



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

PROPOSED RESPONSE

November 14, 2013

Bruce A. Courtade, President
Janet K. Welch, Executive Director
State Bar of Michigan
306 Townsend Street
Michael Franck Building
Lansing, Michigan 48933-2012

Dear Mr. Courtade and Ms. Welch:

The Department of State (Department) acknowledges receipt of your letter dated September 11, 2013, in which you requested a declaratory ruling or interpretive statement regarding the Department's interpretation of the Michigan Campaign Finance Act (MCFA), 1976 PA 388, MCL 169.201 *et seq.* A copy of your request was published on the Department's website beginning September 13, 2013, and the Department received 16 letters and 35 e-mail messages that were timely in response to our solicitation for public comment.

Your request included a question concerning the Department's authority to require all payments for communications referring to judicial candidates to be disclosed, particularly in light of *Federal Election Commission v Wisconsin Right to Life*, 127 S Ct 2652, 168 L Ed 2d 329 (2007), *Caperton v Massey Coal Company*, 129 S Ct 2252, 173 L Ed 2d 1208 (2009), and *Citizens United v Federal Election Commission*, 130 S Ct 876, 175 L Ed 2d 753 (2010).

Under the MCFA and the Michigan Administrative Procedures Act (MAPA), 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 MCFA requires the Department to issue an interpretive statement "providing an informational response to the question presented" as a substitute. MCL 169.215(2). Accordingly, the Department offers the following interpretive statement in response to your request.

You posed the following question to the Department:

In light of Federal Election Commission v. Wisconsin Right to Life (2007), Caperton v. Massey Coal Company (2009), and Citizens United v. FEC (2010), must all payments for communications referring to judicial candidates be considered "expenditures" for purposes of the MCFA, and thus reportable to the

Secretary of State, regardless of whether such payments entail express advocacy or its functional equivalent?

The definition of expenditure does not differentiate between candidate types. An affirmative answer to your question as presented would require the Department to impose disparate rules based upon the office sought, and then require all payments for communications referring to only judicial candidates to be disclosed. There is nothing in the Michigan Campaign Finance Act that would allow the Department to create a carve-out exception for judicial candidates alone; therefore, the Department must answer no to your particular question in accordance with the law.

While your request to include only judicial candidates is fatal at the outset, there is a broader underlying policy issue, and the analysis should not end with the Department's denial of your request.

The Department issued an interpretive statement to Robert S. LaBrant on April 20, 2004 indicating that at that time the Department did not believe that it had the authority to regulate "issue ads" and that it intended to continue to apply the "express advocacy" test to communications to determine whether they fell under the umbrella of the MCFA and its required disclosure. The Department explained that without a legislative amendment to the definition of "expenditure" contained in the MCFA, the express advocacy test was the only way to avoid the constitutional problems of vagueness and overbreadth. The Department notes that the pertinent parts of that definition have not been amended since that time.¹

You have asked the Department to alter its interpretation of the statutory definition of "expenditure" through the declaratory ruling process. However, the MAPA provides, in pertinent part, a rule is:

[A]n agency regulation, statement, standard, policy, ruling, or instruction of general applicability that implements or applies law enforced or administered by the agency [.]

MCL 24.207. Additionally, the MAPA excludes an interpretive statement from the definition of a rule. MCL 24.207(h).

The MCFA expressly states that:

A declaratory ruling or interpretative statement issued under this section shall not state a general rule of law, other than that which is stated in this act, until the general rule of law is promulgated by the secretary of state as a rule under the administrative procedures act

¹ The definition of expenditure was amended by 2012 PA 31 and 2012 PA 273. Those amendments excluded expenditures made for federal candidates or committees (except for the purposes of section 57 of the Act) from the definition of expenditure; included the cost for the establishment and administration of a payroll deduction plan to collect and deliver contributions in the definition of expenditure; excluded certain expenditures for the establishment, administration, or solicitation of contributions to a separate segregated fund from the definition of expenditure; and brought expenditures for the qualification of a new political party under the umbrella of the MCFA.

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of 1969 [citations omitted], or under judicial order. MCL
169.215(2).

This is precisely what you have asked the Department to do, contrary to both the MAPA and the MCFA. The Department cannot create a new disclosure policy, applicable to the general public, through a declaratory ruling or interpretive statement.

The Department has consistently advocated for transparency through disclosure. The Department maintains that any change in policy regarding the issue of disclosing payments for electioneering communications that are the functional equivalent of express advocacy cannot be accomplished through the declaratory ruling or interpretive statement process, but must be addressed by the Legislature or through the administrative rule-making process.

Sincerely,

