MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN o SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

July 26, 1982

Mr. David E. Wilson
4619 Brightmore Court
Bloomfield Hills, MI 48013

Dear Mr. Wilson:

This is in response to your request for a declaratory ruling regarding the provisions of the Campaign Finance Act ("the Act"), 1976 PA 388, as amended, governing independent expenditures. Because your request does not specify a set of facts, no declaratory ruling will be issued.

Since the questions you raise have wide applicability and have not previously been answered by the Department of State, they will be dealt with via the following interpretation of the Act.

You raise a series of questions with respect to the permissible activities of "Independent Expenditure Groups (IEG)". This is to advise you that there is no mention in the Act of anything called an independent expenditure group. An individual or a group may make an expenditure. When a group makes expenditures including independent expenditures of $200.00 or more in a calendar year the group is required to file a statement of organization as a committee pursuant to the Act.

A group making an independent expenditure of more than $100.00 is required to file an independent expenditure report pursuant to section 51 of the Act (MCL 169.251). Enclosed is an interpretative statement issued to Deane Baker September 5, 1981 which deals with reporting independent expenditures.

As indicated previously, a group making expenditures of $200.00 or more in a calendar year is a committee and is thus required to file a statement of organization and periodic campaign statements. This interpretative statement will not deal in detail with the filing requirements of committees since your questions by and large are related to the definition of the term "independent expenditure" in the Act.

Section 9(1) of the Act (MCL 169.209) defines independent expenditure as follows:

> Sec. 9. (1) "'Independent expenditure' means an expenditure as defined in section 6 by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee."

Before answering your questions it should be noted that they appear to be premised on the regulations promulgated to implement the Federal Election Campaign Act which establish "consultation, consent, and communication" as

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the criteria which form the test of an independent expenditure (11 CFR 109.1). In both the federal regulations and the Act an independent expenditure is required to be reported by only the entity making the expenditure. If it is not an independent expenditure it must be reported by the beneficiary committee as well. A gubernatorial committee which utilizes public funds is subject to a limitation on total expenditures by section 67 of the Act (MCL 169.267). If an expenditure is not an independent expenditure pursuant to the Act it must be included as an in kind contribution and thus added to the total of expenditures subject to the limit established in section 67. Section 70 of the Act (MCL 169.270) makes this very clear for publically funded gubernatorial campaigns. Section 70 states:

> Sec. 70. "A contribution or expenditure 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 expenditure or contribution, and shall be regarded as an expenditure or contribution attributable to both persons for purposes of expenditure or contribution limits.

Section 31 (MCL 169.231) makes the same principle applicable for contribution limits established by the Act for campaigns which do not apply for public funding pursuant to section 61 to 71 of the Act (MCL 169.261 to 169.271).

As the foregoing indicates the critical determination which must be made before concluding a particular expenditure is an independent expenditure which is only reportable subject to limitations imposed on the maker is whether the expenditure was "made at the direction of, or under the control of another person. . ."

The American Heritage Dictionary of the English Language, Houghton Mifflen Co., 1978, defines "direction" in relevant part as follows:

> "1. The act or function of directing. 2. Management, supervision, or guidance of some action or operation. 5. An instruction or series of instructions for doing something. 6. An order or command; authoritative indication."

"Control" is defined in the same dictionary, again in relevant part, as follows:

> "1. To exercise authority or dominating influence over; direct; regulate. 2. To hold in restraint."

With this background your questions are discussed below.

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"1. To what extent, if any, may a candidate, campaign official, volunteer, or any other member of a campaign committee directly or indirectly communicate with an IEG?

"A. What constitutes communication?

"B. What constitutes campaign or IEG association?

"2. Under what conditions may a candidate, campaign official, volunteer, or other member of a campaign committee seek support of IEG's for the candidate and his policies?

"A. May a campaign official contact an official of a private expenditure group to seek active and financial support in behalf of the candidate? -- May a campaign official seek such support through a (neutral) third party or intermediary?

"B. May a campaign official express gratitude to an official of an IEG for their offer of, and expressions of support?

"C. May a candidate or campaign official accept an invitation to speak before an IEG, realizing that his acceptance and appearance may increase that group's active and financial support for that candidate in the future?"

These questions ask about the extent of permissible communication between a committee and a gubernatorial candidate on whose behalf the committee wishes to make an independent expenditure. As the foregoing analysis indicates communication between committees is not regulated by the Act. The critical determination to be made is if the particular expenditure was made at the direction of, or under the control of another person. Therefore, these questions can only be answered in terms of the character of the communication between the committees.

"3. In what ways are IEG's limited in the nature of their support for an individual candidate?

"A. May such group utilize T.V., radio, and press advertisements?

"B. May IEG's participate at public rallies in behalf of a candidate?

"C. To what extent are IEG's limited in the amount they may spend in behalf of a specific candidate?"

A committee making independent expenditures is like any other committee. It may utilize any lawful medium to convey its message to the voters without limitation as to amount. This does not exclude participation in public rallies. However, it should be noted that joint participation with a candidate committee could create the impression that the committee making an independent expenditure is under the direction or control of the candidate committee. The only relationship which would transform an independent expenditure into an in kind contribution subject to the Act's limitations on contributions or expenditures is a relationship characterized by one person directing or controlling the expenditures made by another person.

"4. May an IEG solicit funds in the name of a specific candidate?

Example: As Organization "X", we are strongly in support of Candidate "Y" for Governor, and hope that you may support us in this effort. Your financial and active support in this regard is appreciated."

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There is nothing in the Act which would preclude this type of solicitation as long as the solicitation is not made at the direction of or under the control of another person.

"5. May a paid consultant to a campaign actively participate in the activities of an IEG supportive of the same campaign?
Example: May a consultant to a campaign act as a consultant to an IEG which is supportive of that campaign? "

Although you do not specify the functions of a consultant it will be assumed that a "paid consultant" is a person who is in a position to make or influence decisions with respect to the use of campaign resources. A person with access to and influence with the decision makers in a campaign is certainly in a position to participate in the exercise of direction or control by one committee over another.

While each fact situation must, of course, be analyzed on its own merits, the use of the same consultant by a candidate committee and an independent committee making expenditures on behalf of the candidate certainly creates the appearance of direction or control which would negate a claim that expenditures by a committee were truly independent.

"6. If a founder of an IEG becomes a candidate for governor, may the IEG which he founded actively support his candidacy? -- What additional limitations, if any, must such an IEG adhere to in this regard?"

If the founder divests him or herself of all authority with respect to decisions regarding expenditures by the committee or any other manifestation of direction or control of the committee then the committee may make independent expenditures in behalf of the candidacy of the founder.

"7. May non-profit organizations, established for the purpose of public education, act under the law as an IEG?"

Yes, such a group may make expenditures. However, like all other entities it must report its activities as specified in the Act. You should also be advised that a corporation, whether for profit or not, may not utilize corporate funds in behalf of a candidate committee (see MCL 169.254). A corporation may form a separate segregated fund pursuant to section 55 (MCL 169.255), which may make expenditures in behalf of a gubernatorial candidate.

"8. What limitations, if any, are placed on private citizens, not officially associated with a specific campaign or IEG, to actively participate in seeking IEG support for a specific candidate?"

The Act does not regulate the ability of a "private citizen" to express political views or to urge any other person to take positions on issues or candidates. However, when this support is manifested through spending

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resources on campaigns, then the filing and reporting provisions of the Act are applicable. Without specific information a more detailed answer to this question cannot be formulated.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos

Phillip T. Frangos, Director
Office of Hearings and Legislation

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