disclosure Board

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RE: Expenses that must be reported on lobbyist disbursement reports and annual reports of lobbyist principals

ADVISORY OPINION 429

SUMMARY

Compensation paid to a lobbyist is the consideration paid to the lobbyist or the lobbyist's employer for the time that the lobbyist spends (1) communicating with officials to urge official action, (2) urging others to communicate with officials to urge official action, and (3) engaging in any other activity that directly support these activities.

When a principal hires a law firm under an annual retainer agreement to provide the principal with a wide range of government affairs services, the principal incurs the entire fee for those services when the agreement is entered into by the parties. The law firm must track the number of hours spent on each type of service covered by the retainer agreement and the parties must use those records, along with an assumed rate for each type of service, to determine what costs to report on the lobbyist disbursement reports and annual principal reports.

An expense is a lobbyist disbursement if it is incurred (1) to communicate with officials for the purpose of influencing official action, (2) to urge others to communicate with officials for the purpose of influencing official action, or (3) for any activity that directly supports either of these types of communication.

An annual principal report must include the total amount that the principal spent to influence governmental action even if no communication with government officials was involved. The total amount reported must also include the supporting activities listed in Minnesota Statutes section 10A.04, subdivision 6, paragraph (c) (2).

FACTS

As the attorney for a lobbyist principal, you ask the Board for an advisory opinion that the principal intends to use to guide its Minnesota lobbyist and principal report preparation. Your request is based on hypothetical facts that you have provided which are, in relevant part, as follows:

1. The principal that you represent is a business entity (ABC Company) that has legislative and administrative interests in Minnesota.

2. ABC Company has retained XYZ law firm to provide it government-affairs-related advice and services. The services are provided under an annual retainer agreement. A member of XYZ law firm is ABC Company's designated Minnesota lobbyist.

3. ABC Company also has an in-house employee who is a registered Minnesota lobbyist.

4. Non-lobbyist employees of both ABC Company and XYZ law firm engage in various support activities, some of which are directly related to the activity of the lobbyists and some of which are generally related to the fact that ABC Company has legislative and administrative interests in Minnesota.

5. ABC Company compensates XYZ law firm by way of an annual retainer agreement calling for monthly payments of $5,000. The parties understand that ABC Company will pay XYZ law firm the monthly retainer amount without regard to the amount of government-affairs-related work the firm does during any particular month, the type of government-affairs-related work the firm does during the month, and the position of the law firm employees who actually performed the work.

6. The work that XYZ law firm performs for ABC Company includes such things as strategic government affairs consulting, coalition building with industry allies and others with similar legislative and administrative interests, direct communications with public officials to influence legislative and administrative actions, and activities that directly support those communications such as research, drafting, and preparing materials to be used in those communications. The work also includes general public relations, communicating with the principal's representatives regarding the status of matters of interest, and similar activities.

7. ABC Company and both its in-house and outside lobbyist make expenditures. Some of these expenditures are made solely because ABC Company has a lobbying presence in the state and, but for that presence, such expenditures would not be made. Examples of such expenditures would include:

    a. Expenses associated with attending meetings or conferences with those who have similar legislative and administrative interests, but which have no connection to any specific legislation or administrative action (*e.g.*, travel expenses for the in-house lobbyist and non-lobbyist employees to attend a social event to build relationships with representatives of entities with similar government affairs interests and priorities; travel expenses associated with corporate executives meeting a newly retained outside lobbyist; etc.).

    b. Expenses associated with complying with the laws regulating lobbying (*e.g.,* expenses related to managing lobbying registration and reporting requirements, such as the value of employee time involved in recording, collecting, and compiling information required to be included on a lobbying report; expenses associated with obtaining legal counsel with respect to matters such as lobbyist registration, reporting and compliance with the gift ban; etc.).

c. Expenses associated with monitoring political developments in Minnesota and ascertaining their impact on the company's legislative and administrative interests (*e.g.*, expenses associated with consultants, surveys and polling used to assist in the development of long-term government affairs strategic planning; etc.).

8. Other expenditures are made in connection with a specific lobbying activity, such as:

    a. The principal's payment to a lobbyist for his or her time preparing for and communicating with a public official to influence that official.

    b. The preparation of materials used in efforts to influence a public official.

    c. Expenses associated with meetings wherein strategy is discussed relative to a particular legislative or administrative matter that the principal and lobbyist intend to influence.

    d. Travel expenses relating to a non-lobbyist executive of the company appearing to provide testimony before a legislative committee on a bill that the company supports.

9. Between these two categories of expenditures are other expenditures that are ostensibly lobbying-related but which cannot be said to directly support a lobbying communication, such as those related to:

    a. Strategic consultations with respect to general legislative and administrative interests in Minnesota (*e.g.*, expenses associated with meetings wherein general lobbying-related planning and strategy are discussed; discussions with consultants regarding the effectiveness and implementation of various strategies for advancing legislative and administrative interests, etc.);

    b. Updates on the status of government affairs projects or lobbying activity (*e.g.*, preparation of internal reports for company executives relating to the status of various government affairs initiatives in Minnesota; etc.); and

    c. Public relations-related activities designed to influence the general public's opinion about a particular legislative or administrative matter in Minnesota, but which do not urge any specific action on the part of the general public.

Based on these hypothetical facts, you ask for the Board's opinion regarding the application of Minnesota's lobbyist/principal reporting requirements.

Question One

Under Minnesota Rules 4501.0100, subpart 4, "compensation paid to the lobbyist" is not reported on a lobbyist disbursement report but is included on the annual report of lobbyist principal. How can ABC Company determine what constitutes "compensation paid to the lobbyist" when XYZ Law Firm provides the services of a lobbyist as well as lobbying support and other services?

Opinion

The concept of "compensation paid to the lobbyist" is important because it defines a category of payments that are *excluded* from the periodic reports of disbursements filed by lobbyists but are *included* in the lump-sum amount reported by a principal annually.

This principle is codified in Minnesota Rules 4511.0700 as follows:

> Subpart 1. **Reporting by lobbyist.** Compensation paid to a lobbyist for lobbying is not reportable by the lobbyist as a lobbyist disbursement.
>
> Subp. 2. **Reporting by principal.** Compensation for lobbying paid by a lobbyist principal to a lobbyist or to the employer of a lobbyist must be included when determining the spending level categories for reporting by the lobbyist principal.

Subpart 1 above clarifies that the compensation in question is "compensation paid to a lobbyist *for lobbying*." The rule contemplates, and the present request demonstrates, that a person who is a lobbyist for an association may receive compensation for services other than lobbying. When applying Chapter 10A, the Board will interpret the phrase "compensation paid to a lobbyist" to be limited to that compensation paid to the lobbyist *for lobbying*.

In the present context, the word "compensation" is used in its ordinary sense, which means consideration for services. Reimbursements for expenses are separate from compensation and, if in support of lobbying, must be included in lobbyist disbursement reports.

Subpart 2 of the rule quoted above also makes it clear that compensation paid to a lobbyist includes compensation paid to the lobbyist's employer *for the lobbying services* provided by the lobbyist.

The definition of “lobbying” is provided in Minnesota Rules 4511.0100, subpart 3. Lobbying includes (1) communicating with officials for the purpose of influencing official action, (2) urging others to communicate with officials for the purpose of influencing official action, and (3) any activity that directly supports either of these types of communication.

From the above definition, it follows that compensation paid to a lobbyist is the consideration paid to the lobbyist or the lobbyist's employer for the time that the lobbyist spends (1) communicating with officials to urge official action, (2) urging others to communicate with officials to urge official action, and (3) engaging in any other activity that directly support these activities. Compensation for these activities is included in the annual principal's report but is excluded from lobbyist disbursement reports.

Non-lobbyists may also provide services in support of lobbying and a law firm may have other expenditures that constitute lobbying. These payments are not part of the compensation paid to the lobbyist. As a result, they must be included in the lobbyist disbursement reports.

Question Two

How would “compensation paid to the lobbyist” be reported if ABC Company paid XYZ law firm $25,000 for general government affairs representation during the five-month reporting period from January through May ($5,000 per month) but the law firm only performs $10,000 of work

for ABC Company during the period? That is, how is compensation paid by the principal to the lobbying firm, but which is not specifically attributable to any work performed, to be reported?

Opinion

This question asks how much of a principal's payments are for "compensation paid to the lobbyist" when a fixed-fee retainer agreement includes compensation for a broad range of services and the payments for those services do not correspond to the time when the services are actually provided.

To simplify the discussion, the Board assumes that out-of-pocket disbursements made by XYZ law firm on behalf of ABC Company are reimbursed in addition to payments made under the retainer agreement. If the disbursements constitute lobbyist disbursements, they will be included on the lobbyist's report.

The Board also assumes that the retainer agreement is intended to fairly compensate the law firm for all of the services it provides. To reach this goal, the law firm and the client must have a shared expectation about the amount of services that they expect to be performed over the course of a year and about the assumed rates of compensation for various types of services.

The request suggests that the payment of $5,000 each month is compensation for the services provided in that particular month. This is not the approach suggested by Chapter 10A. In the campaign finance program, an expenditure is deemed to be incurred when the obligation to make the expenditure is incurred. Under this approach, which the Board now adopts for lobbying as well, the compensation for XYZ law firm's services for the year is $60,000. This obligation was incurred at the beginning of the year when ABC Company and XYZ law firm entered into the year-long retainer agreement. The $60,000 happens to be paid over the course of the year at the rate of $5,000 per month.

Under section 10A.025, subdivision 3, a person is required to keep detailed records sufficient to support what is included in a report filed with the Board. Under that statute, XYZ law firm must develop and maintain records that reflect with a reasonable degree of accuracy the amount of time spent on the various types of services it provides to ABC Company. These records must separately track the services of the XYZ law firm lobbyist for lobbying or in support of lobbying, services of others for activities in support of lobbying, and non-lobbying services.

Minnesota Rules 4511.0600 requires that, to the extent that actual costs of lobbying activities can be calculated by reasonable means, the actual costs must be used for reporting. The rule also provides that when actual costs cannot be calculated by reasonable means, a reasonable approximation may be used. The procedure set forth in the remainder of this section will produce a reasonable approximation of lobbying costs for reporting purposes.

Lobbyists file two reports annually. The first report covers from January 1 through May 31 of the year and is due June 15. The second report covers the remainder of the year and is due by January 15th of the following year. Under the stated facts, a member of the XYZ law firm is ABC Company's designated lobbyist. Therefore, that individual will be responsible for reporting all of ABC Company's lobbyist disbursements.

After the May 31 cutoff date for disbursements included on the first report, XYZ law firm must review its records to determine the number of hours of work provided for each type of service. Minimally, the classes of service must include class (a): services of the lobbyist for lobbying and

in support of lobbying, class (b): services of others in support of lobbying, and class (c): services that are not included in (a) or (b) above.

Having determined the number of hours for each class of service, XYZ law firm must multiply those hours by the assumed rate for each service to get the total cost of each class of service. If the total calculated for all services is not reasonable based on the parties' expectations of services to be performed during the remaining seven months of the year, the assumed rate for each type of service must be adjusted so that the anticipated cost for all services expected to be provided over the course of the year equals $60,000.

The value of class (b) services, as calculated above, must be disclosed on the lobbyist disbursement report. Both class (a) and class (b) services will be included in the total disbursements reported by ABC Company on its annual principal report. Class (c) services are not subject to disclosure under Chapter 10A.

For the year-end lobbyist disbursement report, the balance of the $60,000 contract not accounted for in the calculations for the first five months must be allocated to the services provided in the last seven months of the year. XYZ law firm again must review its records to determine the number of hours of work provided for each type of service. XYZ law firm should multiply the number of hours for each class of service by the assumed rates for each class to obtain the value of each class of service. If the total of these three values does not equal the unaccounted-for balance of the contract, a pro-rata adjustment of the total for each class of service should be taken so that the total value of the contract over the year equals $60,000.

Question Three

Minnesota Rules 4511.0600 lists specific categories of lobbying disbursements that must be reported. But the subparts and items in this rule use different phrases to refer to the different categories of lobbying disbursements. Does the use of these different phrases create different standards for determining whether an expense is sufficiently connected to lobbying to constitute a reportable disbursement? Is there a general rule that can be applied in all situations to determine if an expense is a reportable lobbying disbursement?

Opinion

Minnesota Statutes section 10A.04, subdivision 4, requires lobbyist disbursements to be reported in specific categories such as the cost of publications used in lobbying, postage, travel, entertainment, and other expenses. Minnesota Rules 4511.0600 further defines these specific categories of lobbyist disbursements and provides additional guidance for reporting lobbyist disbursements. The rule's subparts and items, however, use slightly different phrases to refer to the lobbying disbursements that must be reported. For example, subparts 1 and 2 refer to disbursements for "lobbying activities" while subpart 5, item A, refers to "materials that directly support lobbying." Subpart 5, item D refers to "costs associated with lobbying activities" while two other categories of disbursements, entertainment and food and beverage, refer to costs "associated with any situation where lobbying activities take place."

The rule's use of these slightly different phrases does not create different standards for determining whether an expense is sufficiently connected to lobbying to constitute a reportable disbursement. Minnesota Statutes section 10A.04, subdivision 4, requires a lobbyist to report "total disbursements on lobbying." "Lobbyist's disbursements" are "all disbursements for lobbying made by the lobbyist, the lobbyist's employer or employee, or any person or

association represented by the lobbyist, but do not include compensation paid to the lobbyist." Minn. R. 4511.0100, subpt. 4.

As stated earlier in this opinion, lobbying is defined as (1) communicating with officials for the purpose of influencing official action, (2) urging others to communicate with officials for the purpose of influencing official action, and (3) any activity that directly supports either of these types of communication. Minn. R. 4511.0100, subpt. 3. In the Statement of Need and Reasonableness for this rule, the Board said that this definition of lobbying was reasonable because it

> includes in lobbying those activities which directly support the key component, which is communication. Without this addition, the definition would be incomplete when applied to such concepts as disbursements for lobbying, most of which are in support of the actual communication, which is the end result of the process. If disbursements for lobbying did not include support activities, there would be virtually no disbursements for lobbying and no disclosure under the statute.

When Minnesota Rules 4511.0600 is read with the definition of lobbying and its history in mind, it becomes clear what costs must be reported as lobbying disbursements. Because the key component of lobbying is communication, a cost is a lobbyist disbursement if it is incurred (1) to communicate with officials for the purpose of influencing official action, (2) to urge others to communicate with officials for the purpose of influencing official action, or (3) for any activity that directly supports either of these types of communication.

As a specific example, the costs of travel "associated with lobbying activities" means travel costs incurred by someone other than the lobbyist (1) to communicate with officials for the purpose of influencing official action, (2) to urge others to communicate with officials for the purpose of influencing official action, or (3) for any activity that directly supports either of these types of communication. Similarly, costs "associated with any situation where lobbying activities take place" means the costs of any setting where communicating with officials for the purpose of influencing governmental action; urging others to communicate with officials for the purpose of influencing governmental action; or anything that directly supports either of these types of communication takes place.

Because communication is the end result of the lobbying process, an expense may be incurred long before the actual communication takes place. But if the expense is used for communicating with an official, urging others to communicate with an official, or for any activity that directly supports either of these types of communications, it is a lobbying disbursement that must be reported.

In this opinion, the Board has stated a general rule for determining when an expense is a lobbying disbursement. If the requester wants the Board's advice on the application of that rule to specific disbursements, the requester may submit another advisory opinion request.

Question Four

Minnesota Statutes section 10A.04, subdivision 6, paragraph (b), requires principals to report the total amount spent to influence official action. This statute does not require the influence on official action to include any communication with government officials. Does this omission require principals to use a different standard than lobbyists use to determine what expenses to

include on the annual principal report? If principals are required to use a different standard to determine what to report, what is this standard?

Opinion

Minnesota Statutes section 10A.04, subdivision 6, paragraph (b), provides that a principal "must report the total amount, rounded to the nearest $20,000, spent by the principal during the preceding calendar year to influence legislative action, administrative action, and the official action of metropolitan governmental units." This statute does not require the efforts to influence official action to include any communication with government officials.

This broader reporting requirement is consistent with the definition of "principal." Minnesota Statutes section 10A.01, subdivision 33, provides as follows:

> "Principal" means an individual or association that:
>
> (1) spends more than $500 in the aggregate in any calendar year to engage a lobbyist, compensate a lobbyist, or authorize the expenditure of money by a lobbyist; or
>
> (2) is not included in clause (1) and spends a total of at least $50,000 in any calendar year on efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units, as described in section 10A.04, subdivision 6.

The influence on governmental action described in clause 2 is not limited to communicating with or urging others to communicate with government officials as it is in the definition of lobbyist. *See* Minn. Stat. § 10A.01, subd. 21 (defining lobbyist). Consequently, an entity could become a principal under Minnesota Statutes section 10A.01, subdivision 33, without ever communicating with or encouraging others to communicate with a government official.

Further, an entity that is a principal because it has a lobbyist also may make additional expenditures to influence governmental action that do not involve communicating with or urging others to communicate with government officials. Minnesota Statutes section 10A.04, subdivision 6, paragraph (b), is written more broadly than the lobbyist reporting requirements to ensure that the total amount spent by a principal on all attempts to influence governmental action is disclosed.

Minnesota Statutes section 10A.04, subdivision 6, paragraph (c) (2), specifies that the total amount reported by the principal must include "all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns related to legislative action, administrative action, or the official action of metropolitan governmental units in this state." Unlike Minnesota Statutes section 10A.04, subdivision 6, paragraph (b), this provision does not use the words "to influence" to limit the expenses that must be reported.

An entity becomes a principal because it has taken steps to influence governmental action either by hiring a lobbyist or by spending $50,000 or more directly on this goal. The activities listed in Minnesota Statutes section 10A.04, subdivision 6 (c) (2), all could be used to support the principal's efforts to influence governmental action either through its lobbyist or through direct spending on issues. For example, a public relations campaign could be used to change public opinion on an issue that is, or that will be, before the legislature. Because the activities listed in subdivision 6 (c) (2) provide the underlying support for the principal's efforts to influence

governmental action, the principal must include the cost of those activities in the total amount spent on lobbying.

Dated: March 5, 2013

/s/ Andrew M. Luger

Andrew M. Luger, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes and Rules

Minnesota Statutes

10A.01 DEFINITIONS

. . . .

Subd. 33. **Principal.** "Principal" means an individual or association that:

(1) spends more than $500 in the aggregate in any calendar year to engage a lobbyist, compensate a lobbyist, or authorize the expenditure of money by a lobbyist; or

(2) is not included in clause (1) and spends a total of at least $50,000 in any calendar year on efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units, as described in section 10A.04, subdivision 6.

. . . .

10A.04 LOBBYIST REPORTS.

Subdivision 1. **Reports required.** A lobbyist must file reports of the lobbyist's activities with the board as long as the lobbyist continues to lobby. The report may be filed electronically. A lobbyist may file a termination statement at any time after ceasing to lobby.

Subd. 2. **Time of reports.** Each report must cover the time from the last day of the period covered by the last report to 15 days before the current filing date. The reports must be filed with the board by the following dates:

(1) January 15; and

(2) June 15.

Subd. 3. **Information to lobbyist.** An employer or employee about whose activities a lobbyist is required to report must provide the information required by subdivision 4 to the lobbyist no later than five days before the prescribed filing date.

Subd. 4. **Content.** (a) A report under this section must include information the board requires from the registration form and the information required by this subdivision for the reporting period.

(b) A lobbyist must report the lobbyist's total disbursements on lobbying, separately listing lobbying to influence legislative action, lobbying to influence administrative action, and lobbying to influence the official actions of a metropolitan governmental unit, and a breakdown of disbursements for each of those kinds of lobbying into categories specified by the board, including but not limited to the cost of publication and distribution of each publication used in lobbying; other printing; media, including the cost of production; postage; travel; fees, including allowances; entertainment; telephone and telegraph; and other expenses.

(c) A lobbyist must report the amount and nature of each gift, item, or benefit, excluding contributions to a candidate, equal in value to $5 or more, given or paid to any official, as defined in section 10A.071, subdivision 1, by the lobbyist or an employer or employee of the lobbyist. The list must include the name and address of each official to whom the gift, item, or benefit was given or paid and the date it was given or paid.

(d) A lobbyist must report each original source of money in excess of $500 in any year used for the purpose of lobbying to influence legislative action, administrative action, or the official action of a metropolitan governmental unit. The list must include the name, address, and employer, or, if self-employed, the occupation and principal place of business, of each payer of money in excess of $500.

(e) On the report due June 15, the lobbyist must provide a general description of the subjects lobbied in the previous 12 months.

. . .

Subd. 6. **Principal reports.** (a) A principal must report to the board as required in this subdivision by March 15 for the preceding calendar year.

(b) Except as provided in paragraph (d), the principal must report the total amount, rounded to the nearest $20,000, spent by the principal during the preceding calendar year to influence legislative action, administrative action, and the official action of metropolitan governmental units.

(c) Except as provided in paragraph (d), the principal must report under this subdivision a total amount that includes:

(1) all direct payments by the principal to lobbyists in this state;
(2) all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns related to legislative action, administrative action, or the official action of metropolitan governmental units in this state; and
(3) all salaries and administrative expenses attributable to activities of the principal relating to efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units in this state.

(d) A principal that must report spending to influence administrative action in cases of rate setting, power plant and powerline siting, and granting of certificates of need under section 216B.243 must report those amounts as provided in this subdivision, except that they must be reported separately and not included in the totals required under paragraphs (b) and (c).

Minnesota Rules

4511.0100 DEFINITIONS.

. . .

Subp. 1a. **Designated lobbyist**. "Designated lobbyist" means a lobbyist responsible for reporting the lobbying disbursements of the entity the lobbyist represents. An entity that employs lobbyists may have only one designated lobbyist at any given time.

. . .

Subp. 3**. Lobbying**. "Lobbying" means attempting to influence legislative action, administrative action, or the official action of a metropolitan governmental unit by communicating with or urging others to communicate with public officials or local officials in metropolitan governmental units. Any activity that directly supports this communication is considered a part of lobbying.

Subp. 4. **Lobbyist's disbursements**. "Lobbyist's disbursements" include all disbursements for lobbying made by the lobbyist, the lobbyist's employer or employee, or any person or association represented by the lobbyist, but do not include compensation paid to the lobbyist.

4511.0200 REGISTRATION.

. . .

Subp. 3. **Registration of designated lobbyist**. A designated lobbyist must indicate on the lobbyist registration form that the lobbyist will be reporting disbursements for the entity the lobbyist represents. An entity that employs lobbyists may have only one designated lobbyist. A designated lobbyist who ceases to be responsible for reporting the lobbying disbursements of an entity must amend the lobbyist's registration with the board within ten days.

4511.0600 REPORTING DISBURSEMENTS.

Subpart 1**. Determination of actual costs required**. To the extent that actual costs of lobbying activities can be obtained or calculated by reasonable means, those actual costs must be determined, recorded, and used for reporting purposes.

Subp. 2**. Approximation of costs**. If the actual cost of a lobbying activity cannot be obtained or calculated through reasonable means, those costs must be reasonably approximated.

Subp. 3. **Disbursements allocated between multiple entities.** A disbursement for lobbying purposes that benefits more than one entity for which a lobbyist is separately registered must be allocated between the entities benefited on a reasonable basis and reported based on that allocation.

Subp. 4**. Disbursements which are only partially in support of lobbying.** A disbursement that is partially in support of lobbying and partially for a nonlobbying purpose must be allocated on a reasonable basis between the two purposes and the portion which is for lobbying activities must be reported.

Subp. 5**. Specific disbursement categories**. Lobbying disbursements must be reported based on the categories in items A to I.

A. "Lobbying materials" includes the cost of production, purchase, or other acquisition of materials that directly support lobbying.

B. "Media costs" includes the cost of media space or time, including Web site design and maintenance, used for lobbying activities. The cost of preparation of materials for use in the media is reported in the lobbying materials category.

C. "Telephone and communications" includes costs for local and long-distance telephone services, electronic mail, pagers, cellular telephones, facsimile distribution services, telegraph, and other communications services.

D. "Postage and distribution" includes costs of postage from the United States Postal Service as well as other distribution costs associated with lobbying activities.

E. "Fees and allowances" includes fees for consulting, surveys, polls, legal counsel, or other services as well as expenses associated with those services.

F. "Entertainment" includes costs of all entertainment associated with any situation where lobbying activities take place.

G. "Food and beverages" includes costs of all food and beverages associated with any situation where lobbying activities take place.

H. "Travel and lodging" includes costs of all travel and lodging associated with any lobbying activity, excluding the costs of the lobbyist's own travel to accomplish the lobbying activity.

I. "Other disbursements" includes general administration and overhead and any other lobbyist disbursements not reported in other categories.

. . .

4511.0700 REPORTING COMPENSATION PAID TO LOBBYIST.

Subpart 1. **Reporting by lobbyist**. Compensation paid to a lobbyist for lobbying is not reportable by the lobbyist as a lobbyist disbursement.

Subp. 2**. Reporting by principal**. Compensation for lobbying paid by a lobbyist principal to a lobbyist or to the employer of a lobbyist must be included when determining the spending level categories for reporting by the lobbyist principal.

Advisory Opinion 430

Withdrawn by Requester

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State of Minnesota

Campaign Finance & Public Disclosure Board

Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN55155-1603

THIS ADVISORY OPINION IS PUBLIC DATA
pursuant to a consent for release of information
provided by each of the requesters

RE: Potential conflict of interest

To: Susan L. Trammell
Office of the Minneapolis City Attorney
350 South 5th Street, Room 210
Minneapolis, MN 55415

Ann E. Walther
Rice, Michels & Walther, LLP
10 Second Street N.E. Suite 206
Minneapolis, MN 55413

Steven Liss
District General Counsel
Minneapolis Public Schools

ADVISORY OPINION 431

SUMMARY

A governmental entity is not a "business" and is not an "associated business" of its elected officials for the purposes of Minnesota Statutes section 10A.07.

FACTS

As the representatives of the City of Minneapolis, Minneapolis School District #1, and the Minneapolis Parks and Recreation Board, you ask for an advisory opinion on behalf of local officials based on the following facts which were developed by the requesters in consultation with Board staff:

1. Individuals are elected by citizens to serve on the Minneapolis School District #1 Board (the School Board), which is the governing board for the school district. Other individuals are elected by citizens to serve on the Minneapolis Park and Recreation

Board (the Park Board) which has jurisdiction over the Minneapolis park system.

2. Members of the School Board and members of the Park Board are compensated by the School District or by the Park Board for their work as members of their respective Boards. Each member receives compensation of more than $50 per month from the respective governmental entity.

3. The Planning Commission of the City of Minneapolis (the Planning Commission) is a commission established by the City of Minneapolis charter. The charter requires that a member of the School Board and a member of the Park Board be Planning Commission members.

4. The Planning Commission makes, recommends, or votes on major decisions related to development, zoning, and economic development.

5. Members of the Planning Commission are local officials of Minneapolis, which is itself a metropolitan governmental unit under Minnesota Statutes section 10A.01, subdivision 24.

6. As a member of the Planning Commission, the School Board member may be called upon to vote on planning decisions that would substantially affect the financial interests of the School District and the Park Board member may be called upon to vote on planning decisions that would substantially affect the financial interests of the Park Board.

7. The decisions of the Planning Commission may constitute recommendations to the governing body of the City of Minneapolis, in which case the governing body of the city makes the final decision.

8. Alternately, the decisions of the Planning Commission may constitute final decisions subject only to appeal through an established appeals process.

Based on the above facts, you ask the following question:

Question

If the School Board member or the Park Board member is called upon to vote on a matter that would substantially affect the financial interests of the School District or of the Park Board, respectively, does the School Board member or the Park Board member have a potential conflict of interest that would require the member to take action under Minnesota Statutes section 10A.07?

Opinion

Potential conflicts of interest are defined in terms of the types of action that give rise to such conflicts. Minnesota Statutes section 10A.07 provides that a potential conflict arises if:

> A public official or a local official elected to or appointed by a metropolitan governmental unit who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an

> associated business, unless the effect on the official is no greater than on other members of the official's business classification, profession, or occupation . . .

Minneapolis is a metropolitan governmental unit and Planning Commission members are local officials in that metropolitan governmental unit. Thus, Planning Commission members are officials governed by the requirements of Section 10A.07. The facts specify that the local official receives compensation of more than $50 in a month from the School District or from the Park Board and that a vote by either member may substantially affect the financial interests of the governmental unit with which the member is associated. Nothing in the facts suggests that the governmental unit with which the member is associated is operating as a business instead of acting in its governmental capacity. This opinion is limited to relationships with governmental units acting in a governmental capacity.

The requirements of § 10A.07 are triggered if the official's vote would affect the financial interests of an "associated business" of the official. Thus, if the School District is an associated business of the School Board member or if the Park Board is an associated business of the Park Board member, the official may be required to take the steps specified in §10A.07 to avoid a conflict of interest.

The phrase "associated business" is specifically defined in Minnesota Statutes section 10A.01, subdivision 5. When applying statutes, the Board follows the rules of statutory construction as set forth in Minnesota Statutes, including Minnesota Statutes section 645.08. One of the principles of § 645.08 is that unless it is inconsistent with the intent of the statute, words must be given their common meaning. The common meaning of "business" is understood by most without resort to a dictionary. Typically a business is an endeavor in which one or more persons engage to generate a profit or provide a livelihood. In the common understanding, "business" on the one hand, is separate from "government" on the other.

The statutory definition of "associated business" provides additional support for the understanding that a governmental entity, such as a school district or the Park Board is not a business. Section 10A.01, subdivision 5, defines an associated business as "an association, corporation, partnership, limited liability company, limited liability partnership, or other organized legal entity."

The statute specifically lists types of entities that are commonly understood to be forms of organization under which persons may do business. Corporations, partnerships, limited liability companies, and limited liability partnerships are all statutorily defined legal forms for business organizations. The inclusion of the general phrase "other organized legal entities" does not provide a basis to extend the definition of business to include governmental entities acting in a governmental capacity. Minnesota Statutes section 645.08, clause 3, provides that general words are construed to be restricted in their meaning by preceding particular words. As a result, the Board construes "other organized legal entity" to refer to other forms of business organizations that may be recognized from time to time.

Based on the above analysis the Board concludes that in this case neither the School District nor the Park Board are included in the scope of entities that may be associated businesses under Minnesota Statutes section 10A.07. As a result, votes by the School Board member or the Park Board member do not give rise to potential conflicts of interest based on the relationship between the School Board member and the School District or between the Park Board member to the Park Board.

Comment on Advisory Opinion 325

In Advisory Opinion 325, the Board was asked if a person appointed to a position with a Minnesota municipality was prevented from serving in the legislature. The Board concluded that the municipal appointment did not prevent the individual from also serving in the legislature. However, although the question was not presented or discussed in the opinion, Advisory Opinion 325 appears to assume that a municipality could be an associated business. The present opinion recognizes that a governmental entity, including a municipality, is not a business and, thus, is never an "associated business". To the extent that Advisory Opinion 325 implied a different conclusion, it is hereby revoked.

Issued November 7, 2012

/s/ Andrew M. Luger
Andrew M. Luger, Vice Chair
Campaign Finance and Public Disclosure Board

Advisory Opinion 432
Withdrawn by requester.

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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

RE: Noncampaign disbursements for donations to a county obligated to incur special election expenses due to a candidate's resignation

To: Mr. James P. Dunn
Chief Deputy Nicollet County Attorney
326 South Minnesota Avenue
St. Peter, MN 56082

ADVISORY OPINION 433

SUMMARY

Funds donated by a terminating principal campaign committee to the state general fund or to a county obligated to incur special election expenses due to that candidate's resignation are noncampaign disbursements under Minnesota Statutes section 10A.01, subdivision 26.

FACTS

As an attorney for Nicollet County, you ask the Campaign Finance and Public Disclosure Board for an advisory opinion. Your request is based on the following facts:

1. For many years, Terry Morrow has represented Nicollet County in the Minnesota House of Representatives. Mr. Morrow has a principal campaign committee registered with the Board.

2. Mr. Morrow recently resigned from the House of Representatives. A special election therefore must be held to fill his seat in the legislature. This election has been scheduled for February 12, 2013.

3. Mr. Morrow has asked Nicollet County if he can donate the remainder of his campaign committee's funds to the county to offset the costs of conducting the special election. Mr. Morrow then will terminate his committee's registration with the Board.

4. The county would like to accept Mr. Morrow's offer. The county is concerned, however, because Minnesota law does not expressly state that the proposed donation is an allowed use of a principal campaign committee's funds. The county does not want to accept and spend the donated funds and then later discover that it must return this money. The county therefore is seeking Board guidance on this issue.

Question

Would funds donated to Nicollet County by Terry Morrow's terminating principal campaign committee be considered noncampaign disbursements under Chapter 10A?

Opinion

Minnesota Statutes section 211B.12 provides that the "use of money collected for political purposes is prohibited unless the use is reasonably related to the conduct of election campaigns, or is a noncampaign disbursement as defined in section 10A.01, subdivision 26."

The Campaign Finance and Public Disclosure Board does not have the authority to interpret Chapter 211B. The Board therefore cannot consider whether the proposed donation here would be permitted as a use of funds "reasonably related to the conduct of election campaigns."

The Board, however, does have the authority to administer Chapter 10A. Consequently, the Board can determine whether the proposed donation is a noncampaign disbursement under section 10A.01, subdivision 26. If the proposed donation is a noncampaign disbursement under Chapter 10A, it would be a permitted use of political funds under Minnesota Statutes section 211B.12.

Minnesota Statutes section 10A.01, subdivision 26, defines over 20 specific types of noncampaign disbursements. The proposed donation in this case does not fall within one of the specified categories.

Minnesota Statutes section 10A.01, subdivision 26, however, also gives the Board the authority to recognize new categories of noncampaign disbursements. Any new noncampaign disbursement must be for a "purpose other than to influence the nomination or election of a candidate or to promote or defeat a ballot question." The Board uses this authority with caution. Typically, a new category of noncampaign disbursements is consistent in some way with an existing noncampaign disbursement or with other provisions in Chapter 10A.

Historically, the Board has allowed terminating principal campaign committees to donate their money to the state general fund. *See* Minn. Stat. § 10A.24, subd. 1 (before principal campaign committee can terminate registration with Board, it must first dispose of all assets over $100).

In these instances, the Board has directed the terminating committee to report the donation as a noncampaign disbursement because giving money to the state general fund is a purpose unrelated to the nomination or election of a candidate or the promotion or defeat of a ballot question. A donation from a terminating principal campaign committee to a county obligated to incur special election expenses due to that candidate's resignation would also be a purpose unrelated to the nomination or election of a candidate or the promotion or defeat of a ballot question.

Treating a donation from a terminating principal campaign committee to the state general fund or a county obligated to incur special election expenses due to that candidate's resignation as a noncampaign disbursement is consistent with other provisions in Chapter 10A. For example, Minnesota Statutes section 10A.324 requires candidate committees to return excess public subsidy payments to the state treasury. Minnesota Statutes section 10A.01, subdivision 26,

clause (4), then allows these candidate committees to report the return of the public subsidy funds as noncampaign disbursements. Similarly, Minnesota Statutes section 10A.15, subdivision 1, requires all types of committees to forward anonymous contributions greater than $20 to the Board for deposit in the state treasury.

Although the Board has long allowed terminating candidate committees to report transfers to the state general fund as noncampaign disbursements, the Board has never formally recognized these donations as a category of noncampaign disbursements. To rectify this omission, the Board, in this opinion, now formally recognizes donations from terminating principal campaign committees to the state general fund or to a county obligated to incur special election expenses due to that candidate's resignation as noncampaign disbursements under Minnesota Statutes section 10A.01, subdivision 26.

Any funds donated to Nicollet County by Terry Morrow's terminating principal campaign committee therefore would be noncampaign disbursements under Chapter 10A.

Dated: February 5, 2013

/s/ Andrew M. Luger
Andrew M. Luger, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

Minn. Stat. § 10A.01, 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:

. . . .

(4) return of a public subsidy;

. . . .

(22) other purchases or payments specified in board rules or advisory opinions as being for any purpose other than to influence the nomination or election of a candidate or to promote or defeat a ballot question; . . . .

Relevant Statutes

10A.01 DEFINITIONS

. . .

Subd. 5. **Associated business.** "Associated business" means an association, corporation, partnership, limited liability company, limited liability partnership, or other organized legal entity from which the individual receives compensation in excess of $50, except for actual and reasonable expenses, in any month as a director, officer, owner, member, partner, employer or employee, or whose securities the individual holds worth $2,500 or more at fair market value.

. . .

10A.07 CONFLICTS OF INTEREST.

Subdivision 1. **Disclosure of potential conflicts.** A public official or a local official elected to or appointed by a metropolitan governmental unit who in the discharge of official duties would be required to take an action or make a decision that would substantially affect the official's financial interests or those of an associated business, unless the effect on the official is no greater than on other members of the official's business classification, profession, or occupation, must take the following actions:

(1) prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict of interest;

(2) deliver copies of the statement to the official's immediate superior, if any; and

(3) if a member of the legislature or of the governing body of a metropolitan governmental unit, deliver a copy of the statement to the presiding officer of the body of service.

If a potential conflict of interest presents itself and there is insufficient time to comply with clauses (1) to (3), the public or local official must orally inform the superior or the official body of service or committee of the body of the potential conflict.

. . .

645.08 Canons of Construction

In construing the statutes of this state, the following canons of interpretation are to govern, unless their observance would involve a construction inconsistent with the manifest intent of the legislature, or repugnant to the context of the statute:

(1) words and phrases are construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such others as have acquired a special meaning, or are defined in this chapter, are construed according to such special meaning or their definition;

. . .

(3) general words are construed to be restricted in their meaning by preceding particular words;

. . .

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State of Minnesota

Campaign Finance & Public Disclosure Board

Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN55155-1603

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

Issued to: Trevor Potter
Bryson B. Morgan
Caplin & Drysdale, Chtd.
One Thomas Circle NW, Suite 1100
Washington, DC 20005

ADVISORY OPINION 434

SUMMARY

A company that provides internet-based contribution processing and delivery services for a fee paid by visitors who use the company's website to make contributions to candidates is not, through that service activity, making a contribution to the recipient candidates. As a result, the registration requirements of Chapter 10A and the restrictions on contributions from associations not registered with the Board do not apply to the company.

FACTS

On behalf of your client, Democracy.com, you have asked the Campaign Finance and Public Disclosure Board for an advisory opinion related to a business venture planned by the company. Your request is based on the following relevant hypothetical facts which you have provided.

Democracy Ventures, Inc. (d.b.a. Democracy.com) is a nonpartisan, for-profit corporation. Democracy.com plans to operate a website that will serve as an online national directory of federal, state, and local candidates for elected public office.

To establish its website, Democracy.com will create a separate web page, referred to as a "profile page," for each federal, state, and local candidate, including Minnesota state-level candidates. These web pages will only include publicly available information submitted by the candidates to the Minnesota Secretary of State on their affidavits of candidacy or to the Board on their principal campaign committee registration forms. For a fee, equal to the fair market value of the services provided, a visitor to the site may make a contribution to any included candidate.[1]

[1] Democracy.com states that it will limit such contributions pursuant to the applicable Minnesota election-year and non-election year contribution limits and source prohibitions and that it will notify contributors of the laws governing disclosure of their contributions and will gather all necessary information from the contributors (full name, complete address, employer name or occupation if applicable, and lobbyist or committee registration number if applicable). The webpage also will require contributors to click a checkbox attesting, among other things, that they are eligible to make contributions under Minnesota law. While these features will likely be beneficial to a treasurer, they are not a requirement for the conclusions reached in this opinion. Regardless of Democracy.com's efforts, the obligation to obtain all required disclosure information and to comply with limits, source restrictions, and other requirements of Chapter 10A remains with the treasurer of the principal campaign committee.

Democracy.com will also allow candidates to take control of their Democracy.com web pages in exchange for payment of a fee that represents the fair market value of the services provided. In the case of a web page that has been taken over by a candidate, Democracy.com will act as a vendor to the candidate and will provide contribution processing and delivery services in exchange for payment by the candidate's principal campaign committee of transaction and processing fees representing the fair market value of the services provided.[2]

Other than providing services to those who pay for them, Democracy.com will not act to influence elections in any manner and will not advocate the election or defeat of any particular candidate, group of candidates, or political party. Democracy.com also will not promote the web page of any particular candidate or the web pages of any particular group of candidates or feature any particular candidate or group of candidates more prominently than another in the promotion of its website.

Democracy.com intends to transmit contributions to recipient candidates via check or direct deposit on a weekly basis. When a contribution is made to a candidate using one of Democracy.com's profile pages (and for those pages that candidates have taken control of if the candidates so agree), Democracy.com will deduct its transaction and processing fees from the total contribution amount before transferring the net amount to the recipient.

Other than the deduction of its fees, Democracy.com will not exercise any discretion or control over contributed funds. While funds processed by Democracy.com will be temporarily held in a Democracy.com merchant account, the funds will not be commingled with the treasury funds of Democracy.com and shall be required, pursuant to an agreement with the contributor, to be delivered promptly to the recipient candidate selected by the contributor. If for any reason the contribution cannot be transmitted or is not accepted by the recipient candidate, the entire contribution amount, including transaction and processing fees, will be promptly refunded to the contributor.

Question

Does Democracy.com's plan to process and deliver contributions to Minnesota state-level candidates through a fee-based service provided to visitors to its website violate any provision of Chapter 10A or require any registration or reporting under Chapter 10A?

Opinion

The registration and reporting requirements of Chapter 10A are triggered by making expenditures to influence the nomination or election of candidates or to promote or defeat a ballot question or by making contributions to candidates, party units, or political committees or funds.

Minnesota Statutes section 10A.27, subdivision 13, provides that an association that is not registered with the Board (which includes Democracy.com) may not contribute more than $100 to a candidate

[2] Democracy.com states that it understands that in Advisory Opinions 319 and 369, the Board concluded that a business model in which a company provided internet services, including contribution collection and processing services, to principal campaign committees for a fee did not result in a contribution by an unregistered association or a registration or reporting requirement under Chapter 10A. Based on its understanding of these opinions, Democracy.com has not specifically asked the Board to review its status with respect to the part of its business plan that calls for providing services directly to principal campaign committees. With respect to these services, the Board finds no significant differences between the Democracy.com business model and those described in Advisory Opinions 319 and 369. Thus, the Board concurs with Democracy.com's conclusion that its provision of services to candidates will not result in a contribution by an unregistered association or a requirement that it register as a political committee or fund or report to the Board.

unless the contribution is accompanied by a statement that meets the disclosure requirements of Chapter 10A.

The stated facts indicate that Democracy.com will not engage in any activity to influence the nomination or election of candidates or to promote or defeat a ballot question. Thus, by definition, it does not make expenditures that would trigger a registration requirement. As a result, Democracy.com is brought under the jurisdiction of Chapter 10A only if the transfers facilitated by its website constitute contributions made by Democracy.com itself to the recipient candidates.

In previous advisory opinions, the Board has concluded that providing contribution processing services to candidates for a fee does not result in the contributions being attributed to the processor. See Advisory Opinions 319 and 369. The present request differs from past Board opinions on the subject only in the fact that the fees for processing contributions are to be paid by the contributor rather than by the recipient. Democracy.com seeks guidance on whether this change in the payment relationships results in a different conclusion with respect to the application of Chapter 10A than was reached in previous advisory opinions.

The component of Democracy.com's business plan under review allows people who want to contribute to candidates to do so through Democracy.com's website. Under this plan, the contributor will pay a fee to cover the costs of collecting, processing, and distributing the contribution. This fee will reflect the fair market value of those services. The contribution sent to the candidate will be the net amount of the transaction after the fee has been deducted from the amount the contributor entered into the system.

In this case, Democracy.com will act as a vendor to the individual contributors, providing processing and delivery services. Because there is no business relationship between Democracy.com and the recipient candidate, the amount of the contribution to the candidate is the net amount actually received by the candidate. The fees paid by the contributor are the costs of a business transaction between the contributor and Democracy.com and do not involve the candidate.

The business model that changes the obligation for payment of its services from the candidate to the contributor does not affect the analysis of the transactions for Chapter 10A purposes.

The contributions described are contributions from the various contributors who use Democracy.com's website. They are not contributions from Democracy.com and, thus, do not trigger the disclosure requirements of Minnesota Statutes section 10A.27, subdivision 13.

Because Democracy.com, itself, makes no contributions and, according to the stated facts, engages in no activities to influence the nomination or election of candidates or to promote or defeat a ballot question, it is not required to register as a political committee or fund.

Issued: May 7, 2013

/s/ Andrew M. Luger
Andrew M. Luger, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

Minn. Stat. § 10A.14, subd. 1. First registration. The treasurer of a political committee, political fund, principal campaign committee, or party unit must register with the board by filing a statement of organization no later than 14 days after the committee, fund, or party unit has made a contribution, received contributions, or made expenditures in excess of $100, or by the end of the next business day after it has received a loan or contribution that must be reported under section 10A.20, subdivision 5, whichever is earlier.

Minn. Stat. § 10A.27, 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.

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