FOLEY

FOLEY & LARDNER LLP

ATTORNEYS AT LAW

WASHINGTON HARBOUR
3000 K STREET, N.W.
SUITE 600
WASHINGTON, D.C. 20007-5109
202.672.5300 TEL
202.672.5399 FAX
foley.com

WRITER'S DIRECT LINE
202.295.4081
cmitchell@foley.com EMAIL

CLIENT/MATTER NUMBER
099865-0101

September 30, 2011

VIA OVERNIGHT DELIVERY

Mr. Gary Goldsmith
Executive Director
Campaign Finance & Public Disclosure Board
190 Centennial Office Bldg.
658 Cedar Street
St. Paul, MN 55155

Mr. John J. Scanlon
Chairman
Campaign Finance & Public Disclosure Board
75 Upper Afton Terrace
St. Paul, MN 55106

Members, Campaign Finance & Public
Disclosure Board

Re: Unlawful Actions of Minnesota Campaign Finance & Public Disclosure Board – Request for Documents Pursuant to Minnesota Government Data Practices Act

Dear Mr. Goldsmith, Mr. Scanlon and Members of the Board:

The undersigned represents the National Organization for Marriage ("NOM"). The purpose of this letter is to express NOM's objections to the ongoing actions of the Minnesota Campaign Finance & Public Disclosure Board ("the Board")[1]. The Board has acted and appears posed to continue to act in a manner which is in direct contravention of the law(s) of the State of Minnesota and the United States Constitution.

In particular, we are in receipt late yesterday of a proposed agenda item scheduled to be considered by the Board at next Tuesday's October 4, 2011, monthly meeting. However, as of this moment (noon on Friday, September 30, 2011) this proposed new 'statement of guidance' amending and supplanting and/or supplementing the 'guidance' issued on June 30, 2011 is NOT on the Board's

[1] For these purposes, "Board" includes not only the Members of the Board but also the Minnesota Campaign Finance & Public Disclosure agency, its Executive Director, and other staff and employees

website. It was apparently provided to Minnesota Public Radio[2], where this proposed new policy can be accessed...but it is NOT on the website of the agency[3].

The Board's actions over the past several months and, in particular, the yet-again-revised 'Statement of Guidance' to be considered at the October 4, 2011 meeting of the Board ("October 4 Guidance"), represent a breathtaking disregard of longstanding legal precedent, legislative prerogatives, established constitutional jurisprudence and adherence to basic requirements of due process.

The Board has unilaterally taken it upon itself to rewrite multiple provisions of the Minnesota statutes, and is doing so *specifically because* of the ballot referendum on marriage scheduled for the 2012 general election ballot ("Marriage Referendum").

The Board has plainly stated that the Marriage Referendum is the driving motivation for the changes in the law at this point in time despite having no statutory authority to make such changes. In addition, it is apparent that NOM is a singular target of the Board's proposed new reporting and disclosure regime. The deliberate targeting by the government of a particular citizens organization such as NOM is a violation of NOM's First Amendment rights protecting it from such government assault.

As an observer in attendance at the September 6, 2011 meeting of the Board, I was appalled to listen to the Board's discussion of NOM's website, the language contained in NOM's solicitations, and, further, how NOM's activities related to its support of the Marriage Referendum are to be fitted within whatever 'make-it-up-as-we-go-along' restructuring of Minnesota campaign finance law the Board ultimately comes up with. The October 4 Guidance is clearly aimed directly at NOM in order to force disclosure of NOM's supporters and donors, as was intimated at the September meeting and which is now apparent from the draft October 4 Guidance.

The purpose of this letter is to memorialize NOM's objections to actions being taken by the Board to disadvantage NOM and other pro-family groups in Minnesota in the exercise of their First Amendment rights to promote and support the Marriage Referendum.

1. As a nonprofit corporation, NOM is not subject to the jurisdiction of the Board unless NOM makes independent expenditures expressly advocating the election or defeat of a

---

[2] See website of Minnesota Public Radio http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2011/09/campaign_financ_4.shtml, accessed September 29, 2011

[3] See http://www.cfboard.state.mn.us/, accessed September 30, 2011

clearly identified candidate – and the Board's unilateral redefinition of Minnesota statutes is illegal.

In the October 4 Guidance, there appear a number of new terms and redefinition of existing statutory terms. NONE of these definitions have been adopted by the legislature and are being advanced by the Board specifically to unconstitutionally compel disclosure of NOM's donors and supporters if NOM makes expenditures to support the Marriage Referendum.

The Board is in the process of implementing through multiple back-door, behind the scenes 'statements of guidance' recommendations made by the Board to the legislature over a number of years, but which have never been adopted nor enacted by the legislature into the laws of the State of Minnesota.

As recently as this year, the legislature considered but did not adopt various statutory changes several of which are now being implemented through the Board's June 30, 2011 'Statement of Guidance' ("June 30 Guidance") and the October 4 Guidance. This process is wholly lacking in legal or legislative authority.

The Board's unilateral redefinitions of law include:

1. **Association**.

The statutory definition of "Association" is found at MINN. STAT. 10A.01 (2010):

> **10A.01** DEFINITIONS
>
> Subd. 6. **Association.** "Association" means a group of two or more persons, who are not all members of an immediate family, acting in concert".

Now, the Board would *unilaterally* add its own verbiage which does *not* appear in the statute:

> "The term 'association' includes corporations and other legal forms of existence such as partnerships, as well as groups of people without a formal legal structure."[4]

The Minnesota statute once included corporations in the definition of 'association', but the legislature amended the definition in 1999. The definition had previously stated:

> 'Association' means business, corporation, firm, partnership, committee, labor organization, club, or any other group of two or more persons, which includes more than an immediate family, acting in concert.

Laws, c. 220, § 1; Minn. House Jour., 1999 Reg. Sess. No. 62 at 111.

[4] See October 4 Guidance, p. 1

More than a decade ago, the legislature deleted 'corporations' from the definition of association in 1999. *Only* the legislature can decide to add to or exclude 'corporations' from the statute and the jurisdiction of the Board.

The Board cannot claim that it is unaware that it is a legislative prerogative to define 'association'. The Board has repeatedly requested, over many years, that the legislature *amend* the law to once again include corporations in the definition of 'association'.

In 2004, the Board's Legislative Recommendations stated:

> "3. Amend the definition of 'association' to include all types of legal entities. The current definition means a group off (sic) two or more person, (sic) who are not all members of an immediate family. Since the term was first defined, other legal entities have been established. The disclosure requirement should include all types of legal entities."[5]

In 2005, the Board's Legislative Recommendations requested the Legislature 'to provide direction concerning the following items':

...

- Review the rights of an unregistered association, including a corporation, to make contributions to political committees and political funds established solely to promote or defeat ballot questions. These contributions are allowed under Minn. Stat. §§211B. However, Minn. Stat. Ch. 10A, requires the contributions to be made from a political committee or political fund. The two statutes may be in conflict or may require unnecessary registration for the entities wishing to promote or defeat a ballot question[6]." (emphasis added)

More recently, the Board requested the legislature to "modify the statutes related to associations not registered with the Board donating money to registered entities..." According to the accompanying explanation, "...The Board recommends that the reference to §10A.20 found in §10A.27, subd. 13, be removed and replaced with provisions itemizing the specific disclosure that is required by an unregistered association contributor...Separate provisions for donations to ballot question committees should be considered..."[7]

---

[5] See 2004 Legislative Recommendations, http://www.cfboard.state.mn.us/law/legRec04.pdf, accessed September 30, 2011

[6] See http://www.cfboard.state.mn.us/campfin/AnnualReports/2005ar.pdf, 2005 Annual Report of the Campaign Finance and Disclosure Board, Issued September 2005, Legislative Recommendations Addendum, dated 6 January 2005

[7] See Minutes of January 10, 2011 Meeting, Campaign Finance and Disclosure Board, http://www.cfboard.state.mn.us/bdinfo/minutes/minutes_reg_01_10_2011_with_attachments.pdf, accessed September 30, 2011

Year after year, the Board has recommended statutory changes to the provisions which are now included in the Board's Proposed Guidance. And year after year, the legislature has declined to adopt the Board's recommendations.

When the legislature amended certain provisions of Ch. 10A to incorporate the provisions of *Citizens United*[8] regarding candidate-related expenditures, the legislature most certainly *could* have expanded the definition of 'association' to include 'corporations', or taken any number of other actions sought by the Board. It did not.

The legislature – the people's *elected* representatives – did not see fit to follow the Board's recommendations.

In Mr. Goldsmith's March 30, 2010 Memorandum to the Board regarding issues presented in Minnesota from the Supreme Court's decision in *Citizens United,* one of the legislative recommendations (not adopted by the legislature) was:

> "2. Clarify that the term "association" includes corporations, or define the term "corporation" separately in Chap. 10A. In either case, review the provisions of Chap. 10A to ensure that the application of the definitions reaches the desired result in each case."[9]

The Memorandum went on to include another recommendation that the law be changed to state that "...a corporation may not make an independent expenditure or make a contribution to a ballot question political committee or fund or an independent expenditure political committee or fund except through an affiliated political fund established by the corporation[10]."

Further, the Memorandum asked the legislature to "provide for disclosure of underlying sources of money by nonprofit corporations that have dues and membership fees or general contributions as sources of income. Provide that the disclosure of underlying sources must be made once for each reporting period for reports to be filed by the affiliated political fund...."[11]

The April 6, 2010 Board minutes reflect the Board's discussion of the March 30, 2010 Memorandum and the impact of *Citizens United.* According to the minutes, it was the Board's 'consensus' that the "Board's preference was for the legislature to address the issue[12]."

What happened to that 'preference' in 2011?

---

[8] *Citizens United v. FEC,* 558 U.S. -- (2010)

[9] See Minutes, April 6, 2010 Board Meeting, http://www.cfboard.state.mn.us/bdinfo/minutes/Minutes_Reg_04_06_2010_With_Attachments.pdf

[10] Id.

[11] The Memorandum was apparently not approved or adopted by the Board at the time it was presented, as the document on the public record reflects "DRAFT – Not Adopted by Board".

[12] Id @ p. 6

In a June 28, 2011 memorandum to the Board, Executive Director Goldsmith wrote, "As the Executive Director, I was concerned [about Advisory Opinion 257] because I am unable to articulate *why* the provisions of Chapter 10A should not apply to corporations as they do to other unregistered associations." We wish to clear up this confusion once and for all: ***The provisions of Chapter 10A do not apply to corporations, because corporations are not associations according to the determination of the Minnesota legislature!*** It is clear from the legislative history that corporations are specifically ***excluded*** from the definition of 'association'.

2. **Contribution.**

The October 4 Guidance redefines 'contribution'. Again, the Board is acting *without* legislative authority to unilaterally change the statute.

Minnesota law defines 'contribution' as "money, a negotiable instrument, or a donation in kind that is given to a political committee, political fund, principal campaign committee, or party unit". MINN STAT. §10A, Subd. 11(a).

The October 4 Guidance redefines 'contribution' to include funds received by 'associations', which the Board has further expanded to include corporations.

Other new terms and definitions in the October 4 Guidance found *nowhere* in the statute include "non-major purpose association', 'general donation', 'general treasury money', 'transfer of money' and 'solicitation'[13]

In the recently concluded session of the legislature, HB 1533 would have established new statutory terms such as "Ballot question political committee" and "ballot question political fund" and the definition of 'independent expenditures' would have been expanded to include 'ballot questions' instead of just candidates.

And, most importantly for these purposes, Chap. 10A-subd15 proposed to require disclosure by associations of contributions received for *ballot questions*, not just independent expenditure (candidate) committees.

The legislature did not enact HB 1533. None of these changes in the law were adopted.

The Board's yeoman efforts to persuade the legislature to expand the definitions of Minnesota law to include ballot issues have failed. Likewise, the recommendations from the Board that corporations should be included within the definition of 'associations' have been fruitless.

The clear legislative history is:

[13] See October 4 Guidance

- corporations were once included within the definition of 'association'
- the legislature changed the definition in 1999 to delete corporations from the definition
- the Board has included in its legislative recommendations year after year that the legislature should change the law and to redefine 'associations' to include corporations and all other legal entities
- the legislature has time and again refused to change the definition of 'association'
- the legislature has not expanded the definition of 'independent expenditures' to include 'ballot issues'

In the face of this clear statutory history, the Board has decided to simply charge ahead and to unilaterally change the entire campaign finance regulatory framework of Minnesota, wily-nily as it sees fit, without *any* legislative authority whatsoever to do so.

Both the June 30 and October 4 Guidance represent an unheralded power grab by a regulatory agency totally lacking in legislative authorization.

2. The Board has cloaked its unlawful expansionist actions as an effort to provide 'clarity' to entities involved in the Marriage Referendum; however, it is the Board's recent actions that are fostering confusion.

NOM was never confused by the *status quo ante* existing prior to June 30, 2011, before the Board started 'clarifying' its jurisdiction. The Board's decision to pretend that it is the legislature is the only thing creating confusion to the public and to entities such as NOM affected by the Board's recent actions.

NOM is a nonprofit corporation. As such, it has historically been and legally remains beyond the regulatory jurisdiction of the Board until or unless it makes expenditures expressly advocating the election or defeat of a clearly identified candidate for office[14].

The feigned concern by the Board that entities will be 'confused' if the Board doesn't take action as the excuse for providing these misguided statements of 'guidance' and a 'safe harbor' to corporations such as NOM is, quite simply, absurd.

Historically, there was a 'bright line' established under Minnesota law regarding which speech and activities by corporations in the political realm would be subject to regulation by the government and which would not...a result demanded under the First Amendment to the United States Constitution.[15]

---

[14] See MINN. STAT. §10A, subd. 18

[15] See *Buckley v. Valeo*, 424 U.S. 1 (1976).

Only if NOM and other nonprofit corporations made expenditures expressly advocating the election or defeat of clearly identified *candidates* was the Board able to exercise jurisdiction over their activities.

That *was* the clear statement of the law in Minnesota until June 30, 2011.

As the Board stated in its August 16, 2011 decision dismissing the complaint filed against NOM by Common Cause, "In Minnesota an association[16] with a major purpose of something other than influencing elections (which NOM presumably purports to be) is brought into the statutory campaign finance disclosure system *only* if it makes expenditures that expressly advocate the election or defeat of a clearly identified candidate[17]".

The Minutes of the December 9, 2010 meeting of the Board reflect that a complaint that was sought to be filed against NOM and the Minnesota Family Council was not accepted because "...Minnesota statutes do not give the Board jurisdiction over organizations that are primarily involved in issue advocacy. Those organizations may come under Board jurisdiction only if they produce communications that expressly advocate the election or defeat of a candidate."[18]

Likewise, the Board advised a citizen on November 4, 2010 that "Minnesota statutes do not give the Board jurisdiction over organizations that are primarily involved in issue advocacy. Those organizations may come under Board jurisdiction only if they produce communications that expressly advocate the election or defeat of a candidate."[19]

The legislature has not amended the law to expand the definition of 'independent expenditure' to include ballot issues. The legislature has not amended the law to include corporations as part of the definition of 'association'.

The Board's determination to bring NOM and other nonprofit advocacy corporations within its jurisdiction in order to regulate their efforts on behalf of the Marriage Referendum are wholly lacking not only in legislative authority but also in any precedent from the Board's own history.

Advisory Opinions 257 and 343 were and are clear, concise and legally sound and constituted the requisite 'bright line' under the First Amendment for government regulation of issue based speech.

---

[16] See Minutes, August 16, 2011 Meeting of the Board, p. 44, http://www.cfboard.state.mn.us/bdinfo/minutes/minutes_reg_8_16_2011_with%20attachments.pdf, accessed September 30, 2011

[17] Id.

[18] See Minutes, December 9, 2010 Meeting of the Board, p. 11, http://www.cfboard.state.mn.us/bdinfo/minutes/Minutes_12_09_10_attachments.pdf, accessed September 30, 2011

[19] Id.

It is only the recent shifting sands approach of the Board which is now causing confusion and is chilling the protected First Amendment speech and associational rights of NOM and others.

The Board should cease its efforts to supplant the Minnesota legislature and reaffirm its adherence to longstanding, well-grounded legal precedent, including the reinstatement of Advisory Opinions 257 and 343.

3. There is *nothing* in the Supreme Court's decision in *Citizens United* that demands, requires, or warrants the 'Guidance' the Board seems intent upon providing to NOM and other nonprofit corporations. In fact, the June 30 and October 4 Guidance violate clear principles of *Citizens United.*

The Board and Mr. Goldsmith have couched their actions in recent months on some perceived legally mandated requirement under *Citizens United* to alter the manner in which corporations are allowed to participate in ballot issue efforts.

Such thinking turns *Citizens United* on its head.

The Supreme Court in *Citizens United* dealt solely with the prohibitions under federal law prohibiting independent candidate-related expenditures by corporations. There is *nothing* in *Citizens United* that would in any way suggest that Minnesota or any other jurisdiction should contemplate ways to subject corporations to additional regulation of their issue advocacy, including ballot issues.

Using *Citizens United* for this purpose is a subterfuge to expand the Board's regulatory powers over nonprofit corporations such as NOM...exactly the opposite of the Court's decision in *Citizens United.*

The Court in *Citizens United* determined that the legal structure of a 'speaker' in the realm of candidate-related speech is a constitutionally impermissible criteria for prohibiting such speech. The Supreme Court had long ago invalidated a Massachusetts state law prohibiting a corporation from making contributions or expenditures concerning ballot issues. *First National Bank v. Belloti,* 435 U.S. 765 (1978).

Further, the Supreme Court articulated the principle in *Citizens United* that the Constitution does not allow the government to treat different types of corporations differently. The Board's decision to sweep corporations into the definition of 'association' results in treatment of for-profit corporations differently from non-profit corporations and treating all media corporations differently still.

Because corporations are specifically excluded from the definition of 'associations' and independent expenditures have only been applicable to candidate-related speech in Minnesota, there

has been no need to reconcile provision of the statute that exclude associations from itemizing contributions from their business revenues[20].

Now, the June 30 and October 4 Guidance directed at NOM and other citizens advocacy groups will require itemization of their dues, revenues, contributions and other income if spent on the Marriage Referendum.

Under this scheme, business and media corporations are free to expend funds supporting or opposing the Marriage Referendum without any disclosure of the source(s) of the funding for such expenditures, while citizens groups such as NOM organized as nonprofit corporations will be subjected to the Board's new regulatory regime.

This is exactly what the *Citizens United* Court specifically prohibits.

The Board's new regulatory regime for nonprofit corporations such as NOM in the ballot issue context, where corporations have heretofore been statutorily beyond the reach of the Board, and to do so under the guise of 'implementing' *Citizens United* is perverse and contrary to the very essence of the Court's decision.

4. There is NO 'informational interest' to justify the Board's expansion of its regulatory jurisdiction and there are important reasons *not* to require NOM to disclose its donors and supporters.

The Board's June 30 Guidance was adopted on the basis of some governmental 'informational interest' which presumably also is the basis for the October 4 Guidance. But what 'information' is it, exactly, that the government is lacking with respect to NOM?

NOM is a nationally known, recognized organization. Mr. Goldsmith discussed with the Board at its September 6, 2011 meeting, his visit(s) and viewing of the NOM website.

NOM isn't a 'secret' organization nor does NOM make any secret of its support for the Marriage Referendum in Minnesota or any other state.

NOM has a public website: http://www.nationformarriage.org and NOM's purpose is clearly stated there and in all its publications:

> "The National Organization for Marriage (NOM) is a nonprofit organization with a mission to protect marriage and the faith communities that sustain it.
>
> Founded in 2007 in response to the growing need for an organized opposition to same-sex marriage in state legislatures, NOM serves as a national resource for marriage-related initiatives at the state and local level. For decades, pro-family organizations have educated the public

[20] See MINN. STAT. §10A-Subd. 14.

> about the importance of marriage and the family, but have lacked the organized, national presence needed to impact state and local politics in a coordinated and sustained fashion. NOM seeks to fill that void, organizing as a 501(c)(4) nonprofit organization, giving it the flexibility to lobby and support marriage initiatives across the nation"[21]

NOM is devoted on a national and state by state basis to preserving the traditional definition of marriage as being between one man and one woman.

So, what is the 'informational interest' to be served by demanding that NOM disclose the names of its donors, members or supporters? It is self-evident that its donors and supporters are those who agree with and wish to financially support NOM and its mission. The Minnesota Marriage Referendum is supported quite publicly and proudly by NOM and other well-known and well-recognized pro-family organizations.

The so-called 'informational interest' argued by Executive Director Goldsmith as the basis on which the Board has acted to demolish the rule of law and expand its jurisdiction, cites narrowly to two cases that tend to favor his desired outcome in favor of forcing disclosure of NOM's donors, supporters and members[22].

What Mr. Goldsmith has failed to advise the Board is the breadth of jurisprudence over nearly four decades, including multiple US Supreme Court cases, related to ballot issues and the First Amendment protections afforded to citizens involved in ballot campaigns.

Late last year, the Tenth Circuit summarized the constitutional issues implicated by state disclosure requirements applicable to ballot issue campaigns. In *Sampson v. Buescher*, 625 F.3d 1247 (10th Cir. 2010), the Court invalidated certain disclosure requirements under Colorado law for ballot initiative proponents and, in the process, reviewed the jurisprudence over several decades pertinent to this discussion, stating:

> "…. The [Supreme] Court has *never upheld* a disclosure provision for ballot-issue campaigns that has been presented to it for review. … The difficulty is especially great when the Court has also suggested the limits of the public interest in disclosure in the ballot-issue context. . .In *McIntyre*[23] the Court meticulously distinguished its precedents affirming disclosure requirements in candidate

---

[21] See website of National Organization for Marriage, http://www.nationformarriage.org/site/c.omL2KeN0LzH/b.3479573/k.E2D0/About_NOM.htm, accessed September 30, 2011

[22] See Minutes of August 16, 2011 Board meeting, Gary Goldsmith Memo dated August 9, 2011, http://www.cfboard.state.mn.us/bdinfo/minutes/minutes_reg_8_16_2011_with%20attachments.pdf, accessed September 30, 2011

[23] *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995).

elections as it overturned a fine for distributing anonymous pamphlets opposing a school tax levy. *See* 514 U.S. at 353-56, 115 S.Ct. 1511. And it quoted the following passage from a New York court that struck down a similar statute:

> 'Of course, the identity of the source is helpful in evaluating ideas. But the best test of truth is the power of the thought to get itself accepted in the competition of the market. Don't underestimate the common man. People are intelligent enough to evaluate the source of an anonymous writing. They can see it is anonymous. They know it is anonymous. They can evaluate its anonymity along with its message, as long as they are permitted, as they must be, to read that message. And then, once they have done so, it is for them to decide what is responsible, what is valuable, and what is truth'.

Id. at 348 n. 11, 115 S.Ct. 1511 (citation and internal quotation marks omitted); *cf. Bellotti,* 435 U.S. at 777, 98 S.Ct. 1407 ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union, or individual.")" 625 F.3d @ 1258.

And in this instance, the targeting of NOM and the Marriage Referendum is particularly concerning in light of the history of intimidation, harassment and personal attacks on donors to pro-marriage efforts in other states. See The Price of Prop8, by Thomas Messner, The Heritage Foundation, October 22, 2009, http://www.heritage.org/research/reports/2009/10/the-price-of-prop-8, accessed on September 30, 2011:

> "Supporters of Proposition 8 in California have been subjected to harassment, intimidation, vandalism, racial scapegoating, blacklisting, loss of employment, economic hardships, angry protests, violence, at least one death threat, and gross expressions of anti-religious bigotry"

The Board's sudden attempt to change the law in order to subject the source(s) of NOM funds used to support the Marriage Referendum puts a bullseye squarely on the forehead of every NOM donor, supporter and member if disclosed and any alleged 'informational interest' is purely artificial.

In sum, this newly concocted disclosure and regulatory scheme is unlawful, is not constitutionally sound, threatens NOM members, donors and supporters with personal injury and harm and the Board should cease immediately its efforts to rewrite Minnesota law to achieve this unlawful purpose.

5. This Board is Not the Legislature; and it is also subject to Chapter 14's Rulemaking Requirements which it has, to date, wholly ignored.

This Board is not the Legislature. The Board exists to administer and enforce Chapter 10A and, where appropriate, to adopt rules to carry out the purposes of Chapter 10A. At all times, this Board's authority is limited substantively by Chapter 10A (as the Legislature has *actually* written it) and is limited procedurally by the Administrative Procedures Act, Chapter 14. *See generally* Minn. Stat. 10A.02, subd. 13 ("Chapter 14 applies to the board."). It should go without saying that the Board has no authority to depart from laws that the Board does not like, to add provisions of law where the legislature has declined to do so or to "interpret" laws in fashions that are inconsistent with the plain language of the law. But this is precisely what the Board has done and is proposing to do with its October 4 Guidance.

Compounding these substantive failures, the Board has violated the Administrative Procedures Act by expanding its claim of jurisdiction and issuing informal 'statements of guidance' without undertaking notice-and-comment rulemaking. For every "statement of general applicability and future effect, including amendments, suspensions, and repeals of rules" that this Board adopts, the Board is required to undertake the notice-and-comment procedures set forth in Chapter 14. Minn. Stat. 14.02, subd. 4. This Board has made no effort to comply with these requirements. It has neither published the guidance in the *State Register*, nor given the public 30 days in which to submit comments, nor conducted a public hearing to evaluate the guidance, nor prepared findings as to the guidance's need or reasonableness.

And, as has been discussed at the outset, the Board has even failed to publicly post the October 4 Guidance on its website and has, instead, selectively 'leaked' this significant change in the law to a favored media outlet.

The reference on the October 4, 2011 meeting agenda states "Guidance related to definition of "contribution" in the context of ballot questions"[24]. It does NOT provide the proposed 'guidance' nor any indication of its intent to add multiple new legal terms of art and campaign finance definitions, or to extend the Board's jurisdiction beyond established statutory authority.

In short, this Board is seeking to promulgate rules of general applicability and future effect without undertaking the required processes. This is a woeful failure, and is made all the more egregious by the radical and far-reaching rules this Board is seeking to adopt.

[24] See Board Agenda for October 4, 2011 Meeting, http://www.cfboard.state.mn.us/bdinfo/agenda.pdf, accessed on September 30, 2011

6. Request for Data and Documents under the Minnesota Government Data Practices Act.

NOM hereby requests that the Board[25] provide to NOM's designee(s) the documents and data responsive to the requests below, within thirty (30) days of this request, pursuant to the Minnesota Government Data Practices Act, MINN. STAT. §§13.01 *et seq.* (2010).

Document and Data Request:

NOM hereby respectfully requests all data, documents, memoranda, legal analysis, materials, emails, reports, notes, correspondence and/or communications of any kind related to its Legislative Recommendations from 2001 through the present, including but not limited to internal agency and staff materials and data, communications with legislators and other elected officials or agencies, and any data whatsoever associated with the Board's Legislative Recommendations since 2001 through the present. Please contact me at (202) 295-4081 should you have any questions regarding this letter of the request for the documents and materials pursuant to the Government Data Practices Act.

CONCLUSION

The Board's June 30 and October 4 Guidance are an unauthorized expansion of the Board's regulatory authority, for the reasons set forth herein. Advisory Opinions 257 and 343 should be reinstated and no further actions of the Board related to ballot issues should be taken absent direct legislative authority to do so.

Please contact me if you have further questions or wish additional information or clarification. Thank you.

Sincerely,

Cleta Mitchell

Cleta Mitchell, Esq., Counsel
National Organization for Marriage ("NOM")

cc: Brian Brown, NOM President