



# Nonprofit Alert: Legislature Clarifies Rules for Independent Expenditures in the 2018 Election

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Recently enacted legislation made important changes to Minnesota's election laws. These changes are important for 501(c)(4) and other nonprofits that intervene in state and local candidate campaigns.

501(c)(4) organizations and trade and professional associations exempt under section 501(c)(6) of the Internal Revenue Code are permitted by their tax-exempt status to intervene in campaigns and may endorse, oppose, and otherwise take action to influence the election or defeat of candidates for public office. By contrast, charitable organizations that are tax-exempt under section 501(c)(3) of the Internal Revenue Code must remain entirely nonpartisan and may not comment on or otherwise intervene in campaigns for public office.

For 501(c)(4) and other organizations that are permitted to intervene in campaigns, Minnesota state law governs those activities and how they may—and may not—interact directly with candidates for state and local office. Federal law governs conduct on races for federal office and those rules were not changed by the new legislation.

## **What is an "independent expenditure?"**

While 501(c)(4) organizations may get involved in campaign activities, they may not make any contributions directly to candidates or political parties. Instead, they must conduct their activities independently of the candidate's campaign. These activities are referred to as "independent expenditures." The new amendments, which were effective June 1, 2018, are intended to clarify the distinctions between expenditures that will be considered "independent" versus "coordinated."

An independent expenditure is any communication involving the expenditure of funds that expressly advocates the election or defeat of a candidate and that is made without consulting with or involving the candidate or the candidate's committee in any way. To qualify as independent, the expenditure cannot be made with the express or implied consent, with the authorization of, with the cooperation of, in concert with, at the request of, or at the suggestion of the candidate, the candidate's committee, or the candidate's agent.



## New Examples of Conduct that Would Defeat the Independence of an Expenditure

Over the years, through advisory opinions and enforcement actions, the Minnesota Campaign Finance Board has defined the lines between independent and coordinated activities. The recent amendments to Minnesota law largely align with the Board's prior positions. The new law supplements the general definitions by providing specific examples of activities that will cause expenditures of a "spender" to be considered coordinated (and thus a prohibited contribution to a candidate campaign):

- **Fundraising.** A candidate who will appear on the ballot solicited funds for the spender's political purposes during the election year. This rule does not apply to fundraising for a party unit or money that is not raised for political purposes;
  
- **Candidate's direction of political committee.** A candidate who will appear on the ballot served as the chair, deputy chair, treasurer, or deputy treasurer of the spender (other than a party unit) during the election year;
  
- **Shared consultants.** The candidate (or the candidate's opponent) and the spender obtain services from the same consultant during the same election segment. However, this rule does not apply if the consultant assigns separate personnel to the candidate and the spender implements a proper *firewall* pursuant to a written policy;
  
- **Not publicly available information.** The spender receives nonpublic information from the candidate regarding campaign plans, strategy, or needs;
  
- **Spender-provided information.** Prior to making the communication public, the spender provides information to the candidate about the expenditure's content, intended audience, timing, location or

mode, volume, or frequency;

- **Candidate's participation.** The candidate participates in any of the processes required for the creation and development of the expenditure or any decision regarding the content, timing, location, intended audience, volume of distribution, or frequency of the expenditure.

### **New Examples of Conduct that Does Not Threaten Independence**

The new law also provides examples of activities, which taken alone, do not cause an expenditure to be coordinated and are thus permitted for 501(c)(4) organizations:

- **Saying no.** A candidate asks a spender *not* to make any expenditure to support the candidate or oppose the candidate's opponent;
- **Donor lists.** A candidate provides to a spender names of potential donors, as long as the spender does not suggest that funds received from the donors will be used to benefit the candidate;
- **Public information.** An expenditure uses a photograph, video, or audio recording obtained from a publicly available source or public event;
- **Endorsements.** The spender endorses the candidate;
- **Hyperlinks.** An expenditure includes a hyperlink to the candidate's website;
- **Appearances.** The spender invites the candidate to appear before the spender's members, employees, or shareholders, including the candidate's participation in the event, unless the event promotes the

election of the candidate or the defeat of the candidate's opponent, or the candidate requests or accepts campaign contributions at the event.

### **New Disclaimer Requirements on Campaign Material**

Organizations conducting independent expenditures for Minnesota state and local candidates are required to include a disclaimer on their communications. The disclaimer requirements have long required including who paid for the material and the spender's address.

The amendments modernize these requirements in that the disclaimer may now state an organization's *website* instead of a mailing address, if the website in turn includes the organization's mailing address. In addition, the new law makes clear that the disclaimer requirements are satisfied for an entire website or social media page if the required disclaimer appears on the home page in at least 8-point font.

As amended, the law now specifies that the disclaimer for independent expenditures must be substantially in the forms below:

- **In written communications:** "This is an independent expenditure prepared and paid for by ... (name of entity participating in the expenditure), ... (address). It is not coordinated with or approved by any candidate nor is any candidate responsible for it."
  - "Paid for" can be omitted if the material is produced and disseminated without cost.
  - The words "PAID ADVERTISEMENT" must be included if printed in a newspaper, periodical, or magazine.
  
- **In broadcast communications:** "This independent expenditure is paid for by ... (name of entity participating in the expenditure). It is not coordinated with or approved by any candidate nor is any candidate responsible for it."



- The words "PAID ADVERTISEMENT" must be included at the beginning or end of an advertisement on radio or television.

- **In broadcast (if produced and disseminated without cost):** "... (name of entity participating in the expenditure) is responsible for the contents of this independent expenditure. It is not coordinated with or approved by any candidate nor is any candidate responsible for it."

### **Separate Rules for Federal Campaign Activities**

The amendments described above relate only to activities attempting to influence the election of state or local candidate in Minnesota. Campaigns for federal office are governed by federal law and administered by the Federal Election Commission, and those rules are not changed by these amendments.

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For more information, contact Gray Plant Mooty's Nonprofit and Tax-Exempt Organizations Team.