



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

June 19, 2013

Elliot S. Berke
McGuire Woods LLP
2001 K Street NW
Washington, D.C. 20006-1040

Dear Mr. Berke:

The Department of State (Department) acknowledges receipt of your letter dated April 12, 2013, in which you requested a declaratory ruling or interpretive statement regarding the Department's interpretation of the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.* A copy of your request was published on the Department's website beginning April 17, 2013, and the Department received one letter from Mr. Robert S. LaBrant of The Sterling Corporation in response to our solicitation for public comment.

Your request includes a series of questions concerning the ability of candidates to participate in fundraising events for independent expenditure political committees (Super PACs), particularly in view of the Federal Election Commission's adoption of regulations governing candidates' involvement in such events.

Under the MCFA and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq.*, the Department is authorized to issue a declaratory ruling if an interested person submits a written request that includes a reasonably complete statement of facts and a succinct statement of the legal question presented. MCL 24.263, 169.215(2). Although a factual statement was omitted from your request, the Act requires the Department to issue an interpretive statement "providing an informational response to the question[s] presented" as a substitute. MCL 169.215(2). Accordingly, the Department offers the following interpretive statement in response to your request.

The concept of an "independent expenditure political committee" originates from *Citizens United v Federal Election Commission*, 130 S Ct 876, 175 L Ed 2d 753 (2010), in which the United States Supreme Court held that section 54(1) of the MCFA is unconstitutional to the extent that it prohibits independent expenditures by corporations, labor unions, and domestic dependent sovereigns ("covered entities").¹ The Court's decision was based in part on its conclusion that "independent expenditures do not lead to, or create the appearance of, *quid pro quo* corruption." *Citizens United* at 910.

¹ *Citizens United* left undisturbed the provision of section 54(1) that prohibits covered entities from making *direct* contributions to committees that support or oppose candidates, which in Michigan include candidate committees, independent committees, political committees (other than independent expenditure political committees), political party committees, and legislative political party caucus committees.

To ensure that the general treasury funds of corporations, unions, and Tribes are segregated from funds that could be used to directly support or oppose candidates, the Department requires a covered entity to register as an independent expenditure political committee after spending \$500.00 or more for independent expenditures made in support of or opposition to candidates. These independent expenditures must not in any way be directly or indirectly “coordinated” with any candidate, candidate committee, political party, or political party committee. *Michigan Chamber of Commerce v Land*, 725 F Supp 2d 665 (WD MI, 2010).

The *Michigan Chamber* decision essentially inserts the federal definition of independent expenditure into Michigan law, holding that the Department is authorized to enforce the MCFA’s ban on corporate, labor union, or tribal expenditures “where those expenditures are in any way coordinated with any candidate or the candidate’s campaign committee, political party, or political party committee.” *Michigan Chamber* at 700. The court defined the term “coordinated” as an expenditure which is, (1) “made in concert or cooperation with or at the request or suggestion of such candidate, the candidate’s authorized political committee, or their agents, or a political party committee or its agents” as provided by 2 USC 431(17), or (2) “made at the direction of, or under the control of, another person” under MCL 169.209(2), or (3) one which meets neither of these definitions, but nonetheless “constitutes *quid pro quo* corruption or reasonably fosters the appearance of *quid pro quo* corruption.” *Id.*

While the Michigan Legislature has not enacted amendments to the MCFA to establish independent expenditure political committees or expand the definition of “independent expenditure” to include coordinated activity, under *Citizens United* and *Michigan Chamber of Commerce*, the Department must refer to federal law when considering the extent to which the MCFA governs the activities of independent expenditure political committees.

Your request poses the following questions:

1. “May a Michigan state or local candidate or officeholder attend, speak at, or be a featured guest at a Michigan Super PAC fundraising event?”
2. “May a Michigan state or local candidate or officeholder solicit any funds that are subject to the limitations, prohibitions, and reporting requirements of the MCFA on behalf of a Michigan Super PAC?”
3. “May a Michigan state or local candidate or officeholder solicit any funds that are not subject to the limitations, prohibitions, and reporting requirements of the MCFA on behalf of a Michigan Super PAC?”
4. “Are there any additional restrictions or prohibitions on a state or local candidate or officeholder when participating in activities for a Michigan Super PAC?”

The MCFA is generally silent with respect to the fundraising and solicitation practices of committees, with the following exceptions: (1) committees other than political party committees are required to disclose certain fundraiser event activities, MCL 169.226(1)(d); and (2) separate segregated funds are restricted in the classes of individuals from whom contributions may be solicited, MCL 169.255. In addition, the MCFA authorizes two or more persons (who are not

individuals) to hold a joint fundraising event provided that all receipts and expenses of the event are shared proportionally. MCL 169.244(4).

Your request cites a federal regulation, 11 CFR 300.64, and a Federal Election Commission Advisory Opinion, No. 2011-12, specifically governing the fundraising practices of federal candidates and Super PACs which have no parallel in Michigan law. Additionally, the court in *Michigan Chamber* did not address the issue of whether state and local candidates and officeholders in Michigan may engage in fundraising on behalf of Super PACs, as it was primarily focused on the treatment of communications as independent expenditures. Given the absence of any legal authority in Michigan that restricts a candidate's or officeholder's ability to solicit contributions to an independent expenditure political committee, the Department concludes that state and local candidates and officeholders in Michigan may solicit contributions to independent expenditure political committees.

Sincerely,