

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

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pursuant to a consent for release of information signed by the requester

**RE: Disclosure related to ballot question committees**

**To:** Cleta Mitchell, Esq.  
Foley & Lardner, LLP  
3000 K Street NW, Suite 600  
Washington, DC 20007

**ADVISORY OPINION 419**

**SUMMARY**

Minnesota Statutes Chapter 10A requires certain disclosure when an association accepts contributions or uses its general treasury money for expenditures to promote or defeat a ballot question. This opinion describes the statutory requirements under various scenarios presented by the requester

**FACTS**

As the attorney for the National Organization for Marriage, you ask the Campaign Finance and Public Disclosure Board for an advisory opinion. As a basis for your request, you provided a number of assumed facts and scenarios. The relevant assumed facts from the letter and scenarios are combined below and form the basis for this opinion.

1. The National Organization for Marriage ("NOM") is a nonprofit tax exempt corporation established under Section 501(c)(4) of the Internal Revenue Code.
2. NOM was founded in 2007 to provide an organized response in opposition to same-sex marriage in state legislatures. NOM serves as a national resource for marriage-related initiatives at the state and local level and it lobbies for and supports marriage initiatives across the nation.
3. NOM raises and spends funds to support traditional marriage and the legal definition of marriage as described in the ballot question scheduled to be voted on by the citizens of Minnesota in the 2012 General Election ("the Minnesota ballot question").
4. As a national organization, NOM educates the public about actions and activities in every state. Through its website and other communications, NOM updates its members, supporters, and the public about current events related to marriage. NOM has provided and will continue to provide such information about Minnesota and the Minnesota ballot question, and about actions in every other state where the legal definition of marriage is at issue.

5. NOM is a national leader supporting the Minnesota ballot question on its website, in its materials, and other public venues. Donors contribute to NOM because of NOM's vocal public support not only of the Minnesota ballot question but similar activities in other states.
6. NOM has registered a political fund in Minnesota.
7. NOM publicly solicits contributions for the general support of the organization. All contributions solicited on its website are for general support and not for a particular purpose or state. NOM provides information and urges support on its website for the Minnesota ballot question, but will not solicit contributions online specifically for the support of the ballot question.

### **Question 1**

Must all donations to NOM of more than \$100 be reported to the Minnesota Campaign Finance Board ("the Board") by virtue of references to the Minnesota ballot question on a separate page of its website, or in materials describing NOM's activities nationwide, even if the donation was not solicited specifically for the Minnesota effort?

### **Opinion**

In your request letter you state that according to guidance provided by the Board, "a contribution [to NOM] of over \$100 is subject to public disclosure in Minnesota if the funds are received in response to a solicitation for general purposes, where there are also references to the Minnesota ballot question campaign as one of several projects and activities in which NOM is involved."

The Board is concerned that this statement suggests a serious misunderstanding of the statutes requiring disclosure and of the Board's guidance related to application of those statutes. To clarify the matter, the Board will review its guidance on the subject.

On October 4, 2011, the Board provided advice on the application of the definition of "contribution" as used in Chapter 10A. "Contributions" from a donor must be itemized on a report filed with the Board if they aggregate more than \$100 in a calendar year from that donor.

In the case of ballot question advocacy, Chapter 10A defines a contribution as money given to an association for the purpose of promoting or defeating a ballot question.

The Board's guidance provides criteria for evaluating when money is, in fact, given for the purpose of promoting or defeating a ballot question. The guidance on the definition of "contribution" states:

**1. Money designated for ballot question expenditure purposes**

Money received by an association is a contribution if the contributor specified that the money was given to support the association's campaign to promote or defeat the ballot question.

**2. Money given in response to a solicitation including an express request**

Money given in response to a solicitation that requests money for the express purpose of supporting the association's campaign to promote or defeat the ballot question is a contribution.

An express request is a request that asks for money and states that the money is sought to support the ballot question campaign.

**3. Money given in response to a solicitation that is the functional equivalent of an express request**

Money given in response to a solicitation that meets the all of the following criteria is a contribution:

- A) The solicitation is made after the date of final enactment by the legislature of the bill placing the subject ballot question on the general election ballot;
- B) The solicitation clearly identifies the subject ballot question; and
- C) The solicitation is susceptible to no reasonable interpretation other than that money given as a result of the solicitation will be used to promote or defeat the subject ballot question.

The assumed facts state that money will not be solicited specifically for the purpose of promoting the Minnesota ballot question. Therefore, paragraph 2 of the guidance is not applicable. It also appears from the facts that the donor will not specify that the donation is to promote the Minnesota ballot question. Therefore, paragraph 1 of the guidance is also not applicable.

With respect to the definition in paragraph 3 of the guidance, condition A is met because the legislature has placed the question on the November, 2012, ballot. Condition B is met because the facts indicate that NOM's website or solicitation materials clearly identifies the ballot question as one of the projects or activities in which NOM is involved.

However, condition C of the guidance states that for the resulting donation to be a "contribution", the solicitation must be "susceptible to no reasonable interpretation other than that money given as a result of the solicitation will be used to promote or defeat the subject ballot question".

Without actual specific text or web pages to examine, the Board's opinion must be somewhat hypothetical. However, the Board has made it clear that when determining whether money given is a "contribution" its guidance is to be applied in favor of excluding transfers where the conditions stated in the guidance are not clearly met.

The assumed facts state that "[a]ll contributions solicited on its website are for general support and not for a particular purpose or state." Further, the assumed facts state that contributions are not solicited online specifically for the purposes of the Minnesota ballot question. Although donors might "assume" that part or all of their donation will be used to promote the Minnesota ballot question, they might also assume that all or part of the donation will be used in other states or for other NOM projects.

The Board concludes that the hypothetical solicitation presented in the assumed facts is subject to reasonable interpretations other than that donations resulting from it will, in fact, be used to promote or defeat a ballot question. Thus, funds received as a result of the hypothetical solicitation would not be "contributions" under Chapter 10A and are not subject to the more-than-\$100 itemization threshold.

This opinion is based on hypothetical facts. If the actual facts differ from the hypothetical facts used in this opinion, a different result could be reached.

## Question 2

Is NOM prohibited from spending its general treasury funds to support the Minnesota ballot question unless the funds are first transferred or contributed to its political fund?

### Opinion

NOM may spend its general treasury funds to promote or defeat a ballot question, but it must track that spending through a political fund accounting mechanism for subsequent reporting to the Board. Regardless of the accounting mechanism adopted, money used to promote or defeat a ballot question in Minnesota is, by statutory definition, part of NOM's political fund.

It is up to NOM to determine the accounting mechanism that it will use to track money raised or spent to promote or defeat a ballot question. Use of the words "transferred to or contributed to" the political fund do not necessarily describe the nature of the accounting. If NOM maintains its political fund account in a separate checking account, there would be a "transfer" of money to that account. However, if NOM makes expenditures to promote or defeat a ballot question directly from its general treasury account, there will be no transfer, but disclosure requirements would still apply.

It is important to recognize that a political fund is not a separate entity from the association itself. A political fund is simply an accounting and disclosure mechanism that facilitates an association's disclosure of "contributions," expenditures to promote or defeat a ballot question, and under specified conditions, the underlying sources of money used to make those expenditures.

### Questions 3 and 4

(3) If NOM were to make expenditures in excess of \$100 from its general treasury funds in support of the Minnesota ballot question, would NOM then be required to publicly report all donors to NOM who contributed over \$100 regardless of the fact that their support for NOM is not or was not designated for the Minnesota ballot question?

(4) If NOM were to make expenditures in excess of \$100 from its general treasury funds in support of the Minnesota ballot question, would NOM then be required to publically disclose all members of NOM whose annual membership fees or dues to NOM were in excess of \$100 during the calendar year?

### Opinion

Questions 3 and 4 are the same except that one is based on NOM's receipt of money from "donors" and the other is based on the receipt of money designated as "membership fees or dues."

The Board understands these questions to be related to receipts of money that would not be defined as "contributions" under Chapter 10A. If they are not contributions, the money would constitute general treasury funds. General treasury funds consist of both voluntary donations to the association and money that the association characterizes as membership dues or fees.

Receipts of general treasury funds are not subject to the reporting requirement applicable to "contributions", which requires itemization of any contribution of more than \$100. However, under Minnesota Statutes section 10A.27, subd. 15, if NOM uses \$5,000 or more of its general treasury money for expenditures to promote or defeat a ballot question, it must file a statement of underlying sources with its political fund report.

A statement of underlying sources may result in itemization of donors, but at a \$1,000-or-more threshold rather than at the more-than-\$100 threshold applicable to "contributions."

### **Question 5**

If NOM transfers general treasury money to its political fund for the purpose of making expenditures in support of the Minnesota ballot question, what disclosure is required of the underlying source(s) of the funds transferred?

### **Opinion**

Use of the words "transfers" and "transferred" may not accurately reflect the transactions in which an association uses general treasury money to promote or defeat a ballot question. If the association maintains a separate checking account through which to make its ballot question expenditures, an actual transfer will occur. However, an association is not required to maintain a separate depository from which to make its ballot question expenditures. If it does not maintain a separate depository, no actual "transfer" will occur. Rather, the association will simply pay for ballot question expenditures directly from its general treasury checking account. In such a case, an accounting entry will be made to record the use of general treasury money to make ballot question expenditures.

The requirement to disclose underlying sources of general treasury money used to promote or defeat a ballot question does not depend on whether a physical transfer occurs between checking accounts or an accounting entry records the use of general treasury money for the expenditure.

Prior to legislative action in 2010, underlying source disclosure was required under Minnesota Statutes section 10A.12, subd. 5, which requires disclosure of underlying sources if the amount attributable to the source is more than \$100.

In 2010, the legislature enacted statutes applicable to associations that make only independent expenditures. In its statements of guidance, the Board has recognized that these provisions are written broadly enough to permit their use by associations that make only ballot question expenditures. The Board's recognition that this additional group of associations may elect to provide underlying source disclosure under §10A.27, subd. 15, instead of under §10A.12, subd. 5, provides a second option which the Board will accept as meeting the statutory underlying source disclosure requirements. An association proceeding under §10A.27, subd. 15, is not also required to disclose underlying sources under §10A.12, subd. 5.

If an association elects to proceed under the §10A.27, subd. 15, option and has used \$5,000 or more in general treasury funds to promote or defeat a ballot question, the association must disclose underlying sources sufficient to account for the amount of general treasury money used to promote or defeat a ballot question. The disclosure statement must include itemized underlying sources at the \$1,000-or-more threshold, if any, and a total representing the amount attributable to sources for which itemization is not required.

### **Question 6**

How would the "allocation" described in the June 30, 2011 Statement of Guidance apply to NOM for purposes of transfers from NOM's general treasury to its political fund, where NOM has received funds from its website or other activities that reference NOM's active support for the Minnesota ballot question?

## Opinion

The question refers to the transfer of money from NOM's general treasury. This opinion is based on the assumption that the money under consideration does not constitute "contributions" under Chapter 10A.

The allocation of general treasury money to underlying sources is described in statute and was recognized in the Board's guidance as being available to associations making expenditures to promote or defeat a ballot question. As discussed in the previous section, NOM's use of the word "transfers" may not be applicable. However, regardless of whether there is an actual transfer, or simply the use of general treasury money to promote or defeat a ballot question, allocation of the general treasury money to underlying sources may be required.

If NOM uses \$5,000 or more in general treasury funds to promote the Minnesota ballot question, underlying source disclosure is required under Minnesota Statutes section §10A.27, subd. 15. The statement of underlying sources may require itemization of some sources, based on how NOM allocates the money used to promote the Minnesota ballot question among its sources of general treasury money.

Section 10A.27, subd. 15, provides two options for determining how an association may allocate general treasury money used to promote or defeat a ballot question to underlying source.

(1) Under one option, NOM may determine on a pro-rated basis, compared to the total membership dues, fees, and/or donations received by NOM during the calendar year, each donor's share of the general treasury money that NOM used to promote the Minnesota ballot question. "Donor" in the context of this requirement means an individual or association that has paid dues or membership fees or made donations to NOM.

If no donor's pro-rated share is \$1,000 or more, then no itemization of underlying sources is required.

If the pro-ration method is used and if there are donors to NOM whose pro-rated share of the general treasury money that NOM used to promote the Minnesota ballot question is \$1,000 or more, NOM must itemize those donors as underlying source(s) of funding for its expenditures to promote the Minnesota ballot question.

(2) Under the second option, NOM may instead choose to allocate its use of general treasury money to promote the Minnesota ballot question to specific donors to NOM. If NOM uses this method, it may select from its donors and allocate to its use of general treasury money all or part of each selected donor's dues, fees, and/or donations paid to NOM.

If a donor's dues, fees, and/or donations paid to NOM during the calendar year and allocated by this method total \$1,000 or more, the donor must be itemized as an underlying source.

Under either method of identifying underlying sources, it is possible that general treasury money used by NOM to promote the Minnesota ballot question will be allocated to sources that do not reach the \$1,000 threshold and, therefore, are not required to be itemized. If that is the case,

NOM must indicate the amount of general treasury money used to promote or defeat a ballot question that is attributed to underlying sources for which itemization is not required.

The Board provides a form which may be used by an association to provide the required underlying source disclosure statement.

The underlying source disclosure statement must be filed with NOM's political fund report that includes the expenditures to promote the Minnesota ballot question for which the allocation was made.

### **Question 7**

What is the "safe harbor" referred to in the Board's guidance? How does the Board's guidance apply to NOM as a national leader vocally supporting marriage initiative efforts across the country, including but not limited to Minnesota, where donors give generally to NOM to enable NOM to continue to support various efforts such as the Minnesota ballot question but do not (necessarily) earmark the funds specifically for Minnesota? Are all donors of \$100 or more to NOM's general program activities subject to disclosure solely because NOM advocates support of the Minnesota ballot question as one of several initiatives in which NOM is engaged? If that is the case, when and how is NOM to know when such donors are subject to disclosure?

### **Opinion**

It is Minnesota Statutes Chapter 10A, not a statement of guidance issued by the Board, that establishes the disclosure requirements for NOM and other associations. The Board's statements of guidance represent the Board's enforcement position with respect to the application of Chapter 10A to ballot question matters.

The phrase "safe harbor" as used with respect to the Board's guidance means that so long as an entity provides disclosure in conformance with the guidance, that association will not be sanctioned by the Board even in the context of a complaint alleging that Chapter 10A requires more disclosure than the guidance requires.

If NOM interprets Chapter 10A as requiring less disclosure than outlined in the guidance, it may follow its own interpretation, which will be subject to review in the course of the Board's compliance activities.

With respect to the disclosure question presented above, only "contributions", as that term is defined in Chapter 10A and applied through the Board's Statement of Guidance (as explained in response to Question 1) are itemized at the more-than-\$100 threshold. All Chapter 10A contributions must be reported on the reports NOM submits for its political fund activity. Contributions of \$100 or less are not itemized.

Donations to NOM's general treasury may be subject to underlying source disclosure if statutory thresholds are met, as discussed in other sections of this opinion.

NOM may determine if money received is a Chapter 10A contribution by reference to the applicable statutes and to the Board's guidance on the subject. If NOM is unable to make a determination based on these resources, it may consult with Board staff or seek an advisory opinion based on the specific facts of the transaction.

## Question 8

According to the June 30, 2011 Guidance, if NOM makes a transfer of general treasury funds to its Minnesota registered political fund, NOM is allowed to "allocate" the amount transferred to specific donors to NOM as though those individuals or entities had made contributions designated to the Minnesota ballot question effort, even if they did not do so. In other words, is it a correct understanding of the Guidance that NOM is required by the Board to unilaterally select general donors to NOM and identify them as donors to the Minnesota ballot question without any proof or evidence that the donor intended to contribute specifically to the Minnesota effort? Is this allocation a public filing? If it is not a public filing, is there ever a situation where it would become public?

## Opinion

It is not a correct understanding on NOM's part that NOM is "required by the Board" or by the Board's guidance to do anything. All of the disclosure requirements applicable to NOM are required by Chapter 10A of the Minnesota Statutes, which the Board administers.

Question 6 discusses the requirements for providing underlying source disclosure and the methods available for attribution of general treasury money to specific underlying sources.

The method selected for completing the allocation to underlying sources is not disclosed to the Board, nor are the resulting calculations. The disclosure required by the statute consists of the list of names, addresses, and amounts allocated to those underlying sources for which itemization is required and a lump-sum of the amount of the allocation attributed to underlying sources for which itemization is not required.

In the event of a Board investigation of a complaint related to the allocation, it is possible that records of the calculation of the allocation could be requested by the Board. However, it is the Board's intention that in such a case, the association that made the allocation would substitute numbers for the actual names and addresses of the general treasury donors whose donations were part of the allocation. This would prevent the identification of donors whose names are not required to be itemized under §10A.27, subd. 15.

With respect to the final point in your question, it is not possible to state that there is absolutely no possible scenario under which this information would become public.

Issued January 3, 2012

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/s/ Greg McCullough

Greg McCullough, Chair  
Campaign Finance and Public Disclosure Board



## Relevant Statutes

### 10A.01 DEFINITIONS.

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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. 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.

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### 10A.12 POLITICAL FUNDS.

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Subd. 5. **Dues or membership fees.** An association may, if not prohibited by other law, deposit in its political fund money derived from dues or membership fees. Under section 10A.20, the treasurer of the fund must disclose the name of any member whose dues, membership fees, and contributions deposited in the political fund together exceed \$100 in a year.

### 10A.13 ACCOUNTS THAT MUST BE KEPT.

Subdivision 1. **Accounts; penalty.** The treasurer of a political committee, political fund, principal campaign committee, or party unit must keep an account of:

(1) the sum of all contributions, except any donation in-kind valued at \$20 or less, made to the committee, fund, or party unit;

(2) the name and address of each source of a contribution made to the committee, fund, or party unit in excess of \$20, together with the date and amount of each;

...

### 10A.20 CAMPAIGN REPORTS.

Subdivision 1. **First filing; duration.** The treasurer of a political committee, political fund, principal campaign committee, or party unit must begin to file the reports required by this section in the first year it receives contributions or makes expenditures in excess of \$100 and must continue to file until the committee, fund, or party unit is terminated. The reports must be filed electronically in a standards-based open format specified by the board. For good cause shown, the board must grant exemptions to the requirement that reports be filed electronically.

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Subd. 3. **Contents of report.** (a) The report must disclose the amount of liquid assets on hand at the beginning of the reporting period.

(b) The report must disclose the name, address, and employer, or occupation if self-employed, of each individual or association that has made one or more contributions to the reporting entity, . . .

## 10A.27 CONTRIBUTIONS

. . .

Subd. 15. **Contributions of dues or contribution revenue.** (a) An association may, if not prohibited by other law, contribute revenue from membership dues or fees, or from contributions received by the association to an independent expenditure political committee or an independent expenditure political fund without complying with subdivision 13. Before the day when the recipient committee or fund's next report must be filed with the board under section 10A.20, subdivision 2 or 5, an association that has contributed \$5,000 or more in aggregate to independent expenditure political committees or funds during the calendar year must provide in writing to the recipient's treasurer a statement that includes the name, address, and amount attributable to each individual or association that paid the association dues or fees, or made contributions to the association that, in total, aggregate \$1,000 or more of the contribution from the association to the independent expenditure political committee or fund. The statement must also include the total amount of the contribution from individuals or associations not subject to itemization under this section. The statement must be certified as true and correct by an officer of the donor association.

(b) To determine the membership dues or fees, or contributions made by an individual or association that exceed \$1,000 of the contribution made by the donor association to the independent expenditure political committee or fund, the donor association must:

- (1) apply a pro rata calculation to all unrestricted dues, fees, and contributions received by the donor association in the calendar year; or
- (2) as provided in paragraph (c), identify the specific individuals or associations whose dues, fees, or contributions are included in the contribution to the independent expenditure political committee or fund.

(c) Dues, fees, or contributions from an individual or association must be identified in a contribution to an independent expenditure political committee or fund under paragraph (b), clause (2), if:

- (1) the individual or association has specifically authorized the donor association to use the individual's or association's dues, fees, or contributions for this purpose; or
- (2) if the individual's or association's dues, fees, or contributions to the donor association are unrestricted and the donor association designates them as the source of the subject contribution to the independent expenditure political committee or fund. After a portion of an individual's or association's dues, fees, or contributions to the donor association have been designated as the source of a contribution to an independent expenditure political committee or fund, that portion of the individual's or association's dues, fees, or contributions to the donor association may not be designated as the source of any other contribution to an independent expenditure political committee or fund.

(d) For the purposes of this section, "donor association" means the association contributing to an independent expenditure political committee or fund that is required to provide a statement under paragraph (a).

Subd. 16. **Treasurer to submit disclosure statements.** The treasurer of a political committee or political fund receiving a statement required under subdivision 15, must file a copy of the

statement before the deadline for the committee or fund's next report filed with the board under section 10A.20, subdivision 2 or 5, after receiving the statement.

Subd. 17. **Penalty.** (a) An association that makes a contribution under subdivision 15, and fails to provide the required statement within the time specified is subject to a civil penalty of up to four times the amount of the contribution, but not to exceed \$25,000, except when the violation was intentional.

(b) An independent expenditure political committee or an independent expenditure political fund that files a report without including the statement required under subdivision 15, is subject to a civil penalty of up to four times the amount of the contribution for which disclosure was not filed, but not to exceed \$25,000, except when the violation was intentional.

(c) No other penalty provided in law may be imposed for conduct that is subject to a civil penalty under this section.