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

PRELIMINARY RESPONSE

September 7, 2017

Mr. Robert LaBrant
12411 Pine Ridge Drive
Perry, Michigan 48872

Dear Mr. LaBrant:

The Department of State (Department) acknowledges receipt of your letter dated July 5, 2017, requesting that the Department issue a declaratory ruling or interpretive statement regarding its 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 for public comment beginning July 6, 2017 but no written comments were submitted in response to your request.

The Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 *et seq*., and MCFA authorize the Department to issue a declaratory ruling upon the request of an interested person who submits a reasonably complete statement of facts and succinct statement of the legal questions presented. MCL 24.263, 169.215(2). "An interested person is a person whose course of action would be affected by the declaratory ruling." R 169.6(1). The Department and the requester are bound to act in accordance with a declaratory ruling unless the ruling is modified or invalidated by a court. MCL 24.263. If the Department declines to issue a declaratory ruling, it must instead issue an interpretive statement "providing an informational response to the question presented[.]" MCL 169.215(2).

Your request poses questions regarding the Department's interpretation of how the Act's registration and reporting requirements apply to an entity[1] that is not an individual that in a calendar year, makes one or more contributions totaling at least $500.00 to an independent expenditure-only committee (IEC).[2] However, your letter does not indicate that your request is made by or on behalf of an entity which might be legally bound by such a declaratory ruling. It is not apparent that you are an interested person whose conduct would be affected by a declaratory ruling as required by R 169.6(1), because such a ruling would have no obvious bearing on your course of action as an individual. In short, the Department's answer to your request could not compel you to act or refrain from acting in any particular manner in your individual capacity. Accordingly, the Department issues this interpretive statement as an informational response to your request.

[1] For purposes of this interpretive statement, the term "entity" means a person other than an individual.
[2] An IEC is a political committee that is organized exclusively for the purpose of making independent expenditures that are not in any way 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).

Your request poses a number of questions which may be summarized as follows: Is an entity that makes a contribution of $500.00 or more from its own general treasury funds to an IEC required by the MCFA to register as a committee and file periodic disclosure reports? If the Department answers yes, (a) will this interpretation be applied retroactively or prospectively, and (b) how might the MCFA be amended to repudiate this determination?

The Department's analysis begins with two principles established in the cases of *Citizens United v FEC,* 558 US 310, 130 S Ct 876, 175 L Ed 2d 753 (2010) and *Michigan Chamber of Commerce v Land,* 725 F Supp 2d 665 (WD MI 2010): First, *Citizens United* held that states may not prohibit an entity from making independent expenditures; and second, under *Michigan Chamber*, entities are authorized to make contributions to an IEC for the purpose of pooling resources to pay for independent expenditures. These cases represented a significant departure from the Act's longstanding prohibition against entities making contributions or independent expenditures in relation to candidate elections, yet seven years on, the Act has not been amended to reflect the changed legal landscape.

As the U.S. Supreme Court recognized in *Citizens United*, "[a] campaign finance system that pairs corporate independent expenditures with effective disclosure has not existed before today." 558 US at 370. Within this context the Department issued guidance[3] in 2010 on how entities would disclose their independent expenditures in accordance with the MCFA, and how committees organized exclusively for the purpose of facilitating independent expenditures (IECs) could comply with the Act.

When issuing this guidance, the Department attempted to forge a system for IEC disclosure that reconciled case law with the now-outdated provisions of the MCFA. The purpose in doing so was to align an entity's First Amendment freedom to speak with the pre-existing prohibitions and requirements of the MCFA. Unfortunately, the case law was silent on what, exactly, was required and how, precisely, this could be done. In the absence of any legislative direction, the Department was left to apply the law and its guidance was intentionally limited to what the courts *did* say: An entity must be permitted to finance independent expenditures and make contributions to IECs.

Recognizing that the statutory definition of "political committee"[4] was adequate to describe a committee whose purpose is exclusively limited to making independent expenditures, the Department concluded that IECs were subject to all of the attendant registration and reporting requirements that applied to political committees, but readily acknowledges that an IEC is not a statutory entity. The guidance did not address what reporting obligations, if any, attached when entities made contributions to IECs drawn from their own general treasury funds in excess of the monetary threshold.

One could argue that an entity making a contribution from its own general treasury funds of at least $500.00 in a calendar year does - for that reason alone - become subject to MCFA regulation. The reasoning underpinning this argument is based on the statutory definition of "committee" and the narrow exemption granted to a ballot question committee's (but not an IEC's) contributors:

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[3] Available at http://www.michigan.gov/sos/0,4670,7-127-5647_12539_48294-230881--,00.html; attached to your letter as Exhibit 2.

[4] "[A] committee that is not a candidate committee, political party committee, independent committee, or ballot question committee." MCL 169.211(3).

> [A] person[5] who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, the qualification, passage, or defeat of a ballot question, or the qualification of a new political party, if contributions received total $500.00 or more in a calendar year or expenditures made total $500.00 or more in a calendar year. An individual, other than a candidate, does not constitute a committee. A person, other than a committee registered under this act, making an expenditure to a ballot question committee, shall not, for that reason, be considered a committee for purposes of this act unless the person solicits or receives contributions for the purpose of making an expenditure to that ballot question committee. MCL 169.203(4).

If the Department were to adopt this view, an entity that draws from its own general treasury funds to make a contribution to an IEC has made an expenditure within the meaning of the Act and, assuming that its total expenditures equal or exceed $500.00 in a single calendar year, would constitute a committee. *Id*.

By contrast, sections 3(4) and 54(4) of the MCFA specifically authorize entities to make contributions to ballot question committees without having to comply with the Act's registration and reporting requirements:

> [An entity] may make a contribution to a ballot question committee subject to this act. [An entity] may make an independent expenditure in any amount for the qualification, passage, or defeat of a ballot question. MCL 169.254(4).
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> A person, other than a committee registered under this act, making an expenditure to a ballot question committee, shall not, for that reason, be considered a committee for purposes of this act unless the person solicits or receives contributions for the purpose of making an expenditure to that ballot question committee. MCL 169.203(4).

In other words, an entity that makes an expenditure to a ballot question committee does not, for that reason alone, become subject to the Act's registration and disclosure provisions because of that specific exemption. *Id*.

These exemptions are, at least in part, rooted in the fact that ballot questions were the only committee that the legislature had to accommodate with respect to accepting otherwise prohibited funds at the time the statute was written. The legislature has not yet amended the law to expressly extend any corresponding exemption to IECs in light of recent case law. Because the MCFA expressly *prohibits* an entity from making a contribution or expenditure except to a ballot question committee, a corresponding statutory *exemption* from the Act's registration and reporting requirements necessarily is lacking. MCL 169.254(1), 169.254(4). Your request refers

[5] The statutory definition of "person" includes "a business, individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, labor organization, company, corporation, association, committee, or any other organization or group of persons acting jointly." MCL 169.211(2).

to this, in conjunction with the lack of any corresponding exemption in the definition of "committee" as discussed above, as the "'gotcha' requirement lurking in section 3 of the act[.]"[6]

Yet, neither *Citizens United* nor *Michigan Chamber* addressed registration or reporting requirements for an entity making a contribution to an IEC from its own general treasury funds, and new laws were not enacted to give effect to or expand upon these court decisions. Some contributing entities have elected to register and file campaign statements to insulate themselves from the possibility of a MCFA violation, while others do not do this voluntarily. Considering there is an ambiguity, the Department has not issued failure to file and late filing fee notices to entities that make contributions to IECs exclusively from their own treasury funds.

In effect, your request asks the Department to revisit its current practice, which is based on what the courts *did* require, without speculating on unsettled questions. The Department refrained from promulgating administrative rules to address *Citizens United* and *Michigan Chamber* because any rule that conflicts with a provision of state law is of dubious legality. *See, e.g.*, MCL 24.245a (authorizing the Joint Legislative Committee on Administrative Rules to file objections to a proposed administrative rule that "conflicts with state law" or is promulgated after "[a] substantial change in circumstances has occurred since the enactment of the law on which the proposed rule is based"); and MCL 169.215(1) (authorizing the Secretary of State to promulgate rules "to implement *this act* [.]") (Emphasis added). An agency's request for rulemaking must identify "[t]he state or federal *statutory or regulatory* basis for the rule." MCL 24.239 (emphasis added). And finally, in view of the fact that under the APA, an "interpretive statement … is not enforceable by an agency, is considered merely advisory, and shall not be given the force and effect of law[,]" this is not the appropriate mechanism for imposing the registration and disclosure requirements on contributors themselves, or any enforcement. MCL 24.232(5). Accordingly, the department will not address the issue of liability or enforcement generally in the context of an interpretive statement. However, the department will evaluate the specific facts and circumstances of any future inquiries in light of the requirements of current case law and the surviving and applicable statutory provisions in the MCFA described herein.[7]

The Department encourages the legislature to clarify whether entities that make contributions from their own treasury funds to IECs are themselves required to comply with the Act's disclosure requirements. At a minimum, any proposed legislation must define the term "independent expenditure committee," require an IEC to register with the appropriate filing official, establish a reporting schedule for IECs, and expressly permit entities to make independent expenditures for or against candidates, and make contributions to and expenditures for IECs from their own general treasury funds. This comprehensive legislation would provide needed clarity regarding the disclosure obligations of IECs and their contributors, and is long overdue.

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[6] The Department acknowledges that imposing the registration and reporting requirements of the MCFA on an IEC's contributors would, at best, represent redundant disclosure. According to the Department's 2010 guidance, an IEC must file campaign statements listing the date, amount and source of each contribution it receives from an entity - - the very same information which an entity might be required to disclose if the Act's registration and reporting requirements were interpreted to reach an IEC's contributors.

[7] The Department is cognizant that entities making expenditures to IECs exclusively from their own general treasury funds may have relied on the Department's 2010 guidance, the absence of any amendatory legislation, or both in devising their course of conduct. This request raises an interpretation of the Act differing from the state's existing practices. The department will not retroactively apply the interpretation as presented in the request.

In conclusion, the Department has made a good faith effort to provide a reasonable regulatory structure for this issue. IECs acting in accordance with the Department's established guidance already disclose the amounts, dates, and sources of their contributions, including those made by entities. Interpreting the Act in a way that imposes the registration and reporting requirements on entities would not provide meaningful additional disclosure to the public, yet this would be the consequence of adopting the view embodied in the questions presented here. The legislature is best positioned to address the statutory ambiguities identified above, and the Department stands ready to assist in that effort.

The foregoing represents an interpretive statement regarding the applicability of the MCFA.

Sincerely,