



Minnesota

Campaign Finance and Public Disclosure Board

Date: September 26, 2011

To: Board members

From: Gary Goldsmith, Executive Director

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Re: Board guidance related to definition of Contribution with respect to ballot questions

Background

Over the past few months, members have reviewed and discussed the definition of "contribution" under Chapter 10A as it relates to ballot question expenditures. The attached draft Statement of Guidance was developed as the result of those discussions.

Except in the case of express solicitations or donations given with express instructions, the purpose for which a donation is given must be derived from surrounding facts. The state has an interest in obtaining disclosure about money given or received for political purposes. When addressing the factors that permit a legal conclusion that money was given or received to promote or defeat a ballot question, care must be taken, however, not to be overly broad or vague. The attached draft Statement of Guidance, if adopted, would establish the Board's position on how the determination of "contribution" status should be made.

From discussion during previous meetings staff recognizes a well-placed reluctance by the Board to adopt an interpretation that would bring a great deal of speech into the disclosure system at the expense of vagueness in the definition. Staff agrees with this position, which has a sound constitutional basis. Therefore, the guidance does not propose an interpretation such as the broad one incorporated into Maine statutes which are currently being litigated.

As the agency that applies and enforces Chapter 10A, it is the Board's responsibility to explain how the chapter will be applied. A Board decision on the definition of ballot question contributions would be required if the question were asked in an advisory opinion or if the Board were addressing a complaint regarding particular contributions. Rather than limit its consideration to the hypothetical facts of an advisory opinion request, or to the limited facts of an actual complaint, the Board may also provide guidance on its own initiative. Of course, the issuance of guidance may lead to advisory opinion requests about specific applications of the guidance. These requests would give the Board the opportunity to refine and further clarify the guidance in cases of actual or hypothetical application.

The draft guidance proposes a conservative approach to the definition of "contribution". To be sure, if it is adopted there may be donations of money that were, in fact, for the purpose of promoting or defeating a ballot question yet are not subject to disclosure. This proposed narrow definition favors free speech at the expense of not obtaining the maximum possible disclosure that might be constitutionally permitted.

Definitions

The definitions are included in the draft for two reasons. First, to set forth in the Guidance document itself some of the critical statutory language and, second, to provide shorthand terms by which more complex concepts may be referred.

The definition of "association", for example, is taken directly from statute. However, for clarification, the longstanding Board interpretation that an "association" includes all legal entities is included. The Board has addressed this question before and I do not believe that the interpretation is subject to controversy.

Staff has regularly used the term "non-major-purpose association" in the past. The purpose of formally defining the term is so that it can be used in the Guidance later rather than having to spell out each time that we are talking about an association whose major purpose is something other than, etc.

The statutory definitions of "contribution" and "political fund" are included for convenience of reference since the text of those two definitions lead directly to the starting point for defining a contribution to a non-major-purpose association. A statement is added at the end of the statutory political fund definition to clarify the Board's recognition that the political fund is not a separate entity from the association that uses the political fund as a reporting structure.

The term "general donation" is new. In litigation not involving the Board, the concept has been referred to as "regular donations" and by other terms. Reading the definition should make its purpose clear. It provides a shorthand term to describe what is typically going to be most of the money given to a non-major-purpose association. General donations are essentially all of the money available for the association to use to promote or defeat a ballot question, other than Chapter 10A "contributions". The additional term "general treasury money" has been used regularly and is shorthand for the pool of money consisting of all general donations.

Staff does not believe that there is anything new or controversial about the proposed definitions.

Classification guidance

This section deals with the criteria for determining when a donation of money is a Chapter 10A contribution. These paragraphs relate to that section of the Guidance under the heading "Classification Guidance".

There is no single court case that says: "In the case of contributions, here is how "given for the purpose of influencing" must be interpreted. Nevertheless, other cases have taken up the phrase, particularly in the context of expenditures made "to influence" or "for the purpose of influencing" elections. Those cases are drawn upon to reach the definitions proposed in this draft.

1. Money designated by the donor. There can be no dispute that if a donor states that the money is given for this purpose, it fits within the definition. A variation of the Statement of Guidance on this scenario was adopted by the Board on June 30, 2011.

2. Money given in response to an express request. In this scenario, instead of the donor telling the association the purpose for which the money is given, the association tells the donor the purpose for which the request for money is made. This component of the definition requires an express statement of the purpose. If money is requested for a specific purpose and money is given in response to that request, it follows without further analysis that the money may be considered as to be given for the requested purpose.

Both sections 1 and 2 draw on the *Buckley v. Valeo* concept of "express advocacy". If something is stated in express terms, then it is presumed to be for the purpose of achieving what it states. A statement "Elect John Doe" is presumed to be for the purpose of influencing John Doe's election. A statement "Please donate so that we can enact the Arts and Outdoors legacy amendment" is presumed to be for the purpose of promoting that ballot question.

3. Money given in response to a request with an implied purpose.

This section of the criteria addresses transactions that are not explicitly specified by either the donor or the recipient to be for the purpose of promoting or defeating a ballot question.

This criterion is based on the express advocacy requirement of *Buckley v. Valeo* as later modified by *McConnell v. FEC*, 50 U.S. 93 (2003) and *FEC v. Wisconsin Right To Life (WRTL II)* 551 U.S. 449 (2007).

The *McConnell* Court held that express advocacy was not a constitutional requirement before disclosure of the costs of communications to influence elections could be compelled. It concluded that if the communication was the "functional equivalent" of express advocacy, it was subject to disclosure.

WRTL II followed *McConnell* and addressed the question of what, actually, was the "functional equivalent" of express advocacy. Writing for the Court, Justice Roberts first recognized that the test "must give the benefit of any doubt to protecting rather than stifling speech". The draft guidance incorporates this requirement.

Justice Roberts went on to define when speech should be considered to be the functional equivalent of express advocacy, saying:

[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

Summarizing, in these cases, the Supreme Court was interpreting the phrase "for the purpose of influencing", which is similar to Minnesota's phrases "to influence the nomination or election of a candidate", which is used in the election context and "to promote or defeat a ballot question", which is used in the ballot question context. For practical purposes, the three phrases are the same. "To promote or defeat a ballot question" is no different than "to influence a ballot question" or "for the purpose of influencing a ballot question."

The interpretation took two steps (with *McConnell* being an interim step) to reach its present state. First, the Court in *Buckley* said that a communication "for the purpose of influencing" was limited to a communication including words of express advocacy of or defeat of a clearly identified candidate. The guidance in parts 1 and 2 says that a contribution is given to promote or defeat a ballot question if the donor or the recipient use words of express advocacy to convey that purpose.

In *WRTL II*, the court eliminated the requirement for words of express advocacy in favor of a "no other reasonable interpretation" rule. In *WRTL II*, the court was considering a statute related to electioneering communications. That statute specified a timeframe within which communications must be made before they would come under its requirements. It also required clearly identifying the subject candidates.

The Supreme Court's holding in *WRTL II* is the basis for the third part of the contribution criteria: (1) the solicitation is made during a specific time, (2) the solicitation clearly identifies the ballot

question, and (3) the solicitation can have no reasonable interpretation other than that money received as a result of the solicitation will be used to promote or defeat the ballot question.

There is no one case that provides a clear outline as to the outer bounds that the Board might apply to the definition of a contribution in the ballot question context. The definition proposed in part 3 of the criteria is a relatively conservative one supported by current case law.

Money solicited in the name of the political fund

The final criterion in the contribution definition is not considered controversial. In the past it has been very common for associations register political fund accounts and to choose to refer to them by a name that may be similar to the name of the association or may be strikingly different. These associations have raised money in the name of the political fund, asking for donations "to" the political fund. This last criteria recognizes this longstanding practice as resulting in reportable contributions.

Attachment: Draft Statement of Guidance

Minnesota

Campaign Finance and Public Disclosure Board



October 4, 2011

Statement of Guidance

Providing guidance to Board staff in implementing the determination of "contribution" under Chapter 10A as applied to associations making expenditures to promote or defeat a ballot question.

"Contributions" received by an association must be reported regardless of whether (a) the association is a political committee, party unit, or principal campaign committee; or (b) the association reports on its political activity through a political fund account.

This Guidance is to provide Board staff with information to enable them to advise associations regarding registration and reporting requirements related to or triggered by the acceptance of "contributions" as defined in Chapter 10A for the purpose of ballot questions.

This Guidance does not expand, limit, or otherwise affect the application of Chapter 10A. Rather, its purpose is to recognize certain definitions and enforcement positions that staff and others may rely on when applying registration and reporting requirements. The Board's Executive Director must consider this Guidance when advising interested persons and when determining whether to bring a matter to the Board for investigation or other action.

This Guidance is designed to provide a safe harbor. Therefore, the policies and definitions provided in this Guidance may be more narrowly tailored than a definition that the Board might adopt in an administrative rulemaking procedure. However, in the absence of a completed administrative rulemaking procedure or legislative action, the Board intends to apply these definitions and policies in its application of Chapter 10A as it relates to ballot questions that will be on the 2012 general election ballot.

Definitions.

The following definitions apply to the specified terms as they are used in this Guidance and in application of this Guidance by Board staff.

Association

An association is a group of two or more persons, who are not all members of an immediate family, acting in concert. The term "association" includes corporations and other legal forms of existence such as partnerships, as well as groups of people without a formal legal structure.

Non-major-purpose association

An association that has as its major purpose something other than to influence the nomination or election of candidates or to promote or defeat a ballot question is referred to as a "non-major-purpose association." Any association that is not a political

committee, party unit, or principal campaign committee, as those terms are defined in Chapter 10A, is a non-major-purpose association.

Statutory definition of "contribution"

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

Statutory definition of "political fund"

A "political fund" is "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." Minnesota Statutes Section 10A.01, subd. 28.

A political fund is an accumulation of an association's money tracked by some accounting mechanism. It is not a separate association or legal entity.

General donation

A "general donation" is money given to a non-major-purpose association that does not constitute a "contribution" under Chapter 10A and is not restricted by the donor as to its use. General donations may be referred to by the recipient as "membership dues" "fees" "contributions", "donations", or similar terms. Whether money received by a non-major-purpose association is a "general donation" or a "contribution" is not determined by the words the recipient uses to describe it, but by the purpose for which the money was given, as determined by the criteria set forth in this Guidance.

General treasury money

An association's "general treasury money" is all of the money received by the association in the form of general donations.

Scope and purpose of Guidance

A non-major-purpose association that engages in expenditures to promote or defeat a ballot question is not a political committee. It is required to report on only that pool of its money that constitutes its political fund. For these associations it is important to understand whether money received is a "contribution" that is reportable through the political fund accounting mechanism or whether it is a general donation, which is subject to more limited disclosure and then only if the money was actually used to make ballot question expenditures.

This Guidance is limited to providing guidance to assist in determining when money received from individuals or other associations by a non-major-purpose association engaging in expenditures to promote or defeat a ballot question falls within the Chapter 10A definition of a contribution.

Disclosure related to a non-major-purpose association using its general treasury money to promote or defeat a ballot question is controlled by other provisions of Chapter 10A as more fully described in the Statement of Guidance issued by the Board at its meeting of June 30, 2011, and is not within the scope of this Guidance. Also not within the scope of this Guidance are issues related to associations engaging in other potentially regulated transactions such as making independent expenditures or making contributions to candidates or associations registered with the Board.

Considering the definitions included in Section 10A.01, subds. 11 and 28 together, and excluding the case of expending general treasury money to promote or defeat a ballot question, the definition of "contribution" in the context of a non-major-purpose association making expenditures to promote or defeat a ballot question may be restated as follows:

A contribution is money given to an association for the purpose of promoting or defeating a ballot question.

This Statement of Guidance is adopted to clarify when money given to an association is considered to be for the purpose of promoting or defeating a ballot question.

Classification of a transfer of money as a "contribution" or a "general donation".

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.

(This statement replaces the corresponding statement adopted by the Board in its preliminary guidance issued June 30, 2011.)

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 including an implied 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.

For the purpose of determining whether a solicitation clearly identifies the ballot question, the "solicitation" includes:

- A) For a mailed solicitation: the solicitation itself and any material included in the same mailing;
- B) For an electronically transmitted solicitation: the electronic communication itself and any attachments to the communication. An electronic solicitation also

includes material accessed directly by a hyperlink in the solicitation or its attachments. Intermediate hyperlinks inserted merely to subvert the direct link requirement will not be considered when examining whether the solicitation directly links to a page that refers to the subject ballot question;

C) For a website based solicitation: the solicitation form itself and all other pages of the association's website.

Limitation

It is the Board's intention that the definitions of "contribution" set forth in this Guidance be applied in favor of excluding transfers of money from the definition of "contribution" in any case where it is not clear that all of the specified criteria have been met.

4. Money solicited in the name of an association's political fund

Some associations choose to establish a more formal structure than is required for their political fund accounts. They may set up bank accounts separate from those used for the association's general treasury money. They may solicit money under the name of the political fund as if the fund were, itself, an entity separate from the association. Money given in response to solicitations that ask for money in the name of the political fund itself are contributions.

Statement of Guidance regarding the provision of underlying source disclosure when an association not registered with the Board contributes or transfers general treasury money to a registered political committee or fund that limits its activities to those to promote or defeat a ballot question.

1. An independent expenditure political committee or fund is a political committee or fund that makes only independent expenditures and those types of disbursements permitted under Section 10A.121, subd. 1, which include expenditures to promote or defeat a ballot question. An independent expenditure political committee or fund is not *required* under Chapter 10A to make independent expenditures. It may limit its activities to those described in Section 10A.121,
2. A political committee or an association maintaining a political fund that intends to limit its political activities to promoting or defeating a ballot question may operate as an independent expenditure political committee or fund organized for ballot question purposes. In that case, it may accept contributions from associations not registered with the Board subject to the underlying source disclosure requirements of 10A.27, subds. 14 and 15, rather than the requirements of sections 10A.12, subd. 5, or 10A.27, subd. 13.
3. A political committee or fund registered under paragraph 2, above, must also comply with the requirements of Section 10A.27, subd. 16, which requires the treasurer to file statements of underlying disclosure with the Board.
4. Unregistered associations are cautioned that underlying source disclosure under Sections 10A.27, subds. 14 and 15, is available only for transfers of revenue from the operation of a business, membership dues or fees, and general contributions received by the unregistered association. An association that is not a political committee and that accepts contributions for the purpose of promoting or defeating a ballot question is required to register its own political fund to accommodate disclosure of those contributions, subject to registration thresholds.
5. Section 10A.27, subd. 15, provides three methods for determining whether an underlying source of general treasury money contributed or transferred to a registered political committee or fund must be itemized. The method that will result in the association being able to transfer the highest amount of money with the least itemized disclosure is provided in Section 10A.27, subd. 15(b)(2). Under that option, the association may allocate to its contribution or transfer the first \$999.99 of the total donations and membership dues or fees received from an individual or association by the donor association. Donors whose allocation to the contribution or transfer does not exceed this amount need not be itemized.