

**LETTER OPINION
2008-L-13**

July 23, 2008

The Honorable JoNell Bakke
State Senator
1498 Norchip Circle
Grand Forks, ND 58201-3702

The Honorable Lisa Wolf
State Representative
1420 78th Street SE
Minot, ND 58701-9357

Dear Senator Bakke and Representative Wolf:

Thank you for your letter raising several questions about corporate expenditures for promoting passage or defeat of initiated measures. You ask whether corporate labor costs allocable to a corporation's promotion of passage or defeat of an initiated measure constitute an expenditure or contribution under N.D.C.C. § 16.1-08.1-03.5, as well as an expenditure of money, triggering a requirement to file a statement with the Secretary of State under N.D.C.C. § 16.1-08.1-03.1. For the reasons indicated below, it is my opinion that corporate labor costs of more than a nominal value that are directly allocable to a corporation's promotion of passage or defeat of an initiated measure constitute an expenditure or contribution, as well as an expenditure of money under N.D.C.C. § 16.1-08.1-03.5, and trigger a requirement to file a statement with the Secretary of State under N.D.C.C. § 16.1-08.1-03.1 along with a statement listing the total amount of money spent for that purpose.

ANALYSIS

Corporate expenditures for purposes of promoting passage or defeat of initiated measures are governed by N.D.C.C. § 16.1-08.1-03.5. The statute provides, in part:

This chapter does not prohibit the exercise by corporations, cooperative corporations, limited liability companies, and associations of the right to make expenditures and contributions for the purpose of promoting

passage or defeat of initiated or referred measures, or for promoting any general political philosophy or belief deemed in the best interest of the employees, stockholders, patrons, or members of the corporation, cooperative corporation, limited liability company, or association other than a “political purpose” as defined by this chapter. Any corporation, cooperative corporation, limited liability company, or association that receives contributions pursuant to section 16.1-08.1-03.1 or spends money for the purpose of promoting passage or defeat of initiated or referred measures, other than a contribution to another person or measure committee promoting passage or defeat of an initiated or referred measure, shall file a statement pursuant to section 16.1-08.1-03.1 along with a statement listing the total amount of money spent for that purpose. The statements filed pursuant to section 16.1-08.1-03.1 must be filed with the secretary of state no later than the twelfth day before the date of the election in which the measure appears or would have appeared on the ballot complete from the beginning of that calendar year through the twentieth day before the date of the election. Statements showing the total amount of money spent for the purpose of promoting passage or defeat of initiated or referred measures must be filed with the secretary of state through the end of the calendar year in which the measure appeared on the ballot.¹

You ask whether corporate labor costs allocable to promoting passage or defeat of an initiated measure constitute an “expenditure” or “contribution” under N.D.C.C. § 16.1-08.1-03.5. The term “expenditure” is defined in N.D.C.C. ch. 16.1-08.1:

As used in this chapter, unless the context otherwise requires:

5. “Expenditure” means a gift, transfer, conveyance, provision, loan, advance, payment, distribution, disbursement, outlay, or deposit of money or anything of value, except a loan of money from a bank or other lending institution made in the regular course of business, made for the direct purpose of influencing the nomination for election, or election, of any person to office. The term also means a contract, promise, or agreement, express or implied, whether or not legally enforceable, to make any expenditure and includes the

¹ N.D.C.C. § 16.1-08.1-03.5(1).

transfer of funds by a political committee to another political committee.²

Likewise, the word “contribution” is defined as meaning a “gift, transfer, conveyance, provision, receipt, subscription, loan, advance, deposit of money, or anything of value, made for the purpose of . . . aiding or opposing the circulation or passage of a statewide initiative . . . petition or measure.”³

As indicated above, the definitions of both “contribution” and “expenditure” refer to the phrase “anything of value.”⁴ This is a broad concept. Contained within the definition of “contribution” is a further explanation: “[t]he term ‘anything of value’ includes any good or service of more than a nominal value. The term ‘nominal value’ means the cost, price, or worth of the good or service is trivial, token, or of no appreciable value.”⁵ Obviously, in many cases, corporate labor costs that are directly allocable to the promotion of passage or defeat of an initiated measure would have value beyond a trivial, token, or non-appreciable amount. Consequently, based on a plain reading of the statutory definitions, it is my opinion that non-trivial corporate labor costs directly allocable to the promotion of passage or defeat of an initiated measure constitute an expenditure or contribution under N.D.C.C. § 16.1-08.1-03.5.⁶

You next ask whether corporate labor costs directly allocable to the promotion of passage or defeat of an initiated measure constitute spending money under N.D.C.C.

² N.D.C.C. § 16.1-08.1-01(5) (emphasis added). Obviously, based on the context of how the term “expenditure” is used in N.D.C.C. § 16.1-08.1-03.5, only the first part of this definition is applicable to the promotion of passage or defeat of an initiated measure.

³ N.D.C.C. § 16.1-08.1-01(3) (emphasis added).

⁴ The term “anything of value” was added to N.D.C.C. § 16.1-08.1-01 in 2003. See n. 10 below.

⁵ N.D.C.C. § 16.1-08.1-01(3).

⁶ N.D.C.C. § 1-02-02 (words used in any statute are to be understood in their ordinary sense, but words explained in the code are to be understood as thus explained). See also Fair Political Practices Comm. v. Suitt, 153 Cal. Rptr. 311, 313-14 (Cal. Ct. App. 1979) (contribution includes not only cash and cash-equivalent contributions but also non-monetary or in-kind contributions of goods and services; statutory definition is intended to prevent a potential subterfuge by assuring that when an employer allows an employee to spend compensated time in campaign work for a campaign committee, the committee must report the benefit, just as if the employer had made a direct cash contribution); Caldwell v. Bateman, 312 S.E.2d 320, 323-24 (Ga. 1984) (statutory definition of “contribution” including “anything of value” includes compensation to an employee for personal services rendered by employee to a candidate, with the amount of the compensation being a contribution from the employer which must be disclosed).

§ 16.1-08.1-03.5, which triggers a reporting requirement under N.D.C.C. § 16.1-08.1-03.1 (if such amounts meet the dollar threshold of that statute). The second sentence in N.D.C.C. § 16.1-08.1-03.5(1) provides that “[a]ny corporation, cooperative corporation, limited liability company, or association that receives contributions pursuant to section 16.1-08.1-03.1 or spends money for the purpose of promoting passage or defeat of initiated or referred measures, other than a contribution to another person or measure committee promoting passage or defeat of an initiated or referred measure, shall file a statement pursuant to section 16.1-08.1-03.1 along with a statement listing the total amount of money spent for that purpose.”⁷ Both the first and second sentences of the statute refer to the defined term “contribution”; however, the first sentence refers to making “expenditures” while the second sentence refers to “spends money.” Even though the antecedent term “expenditures” differs slightly from the subsequent “spends money,” I believe those terms are used in the same sense,⁸ and it is my opinion that non-trivial corporate labor costs directly allocable to the purpose of promoting passage or defeat of an initiated measure constitute the spending of money within the meaning of N.D.C.C. § 16.1-08.1-03.5 and thus would trigger the requirement to file a statement under N.D.C.C. § 16.1-08.1-03.1 with the Secretary of State, along with a statement listing the total amount of money spent for that purpose.⁹

Finally, you ask what method should be used to calculate corporate labor costs allocable to the promotion of passage or defeat of an initiated measure. There is nothing in N.D.C.C. ch. 16.1-08.1 that specifies any particular method to calculate contributions or expenditures that are not direct cash contributions or expenditures. However, the concept of valuing non-cash contributions in the context of campaign reports was discussed in the Legislature when the pertinent statutes were amended in 2003. In a hearing before the House Judiciary Committee on Senate Bill 2063, the following exchange took place:

Rep. Klemin: Anything of value, for a good or service, is the candidate then to suppose to get some kind of statement from the party making this non-monetary contribution as to what the value is. How do you know what the value is.

Mr. Fong: I believe that we are going to expanding it to definitely to include anything of value. It’s going to have to be based on what the fair market value of that particular item might be. For example, if an individual decides

⁷ N.D.C.C. § 16.1-08.1-03.5(1) (emphasis added).

⁸ Indeed, the terms “expenditure” and “spends money” are often used interchangeably in a variety of contexts. See, e.g., N.D.A.G. Letter to Wagner (Jan. 6, 1992); N.D.A.G. Letter to Mertens (Mar. 16, 1990); N.D.A.G. Letter to Rayl (Oct. 31, 1990); N.D.A.G. Letter to Wild (Sept. 6, 1988).

⁹ N.D.C.C. §§ 16.1-08.1-03.5(1) and 16.1-08.1-03.1.

they are going to hold a party or have a reception of some kind, the receipts from that reception, are going to have to be equated at fair market value to determine whether or not there is a reporting requirement. It's still a contribution now, because it's of anything of value. If it exceeds \$200, then it is going to have to be reported as such.

Rep. Klemin: Is there going to be a requirement to submit some kind of proof of what the value is, or just on the report you set down the total.

Mr. Fong: There won't be a requirement to say, we have ascertained through these receipts that this was going to, that this contribution is going to exceed this amount, it will simply be based on what the individual filer says is the value of that contribution. But it's going to have to be based on fair market value.

Rep. Klemin: When we're talking services, other than volunteer service, which is not included, are you talking about personal service?

Mr. Fong: I guess you'd have to define what you mean by personal service. We're not talking about volunteer time, volunteer time is already exempt as a contribution. The time that those volunteers spend does not have to be equated as a contribution.

Rep. Delmore: When we're looking at nominal value, are we still speaking under \$200.

Mr. Fong: No, I think what we're talking about with nominal value, nominal value is defined as that which does not have to be considered of value. Nominal value means the cost, price or worth of good[s] or services, trivial token, or of no appreciable value. So there is no dollar figure on that, it means that there is very little value, cost, price, etc.¹⁰

Thus, it is apparent from the legislative history that although neither of the pertinent bills in the 2003 session specified a method to calculate either contributions or expenditures, the

¹⁰ Hearing on S.B. 2063 Before the House Comm. on the Judiciary, 2003 N.D. Leg. (Mar. 10) (Statements of Rep. Klemin, Rep. Delmore, and Cory Fong, Deputy Secretary of State). See also Hearing on S.B. 2403 Before the Senate Comm. on Government and Veterans Affairs, 2003 N.D. Leg. (Feb. 6) (Statement of Cory Fong, Deputy Secretary of State) (purpose of Senate Bill 2403 was to make definition of "expenditure" consistent with the updated definition of "contribution" which was being changed in Senate Bill 2063 defining "candidate" and "contribution").

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Legislature contemplated that it would be the responsibility of the filer to place the value on any non-cash or in-kind contribution based on a fair market value of the goods and services.

In summary, it is my opinion that non-trivial corporate labor costs directly allocable to a corporation's promotion of passage or defeat of an initiated measure constitute an expenditure or contribution, as well as an expenditure of money, under N.D.C.C. § 16.1-08.1-03.5 and trigger a requirement to file a statement with the Secretary of State under N.D.C.C. § 16.1-08.1-03.1, along with a statement listing the total amount of money spent for that purpose.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.¹¹

¹¹ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).