



MINNESOTA
CHAMBER *of*
COMMERCE

August 10, 2017

Ms. Jodi Pope
Campaign Finance and Public Disclosure Board
190 Centennial Office Building
658 Cedar Street
Saint Paul, Minnesota 55155

VIA ELECTRONIC MAIL

jodi.pope@state.mn.us

Dear Ms. Pope,

The Minnesota Chamber of Commerce (the "Chamber") submitted initial comments on June 28, 2017 in response to the rulemaking work being completed by the Minnesota Campaign Finance and Public Disclosure Board (the "Board") with respect to issues related to independent expenditures in Minnesota (the "Proposed Rules"). The Chamber attended the Rule Committee (the "Committee") Meeting of the Board on July 20, 2017 and shared additional concerns with the potential impacts of certain sections of the Proposed Rules published by the Board on July 13, 2017.

The Committee requested, at the July 20, 2017 meeting, that the Chamber provide copies of the Florida Elections Commission's decisions referenced during the Chamber's statement to the Committee concerning the use of marital status to determine coordination. Enclosed with this letter are the following decisions by the Florida Elections Commission:

1. Florida Elections Commission v. Susan Valliere and A. James Valliere, 2009 WL 1914723 (Fla. Div. Admin. Hrgs. 2009);
2. Florida Elections Commission v. Judy K. Beardslee, 2006 WL 1309956 (Fla Div. Admin. Hrgs. 2006); and
3. Judy K. Beardslee v. Florida Elections Commission, 962 So. 2d 390 (Fla. 5th Dist. App. 2007).

During the July 20, 2017 Committee meeting, the Chamber raised concerns related to the section of the Proposed Rules that automatically characterizes an expenditure as "coordinated" if materials used in an independent expenditure are later used by a candidate or campaign. In response to the Chamber's statement, the Committee raised continuing concerns related to situations where a candidate subsequently uses materials created by an independent expenditure, specifically republication of photos, or situations where an independent expenditure is made to

distribute or republish campaign material produced or prepared by a candidate's campaign. The Committee requested that that Chamber provide additional comments in response to these concerns.

The Chamber appreciates the Committee's concerns with regards to the reuse of publically available information as an independent expenditure. However, federal campaign finance laws and other states have continued to recognize that an expenditure is not coordinated if the materials are obtained from publically available sources. Specifically, New York Election Law defines coordination occurring when

The independent expenditure committee making the payment or expenditure benefiting the candidate, republishes, disseminates, or distributes, in whole or in part, any video, audio, written, or other campaign-related materials prepared by the candidate or the candidate's authorized committee or by an agent of the candidate or the candidate's authorized committee.

N.Y. Elec. Law App 6200.10(b)(2)(iii)(a)(5). However, in the event "the independent expenditure committee making the payment or expenditure obtains the communication or materials from a publicly available source," then coordination is not deemed to have occurred.

Moreover, the Maryland State Board of Elections defines a coordinated action as one which "uses campaign material, strategies, or other campaign information that is not generally available to the public and was shared by a candidate or an agent of the candidate, political party, or ballot issue committee" - Code Md. Regs. 33.13.10.04(B)(2). The Campaign and Political Finance laws in Colorado also focus on public versus non-public information as a factor to determining whether an action is coordinated. For example, in Colorado an expenditure is coordinated if an independent expenditure is created, produced or distributed based on the receipt of non-public information about the candidate - 8 Colo. Code Regs. § 1505-6:21.1.2.

Similarly, federal campaign finance laws incorporate several safe harbors, such as publicly available information, that exempt certain communication from the coordinated regulations. Given the safe harbor, persons may use publicly available information in creating, producing or distributing a communication, and such use does not, in and of itself, constitute coordination. 11 CFR 109.21(d). However, the burden is placed on the person paying for the communication to demonstrate that the information used in creating, producing or distributing the communication was obtained from a publicly available source.

Adopting an approach that focuses on public versus non-public information used to produce independent expenditures, as used in other states, as well as on the federal level, protects a spender who produces an independent expenditure which is later used by a candidate without the consent of the spender from making an illegal campaign contribution. This approach also protects candidates who produce campaign material which is later used as an independent expenditure without the knowledge of the campaign from failure to report as an in-kind contribution.

Accordingly, the Chamber requests that the Board remove (I) from proposed subpart 10 of Proposed Rule 4503.0XXX which would convert an independent expenditure into a campaign contribution if the materials are used by a candidate or campaign, even if the materials are public information.

We appreciate your consideration of these comments and our concerns. We look forward to continuing to participate in the discussion of this important issue.

Very truly yours,

MINNESOTA CHAMBER OF COMMERCE

Enclosures