

State of Minnesota
Campaign Finance & Public Disclosure Board
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN55155-1603

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

RE: The Purchase of Research and Polling Data Services

ADVISORY OPINION 436

SUMMARY

Purchasing research and polling services from a commercial vendor as a defined package for a flat annual fee does not create an in-kind contribution to other committees who purchase the same services at the same flat annual fee. Joint purchases of research and polling services from a commercial vendor by committees that have a bona fide use for the services are not an in-kind contribution as long as each committee pays an equal or proportionate share of the cost of the service.

FACTS

As the attorney for a commercial services company (the Vendor) that provides issue and candidate related research and opinion polling services in Minnesota, you ask the Board for an advisory opinion. The Vendor requests the opinion in order to verify that its proposed pricing models for its products will not create in-kind contributions between customers who buy the same product or service. Your request is based on hypothetical facts that you have provided which are, in relevant part, as follows:

1. The Vendor is a corporation that operates a commercial research and opinion polling service that provides its customers with information which helps their election related activities in Minnesota.
2. The Vendor's customers include candidate committees, political party units, political committees and funds, and independent expenditure committees and funds registered with the Board.
3. The Vendor is considering a new pricing model for its services in 2014. Under this model customers will have the option to purchase a defined package of research and opinion polling services for a flat annual fee. The Vendor will set the amount of the annual fee and require customers to pay the fee at the beginning of the year.
4. If the flat annual fee pricing model is implemented the amount of the fee will be set at a level the Vendor reasonably believes will result in total flat fee revenue that exceeds the total costs (including overhead) to produce the services provided.
5. If more customers than expected wish to purchase the flat annual fee package the Vendor may decide to either lower the flat fee, or increase the services provided in the package.

6. All customers who purchase services from the Vendor using the flat annual fee pricing model will receive the same package of products and services. Under no circumstances will the Vendor provide discounted rates, benefits, or preferential treatment to any customer that purchases services under the flat annual fee model.
7. The flat annual fee package of products and services will be delivered to customers over the course of the year. As topics of interest to customers will likely change over the course of an election year the Vendor will periodically solicit input from customers on the issues of interest to them. The Vendor will retain discretion over the specific topics and subjects of the work it provides under the flat annual fee model. Through this process the Vendor hopes to ensure that customers have a bona fide use for the information purchased.
8. Because expenditures made by customers registered with the Board are disclosed on periodic Reports of Receipts and Expenditures, it may be that customers will become aware of other customers who have purchased the Vendor's products. However, the Vendor business model is to maintain the confidentiality of its customers' identities.
9. The Vendor has in place policies and procedures that prohibit its customers from discussing their election related plans, including how the customer will use polling and research information, with employees of the Vendor.
10. In addition to the flat annual fee package of services, the Vendor expects to sell additional discrete research and polling projects in response to specific requests received from customers. The Vendor will charge either an hourly rate or a flat fee for services not provided as part of the flat annual fee package. Both the hourly rate and the flat fee will reflect a rate the Vendor reasonably believes will exceed the cost to produce the work requested.
11. If two or more customers jointly ask the Vendor to work on a discrete research or polling project, the Vendor will charge the same hourly rate or flat fee as it would if only one customer were purchasing the product. The cost of the project will be divided between the customers so that each customer pays an equal and proportionate share of the total project cost.
12. The Vendor is aware of Advisory Opinion 410, issued by the Board in September of 2010. The Vendor is concerned that the answer the Board provided in response to question 9(b) may mean that customers who purchase research or polling services under either of the pricing models described in the facts of this advisory opinion could be viewed as making in-kind contributions to other customers who purchase the same service or product.

Background

An advisory opinion may be requested only to guide the requestor in actions it is considering taking. In this case, the requestor is a commercial vendor making a decision on how to market and set prices for its services. The Board recognizes that it has no authority to regulate the Vendor's decisions on these matters. However, the Vendor recognizes that its pricing models have the potential to automatically result in transactions that would be recognized, and may be prohibited, under Chapter 10A. Thus, the application of Chapter 10A will have a bearing on the Vendor's decisions, even though any potential violation resulting from the described transactions would be a violation for the some of the Vendor's prospective customers.

The requestor's impetus to ask for this advisory opinion is found in its reading of Advisory Opinion 410; in particular the Board's answer to question 9 (b). Advisory Opinion 410 was issued in response to a series of questions from an association that planned to register as an independent expenditure political committee (IEPC) with the Board. Most of the questions asked in the opinion sought to determine what communications and actions an IEPC may make without jeopardizing the independence of expenditures later made by the IEPC to support or oppose a candidate. The text of the question 9 (b) and the opinion offered by the Board in Advisory Opinion 410 are as follows:

Question 9(b) The IEPC hires a polling firm to conduct a poll and the IEPC shares the cost of polling activities with a political party or legislative caucus. The results of the poll are used by the IEPC and the political party or legislative caucus to make independent expenditures.

Opinion: Legislative caucuses are party units, so the question as stated applies to all party units. While the scenario as presented would not destroy the independence of resulting independent expenditures, it presents a different potential problem. Independent expenditure political committees or funds are not permitted to make contributions to party units. The Board believes that polling results are not diminished in value by being shared between two entities, the value of the results to each entity is the same as either would have had to pay for the results on its own. Therefore, sharing costs of a poll as described would result in a prohibited contribution from the IEPC to the party unit.

The question in Advisory Opinion 410, like the question in this opinion, relates to the joint purchase of services by two associations registered under Chapter 10A. To the extent that the Board's answer in Advisory Opinion 410, question 9 (b), provides that *any* joint purchase between an IEPC and a political party unit automatically results in a prohibited in-kind contribution, that conclusion is clarified by this opinion, and section 9(b) of Advisory Opinion 410 is limited to joint purchases of polling data when the IEPC has no bona fide need for the polling data acquired through the joint purchase.

Question One

If a registered committee purchases a defined package of research and opinion polling services from Vendor for a flat annual fee, will that committee have made an in-kind contribution to any other registered committee that purchases the same package of services for the same flat annual fee?

Opinion One

No. The amount of the flat annual fee will be based on the Vendor's calculation of the expected total fixed and variable costs for providing the package of services divided by the estimated number of customers who will purchase the service. The Vendor may, at its discretion, lower the flat annual fee if more customers than expected purchase the services. But the customers of the service are not in control of the price set by the Vendor, and therefore, have no control over whether their use of the flat annual fee package will result in a lower cost to other customers.

Further, for an in-kind contribution to occur there must be a decision by the contributor to transfer goods or services to the recipient committee. An in-kind contribution does not occur if an action has the inadvertent result of reducing the cost of goods or services to another committee. The facts of this request provide no basis for the Board to conclude that the purchase of services for a flat annual fee is anything more than a commercial transaction between the customer and the Vendor.

In reaching this conclusion, the Board assumes that there is no collusion between the Vendors customers for the purpose of reducing the cost of the Vendor's services for a particular customer.

Question Two

If two or more registered committees or funds evenly share the cost of purchasing a specific set of research or polling services, will the registered committees or funds have made in-kind contributions to each other equal in value to the amount each committee or fund saved by not purchasing the services alone?

Opinion Two

No, as long as all parties that are a part of the joint purchase have a bona fide use for the services purchased and the share each party pays is equivalent to the proportionate benefit each party expects to receive from the service. Registered committees and funds, like any other consumer, try to derive the best value possible for their money. As long as all of the parties in a joint purchase of services have a legitimate use for the services, and the joint purchase is a way to buy needed services at a reduced cost, then the joint purchase is not an in-kind contribution.

If, however, a participant in a joint purchase has no need for the services acquired, then the purpose of the joint purchase changes. A party to a joint purchase of services that has no bona fide use for the services is partially subsidizing the services used by the other participants in the purchase. In this scenario the cost paid by the party that had no use for the service is an in-kind contribution to any registered committee that received the service through the joint purchase. An in-kind contribution is not necessarily prohibited, but as pointed out by Advisory Opinion 410, an in-kind contribution between an IEPC and any other type of registered committee, is a violation of Chapter 10A.

An in-kind contribution may also occur if the cost paid by a party to a joint purchase is significantly disproportionate to the parties' use of the service. In such a case, the parties must allocate the cost of the service in proportion to the benefit they received from it.

The requestor states that the Vendor will try to ensure that customers have a bona fide use of the services provided, and that customers pay an equal and proportionate share of joint purchases. However, the Vendor's policy of prohibiting its employees from discussing with a customer the customer's intended use of research and polling information seems to preclude the Vendor from being able to determine if a bona fide use exists or that joint payments are proportionate to the parties' expected use. If evidence is provided to the Board that indicates that a joint purchase was used as a means to make an unreported in-kind contribution, the Board may investigate to determine if all parties to the purchase had a bona fide need for the information acquired and that the amount paid in a joint purchase was appropriate.

Issued: November 5, 2013

/s/ Deanna Wiener

Deanna Wiener, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

Minn. Stat. § 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.

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RE: Candidate fundraising for independent expenditure political committee or fund

ADVISORY OPINION 437

SUMMARY

Under the specific facts presented, assistance by a candidate in the fundraising efforts of an independent expenditure political committee will not destroy the independence of an expenditure later made by the independent expenditure political committee to influence the candidate's election. However, the statutes prohibit virtually all candidate involvement at any step of the process of making an independent expenditure. As a result, even a slight deviation from the hypothetical facts of this opinion could result in the resulting expenditure being a contribution to the candidate.

FACTS

As the attorney for a Minnesota candidate, as defined in Minnesota Statutes Chapter 10A, (the Candidate), 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 candidate has been approached by a group of individuals who intend to form an independent expenditure political committee (IEPC). The group intends to register the IEPC with the Board as required by statute. The IEPC intends to accept unlimited contributions from individuals and corporations. It also intends to make expenditures expressly advocating the election or defeat of candidates for state office.
2. Neither the Candidate nor the Candidate's principal campaign committee or any agent of the Candidate has any knowledge regarding the content, timing, or volume of any of the IEPC's expenditures. The Candidate, the committee, and the Candidate's agents also have no knowledge about the location, mode, or intended audience of the IEPC's expenditures (e.g., choice between online advertisements and television advertisement or choice between a message targeted at Republican-leaning voters and a message targeted at Independent-leaning voters).
3. The group has asked the Candidate to assist the IEPC with fundraising, both by directly

soliciting contributions for the IEPC and by appearing as a speaker at the IEPC's fundraising events.

Assumptions;

For the purposes of this opinion, the Board makes the following further assumptions:

1. In addition to the stated facts, the Board assumes that the neither the Candidate's principal campaign committee nor any agent of the Candidate are involved in any way that might defeat the independence of the subject expenditure. On the basis of that assumption, this opinion examines only the actions of the Candidate. Readers seeking guidance from this opinion should recognize that although this opinion discusses only conduct by a candidate, that same conduct by the candidate's principal campaign committee or agent would have the same effect as if engaged in by the candidate.
2. The Board also assumes that the described IEPC intends to make independent expenditures for multiple candidates, that the Candidate has no knowledge or information as to the identities of the candidates who will be the subjects of the IEPC's independent expenditures, and that there is nothing to suggest to the Candidate that the Candidate will necessarily be a beneficiary of those expenditures.
3. The Board finally assumes that the fundraising is not undertaken in such a way that the fundraising itself would promote the Candidate's nomination or election. On the basis of this assumption, the Board does not address situations in which fundraising efforts undertaken by an association could constitute contributions to a candidate assisting in the fundraising.

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

Question One

May the candidate solicit unlimited contributions from individuals and corporations to the IEPC without giving "consent, authorization, or cooperation" for any subsequent expenditures in support of the candidate?

Opinion

This question requires the Board to examine the definition of independent expenditure, which is only partly quoted in the question posed by the Candidate. The Candidate recognizes that certain actions by the Candidate could destroy the independence of an expenditure that would otherwise be characterized as an independent expenditure.

The question confirms that the Candidate also recognizes that an independent expenditure political committee may accept unlimited contributions from both individuals and corporations, subject to limited disclosure provisions. The Candidate, on the other hand, is subject to strict limits on the amount that the Candidate may accept from an individual donor and is prohibited from accepting contributions from corporations.

An independent expenditure is a special type of expenditure in Minnesota law because it can be made without financial limits and it may be made using any source of funding, including corporate money. Additionally, an independent expenditure does not constitute a contribution to the candidate who may benefit from the expenditure. Thus, it provides a means of supporting candidates without being bound by the financial limits applicable to contributions to candidates.

An independent expenditure is defined in terms of conduct that is *not* associated with the expenditure. The definition is as follows:

"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.

Minnesota Statutes section 10A.01, subdivision 18.

The facts of this matter specify that the expenditure made by the IEPC will expressly advocate for the election or defeat of a clearly identified candidate, meeting the requirement for content of a message that may be an independent expenditure. The question presented is whether an expenditure for a communication that advocates for the election of the Candidate or against the election of the Candidate's opponent can be an independent expenditure in view of the Candidate's participation in fundraising for the IEPC.

Under Minnesota law, an independent expenditure is not merely a financial transaction. An independent expenditure includes the decision to spend money and the financial transactions making the payment. But it also includes decisions about content of the resulting communication, timing of the communication's distribution, and decisions about the audience to whom the communication will be distributed. Finally, an independent expenditure includes the communication that results from the spending. This final conclusion is mandated by the definition of independent expenditure, which says that an independent expenditure is an expenditure "expressly advocating the election or defeat of a clearly identified candidate." Only the communication itself, which results from decisions leading up to its creation and distribution, can advocate for anything.

The conclusion that the independent expenditure consists of the communication itself as well as the processes and decisions involved in creating and distributing the communication is further supported by the independent expenditure disclaimer requirement of Minnesota Statutes section 10A. 17, subdivision 4, which requires that persons making independent expenditures must provide specified disclosure on all literature or advertisements published as independent expenditures.

To assist in examining whether an expenditure remains independent of a candidate, it is helpful to break down the possible types of action or communication that could defeat its independence. Examined in this way, the statute says that an expenditure is not an independent expenditure if the expenditure is made:

with the express consent of the candidate,
with the implied consent of the candidate,

with the authorization of the candidate,
with the cooperation of the candidate,
in concert with the candidate,
at the request of the candidate, or
at the suggestion of the candidate.

By using a comprehensive list of activities and relationships that will defeat the independence of an expenditure, the legislature has conveyed its intention to require a high degree of separation between independent expenditure spenders and affected candidates. The Board has applied this legislative intent in previous advisory opinions and enforcement actions related to protecting the independence of independent expenditures.

The Board assumes that the legislature, through the use of this comprehensive list of prohibited communications and relationships, intended to require the highest degree of separation between candidates and independent expenditure spenders that is constitutionally permitted. In fact, when the statute was enacted it included a clause that completely precluded recognition of independent expenditures made by political parties once they had candidates on the ballot. While that clause was stricken by the courts as unconstitutional, it is still instructive with respect to the concern the legislature had about maintaining separation between candidates and associations that could raise and spend money without statutory limits to influence the elections of those same candidates.

The facts of the request suggest a close relationship between the Candidate and the IEPC. A candidate will not be approached by an independent expenditure political committee to engage in fundraising unless the candidate's expressed values and goals are consistent with those of the political committee. Conversely, a candidate would not consider engaging in fundraising for a political committee whose values and goals were contrary to those of the candidate. It is this very alignment of values and goals that makes it possible, perhaps likely, that the IEPC would decide to engage in independent expenditure communications to affect the Candidate's election.

With the above analysis in mind, the Board considers whether the scenario posed by the Candidate involves any of the conducts or relationships that would defeat the independence of an IEPC expenditure affecting the Candidate's election.

Express consent or authorization

Express consent and authorization are similar in that they each require a specific manifestation of a candidate's approval of the association's making expenditures to affect the candidate's election. That approval may be of a specific expenditure or of the general proposition that the association will make expenditures to affect the candidate's election.

Whether an action is "consent" or "authorization" may depend on whether the association approached the candidate and asked about doing independent expenditures, in which consent might result, or whether the candidate somehow authorized expenditures without being asked or without a two-way communication taking place. The Board concludes that the use of both "consent" and "authorization" was part of the legislature's broad approach in which it intended to preclude any communication about independent expenditures between the spender and the affected candidate.

Neither express consent nor authorization can be implied by conduct. Each requires an affirmative manifestation of approval for associations making expenditures affecting the candidate's election. Under the facts of this opinion, there is no act or statement by the Candidate affirmatively consenting to or authorizing the IEPC to make expenditures on behalf of the Candidate.

Request or suggestion

A request that an association make expenditures to support a candidate is slightly different than a suggestion that the association do the same thing. The inclusion of both concepts as acts that destroy the independence of an expenditure is another example of the legislature's intent to prohibit all expenditure-related communications between a candidate and a potential independent expenditure spender. For the purposes of this opinion, it is sufficient to recognize that a request or suggestion cannot be implied. Like express consent or authorization, a specific affirmative action must be taken by the candidate to constitute conduct that defeats the independence of the expenditure. Under the facts of this opinion, there is no such conduct.

In concert with

When one works in concert with another, they are working together toward a mutual goal or endpoint. The phrase requires some joint or coordinated effort to reach the mutually sought result.

When considering the question of working in concert with respect to independent expenditure communications, a more specific joint effort is required than that specified in the facts of this opinion. The facts establish that the IEPC wishes to make independent expenditures and that the Candidate may assist the IEPC in fundraising for that purpose. The Board has assumed that the independent expenditures will support the mutual goals of the IEPC and the Candidate. However supporting the political goals of an association, even by assisting the association in raising money to reach those goals through the making of independent expenditures is insufficient to constitute working in concert with the association on any specific independent expenditure communication or group of communications.

Implied consent

Unlike express consent, implied consent does not require any affirmative assertion of consent. Implied consent may be demonstrated solely through conduct. Under the facts of this opinion, the political committee for which the Candidate would raise money is a political committee formed expressly to make independent expenditures. It follows that the Candidate's participation in fundraising for that purpose constitutes implied consent for the IEPC's overall mission and approach, that is advocating for candidates through independent expenditure communications.

However, the implied consent that will defeat the independence of an expenditure must be implied consent for independent expenditure communications related to the candidate giving the consent; not simply implied consent that the association may make independent expenditures. Under the facts of this opinion, there is no indication of whether the IEPC will even make independent expenditures supporting the Candidate. A mere hope, or even the likelihood, that an association will make independent expenditures supporting a candidate is not sufficient for the candidate's participation in fundraising to constitute implied consent for such an independent expenditure should one eventually occur.

If a real life scenario differs from the limited facts presented in this opinion, the Board's conclusion might be different. For example, an independent expenditure political committee that includes a candidate's name implies that it exists to make independent expenditures for that candidate. That candidate's participation in fundraising would, at a minimum, constitute implied consent for any resulting expenditures.

Similarly, if a candidate understands or has reason to believe that the activities of an independent expenditure political committee are directed toward expenditures for that candidate, then that candidate's participation in fundraising for the furtherance of those activities could constitute implied consent for the resulting expenditures.

In cooperation with

Like implied consent, the question of whether a candidate acts in cooperation with an association in the association's independent expenditure communications is a question of fact that will usually require a case-by-case analysis.

Acting in cooperation with an association developing independent expenditure communications is different than acting in concert. As noted above, acting in concert requires some level of coordination or joint effort to reach a mutual goal or endpoint. On the other hand, a candidate may cooperate with a political committee in the development of communications intended to be independent expenditures without coordinating the association's efforts with those of the candidate's principal campaign committee. Acting in cooperation requires some level of participation by the candidate in at least one of the various processes or decisions that are undertaken to make an independent expenditure.

Under the facts presented, the Candidate's general cooperation with fundraising for the IEPC is not in the furtherance of any particular expenditure and, thus, does not meet the threshold for cooperation that would defeat the independence of an expenditure.

If a real life scenario differs from the limited facts presented in this opinion, the Board's conclusion might be different. For example, if a candidate understands or has reason to believe that the activities of an independent expenditure political committee are directed toward expenditures for that candidate, then that candidate's participation in fundraising for the furtherance of those activities could constitute cooperation in making the resulting expenditures.

When cooperation is in question a case-by-case factual analysis will usually be required.

Conclusion

Under the facts and assumptions on which this opinion is based, the actions of the Candidate in fundraising for the IEPC would not destroy the independence of any expenditure the IEPC decides to make affecting the Candidate's election. However, certain actions can only be evaluated based on real-world events on a case-by-case basis. Thus, this opinion is narrowly limited to the facts and assumptions contained herein.

Questions Two and Three

May the Candidate participate in fundraising events where the IEPC solicits unlimited contributions from individuals and corporations?

May the Candidate promote the IEPC to the Candidate's supporters without directly soliciting funds?

Opinion

The analysis in response to Question One is applicable to these questions. If none of the factors that would defeat the independence of an expenditure exists, the expenditure made with funds raised at a fundraising event in which the Candidate participates or through the promotion of the IEPC to the Candidate's supporters would not destroy the independence of a subsequent expenditure made to influence the election of the candidate.

Questions Four and Five

Would it lessen the risk of a coordinated expenditure if the Candidate and the Candidate's campaign took the following actions?

- (a) Avoid hiring employees, vendors, or consultants who have knowledge or decision-making authority regarding the IEPC's strategies or expenditures.
- (b) Avoid sharing any non-public information with the IEPC about the campaign's plans, strategies, or needs.
- (c) Avoid conversations with any person making decisions for the IEPC about the IEPC's proposed expenditures or the campaign's plans.

Are there any other actions the candidate could take to lessen the risk of a coordinated expenditure with the IEPC?

Opinion

The opinions expressed in the previous sections assumed that there were no relationships other than the Candidate's fundraising efforts that would affect the characterization of the IEPC's expenditures. The previous questions related solely to the Candidate's fundraising activities on behalf of the IEPC. Questions Four and Five introduce an entirely different category of relationships and conducts that could destroy the independence of an IEPC expenditure affecting the Candidate's election.

The Board has addressed the question of shared contractors in previous advisory opinions and, while advisory opinions are not binding and do not constitute any sort of precedent, the Board finds the advice given previously to be applicable here. In Advisory Opinion 410, the Board recognized the danger of shared consultants and determined that a consultant working for both an independent expenditure political committee and a candidate would have to create two essentially separate companies. The Board recognized that it is not possible for one individual to mentally compartmentalize two related campaigns without one affecting the other.

To the extent that it remains unclear, the Board concludes that a candidate's hiring or retaining of employees, vendors, or consultants who have knowledge or decision-making authority regarding the strategies or expenditures of an independent expenditure political committee or fund results in coordination that defeats the independence of any expenditure made by the

independent expenditure political committee or fund to affect the candidate's election. Such relationships should be strictly avoided.

If a consultant or vendor has established separate independent expenditure and candidate divisions with the required level of separation, the candidate could retain the candidate division without destroying the independence of any expenditure on which the independent expenditure division worked. Advisory Opinion 410 discusses the level of separation required and reflects the opinion of the Board with respect to the issue raised in question four (a).

The Candidate also asks whether the principal campaign committee should avoid sharing any non-public information with the IEPC about the campaign's plans, strategies, or needs. Without more specific facts, the Board cannot issue an absolute opinion. It is possible that there are situations when sharing such information would not destroy the independence of an eventual IEPC on behalf of the Candidate. However, it is more likely that sharing such information would constitute coordination, defeating the independence of any eventual IEPC expenditures. It is also possible that sharing such information could constitute a request by the Candidate that the IEPC make independent expenditures on the Candidate's behalf.

The Candidate asks if the Candidate should avoid conversations with any person making decisions for the IEPC about the IEPC's proposed expenditures or the campaign's plans. Clearly such conversations are to be avoided if the independence of any eventual IEPC expenditure is to be maintained. Such conversations have the potential of constituting express or implied consent, request, or authorization.

Finally, the Candidate asks if there are other steps the Candidate should take to maintain the independence of any IEPC expenditures.

This opinion discusses in detail the types of actions or communications involving candidates and political committees or funds that would could defeat the independence of a political committee or fund expenditure. Although this opinion is limited to possible expenditures by an independent expenditure political committee, these types of actions and communications can destroy the independence of an expenditure made by any type of entity engaged in communications to influence the nomination or election of candidates.

The list of actions and communications that will defeat the independence of an expenditure is comprehensive. The Board has concluded that the legislature intended the statute to be applied broadly so as to prohibit all involvement of candidates in any part of the process of an association's making independent expenditures. As candidates and associations seek to determine the boundaries of interactions that they may have without defeating the independence of an expenditure, this interpretation and the guidance of this opinion should be considered.

Dated: November 5, 2013

Deanna Wiener, Chair
Campaign Finance and Public Disclosure Board

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RE: Expenditures for which an individual will be deemed a candidate

ADVISORY OPINION 438

SUMMARY

An individual is deemed a candidate under Chapter 10A when the individual self-funds activities (1) that cost more \$100 and (2) that are made for the purpose of bringing about the individual's nomination or election to office. Certain very limited activities may be undertaken by an individual exploring a candidacy without making the individual a candidate. A candidate who has not formed a principal campaign committee still must file campaign finance reports if the candidate self-funds campaign expenditures in excess of \$750.

FACTS

As the attorney for an individual who is exploring whether to seek nomination and election to a Minnesota constitutional office, 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. For question 1 below, assume that the individual is exploring whether to seek nomination and election for a constitutional office in 2014.
2. For question 1 below, assume that the individual has not decided whether to seek nomination and election for a constitutional office in 2014.
3. For question 1 below, assume the individual has not received contributions or made expenditures in excess of \$100 for the purpose of bringing about the individual's nomination or election.
4. For question 1 below, assume the individual has not 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.
5. For question 1 below, assume the individual will spend only the individual's own money on the activities described in the question.

6. For question 2 below, assume that the individual has decided to seek nomination and election for a constitutional office in 2014.
7. For question 2 below, assume the individual will spend only the individual's own money on the campaign, or the individual will not accept contributions totaling more than \$750 from other people and will not want or seek public funding for the campaign.
8. For all questions, assume the individual has not formed or registered a principal campaign committee.
9. For all questions, assume the individual has not taken the action necessary under the law of this state to qualify for nomination or election.

Question One

Must an individual file a campaign finance report under Minnesota Statutes section 10A.20, subdivision 6, if the individual takes one or more of the following actions:

- 1) self-funds background research about himself or herself as part of the exploratory process;
- 2) self-funds name-recognition polling or issue polling as part of the exploratory process;
- 3) self-funds name-recognition polling or issue polling as part of the exploratory process and the polling questions reference the upcoming election for the constitutional office being considered by the individual; or
- 4) self-funds focus group research as a means of further refining issue polling as part of the exploratory process.

If the individual takes any one of these actions, does the individual need to form and register a principal campaign committee? Similarly, by making such self-funded expenditures as part of the exploratory process, would the individual be deemed a "candidate" under Minnesota Statutes section 10A.01, subdivision 10?

Opinion

Minnesota Statutes section 10A.01, subdivision 10, provides as follows:

"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 must form and register a principal campaign committee with the Board if the candidate accepts more than \$750 in contributions or accepts public subsidy. Minn. Stat. § 10A.105, subd. 1. A candidate who is not required to form a principal campaign committee still must report to the Board if the candidate "makes campaign expenditures in aggregate in excess

of \$750 in a year.” Minn. Stat. § 10A.20, subd. 6.

According to the provided facts, the individual has not yet decided whether to seek office and has not yet taken the action necessary to qualify for nomination or election to office. Nor has the individual received contributions in excess of \$100 or given consent for another person to receive contributions or make expenditures in excess of the \$100 threshold. Consequently, the individual can be deemed a candidate under Minnesota Statutes section 10A.01, subdivision 10, only if the individual’s own payments for one or more of the activities identified in the question exceed the \$100 threshold and are made “for the purpose of bringing about the individual’s nomination or election.”

The first activity listed is the self-funding of background research on the individual that is undertaken before the individual has decided to seek office. Running a background check on oneself when deciding whether to run for office is sufficiently remote from the process of seeking nomination or election to office that it will not transform an individual into a candidate by operation of Minnesota Statutes section 10A.01, subdivision 10.

The second activity listed is name-recognition polling that again is undertaken before the individual has decided to seek office. Polling, however, involves contact with potential voters. A poll theoretically could be structured both to measure the name recognition of the individual and to also create a positive impression of the individual in a way that could help bring about the individual’s nomination or election. Consequently, whether name-recognition polling is an activity that transforms an individual into a candidate by operation of Chapter 10A depends on the specific content of the poll.

If the questions in the poll simply ask voters whether they have heard of the individual or whether they have an impression of the individual, the potential influence on the voters would be minimal. When name-recognition polling can have only a minimal effect on voters, the Board will not consider the polling to be for the purpose of bringing about the individual’s nomination or election and this activity will not transform an individual into a candidate under Chapter 10A.

Conversely, if the poll questions refer to the individual in a way that could change the voter’s impression of the individual or the individual’s potential opponents, the poll could help to bring about the individual’s nomination or election to office. An individual who authorizes this type of polling would be deemed a candidate under Chapter 10A if the cost of the activity exceeds \$100.

The final activities listed in question one are issue polling and focus group research. These activities are conducted to determine which issues are most important to potential voters and which messages best resonate with voters on those issues. This information then is used to develop a more effective campaign to nominate or elect an individual. Because the information gathered from issue polling and focus group research is so directly related to bringing about an individual’s nomination or election, an individual who authorizes these activities would be deemed a candidate under Chapter 10A if their cost exceeds \$100.

Under the facts presented for question one, the individual will not accept any contributions or public subsidy. Thus, even if the individual is deemed a candidate under Chapter 10A due to one of the activities discussed above, the individual would not be required to form or register a principal campaign committee with the Board. See Minn. Stat. § 10A.105, subd. 1 (candidate

must form and register principal campaign committee when candidate receives more than \$750 in contributions or accepts public money).

Even without a campaign committee, however, a self-funded candidate still must disclose expenditures when those expenditures exceed \$750 in a calendar year. See Minn. Stat. § 10A.20, subd. 6 (candidate who does not register principal campaign committee must file reports when expenditures exceed \$750). An expenditure is “a purchase or payment of money or anything of value or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate.” Minn. Stat. § 10A.01, subd. 9.

An activity that is undertaken for the purpose of bringing about the individual’s nomination or election also would be an activity undertaken “for the purpose of influencing the nomination or election of a candidate.” *Id.* Thus, if the cost of any of the activities undertaken for the purpose of bringing about the individual’s nomination or election exceeds \$750, alone or in aggregate, the individual must file campaign finance reports with the Board. The schedule for filing these reports is in Minnesota Statutes section 10A.20, subdivisions 2 and 6.

Question Two

Must an individual file a campaign finance report under Minnesota Statutes section 10A.20 if the individual, having decided to seek nomination and election for a constitutional office, takes one or more of the following actions:

- 1) self-funds communication development such as issue statements or media training;
- 2) self-funds creative work such as the development of a campaign website, introductory video, and logo; or
- 3) self-funds the purchase of mailing lists.

Does the individual need to form and register a principal campaign committee? Similarly, by making such self-funded expenditures, would the individual be deemed a “candidate” under Minnesota Statutes section 10A.01, subdivision 10?

Opinion

As stated above, a candidate is someone “who seeks nomination or election” to a state-level office or who is deemed to seek nomination or election to an office because the individual meets the criteria listed in Minnesota Statutes section 10A.01, subdivision 10. Under the facts presented for question two, the individual already has decided to seek nomination and election to an office when the individual undertakes the listed actions. Because the individual is someone “who seeks nomination or election” to office, the individual is a candidate under the Chapter 10A definition.

Under the facts presented for question two, the individual will not accept any contributions or public subsidy. Thus, even if the individual is a candidate under Chapter 10A, the individual would not be required to form or register a principal campaign committee with the Board. See Minn. Stat. § 10A.105, subd. 1 (candidate must form and register principal campaign committee when candidate receives more than \$750 in contributions or accepts public money).

Even without a campaign committee, however, a self-funded candidate still must disclose

expenditures when those expenditures exceed \$750 in a calendar year. See Minn. Stat. § 10A.20, subd. 6 (candidate who does not register principal campaign committee must file reports when expenditures exceed \$750). As discussed above, an expenditure is an expense made or incurred to influence the nomination or election of a candidate. Minn. Stat. § 10A.01, subd. 9. Because the individual has decided to seek office, all of the activities listed in question two are undertaken to influence the individual's nomination or election to that office. The individual therefore must file campaign finance reports with the Board if the cost of the activities exceeds \$750.

Question Three

If after the activities described in questions one and two above are taken, the individual later forms and registers a principal campaign committee, can that committee then purchase the results or products of those activities for fair market value from the individual and then report those purchases as expenditures?

Opinion

If the individual forms a principal campaign committee, nothing in Chapter 10A prevents the committee from purchasing the results or products of the activities listed in questions one and two from the individual for fair market value. The individual also could make an in-kind contribute of the results or products to the committee. The amount of this in-kind contribution would be the fair market value of the donated results or products. In both cases, the fair market value of the results or products would be the amount that the individual paid for those results or products. See Minn. R. 4503.0100, subpt. 3a (fair market value is the amount that individual would pay to buy same service or item in open market).

Dated: February 11, 2014

/s/ Deanna Wiener
Deanna Wiener, Chair
Campaign Finance and Public Disclosure Board

Relevant Statutes

Minn. Stat. § 10A.01 DEFINITIONS

Subd. 9. **Campaign expenditure.** "Campaign expenditure" or "expenditure" means a purchase or payment of money or anything of value, or an advance of credit, made or incurred for the purpose of influencing the nomination or election of a candidate or for the purpose of promoting or defeating a ballot question.

....

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.243.

Minn. Stat. § 10A.105 PRINCIPAL CAMPAIGN COMMITTEE.

Subdivision 1. **Single committee.** A candidate must not accept contributions from a source, other than self, in aggregate in excess of \$750 or accept a public subsidy unless the candidate designates and causes to be formed a single principal campaign committee for each office sought. A candidate may not authorize, designate, or cause to be formed any other political committee bearing the candidate's name or title or otherwise operating under the direct or indirect control of the candidate. However, a candidate may be involved in the direct or indirect control of a party unit.

Minn. Stat. § 10A.20 CAMPAIGN REPORTS

Subd. 6. **Report when no committee.** (a) A candidate who does not designate and cause to be formed a principal campaign committee and who makes campaign expenditures in aggregate in excess of \$750 in a year must file with the board a report containing the information required by subdivision 3. Reports required by this subdivision must be filed by the dates on which reports by principal campaign committees must be filed.