



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

December 15, 2009

Robert S. LaBrant
Senior Vice President, Political Affairs and General Counsel
Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

The Department of State (Department) acknowledges receipt of your correspondence dated July 28, 2009, in which you asked the Department to issue a declaratory ruling pursuant to the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.*, to determine the point at which certain preparatory activities may trigger application of the Act's registration requirements. Your letter describes specific preliminary actions to be taken by the Michigan Chamber of Commerce (Chamber) with respect to one or more ballot questions.

The MCFA and Administrative Procedures Act authorize the Department to issue a declaratory ruling if the person who submits the request is as an interested party, recites a reasonably complete statement of facts, states the legal question presented, and puts forth the request in a signed writing. MCL 24.263, 169.215(2). "A declaratory ruling is binding on the agency and the person requesting it unless it is altered or set aside by any court." MCL 24.263. The Department's answers to the questions presented in your request for a declaratory ruling rely on a subjective test: whether an activity directly influences or attempts to influence the qualification or passage of a ballot question. The application of this standard requires a careful analysis of a comprehensive statement of facts, the need for which was not recognized at the time your request was received. In the absence of a factual statement that is substantially more developed than the one you presented, it is not possible to determine with the certainty required for issuing a binding ruling whether the Chamber's proposed course of conduct falls within the scope of the Act. Therefore, in lieu of a declaratory ruling the Department issues this interpretive statement setting forth its understanding of the Act. MCL 169.215(2).

According to your letter the Chamber will publicly announce its intention to select which of several "ballot questions" to advance through the qualification process at an upcoming press conference. Following the event, the Chamber plans to use numerous techniques to gauge support for its proposals, including online surveys, focus groups, polling, ballot testing, and fundraising. The Chamber also intends to create a PowerPoint presentation for the purpose of soliciting support from potential allies. The Chamber's anticipated expenses include the drafting of petitions, hiring consultants, performing research, and obtaining legal advice with respect to

the proposed ballot questions. You advise that the costs associated with these preparatory activities will certainly exceed \$500.00, and that the cost of the initial event, the press conference, itself may exceed that amount. The Chamber indicates that it plans to circulate petitions on or after November 27, 2009, and also pledges to timely file a statement of organization with respect to these ballot questions.

A copy of your request was published on the Department's website beginning August 3, 2009 and the Department's draft response was issued on October 8, 2009. That draft elicited one comment (yours) which criticized the Department's conclusion that a precise ballot question must exist before the requirements of the Act may fairly be applied to the Chamber's proposed course of action, and encouraged the adoption of "a 'look back' disclosure provision if a proposal advances to the petition stage." You argued that proponents could "front load" expenditures for surveys, marketing, staffing, and attorney fees before the ballot question was finalized and thereby evade the disclosure requirements of the Act.

The Act's registration and reporting requirements apply to a "committee", which is defined as "a person 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, or the qualification, passage, or defeat of a ballot question, if contributions received total \$500.00 or more in a calendar year or expenditures made total \$500.00 or more in a calendar year." MCL 169.203(4).

Under the MCFA, a committee is required to file its statement of organization within 10 days of its formation. MCL 169.224(1). For purposes of determining whether the monetary threshold has been met, the words "contribution" and "expenditure" are generally defined, in pertinent part, to include anything of ascertainable monetary value that is used to influence, assist, or oppose the qualification, passage or defeat of a ballot question. MCL 169.204(1), 169.206(1). Thus, a ballot question committee's obligation to register is triggered not more than ten days after it receives contributions or makes expenditures of at least \$500.00 in a single calendar year to influence or assist the qualification, passage or defeat of a ballot question.

A ballot question must exist before any of these provisions can fairly be applied to the Chamber's proposed course of conduct. Under the Act, a ballot question is defined as "a question that is submitted or intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot." MCL 169.202(2). A ballot question committee is "a committee acting in support of, or in opposition to, the qualification, passage, or defeat of a ballot question [.]" MCL 169.202(3).

In the Declaratory Ruling to Peter Ellsworth (April 3, 1995) the Department described the integral steps of the qualification process, which include the option of seeking the approval of the Board of State Canvassers for a ballot question petition as to form, the mandatory tasks of petition circulation, filing, and canvassing, and if the ballot question is certified by the Board of State Canvassers, the ballot question election. The *Ellsworth* ruling also establishes an objective test to determine whether a contribution or expenditure has been made with respect to a ballot question, "whether the payment directly influences or attempts to influence the qualification of a

ballot question or an election regarding that question [,]" and the corollary that no expenditure occurs if its impact is incidental to the qualification, passage, or defeat of the ballot question. Finally, *Ellsworth* instructs us that "expenses incurred before a ballot question exists are not expenditures under the ... Act."

While *Ellsworth* describes in considerable detail the circumstances in which an expenditure may be said to assist the qualification of a ballot question, it also alludes to activities which may "directly influence or attempt to influence ... the outcome of an election regarding that question." This concept is supported by the statutory definitions of ballot question committee, contribution, and expenditure, which when read together apply to "act[ion]" taken "for the purpose of influencing" or "assist[ing]" the passage or defeat of a ballot question. MCL 169.202(3), 169.204(1), 169.206(1).

The Department is cognizant that the process of formulating a ballot question in its final form might directly influence the outcome of an election on that question; thus, in certain circumstances some of the proponents' preparatory activities may fall within the ambit of the Act. For example, preliminary research may indicate that the inclusion or exclusion of a certain aspect of a proposal will ultimately influence qualification or passage, or both, and the proponents could draft the ballot question in a manner that incorporates these findings. Yet whether a particular activity constitutes an expenditure which directly influences or attempts to influence qualification, passage or defeat must be carefully weighed against the dual notions that simple ideas do not constitute ballot questions, and "expenses incurred before a ballot question exists are not expenditures [.]" Interpretive Statement to Deane Baker (September 15, 1981), *Ellsworth*.

With these principles in mind, the Department provides the following answers to your questions.

- (1) *"Whether payment for the Chamber's preparatory activities referenced in this Request directly influence or attempt to influence the qualification of a ballot question or an election regarding that question?"*

To the extent that any of the Chamber's preliminary activities directly influence or attempt to influence the qualification or passage of a ballot question, the Chamber has made an expenditure in support of a ballot question. Fundraising is one activity that satisfies the direct influence test: the collection of contributions directly influences the proponents' ability to pay expenses incurred during the process and thereby furthers the prospects for qualification and passage of the ballot question. Likewise, the development of the precise language of the ballot question through drafting or ballot testing may directly influence or attempt to influence the qualification and passage of the ballot question. With respect to the other preliminary activities described in your letter, the Chamber must consider all of the facts and circumstances when determining whether payment of a particular expense is subject to the Act's reach.

(2) , (3) *“Does the answer to Question No. 1 above change if the Chamber never circulates a petition containing the ballot question to registered voters?”* and *“Does the answer in Question No. 1 above change if the Chamber never seeks the approval of the ballot petition from the Board of State Canvassers as to form?”*

No.

(4) *“When does a ballot question exist for the purposes of the Michigan Campaign Finance Act?”*

As the Department explained in *Baker*, “[i]t is clear that by the time a ballot question committee is formed the relevant issue is no longer an idea but is a question ‘intended to be submitted to a popular vote at an election.’” Thus, a ballot question is distinguished from a mere idea by the proponents’ intention to submit the question to a popular vote, regardless of their success in securing qualification and enactment of the ballot question. MCL 169.202(2). An intention to submit a ballot question to a popular vote is evident when the proponents perform an act that is reasonably calculated to result in the qualification or passage of a ballot question.

(5) *“Are the Chamber’s preparatory activities referenced in this Request sufficient to establish that a question is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot?”*

For the purpose of determining whether a ballot question exists, any preliminary activity that is reasonably calculated to result in qualification or passage of a ballot question is sufficient to establish that the proponents intend to seek qualification and passage of that question. With respect to the Chamber’s proposed course of conduct these activities may include, but are not limited to, fundraising and petition drafting.

(6) *“Is the initial press conference to be held by the Chamber (when the Chamber announces ballot questions it will be considering placing on the November 2010 general election ballot) sufficient to establish that a question is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot?”*

Perhaps, but because the effect of the Chamber’s announcement is incidental to and does not directly influence or attempt to influence the qualification or passage of a ballot question, it does not constitute an expenditure.

(7) *“With respect to the Chamber’s proposed activities referenced in this Request, when is a ballot question committee formed?”*

A ballot question committee is established when the Chamber receives contributions or makes expenditures of \$500.00 or more by engaging in activities that are designed to directly influence or attempt to influence the qualification or passage of the ballot question. For example, the results of polls, focus groups, or ballot tests may be used to formulate the precise wording of the ballot question, to develop a campaign strategy for securing the qualification and passage of the

ballot question, or for an advertisement that expressly advocates the qualification or passage of the ballot question. Such uses are expenditures if they directly influence or attempt to influence the qualification of the ballot question or the subsequent election.

To the extent that the information derived from the Chamber's proposed focus groups, polling, ballot testing, consultation, or research is used in a manner that directly influences or attempts to influence the qualification or passage of a ballot question, the Chamber has made an expenditure to which the monetary threshold of section 3(4) applies. Whether any of the Chamber's preparatory activities satisfy this standard must be determined with reference to the surrounding facts and circumstances.

(8) *"When is the Chamber required to file a Statement of Organization to form a ballot question committee with the Michigan Department of State with respect to these ballot questions?"*

The Chamber's obligation to file a statement of organization is triggered not more than ten days after it receives contributions or makes expenditures of at least \$500.00 in a single calendar year while engaging in activities that directly influence or attempt to influence the qualification or passage of the ballot question.

The people of Michigan have reserved for themselves the powers to initiate legislation, approve or reject enacted laws by referendum, and amend the state constitution, directly or through their elected representatives. MI Const. Art. II, Sec. 9, Art. IV, Sec. 34, Art. XII, Sec. 1, and Art. XII, Sec. 2. The people's choice to exercise these cherished rights should be encouraged to flourish free from government regulation until such time as their idea has evolved into a ballot question. This step occurs when the proponents undertake any action that is reasonably designed to result in the qualification and passage of a ballot question. The proponents make an expenditure to the extent that their preliminary activity directly influences or attempts to influence the qualification of the ballot question or the outcome of an election regarding that question.

The foregoing represents the Department's informational response to the questions you presented.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian DeBano", written over a horizontal line.

Brian DeBano
Chief of Staff / Chief Operating Officer