

MINNESOTA GOVERNMENTAL RELATIONS COUNCIL

COMMENTS TO MINNESOTA CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD (CFB)

FEBRUARY 6, 2024

1. DEFINITION OF “LEGISLATIVE ACTION”

- Minnesota’s definition of “legislative action” is broad and the proposed rules do not achieve much in the way of clarification.
- The proposed rules attempt to clarify “the development of prospective legislation” but in doing so, they do not solve the called-for clarity and, moreover, create more questions about how this will impact regular citizens.

4511.0100, Subp. 3. Development of prospective legislation. “Development of prospective legislation” means communications that:

A. explain the need for legislation that has not been introduced as a bill;

B. request support for legislation that has not been introduced as a bill;

C. provide language, or comments on language, used in draft legislation that has not been introduced as a bill; or

D. are intended to facilitate the drafting of language, or comments on language, used in draft legislation that has not been introduced as a bill.

- The effect of these proposed rules restricts speech even more than the underlying statute by expanding the definition of “prospective legislation” to conversations about issues that may – or may not – eventually become bills.
- Here are examples of potential unintended impact:

Jane attends a legislator’s constituent townhall meeting. Jane stands up during Q&A to talk about how important internships are for high school students. The legislator requests a follow-up conversation to learn more about the issue. Jane and the legislator and the legislator’s staff met for several hours to talk about the issue, following which, the legislator drafts a bill to mandate internships in high school. While Jane was not seeking a bill when she expressed her opinion, Jane happens to be a highly compensated individual, so does the time she has spent explaining the issue now compel her to register as a lobbyist?

John attends the same community church as his state representative. After services, they often talk about issues. John has opinions about a particular energy credit in place in other states that he believes would be great for the environment, and John has remarked from time to time that it would be great if the legislator could support a similar credit if it ever came before the state legislature. Because John’s company is a pass-through company, corporate revenue is attributed to his individual income taxes - so after a particularly good business year, his compensation is high and do the casual conversations about supporting an energy credit now become “legislative action” even though the energy credit never became a bill?

Mary is an expert on dyslexia education. Her state senator wants to learn more about how best to educate students with severe dyslexia. They have several conversations about best practices, following which the senator asks Mary for technical assistance developing potential language. Mary spends many hours of her own time researching other states' dyslexia statutes and rules, and she conducts numerous interviews with educators and parents to help with drafting language, which then is never introduced as a bill. Based on the amount of time she spent working on the project and research costs of \$3,000 to conduct interviews, Mary has reached the threshold of "legislative action" through "development of prospective legislation" does she need to register, even though her work never became a bill?

- The question inherent in these scenarios is: **what information is gained from requiring regular citizens register as lobbyists?** The U.S. Supreme Court has held that restrictions on free speech must be narrowly tailored to serve compelling governmental interests. We question whether requiring regular citizens engaging in political discourse to register as lobbyists meets a compelling government interest, and whether the proposed rules (not to mention the underlying statute) are sufficiently narrowly tailored.
- **We recommend that the section on "development of prospective legislation" be deleted or reworked** so that it does not unconstitutionally ensnare regular citizens and create additional confusion for the professional community.
- Further, **we propose that proposed rules conform with the federal definition of "legislative action" to the extent possible.** The Minnesota professional lobbying community is familiar with the federal definition, which provides more uniform direction on what does – or does not – constitute legislative activity. The nonprofit community in particular relies upon Internal Revenue Service guidance on "legislative action" and "lobbying" to ensure compliance with IRS regulations with regard to 501(c)(3) entities.

2. DEFINITION OF "LOBBYIST"

- Members of Minnesota's professional lobbying community have an inherent understanding of what professional lobbying means, and why we are different from citizens exercising their rights to petition the government. As the National Council on State Legislators (NCSL) states: **Lobbyists are not simply individuals who engage in lobbying.** Lobbyists are **professional advocates** who work to influence political decisions on behalf of individuals and organizations.
- Minnesota's new definition of "lobbyist" does not take into account the professional nature of lobbyists' work and instead expands it to individuals who are not professional advocates. In doing so, it forces ordinary citizens to monitor – and perhaps forego – their engagement with government officials.
- **We express concern with the draft rules at Part 4511.0200, which define registration parameters based on a compensation equation.** The proposed equation creates an unlevel playing field for advocates due to their compensation levels. For example, one advocate can trigger professional lobbying registration where her coworker who is spending the same time on the issue does not, solely based on compensation.

- **We encourage the CFB to incorporate an HOURLY THRESHOLD or EMPLOYMENT FACTOR in the draft rules.** Other states have created parameters for “lobbying” that take into account not just compensation, but the time spent on lobbying activities and whether lobbying is a key part of their work duties. We think an hourly threshold or employment factor test is a better approach to marking the line between citizen advocate and professional advocate than a case-by-case determination of compensation and activities.

For example:

- Alaska: “Lobbyist” means a person who: (A) is employed and receives payments, or who contracts for economic consideration, including reimbursement for reasonable travel and living expenses, to communicate directly or through the person's agents with any public official for the purpose of influencing legislation or administrative action *for more than 10 hours in any 30-day period in one calendar year*; or (B) represents oneself as engaging in the influencing of legislative or administrative action as a business, occupation, or profession. Alaska Stat. § 24.45.171.
- California: “Lobbyist” means either of the following: (1) Any individual who receives \$2,000 or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or *whose principal duties as an employee* are, to communicate directly or through his or her agents with any elective state official, agency official, or legislative official for the purpose of influencing legislative or administrative action. Cal. Gov. Code § 82039.
- Hawaii: “Lobbyist” means any individual who : (1) Receives or expects to receive \$1,000 or more in monetary or in-kind compensation in any calendar year for engaging in lobbying; or (2) For pay or other consideration, on behalf of another person:(A) Engages in *lobbying in excess of five hours in any month* of any reporting period; (B) Engages in *lobbying in excess of ten hours during any calendar year*; or (C) Makes expenditures of \$1,000 or more of the person's or any other person's money lobbying during any reporting period described in section 97-3. Haw. Rev. Stat. Ann. § 97-1.
- Kansas: “Lobbyist” means: (1) Any person *employed in considerable degree* for lobbying; (2) any person formally appointed as the primary representative of an organization or other person to lobby in person on state-owned or leased property; or (3) any person who makes expenditures in an aggregate amount of \$1,000 or more, exclusive of personal travel and subsistence expenses, in any calendar year for lobbying; (4) any person hired as an independent contractor and compensated by an executive agency for the purpose of evaluation, management, consulting or acting as a liaison for the executive agency and who engages in lobbying, except an attorney or law firm representing the executive agency in a legal matter. Kan. Stat. Ann. § 46-222.
- Louisiana: “Lobbyist” means either: (i) *Any person who is employed or engaged for compensation to act in a representative capacity for the purpose of lobbying if lobbying constitutes one of the principal duties of such employment or engagement.* (ii) Any person who acts in a representative capacity and makes an expenditure. La. Stat. Ann. § 24:51.

- Maine: “Lobbyist” means any person who is *specifically employed* by another person for the purpose of and who *engages in lobbying in excess of 8 hours in any calendar month*, or any individual who, as a regular employee of another person, expends an amount of time in excess of 8 hours in any calendar month in lobbying. Me. Rev. Stat. tit. 3, § 312-A.
- New Mexico: “Lobbyist” means any individual who is compensated for the specific purpose of lobbying; is designated by an interest group or organization to represent it on a substantial or regular basis for the purpose of lobbying; or in the *course of his employment is engaged in lobbying on a substantial or regular basis*. N.M. Stat. Ann. § 2-11-2.
- North Carolina: Lobbyist - An individual who engages in lobbying for payment and meets any of the following criteria: a. Represents another person or governmental unit, but is not directly employed by that person or governmental unit. b. Contracts for payment for lobbying. c. Is employed by a person and a *significant part of that employee's duties* include lobbying. Exceptions: an employee if in no 30-day period *less than 5% of employee's actual duties* include engaging in lobbying; individuals who are specifically exempted or registered as liaison personnel. N.C. Gen. Stat. Ann. § 163A-250.
- Wisconsin: “Lobbyist” means an individual who is employed by a principal, or contracts for or receives economic consideration, other than reimbursement for actual expenses, from a principal and *whose duties include lobbying* on behalf of the principal. *If an individual's duties on behalf of a principal are not limited exclusively to lobbying, the individual is a lobbyist only if he or she makes lobbying communications on each of at least 5 days within a reporting period*. Wis. Stat. Ann. § 13.62.

[Additional states’ definitions are available at: <https://www.ncsl.org/ethics/how-states-define-lobbying-and-lobbyist>]

- In hearing from our members, **we encourage the CFB to consider additional EXEMPTIONS from lobbying** for certain categories. Many other states (including Minnesota) have exemptions, and states like Rhode Island provide an expanded and well-considered list of exemptions from lobbying:

The following persons shall not be deemed “lobbyists” for purposes of this chapter: (from 42 R.I. Gen. Laws Ann. § 42-139.1-3)

(1) *Licensed attorneys* who: (i) Represent a client in a contested administrative proceeding, a licensing or permitting proceeding, or a disciplinary proceeding; and (ii) Engage in any communications with an executive branch official or office if those communications are incidental to the attorney's representation of their client rather than lobbying activities as defined in this section.

(2) A *qualified expert witness* testifying in an administrative proceeding or legislative hearing, either on behalf of an interested party or at the request of the agency or legislative body or committee;

(3) Any member of the general assembly, general officer of the state, municipal elected or appointed official, head of any executive department of state government, and/or head of any public corporation, or a duly appointed designee of one of the foregoing offices acting

in the official capacity of said office, and any judge of this state *acting in their official capacity*;

(4) Persons participating in a governmental *advisory committee or task force*;

(5) Persons appearing on behalf of a *business entity by which they are employed* or organization with which they are associated, *if that person's regular duties do not include lobbying or government relations*;

(6) Persons appearing solely on *their own behalf*;

(7) *Employees or agents of the news media* who write, publish, or broadcast news items or editorials which directly or indirectly promote or oppose any action or inaction by any member or office of the executive or legislative branch of state government;

(8) *Individuals participating in or attending a rally, protest, or other public assemblage* organized for the expression of political or social views, positions, or beliefs;

(9) Individuals participating in any proceeding pursuant to chapter 35 of this title;

(10) Individuals, other than employees or agents of the news media, involved in the *issuance and dissemination of any publication, including data, research, or analysis on public policy issues* that is available to the general public, including news media reports, editorials, commentary or advertisements; and

(11) *Individuals responding to a request for information* made by a state agency, department, legislative body, or public corporation.

- Finally, **we encourage the CFB ELIMINATE the reporting requirement at 4511.0500**, Subp. 2 (C) – underlying sources of money are more appropriate for the Principal Report than the Designated Lobbyist Report. Contract lobbyists are hired by organizations to advocate for their interests to policymakers, and they typically do not have direct access to the funding sources of those organizations. While we question in general why this information is necessary or if it is narrowly tailored, it is not suitable for the Designated Lobbyist report.

3. POLITICAL SUBDIVISIONS

The inclusion of all “political subdivisions” in the lobbyist registration and reporting regulatory schema is unwieldy and leads to significant confusion. While we question why the extensive regulation of advocacy matters at the political subdivision level is necessary – or constitutional – we appreciate the Campaign Finance Board’s attempts to provide better clarity on actions of elected local officials and who may be considered an employee of a political subdivision. Nonetheless, we think additional clarifications are needed, and we reiterate our comments above about narrow tailoring where free speech – particularly at the community level – is concerned.