

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.

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.