



STATE OF MICHIGAN
RUTH JOHNSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

November 1, 2011

Eric E. Doster
Foster, Swift, Collins & Smith, P.C.
313 South Washington Square
Lansing, Michigan 48933-2193

Dear Mr. Doster:

The Department of State (the Department) acknowledges receipt of your letter dated August 8, 2011, in which you sought a declaratory ruling or interpretive statement under the Michigan Campaign Finance Act (the MCFA), 1976 PA 388, as amended, MCL 169.201 *et seq.* A copy of your request was published on the Department's website beginning August 10, 2011 for public comment, yet no public comments were submitted for consideration.

Specifically, you asked a series of questions concerning the applicability of the MCFA to recall activities under section 952 of the Michigan Election Law, 1954 PA 116, as amended, MCL 168.1 *et seq.* As you point out, section 5(2) of the MCFA provides that a recall vote is an election; therefore, the funds spent or received by elected officeholders to defend themselves from a recall and the funds spent or received by groups supporting or opposing the recall of an elected official are regulated under the MCFA.

According to your request, your office represents individuals, candidates, committees and entities who participate in the recall process. Your request includes a statement of facts, indicating among other things, that the recall petition process is essentially comprised of four stages:

1. "The preparation and submission of a recall petition," to occur "after a recall petition is prepared" by the sponsors of the recall to the Board of County Election Commissioners (the Board) located in the county where the officer whose recall is sought resides. MCL 168.952(2).
2. The "Clarity Hearing," to be conducted by the Board "before petitions are circulated" by the sponsors of the recall, so as to determine the sufficiency of each reason stated in the recall petition, so as to allow the officer and electors the basis for the recall. MCL 168.952(3).

3. The “petition gathering and petition review” process, which is intended¹ to culminate in the filing of a petition containing a sufficient number of valid signatures. Within 35 days after this filing, the official who accepts the petition must declare the sufficiency or insufficiency of the recall petition. MCL 168.963(1). If the petition is sufficient, then a special election to determine whether the electors will recall the officer must be held on the next regular election date that falls not less than 95 days after the date that the petition is filed. MCL 168.963 (2) and (3).
4. The procedures that govern the question of a “recall election” are the same, unless provided otherwise, as those by which the officer is elected to office. MCL 168.964. The recall ballot must include the reasons for demanding the recall, the officer’s justification against the recall and the “yes” or “no” question asking whether the officer shall be recalled from office. MCL 168.966(4).

As required by section 15(2) of the MCFA, the Department has reviewed your request and determined that it does not contain a sufficient statement of facts to warrant issuance of a declaratory ruling. Accordingly, the Department offers the following interpretive statement as an informational response to your questions, which are set forth below.

1. *“Does the [MCFA] apply to recall activities incidental to the preparation of a recall petition before the recall petition is initially submitted to the Board of County Election Commissioners to obtain a clarity hearing pursuant to MCL 168.952(2)?”*
2. *“Does the [MCFA] apply to recall activities once a recall petition is initially submitted to the Board of County Election Commissioners to obtain a clarity hearing pursuant to MCL 168.952(2)?”*
3. *“Does the [MCFA] apply to expenses incurred in connection with a recall petition clarity hearing held pursuant to MCL 168.952(3)?”*
4. *“Does the [MCFA] apply to expenses incurred in connection with recall petition litigation (authorized by MCL 168.952(6))?”*

Michigan Election Law requires the Board to review the language of a recall petition *before* the petition is circulated. MCL 168.952(3). Thus, a “clarity review” is the starting point of each and every recall effort launched in Michigan.

Pursuant to section 3(1)(d) of the MCFA, a candidate includes “an officeholder who is the subject of a recall vote.” Every candidate must organize and register a candidate committee without regard to the monetary threshold of contributions and expenditures established for other types of committees. MCL 169.203(2). Under the MCFA, a candidate committee must file its statement of organization within 20 days of its formation. MCL 169.221(1), 169.224(1).

¹ The Department is cognizant that the sponsor of a recall petition may abandon the effort without ever filing a complete petition. Nonetheless, the registration and reporting requirements of the MCFA may apply if the sponsor becomes a “committee” by receiving contributions or making expenditures in excess of \$500.00 in a calendar year. MCL 169.203(4).

For other committees, the registration and disclosure requirements of the MCFA become operative when “a person ... 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 ... 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 MCFA, a committee must file its statement of organization within 10 days of its formation. MCL 169.224(1).

The statute clearly provides that the legal obligation to register is triggered not more than ten days after an organization receives contributions or makes expenditures of at least \$500.00 in a single calendar year to support or oppose a candidate’s nomination or election. For purposes of determining whether a committee has attained or surpassed the \$500.00 threshold required for registration, the words “contribution” and “expenditure” are defined, in pertinent part, to include payments for goods or services that are “made for the purpose of influencing” or made “in assistance of, or in opposition to,” the nomination or election of a candidate. MCL 169.204(1), 169.206(1). A communication or activity that does not constitute a contribution or expenditure is not regulated by the MCFA.²

Thus, to the extent that the recall activities described in your correspondence constitute contributions or expenditures, the MCFA applies. With respect to the clarity hearing process such activities may include, by way of illustration, costs incurred in the drafting of the language that appears in the heading of the recall petition, preparation of the petition form, attending or participating in the clarity hearing, engaging counsel for these purposes, and so on. The commonality among these activities is that each is “made for the purpose of influencing” or made “in assistance of, or in opposition to,” the recall of an elected official. Once the monetary threshold provided in MCL 169.203(4) is surpassed, the committee must submit a statement of organization to the designated filing official within 10 days. MCL 169.224(1). Contributions received and expenditures made by a committee, including the candidate committee of the official whose recall is sought, must be disclosed on the campaign statement covering the reporting period in which the contribution is received or the expenditure is made.³ MCL 169.226.

5. *“Does the [MCFA] apply to recall activities relating to gathering signatures for the recall petition after the Board of County Election Commissioners and/or a court of record determine[] that the recall petition is of sufficient clarity?”*
6. *“Does the [MCFA] apply to recall activities related to the review and/or challenge of recall petition signatures after the recall petition and signatures are filed with the filing official?”*

A recall is an election; therefore, expenditures attendant to supporting or opposing a recall (including legal fees) are legitimate campaign expenditures that may be paid with committee funds.

² For example, costs incurred by a labor organization or corporation to produce and disseminate communications to its members or shareholders are excluded from the statutory definition of expenditure. MCL 169.206(2)(a).

³ Unless the reporting waiver provisions of MCL 169.224(5)-(6) apply, a committee is required to file campaign statements according to the schedule established by MCL 169.233 and 169.235.

Legal fees paid or incurred for the purpose of prosecuting or defending a lawsuit relating to the sufficiency of a recall petition, or for submitting challenges to signatures, constitute expenditures within the meaning of MCL 169.206(1) because they represent payments for services that assist or oppose the election of a candidate. Such expenditures are subject to the ordinary disclosure requirements of the MCFA.

7. *"Since the term "election" includes a "recall election" (MCL 169.205(2)), please confirm that the [MCFA] applies to express advocacy activities conducted in connection with a recall election."*

By law, a communication that "does *not* support or oppose a ballot question or candidate by name or clear inference [,]" is not an expenditure and is exempt from the requirements and limitations of the MCFA. MCL 169.206(2)(b) (emphasis added). This provision requires the Department "to apply the express advocacy standard in determining which communications are regulated by the MCFA." Interpretive Statement to Robert LaBrant (April 20, 2004).

In conclusion, the MCFA applies to the contributions received and expenditures made for recall activities associated with a clarity hearing, such as the costs incurred in drafting and preparing the recall petition or attending or participating in such hearing. Legal fees paid or incurred for the purposes of prosecuting or defending such a lawsuit are regulated under the MCFA.

Sincerely,



Michael J. Senyko
Chief of Staff