STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

April 8, 2024

Attorney General Dana Nessel
G. Mennen Williams Building
525 W. Ottawa Street
Lansing, Michigan 48909
by e-mail

Dear Attorney General Nessel:

I write to request an opinion from the Attorney General (AG) regarding the Department of State's Personal Financial Disclosure Portal (Portal), created pursuant to our obligations under Proposal 2022-1 and the implementing statutes enacted by the Legislature on December 29, 2023. Specifically, I would like you to confirm whether some of the initial positions we have taken represent the proper interpretation of the statute or whether modifications are necessary. Understanding that your office likely cannot resolve these questions with enough time for our office to inform affected individuals in advance of the April 15, 2024, deadline, we will make certain disclosures optional for the time being, as further explained below.

Background

In November 2022, the people of Michigan voted overwhelmingly to adopt Proposal 2022-1. Its passage resulted in the incorporation of personal financial disclosure requirements into Article IV, Section 10 of the Michigan Constitution. Const 1963, art 4, § 10 (the amendment). Under the Constitution's new requirements, the governor, lieutenant governor, secretary of state, attorney general, and each member of the state legislature must submit an annual financial disclosure report that specifies assets, liabilities, sources of earned and unearned income, and other personal information that may disclose conflicts of interest.

The amendment required implementing legislation and Public Acts 281, 282, 283, 284, and 267 of 2023 (the acts) were enacted, effective February 13, 2024. The acts generally implement the reporting requirements listed in the constitution. 2023 PA 281 applies to public officers as mandated by the amendment. 2023 PA 282 requires candidates for public office to make generally the same financial disclosures as public officers. The constitutional amendment does not include candidates for public office. The acts also added modest reporting requirements for spouses of both public officers and candidates for public office.

As required by the amendment, state officials must provide their first report by April 15, 2024. In accordance with the acts, candidates for these offices will provide their first report by May 15, 2024. In 2025 and annually after, both officials and candidates (filers) will provide their reports or updated information by May 15 of each year.

Although the disclosure requirements were added to the Michigan Constitution in 2022, the implementing legislation was enacted on December 29, 2023, with a requirement that the disclosure portal be launched by March 15, 2024, leaving less than 3 months for the Department to develop requirements, program and test the portal, and publish instructions. The March 15 launch date was only a month before the filing deadline on April 15, and filers have subsequently raised questions about some of the items listed as required in the portal. As a result of these short timelines, a full review of the statutory and constitutional questions has not been possible. Since the launch, the Department has updated the instructional manual and published webinars in response to questions, but as additional questions are raised, it is clear that not all of them will be resolved in the next week and a full review would be preferrable.

Address of Source of Unearned Income and List of Securities and Investments

We have received questions about the requirement that filers using the Portal provide an address when they report the sources of unearned income and the list of securities/investments they are required to disclose. Some argue that they should not have to answer because the word "address" is not expressly required in the statute.

Section 2(b) of the amendment requires public officials to report "a description of assets and sources of unearned income." The PFD Act similarly requires a "complete statement" of "any sources of unearned income that exceed $200.00 during the reporting period". MCL 15.707(1).

Our position has been that a location is needed to identify and properly describe the actual source of income or investment/security listed; for example, simply writing "First Bank" would not actually identify the source or investment/security. (Notably, "name" is not listed in the statute either.) Our view is that a location is necessary to actually determine what the source of income or the security/investment listed is.

The Department seeks clarification from your office as to whether a location/address may be required so that the source of unearned income or security/investment listed can be clearly identified. Understanding that there is some expressed concern about fraud or identity theft if a street address is provided, for the time being the Department will require that filers disclose *only* the <u>city, state, and country</u> of the source of unearned income or the security/investment, but not the <u>street number</u>. This would mirror what appears on federal financial disclosure forms (for example: https://efdsearch.senate.gov/search/view/annual/164ea2bc-507e-4749-944b-fc58d3fcff85/)

The Department asks the Office of the Attorney General to provide a formal advisory opinion regarding whether an address can be required to clearly identify the sources of unearned income, securities and investments. For the time being, the Department will make providing exact location information (full street address with street number) information optional while requiring city, state and country (if applicable).

Lobbyist / Gift Information

We have received questions about some of the information that is required in the gift/lobbyist section of the Portal.

The acts specifically reference disclosure of "gifts received and reported by a lobbyist or lobbyist agent under state law." MCL 15.707(l). Our position has been that this information, including date and name/ID of lobbyist, is required because this is how lobbyist information is required to be reported under state law. As such, the description fields correspond to the reporting requirements found in state law, i.e., the Michigan Campaign Finance Act (MCL 169.207) and the Michigan Lobby Act (MCL 4.418).

Additionally, the Department seeks confirmation that the Portal's current requirement–that gifts and travel expenses be disclosed only if they are reported by lobbyists–is consistent with the statutes and the Constitution. Article IV, Section 10(2)(f) of the Constitution requires disclosure of "Gifts received and *required to be reported* by a lobbyist or lobbyist agent, as prescribed by state law." (emphasis added). Under MCL 15.707, the PFD Act requires public officers to disclose the following:

> "(l) A list of all gifts received and reported by a lobbyist or lobbyist agent under state law. (m) A list of all travel payments *received and reported* by a lobbyist or lobbyist agent under state law. (n) A list of each payment made by a lobbyist or lobbyist agent to a charity in lieu of honoraria." (emphasis added).

Similarly, under MCL 4.418, the Lobby Act requires a lobbyist or lobbyist agent to report expenditures related to lobbying. Relevant to required disclosure for public officers, the Lobby Act requires lobbyists to report expenditures for food and beverages provided for public officials that are above specified values, accounts "of every financial transaction" during the reporting period that involve a public official or a member of their immediate family when goods and services having a specified value are involved, and reporting of travel and lodging expenses paid for or reimbursed to a public official in connection with public business in excess of a specified value. The reports of every financial transaction "shall include the date and nature of the transaction, the parties to the transaction, and the amount involved in the transaction." MCL 4.418(1)(c).

For purposes of the PFD Act, "lobbyist" and "lobbyist agent" are defined as those terms are defined in the Lobby Act. MCL 15.703(h)-(i). However, under the PFD Act, "gift" and "honorarium" are defined in reference to Michigan Campaign Finance Act ("MCFA"), not the Lobby Act. The Lobby Act prohibits a lobbyist or lobbyist agent from giving a gift. MCL 4.421.

However, despite not defining "gift" as the term is defined in the Lobby Act and the Lobby Act's prohibition on the giving of gifts, the PFD Act appears to link the reporting requirements of public officers set out in subsections (l) and (m) with the reporting requirements imposed upon lobbyists and lobbyist agents by including the language "and reported by a lobbyist or lobbyist agent under state law." MCL 15.707(1)(l)-(m). The inclusion of this language supports the conclusion that the only gifts or travel payments received that must be reported are those gifts and/or payments that were also "reported by a lobbyist or lobbyist agent under state law" because the "use of the conjunctive term 'and' reflects that both requirements must be met[.]" In re Koehler Estate, 314 Mich App 667, 681-682 (2016) (quotation marks and citations omitted).

Accordingly, under the language of the PFD Act, the public officer must have received a gift and/or a travel payment and that gift/travel payment must have been reported by a lobbyist or lobbyist agent to trigger the reporting obligation. Nonetheless, these are independent filing requirements. Thus, it would make the reporting complete, as the statute requires, to state not only the gift, but also from whom and when the gift or travel payment was made.

The final PFD Act reporting requirement related to lobbyists is "[a] list of each payment made by a lobbyist or lobbyist agent to a charity in lieu of honoraria." MCL 15.707(1)(n). The Lobby Act does not define honorarium; however, it does include an honorarium in its definition of "expenditure," MCL 4.413(2), and it requires expenditures to be reported in various categories under MCL 4.418. Despite this possible connection to the Lobby Act, the required reporting under MCL 15.707(1)(n) does not reference any other state law (other than defining lobbyist and lobbyist agent). MCL 15.707(1)(n) does not include any dollar value modifier to its requirement to list each payment made by a lobbyist or lobbyist agent to a charity in lieu of honoraria; accordingly, the Department concludes that all payments of any value made to a charity in lieu of honoraria must be reported.

The Department asks the Office of the Attorney General to provide a formal advisory opinion whether the Acts can be construed to require the filer to report from whom and when the filer received the gifts and travel payments referenced in 15.707(1)(l) and (m). Additionally, the Department asks the Office of Attorney General to provide a formal opinion on whether the Acts can be construed to require the filer to report all gifts received, all travel payments received, and all payments made by a lobbyist or lobbyist agent to a charity in lieu of honoraria, or only those items that have been reported by a lobbyist or lobbyist agent. For the time being, in light of concerns about the ability of filers to complete all of these fields, the Department will make the date and lobbyist name/ID fields optional.

Declaratory Ruling

Since launching the portal, the Department has received numerous questions from individuals required to file personal financial disclosures. Those questions vary from strictly technical questions about how the portal works to questions about how and whether certain items must be disclosed under the PFD Act. A few examples of questions received include:

- May I save information in the MiTN program and return to the program later to complete it?
- Is a vehicle an asset for reporting purposes?
- Does a 401K have to be listed under securities or under assets?
- If a person is not drawing from their pension, is it required to be listed as unearned income?

The Department does not dispute that it should answer questions from filers that are strictly technical in nature. The Department is the entity that created the technical requirements and specifications; therefore, it is best equipped to provide answers regarding the functionality of the portal. However, because the secretary of state is charged with reviewing and resolving complaints alleging violations of the PFD Act, MCL 15.713(5), we are unclear whether it would be appropriate for the Department, as the enforcing agency, to answer informal requests for guidance and interpretation of the PFD Act.

The PFD Act, similar to the MCFA, outlines a process for requesting a declaratory ruling. The secretary of state is required to issue a declaratory ruling if a person requests one and has provided a reasonably complete statement of facts necessary for the ruling. MCL 15.713(2). A declaratory ruling under this act must be made available, without charge to the public on the Departments webpage. *Id.*

The Department is asking the Office of the Attorney General to provide a formal advisory opinion on whether the Department may informally answer questions regarding what is or is not required to be disclosed under the PFD Act. Additionally, the Department asks what types of questions the Department should decline to answer informally and instead required to be answered through the declaratory ruling process.

Sincerely,

Jocelyn Benson

Jocelyn Benson
Secretary of State