MINNESOTA
CAMPAIGN FINANCE BOARD

VIA EFILING
[DATE], 2024

The Honorable Judge Kristien R. E. Butler
Assistant Chief Administrative Law Judge
Office of Administrative Hearings

In the Matter of the Proposed Permanent Rules Relating to Campaign Finance; Lobbying; and Audits and Investigations; Revisor's ID Number 4809; OAH Docket No. 24-9030-39382

Dear Judge Butler:

This letter contains the Campaign Finance and Public Disclosure Board's responses to comments it received during the 30-day comment period that spanned the period from October 7, through November 6, 2024. Portions of the four comments received by the Board are quoted below, followed by the Board's responses. Comments are ordered sequentially by the rule chapter, part, and subpart to which they pertain. The Board received comments from State Representative Nathan Coulter, the Minnesota School Boards Association (MSBA), the Minnesota Council of Nonprofits (MCN), and the Campaign Legal Center (CLC).

TABLE OF CONTENTS

Suite 190 • Centennial Office Building • 658 Cedar Street • St. Paul, MN 55155-1603
651-539-1180 • 800-657-3889 • Fax 651-539-1196 • 800-357-4114 • cf.board@state.mn.us
For TTY/TDD communication, contact us through the Minnesota Relay Service at 800-627-3529

Chapter 4501, General Provisions

Part 4501.0100, subpart 4. Compensation. - Comment of MCN

The MCN stated:

> We appreciate the clarification here in adding health care and retirement to the list of compensation included in the definition of compensation. However, we think the rules can go farther in this clarification.
>
> It is a common practice for nonprofit employers to provide their employees with a personalized benefits statement that provides a comprehensive list of all types of compensation provided to the employee. These lists usually include: salary, stipends, medical insurance, dental insurance, HSA contributions, long- and short-term disability insurance, life insurance, 403(b) plan contributions, Social Security tax, Medicare tax, and paid leave benefits (the dollar amount that paid time off including vacation and sick time would be worth if it was paid out).
>
> MCN recommends adding the following items to the current list of what is not included in the definition of compensation: insurance premiums for short- and long- term disability and life insurance, Medicare tax, and paid leave benefits. If the CFB disagrees and determines that any of these items should be included in the calculation of compensation, that must be clearly spelled out in this section.
>
> We think it would also be very beneficial to add non-exhaustive list of what is included in compensation. That list would include: salary, stipends, and contributions to retirement accounts.

> MCN's goal in recommending these changes is that when a nonprofit staff person engages in lobbying activity and reads in the lobbying handbook that they need to register if they have been paid more than $3,000 to lobby, that they can easily understand what number to use to determine their compensation under these rules.

Response: The word "compensation" is used throughout Minnesota Statutes, Chapter 10A, and how the term is defined impacts three of the Board's four major program areas, including economic interest disclosure by certain officials and candidates, lobbying, and campaign finance. For example, the word "compensation" is used within Minnesota Statutes, section 10A.09, subdivisions 5 and 5b, which impact the information required to be disclosed within statements of economic interest filed pursuant to Minnesota Statutes, section 10A.09. It is used within the definition of the term "associated business" codified at Minnesota Statutes, section 10A.01, subdivision 5, which impacts the information required to be disclosed within statements of economic interest, and the disclosure of potential conflicts of interest under Minnesota Statutes, section 10A.07. The word "compensate" is used within the definition of the term "principal" codified at Minnesota Statutes, section 10A.01, subdivision 33, and the word "compensation" is used within Minnesota Statutes, section 10A.04, subdivision 6, and Minnesota Rules, part 4511.0700, which impact who is defined as a principal, and what principals must report to the Board, respectively. The word "compensation" is used within the prohibition on contingent fees for lobbying, codified at Minnesota Statutes, section 10A.06. It is used within Minnesota Statutes, section 10A.08, which impacts whether a public official who represents a client before an agency with rulemaking authority must disclose that representation to the Board. It is used in describing exclusions from the definitions of the terms "campaign expenditure" and "contribution" under Minnesota Statutes, section 10A.01, subdivisions 9 and 11, which impact what must be reported to the Board within campaign finance reports filed pursuant to Minnesota Statutes, section 10A.20. Importantly, the word "compensation" is also used within the proposed definition of "pay or consideration for lobbying" to be codified at Minnesota Rules, part 4511.0100, subpart 5a.

The Board shares the MCN's concern regarding the need for clarity in how the word "compensation" is defined. As explained more fully on page 11 of the Board's Statement of Need and Reasonableness (SONAR), the definition of the term has remained the same since 1996, and needs to be updated. The MCN's comment illustrates the difficulty in defining the term "compensation" in a manner that is sufficiently inclusive while also being sufficiently easy to calculate. The Board believes that including a non-exhaustive list of examples of compensation may make the rule more prone to becoming outdated, and may also lead some to believe that types of compensation not clearly included within the list are not defined as compensation. Also, the Board does not believe that it is necessary to exclude the accrual of paid leave from the definition of "compensation." The accrual of paid leave is not a payment and therefore is not included within the definition of "compensation." When an individual is paid, either as a result of using accrued paid leave, or as a result of some type of payout of accrued

leave time, that payment will be defined as “compensation” because the leave time was afforded to the individual in exchange for their labor or personal services.

The MCN’s comment regarding Medicare taxes and insurance premiums, the MCN’s comment regarding the proposed definition of the phrase “pay or consideration for lobbying” to be codified at Minnesota Rules, part 4511.0100, subpart 5a, and the MCN’s broader call for increased clarity, has prompted the Board to propose a revised definition of the term “compensation,” as follows.

Proposed modification to Part 4501.0100, subpart 4

> Subp. 4. **Compensation.** "Compensation" means every kind of payment for labor or personal services, including any amount withheld by an employer for the payment of income tax. Compensation does not include payments ~~of Social Security~~ for Federal Insurance Contributions Act taxes, unemployment ~~compensation~~ taxes, insurance, or benefits, workers' compensation insurance or benefits, disability insurance or benefits, life insurance, health care insurance or benefits, retirement benefits, or pension benefits.

As modified, the rule would provide clarity by excluding many similar types of payments made by employers for various benefits from the definition of compensation, which for some individuals may be difficult to calculate without those exclusions. The rule would continue to define core types of remuneration as compensation, including wages and salaries, payments made to contractors for services rendered, bonuses, commissions, deferred compensation, and payments of stock or other shares of ownership. The proposed modification would also eliminate the need to refer to “gross compensation” within the proposed rule to be codified at Minnesota Rules, part 4511.0100, subpart 5a.

The proposed modification would not make the rule substantially different from the rule text published with the Board’s Dual Notice:

> Subp. 4. **Compensation.** "Compensation" means every kind of payment for labor or personal services. Compensation does not include payments of Social Security, unemployment compensation, workers' compensation, health care, retirement, or pension benefits.

The proposed modification regarding amounts withheld for the payment of income tax, while adding clarity, would not change the substance of the rule because the word “payment” is already considered to include earnings prior to any withholding for payment of income tax. The differences between the rule text published with the Board’s Dual Notice and the proposed modified text are within the scope of the Board’s Dual Notice because they concern the definition of a single word. The differences are a logical outgrowth of the Board’s Dual Notice and MCN’s comment, which seeks additional clarity so that individuals may better understand

how to calculate their compensation for purposes of determining whether they need to register as a lobbyist. The Board's Dual Notice provided fair warning that the outcome could be the proposed rule, as modified, because the modification is a logical outgrowth of the Board's Dual Notice, the subject matter remains the same, and the effects of the proposed rule, as modified, are not substantially different from the effects of the proposed rule as published with the Board's Dual Notice.

In each case, the proposed rule would make adjustments regarding types of payments that are excluded from the definition of "compensation" in order to provide clarity and ensure that benefits similar to those already excluded from the definition of "compensation" will also be excluded under the amended rule. The proposed modification will have little impact on the totals reported to the Board by principals pursuant to Minnesota Statutes, section 10A.04, subdivision 6, for two reasons. First, paragraph (c), clause (1), of that subdivision requires principals to include "the portion of all direct payments for compensation *and benefits* paid by the principal to lobbyists in this state for that type of lobbying" (emphasis added). Second, the proposed modification will have only a slight impact on whether individuals are required to register with the Board as lobbyists under Minnesota Statutes, section 10A.03, because payments for disability insurance or benefits, or life insurance, are unlikely to be determinative as to whether an individual has exceeded the $3,000 threshold and is thereby defined as a lobbyist under Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1).

Chapter 4503, Campaign Finance Activities

Part 4503.2000, subpart 2. Material linked to a disclaimer. - Comment of CLC

The Campaign Legal Center (CLC) submitted a lengthy comment regarding the proposed rule to be codified at Minnesota Rules, part 4503.2000. The CLC does not appear to object to the definitions provided in subpart 1. The issues raised by the CLC that are specific to the proposed rule are listed below in the order they are listed within the CLC's comment. The Board declines to respond to other portions of the CLC's comment that are extraneous to the proposed rule.

The CLC stated:

> The Proposed Rule's on-ad disclaimer exemption for digital ads is overbroad, expanding the scope of the limited exception for banner ads and "similar electronic communications" in Minn. Stat. § 211B.04(3)(c)(3) to relieve political spenders of their obligation to include an on-ad disclaimer for the majority of political spending online, regardless of whether including such a disclaimer is technologically possible. Interpreting the exemption so expansively is both unnecessary and detrimental to Minnesota voters.

The overall statutory scheme for on-ad disclaimers is important for understanding the limited exception for banner ads and "similar electronic communications." Minn. Stat. § 211B.04 outlines disclaimer requirements for paid political material and electioneering communications, including by identifying materials that are exempt from political disclaimer requirements The other materials specifically exempted from on-ad disclaimers are:

> • "fundraising tickets, business cards, personal letters, or similar items that are clearly being distributed by the candidate;"
>
> • "bumper stickers, pins, buttons, pens, or similar small items on which the disclaimer cannot be conveniently printed;" and
>
> • "skywriting, wearing apparel, or other means of displaying an advertisement of such a nature that the inclusion of a disclaimer would be impracticable."

Read in context, the exemption for "online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer" in the statute reflects that some political ads—including small digital banner ads, but also pens or bumper stickers, shirts, and skywriting—are presented in a format or such limited size as to make an on-ad disclaimer impracticable or technologically impossible. In the case of such communications, the exception—in conjunction with the requirement to link to an online page including the full disclaimer—is an effective way to balance voters' right to know who is spending to influence their ballots and the restrictions of the communication's format.

However, the Proposed Rule expands on this reasonable exception to create a sweeping exemption from Minn. Stat. § 211B.04's disclaimer requirements for a much broader range of paid digital political communications, including any text, images, video, or audio disseminated via a social media platform, on an application accessed primarily by mobile phone, or disseminated via the Internet by a third party (among other exceptions), so long as such communications link directly to an online page that includes a disclaimer in the correct format.

While some digital ads included in this sweeping list are truly "similar" to "online banner advertisements"—i.e., communications where the format is so small, short, or otherwise limited that it would not be possible to include a disclaimer without obscuring the message—this is not true for many digital political ads, which may use video or audio formats that are practically identical to traditional broadcast ads. This issue is particularly glaring in Subp. 2(A), (C), and (D), where the Proposed Rule exempts paid political communications distributed through social media platforms, mobile phone applications, and third-party ad

brokers. As explained below, such communications should not be exempt from the on-ad disclaimer requirement based solely on these features.

Response: The Board does not agree that the proposed rule is overbroad. The Board does not believe that the statutory exception to the disclaimer requirement for "online banner ads and similar electronic communications" under Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), clause (3), is limited to communications for which including a disclaimer on the face of the communication is impracticable or impossible. The CLC contends that the structure of section 211B.04, subdivision 3, indicates that the impracticability or impossibility of including a disclaimer should be considered when determining whether a disclaimer is required on the face of an online banner ad or similar electronic communication. However, the text of the statute leads to the opposite conclusion.

Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), contains three numbered exceptions to the disclaimer requirement. Exception (1) is "bumper stickers, pins, buttons, pens, or similar small items *on which the disclaimer cannot be conveniently printed*" (emphasis added). Exception (2) is "skywriting, wearing apparel, or other means of displaying an advertisement *of such a nature that the inclusion of a disclaimer would be impracticable*" (emphasis added). Exception (3) is "online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer." Exception (3) is distinct from exceptions (1) and (2) in two critical respects. First, exception (3) is the only exception of the three that does not include text addressing whether the inclusion of a disclaimer would be inconvenient, impracticable, impossible, or otherwise difficult to accomplish. That distinction, alone, strongly indicates that the legislature did not intend to incorporate an impracticability requirement within exception (3). If the legislature had intended to include an impracticability or impossibility element within exception (3), it presumably would have included language similar to that included within the text of exceptions (1) and (2).

Second, exception (3) is the only exception of the three that nonetheless requires that a disclaimer be provided, albeit via a link to a webpage that contains the disclaimer, rather than via text or other means displayed on the face of the communication. That requirement suggests that communications covered by exception (3) do not require a disclaimer on their face because the inclusion of a link to a webpage with the required disclaimer is an effective means of conveying the same information that would be conveyed by a disclaimer on the face of the communication. It is notable that of the three enumerated exceptions within paragraph (c), exception (3) is the only exception for which the inclusion of a link to a webpage is technologically possible. The three exceptions enumerated within paragraph (c) were added to Minnesota Statutes, section 211B.04, in 2015,[1] which was two years after the Board was first

[1] 2015 Minn. Laws ch. 73, § 22.

afforded the power to enforce the disclaimer requirement with respect to entities under its jurisdiction.[2]

In summary, the structure and text of Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), lead to the opposite conclusion than that encouraged by the CLC. The Board cannot interpret exception (3) to mean something other than what the text of the statute says.[3]

The CLC stated:

> Subp. 2(A) excludes "text, images, video, or audio disseminated via a social media platform" from the on-ad disclaimer requirement outlined in Minn. Stat. § 211B.04, where the communication links directly to an online page containing the disclaimer. Social media platforms, like Meta's Facebook and Instagram and Google's YouTube, are some of the most popular venues for political spending, providing campaigns and other political spenders with the ability to reach large swaths of the voting public with a few clicks.
>
> Social media platforms serve a broad range of content to users—including ads that are virtually indistinguishable from traditional broadcast ads. As a result, political spenders can promote their messages in a wide range of formats, depending on the social media platform, from still images to short-form video (similar to traditional 15-to-60 second broadcast ads) to long-form video of a few minutes and more.
>
> Under Subp. 2(A) of the Proposed Rule, such ads are exempt from including an on-ad disclaimer if they simply link to a page with the disclaimer, even if the ad would be required to include a disclaimer if it were run on broadcast television.
>
> This would result in illogical and inconsistent application of disclaimer requirements to substantially similar (or the same) paid political content if it is distributed via both broadcast channels and social media. Regardless of the platform where an ad reaches a voter, the voter's interest in understanding the source of the advertisement as quickly and easily as possible does not change; excluding digital ads from the on-ad disclaimer requirement is both unnecessary

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[2] 2013 Minn. Laws ch. 138, art. 1, § 13.

[3] *See* Minn. Stat. § 645.16 (providing that "[w]hen the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.").

> and would harm voters by substantially diminishing the scope of information available about who is spending money to influence their votes.

Response: The Board disagrees with the contention that it is illogical or inconsistent to treat "text, images, video, or audio disseminated via a social media platform" in the same manner as online banner ads. While it is true that social media communications and communications disseminated via broadcast media may be and often are very similar with respect to their content, and may reach large numbers of potential voters, the key distinction is that social media communications may be configured to include a link to a webpage that includes the required disclaimer, whereas that is not the case with broadcast communications. The legislature chose to exempt "online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer" regardless of whether it would be practicable or convenient to include a disclaimer on the face of the communication. The Board's role in drafting the proposed rule is to provide clarity regarding the application of the phrase "similar electronic communications," and the Board's role is not to second-guess the decision of the legislature to exempt certain communications from the disclaimer requirement when those communications include a link to the required disclaimer.

The CLC stated:

> The Proposed Rule's effort to address political advertising on mobile applications (or "apps") implicates many of the same issues as social media advertising, and some novel concerns, including how regulators define and apply language around when an app is "accessed primarily via mobile phone."
>
> As with social media, apps—including popular mobile games, music streaming and podcast apps, and major video streaming platforms (like Netflix, Hulu, and Peacock)—often offer not only banner-style image ads, but also regular video and still ad breaks, which can include paid political communications. Such ads are often substantially similar in format and content to those distributed on traditional and broadcast media, including video and audio ads. However, under Subp. 2(C) of the Proposed Rule, these digital political ads would be exempt from displaying on-ad disclaimers, provided they comply with the alternative requirement of providing a link. Again, this broad application unnecessarily captures political ads that may be substantially or entirely identical to traditional broadcast ads that would require an on-ad disclaimer.

Response: The Board disagrees with the contention that the relevant question is whether communications disseminated via mobile applications are similar to broadcast advertisements in terms of their format and content. As explained in more detail above, the Board believes that the relevant question is whether communications disseminated via mobile applications are "similar electronic communications" within the meaning of Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), clause (3). The Board believes that the answer to that question is

yes, because communications disseminated via mobile applications, like banner ads, typically may be configured to include a link to a webpage that includes the required disclaimer, whereas that is not the case with broadcast communications.

The CLC stated:

> Subp. 2(C)'s exemption for communications disseminated via app is further complicated by the question of what "an application accessed primarily via mobile phone" means in an era of connected devices, where many popular apps are available on a broad range of devices, including tablets, smart watches, e-readers, smart TVs, and streaming boxes like Apple TV and Roku. Little (if any) public information is available about the relative proportion of smart devices used to access a particular app, although advertisers do distinguish more broadly between ads on streaming video content delivered OTT ("over-the-top" – streaming over the internet to devices like mobile phones, tablets, computers via app or website) and CTV ("connected TV" – TV sets connected to the Internet using apps to deliver streaming content, including smart TVs, TV sticks, and gaming consoles).
>
> Even for the subset of apps used for both CTV and OTT streaming, it is unclear under the Proposed Rule how the Board would determine whether an application is "accessed primarily via mobile phone" (as opposed to other mobile devices) for the purposes of this exception; it would seem to necessitate the Board either obtain such information from the multiplicity of apps serving ads or rely on the representation of the political spender. In any event, determining the precise device being used when an ad is seen by a voter is unnecessary because such an approach fails to account for the feature of digital ads that matters, which is whether it is technologically possible to provide a clear on-ad disclaimer.

Response: The Board disagrees with the contention that the relevant question is "whether it is technologically possible to provide a clear on-ad disclaimer." As explained in more detail above, the Board believes that the relevant question is whether communications disseminated via mobile applications are "similar electronic communications" within the meaning of Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), clause (3).

The CLC's point regarding the challenge in defining communications accessed primarily from mobile phones is well taken. It is difficult, in the midst of ever-evolving and growing means to communicate to draw distinctions between methods of communication that will not quickly become outdated or difficult to apply. The language within subpart 2, item C, including "text, images, video, or audio disseminated using an application accessed primarily via mobile phone, excluding email messages, telephone calls, and voicemail messages" is intended to encompass communications received via a mobile phone application, and buttress the potential argument that a mobile phone application user is not accessing the internet when receiving a

communication, such as if the user is connected to a cellular network rather than a wi-fi network. Based on how the proposed rule is drafted, it is highly unlikely that the Board will ever need to inquire into whether a communication was received via an application accessed primarily by mobile phone, because subpart 2, item D, includes "paid electronic advertisements disseminated via the internet by a third party, including but not limited to online banner advertisements and advertisements appearing within the electronic version of a newspaper, periodical, or magazine." That item may be considered a catch-all category for electronic communications disseminated via the internet that, like banner ads, may be configured to include a link to a webpage containing the required disclaimer. Advertisements accessed via tablets, smart watches, e-readers, smart TVs, and streaming devices will almost certainly be disseminated via the internet, and will thereby be encompassed by the proposed rule.

The CLC stated:

> Perhaps the most problematic exception in the Proposed Rule is Subp. 2(D), which exempts digital political ads via the internet by a third party, "including but not limited to online banner advertisements." Third-party distribution is common for online political ads in many formats, including small online banner ads, but also long-format video ads similar to (or exactly the same as) those aired on broadcast media.
>
> Google dominates the third-party ad market, with its Ad Manager holding "about [a] 90% share of the U.S. Market for ad-serving software." While banner ads remain one of the most common ad formats, appearing in feeds, around articles, and around other online content, Google Ad Manager also presents in-stream ads for audio and video players, "interstitial ads" occurring between content "at natural breaks and transitions, such as level completion," and "rewarded ads" "where a user explicitly opts-into an ad experience to receive a reward from the publisher," as in mobile games. As with ads on social media platforms and mobile apps, there is no reason to categorically exempt such a broad range of advertising formats from on-ad disclaimer requirements in Minnesota."

Response: The Board disagrees with the contention that there is no reason to apply the exception stated in Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), clause (3), to paid electronic advertisements disseminated via the internet. As explained in more detail above, the reason is that online electronic communications generally may be configured to include a link to a webpage with the required disclaimer. Moreover, the statutory exception explicitly applies to "online banner ads and similar electronic communications" without defining those terms. If the Board were to limit the exception to banner ads, it would effectively

ignore the intent of the legislature and read the phrase "and similar electronic communications" out of the statute.[4]

The CLC stated:

> CLC recommends the Board narrow the Proposed Rule's language to reflect the statute's more limited exception for banner ads and ads that are truly substantially similar—i.e., ads where it is not technologically possible to display a clear, legible disclaimer statement and still convey the ad's message in the space available—and clarify that disclaimers should be included on digital political ads unless it is technologically impossible to do so.
>
> To enforce this standard, we also propose that the final regulation require that the sponsor of a digital advertisement be able to establish, at the Board's request, why a disclosure statement could not be included on the face of an advertisement due to technological constraints. Where technological constraints prevent the inclusion of an on-ad disclaimer, the rule should continue to require the spender to include a click-through link leading to a page with the clear disclosure statement, as statutorily required.
>
> Other states have similar set similar standards for allowing an alternative method of providing information that would otherwise be included in an on-ad disclaimer. Wisconsin, for example, allows sponsors of "small online ads and similar electronic communications" where disclaimers "could not conveniently be included" to link directly to a website with the required attribution, but "[s]ponsors of such small online ads or similar electronic communications must be able to establish, at the Commission's request, that including the attribution on the ad or communication was not possible due to size or technological constraints." Similarly, California's Political Reform Act permits the sponsor of an "electronic media advertisement" to substitute a complete disclaimer statement on the face of an ad with a hyperlink to the required information when including a complete disclaimer would be "impracticable or would severely interfere with the [sponsor's] ability to convey the intended message due to the nature of the technology used to make the communication." Like Wisconsin, California's Fair Political Practices Commission requires that a sponsor of an electronic media advertisement who claims inclusion of a full disclaimer on the ad is

[4] *See* Minn. Stat. § 645.16 (providing that "[t]he object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.").

"impracticable" be able to show why it was not possible to include a complete disclaimer on the advertisement.

At the federal level, the proposed Honest Ads Act would enact a similar standard, requiring qualified internet or digital communications to both "state the name of the person who paid for the communication " and "provide a means for the recipient of the communication to obtain the remainder of the information required under this section with minimal effort and without receiving or viewing any additional material other than such required information" where it is "not possible" to include all of the disclaimer information required on the ad itself.

By adopting the technological impossibility standard, the Board would bring the Proposed Rule into line with the limited list of exceptions outlined in Minn. Stat. § 211B.04. Furthermore, this standard would ensure that Minnesota voters have access to complete information about the sources of digital political ads, provide clear guidance to political spenders, and protect against exploitation of the exemption.

Finally, CLC also recommends the Board specify additional guidelines for how a digital advertisement must provide the required linked disclosure statement for communications that meet the technological impossibility standard. Currently, the Proposed Rule merely requires a communication "link directly to an online page that includes a disclaimer in the form required by that section [of the statute]." We suggest that, in the final rule, the Board should make clear that clicking on a digital advertisement must immediately direct the recipients of the advertisement to a page displaying the disclaimer information required by Minn. Stat. § 211B.04 without requiring the recipient to navigate through or view any extraneous material beyond the disclosure statement, as the Honest Ads Act proposes.

Spenders should not get a second bite at the apple in presenting their messages to voters by requiring voters to scroll through additional political or electioneering content to discover who is sponsoring the message. Other states—including Wisconsin, Washington, and New York—have promulgated similar regulations for modified disclaimers on certain digital ads, which allow the public to readily obtain key information about the sources of online advertising in elections. This additional clarification would ensure Minnesota voters have one-step access to clear, complete disclosure information when they view digital advertisements that refer to state and local candidates running for office in Minnesota, even where it is not technically possible to include an on-ad disclaimer.

Response: As explained in more detail above, the Board cannot read a technological impossibility standard into the exception provided at Minnesota Statutes, section 211B.04,

subdivision 3, paragraph (c), clause (3). The legislature chose to exempt "online banner ads and similar electronic communications that link directly to an online page that includes the disclaimer" regardless of whether it would be possible, practicable, or convenient to include a disclaimer on the face of the communication. The Board's role in drafting the proposed rule is to provide clarity regarding the application of the phrase "similar electronic communications," and the Board's role is not to second-guess the decision of the legislature to exempt certain communications from the disclaimer requirement when those communications include a link to the required disclaimer.

Wisconsin's disclaimer exception for "text messages, social media communications, and certain small advertisements on mobile phones" applies to communications on which the required disclaimer "cannot be conveniently printed," is statutory, and explicitly provides that the Wisconsin Ethics Commission "may, by rule, specify small items or other communications to which this subsection shall not apply."[5] California's disclaimer exception for communications for which the inclusion or the required disclaimer "is impracticable or would severely interfere with the committee's ability to convey the intended message due to the nature of the technology used to make the communication," is also statutory, and explicitly provides that the California Fair Political Practices Commission may promulgate regulations determining the scope of that exception.[6] Unlike in Wisconsin and California, the Board does not have statutory authority to promulgate a rule stating that disclaimers must be included on digital political ads unless it is technologically impossible to do so. The Board also lacks statutory authority to require those preparing and disseminating campaign material to certify that a disclaimer could not be included on the face of a communication. If the legislature had intended to authorize the Board to impose such a requirement, it presumably would have included language similar to that found in Minnesota Statutes, section 10A.38, which requires certain candidates who disseminate advertisements without closed captioning or without a published transcript to file with the Board "a statement setting forth the reasons for not doing so."

With respect to the suggestion that the Board modify the proposed rule to provide that clicking on a link "must immediately direct the recipients of the advertisement to a page displaying the disclaimer information required by Minn. Stat. § 211B.04 without requiring the recipient to navigate through or view any extraneous material beyond the disclosure statement," the Board has no information suggesting that such a rule is necessary in Minnesota. Minnesota Statutes, section 211B.04, subdivision 3, paragraph (c), clause (3), already provides that a communication covered by that exception must "link directly to an online page that includes the disclaimer," and the Board is capable of enforcing that requirement. Since the Board was first afforded the authority to enforce the disclaimer requirement in mid-2013, the Board has not

[5] Wis. Stat. § 11.1303 (2) (f).
[6] Cal. Gov't Code § 84501 (a) (2) (G).

received any complaints filed pursuant to Minnesota Statutes, section 10A.022, and Minnesota Rules, part 4525.0200, alleging that a link within an advertisement required the viewer navigate through extraneous material in order to view the required disclaimer.

The CLC appears to suggest that those clicking on a link should not be required to scroll through any content, after clicking a link, to view the required disclaimer. However, the statute requires the link to go "directly to an online page that includes the disclaimer," not to a page that includes only the disclaimer. Those disseminating campaign material via the internet often include a link within their campaign material to their website's home page, which often will display the required disclaimer at the bottom of the page. Modifying the proposed rule to prohibit linking to a page that requires a viewer to scroll down would thereby significantly alter the statutory requirement, and may exceed the Board's statutory authority. Moreover, such a provision would likely be difficult to administer. Users access the internet from a wide variety of devices that use a wide variety of software applications to display web pages in a wide variety of formats, particularly in terms of the amount of text and images that may be displayed on a user's screen without needing to scroll, either vertically or horizontally. Crafting a rule that would prohibit requiring viewers to scroll, that could account for that variability and the use of assistive software such as screen readers, would be very difficult.

The Board shares the CLC's desire to ensure that individuals are provided with the information necessary to ascertain the source of campaign material as quickly and easily as possible. Many of the CLC's suggestions are topics the legislature may wish to consider, should it decide to amend Minnesota Statutes, section 211B.04. However, implementing those suggestions would, in many cases, exceed the Board's statutory authority to promulgate administrative rules.

Chapter 4511, Lobbyist Registration and Reporting

Part 4511.0100, subpart 1c. Development of prospective legislation. - Comment of MSBA

The MSBA quoted from a portion of the proposed definition of the phrase "development of prospective legislation," then stated:

> MSBA regularly receives requests for information regarding prospective legislation from state legislators, state agencies and departments (including the Minnesota Department of Education), and the executive branch. The scope of this definition may be too broad as it includes communications that serve to share MSBA's experience and expertise rather than to affect potential legislation.
>
> An exception to "development of prospective legislation" is "responding to a request for information by a public official." The term "public official" is not defined in the existing or proposed rules. MSBA regularly receives requests for information from the Minnesota Department of Education and other state agencies. It is not clear whether these employees, including the Commissioners

> of these agencies, would constitute a "public official" for purposes of the proposed rule.

Response: The term "public official" is defined by Minnesota Statutes, section 10A.01, subdivision 35. A current list of public officials employed by the Department of Education is available on the Board's website at cfb.mn.gov/reports-and-data/officials-financial-disclosure/agency/71500000. Public officials may be searched for by name at cfb.mn.gov/reports-and-data/officials-financial-disclosure/official, or by agency at cfb.mn.gov/reports-and-data/officials-financial-disclosure/agency. Consulting the Board's website allows individuals and organizations to quickly determine which individuals have been identified as public officials.

With respect to the breadth of the definition, it is intended to distinguish between communications requesting support for prospective legislation or communications intended to facilitate the drafting of legislation, versus communications that merely provide information without seeking support for legislation and without intending to facilitate the drafting of legislation. Stated simply, the sharing of experience and expertise, and attempting to influence the development of prospective legislation, are not mutually exclusive activities. Principals such as the MSBA may share information without engaging in lobbying, but the Board believes that when the sharing of information is coupled with a request for support of legislation, or is intended to facilitate the drafting of legislation, that activity is properly defined as attempting to influence the development of prospective legislation within the meaning of Minnesota Statutes, section 10A.01, subdivision 19a.

The MSBA stated:

> The line between "developing" and "responding" is uncertain. Similarly, the exception for "providing information to public officials in order to raise awareness and educate on an issue or topic" may be difficult to distinguish from development of prospective legislation.

Response: The proposed rule would define the phrase "development of prospective legislation" in a manner that would expressly exclude "responding to a request for information by a public official." As long as there is a request for information by a public official and the communication in question is a response to that request, the communication would not constitute the development of prospective legislation. The term "public official" is defined by statute and the phrase "responding to a request for information" is clear in its meaning. Nonetheless, an individual who is uncertain may contact Board staff for guidance, treat the activity in question as though it is lobbying, or request an advisory opinion from the Board pursuant to Minnesota Statutes, section 10A.02, subdivision 12.

The MSBA stated:

> MSBA holds an annual meeting, the Delegate Assembly, at which Minnesota's school board members gather to discuss resolutions and potential legislation. It is not clear whether this definition would apply to the Delegate Assembly and, if so, what the ramifications would be.

Response: The phrase "development of prospective legislation" appears within the definition of the term "legislative action" that is codified at Minnesota Statutes, section 10A.01, subdivision 19a. The proposed rule defines the phrase "development of prospective legislation" for two purposes. First, so that there is clarity as to the type of communication that may trigger a requirement for an individual to register as a lobbyist. Second, so that there is clarity as to when a lobbyist is first attempting to influence legislative action, which must be reported as required by Minnesota Statutes, section 10A.04, subdivision 4, paragraph (e).

Minnesota Statutes, section 10A.01, subdivision 21, generally defines the term "lobbyist" in a manner that only includes those who communicate "for the purpose of attempting to influence legislative or administrative action, or the official action of a political subdivision, by communicating with public or local officials."[7] Minnesota Rules, part 4511.0100, subpart 3, similarly defines the term "lobbying" in a manner that only includes "communicating with or urging others to communicate with public officials or local officials" as well as "[a]ny activity that directly supports this communication." Therefore, an individual participating in the Delegate Assembly would not need to consider if they must register as a lobbyist for that activity unless there was also a public official at the event, and the individual was attempting to influence legislative action by communicating with the public official. Even if that scenario did play out the other registration thresholds in Minnesota Statutes, section 10A.01, subdivision 21 would apply, and generally would require registration under Minnesota Statutes, section 10A.03, only if the individual was compensated over $3,000 for lobbying.

The MSBA has a number of lobbyists registered with the Board. It is possible that the individuals who are registered to engage in lobbying for the MSBA could prepare future communications with public officials during the event that are intended to influence legislative action, such as by engaging in the development of prospective legislation. Whether activities occurring during the MSBA's annual meeting are defined as lobbying or not, and whether those activities would require a lobbyist to report that activity within a lobbyist report, would likely

[7] Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1), item (ii), also includes someone compensated by "a business whose primary source of revenue is derived from facilitating government relations or government affairs services if the individual's job duties include offering direct or indirect consulting or advice that helps the business provide those services to clients," but that provision is unlikely to apply under the circumstances described by the MSBA.

depend on specific facts regarding the individuals involved, who they are communicating with or intend to communicate with, and the subjects of those communications.

The MSBA stated:

> Finally, it is not clear where this proposed definition would apply in the Rules. The term "development of prospective legislation" appears only in the definition.

Response: The phrase "development of prospective legislation" appears within the definition of the term "legislative action" that is codified at Minnesota Statutes, section 10A.01, subdivision 19a. The definition of the term "legislative action" impacts the definitions of the terms "lobbyist" and "principal" defined at Minnesota Statutes, section 10A.01, subdivisions 21 and 33, the reporting requirements imposed by Minnesota Statutes, sections 10A.04, subdivisions 4 and 6, and 10A.05, the prohibition on contingent fees for lobbying codified at Minnesota Statutes, section 10A.06, and the definition of the term "lobbying" that appears at Minnesota Rules, part 4511.0100, subpart 3. As explained on pages 23-24 of the Board's SONAR, the term "legislative action" was not defined prior to Minnesota Statutes, section 10A.01, subdivision 19a, becoming effective in 2024, and the new definition of that term introduced the phrase "development of prospective legislation" to Minnesota Statutes, Chapter 10A. The proposed rule is needed to define that phrase, and in turn more clearly define the term "legislative action."

Part 4511.0100, subpart 4. Lobbyist's disbursements. - Comment of MCN

The MCN stated:

> Given that the definition of "disbursement" has changed drastically, and is not a commonly used term, we recommend retitling this section "Lobbyist's gifts."
>
> Further, we recommend changing "each" to "any." The word "each" could be construed to imply all lobbyists should be reporting something here. "Any" provides clarity that a lobbyist may have no gifts to report.
>
> Lastly in this section, we recommend adding "to an official" after "gift given," in an effort to be exceedingly clear.

Response: The rule defines the term "lobbyist's disbursements" because the term "lobbyist disbursements" is used within Minnesota Statutes, section 10A.04, subdivision 9, clause (1), in describing what a designated lobbyist must report to the Board. While the use of the term "lobbyist disbursements" has decreased considerably as a result of legislative changes, the term being defined needs to match the statute to which it pertains.

With respect to the use of the word "each" or "any," the Board believes that either word would be suitable and have the same meaning. However, the word "each" better matches the statute

to which the rule pertains. Specifically, Minnesota Statutes, section 10A.04, subdivision 4, paragraph (g), provides that "[a] lobbyist must report the amount and nature of each gift, item, or benefit, excluding contributions to a candidate, equal in value to $5 or more, given or paid to any official, as defined in section 10A.071, subdivision 1, by the lobbyist or an employer or employee of the lobbyist. The list must include the name and address of each official to whom the gift, item, or benefit was given or paid and the date it was given or paid."

With respect to adding "to an official" after the text "gift given," that addition is unnecessary because the reporting of gifts, pursuant to Minnesota Statutes, section 10A.04, subdivision 4, paragraph (g), is limited to gifts "given or paid to any official, as defined in section 10A.071, subdivision 1," and Minnesota Statutes, section 10A.071, subdivision 1, paragraph (c), defines the term "official" to mean "a public official, an employee of the legislature, or a local official." Moreover, Minnesota Rules, part 4511.0200, subpart 2, provides that the word "gift" "has the meaning given in chapter 4512 and Minnesota Statutes, section 10A.071. While the Board shares the MCN's desire for clarity, adding more words than are necessary make it more likely that the Board's rules will become outdated as the result of future legislative changes.

Part 4511.0100, subpart 5a. Pay or consideration for lobbying. - Comment of MCN

The MCN stated:

> We ask the Board to remove the word "gross" before "compensation," because compensation is defined in section 4501.0100. Adding "gross" in this section signals that the calculation is different than the calculation for "compensation," which we do not think is the intent.

Response: The Board's intent was to define "pay or consideration for lobbying" in a manner that includes total compensation, before income taxes. However, the term "gross compensation" may be construed to be inclusive of money withheld via a payroll deduction for things that are currently excluded from the definition of "compensation" under Minnesota Rules, part 4501.0100, subpart 4, such as Social Security taxes, as well as for additional things that the Board seeks to exclude from the definition of "compensation" via the proposed rules. The MCN's comment has prompted the Board to propose a revised definition of the phrase "pay or consideration for lobbying" that eliminates the use of the word "gross" as follows.

Proposed modification to Part 4511.0100, subpart 5a

> Subp. 5a. **Pay or consideration for lobbying.** "Pay or consideration for lobbying" means the compensation paid to an individual for lobbying. An individual whose job responsibilities do not include lobbying, and who has not been directed or requested to lobby on an issue by their employer, does not receive pay or consideration for lobbying they undertake on their own initiative.

As modified, the rule would provide clarity by defining a phrase that impacts whether an individual is defined as a lobbyist under Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1). The need for this rule is explained in more detail on page 24 of the Board's SONAR. The proposed modification would eliminate a single word, "gross," in order to avoid a potential conflict between this rule and the definition of "compensation" under Minnesota Rules, part 4501.0100, subpart 4. The proposed modification would not make the rule substantially different from the rule text published with the Board's Dual Notice:

> Subp. 5a. **Pay or consideration for lobbying.** "Pay or consideration for lobbying" means the gross compensation paid to an individual for lobbying. An individual whose job responsibilities do not include lobbying, and who has not been directed or requested to lobby on an issue by their employer, does not receive pay or consideration for lobbying they undertake on their own initiative.

The difference between the rule text published with the Board's Dual Notice and the proposed modified text is within the scope of the Board's Dual Notice because it involves the deletion of a single word within the definition of a single phrase. The difference is a logical outgrowth of the Board's Dual Notice and MCN's comment, which seeks to avoid a conflict between this rule and the definition of "compensation" under Minnesota Rules, part 4501.0100, subpart 4. The Board's Dual Notice provided fair warning that the outcome could be the proposed rule, as modified, because the modification is a logical outgrowth of the Board's Dual Notice, the subject matter remains the same, and the effects of the proposed rule, as modified, are not substantially different from the effects of the proposed rule as published with the Board's Dual Notice.

In each case, the proposed rule would define a term that needs to be defined in order to provide clarity as to who is defined as a lobbyist under Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1). The proposed modification will only impact the totals reported to the Board by principals pursuant to Minnesota Statutes, section 10A.04, subdivision 6, to the extent that a relatively small number of individuals are not defined as lobbyists as a result of deleting the word "gross." The proposed modification will have only a slight impact on whether individuals are required to register with the Board as lobbyists under Minnesota Statutes, section 10A.03, because the distinction between "gross compensation" and "compensation," as defined by Minnesota Rules, part 4501.0100, subpart 4, is unlikely to be determinative as to whether an individual has exceeded the $3,000 threshold and is thereby defined as a lobbyist under Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1).

In order to clarify that compensation is calculated to include earnings before any payroll deduction for income tax, the Board has also proposed a revised amendment of the definition of the term "compensation" that is codified at Minnesota Rules, part 4501.0100, subpart 4.

Part 4511.0200, subpart 2a. Registration threshold. - Comment of MCN

With respect to the definition of the phrase “pay or consideration for lobbying” to be codified at part 4511.0100, subpart 5a, the MCN stated:

> We ask the Board to remove the word “gross” before “compensation,” because compensation is defined in section 4501.0100. Adding “gross” in this section signals that the calculation is different than the calculation for “compensation,” which we do not think is the intent.

Response: While the MCN did not specifically refer to the proposed rule to be codified at part 4511.0200, subpart 2a, the term “gross compensation” is used and the word “gross” should be removed for the same reasons the Board proposes removing it from the text of the proposed rule to be codified at part 4511.0100, subpart 5a.

Proposed modification to Part 4511.0200, subpart 2a

> Subp. 2a. **Registration threshold.** An individual must register as a lobbyist with the board upon the earlier of when:
>
> A. the individual receives total pay or consideration from all sources that exceeds $3,000 in a calendar year for the purpose of lobbying or from a business whose primary source of revenue is derived from facilitating government relations or government affairs services if the individual's job duties include offering direct or indirect consulting or advice that helps the business provide those services to clients. The pay or consideration for lobbying for an individual whose job duties include both lobbying and functions unrelated to lobbying is determined by multiplying the compensation of the individual by the percentage of the individual's work time spent lobbying in the calendar year; or
>
> B. the individual spends more than $3,000 of their own funds in a calendar year for the purpose of lobbying. Membership dues paid by the individual, and expenses for transportation, lodging, and meals used to support lobbying by the individual, are not costs that count toward the $3,000 expenditure threshold that requires registration.

As modified, the rule would provide clarity by addressing how the registration threshold applies when an individual is compensated both for lobbying and for functions unrelated to lobbying. The proposed modification would eliminate a single word, “gross,” in order to be consistent with the proposed modification to the proposed rule to be codified at part 4511.0100, subpart 5a, and avoid a potential conflict between this rule and the definition of “compensation” under Minnesota Rules, part 4501.0100, subpart 4. The proposed modification would not make the rule substantially different from the rule text published with the Board’s Dual Notice:

Subp. 2a. **Registration threshold.** An individual must register as a lobbyist with the board upon the earlier of when:

A. the individual receives total pay or consideration from all sources that exceeds $3,000 in a calendar year for the purpose of lobbying or from a business whose primary source of revenue is derived from facilitating government relations or government affairs services if the individual's job duties include offering direct or indirect consulting or advice that helps the business provide those services to clients. The pay or consideration for lobbying for an individual whose job duties include both lobbying and functions unrelated to lobbying is determined by multiplying the gross compensation of the individual by the percentage of the individual's work time spent lobbying in the calendar year; or

B. the individual spends more than $3,000 of their own funds in a calendar year for the purpose of lobbying. Membership dues paid by the individual, and expenses for transportation, lodging, and meals used to support lobbying by the individual, are not costs that count toward the $3,000 expenditure threshold that requires registration.

The difference between the rule text published with the Board's Dual Notice and the proposed modified text is within the scope of the Board's Dual Notice because it involves the deletion of a single word. The difference is a logical outgrowth of the Board's Dual Notice and MCN's comment, which seeks to avoid a conflict with the definition of "compensation" under Minnesota Rules, part 4501.0100, subpart 4. The Board's Dual Notice provided fair warning that the outcome could be the proposed rule, as modified, because the modification is a logical outgrowth of the Board's Dual Notice, the subject matter remains the same, and the effects of the proposed rule, as modified, are not substantially different from the effects of the proposed rule as published with the Board's Dual Notice.

In each case, the proposed rule would provide clarity as to how to apply Minnesota Statutes, sections 10A.01, subdivision 21, and 10A.03, when an individual is compensated both for lobbying and functions unrelated to lobbying. The proposed modification will only impact the totals reported to the Board by principals pursuant to Minnesota Statutes, section 10A.04, subdivision 6, to the extent that a relatively small number of individuals are not defined as lobbyists as a result of deleting the word "gross." The proposed modification will have only a slight impact on whether individuals are required to register with the Board as lobbyists under Minnesota Statutes, section 10A.03, because the distinction between "gross compensation" and "compensation," as defined by Minnesota Rules, part 4501.0100, subpart 4, is unlikely to be determinative as to whether an individual has exceeded the $3,000 threshold and is thereby defined as a lobbyist under Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1).

In order to clarify that compensation is calculated to include earnings before any payroll deduction for income tax, the Board has also proposed a revised amendment of the definition of the term "compensation" that is codified at Minnesota Rules, part 4501.0100, subpart 4.

Part 4511.0200, subpart 2a. Registration threshold. - Comment of MSBA

The MSBA quoted from a portion of the proposed rule, then stated:

> Currently, MSBA registers a number of employees as lobbyists. However, other MSBA staff who do not directly interact with public officials support the activities of MSBA's registered lobbyists by conducting research, reviewing language, discussing options and challenges, and other activities related to prospective legislation. Because the definition of "lobbyist" includes *direct or indirect consulting or advice*, it is possible that many more MSBA employees could come within the reporting threshold.

Response: The proposed rule explains when an individual is required to register as a lobbyist pursuant to Minnesota Statutes, section 10A.03. The proposed rule does not expand the scope of who is defined as a lobbyist. Whether an individual is defined as a lobbyist or not is dictated by Minnesota Statutes, section 10A.01, subdivision 21, which generally defines the term "lobbyist" in a manner that only includes those who communicate "with public or local officials." That statute was amended, effective January 3, 2023, to provide that an individual is a lobbyist if, within a calendar year, they are paid more than $3,000 "from a business whose primary source of revenue is derived from facilitating government relations or government affairs services between two third parties."[8] The newly added statutory language was amended, effective January 1, 2024, as follows:

> (ii) from a business whose primary source of revenue is derived from facilitating government relations or government affairs services ~~between two third parties~~ if the individual's job duties include offering direct or indirect consulting or advice that helps the business provide those services to clients; or[9]

Rather than expand the scope of who is defined as a lobbyist, the proposed rule includes text contained within the statutory definition of the term "lobbyist" in describing when a lobbyist is required to register with the Board. The "direct or indirect consulting or advice" language comes directly from the statute and the $3,000 threshold stated within Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1), has not changed. The Board does

[8] 2021 Minn. Laws 1st Spec. Sess. ch. 14, art. 11, § 6.
[9] 2023 Minn. Laws ch. 62, art. 5, § 5.

not believe that the language in question would apply to MSBA employees, because the Board does not believe that the MSBA is a business, or that its "primary source of revenue is derived from facilitating government relations or government affairs services." Regardless, if additional MSBA employees are now defined as lobbyists because they are compensated by such a business and their job duties include providing consulting or advice that helps the business provide government relations or government affairs services to clients, that is the direct result of a statutory change that is already in effect, rather than the proposed rule.

The MSBA stated that some of its staff, who do not directly interact with public officials, support the "MSBA's registered lobbyists by conducting research, reviewing language, discussing options and challenges, and other activities related to prospective legislation." The proposed rules would not impact whether those staff members are required to register as lobbyists for the reasons explained above. However, there is a distinction between the statutory definition of the term "lobbyist" under Minnesota Statutes, section 10A.01, subdivision 21, and the definition of "lobbying" that appears at Minnesota Rules, part 4511.0100, subpart 3. The term "lobbying" is defined to include both communication with public and local officials, and "[a]ny activity that directly supports this communication. . . ." As a result, a principal such as the MSBA is required to include compensation paid to non-lobbyist staff and other expenses directly related to the communications of its registered lobbyists when calculating the totals included within its annual principal report, filed pursuant to Minnesota Statutes, section 10A.04, subdivision 6.

Part 4511.0200, subpart 2b. Registration not required. - Comment of MSBA

The MSBA stated:

> Subpart 2b(B) states that an association board member is not a lobbyist "unless the individual receives pay or other consideration to lobby on behalf of the association." MSBA board members receive a stipend for their service on the MSBA board, yet only a portion of a board member's time is devoted to lobbying. Some MSBA board members travel to Washington, D.C. to talk with federal legislators. The rules are not clear whether they encompass federal activity. The scope of the term "or other consideration" needs clarification. Would airfare, hotel room, food/beverage, and other expense reimbursements be considered "other consideration"?

Response: The proposed rule does not encompass the MSBA's communication with members of the United States Congress because it pertains to whether an individual is required to register as a lobbyist, under Minnesota Statutes, Chapter 10A, as a result of serving on the board or governing body of an association that is a principal. The terms "lobbyist" and "principal" are defined by Minnesota Statutes, section 10A.01, subdivisions 21 and 33, respectively. The statutory definitions of those terms are reliant upon the definitions of other terms, namely "legislative action," which is defined by Minnesota Statutes, section 10A.01, subdivision 19a, "administrative action," which is defined by Minnesota Statutes, section 10A.01, subdivision 2,

"official action of a political subdivision," which is defined by Minnesota Statutes, section 10A.01, subdivision 26b, "political subdivision," which is defined by Minnesota Statutes, section 10A.01, subdivision 31, "public official," which is defined by Minnesota Statutes, section 10A.01, subdivision 35, "local official," which is defined by Minnesota Statutes, section 10A.01, subdivision 22, and "association," which is defined by Minnesota Statutes, section 10A.01, subdivision 6. With the limited exception of an individual who is defined as a lobbyist under Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1), item (ii), which as explained above almost certainly would not encompass MSBA staff, an individual is defined as a lobbyist only to the extent that they communicate with public or local officials, which do not include federal officials such as members of Congress.

The proposed rules would define the phrase "pay or consideration for lobbying" to mean "the compensation paid to an individual for lobbying." That definition would be codified at Minnesota Rules, part 4511.0100, subpart 5a. The word "compensation" is defined by Minnesota Rules, part 4501.0100, subpart 4. The proposed rules would modify the definition of "compensation" slightly to exclude health care and retirement benefits. If the proposed amendment of that rule is adopted, the word "compensation" will be defined to mean "every kind of payment for labor or personal services," excluding "payments of Social Security, unemployment compensation, workers' compensation, health care, retirement, or pension benefits." The reimbursement payments described by the MSBA are not compensation because they are made in order to reimburse individuals for expenses they have incurred, rather than to compensate them for labor or personal services.

The proposed rule would clarify that an individual, such as an MSBA board member, is not required to register as a lobbyist unless they receive "pay or other consideration to lobby on behalf of the association, and the aggregate pay or consideration for lobbying from all sources exceeds $3,000 in a calendar year." The proposed rule to be codified at Minnesota Rules, part 4511.0200, subpart 2a, would further provide that "pay or consideration for lobbying for an individual whose job duties include both lobbying and functions unrelated to lobbying is determined by multiplying the gross compensation of the individual by the percentage of the individual's work time spent lobbying in the calendar year. . . ." Therefore, if an MSBA board member is not compensated more than $3,000 within a calendar year, from all sources, specifically to engage in lobbying, then that individual will not be required to register with the Board as a lobbyist as a result of being paid a stipend to serve on the MSBA's board of directors.

Part 4511.0500, subpart 3. Report of designated lobbyist. - Comment of MSBA

The MSBA stated:

> The proposed rules regarding the designated lobbyist report include, "*if the lobbyist represents an association, a current list of the names and addresses of*

> *each officer and director of the association.*" MSBA hopes to confirm that MSBA's address may be provided rather than residential addresses.

Response: Minnesota Statutes, section 10A.04, subdivision 4, paragraph (a), requires that lobbyist reports "include information the board requires from the registration form," and Minnesota Statutes, section 10A.03, subdivision 2, clause (6), requires that the lobbyist registration form include, "if the lobbyist lobbies on behalf of an association, the name and address of the officers and directors of the association." Minnesota Rules, part 4501.0100, subpart 2, defines the word "address" to mean "the complete mailing address, including the zip code. An individual may use either the person's business address or home address. An association's address is the address from which the association conducts its business." Because the word "address" is defined to include a business or home address, Board staff have advised lobbyists that when listing the addresses of an association's officers and directors, the lobbyist may use the association's address if the association's officers and directors may receive mail at that address. The Board does not intend to deviate from that practice and the proposed rules do not have any impact on how the word "address" is defined. As explained more fully on page 28 of the Board's SONAR, the proposed changes to this rule are needed to accommodate legislative changes that took effect on January 1, 2024, regarding the content of lobbyist reports.

The MSBA stated:

> The proposed rules would require a report of "each original source of money in excess of $500 provided to the individual or association that the lobbyist represents." For a membership organization that holds an annual conference and other meetings that include exhibitors and sponsorships, publishes the MSBA Journal and other materials that include advertisements, has over 2,000 school board members who typically attend one or more paid trainings or webinars, and collects other revenue, this reporting requirement may quickly become challenging to fulfill.

Response: Minnesota Statutes, section 10A.04, subdivision 4, paragraph (h), requires that lobbyist reports include:

> each original source of money in excess of $500 in any year used for the purpose of lobbying to influence legislative action, administrative action, or the official action of a political subdivision. The list must include the name, address, and employer, or, if self-employed, the occupation and principal place of business, of each payer of money in excess of $500.

Minnesota Rules, part 4511.0100, subpart 5, defines the phrase "original source of funds" to mean "a source of funds, other than the entity for which a lobbyist is registered, paid to the lobbyist, the lobbyist's employer, the entity represented by the lobbyist, or the lobbyist's

principal, for lobbying purposes." The proposed rules would modify that definition slightly, by adding the text "provided by an individual or association" immediately preceding the text "other than the entity for which a lobbyist is registered. . . ." The proposed rules do not alter the scope of the information that must be reported to the Board. Instead, the requirement to report original sources of money used for lobbying is statutory, and has been in effect since the Ethics in Government Act was first enacted into law in 1974.[10]

Minnesota Statutes, section 10A.04, subdivision 4, paragraphs (g) and (h), do not explicitly state whether each lobbyist registered on behalf of an entity with multiple reporting lobbyists[11] is required to separately report gifts to officials and original sources of money used for lobbying. Each principal or other entity with registered lobbyists must have a single designated lobbyist who is responsible for reporting lobbying disbursements made by the entity, pursuant to Minnesota Statutes, section 10A.04, subdivision 9. Because there is no benefit to requiring multiple lobbyists to report duplicative information, and principals and other entities with registered lobbyists are already required to have a designated lobbyist who reports more information than other lobbyists, Board staff have advised lobbyists that only the designated lobbyist needs to report their association's gifts to officials and original sources of money used for lobbying. This practice benefits lobbyists registered on behalf of principals, such as the MSBA, that have multiple reporting lobbyists. The proposed rule would codify that practice by stating that the reporting of gifts to officials and original sources of money used for lobbying is the responsibility of the designated lobbyist.

Part 4511.0900. Lobbyist reporting for political subdivision membership organizations. - Comment of MSBA

The MSBA quoted the text of subpart 1 of the proposed rule, then stated:

> MSBA hopes that the CFB will provide greater clarity on this expansive requirement. The meaning of "attempt" is uncertain. It could constitute every conversation, phone call, email, and more. If so, the reporting requirement would be tremendously time-consuming and costly, if not actually impossible to fulfill.

Response: The proposed rule does not impose a new reporting requirement. The word "attempts" was used because Minnesota Rules, part 4511.0100, subpart 3, defines "lobbying" to mean "attempting to influence" one of three categories of government action. The three categories include legislative action, administrative action, and the official action of a political

[10] 1974 Minn. Laws 1156.

[11] *See* Minn. Stat. § 10A.04, subd. 9 (2). As used in this paragraph, the term "reporting lobbyist" includes a lobbyist who reports only their own lobbying activity, commonly referred to as a self-reporting lobbyist.

subdivision.[12] Principals such as the MSBA are required to file annual reports disclosing the total amount spent attempting to influence those three categories of government action, pursuant to Minnesota Statutes, section 10A.04, subdivision 6. The principal reporting requirement has been in effect since 1991.[13]

As explained more fully on pages 28-29 of the Board's SONAR, the legislature changed the scope of what is defined as lobbying, effective January 1, 2024, primarily by expanding it to include lobbying any political subdivision in Minnesota. That change prompted the request for Advisory Opinion 456. The question addressed by the advisory opinion is whether a membership organization whose members consist of political subdivisions is lobbying its own members when it communicates with them regarding the organization's lobbying efforts. The Board answered the question in the negative and intends to apply principles announced in the advisory opinion more broadly, necessitating the proposed rule.[14]

Subpart 1 of the proposed rule simply restates the statutory reporting requirement, except that it provides that an association whose members are political subdivisions does not need to report attempts to influence the actions of its own members. Subpart 2 of the proposed rule elaborates on that exception, stating that such an association "is not lobbying political subdivisions when the association communicates with its membership regarding lobbying efforts made on the members' behalf, or when the association recommends actions by its membership to support a lobbying effort." That exception directly benefits the MSBA and its lobbyists by largely, if not completely, eliminating one of the three categories of lobbying from their reports, namely attempts to influence the official action of a political subdivision.

As explained in more detail above with respect to the proposed rule to be codified at Minnesota Rules, part 4511.0100, subpart 1c, Minnesota Statutes, section 10A.01, subdivision 21, generally defines the term "lobbyist" in a manner that only includes those who communicate "with public or local officials."[15] Minnesota Statutes, section 10A.01, subdivision 33, defines the term principal to include those who pay lobbyists and those who engage in lobbying as described in Minnesota Statutes, section 10A.04, subdivision 6, which is limited to communications with public and local officials, urging others to communicate with public and local officials, and activities directly supporting those communications, pursuant to Minnesota

[12] *See* Minn. Stat. §§ 10A.04, subds. 4, 6, 10A.01, subds. 21, 33, 10A.05.
[13] 1991 Minn. Laws 2761-62.
[14] *See* Minn. Stat. § 10A.02, subd. 12a.
[15] Minnesota Statutes, section 10A.01, subdivision 21, paragraph (a), clause (1), item (ii), also includes someone compensated by "a business whose primary source of revenue is derived from facilitating government relations or government affairs services if the individual's job duties include offering direct or indirect consulting or advice that helps the business provide those services to clients," but that provision is unlikely to apply under the circumstances described by the MSBA.

Rules, part 4511.0100, subpart 3. To the extent that the MSBA is concerned that the word "attempts" is being used in a manner that encompasses efforts other than those described above, the concern is unwarranted because the proposed rule does not, and cannot, supplant the statutory definitions of "lobbyist" and "principal," nor does it alter the definition of "lobbying" under Minnesota Rules, part 4511.0100, subpart 3.[16] To the extent that the MSBA is concerned about being required to report the total that it spends on in-person conversations, phone calls, emails, and other communications involving public or local officials, in an attempt to influence legislative or administrative action, it should remember that direct communication with public and local officials is conducted through its registered lobbyists. The new statutory reporting requirements for lobbyists have eliminated the need to report disbursements made by the lobbyist in support of lobbying, including telephone, email, and other administrative costs. As a principal the MSBA's reporting obligation is to report the total amount spent in the preceding calendar year for lobbying in Minnesota, rounded to the nearest $5,000. The reporting obligations for lobbyists and principals are statutory, and are not expanded by this administrative rule.

Part 4511.1100. Major decision of nonelected local officials. - Comment of MCN

The MCN stated:

> Subparts 1 and 2 in this section are clear that a major decision regarding the expenditure or investment of public money includes selecting recipients for government grants from the political subdivision, and that attempting to influence a nonelected official is lobbying if that person may make, recommend, or vote on a major decision regarding an expenditure or investment of public money.
>
> We strongly encourage the CFB to clarify this language to include that responding to a grant program's request for proposals or otherwise applying for an existing grant program does not constitute lobbying. Additionally, answering any follow-up questions from the municipality regarding the content of grant application is not lobbying. And finally, that if a potential grantee communicates with a nonelected official about a grant opportunity outside of the normal grant process, and with the intent to influence the nonelected official to choose their proposal, that is lobbying.

Response: Minnesota Statutes, section 10A.01, subdivision 26b, defines the phrase "official action of a political subdivision" to mean "any action that requires a vote or approval by one or

[16] The definition of the term "lobbying" would be amended by the proposed rules, for other reasons, described on page 24 of the Board's SONAR.

more elected local officials while acting in their official capacity; or an action by an appointed or employed local official to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money." As explained in more detail on pages 30-32 of the Board's SONAR, the phrase "major decisions" is not presently defined in Minnesota Statutes, Chapter 10A, or within the Board's rules, and it needs to be defined to provide clarity as to when the action of a local official constitutes the official action of a political subdivision. The statutory definition of the phrase "official action of a political subdivision" does not make a distinction between major decisions that are made, recommended, or voted upon via an existing or "normal" process, and those made, recommended, or voted upon using a new or abnormal process.

Subdivision 3 of the proposed rule would provide a non-exhaustive list of decisions by political subdivisions that do not qualify as major decisions regarding the expenditure or investment of public funds. The three exclusions within that list each have a unique and specific rationale. The first is "the purchase of goods or services with public funds in the operating or capital budget of a political subdivision." That exclusion parallels Minnesota Statutes, section 10A.01, subdivision 21, paragraph (b), clause (6), which provides that the word "lobbyist" does not include "an individual while engaged in selling goods or services to be paid for by public funds." The second is "collective bargaining of a labor contract on behalf of a political subdivision." That exclusion parallels Minnesota Statutes, section 10A.01, subdivision 21, paragraph (b), clause (10), which provides that the word "lobbyist" does not include "an individual providing information or advice to members of a collective bargaining unit when the unit is actively engaged in the collective bargaining process with a state agency or a political subdivision." The third is "participating in discussions with a party or a party's representative regarding litigation between the party and the political subdivision of the local official." That exclusion is the result of a comment submitted to the Board by the Minnesota State Bar Association in January 2024,[17] and is consistent with various statutes and rules protecting the confidentiality of settlement discussions and other communications protected by attorney-client privilege.[18]

There is no statutory basis for categorically excluding a local official's decision regarding a grant application, submitted in response to a request for proposals or as part of an existing grant program, from what is defined as a major decision regarding the expenditure or investment of

[17] The comment is available on the Board's website at cfb.mn.gov/pdf/legal/rulemaking/2023/1_29_24_comments/MSBA.pdf.

[18] *See, e.g.*, Rule 1.6, Minn. R. Prof. Conduct. (providing that generally, "a lawyer shall not knowingly reveal information relating to the representation of a client"); Minn. Stat. § 13D.05, subd. 3 (b) (providing that a meeting of a public body may be closed to the public as "permitted by the attorney-client privilege"); Minn. Stat. § 13.393 (providing that data collected by an attorney acting in a professional capacity for a government entity is "governed by statutes, rules, and professional standards concerning discovery, production of documents, introduction of evidence, and professional responsibility," notwithstanding the Minnesota Government Data Practices Act).

public money. Moreover, there is no statutory basis for categorially excluding grant applications, or subsequent communications regarding a grant application, from what is defined as lobbying. The text of subpart 2 of the proposed rule would provide that "selecting recipients for government grants from the political subdivision" constitutes a major decision regarding the expenditure or investment of public money. A grant application, and subsequent communications between the prospective grantee and a local official in a position to influence whether the grant is approved by a political subdivision, are almost certainly attempts to influence whether the grant is approved, and thereby are no different than any other communications with a local official seeking to influence the official action of a political subdivision.

Part 4511.1100, subpart 2. Actions that are a major decision regarding public funds. - Comment of Rep. Coulter

State Representative Nathan Coulter was a member of the House Elections Finance and Policy Committee during the 2023-2024 biennium. Representative Coulter quoted the text of the proposed rule, then stated:

> My only comment is on Subpart 2, Section D, referring to "expenditures". My concern is that the term could be construed as only referring to direct expenditures, not more indirect forms of financing such as Tax Increment Financing, land value write-downs, etc. I think some clarification is warranted – perhaps something like "expenditures and/or financing"?

Response: Subpart 2 will provide a non-exhaustive list of types of decisions by political subdivisions that are major decisions regarding the expenditure or investment of public money. As explained more fully on pages 30-32 of the Board's SONAR, the phrase "major decisions regarding the expenditure or investment of public money" is not defined within Minnesota Statutes, Chapter 10A, or the Board's rules, and how the phrase is defined impacts the statutory definitions of the terms "local official" and "official action of a political subdivision," codified at Minnesota Statutes, section 10A.01, subdivisions 22 and 26b, respectively.

One type of decision that would be classified as a major decision within subpart 2, item D, is a decision on "expenditures on public infrastructure used to support private housing or business developments." Unlike directly spending or investing public money, tax abatement[19] and tax increment financing[20] may involve reducing or deferring property tax payments, or using property tax payments to indirectly finance a portion of the costs related to a specific

[19] *See* Minn. Stat. §§ 469.1812 - 469.1815.
[20] *See* Minn. Stat. §§ 469.174 - 469.1799.

development. Representative Coulter's comment has prompted the Board to propose modifying subpart 2, item D, to include tax abatement and tax increment financing as follows.

Proposed modification to Part 4511.1100, subpart 2

> Subp. 2. **Actions that are a major decision regarding public funds.** A major decision regarding the expenditure or investment of public money includes but is not limited to a decision on:
>
> A. the development and ratification of operating and capital budgets of a political subdivision, including development of the budget request for an office or department within the political subdivision;
>
> B. whether to apply for or accept state or federal funding or private grant funding;
>
> C. selecting recipients for government grants from the political subdivision; or
>
> D. tax abatement, tax increment financing, or expenditures on public infrastructure, used to support private housing or business developments.

As modified, subpart 2, item D, would clarify that tax abatement and tax increment financing are treated the same as expenditures on public infrastructure, if used to support private housing or business developments. The proposed modification would add the text "tax abatement, tax increment financing, or" to item D and add a comma after the word "infrastructure" to accommodate that change. The need for the rule is explained in more detail on pages 30-32 of the Board's SONAR. The proposed modification would not make the rule substantially different from the rule text published with the Board's Dual Notice:

> Subp. 2. **Actions that are a major decision regarding public funds.** A major decision regarding the expenditure or investment of public money includes but is not limited to a decision on:
>
> A. the development and ratification of operating and capital budgets of a political subdivision, including development of the budget request for an office or department within the political subdivision;
>
> B. whether to apply for or accept state or federal funding or private grant funding;
>
> C. selecting recipients for government grants from the political subdivision; or
>
> D. expenditures on public infrastructure used to support private housing or business developments.

The difference between the rule text published with the Board's Dual Notice and the proposed modified text is within the scope of the Board's Dual Notice because it concerns the scope of a single phrase. The difference is a logical outgrowth of the Board's Dual Notice and Representative Coulter's comment, which seeks additional clarity so that the proposed rule will not be construed to exclude indirect forms of financing from what is considered a major decision. The Board's Dual Notice provided fair warning that the outcome could be the proposed rule, as modified, because the modification is a logical outgrowth of the Board's Dual Notice, the subject matter remains the same, and the effects of the proposed rule, as modified, are not substantially different from the effects of the proposed rule as published with the Board's Dual Notice.

In each case, subpart 2 would provide a non-exhaustive list of types of decisions by political subdivisions that are major decisions regarding the expenditure or investment of public money. The proposed modification would alter item D slightly to provide clarity and ensure the inclusion of two specific types of major decisions. The proposed modification would have little or no substantive impact for three reasons. First, subpart 2 consists of a non-exhaustive list. The Board believes that tax abatement and tax increment financing, used to support private housing or business developments, likely fall within the scope of "major decisions regarding the expenditure or investment of public money" as that phrase is used within Minnesota Statutes, section 10A.01, subdivisions 22 and 26b, regardless of the proposed rule.

Second, any impact on the definition of the term "local official" under Minnesota Statutes, section 10A.01, subdivision 22, will likely be minimal because there is likely little, if any, difference between the universe of individuals who have the "authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding the expenditure or investment of public money" and the universe of individuals who lack that authority but do have the authority to make, to recommend, or to vote on as a member of the governing body, major decisions regarding tax abatement or tax increment financing.

Third, any impact on the definition of the phrase "official action of a political subdivision" under Minnesota Statutes, section 10A.01, subdivision 26b, will likely be minimal as well. That phrase already encompasses "any action that requires a vote or approval by one or more elected local officials while acting in their official capacity," and the Board is not aware of a political subdivision with nonelected local officials who have the authority to approve tax abatement for economic development purposes or tax increment financing without that approval being subject to a vote or approval by one or more elected officials.[21]

[21] Minnesota Statutes section 469.1812, subdivision 4, which concerns tax abatement for economic development purposes, defines the term "political subdivision" to be limited to "a statutory or home rule charter city, town,

Therefore, the proposed modification is not expected to expand the scope of what is considered lobbying. The benefit of the proposed modification is added clarity and avoiding the appearance of a loophole regarding tax abatement for economic development purposes and tax increment financing.

Conclusion

The Board has addressed many concerns raised during the rulemaking process, including those raised during the formal comment period that followed publication of the Board's Dual Notice. The Board has proposed four modifications to the draft of the rules published with the Board's Dual Notice. The Board has shown that the rules are needed and reasonable. We respectfully submit that the Administrative Law Judge should recommend adoption of these rules, as modified.

Respectfully,

Andrew Olson
Legal/Management Analyst

school district, or county." Minnesota Statutes section 469.174, subdivisions 5-6, which concern tax increment financing, define the term "governing body" to mean "the elected council or board of a municipality" and the term "municipality" to mean a city, a county, or in rare instances, a township.