

**STATE OF MINNESOTA
CAMPAIGN FINANCE AND PUBLIC DISCLOSURE BOARD**

**Findings and Order in the Matter of the Complaint of Common Cause Minnesota
Regarding The National Organization for Marriage**

The Allegations of the Complaint

On April 8, 2011, Mike Dean, Executive Director of Common Cause Minnesota filed a complaint (the "Complaint") with the Campaign Finance and Public Disclosure Board (The "Board") alleging that the National Organization for Marriage ("NOM") violated various provisions of Minnesota Statutes Chapter 10A.

The Complaint alleged that NOM engaged in lobbying to influence legislative action in Minnesota in 2010. The Complaint further alleged that as a result of its lobbying efforts, NOM was required to register and report as a lobbyist principal, but failed to do so.

In support of his complaint, Mr. Dean cites a *Minnesota Independent* article published on May 18, 2010, in which it was reported that the National Organization for Marriage and the Minnesota Family Council were coordinating in a \$200,000 media buy. Mr. Dean characterizes the purpose of the media campaign as "to oppose legislation to 'redefine marriage'."

The complaint also alleges that in a press release, the National Organization for Marriage "called on elected officials to let the people vote on this critical issue." Mr. Dean alleges that this statement makes it clear that the intent of the media campaign was to influence legislative action.

In support of the Complaint, Mr. Dean provided transcripts of two communications, excerpts from the NOM website, and additional published articles.

Scope of the Investigation

A "principal" is defined in Minnesota Statutes Section 10A.01, subd. 33, as

[A] n individual or association that:

- (1) spends more than \$500 in the aggregate in any calendar year to engage a lobbyist, compensate a lobbyist, or authorize the expenditure of money by a lobbyist; or
- (2) is not included in clause (1) and spends a total of at least \$50,000 in any calendar year on efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units, as described in section 10A.04, subdivision 6.

Chapter 10A does not include a provision requiring principals to register with the Board. When a lobbyist registers, the lobbyist identifies the principal, but an association that is a principal by virtue of clause (2) above does not register. It's obligation under Chapter 10A is limited to the filing of an annual principal's report. For this reason, the allegation of the complaint that NOM failed to register as a principal is without merit.

As a result of the above statutory analysis and the limitations imposed by the allegations of the complaint, the scope of the investigation is limited to the question of whether NOM spent more than \$50,000 in 2010 to influence legislative action in Minnesota. Board records indicate that NOM did not file a Principal's report for 2010.

The Investigation

On April 15, Board staff notified NOM of the complaint and requested a response. In addition to a general response, the Board requested transcripts of all advertisements and audio/video copies of television advertisements. The Board also requested information related to the cost of the various ads.

In response, NOM provided transcripts of five communications, four of which ended with the statement "Paid for by the Minnesota Family Council and the National Organization for Marriage." Three of the communications were in the form of television ads and NOM provided audio/video copies of each. NOM also provided a list of invoices which it stated represented the cost of services for the production, distribution, and broadcast of the communications.¹ A copy of each transcript is attached to and made a part of these Findings and Order.

In its response, NOM stated that the entire cost of creating, producing, and broadcasting the subject communications was paid by it, not by Minnesota Family Council even though Minnesota Family Council was identified as a co-payer on some of the communications.

The invoices that were responsive to the Board's request in this investigation were as follows:

Title	Type – Length	Air Dates	Cost
1. Your Right to Vote	TV – 30 sec.	May 18 – 26	\$212,716
2. Minnesota's Next Governor Logo and literature included in 5,000 state fair WWTC-AM bags. ²	Radio – 60 sec.	Aug. 26 – Sept 6	\$4,700
3. Minnesota's Next Governor	Radio – 60 Sec.	Aug 12 – 20	\$96,050
4. Most Important Civil Right Give Us the Ballot	TV – 30 sec. TV – 30 sec.	Sept 20 – Oct 24 (two ads included in this buy)	\$333,155
5. The Most Important Civil Right	Radio - 60 sec.	Oct 13 – Oct 24	\$62,549

The ads will be referred to hereinafter by the numbers listed above.

NOM's response indicated that the air dates, all of which were in 2010, were approximate.

¹ NOM actually listed six invoices, including one titled "What Kind of Senator Do We Want?", which is not a subject of this investigation.

² In response to a subsequent Board request, NOM provided documentation that this item was for the imprinting of the NOM logo on bags given out at the State Fair and for the inclusion of a ballpoint pen with the NOM name and address on it in those bags. These items were not considered in this investigation because they conveyed only NOM's name and address and no political message.

Analysis

With the exception of the literature included in the State Fair Bags, each separate ad resulted in the expenditure by NOM of more than \$50,000. Thus, if any ad constituted an activity that would trigger the requirement to file a principal's report, the financial threshold would be met.

The facts are not in dispute in this matter. Therefore, the question is one of the application of law to those facts. The Board begins with an examination of the relevant statutes.

The term "principal" is defined in Minnesota Statutes Section 10A.01, subd. 33, which is reproduced in full at the beginning of this document. For the purposes of this investigation, the definition may be restated as follows:

A principal is an association that spends at least \$50,000 in any calendar year on efforts to influence legislative action, as described in section 10A.04, subdivision 6.³

Section 10A.04, subdivision 6, describes the report of the principal and the types of spending that must be included when determining whether the \$50,000 threshold has been met. That section reads as follows:

Subd. 6. **Principal reports.** (a) A principal must report to the board as required in this subdivision by March 15 for the preceding calendar year.

(b) The principal must report the total amount, rounded to the nearest \$20,000, spent by the principal during the preceding calendar year to influence legislative action, administrative action, and the official action of metropolitan governmental units.

(c) The principal must report under this subdivision a total amount that includes:

(1) all direct payments by the principal to lobbyists in this state;

(2) all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns related to legislative action, administrative action, or the official action of metropolitan governmental units in this state; and

(3) all salaries and administrative expenses attributable to activities of the principal relating to efforts to influence legislative action, administrative action, or the official action of metropolitan governmental units in this state.

Part (a) of Subdivision 6 establishes the time for filing the report. Part (b) explains the method of reporting, which requires the report of a single amount for each of three potential types of lobbying. The amount is rounded to the nearest \$20,000.

³ Under Chapter 10A, an "association" includes unincorporated groups, corporations, and other legal forms of organization. The legislative history of the definition makes it clear that the term always was, and still is, intended to include any group or entity other than a single individual person or members of an immediate family.

Part (c) sets forth the types of activities that the potential association must include in its report. It is this part that must be applied to the communications of NOM to determine whether they fall within the scope of activities that will trigger the requirement to file a principal's report.

In examining the types of spending that is reportable by a principal, the Board first recognizes that there is no evidence suggesting that NOM spent any money on direct payments to lobbyists in Minnesota. Thus, the Board need not consider part (c)(1) quoted above.

If the communications broadcast by NOM constitute activities to influence legislative action, presumably there would be some salaries and administrative expenses attributable to these activities. Before that question is reached, however, the Board must determine whether the development and broadcast of the subject communications are disclosable under part (c)(2) quoted above.

Minnesota Statutes Section 10A.04, subd. 6(c)(2) requires inclusion in the principal's potentially reportable expenditures of:

all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns related to legislative action, administrative action, or the official action of metropolitan governmental units in this state[.]

NOM's expenditures for the broadcast communications fits within the *types* of expenditures that must be considered since they could be classified as either "advertising" or a "public relations campaign". Thus, the question becomes one of whether the expenditures were "related to legislative action".

Taken literally, the phrase "related to legislative action" as used in Subd. 6(c)(2) quoted above could include research on an issue even when that research is not conveyed to officials, attending hearings without testifying, drafting potential legislation, and a wide variety of other activities that are not generally assumed to trigger a principal reporting requirement in Minnesota.

To limit the scope of activities that may trigger a principal reporting requirement, the Board will interpret the phrase "related to legislative action" to be consistent with the definition of a principal, which is an association that spends money "to influence legislative action".

Applying this narrowing approach in determining whether an association is a principal, the Board will interpret Minnesota Statutes Section 10A.04, subd. 6(c)(2) as requiring consideration of:

all expenditures for advertising, mailing, research, analysis, compilation and dissemination of information, and public relations campaigns *to influence* legislative action, administrative action, or the official action of metropolitan governmental units in this state.

The Board notes that in defining a "lobbyist" the legislature limited the definition to a person who tries to influence official action "by communicating or urging others to communicate with public or local officials". Minnesota Statutes Section 10A.01, subd 21. The definition of "principal" does not include the requirement that the attempt to influence official action be limited to "communicating or urging others to communicate with. . . officials." In the matter currently under

consideration it is not necessary to examine whether further narrowing of the phrase "to influence legislative action" as it is used in the context of principal reporting is required. As will be discussed below, even under the broadest interpretation, the ads broadcast by NOM cannot be construed as actions to influence legislative action and, thus, would not trigger the requirement to file a principal's report.

The Call on Legislators to Let the People Vote

The Complaint alleges that NOM issued a press release calling on the Minnesota legislature to let Minnesotans' vote on the marriage issue. Board research confirms that NOM did produce such a press release, which remains published on its website.⁴ The release is titled "NOM Demands that Minnesotans be Allowed to Vote on Marriage." In the release, NOM says that today it "called on elected officials to let the people vote on this critical issue."

Press releases or public announcements that call on officials to take a specific action are, by definition, communications intended to influence those officials. A public demand for official action could scarcely be made for any purpose other than to encourage that action. However, the cost of issuing a press release or publishing a demand on a website is minimal. Without significant expenditures to publish the demand extensively, the action would never trigger the \$50,000 threshold for principal reporting in Minnesota. In this matter, there is no evidence that the public demand was published beyond the press release and website and, thus, the Board concludes that it does not trigger a principal reporting requirement.

The May 2010 Communication

The communication listed as item 1 above was a television advertisement broadcast between May 18 and May 26, 2010.

When considering whether a communication is for the purpose of influencing legislative action, the Board will in most cases limit itself to consideration of the text and images of the communication itself. Contextual factors outside of the communication will seldom play a significant role in the inquiry. For that reason, the stated intent of the association broadcasting the communication will generally not be a factor in the Board's analysis of the communication itself. On the other hand, the Board need not ignore basic background information that may be necessary to put a communication in context.

As background context, the Board recognizes that in 2010 both bodies of the legislature were controlled by the Democratic Farmer Labor party ("the DFL"). The Board also recognizes that the DFL has consistently opposed amending Minnesota's constitution to define "marriage". The Board also recognizes that the DFL's 2010 "Action Agenda", part of the party's official platform adopted at its April, 2010, state convention included the item: "Support legislation to legalize gay marriage in Minnesota."⁵

Finally, the Board recognizes that the Minnesota legislature adjourned sine die on May 16, 2010, just before the May ads began to run. Because 2010 was the second year of the biennial session, all bills that had not been adopted into law died upon adjournment. Both bodies of the

⁴ Available at: www.nationformarriage.org/site/apps/nlnet/content2.aspx?c=omL2KeN0LzH&b=5075189&ct=8400289 last visited July 28, 2011.

⁵ Available at: <http://dfi.org/sites/dfi.org/files/2010%20Action%20Agenda%202010-08-21.pdf> last viewed July 29, 2011.

legislature as well as the office of governor were up for election in November and a new legislature would be sworn in January, 2011, for the next biennium.

The May ad began with 2010 testimony of Senator John Marty explaining that he believed a bill to expand scope Minnesota's statutes that define marriage could be passed in the next legislative session. The announcer then said that "Leading DFL and Independence candidates for governor support homosexual marriage". As that text was read, photos of the three DFL primary election candidates for governor as well as the independence party candidate were displayed with their names superimposed on the images.

The ad then makes a claim and urges action: "[M]ost DFL lawmakers don't want you to have a say. When they ask for your support, ask them if they'll guarantee your right to vote on marriage." (Underlining in original transcript.)

In the context of the background factors that the Board recognizes, the Board concludes that this ad can only be construed as relating to the 2010 general election, not to legislation that may be considered in a future legislative session.

While the ad mentions issues that are important to NOM and that can only be addressed by legislative action, the thrust of the ad is to influence change in the political party composition of the legislature itself and the party affiliation of the governor. The ad explicitly charges that DFL legislators and the DFL and Independence Party gubernatorial candidates will impose on Minnesota laws that NOM obviously opposes. Only incidentally does the ad ask voters to ask candidates what their position on the issue is and, even then, it only suggests that the question be asked of DFL candidates, whose position NOM has already laid out. The question NOM suggests posing becomes, at best, rhetorical.

While changing the composition of the legislature is likely to affect legislation in various ways, efforts to accomplish such changes are regulated, if at all, by Minnesota's campaign finance statutes. Given the DFL platform, the only realistic way that NOM could accomplish its legislative goals would be to achieve a Republican controlled legislature.

The Board recognizes that a governor controls legislation (other than legislation to place a constitutional amendment question on the ballot) to the extent that the governor has the power of veto. However, advocating for a change in the governorship of the state to thwart assumed DFL goals with respect to specific legislation is, again, an election-related activity, not an activity to influence legislation.

The Board concludes that the May ad was election-related and does not trigger the requirement that NOM file a principal's report.

The Gubernatorial Commercials

The communications numbered 2 through 4 on the list of invoices share significant common characteristics which allow the Board to consider them as a group.

The Board recognizes three basic contextual elements that are relevant to the examination of communications 2 through 4. The first is that the office of Governor would be on the 2010 ballot and the primary election was held on August 10, 2010. As a result of the primary election, the candidates for governor were Mark Dayton, the Democratic Farmer Labor candidate; Tom Horner, the Independence Party of Minnesota candidate; and Tom Emmer, the Republican Party of Minnesota candidate. Together, this slate constituted the major party candidates for

governor. Second, by the time the ads numbered 2 through 4 ran, the 2010 legislature had adjourned sine die. That is, 2010 was the second year of the state's biennial legislative session. All bills introduced and not passed died upon adjournment. Finally, in Minnesota, the Governor has no direct control over whether a constitutional amendment will be placed on the general election ballot. That action is the prerogative solely of the legislature.

In the context of this factual background, the common characteristics of communications 2 through 4 may be considered.

First, each of these communications clearly identifies each of the three major party candidates for governor. Some of the ads also identify the party affiliation of each candidate. More specifically, each ad makes a claim concerning the positions of the candidates with regard to "same-sex marriage" or "gay marriage". Examples include:

"DFL nominee for Governor Mark Dayton wants to impose same-sex marriage on Minnesota, as does Independent Tom Horner."

"Mark Dayton and Tom Horner want gay marriage with no vote of the people."

"Mark Dayton and Tom Horner want to impose gay marriage without a public vote."

"Republican Tom Emmer wants to preserve marriage as the union of one man and one woman."

"Tom Emmer believes marriage is between one man and one woman. And Emmer says let the people vote."

"Only Tom Emmer says let the people vote on marriage."

Second, each of the communications concludes with a call to listeners or viewers to advocate to the gubernatorial candidates for their right to vote on the definition of marriage.

The legislation most clearly implied in the ads is the constitutional amendment to define marriage. While the next Governor may advocate for a legislative action, the Governor himself or herself can neither force nor prevent the placing a constitutional amendment question before the voters. Some of the ads also refer generally to the claim that Dayton, Horner, or the DFL legislature want to impose gay marriage on Minnesotans. Considering the fact that at the time the ads ran, there were no active bills and the composition of the next legislature could not be predicted, these references are too remote and vague to constitute an attempt to influence legislative action.

The Board also recognizes that the ads comment on NOM's perception of harm that will occur if the statutes defining the civil contract referred to as "marriage" are broadened. These comments could be for the purpose of preparing voters to be receptive to a so-called "marriage amendment" in the future. They could also be for the purpose of helping elect a republican governor, who NOM's ads claim will support a more traditional definition of marriage. Any influence the ads may have on the actions of future legislature, the composition of which will not be known until after the 2010 elections, is too speculative to permit regulation of the ads under Minnesota's principal disclosure statutes.

