STATE OF MICHIGAN

JENNIFER M. GRANHOLM, ATTORNEY GENERAL

CAMPAIGN FINANCE ACT:

CASINOS:

ELECTIONS:

GAMBLING:

POLITICAL ACTIVITY:

Casino officer or manager making contribution to independent committee

Independent committee's obligation to return prohibited contribution

Section 7b of the Michigan Gaming Control and Revenue Act prohibits an officer or managerial employee of a casino, enterprise, or of a licensed casino supplier from making a contribution to an independent committee operated by a profe organization to which the officer or employee belongs.

An independent committee that receives a contribution prohibited by section 7b of the Michigan Gaming Control and R is not subject to a penalty for failure to return the contribution unless the committee first receives a notice from the Secı State in accordance with section 30 of the Michigan Campaign Finance Act.

Opinion No. 7099

January 9, 2002

Honorable Dale L. Shugars
State Senator
The Capitol
Lansing, MI 48909-7536

You have asked two questions both of which concern section 7b of the Michigan Gaming Control and Revenue Act (Gi 1996 Initiated Law, MCL 432.201 *et seq.*

The scope and purpose of the Gaming Act is described in its title, which states, in part, that it is:

> An act to provide for the licensing, regulation, and control of casino gaming operations, manufacturers and distributors of gaming devices and gaming related equipment and supplies, and persons who participate in gaming; . . . *to restrict certain political contributions*; [and] to establish a code of ethics for certain persons involved in gaming; . . . [Emphasis added.]

In furtherance of this purpose, section 7b of the Gaming Act contains provisions that prohibit contributions by certain p

connected with casino operations or with licensed casino suppliers to political candidates and committees, including co to an "independent committee" as that term is defined by section 8 of the Michigan Campaign Finance Act, 1976 PA 3 169.201 *et seq.*[1]

Your first question asks whether section 7b of the Gaming Act prohibits an officer or managerial employee of a casino, enterprise, or of a licensed casino supplier from making a contribution to an independent committee operated by a profe organization to which the officer or employee belongs.

To illustrate your concern, you describe a series of hypothetical situations each involving a certified public accountant to make a contribution to the Michigan Association of Certified Public Accountants Political Action Committee (MAC You advise that MACPAPAC is an independent committee established by the Michigan Association of Certified Public Accountants to identify and make contributions to candidates who support the advancement of the practice of certified accounting and that it solicits and accepts contributions only from members of the Association. You ask if section 7b of Gaming Act would operate to prohibit a certified public accountant from contributing to MACPAPAC if the accountan example, (1) an officer of a non-accounting firm that is a licensed casino supplier; (2) employed by, but owns no equity accounting firm that is licensed as a casino supplier; or (3) the owner of an equity share in a large accounting firm that as a casino supplier. You also inquire whether it would make a difference if the employee in any of these circumstance role in directing or controlling the independent committee.

Subsections 7b(4) and (5) of the Gaming Act provide in pertinent part that:

> (4) A licensee or person who has an interest in a licensee or casino enterprise, . . . or person who has an interest in a licensee or casino enterprise, shall not make a contribution to a candidate or a committee . . . .
>
> * * *
>
> (5) A licensee or person who has an interest in a licensee or casino enterprise, . . . or a person who has an interest in a licensee or casino enterprise, shall not make a contribution to a candidate or committee through a legal entity that is established, directed, or controlled by any of the persons described in this subsection . . . .

Violation of these provisions is a felony punishable by 10 years imprisonment, a $100,000 fine, and a permanent bar ag receiving or maintaining a casino-related license. Section 18(1)(f) of the Gaming Act. These provisions expressly prohi contributions to a political candidate or committee not only by a licensee but also by a "person holding an interest" in a in a casino enterprise.[2] Section 7b(2) specifically defines what shall be considered to be such an interest:

> (2) For purposes of this section, a person is considered to have an interest in a licensee or casino enterprise if any of the following circumstances exist:
>
> (a) The person holds at least a 1% interest in the licensee or casino enterprise.
>
> (b) The person is an *officer or managerial employee of the licensee* or casino enterprise as defined by rules promulgated by the board.
>
> (c) The person is an officer of the person who holds at least a 1% interest in the licensee or casino enterprise.
>
> (d) The person is an independent committee of the licensee or casino enterprise. [Emphasis added.]

Thus, the plain and unambiguous terms of section 7b(2)(b) make it clear that any person who is an officer or a manager

employee[3] of a licensee, or of a casino enterprise, is a "person who has an interest in" that licensee or enterprise; such a subject to the prohibition in sections 7b(4) and (5) of the Gaming Act. Moreover, while ownership of a financial interes more in the licensee or enterprise is sufficient, in and of itself, to give the person an "interest in" the casino licensee or e under section 7b(2)(a), no such financial requirement is included in section 7b(2)(b). Nor does section 7b(2)(b) make ar distinction based upon whether the person does or does not play a role in directing the affairs of the independent comm which the contribution is being made. To the contrary, under the plain language of section 7b(2)(b), the only relevant fa whether the person is in fact an officer or managerial employee of the licensee or casino enterprise; if so, that person is from making a contribution to an independent committee even if he or she does not hold a financial interest in the licen casino enterprise.

These explicit provisions of section 7b directly address each of the specific examples described in your inquiry:

> 1. An individual who is an officer in an accounting firm that is a licensed casino supplier is "an officer or managerial employee of" that licensed supplier and, therefore, clearly does "have an interest in" that licensee as defined by section 7b(2)(b); such an individual would be prohibited from contributing to MACPAPAC under sections 7b(4) and (5).
>
> 2. An individual who is employed by a large accounting firm that is licensed as a casino supplier, but who owns no equity interest in that firm, does not have an interest in that licensee within the meaning of section 7b, provided that the individual is neither an officer nor a managerial employee of the licensee; such an employee, therefore, would not be prohibited from making a contribution to MACPAPAC.
>
> 3. Finally, the owner of an equity interest in a large accounting firm that is licensed as a casino supplier does have an interest in that licensee if the equity interest is equal to or greater than a 1% interest; such a person, therefore, would be prohibited from contributing to MACPAPAC under sections 7b(4) and (5).

It is my opinion, therefore, in answer to your first question, that section 7b of the Michigan Gaming Control and Reven prohibits an officer or managerial employee of a casino, a casino enterprise, or of a licensed casino supplier from makir contribution to an independent committee operated by a professional organization to which the officer or employee bel

Your second question asks whether an independent committee that receives a contribution prohibited under section 7b c Michigan Gaming Control and Revenue Act is subject to a penalty for failure to return the contribution before the comr notified by the Secretary of State in accordance with section 30 of the Michigan Campaign Finance Act.

The Campaign Finance Act regulates the financing of political campaigns. It was enacted "to ensure the integrity of Mi political campaigns and offices, thereby protecting the interest of the public at large, individual citizens, and candidates political office." Senate Legislative Analysis, SB 1570, December 17, 1976.

Section 30 of the Campaign Finance Act, which prohibits a committee from knowingly maintaining the receipt of a con prohibited under section 7b of the Gaming Act, provides that:

> (1) A committee shall not knowingly maintain receipt of a contribution from a person prohibited from making a contribution during the prohibited period under section 7b of the Michigan gaming control and revenue act, the Initiated Law of 1996, MCL 432.207b.

The term "knowingly," as it is used in this section, is narrowly defined by section 30(2) as follows:

> (2) For purposes this section, a committee is only considered to have knowingly maintained receipt of a contribution prohibited under subsection (1) and is subject to a penalty[4] for that violation if both of the following circumstances exist:
>
> (a) The secretary of state has, by registered mail, notified the committee that the committee has

received a contribution in violation of this section and has specifically identified that contribution.

(b) The committee fails to return the contribution identified under subdivision (a) on or before the thirtieth business day after the date the committee receives the notification described in subdivision (a).

Under section 30 of the Campaign Finance Act, a committee that *knowingly* maintains receipt of a prohibited contributi return it or be subject to a penalty. By adopting the very limited definition of the term "knowingly" as provided in secti and (b), the Legislature has chosen to require a committee to return a contribution prohibited under section 7b of the Ga only *after* it receives specific written notification from the Secretary of State.

It is my opinion, therefore, in answer to your second question, that an independent committee that receives a contributi prohibited by section 7b of the Michigan Gaming Control and Revenue Act is not subject to a penalty for failure to retu contribution unless the committee first receives a notice from the Secretary of State in accordance with section 30 of th Campaign Finance Act.

JENNIFER M. GRANHOLM
Attorney General

[1]The Gaming Act regulates, *inter alia,* casino suppliers and requires suppliers to be licensed according to standards set Section 7a. Under the Gaming Act, a "licensee" is a person who holds either a casino license or a supplier's license. Sec (c) and (d).

[2] Sections 7b(4) and (5) of the Gaming Act also purport to restrict political contributions by a "spouse, parent, child, or child" of certain casino-related licensees or interest holders. OAG, 1997-1998, No 7002, pp 206, 210 (December 17, 19 concluded that those portions of sections 7b(4) and (5) that purport to prohibit political contributions by a spouse, paren spouse of a child violate the free speech provisions of the First Amendment to the United States Constitution and are, th unconstitutional.

[3] The Administrative Rules promulgated by the Michigan Gaming Control Board [1998 MR 6, R 432.1101 *et seq*] do n either "officer" or "managerial employee." However, the Gaming Act itself defines both terms. A "managerial employe defined at section 2(cc) as "a person who by virtue of the level of their remuneration or otherwise holds a management, supervisory, or policy making position with any licensee under this act, vendor, or the board." Section 7b(1)(e) defines "officer" as either of the following: (i) An individual listed as an officer of a corporation, limited liability company, or l liability partnership. (ii) An individual who is a successor to an individual described in subparagraph (i).

[4] Sections 15(9)-(11) of the Campaign Finance Act authorize the Secretary of State to investigate alleged violations of t in appropriate cases, to issue an order requiring payment of a civil fine. Section 15(12) authorizes the Secretary of State alleged violations of the act to the Attorney General for consideration of criminal prosecution.

STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
TREASURY BUILDING, LANSING, MICHIGAN 48918

May 17, 2002

Andrew Nickelhoff
Sachs Waldman
1000 Farmer
Detroit, Michigan 48226

Dear Mr. Nickelhoff:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

Your request presents the following facts:

James Barcia is a member of the United States House of Representatives and maintains a congressional candidate committee. Under the Federal Election Campaign Act ("FECA"), he is allowed to receive $2,000 per election cycle ($1,000 per election) from an individual and $5,000 per election ($10,000 per election cycle) from a PAC.

Representative Barcia is considering organizing a senate candidate committee pursuant to the MCFA. The MCFA allows a candidate for senate to receive $1,000 per election cycle from an individual and $10,000 per election cycle from a PAC.

You have asked whether Representative Barcia's congressional candidate committee may transfer any PAC funds to a MCFA-based senate committee, and if so, what conditions or restrictions would govern such a transfer.

LAW

Until 1999, the MCFA did not contemplate the existence of federal candidate committees. That year, the legislature amended the definition of "elective office" to include federal candidate committees for purposes of Section 57 of the MCFA. Otherwise, the Act is silent regarding the status of federal candidate committees and federal-to-state transfers.

The MCFA does contemplate transfers between MCFA committees. Section 45(1) states that" [A] person may transfer any unexpended funds from 1 candidate committee

to another candidate committee of that person if the contribution limits prescribed in Section 52 or 69 for the candidate committee receiving the funds are equal to or greater than the contribution limits for the candidate committee receiving the funds and if the candidate committees are simultaneously held by the same person."

DECLARATORY RULINGS AND INTERPRETIVE STATEMENTS

The Department has addressed the issue of federal-to-state transfers through its declaratory rulings and interpretive statements. In 1978, the Department informed Phillip J. Arthurhultz that he was prohibited from transferring funds from his FECA congressional candidate committee to his MCFA Senate Committee. In reaching this conclusion, the Department applied Section 45's rationale to federal-to state transfers. The Department stated as follows:

> Section 52(1) of the Act (MCLA 169.252) establishes a contribution limit of $450 per election for the elective offices of State Senator [Now $1,000 per election cycle]. It is the understanding of the Department [that] the Federal Elections Campaign Act sets a contribution limit in excess of that amount for Congressional office. Section 45(1) of the [MCFA] precludes the transfer of funds from one candidate committee of an individual to another candidate committee of the same individual if the contribution limits of the former committee are greater than the limits of the recipient committee.
>
> Although in the hypothetical you present, the transferring committee is subject to Federal Law and the recipient committee is subject to the Act, Section 45(1) serves to preclude receipt of the funds by the State Senate Committee. This interpretation is consistent with the contribution limits imposed by the Act.

The Department again addressed federal-to-state transfers in its 1992 Wolpe declaratory ruling. In that ruling, the Department stated that:

> In a 1978 letter to Mr. Phillip J. Arthurhultz, the Department indicated that a candidate committee for state senate could not receive a transfer of funds from a congressional campaign committee because the contribution limits for the federal committee exceeded the contribution limits for the state committee . . .
>
> Contribution limits for federal campaign committees continue to be calculated on a per election basis. Pursuant to Section 315 of the Federal Election Campaign Act of 1971 [2 USC 441a], contributions to congressional campaign committees are limited to $1,000 for each election if the contributor is not a multi-candidate committee. For multi-candidate committees, the limit is $5,000 for each election. If calculated

> over the election cycle for the United States House of Representatives, the corresponding contribution limits would be $2,000 and $10,000.
>
> When the contribution limits for gubernatorial candidate committees and congressional campaign committees are compared on either a per election or election cycle basis, the contribution limits for the gubernatorial committee are greater than the contribution limits prescribed in the FECA for federal campaign committees. Therefore, in answer to your first question, Section 45(1) of the [MCFA] does not preclude you from transferring funds raised by your congressional campaign committee to a candidate committee organized to support your candidacy for the office of Governor, provided the federal and state committees are simultaneously held.

Thus, while the MCFA does not define federal candidate committees, the department's interpretive statements and declaratory rulings have, on two occasions, treated federal candidate committees as if they were MCFA committees for purposes of Section 45.

QUESTIONS

Your question asks whether Representative Barcia can transfer PAC funds from his congressional committee to his state senate committee. According to one aforementioned ruling, individual contributions would be prohibited because the election cycle limit for a federal congressional candidate committee ($2,000) exceeds the election cycle limit for a MCFA-based Senate candidate ($1,000). The answer is not as clear with respect to PAC transfers.

The Department does not interpret Section 45 as allowing the transfer of PAC funds from a federal congressional candidate committee to a MCFA senate committee. Section 45's purpose is to allow a candidate to use campaign funds that he or she has accumulated to run for a similar or higher office. For example, a MCFA house candidate committee can transfer funds to a MCFA senate candidate committee, but no contribution, regardless of amount, can be transferred from a committee with higher limits to a committee with lower limits. The test is whether a candidate committee wishing to transfer funds to a simultaneously held committee meets Section 52's limitations for all contributions, whether individual or PAC.

We reach this conclusion for several reasons. First, the Michigan legislature was silent regarding a federal candidate running for a state office. The Department is therefore reluctant to sanction a more liberal standard with regard to federal-to-state transfers. While the Department has allowed transfers among candidate committees, it has only done so when all contribution limits for the contributing committee ($2,000 and $10,000) were lower than the contribution limits for the recipient committee ($3,400 and $34,000). We see no reason to depart from this rationale.

Second, the PAC contribution limits for congressional candidates at the time of the enactment of the MCFA ($10,000) were greater than the PAC limits for a Michigan Senate Candidate ($9,000). Section 45 is essentially unchanged since 1976, while Section 52 has been amended. We find it unlikely that the legislature, in increasing Section 52's contribution limits, intended to allow federal-to-state transfers of contributions from PACs but not those from individuals for MCFA senate candidates. Had the legislature intended to do so, we believe that it would have amended Section 45 itself.

Finally, the Department would undermine the legislative intent behind Section 45 if it allowed federal candidate committees to bifurcate contributions and transfer only PAC funds. Once a distinction is made between transferable and non-transferable funds, numerous other transfers are possible. For example, a candidate with a MCFA senate committee may wish to transfer contributions of $500 or less to a MCFA house committee. Such a transfer violates Section 45, because funds from a candidate committee with a $1,000 contribution limit are transferred to one with a $500 limit. Yet once the bifurcation rationale is accepted, the answer is not clear. One could argue that contributions of $500 or less to the senate committee can be transferred to a house committee. Clearly, such transfers violate both the letter and spirit of Section 45.

Because the legislature did not authorize bifurcated transfers, it also did not provide standards to effectuate them. Consider the situation where a congressional candidate committee received a $10,000 PAC contribution in the 1998, 2000, and 2002 congressional election cycles ($30,000 total). What amount could be transferred to a MCFA senate committee? The entire amount? The money the congressional candidate raised during the 2002 MCFA senate election cycle ($10,000 in 2000 and $10,000 in 2002 for a total of $20,000)? If a PAC has already given $10,000 to a candidate's congressional candidate committee in 2002, may it also give $10,000 to his MCFA senate committee? The legislature, by its silence on these questions, apparently rejected any transfers other than Section 45's "equal or greater" standard.

CONCLUSION

We note that the entire federal-to-state transfer issue may be mooted by the recent amendments to the FECA. These amendments increased the amount that individuals can contribute to FECA house and senate candidate committees from $2,000 per election cycle to $4,000 per election cycle. The new $4,000 contribution limit exceeds the MCFA's $3,400 limit for statewide office. As a result, after the 2002 election cycle, a federal candidate will be prohibited from transferring funds to a simultaneously held MCFA committee.

Finally, the legislature may wish to address the issue of federal-to-state transfers. The Department has interpreted Section 45 to allow certain transfers between federal and state committees. In the era of term limits, we may see more federal candidates seeking statewide office. If the legislature wishes to allow or disallow federal-to-state transfers in the future, it should consider amending the MCFA.

Thank you for you inquiry. Please contact the Department at (517) 241-3463 if you have any additional questions.

Sincerely,

Robert T. Sacco

Robert T. Sacco, Director
Regulatory Services Administration

RTS/DEM/kc

2-02-CL

STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
LANSING, MICHIGAN 48918

June 14, 2002

Judith Corley
Perkins Coie
607 Fourteenth Street, Northwest
Washington, D.C. 20005

Dear Ms. Corley:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

Your request presents the following facts:

EMILY's List is a political committee membership group, "incorporated for political liability purposes only." It is a national political organization that supports candidates for both federal and nonfederal elections. EMILY's List is registered with the Federal Election Commission (FEC) and with numerous states throughout the nation. In Michigan, EMILY's List is registered and qualified as an independent committee.

As described in a 1993 request for a Declaratory Ruling, EMILY's List suggests support for specific candidates through a series of mailings. Each mailing discusses between four and eight candidates. The mailings provide biographical and political information about the featured candidates while asking for contributions to these candidates.

The recipient decides which candidate(s) to support, if any, writes a personal check made payable to each candidate, places the checks into a postage paid envelope provided with the mailing, and sends the contributions back to EMILY'S List. Because of the volume of mail, the envelopes are actually received by a vendor—a caging company—that opens the envelopes and distributes the individual checks for deposit in the appropriate recipient's bank account.

LAW

2001 P.A. 250 amended the MCFA to regulate certain bundling activities. The amendments define the following terms:

> Sec. 2. (4) "Bundle" means for a bundling committee to deliver 1 or more contributions from individuals to the candidate committee of a candidate for statewide elective office, without the money becoming money of the bundling committee.
>
> Sec. 2. (5) "Bundling committee" means an independent committee or political committee that makes an expenditure to solicit or collect from individuals contributions that are to be part of a bundled contribution, which expenditure is required to be reported as an in-kind expenditure for a candidate for statewide elective office.

P.A. 250 also amended Sections 31 and 52 of the MCFA to create a separate $34,000 limit for bundled contributions that are delivered by an independent committee. Specifically, Section 31(2) provides that for purposes of contribution limits, a bundled contribution is attributable to both the individual contributor and the bundling committee that delivered the contribution. Pursuant to Section 52(12), an independent committee may only deliver a total of $34,000 in attributed contributions.

Finally, P.A. 250 amended Section 26 of the MCFA to require detailed reporting of bundled contributions by the bundling committee and the recipient candidate committee.

For the remainder of this communication, "candidate" shall mean candidate for statewide office.

QUESTIONS & ANSWERS

You ask the following questions:

1) What is included within the term "bundled contribution?"

A committee becomes a bundling committee when it makes an expenditure to either solicit or collect a contribution that is to be part of a bundled contribution for a candidate. A bundled contribution is a contribution from one or more individuals that is delivered by a bundling committee to a candidate for statewide office. Only those contributions that are delivered to a candidate are part of a bundled contribution.

2) What constitutes "delivery" of contributions?

A committee must receive contributions for a candidate before it can deliver them. A committee that encourages individuals to send contributions directly to a candidate committee has neither received nor delivered the contributions, and such activity does not constitute bundling. It does, however, constitute an in-kind expenditure by the committee to the candidate.

EMILY's List is not precluded from making expenditures to solicit contributions for any candidate as long as the individual contributions are sent directly to that candidate. The cost of the solicitation and any other cost incurred to deliver the contribution, such as the cost of a stamped envelope addressed to the candidate, would count towards EMILY's List $34,000 limit on direct and in-kind contributions. However, contributions that are sent directly to the candidate are not bundled contributions. Therefore, they are not attributable to EMILY's List under Section 31(2) and are not subject to the $34,000 limit on bundled contributions established in Section 52(12).

3) What are the definitions of "collect" and "deliver" as used in the definition of bundling committee?

"Collect" and "deliver" are not defined in the MCFA and we cannot supply definitions other than the common usage of those terms. As mentioned above, a committee becomes a bundling committee by making expenditures to solicit or collect contributions that are to be bundled. It is only when the contributions are delivered that they become attributable to EMILY's List for purposes of Section 52(12) and subject to the reporting requirements of Section 26(4), (5) and (6).

4) If EMILY's List receives a contribution made to a candidate and returns it to the original donor, may it assume that the contribution does not count against its limit to the candidate?

Pursuant to Section 4(3)(a), an offer or tender of a contribution that is returned within 30 business days is not a contribution. Therefore, a committee that receives a contribution and returns it to the contributor within 30 business days may do so without that contribution being considered a "bundled contribution." However, any expense incurred in facilitating a contribution to a candidate must be reported as an in-kind contribution. For example, the expense incurred to return a contribution that includes mailing instructions or information supporting a particular candidate would be deemed an in-kind contribution.

5) What costs or expenses must be included in calculating the in-kind expenditure made "to solicit or collect from individuals contributions that are to be part of a bundled contribution?"

We do not know precisely how EMILY's List operates and thus cannot give you an exhaustive list of what must be considered an in-kind expenditure. Certainly proportionate expenses incurred for salaries, postage, printing, telephone, computers, and all other services and products which are in used to assist a candidate must be considered an in–kind contribution to a candidate.

CONCLUSION

We have attempted to answer your questions regarding the new "bundling" provisions of the MCFA. It is clear that P.A. 250 does not preclude EMILY's List from making expenditures to solicit an unlimited amount of contributions for any candidate as long as the individual contributions are sent directly to the candidate and not to EMILY's List. Contributions that are sent directly to the candidate are not bundled contributions, and they are not attributable to EMILY's List or subject to the $34,000 limit on bundled contributions. Under the amendatory law, an independent committee can still make a contribution to a candidate committee of $34,000. An independent committee may also collect and deliver up to $34,000 worth of individual contributions. Finally, an independent committee, rather that contributing directly to a candidate, may spend up to $34,000 in solicitation and mailing costs that facilitate the contribution of funds directly from a donor to a candidate committee.

Thank you for your inquiry. Because it did not present sufficient facts for the Department to issue a declaratory ruling, this response should be considered an interpretive statement. If you have additional questions, please contact the Bureau of Legal Services at (517) 241-3463.

Sincerely

Robert T. Sacco

Robert T. Sacco, Director
Regulatory Services Administration

RTS/kc

STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF [illegible]
LANSING, MICHIGAN [illegible]

August 26, 2002

Norman C. Witte
119 E. Kalamazoo
Lansing, Michigan 48933

Dear Mr. Witte:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

Your request presents the following facts:

You state that your office represents a number of entities that are prohibited by Section 54 of the MCFA from making contributions and expenditures in Michigan elections (Hereafter Section 54 entities). These Section 54 entities intend to use their treasury funds to produce issue ads during the 2002 election cycle. (For purposes of this letter, the term "issue ad" shall mean any communication that does not expressly advocate the election or defeat of a candidate.) To produce the ads, the entity plans to hire vendors that may also be producing ads for the candidate.

You also state that notwithstanding any request or suggestion by a candidate (or any vendor or agent of a candidate) the Section 54 entity shall exercise exclusive direction, control, or decision-making authority over the content, timing, location, mode, intended audience, volume or distribution or frequency of placement of the issue ads. Furthermore, no candidate shall be allowed to organize, supervise, or create any issue advocacy communication distributed by the Section 54 entity. However, the entities plan to conduct meetings with the candidate and may ask the candidate for photographs and other information.

While the Department accepts your statement of facts, we do not necessarily accept that the Section 54 entity shall exercise exclusive direction, control, or decision-making authority over the content, timing, etc. of the ads. Ultimately, whether direction, control, and decision-making authority is exercised by a Section 54 entity, a candidate committee, or some combination thereof is a legal conclusion, rather than a factual contention.

QUESTIONS PRESENTED

You ask us to:

1) Confirm that the Section 54 entity's issue advocacy activities, which are not otherwise subject to the Act's requirements, do not become subject to the Act's requirements where the Section 54 entity intends to employ certain vendor(s) or agent(s) (who may also be rendering services to a candidate who may be referenced in the Section 54 entity's issue ads) in order to create, produce, or distribute issue advocacy ads.

2) Please confirm that the Section 54 entity's issue advocacy activities, which are not otherwise subject to the Act's requirements, do not become subject to the Act's requirements where the Section 54 entity communicates with a candidate within the parameters as outlined above.

ANSWER

With respect to your first question, the Department would not consider the employment of a vendor or agent that also works for a candidate committee to be *per se* evidence of direction or control by the committee. Certainly a person that is employed by both a candidate committee and a Section 54 entity could be in a position to direct or control an issue ad on behalf of one or the other. If other circumstances create the appearance of direction or control by the candidate committee, we may seek more information regarding the vendor's or agent's role in the creation of the issue ads

With respect to your second question, please see our explanation below.

STATUTORY LAW

The MCFA governs "contributions" and "expenditures". "Contribution" is defined, in relevant part, as "[A] payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person, made for the purpose of influencing the nomination or election of a candidate, or for the qualification, passage or defeat of a ballot question."

"Expenditure" means "[A] payment, donation, loan, or promise of payment or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. Expenditure includes . . . A contribution or transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question."

"Independent expenditure" means an "expenditure 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."

CASE LAW

While both definitions of contributions and expenditures use terms of influencing, assisting, or opposing candidates or ballot questions, the U.S. Supreme Court has limited the reach of this language. In *Buckley v. Valeo*, 424 U.S. 1 (1976) the Court held that, in effect, money was speech and that any regulation of the amount of money spent constituted a burden on a person's first amendment rights.

According to the Court's "strict scrutiny" test, any law or regulation that burdens constitutional rights must be shown to serve a compelling governmental interest and be narrowly tailored to meet that interest.

Based on that test, the court concluded that Congress could not cap independent expenditures. The court found that any limitation on spending infringed on political speech and did not relate to any governmental interest in prohibiting corruption, because the speaker was independent of the candidate. In addition, the Supreme Court required words of express advocacy—"vote for", "vote against", "elect", "defeat", etc.—before a communication could be deemed an independent expenditure and therefore subject to governmental regulation. As a consequence, communications that do not expressly advocate the election or defeat of a candidate are generally exempt from regulation.

The Court treated contributions differently. The Court held that the government had a compelling interest in preventing the corruption, or even the appearance of corruption, that could occur if wealthy contributors were allowed to give large sums of money to candidate committees. Further, unlike expenditures, the limitation of contributions burdened only a limited degree of political speech—"the symbolic expression of support" between a contributor and a candidate.

This bifurcated treatment of contributions and expenditures has left a middle ground that has yet to be addressed in Michigan—the issue ad that is produced with the active participation of the candidate or candidate committee. Under this scenario, a third party, such as a Section 54 entity, produces an issue ad with the cooperation of the candidate committee, but the ad does not expressly advocate the candidate's election or defeat.

Case law on this issue has been minimal. Neither the U.S. Supreme Court, the sixth Circuit Court of Appeals, nor the Michigan Supreme Court has addressed this issue. Undoubtedly the strongest case in favor of regulating these coordinated issue ads is the *Federal Election Commission v. Christian Coalition*, 52 F.Supp.2d 45 (1999). In that case, the FEC had brought charges against the Christian Coalition and several candidate committees, alleging that the coordination between them amounted to corporate contributions. The court dismissed nearly all of the charges (except one where the coalition provided a valuable

mailing list to a campaign). However, the court noted the FEC could regulate what it called "expressive coordinated expenditures"—issue communications (ads, fliers, booklets, etc.) which a corporation or union closely coordinated the location, timing or volume with a candidate committee.

> It is worth noting that the court rejected the FEC's broad interpretation of coordination, in which virtually any contact between a candidate committee and a corporation or union that was later followed by the production of issue communication would be deemed an illegal contribution. The court rejected this theory, noting that "Discussion of campaign strategy and discussion of policy issues are hardly two easily distinguished subjects . . . The FEC's tidy distinction between discussion of campaign strategy and mere lobbying is cold comfort for those who seek to discuss with a candidate an issue that is at the time dominating the campaign . . . The record demonstrates that a candidate's decision when to take a stand, where to stand, and how to communicate the stand on a policy issue are often integral parts of the campaign strategy. . . a candidate frequently listens to the concerns of sympathetic constituencies or factions before making those important strategic decisions.

Christian Coalition is noteworthy for two other reasons. First, the FEC had a law and regulations that prohibited coordination and arguably allowed it to take action against the coalition and the campaigns. The Department of State has only the "direction or control" standard. Second, the court admitted that to find this close coordination would require a thorough investigation that would be very fact-intensive. The FEC has subpoena power and can compel the production of documents and sworn testimony. Indeed, the *Christian Coalition* case took 6 ½ years and involved 81 separate depositions of 48 individuals. It involved 49 Coalition state affiliates that produced over 100,000 pages of material. The Michigan Department of State does not have subpoena power, cannot compel witness testimony, and, quite simply, is limited in creating a factual record from which it might argue that a candidate has exercised direction or control over the creation of an issue ad.

Other courts have held that the FEC does not have the authority to regulate issue communications. For example, in *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), which concerned the corporate funding of a political rally, the D.C. Circuit stated:

> The mere fact that corporate donations were made with the consent of the candidate does not mean that a contribution within the meaning of the Act has been made. Under the Act this type of "donation" is only a "contribution" if it first qualifies as an "expenditure" and, under the FEC's [then] interpretation, such a donation is not an expenditure unless someone at the funded event expressly advocates. . . the election or defeat of a candidate. An objective, bright-line test for distinguishing between permissible and impermissible corporate donations . . . is necessary to enable donees and

> donors to easily conform their conduct to the law . . . A subjective test based upon the totality of the circumstances would inevitably curtail permissible conduct . . . in this politically charged area, bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results."

Other courts have also curtailed the government's efforts to regulate coordinated issue advocacy. The District Court in Colorado in *FEC v. Colorado Republican Campaign Committee* 839 F. Supp. 1448 ((D. Col 1993) prohibited the FEC from regulating expenditures that did not contain issue advocacy, holding that the FEC's statutory powers to regulate expenditures did not begin until words of express advocacy were spoken. The District Court of Maine, in *Clifton v. FEC*, 927 F. Supp 493 (D. Me. 1996), also required express advocacy before the FEC could regulate expenditures, holding "As long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication to turn a protected expenditure into an unprotected contribution to a candidate."

MICHIGAN

The Department has not had many occasions to address the question of coordinated issue advocacy. It has tried to limit issue ads in Michigan elections. In 1998, at the direction of Secretary of State Candice Miller, the Department promulgated a rule that prohibited Section 54 entities from running issue ads that contained a candidate's name or likeness 45 days before an election. 1999 AC, R 169.39b. The rule was struck down as unconstitutional in both the Western and Eastern District Courts of Michigan. *Right to Life of Michigan v. Miller*, 23 F. Supp.2d 766 (1998); *Planned Parenthood of Michigan v. Miller*, 21 F. Supp.2d 740 (1998). The Department has also issued an interpretive statement that concerned Section 54 entities and their involvement in elections. The statement affirmed that Section 54 entities were free to use treasury dollars to run ads that did not expressly advocate the election or defeat of a candidate. However, the statement did not address whether a candidate committee could direct or control a Section 54 entity to run issue ads on its behalf. (Statement to Katherine Corkin Boyle, dated June 15, 2001.)

Finally, the Department dismissed a complaint in which express advocacy advertisements were produced by a political party after it informed the candidate of its intention to create the ads and asked for items—such as photographs and the names of supportive constituents—to assist it in creating the ads. The Department deemed these communications to be independent expenditures, for, unlike the FECA and its accompanying regulations, coordination between a candidate and a third party is irrelevant to a determination of whether a contribution has been made. Only if a candidate directs or controls the creation of an express advocacy communication would it be deemed a contribution. While this matter concerned the distinction between an independent expenditure and a contribution, it utilized the same analysis that would be employed to determine whether an issue ad had, in fact, become a contribution. (March 15, 2002 dismissal letter of LaBrant v. Virg Bernaro and the Michigan Democratic Party.)

CONCLUSION

After a thorough review of the MCFA, federal case law, and previous departmental declaratory rulings and complaints, we conclude that we do not have the authority to regulate issue ads.

This in no way endorses some of the so-called issue ads, which are often more vicious than election ads. Clearly, many if not most of these issue ads are campaign ads without words of express advocacy. Moreover, because they are not considered campaign ads, relevant information, such as who paid for them, is often not disclosed.

However, the Department's responsibility is to enforce the law, regardless of whether we like it or not. Our reading of both Michigan and federal law indicates that we do not have the authority to regulate ads that do not contain words of express advocacy. Because the communication itself may not be regulated, the Department also does not have the authority to investigate whether a candidate has directed or controlled an issue ad. Moreover, even if the law were changed to give us that responsibility, we do not have the tools to do so. Without subpoena power and other tools needed to create a factual record, any determination of what was direction or control and what was mere communication between a candidate committee and a Section 54 entity would be mere speculation, which is not the same thing as due process or equal protection of the law.

Because your request does not include a statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Sincerely,

Robert T. Sacco

Robert T. Sacco, Director
Legal and Regulatory Affairs Administration

RTS/kc

STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
TREASURY BUILDING, LANSING, MICHIGAN 48918

December 9, 2002

Daniel J. Loepp
bluesPAC
602 West Ionia Street, B102
Lansing, Michigan 48933

Dear Mr. Loepp:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

Your request presents the following facts:

bluesPac is the separate segregated fund (SSF) of Blue Cross/Blue Shield. It currently obtains the annual affirmative consent required by the MCFA by "traditional" means, such as hand-written authorizations from members of its restricted class.

You wish to use the BC/BS e-mail and intranet system (system) to obtain the written authorization required by Section 55(6) of the MCFA. Your system requires a person to login and provide a password before he or she can access the site. Your proposed system will allow the contributor to revoke or modify his or her authorization at any time and will keep a permanent record of every transaction so that it can be retrieved in the event of an audit.

Whether BC/BS can use its electronic system to meet Section 55(6)'s annual affirmative consent requirements will depend on the requirements of the MCFA and the new Uniform Electronic Signatures Act.

CAMPAIGN FINANCE LAW

Section 55(6) of the MCFA reads, in relevant part "A corporation organized on a for profit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund [from an eligible contributor] on an automatic basis, including, but not limited to a payroll

deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year."

The administrative rule implementing this section, 1999 AC, R 169.39(d), states that "the affirmative consent required by Section 55(6) of the act shall be given in writing and shall include" the contributors name, the amount of money to be withheld, etc.

ELECTRONIC SIGNATURES

The title of the Uniform Electronic Signatures Act (UESA), 2000 P.A. 305, describes it as "An act to authorize and provide the terms and conditions under which information and signatures can be transmitted, received, and stored by electronic means." In determining whether BC/BS can use its computer system to meet the MCFA's requirements, three questions must be answered: 1) Does the UESA apply to the consent required by Section 55(6)? 2) Is the electronic record or signature described in the UESA "given in writing," as required by rule 39(d)? 3) Does the BC/BS system conform to the UESA requirements for electronic signatures and electronic records?

Section 3 of the UESA indicates that it applies to electronic records and electronic signatures relating to an action, or set of actions, occurring between 2 or more persons relating to the conduct of business, commercial or governmental affairs. Section 55 requires a contributor to a SSF to consent annually to having money taken out of her paycheck. The process of administering, and contributing to, a SSF appears to be a series of actions that relate to both business and governmental affairs. Thus, it appears that the UESA applies to the exchange that occurs between employer and employee in obtaining annual affirmative consent.

Rule 39 (d) requires a contributor to put his or her annual affirmative consent "in writing." If "writing" only means a hand-written response, using pen and paper, then the BC/BS proposal would seem to violate Rule 39(d). If "writing" can be defined to include some type of electronic means, then the proposed system would seem to comply with Rule 39(d).

Section 7(3) of the UESA states that "If a law requires a record to be in writing, an electronic record satisfies that law." Section 7(4) states "If a law requires a signature, an electronic signature satisfies the law." Finally, Section 8(1) provides "If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt." Clearly, if the BC/BS system creates an electronic record and electronic signature, it would comply with Rule 39(d)'s requirements of a "written" record.

Section 9 of the UESA sets forth minimal requirements for electronic signatures and electronic records. Section 9(1) reads "An electronic record or electronic signature is

attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including the showing of the efficacy of any security procedure applied to determine the person to whom the electronic record or electronic signature was attributable."

Your proposed record system appears to meet Section 9's requirements. Your system requires a password and will also send e-mail verification to the employee, confirming that the authorization has been received. Finally, your system will archive the submission of a contributor's "authorizing" signature, as well as the aforementioned e-mail verification.

CONCLUSION

The UESA allows an employer to meet the MCFA's written annual affirmative consent requirements by collecting electronic signatures. The MCFA's Rule 39(d) requires annual affirmative consent forms to be in writing, but fails to define the term "writing". The UESA makes such a definition unnecessary, for it authorizes parties to use electronic signatures and records to conduct transactions between parties. bluesPac will have to determine whether its proposed record system complies with the UESA. However, it appears to the Department that bluesPac's proposed system for collecting written annual affirmative consent forms complies with the UESA.

Because your request does not include a statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Sincerely,

Robert T. Sacco

Robert T. Sacco, Director
Legal and Regulatory Affairs

RTS/kc