

STATE OF MICHIGAN



CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
TREASURY BUILDING, LANSING, MICHIGAN 48918-9900

April 3, 1995

Mr. Peter H. Ellsworth
Attorney at Law
Suite 200
215 South Washington Square
Lansing, Michigan 48933-1812

Dear Mr. Ellsworth:

This is in response to your request for a declaratory ruling concerning the applicability of the Michigan Campaign Finance Act (the Act), 1976 PA 388, as amended, to legal expenses incurred to determine when the power of referendum is properly invoked.

Specifically, on behalf of your clients, Auto Club Insurance Association (ACIA) and Farm Bureau Mutual Insurance Company (Farm Bureau Mutual), you asked:

"Are the registration and reporting requirements of the Campaign Finance Act applicable where a person expends funds to secure a declaratory ruling and subsequent judicial review thereof concerning the effect of the filing of a referendum petition on existing regulatory laws if the person's purpose is other than to support or defeat the qualification of the question or to influence voters for or against the qualification, passage or defeat of the question?"

General Conclusions

In response to your question, the Department of State concludes:

The registration and reporting provisions of the Campaign Finance Act do not require that contributions or expenditures regarding ballot questions be for the purpose of influencing or attempting to influence the voters.

The purpose of the contributions or expenditures must be determined through the use of an objective standard: whether the payment directly influences or attempts to influence the qualification of a ballot question or an election regarding that

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question. A payment does not meet this standard if its impact on the qualification of a ballot question or an election regarding that question is incidental.

The ballot question process includes several integral steps: the approval of the ballot petitions as to form, the circulation of the petitions, the filing of the petitions, the canvass to determine whether the petitions bear an adequate number of proper signatures, the decision of the Board of State Canvassers whether to certify the question, and the vote.

Legal expenses incurred to support or oppose a ballot question at any of the integral steps are expenditures under the Campaign Finance Act.

Other legal expenses are expenditures under the Campaign Finance Act only if they directly influence or attempt to influence the qualification of a ballot question or an election regarding that question.

Legal expenses incurred before a ballot question exists are not expenditures under the Campaign Finance Act.

Facts

On August 6, 1993, a no-fault insurance reform act (PA 143) was signed into law. It made significant changes in the Insurance Code, which, as you wrote, ". . . required a lengthy time to implement. Accordingly, certainty as to the effective date of these changes was imperative." PA 143 was scheduled to become effective on April 1, 1994.

On November 7, 1993, the Committee for Fairness and Accountability in Insurance Reform (FAIR) advised the Board of State Canvassers that the petition calling for a referendum on PA 143 was being circulated. Under Article 2, section 9 of the Michigan Constitution of 1963, if the power of the referendum were properly invoked PA 143 would not be effective until approved by the voters. However, as explained in your request:

"There [was] uncertainty as to when a referendum petition prevents an enacted law from becoming effective; is it merely upon the filing of the petition or is it upon filing and official action declaring the sufficiency of the petition (eg., does it contain a sufficient number of signatures of registered voters)? There [was] also uncertainty as to when certification as to the sufficiency of the petition must occur. This uncertainty [was] poised to wreak havoc on insurance companies, policyholders, accident victims, and the judicial system itself."

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In order to resolve these issues, ACIA and Farm Bureau Mutual sought the advice of legal counsel, who developed a strategy designed to obtain a rapid, definitive answer. The first step was to seek a declaratory ruling from the Insurance Commissioner, which could then be used as a vehicle for seeking a declaratory judgment from a court of competent jurisdiction.

On December 22, 1993, the Commissioner issued his ruling. Although in his view the power of referendum was not properly invoked until the Board of State Canvassers determined the sufficiency of the petition, he was "constrained" as a state officer to follow an Informal Letter Opinion of the Attorney General that reached the opposite conclusion. He therefore ruled that the mere filing of the petition was sufficient to prevent PA 143 from taking effect.

In early January of 1994, ACIA and Farm Bureau Mutual filed an appeal of the declaratory ruling with the Eaton County Circuit Court.

At approximately the same time, they also asked the Governor to send an Executive Message to the Michigan Supreme Court requesting that Court to intervene and expeditiously resolve the legal issues. The Governor sent that message, stressing the importance of knowing with certainty which insurance laws were in effect on a particular date. On February 3, 1994, the Supreme Court declined the Governor's request.

On February 25, 1994, the Eaton County Circuit Court overturned the Insurance Commissioner's ruling, holding that he did not have the authority to interpret constitutional principles. The Circuit Court did not address the impact of FAIR's petition on the effective date of PA 143.

On or about March 1, 1994, ACIA and Farm Bureau Mutual filed an emergency appeal with the Michigan Court of Appeals.

On March 23, 1994, FAIR filed its petition with the State Board of Canvassers.

On March 31, 1994, the Court of Appeals reversed the Eaton County Circuit Court, ruling that the Insurance Commissioner did have the authority to address constitutional issues. However, on the merits, the Court of Appeals agreed with the official position of the Insurance Commissioner and the Attorney General.

On March 31, 1994, counsel for ACIA and Farm Bureau Mutual appeared before the Board of State Canvassers and sought rapid resolution of the question of the petition's impact on the effective date of PA 143. Counsel explained to the Board that the questions had to be answered by the courts, and suggested that quick completion of the canvass might help produce those answers.

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On April 8, 1994, ACIA and Farm Bureau Mutual filed an expedited application for leave to appeal with the Michigan Supreme Court. On May 27, 1994, the Supreme Court denied the application for leave to appeal, and the Court of Appeals ruling became the final decision on the merits.

The activities which are the subject of this declaratory ruling request were never directed at the voters. Rather, they were directed at the Insurance Commissioner, the Governor, the Board of State Canvassers and the courts. Further, ACIA's Chief Executive Officer directed his subordinates "to do nothing to impede efforts to place the question on the ballot."

Discussion

The registration and reporting requirements of the Campaign Finance Act are triggered when a person becomes a "committee" as defined in section 3(4) of the Act (MCL 169.203(4)). This section states, in pertinent part (emphasis added):

"'Committee' means a person 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."

You argue that "for ACIA and Farm Bureau Mutual to be 'committees' there must be a determination that the expenditures were made 'for the purpose of influencing or attempting to influence the action of the voters for or against . . . the qualification, passage or defeat of a ballot question . . .'" (Emphasis in original.)

Your argument ignores the comma and the word "or" after the word "candidate". As discussed below, in some instances whether a question qualifies for the ballot may not turn on any action by the voters.

As it applies to your question, the Department of State concludes that the appropriate excerpt of the first sentence of section 3(4) is:

"'Committee' means a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence . . . the qualification, passage, or defeat of a ballot question, if the contributions received total \$500.00 or more in a calendar year or expenditures made total \$500.00 or more in a calendar year."

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This conclusion is supported by the language of section 2(2) of the Act (MCL 169.202(2)), which defines the term "ballot question committee" as follows:

"Sec. 2. (2) 'Ballot question committee' means a committee acting in support of, or in opposition to, the qualification, passage, or defeat of a ballot question but which does not receive contributions or make expenditures or contributions for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate."

Further, section 2(1) of the Act (MCL 169.202(1)) defines the term "ballot question" as follows:

"Sec. 2. (1) 'Ballot question' means a question which is submitted or which is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot."

Sections 2(1) and 2(2) do not require that there be an attempt to influence the voters.

You cite an interpretive statement issued to Nina F. Collins (3-83-CI) on June 13, 1983, for the proposition that an expenditure must be made for the purpose of influencing voters to determine that ballot committee registration is required. That argument misreads the Collins interpretive statement. Collins concluded that an objective standard must be applied to determine the purpose of an expenditure, and that donated billboard space was an expenditure because it was used to influence voters. It did not, however, conclude that a ballot question committee must be formed only if expenditures are made to influence voters.

The Department of State previously indicated, in an interpretive statement issued to Mr. David M. Savu (1-83-CI) on March 4, 1983, that the Act's registration requirements apply even if an expenditure was not made for the purpose of influencing voters.

You also submit that there were no "expenditures" under the Act because your client's expenses were not incurred for the purpose of influencing the voters.

Section 6(1) of the Act (MCL 169.206(1)) defines "expenditure". It provides (emphasis added):

"Sec. 6. (1) 'Expenditure' means a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election or a candidate, or the qualification, passage, or defeat of a ballot question."

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A payment may assist the qualification of a ballot question even if it is not made to influence the action of the voters. For example, payments made to respond to challenges regarding the sufficiency of petition signatures filed with the Board of State Canvassers are in assistance of a ballot question's qualification, even though the response is not directed at voters.

In light of the above, the Act must be construed to mean that a person is a "ballot question committee" if, in a calendar year, the person receives contributions or makes expenditures totalling \$500.00 or more for the purpose of influencing or attempting to influence the qualification of a ballot question or an election regarding that question. The Act does not require the contribution or expenditure to be for the purpose of influencing or attempting to influence the voters. Further, the purpose of the contribution or expenditure must be determined through the use of an objective standard: whether the payment directly influences or attempts to influence the qualification of a ballot question or an election regarding that question. A payment does not meet this standard if its impact on the qualification of a ballot question or an election regarding that question is incidental.

Legal expenses

In response to your request, written comments were submitted by Robert S. LaBrant, Vice President, Political Affairs and General Counsel, Michigan Chamber of Commerce. Mr. LaBrant suggests that legal expenses incurred for the purpose of seeking judicial review of a declaratory ruling are not "expenditures" under the Campaign Finance Act. However, the payment of an expense incurred for a subjective purpose that is unrelated to the financing of elections is within the Act's purview if the payment directly affects or influences either the placement of a name or question on the ballot or the outcome of an election. In such cases, the payment is clearly "in assistance of, or in opposition to the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question."

The ballot question process comprises a number of integral steps. Activities at any of those steps could influence whether the question even reaches the ballot or how the voters will respond. The steps include the approval of the ballot petitions as to form, the circulation of the petitions, the filing of the petitions, the canvass to determine whether the petitions bear an adequate number of proper signatures, the decision of the Board of State Canvassers whether to certify the question, and, if so, the vote. Legal expenses incurred to support or oppose a ballot question at any of the integral steps are expenditures under the Act.

Legal expenses incurred outside that process are expenditures under the Act if they directly influence or attempt to influence the qualification of a ballot question or the outcome of an election regarding that question.

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Application

ACIA and Farm Bureau Mutual incurred legal fees to determine whether PA 143 would take effect on April 1, 1994. Legal expenses were incurred to secure a declaratory ruling from the Insurance Commissioner, to appeal that ruling through the judicial system, and for a March 31, 1994 appearance by counsel before the Board of State Canvassers. The dispositive issue in each forum was the point at which the power of referendum was properly invoked.

The court pleadings and other documents submitted by ACIA and Farm Bureau Mutual clearly demonstrate that the legal expenses incurred prior to the March 31, 1994 Board of State Canvassers hearing were made to resolve the uncertainty regarding the effective date of PA 143. These expenses were outside the ordinary process of qualifying for the ballot and did not directly influence or attempt to influence the placement of a question on the ballot or an election regarding that question. Consequently, these expenses were not expenditures and did not trigger the Act's registration requirements.

FAIR's petition was filed on March 23, 1994. The Board of State Canvassers met on March 31, 1994. At that meeting, legal counsel for ACIA and Farm Bureau Mutual urged the Board to quickly complete the canvass in the hope rapid completion would resolve the legal questions involving the referendum. The position taken by ACIA and Farm Bureau Mutual before the Board of State Canvassers, and subsequently the Supreme Court, was consistent from the time they filed the original declaratory ruling request with the Insurance Commissioner.

ACIA and Farm Bureau Mutual were impelled by circumstances beyond their control to indicate to the Board of State of Canvassers on March 31, 1994 and to the Supreme Court on April 8, 1994 that the power of referendum was not properly invoked, and that PA 143 should take effect as scheduled. However, the impact that argument might have had on the qualification of the referendum was incidental to the consistent position of ACIA and Farm Bureau Mutual that certainty regarding the effective date of PA 143 was essential to avoid chaos in the insurance industry. Consequently, these expenses were not expenditures and did not trigger the Act's registration requirements.

Specific Conclusions

In light of the above, the activities of ACIA and Farm Bureau Mutual do not meet the tests set out in this declaratory ruling.

The legal expenses incurred to secure a declaratory ruling from the Insurance Commissioner, to appeal that ruling through the judicial system and counsel's March 31, 1994 appearance before the State Board of Canvassers were not expenditures subject to the registration and reporting

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requirements of the Act. Those activities did not directly influence or attempt to influence the qualification of the ballot question regarding PA 143 or an election regarding that question.

This response is a declaratory ruling concerning the applicability of the Michigan Campaign Finance Act to the unique facts and questions presented.

Sincerely,

A handwritten signature in cursive script that reads "Candice S. Miller".

Candice S. Miller
Secretary of State

CSM:rlp