

## Advisory Opinion

IECDB AO 2018-03

July 13, 2018

TO ALL INTERESTED PERSONS:

Pursuant to Iowa Code section 68B.32A(12) and rule 351-1.2, the Iowa Ethics and Campaign Disclosure Board issues this opinion concerning Iowa Code section 68A.405A. We note at the outset that the Board's jurisdiction is limited to the application of Iowa Code chapters 68A and 68B, Iowa Code section 8.7, and rules in Iowa Administrative Code chapter 351. Advice in a Board opinion, if followed, constitutes a defense to a subsequent complaint based on the same facts and circumstances.

FACTUAL STATEMENT:

Iowa's General Assembly recently enacted 2018 Iowa Acts, House File 2502, section 70, which created Iowa Code section 68A.405A. Under the new law, a statewide elected official shall not

permit the expenditure public moneys under the control of the statewide elected official . . . , including but not limited to moneys held in a private trust fund as defined by section 8.2, for the purpose of any paid advertisement or promotion bearing the written name, likeness, or voice of the statewide elected official . . . distributed through any of the following means:

- (1) A paid direct mass mailing.
- (2) A paid radio advertisement or promotion.
- (3) A paid newspaper advertisement or promotion.
- (4) A paid television advertisement or promotion.
- (5) A paid internet advertisement or promotion.
- (6) A paid exhibit display at the Iowa state fair or a fairground or grounds as defined in section 174.1.<sup>i</sup>

The prohibition does not apply to "bona fide ministerial or ceremonial records or ordinary, common, and frequent constituent correspondence containing the name of the statewide elected official."<sup>ii</sup>

The statute further provides that a person who "willfully violates" the statute "shall be subject to a civil penalty of an amount up to the amount of moneys . . . used to fund the communication," which "shall be paid by the [statewide elected official's] candidate's committee."<sup>iii</sup> A violator may also be subject to

additional criminal or civil penalties available under section 68A.701 or established by the board pursuant to section 68B.32A.<sup>iv</sup>

Iowa Code section 68A.405A took effect on July 1, 2018. Because the Board's staff has received frequent questions concerning the scope of this new law, the Board issues this opinion to clarify terms used in the law the legislature chose not to define. We will address a series of questions that have been repeatedly asked.

OPINION:

**1. Does this law apply to items purchased before July 1, 2018?**

No. "A statute is presumed to be prospective in its operation unless expressly made retrospective."<sup>v</sup> Notably the statute does not bar the *use* of certain items bearing the written name, voice or likeness of an elected official. Rather, it prohibits "the expenditure of public moneys" for certain things. For items that were previously purchased, there is no expenditure to be prohibited on or after July 1, 2018.

**2. What is a "paid direct mass mailing?"**

Iowa Code section 68A.405A prohibits the "expenditure of public moneys" for "any paid advertisement or promotion bearing the written name, likeness or voice of the statewide elected official" through any of six listed means, including a "paid direct mass mailing." We found no other reference in the Code of Iowa to "mass mailing." We did, however, find a definitions section in Iowa Code chapter 423<sup>vi</sup> which defines the terms "advertising and promotional direct mail" and "direct mail." Under chapter 423,

"Advertising and promotional direct mail" means direct mail the primary purpose of which is to attract public attention to a product, person, business, or organization or in an attempt to sell, popularize, or secure financial support for a product, person, business, or organization. For purposes of this subsection, "product" may include tangible personal property, a service, or an item transferred electronically.<sup>vii</sup>

"Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients.<sup>viii</sup>

Neither definition includes the term "mass." We consulted a dictionary for a definition of the adjective "mass" and found the following: "done or carried out on a large scale."<sup>ix</sup> We also found two definitions of "mass mailing" in the United State Code that require more than 500 pieces of mail of an identical or

substantially similar nature sent at the same time or within a short period of time.<sup>x</sup>

We believe these definitions are instructive and a good starting point for us to determine what a “paid direct mass mailing” shall entail under section 68A.405A. Iowa Code chapter 423’s definition of “advertising and promotional direct mail” is perfectly suited for a commercial setting. However, a statewide elected official’s office is likely to be promoting government programs or politics. For purposes of section 68A.405A, we are of the opinion that a “paid advertisement or promotion” in the form of a “paid direct mass mailing” must meet all of the following criteria:

- a. The primary purpose of the mailing is to attract public attention to something or someone being promoted by the statewide elected official, such as a product, person, service, policy, program, initiative, law, legislation, event or activity.
- b. The mailing is printed material delivered by United States mail or other delivery service.
- c. The mailing is sent to more than 500 physical addresses.
- d. The pieces of mail are of an identical or substantially similar nature.
- e. The mailings are sent at the same time or within any 30 day period.

### **3. What does it mean to be a “paid” radio, newspaper, or television “advertisement or promotion?”**

Section 68A.405A also prohibits “paid” radio, newspaper, or television “advertisement or promotion” bearing “the written name, likeness or voice of the statewide elected official.” We believe these terms are much more self-evident than “paid direct mass mailing.” For a radio, newspaper, or television advertisement to be “paid,” the statewide elected official must expend or permit the expenditure of public moneys, directly or indirectly, to a media company for the broadcast or publication of an advertisement or promotion. The prohibition does not apply to earned or non-paid radio, newspaper or television coverage such as news stories, interviews or public service announcements.

### **4. What is a “paid internet advertisement or promotion”**

Section 68A.405 prohibits “paid internet advertisement or promotion” bearing “the written name, likeness or voice of the statewide elected official.” Again, to qualify as being “paid” the statewide elected official has to expend or permit the expenditure of public moneys, directly or indirectly, to a traditional or online media company (including social media) for an advertisement or promotion. This definition does not include websites or social media accounts that are merely maintained by or on behalf of the statewide elected official’s office. This definition does not include electronic mail, unless the statewide elected official expends public moneys to pay a third party for the email addresses.

Many of Iowa's statewide elected officials have a robust online presence. In addition to websites, these officials maintain official Facebook, Twitter and Instagram accounts and YouTube channels. Many social media sites allow users to pay to boost or promote a particular post. We believe section 68A.405A would be violated if a statewide elected official used public moneys to boost or promote a social media post or web advertisement bearing the written name, likeness or voice of the statewide elected official. To determine whether a social media post or web advertisement contains the written name, likeness or voice of the statewide elected official, we will look at the body of the post or advertisement. We will not consider it a violation if the name or handle of the social media account contains the name of the statewide elected official nor will we consider it a violation if the avatar for the social media account bears the written name or likeness of the statewide elected official. Likewise, we will not consider it a violation if the social media post that is being boosted or the web ad includes a "click through" option that takes the recipient to the statewide elected official's website or social media account. To hold otherwise, would require statewide elected officials to scrub their websites and social media accounts of any reference to or pictures of the statewide elected official, which in our view would be beyond the intent of the law.

#### **5. What does a "paid exhibit display" at the state or a county fair entail?**

Section 68A.405 prohibits the expenditure of public moneys for a "paid exhibit display" at the Iowa state fair or a county fair which bears "the written name, likeness or voice of the statewide elected official." We found nothing in the Code of Iowa that would help us define a "paid exhibit display." We turned once again to a dictionary and found the definitions of "exhibit" and "display" to be too generalized to be useful.<sup>xi</sup> Thus, we are left to craft our own definition. We believe a "paid exhibit display" is a permanent or semi-permanent stationary structure or booth purchased with public moneys by or under the authority of a statewide elected official that is placed upon the ground that is rented from or provided by the state fair or a county fair. This definition does not include items distributed to fairgoers, such as brochures, literature, business cards, stickers, trinkets, clothing or prizes. It also does not include individuals within or near the paid exhibit display or their clothing. In other words, the statewide elected official may be present at or near the official's state or county fair booth.

#### **CONCLUSION:**

Iowa Code section 68A.405A is a highly technical statute without the benefit of defined terms. It is also quite punitive if one is found to have "willfully" violated the law. We have done our best to give statewide elected officials and the public at large guidance on how we interpret this statute. We encourage statewide elected officials and their staff to continue seeking input and advice

from the Board's staff to ensure compliance with the law. We anticipate promulgating rules interpreting section 68A.405A in the near future.

BY DIRECTION AND VOTE OF THE BOARD

James Albert, Board Chair

John Walsh, Vice Chair

Carole Tillotson

Jonathan Roos

Mary Rueter

Elaine Olson

Submitted by Megan Tooker, Board Legal Counsel

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<sup>i</sup> Iowa Code section 68A.405A(1).

<sup>ii</sup> *Id.* § 68A.405A(1)(a).

<sup>iii</sup> *Id.* § 68A.405A(2).

<sup>iv</sup> *Id.*

<sup>v</sup> *Id.* § 4.5.

<sup>vi</sup> Streamlined Sales and Use Tax Act.

<sup>vii</sup> *Id.* § 423.1(1).

<sup>viii</sup> *Id.* § 423.1(15).

<sup>ix</sup> The American Heritage Dictionary of the English Language 1106 (3<sup>rd</sup> ed. 1996).

<sup>x</sup> *See* 39 U.S.C. § 3210 and 52 U.S.C. § 30101.

<sup>xi</sup> The American Heritage Dictionary of the English Language 537 (defining display to mean “a public exhibition,” “objects or merchandise set out for viewing by the public” and a “visual representation of information”); 641-42 (defining exhibit to mean “a public showing”).