



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**MEMORANDUM**

**TO:** The Commission

**FROM:** Office of the Commission Secretary *LC*

**DATE:** May 26, 2022

**SUBJECT:** AO 2022-05 (DSCC) Requestor Comment #2

**Attached is a comment on AO 2022-05 (DSCC). This matter is on the May 26, 2022 Open Meeting Agenda.**

**Attachment**

**RECEIVED**

By Office of the Commission Secretary at 9:30 am, May 26, 2022

**Joanna Waldstreicher**

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**From:** Jacquelyn Lopez <[REDACTED]>  
**Sent:** Thursday, May 26, 2022 8:49 AM  
**To:** Zachary Morrison; Joanna Waldstreicher  
**Cc:** Amy Rothstein  
**Subject:** RE: Advisory Opinion 2022-05 (DSCC) draft  
**Attachments:** AO436.pdf; AO452.pdf

Ms. Waldstreicher,

I wanted to provide one additional piece of information this morning. We did a bit of research on the state level to see how state level equivalents of the Commission handle the question and I found the two attached opinions instructive. Therefore, I wanted to provide them as additional support.

Thank you,  
Jackie

**Jacquelyn (“Jackie”) Lopez**  
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**State of Minnesota  
Campaign Finance & Public Disclosure Board  
Suite 190, Centennial Building. 658 Cedar Street. St. Paul, MN 55155-1603**

**THE FOLLOWING PUBLICATION DOES NOT IDENTIFY THE  
REQUESTER OF THE ADVISORY OPINION, WHICH IS NON PUBLIC DATA  
under Minn. Stat. § 10A.02, subd. 12(b)**

**ADVISORY OPINION 452**

**SUMMARY**

Committees may jointly purchase services and products from a commercial vendor without the use of a third-party intermediary.

**Facts**

As a representative of a committee registered with the Board, you ask the Campaign Finance and Public Disclosure Board for an advisory opinion to clarify the guidance found in Advisory Opinion 436.<sup>1</sup> In particular, the answer provided to question 2 of Advisory Opinion 436 gives direction on how political committees may jointly purchase services from a commercial vendor without making an inadvertent in-kind contribution, or a prohibited contribution, between the committees that are making the purchase. The facts from Advisory Opinion 436 that are relevant to question 2, and needed to understand the basis of this opinion, are as follows.

1. The vendor is a commercial corporation that operates a research and opinion polling service that provides its customers with information which helps their election related activities in Minnesota.
2. The vendor's customers include candidate committees, political party units, political committees and funds, and independent expenditure committees and funds registered with the Board.
3. The vendor has in place policies and procedures that prohibit its customers from discussing their election related plans, including how the customer will use polling and research information, with employees of the vendor.
4. The vendor sells discrete research and polling projects in response to specific requests received from customers. The vendor charges either an hourly rate or a flat fee for these services. Both the hourly rate and the flat fee will reflect a rate the vendor reasonably believes will exceed the cost to produce the work requested.
5. If two or more customers jointly ask the vendor to work on a discrete research or polling project, the vendor will charge the same hourly rate or flat fee as it would if only one customer were purchasing the product. The cost of the project will be divided between the customers so that each customer pays an equal and proportionate share of the total project cost.

In addition, for the purposes of this opinion, the Board provides this definition.

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<sup>1</sup> Advisory Opinion 436 (Nov. 5, 2013) [https://cfb.mn.gov/pdf/advisory\\_opinions/AO436.pdf](https://cfb.mn.gov/pdf/advisory_opinions/AO436.pdf)

6. "Bona fide use" means that each committee has an authentic, genuine, and real need for the services provided by the vendor that is autonomous of the needs of other committee(s) that jointly purchase the services.

### **Background**

Advisory opinions issued by the Board provide safe harbor to a requestor who follows the advice given in the opinion. Political committees often refer to advisory opinions that were not issued to them for guidance on their behavior and for an understanding of how the Board interprets a given statutory requirement. In this opinion, the requestor asks for clarification on Advisory Opinion 436, which it has used for guidance when making joint purchases of services with other registered political committees.

Advisory Opinion 436 was issued to a commercial vendor that provides issue and candidate related research and polling services for use in political campaigns. The vendor was willing to sell its products to two or more committees that jointly purchased the products at the same rate or flat fee that would be charged to a single committee purchasing their products. Question 2 and the opinion provided in Advisory Opinion 436 are as follows:

**Question 2:** If two or more registered committees or funds evenly share the cost of purchasing a specific set of research or polling services, will the registered committees or funds have made in-kind contributions to each other equal in value to the amount each committee or fund saved by not purchasing the services alone?

**Opinion:** No, as long as all parties that are a part of the joint purchase have a bone fide use for the services purchased and the share each party pays is equivalent to the proportionate benefit each party expects to receive from the service. Registered committees and funds, like any other consumer, try to derive the best value possible for their money. As long as all of the parties in a joint purchase of services have a legitimate use for the services, and the joint purchase is a way to buy needed services at a reduced cost, then the joint purchase is not an in-kind contribution.

If, however, a participant in a joint purchase has no need for the services acquired, then the purpose of the joint purchase changes. A party to a joint purchase of services that has no bona fide use for the services is partially subsidizing the services used by the other participants in the purchase. In this scenario the cost paid by the party that had no use for the service is an in-kind contribution to any registered committee that received the service through the joint purchase. An in-kind contribution is not necessarily prohibited, but as pointed out by Advisory Opinion 410, an in-kind contribution between an IEPC and any other type of registered committee, is a violation of Chapter 10A.

An in-kind contribution may also occur if the cost paid by a party to a joint purchase is significantly disproportionate to the parties' use of the service. In such a case, the parties must allocate the cost of the service in proportion to the benefit they received from it....

To this point in Advisory Opinion 436 the guidance is clear, a joint purchase by committees of research and polling services does not create an in-kind contribution between the committees as long as 1) each committee has a bona fide use for the services, and 2) each committee pays an equal or proportionate share of the cost of the services.

However, the vendor in Advisory Opinion 436 stated that it had policies prohibiting its employees from discussing with customers their use of purchased services and the customers' election related plans. The Board noted in the opinion that these policies would prevent the vendor from ensuring that each committee involved in a joint purchase had a bona fide use for the services, and also would prevent the vendor from knowing if each committee was paying an equal or equitable share of the cost of the services. In the opinion, the Board provided that it "... may investigate to determine if all parties to the purchase had a bona fide need for the information acquired and that the amount paid in a joint purchase was appropriate."

The requestor believes that committees have tried to comply with the guidance of Advisory Opinion 436 in part by using a third-party vendor to act as a conduit between the vendor providing the services and the committees that are purchasing the services. Presumably the third-party vendor determines that each committee that participates in the joint purchase has a bona fide use for the product, and that each committee is paying an equal or equitable share of the cost.

With this background in mind, the requestor asks the following questions.

### **Issue One**

Is a third-party vendor required to properly execute a joint purchase of bona fide services from a commercial vendor?

### **Opinion One**

No, the use of a third-party vendor is not required. The committees that jointly purchase the services are ultimately responsible for complying with the provisions of Chapter 10A. Committees that agree to make a joint purchase, and wish to avoid making an in-kind contribution, will need to determine beforehand that all committees have a bona fide use for the services and that each committee pays for an equal or proportionate share of the services. As documentation of their compliance the Board recommends that the participating committees keep as records the calculations and relevant communications used to determine that an in-kind contribution did not occur.

### **Issue Two**

May committees directly contract with a vendor for services and split the costs, provided the other necessary conditions are met?

### **Opinion Two**

Yes, both this opinion and Advisory Opinion 436 acknowledge that committees may jointly purchase services assuming that no unreported or impermissible in-kind contributions occur. The use of a third-party vendor to purchase the services is permissible, but not required.

### **Issue Three**

If committees do contract directly with a vendor, does the administrative work of the committee acting as point of contact with the vendor constitute an in-kind contribution from that group to the other committees?



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under Minn. Stat. § 10A.02, subd. 12(b)**

**RE: The Purchase of Research and Polling Data Services**

**ADVISORY OPINION 436**

**SUMMARY**

Purchasing research and polling services from a commercial vendor as a defined package for a flat annual fee does not create an in-kind contribution to other committees who purchase the same services at the same flat annual fee. Joint purchases of research and polling services from a commercial vendor by committees that have a bona fide use for the services are not an in-kind contribution as long as each committee pays an equal or proportionate share of the cost of the service.

**FACTS**

As the attorney for a commercial services company (the Vendor) that provides issue and candidate related research and opinion polling services in Minnesota, you ask the Board for an advisory opinion. The Vendor requests the opinion in order to verify that its proposed pricing models for its products will not create in-kind contributions between customers who buy the same product or service. Your request is based on hypothetical facts that you have provided which are, in relevant part, as follows:

1. The Vendor is a corporation that operates a commercial research and opinion polling service that provides its customers with information which helps their election related activities in Minnesota.
2. The Vendor's customers include candidate committees, political party units, political committees and funds, and independent expenditure committees and funds registered with the Board.
3. The Vendor is considering a new pricing model for its services in 2014. Under this model customers will have the option to purchase a defined package of research and opinion polling services for a flat annual fee. The Vendor will set the amount of the annual fee and require customers to pay the fee at the beginning of the year.
4. If the flat annual fee pricing model is implemented the amount of the fee will be set at a level the Vendor reasonably believes will result in total flat fee revenue that exceeds the total costs (including overhead) to produce the services provided.
5. If more customers than expected wish to purchase the flat annual fee package the Vendor may decide to either lower the flat fee, or increase the services provided in the package.

6. All customers who purchase services from the Vendor using the flat annual fee pricing model will receive the same package of products and services. Under no circumstances will the Vendor provide discounted rates, benefits, or preferential treatment to any customer that purchases services under the flat annual fee model.
7. The flat annual fee package of products and services will be delivered to customers over the course of the year. As topics of interest to customers will likely change over the course of an election year the Vendor will periodically solicit input from customers on the issues of interest to them. The Vendor will retain discretion over the specific topics and subjects of the work it provides under the flat annual fee model. Through this process the Vendor hopes to ensure that customers have a bona fide use for the information purchased.
8. Because expenditures made by customers registered with the Board are disclosed on periodic Reports of Receipts and Expenditures, it may be that customers will become aware of other customers who have purchased the Vendor's products. However, the Vendor business model is to maintain the confidentiality of its customers' identities.
9. The Vendor has in place policies and procedures that prohibit its customers from discussing their election related plans, including how the customer will use polling and research information, with employees of the Vendor.
10. In addition to the flat annual fee package of services, the Vendor expects to sell additional discrete research and polling projects in response to specific requests received from customers. The Vendor will charge either an hourly rate or a flat fee for services not provided as part of the flat annual fee package. Both the hourly rate and the flat fee will reflect a rate the Vendor reasonably believes will exceed the cost to produce the work requested.
11. If two or more customers jointly ask the Vendor to work on a discrete research or polling project, the Vendor will charge the same hourly rate or flat fee as it would if only one customer were purchasing the product. The cost of the project will be divided between the customers so that each customer pays an equal and proportionate share of the total project cost.
12. The Vendor is aware of Advisory Opinion 410, issued by the Board in September of 2010. The Vendor is concerned that the answer the Board provided in response to question 9(b) may mean that customers who purchase research or polling services under either of the pricing models described in the facts of this advisory opinion could be viewed as making in-kind contributions to other customers who purchase the same service or product.

### **Background**

An advisory opinion may be requested only to guide the requestor in actions it is considering taking. In this case, the requestor is a commercial vendor making a decision on how to market and set prices for its services. The Board recognizes that it has no authority to regulate the Vendor's decisions on these matters. However, the Vendor recognizes that its pricing models have the potential to automatically result in transactions that would be recognized, and may be prohibited, under Chapter 10A. Thus, the application of Chapter 10A will have a bearing on the Vendor's decisions, even though any potential violation resulting from the described transactions would be a violation for the some of the Vendor's prospective customers.



The requestor's impetus to ask for this advisory opinion is found in its reading of Advisory Opinion 410; in particular the Board's answer to question 9 (b). Advisory Opinion 410 was issued in response to a series of questions from an association that planned to register as an independent expenditure political committee (IEPC) with the Board. Most of the questions asked in the opinion sought to determine what communications and actions an IEPC may make without jeopardizing the independence of expenditures later made by the IEPC to support or oppose a candidate. The text of the question 9 (b) and the opinion offered by the Board in Advisory Opinion 410 are as follows:

**Question 9(b)** The IEPC hires a polling firm to conduct a poll and the IEPC shares the cost of polling activities with a political party or legislative caucus. The results of the poll are used by the IEPC and the political party or legislative caucus to make independent expenditures.

**Opinion:** Legislative caucuses are party units, so the question as stated applies to all party units. While the scenario as presented would not destroy the independence of resulting independent expenditures, it presents a different potential problem. Independent expenditure political committees or funds are not permitted to make contributions to party units. The Board believes that polling results are not diminished in value by being shared between two entities, the value of the results to each entity is the same as either would have had to pay for the results on its own. Therefore, sharing costs of a poll as described would result in a prohibited contribution from the IEPC to the party unit.

The question in Advisory Opinion 410, like the question in this opinion, relates to the joint purchase of services by two associations registered under Chapter 10A. To the extent that the Board's answer in Advisory Opinion 410, question 9 (b), provides that *any* joint purchase between an IEPC and a political party unit automatically results in a prohibited in-kind contribution, that conclusion is clarified by this opinion, and section 9(b) of Advisory Opinion 410 is limited to joint purchases of polling data when the IEPC has no bona fide need for the polling data acquired through the joint purchase.

### **Question One**

If a registered committee purchases a defined package of research and opinion polling services from Vendor for a flat annual fee, will that committee have made an in-kind contribution to any other registered committee that purchases the same package of services for the same flat annual fee?

### **Opinion One**

No. The amount of the flat annual fee will be based on the Vendor's calculation of the expected total fixed and variable costs for providing the package of services divided by the estimated number of customers who will purchase the service. The Vendor may, at its discretion, lower the flat annual fee if more customers than expected purchase the services. But the customers of the service are not in control of the price set by the Vendor, and therefore, have no control over whether their use of the flat annual fee package will result in a lower cost to other customers.

Further, for an in-kind contribution to occur there must be a decision by the contributor to transfer goods or services to the recipient committee. An in-kind contribution does not occur if an action has the inadvertent result of reducing the cost of goods or services to another committee. The facts of this request provide no basis for the Board to conclude that the purchase of services for a flat annual fee is anything more than a commercial transaction between the customer and the Vendor.



## **Relevant Statutes**

**Minn. Stat. § Subd. 13. Donation in kind.** "Donation in kind" means anything of value that is given, other than money or negotiable instruments. An approved expenditure is a donation in kind.