RICHARD H. AUSTIN
SECRETARY OF STATE

MICHIGAN
DEPARTMENT
OF STATE
LANSING, MICHIGAN 48918

November 2, 1993

Mr. Timothy Sponsler
Venture Capitol
Suite 319, 850 North Randolph
Arlington, Virginia 22203

Dear Mr. Sponsler:

This is in response to your request for a declaratory ruling concerning the delivery of contributions to candidates under the Michigan Campaign Finance Act, 1976 PA 388, as amended.

Facts

According to your request, Venture Capitol is an unincorporated association that has recently established a national donor network of business people. An individual may become a member of the network by making a $100 contribution to Venture Capitol, to be used for administration, solicitation and communication costs, and pledging to make at least two contributions of $100 each to candidates recommended by Venture Capitol.

The donor network will operate as follows:

> "Venture Capitol will send a newsletter to its members recommending specific candidates for financial support. The Venture Capitol member writes a personal check made payable to the candidate committee he or she chooses to support. Venture Capitol, in the mailing recommending candidates for support, plans to include a postage paid reply envelope addressed back to Venture Capitol for return of those requested contributions. Venture Capitol will collect the returned checks and will deliver them either in person or by air express delivery to the candidate. The Candidate Committee reports those individuals as contributors on the Candidate Committee's financial report.
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> "Venture Capitol will also host local fund-raising events in regional locations. Recommended candidates will appear at these events. Venture Capitol members in attendance will be asked to write out a personal check to the candidate committee and the

candidate will leave with those checks at the conclusion of the event."

Venture Capitol is considering recommending that its members support a candidate in the 1994 Michigan gubernatorial race and in several legislative races. Therefore, you ask a series of questions regarding the applicability of the Michigan Campaign Finance Act (the Act) to Venture Capitol's proposed activities. The answer to your first question will dictate the response to those that follow. This question asks:

> "If Venture Capitol collects and delivers to Michigan candidate committees checks totaling $500 or more in a calendar year would that action be considered 'Joint Activity' under the Act requiring Venture Capitol to be registered as a 'Committee' with the Michigan Department of State?"

Your inquiry resulted in the submission of written comments by two parties, as authorized under the Act. Ms. Judith L. Corley, counsel to EMILY's List, noted that Venture Capitol's proposed activities are strikingly similar to those of EMILY's List, a membership group incorporated for political purposes only that is registered as a committee with both the Federal Election Commission and the Michigan Secretary of State. However, since there are "significant differences in the fact pattern set out by Venture Capitol and the actual activities of EMILY's List," Ms. Corley asked for a separate declaratory ruling on behalf of her client. In her view, the dispositive issue in both cases is whether contributions made by individuals that are transmitted to a candidate through a third party count as contributions by both the individual contributor and the third party.

Mr. Robert S. LaBrant, Vice President, Political Affairs and General Counsel, Michigan Chamber of Commerce, stated that conclusions reached in previous interpretive statements to Mr. Carl L. Gromek (6-92-CI) and Ms. Margaret M. Ayres (1-93-CI) indicate that Venture Capitol's proposed activity would result in a "group of persons acting jointly" who would be subject to a single contribution limitation. He elaborated on this viewpoint in written comments submitted in response to Ms. Corley's ruling request. Mr. LaBrant also suggested that the Department of State use an audit procedure to disqualify all but the first $100 of "bundled money" from being matched with money from the State Campaign Fund.

Before responding to your questions and, where necessary, the comments submitted by Mr. LaBrant and Ms. Corley, it is first necessary to revisit the Gromek and Ayres interpretive statements.

Gromek and Ayres

The Gromek interpretive statement, issued on September 24, 1992, addressed a proposed system for purchasing fundraiser tickets for use by judges of the Michigan Court of Appeals. Under that proposal, the Court's administrative officer would determine which fundraising events representatives of the Court should attend. The administrative officer would then contact the judge whose name appeared at the top of a list maintained by the officer. The judge would be asked to purchase tickets to a particular fundraiser by writing a check to the committee conducting the event. If the judge declined, the administrative officer would contact the next person named on the list. The administrative officer would keep records of contributions made and distribute fundraiser tickets to judges wishing to attend the event.

Relying upon the Act's definitions of "committee" and "person" [MCL 169.203(4); MCL 169.211(1)], the Department concluded that the proposed system resulted in a "group of persons acting jointly" that functioned as a committee. As such, the judges and administrative officer would be required to file a statement of organization after contributing $500 or more in a calendar year.

The Department issued the Ayres interpretive statement on April 14, 1993. Ayres dealt with the proposed fundraising activities of a corporate officer, who first asked the corporation's separate segregated fund to contribute $2,500 to a specific, though unnamed, candidate committee. After the request was rejected, the corporate officer planned to collect contributions totaling $2,500 from other corporate officers and pass them on directly to the candidate committee. During the course of responding to the Ayres request, the corporate officer's proposed activity was modified further: he or she "could refrain from taking any action to facilitate contributions by other officers" and "would do no more than suggest possible political contributions to fellow office-shareholders and pass on to them the solicitation cards provided by the proposed recipient committee."

The Department concluded that the corporate officer could communicate with fellow officers and distribute political literature produced at corporate expense. However, section 54 of the Act (MCL 169.254), which prohibits a corporation from contributing to a candidate, would preclude the officer from distributing solicitation cards paid for by the candidate.

The Department further indicated that the corporate officer could not collect contributions from other officers and forward them to the candidate. This "bundling of contributions would be construed as joint activity by the individuals involved, making them subject to the Act's requirements because they would be a committee as defined in section 3(4) of the Act (MCL 169.203)."

The Gromek system for purchasing fundraiser tickets was cited as an example of joint activity regulated by the Act. However, neither the Gromek nor Ayres interpretive statement considered those provisions of the Act which recognize that contributions may be delivered to a candidate by someone other than the contributor. As a consequence, Gromek and Ayres cannot be regarded - nor were they intended to be regarded - as definitive statements on the practice of "bundling," a term not defined in the Act but generally used to describe the collection and delivery of contributions by a third party. For this reason, the Gromek and Ayres interpretive statements do not dispose of the questions raised by Venture Capitol.

Delivery of contributions

The Campaign Finance Act clearly anticipates that an intermediary may deliver contributions to a committee. Section 21(10) of the Act [MCL 169.221(10)] provides that "contributions received by an individual acting in behalf of a committee" shall be reported to the committee's treasurer not later than 5 days before the closing date of the committee's next campaign statement.

Similarly, section 42(1) [MCL 169.242(1)] states that a person who accepts a cash or an in-kind contribution "on behalf of another and acts as the intermediary or agent of the person from whom the contribution was accepted" must provide the contributor's name and address and the intermediary's name and address to the recipient of the contribution.

Under section 21(10) and section 42(1), contributions are delivered to the intended recipient through the combined actions of more than one person. However, this combined action does not give rise to registration and reporting obligations. Instead, the Act appears to create a distinction between the delivery of contributions by one person on behalf of another and "joint activity" that requires formation of a committee.

In Gromek, the Court of Appeals proposed establishing a system to ensure that representatives of the Court attended fundraising events selected by the Court's administrative officer. The administrative officer determined the recipient of the contribution, the number of tickets to be purchased, and who would attend the fundraiser. Although a particular judge could decline to make a requested contribution, the Court of Appeals directed and controlled the program through its administrative officer who, with the acquiescence of the judges, made all of the decisions in the group's behalf. The contributions, though drawn upon individual accounts, were intended to be contributions from the group itself.

By contrast, the Ayres interpretive statement concluded that where a corporate officer solicited fellow officers without collecting or "bundling" contributions for delivery to a candidate, joint activity did not exist.

However, Ayres does not stand for the proposition that delivery of contributions by a third party always requires the formation of a committee.

While not thoroughly addressed in Ayres, the restrictions upon corporate political activity significantly affect solicitations of corporate officers. Section 54 of the Act [MCL 169.254] prohibits a corporation or anyone acting on behalf of a corporation, other than a corporation formed for political purposes, from making contributions or expenditures in candidate elections. Corporate political activity must be channeled through a single separate segregated fund. [MCL 169.255] These restrictions cannot be avoided by allowing a corporate officer to solicit and collect contributions from other officers.

The joint activity inherent in Gromek does not exist in every cooperative effort that results in the delivery of contributions to a committee. For example, as noted by Ms. Corley, it is not uncommon for a friend or colleague of a candidate to host a fundraising event in his or her home. The host or hostess may play an active role in organizing the event and in the collection and delivery of contributions to the candidate. However, the fundraiser does not result in a "group of persons acting jointly" within the meaning of section 11(1) of the Act [MCL 169.211(1)] because there is no united activity resulting in the receipt of contributions for the group's collective use or the making of expenditures in the group's collective behalf. The decision to contribute to the candidate is left solely to each individual attending the event and is not controlled by the host or hostess. In these circumstances, the Act simply requires the person collecting the contributions to report them to the committee's treasurer within the time provided in section 21(10).

Neither section 21(10) nor section 42(1) apply to Venture Capitol's proposed activities. However, they do indicate that the delivery of contributions by a third party is not necessarily equivalent to joint activity. The issue you raise is whether the business persons who choose to contribute to one of several candidates endorsed by Venture Capitol become a "group of persons acting jointly," subject to a single contribution limit, by forwarding contributions made payable to the candidate to Venture Capitol for delivery to the recipient committees.

Before addressing this issue, a third provision of the Act that deals with the delivery of contributions by an intermediary must be considered. Specifically, section 44(3) [MCL 169.244(3)] states as follows:

> "Sec. 44. (3) An individual, other than a committee treasurer or the individual designated as responsible for the record keeping, report preparation, or report filing for a committee, who obtains possession of 1 committee's contribution for the purpose of delivering the contribution to another committee shall deliver the contribution to that committee, that committee's treasurer, or

> that committee's agent, or return the contribution to the payor, not later than 10 business days after obtaining possession of the contribution."

This section of the Act was added in 1989 after campaign statements filed with the Department disclosed that contributions to candidates reportedly made by independent and political committees (commonly referred to as "PAC's") had not been received by the candidates. This occurred because the contributions had been given to a lobbyist, who had not delivered the contributions to their intended recipients. Rather than prohibiting this activity, the Legislature responded by establishing a 10 day deadline for delivering the contributions.

As a result of this legislative determination, individuals with similar interests may contribute unlimited funds to one or more PAC's. An individual representing those PAC's may then accept contributions intended for the same candidate from each PAC and deliver those "bundled" contributions to the candidate within 10 days. Although the person's role in delivering the contributions is not disclosed, contributions from the individuals to the PAC's and expenditures by the PAC's to the candidate are reported in campaign statements filed with the Department. Thus, section 44(3) does not undermine the Act's disclosure purposes.

Similarly, the Act's contribution limitations are not threatened. Pursuant to section 52 and section 69 of the Act [MCL 169.252; MCL 169.269], the amount each PAC may contribute to a candidate is limited. In the case of a gubernatorial candidate, a PAC that is registered as a political committee is prohibited from contributing more than $3,400 in an election cycle. An independent committee may contribute 10 times that amount.

Any individual who contributes to the PAC may also directly contribute $3,400 in an election cycle to the candidate supported by the PAC. One could argue that an individual who contributes the maximum amount to the candidate may avoid the $3,400 limitation by giving unlimited funds to a PAC that contributes to the same candidate. However, if the PAC controls the subsequent use of the individual's contribution, the individual cannot be held responsible for a violation of section 52 or section 69. On the other hand, if that subsequent use is controlled by the individual, a violation of section 44(1) may occur.

Section 44(1) [MCL 169.244(1)] ensures that the Act's contribution limitations are heeded by prohibiting earmarked contributions. This section provides:

> "Sec. 44. (1) A contribution shall not be made by a person to another person with the agreement or arrangement that the person receiving the contribution will then transfer that contribution to a particular candidate committee."

In his written comments, Mr. LaBrant suggests that section 44(1) prohibits a person from delivering a written instrument drawn by another person and made payable to a specific candidate. However, Mr. LaBrant misconstrues the meaning of this section by failing to distinguish between *delivering* a contribution and *making* a contribution.

In the scenario described above, section 44(1) prohibits the individual from making a contribution to, and for the ostensible benefit of, the PAC with the agreement or arrangement that the PAC will deposit the contribution into its own account and then use the money to contribute to a particular candidate. By so doing, section 44(1) prevents the laundering of contributions and the circumvention of the Act's contribution limits.

Thus, the Act accepts the bundling and delivery of PAC contributions by individuals. However, the same activity, when engaged in by a person other than an individual on behalf of individual contributors, is not specifically addressed by the Act.

It is in the context of the foregoing that your questions may now be answered.

Joint activity

To reiterate, your first question is whether Venture Capitol becomes a committee subject to the Act's provisions by collecting and delivering checks totaling $500 or more in a calendar year from individual members made payable to Michigan candidate committees. This depends upon whether Venture Capitol and its members are a "group of persons acting jointly" within the meaning of section 11(1) of the Act and whether the individual members contributions are attributable to the group.

As noted earlier, Venture Capitol plans to communicate with its members and recommend candidates for support. Members would then choose whether or not to contribute to any of the candidates and, if so, to whom. If a member decides to make a contribution, he or she would write a check made payable to the selected candidate committee and send the check in a postage paid reply envelope addressed to and provided by Venture Capitol. Venture Capitol would then forward checks it receives to their intended recipients.

The answer to your question depends upon whether the collection and delivery of contributions totaling $500 to various candidates by Venture Capitol transforms the individual members contributions into expenditures made on behalf of the group, for that is the significance of joint activity. Joint activity itself is not enough - there must be contributions or expenditures attributable to the group as a whole. This becomes evident when the phrase a "group of persons acting jointly" is interpreted, not in isolation, but with reference to the Act's definition of "committee."

Section 3(4) of the Act describes when a "person", including a "group of persons acting jointly", becomes a committee. If the latter phrase is inserted for the word "person", section 3(4) states, in pertinent part:

> "Sec. 3. (4) 'Committee' means a [group of persons acting jointly] 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. . ."

This definition indicates that the group becomes a committee when it receives contributions for the group's use or when it makes expenditures attributable to the group as a whole. The resources of the persons within the group are combined to become the resources of the group itself. Once combined, no member of the group retains exclusive control over the timing or use of money or resources the member has devoted to the collective effort. If the member does not relinquish control to the group or, as in Gromek, to a person acting in the group's behalf, there is no contribution attributable to joint activity as required by section 3(4).

In the proposal you have described, members of Venture Capitol retain exclusive control over the funds they choose to contribute. The member decides whether or not to make a contribution and, if so, which candidates the member will support. The member's check is made payable to the candidate committee and cannot be used for any other purpose. In short, the contribution is directed and controlled at all times by the individual member and not by a "group of persons acting jointly." As such, the contribution is attributable to the individual member and not to Venture Capitol.

In his comments concerning Ms. Corley's ruling request, Mr. LaBrant argues that this result "will permit the contribution limits of section 52 and 69 to be systematically evaded by a sophisticated 'bundling' operation."[1] However, just as the earmarking prohibition found in section 44(1) ensures that contribution limits are not avoided by laundering money through a PAC, section 31 of the Act operates to preclude Venture Capitol from exceeding its contribution limitations.

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[1]. In fact, this result may have the salutary effect of minimizing a candidate's reliance upon PAC contributions. As Mr. LaBrant has noted in an article appearing in Michigan Forward (May, 1993), "EMILY'S LIST may well be the model for the post-PAC era" in campaign finance.

Section 31 [MCL 169.231] states as follows:

> "Sec. 31. A contribution which is controlled by, or made at the direction of, another person, including a parent organization, subsidiary, division, committee, department, branch, or local unit of a person, shall be reported by the person making the contribution, and shall be regarded as a contribution attributable to both persons for purposes of contribution limits."

Therefore, if Venture Capitol controls or directs a contribution made by an individual member, the contribution must be attributed to both the individual and Venture Capitol.

This interpretation of the Michigan statute is consistent with the construction of the Federal Election Campaign Act. This act differs from the Michigan statute in that the federal law specifically authorizes a PAC to serve as a conduit for earmarked contributions. The earmarked contribution can be in the form of a check made payable to the candidate or the PAC. If made out to the candidate, it is simply passed along by the conduit. If made out to the PAC, it is deposited and an equivalent amount is forwarded to the candidate. These earmarked contributions count towards the PAC's contribution limit if the PAC "exercises any direction or control over the choice of the recipient candidate." Thus, even though the statutes differ, the attribution of contributions is determined by the same test - direction and control.

In Federal Election Commission v National Republican Senatorial Committee, 966 F 2d 1471 (DC Cir, 1992) the United States Court of Appeals considered whether the National Republican Senatorial Committee directed or controlled contributions from individuals by selecting the candidates included in a solicitation, depositing solicited funds in its account, dividing the money in accordance with the terms of the solicitation, and passing the funds on to the candidates. The Court concluded that direction or control did not exist.

In reaching this conclusion, the Court considered previous Advisory Opinions issued by the Federal Election Commission, including an opinion requested by the National Conservative Political Action Committee (NCPAC):

> "In the NCPAC opinion, the Commission held that 'a mass mailing advocating the election of a clearly identified candidate' and including 'a suggestion that a contribution . . . be mailed to NCPAC' did not constitute direction or control within the meaning of §110.6(d). Fed. Election Camp. Fin. Guide (CCH) at 10,589. The Commission's opinion rested mainly on the fact that 'the individual contributor, not NCPAC, chooses whether to make a contribution,' to which the Commission added that '[t]he fact that a potential contributor may decide against making a contribution indicates a lack of control over the choice of the recipient

> candidate by NCPAC.' *Id.* at 10,590. So here, where more than 90 percent of those solicited did not contribute. *See also* Matter Under Review 1028 (Council for a Liveable World) (1980). The one case in recent years where the Commission has found direction or control concerned a 'corporate-sponsored political contributions program' in which 'personnel from the corporate president's office . . . [sought] to convince . . . executive and adminsitrative [sic] personnel' to make contributions. Advisory Opinion 1986-4, Fed. Election Camp. Fin. Guide (CCH) ¶ 5846, at 11,246 (1986). The potential for 'control' in such context is apparent."

An additional factor mentioned in both the Court of Appeals decision and in the Federal Election Commission opinions is that the committee making the solicitation did not select the amount of the individual contributions. In your proposal, each member of Venture Capitol would agree to contribute $100 to each of two candidates. However, there is nothing preventing the member from contributing a different amount or choosing not to contribute at all.

Similarly, while the member who decides to make a contribution selects from a list of candidates recommended by Venture Capitol, this "pre-selection" does not establish direction or control. As stated by the Court of Appeals:

> "The problem is that if this establishes 'direction or control' within the meaning of §110.6(d)(2) then every solicitation qualifies for the same treatment. Every solicitation 'pre-selects' candidates to some degree. It is fanciful to suppose that national political committees of any party would expend their resources merely to urge individuals to contribute to the candidate of their choice. . . ." NRSC *supra* at 1477.

As stated at the outset, the Federal Election Campaign Act differs from the Michigan statute in that the federal law specifically authorizes a PAC to serve as a conduit for contributions made by individuals. These contributions count towards the conduit's contribution limit only if they are directed or controlled by the PAC. However, the same test - direction or control - determines whether a contribution is attributable to both the individual and the PAC which delivers the contribution. Similarly, control over the use of resources distinguishes between activity undertaken by an individual and activity resulting in a "group of persons action jointly."

In answer to your question, Venture Capitol does not become a committee by collecting and delivering $500 or more in contributions its members choose to make to candidates endorsed by Venture Capitol. However, under your proposal, Venture Capitol will make expenditures on behalf of those candidates. Under the Michigan act, these expenditures, including the cost of the postage paid, pre-addressed envelopes mailed back to Venture Capitol and the cost of sorting and delivering those contributions to the recipient candidate committees, are

considered in-kind contributions to the candidates and must be reported by the candidate committees.

Venture Capitol must file a statement of organization as a committee and is subject to the Act's requirements if its in-kind contributions to candidates total $500 or more in a calendar year. If organized as a political committee, Venture Capitol may not contribute more than $3,400 in an election cycle to a gubernatorial candidate committee. If qualified to operate as an independent committee, Venture Capitol may not contribute more than $34,000 to that committee.

Your remaining questions presuppose that Venture Capitol and its members were engaged in joint activity and subject to a single contribution limit. Consequently, there is no need to respond to these questions.

This response is a declaratory ruling concerning the facts and questions presented.

Sincerely,

Richard H. Austin