Malerman, Melissa (MDOS)

From: Eric Doster <eric@ericdoster.com>
Sent: Sunday, September 10, 2017 12:44 PM
To: Malerman, Melissa (MDOS)
Subject: Footnote 7 Of LaBrant Preliminary Response

Melissa:

In Footnote 7 of the LaBrant Preliminary Response, it states:

"The department will not retroactively apply the interpretation as presented in the request."

What exactly does this mean? Which "interpretation" is meant here?

In Mr. LaBrant's July 5, 2017 Request, he asks the Department for an interpretation whereby contributions to SuperPACs should be treated like contributions to ballot question committees. Consequently, the way the foregoing sentence from Footnote 7 reads, this leads one to conclude that the Department will not retroactively apply an interpretation whereby contributions to SuperPACs should be treated like contributions to ballot question committees. Stated differently, the foregoing sentence from Footnote 7 suggests that contributors of $500 or more to SuperPACS could be found in violation of the registration and reporting requirements of the MCFA for their past contributions to a SuperPAC. Nonetheless, below is a statement that was sent to me offering the opposite interpretation of Footnote 7:

2) Based on Footnote 7 on page 4 of the attached response, the Department has stated that regardless of how this is ultimately interpreted, ***your past contributions to [NAME OF SUPERPAC] (and other SuperPACs formed pursuant to the Guidance issued by the MDOS in 2010) will not be deemed violations of the MCFA***.

Accordingly, I would appreciate your guidance on the following interpretation of Footnote 7: May contributors of $500 or more to SuperPACS be found in violation of the registration and reporting requirements of the MCFA for their past contributions to a SuperPAC?

Thank you. EED

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Malerman, Melissa (MDOS)

From: Bob LaBrant <bob@boblabrant.com>
Sent: Monday, September 11, 2017 1:25 PM
To: Malerman, Melissa (MDOS)
Subject: comments on preliminary response
Attachments: comments.docx

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September 11, 2017

Melissa Malerman
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Sent via email: malermanm@michigan.gov

RE: Comments on draft Interpretive Statement

Dear Ms. Malerman:

The preliminary response sent me on September 7, 2017 has already led to conflicting interpretations by legal counsels advising clients.

Most of the confusion stems from what Footnote 7actually means. Footnote 7 states:

"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." (emphasis added).

This sentence was Footnoted:

"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 here."

After I submitted my ruling request on July 5, 2017, you asked me via email to clarify my second question under "Legal Questions Presented." I responded to you writing:

"Question 2 is whether the registration and reporting obligations granted corporate and labor union contributors of $500 or more to a ballot question in Section 3, also apply to corporate and labor union contributors of $500 or more to an independent expenditure-only political committee?"

This is what I believe Footnote 7 meant when it said:

"The department will not retroactively apply the interpretation as presented in the request."

Other have opined that..." based on Footnote 7 on page 4 of the attached response, the Department has stated that regardless of how this ultimately interpreted, your past contributions to (name of super PAC omitted) and other super PACs formed pursuant to the Guidance issued by the MDOS in 2010 will not be deemed violations of the MCFA.

I believe that is not a correct reading of Footnote 7.

In an April 9, 2014 letter to Karen Zeglis, an attorney representing the Michigan Community Education Fund MCEF), the Michigan Department of State discussed the disposition of a complaint filed against MCEF. The Department made the following finding:

> MCEF is a Committee subject to the Act's Registration and Reporting Requirements
>
> The registration and reporting requirements of the Act apply to any "committee," which is defined as "a person who receives contributions or 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...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 Act, a committee is required to file a statement of organization within 10 days of its formation. MCL 169.224(1). The failure to timely file a statement of organization may result in the assessment of late filing fees or, in extreme circumstances, the filing of misdemeanor charges. The failure to file a single campaign finance statement may trigger late filing fees. MCL 169.233(7). In certain circumstances, multiple failures to file may constitute a misdemeanor offense. MCL 169.233(8)Although not relevant to this disposition of this complaint, the Act provides a safe harbor for persons who make contributions to ballot question committees: "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 the purposes of this Act unless the person solicits or receives contributions for the purpose of making an expenditure to a ballot question committee." MCL 169.203(4). Thus, a corporation that makes a contribution to a ballot question committee is not subject to the Act's registration and reporting requirements unless the corporation the corporation solicits or receives contributions from other sources form the purpose of making an expenditure to a ballot question committee. Because Detroit Forward is not a ballot question committee, MCEF cannot avoid registering as a committee on the basis that it did not solicit or receive money for the express purpose of making an expenditure to Detroit Forward.
>
> In your answer on behalf of MCEF, you assert that" [t]here is no requirement under Michigan law that requires a nonprofit corporation to register as a political committee if its only activity is making a contribution to an independent

expenditure political committee." This assertion is not a correct statement of Michigan law.

I would urge the Department of State to clarify Footnote 7 in the Final Statement issued later this month and specifically urge the Michigan legislature to amend Section 3 as the only way to prevent fines from being applied to "persons" who have made contributions of $500 to independent expenditure committees (IEC) and have not registered and reported themselves as an IEC.

Sincerely,

Robert S. LaBrant

Malerman, Melissa (MDOS)

From: Hansen, Andrea L. <AHansen@honigman.com>
Sent: Thursday, September 14, 2017 4:39 PM
To: Malerman, Melissa (MDOS)
Subject: Comment to Preliminary Response
Attachments: Comments to Preliminary Response.pdf

Melissa, please see the attached. Thank you, Andrea

HONIGMAN

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September 14, 2017

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Re: Comments on Draft Interpretive Statement

Dear Ms. Malerman,

In the Preliminary Response to Mr. LaBrant dated September 7, 2017, at footnote 7, the Department appropriately acknowledged that entities making expenditures to IECs exclusively from their own general treasury funds may have relied on the Department's 2010 Guidance and/or the lack of any amendatory legislation to guide their conduct and, therefore, to the extent the MCFA is ultimately interpreted to require a contributor to itself register, that interpretation will not be applied retroactively. That conclusion is wholly appropriate and, indeed, to conclude otherwise would be incredibly disingenuous and likely held unconstitutional.

In the Department's 2010 Guidance, it states that corporations, labor unions and domestic dependent sovereigns are permitted to contribute treasury funds to an IEC that is not their own. Nowhere in that Guidance does the Department state that such a contributor must itself register as a committee and, indeed, such a conclusion would almost certainly be deemed a First Amendment violation given it would serve no rational regulatory purpose and effectively chill the very rights that were declared fundamental in *MI Chamber of Commerce v Land*, 725 F. Supp.2d 665, 685 (2010). (In *Chamber v Land*, the Court held that the "solicitation and pooling of funds…in order to make those expenditures both larger and more effective—qualify as core political speech. That speech must be protected to the fullest extent possible, because the First Amendment creates an open marketplace where ideas, most especially political ideas, may compete without government interference." (Citations omitted). *Id.* The Court likewise stated that the State cannot "punish or interfere with these corporations if they choose to donate to" an IEC. *Id.* at 696.)

In addition, the statutory interpretation at issue is tenuous at best. The MCFA does not specify what a contributor to an IEC is or is not required to do, because an IEC is not recognized as a committee under the MCFA. In addition, the Department acknowledges that it has never interpreted the MCFA in the manner suggested, nor has it been its existing practice to require

contributors to register. While Mr. LaBrant cites to a letter purportedly sent by the Department in an entirely different context, the issue in that case was very different than the issue presented here. In that case, the complaint alleged that the entity had served as an illegal conduit for contributions to a SuperPAC by soliciting contributions from donors and then making a lump sum contribution to the SuperPAC without disclosing the names of the true donors. That is, however, not the issue presently before the Department, which is whether a contributor simply giving from its own general treasury funds—as expressly permitted by *Chamber of Commerce v Land* and the Department's 2010 Guidance—is somehow required to register as a committee, despite the complete lack of statutory or agency notice or direction stating so.

I would therefore encourage the Department to stand by its preliminary determination that any future interpretation that would impose an obligation on an entity making a contribution to an IEC from its own treasury funds to itself register will not be applied retroactively. I further note that such a registration requirement, if imposed in the future, will likely be deemed unconstitutional[1], given it would provide absolutely no disclosure benefit to the Department or public, yet would impose significant and ongoing registration and filing burdens on potential contributors. As a practical matter, such a requirement would have a chilling effect sufficiently significant that it would undoubtedly result in the cessation of IECs in Michigan.

Very truly yours,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

Andrea L. Hansen

[1] At a minimum, such a registration requirement would raise significant First Amendment, due process and equal protection concerns.