



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

September 1, 2010

Robert S. LaBrant
Senior Vice President, Political Affairs and General Counsel
Michigan Chamber of Commerce
600 S. Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

This letter concerns the Declaratory Ruling issued on May 21, 2010, pursuant to section 15(2) of the Michigan Campaign Finance Act (Act), 1976 PA 388, MCL 169.215(2), regarding the applicability of the Act to certain proposed activities of the Michigan Chamber of Commerce. Consistent with the Stipulated Judgment and Order entered on August 31, 2010, in the case of *MI Chamber of Commerce et al v Terri Lynn Land*, Case No. 1:10-cv-664, I hereby rescind the May 21, 2010 Declaratory Ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Terri Lynn Land".

Terri Lynn Land
Secretary of State

c: Gary Gordon
Eric Doster
Denise Barton



STATE OF MICHIGAN
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 DEPARTMENT OF STATE
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May 21, 2010

RESCINDED
 September 1, 2010

Robert S. LaBrant
 Senior Vice President, Political Affairs and General Counsel
 Michigan Chamber of Commerce
 600 S. Walnut Street
 Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

This is in response to your request for a declaratory ruling or interpretive statement under the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, as amended.

Specifically, you asked a series of questions concerning the impact of *Citizens United v Federal Election Commission*, ___ US ___; 130 S Ct 876; 175 L Ed 2d 753 (2010). In *Citizens United*, the United States Supreme Court overruled its decision in *Austin v Michigan Chamber of Commerce*, 494 US 652; 110 S Ct 1391; 108 L Ed 2d 652 (1990). By overruling *Austin*, the Supreme Court declared that section 54 of the MCFA (MCL 169.254) is unconstitutional to the extent that it prohibits independent expenditures by corporations, labor organizations or domestic dependent sovereigns (collectively referred to as “corporations” for purposes of this response). However, as pointed out in your request, *Citizens United* left in effect the prohibition against “contributions” as defined in section 4 of the Act from those organizations.

According to your February 19, 2010 request, the Michigan Chamber of Commerce (the “Chamber”) proposes to register a political committee, called “Michigan Chamber PAC III” (“MCPAC III”). Your request includes a statement of facts, indicating among other things:

1. The Chamber is a Michigan nonprofit corporation and a trade association, and is an interested person whose course of action would be affected by a declaratory ruling.
2. The Chamber’s members consist of more than 7,000 entities, many of them corporations.
3. MCPAC III will not be a separate segregated fund of the Chamber under section 55 of the MCFA (MCL 169.255).
4. MCPAC III will be a distinct and separate entity. Its funds and assets will not be commingled with those of the Chamber, the Michigan Chamber PAC, the Michigan Chamber PAC II, or any other entity.

5. Contributions to MCPAC III would come from the following sources:
 - a. Contributions from persons that were specifically solicited or received for the express purpose of making a contribution to MCPAC III.
 - b. Chamber treasury funds.
6. MCPAC III would report contributions from the Chamber treasury as being from the Chamber. MCPAC III would report contributions from another person's treasury funds as being made from that person.
7. The Chamber intends to make in-kind contributions to MCPAC III, "including, but not limited to, in-kind contributions with respect to the administration and solicitation of contributions to MCPAC III."

As required by section 15(2) of the MCFA (MCL 169.215), the Department made copies of your request and its April 30, 2010 draft response available for public comment. Comments were received from Jeff Kowalski, Richard L. Robinson, Executive Director, Michigan Campaign Finance Network, Kathleen Corkin Boyle, counsel for the Michigan Education Association, Peter Ellsworth and Eric Doster.

In response to your declaratory ruling request, Mr. Kowalski asked the Department to discuss whether the Chamber is tax-exempt under the Internal Revenue Code, and whether that would prohibit the Chamber from participating in political campaigns. However, the Department does not have the authority to interpret provisions of federal tax law.

Mr. Robinson's comments regarding your request urged the Department to issue an expansive declaratory ruling that would establish "a robust campaign finance disclosure regime." Among other things, he asserted that the Department's response should include "the *new rules* of the campaign finance disclosure environment." However, the Department is unable to create a new regulatory scheme through the issuance of a declaratory ruling. Under the Administrative Procedures Act, a declaratory ruling applies the existing statute to a specific statement of facts and is only binding on the agency and the person requesting the ruling. MCL 24.263.

Mr. Robinson also filed separate comments regarding the Department's initial draft of this ruling, advancing the argument that the Department's application of the express advocacy test is inadequate in view of the "functional equivalent" standard established by the U.S. Supreme Court. However, this issue is outside the scope of your ruling request, which focuses on the applicability of the Act's registration and reporting requirements to corporate independent expenditures. Mr. Robinson also expressed his concern that the draft ruling would permit the Chamber to "claim that its sole source of funding is an undifferentiated general treasury [,]" without disclosing the identities of members who were the original source of those funds. This comment is addressed in the response to question 7.

Ms. Corkin Boyle, who wrote in response to the Department's draft declaratory ruling, sought clarification regarding the legality of the Chamber's proposed course of conduct with respect to funds obtained from other entities. Noting that the Chamber's statement of facts indicates "that the Chamber anticipates receiving funds from other entities," she asked the Department to consider whether a person can "give money to the Chamber of Commerce for the express purpose of making independent expenditures in a political campaign, or would that constitute an unlawful 'contribution' . . . even though the payment is made to the Chamber of Commerce and not to its political committee"? Ms. Corkin Boyle's comments are addressed in revised responses to questions 5 and 7.

Mr. Ellsworth, on the other hand, stated his belief "that the Proposed Declaratory Ruling is incorrect to the extent that it stands for the proposition that political committees, like MCPAC III, may neither receive contributions from corporations' general treasury funds nor use such contributions to make independent expenditures in support of or in opposition to candidates for elected office." In his view, corporations are permitted to make unlimited contributions to any committee that, like MCPAC III, is limited to making independent expenditures. He therefore suggested that the Department broaden its draft declaratory ruling to authorize MCPAC III to receive contributions from the general treasury funds of the Michigan Chamber and other corporations and utilize these funds to make independent expenditures in candidate elections. The Department notes, however, that *Citizens United* did not disturb the remainder of section 54(1) (MCL 169.254(1)) of the Act, which provides, "a corporation, joint stock company, domestic dependent sovereign, or labor organization *shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution [.]*" Because this statutory ban on corporate contributions remains in effect, the Department cannot adopt the view that corporations are authorized by law to make contributions to political committees. However, Mr. Ellsworth's comments resulted in further clarification of the Department's response to question 5.

Finally, Mr. Doster suggested minor revisions to clarify the response to question 7. In particular, he proposed additional language to make it clear that the Chamber's transfers to MCPAC III were not prohibited contributions, and that the Chamber's status as a political committee was triggered by making independent expenditures and not by making contributions. The revised responses to questions 5 and 7 negate these concerns.

The Department has carefully considered your correspondence and the public comments described above, and answers each of your questions separately below.

1. "*Whether the Michigan Chamber PAC III is permitted to register as a 'political committee' (as defined in the Act) pursuant to the Act?*"

On January 29, 2010, the Department posted information on its web site indicating that a corporation must register as a political committee when it makes independent expenditures of \$500.00 in a calendar year. The political committee is the only mechanism available for reporting the corporation's independent expenditures for the political speech permitted under *Citizens United*.

When the \$500.00 expenditure threshold is met, MCPAC III will be a “committee” as that term is defined in section 3(4) of the MCFA (MCL 169.203). It would then be required to file a statement of organization under section 24 of the MCFA (MCL 169.224).

The only type of committee MCPAC III could be is a “political committee.” It could not be an “independent committee.” That term is defined in section 8(3) of the MCFA (MCL 169.208), which provides in part:

“Independent committee” means a committee, other than a political party committee, that before contributing to a candidate committee for elective office under section 52(2) or 69(3) files a statement of organization [and meets certain other requirements]. (Emphasis added.)

Corporate funds cannot be used to contribute to candidate committees. Therefore, a corporation that makes independent expenditures to support or oppose candidates cannot meet the definition of an independent committee.

2. *“Whether Michigan Chamber PAC III may make ‘independent expenditures’ on behalf of candidates (as defined in the Act) pursuant to the Act?”*

Yes. It is clear that the MCFA cannot constitutionally prohibit a corporation from making independent expenditures to express its own views in support of or opposition to candidates in Michigan elections.

3. *“Whether Michigan Chamber PAC III may only engage in express advocacy activities for candidates by making independent expenditures pursuant to the Act?”*

The limited impact of *Citizens United* under the MCFA is that it allows a corporation to make and report independent expenditures by engaging in political speech that expressly advocates the nomination or election of state and local candidates. The express advocacy must consist of the corporation’s own political speech and be funded exclusively by that corporation.

4. *“Whether Michigan Chamber PAC III may make contributions to another political committee which contains funds derived from Section 54 Entities?”*

No. *Citizens United* only lifted the section 54 ban on independent expenditures. The ban on contributions remains intact and cannot be avoided by transferring corporate funds to MCPAC III and then contributing those funds to another committee.

Moreover, a MCPAC III contribution to another political committee would not be an “independent expenditure” permitted under *Citizens United*. Pursuant to section 9(2) of the MCFA (MCL 169.209), an “independent expenditure” is 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.” (Emphasis added.)

5. *“Whether Michigan Chamber PAC III will comply with the reporting provisions of the Act where the contributor to Michigan Chamber PAC III will be reported as the Chamber where the contribution to Michigan Chamber PAC III from the Chamber is derived from the treasury funds of the Chamber?”*

As previously indicated, a political committee must be formed for purposes of reporting the Michigan Chamber’s independent expenditures in candidate elections. The reporting requirements of the MCFA will be met when the Michigan Chamber’s independent expenditures are reported in periodic campaign statements filed as required by section 33. MCL 169.233.

The Department’s initial review of *Citizens United* concluded that a corporation could transfer funds to a political committee and use those funds to make independent expenditures. Consequently, the Department did not dispute your premise that the Michigan Chamber could be a “contributor” to MCPAC III by transferring treasury funds of the Chamber to the committee. Upon further analysis, the transfer of treasury funds would result in a prohibited contribution from the Chamber to MCPAC III.

This prohibition must be reconciled with the Chamber’s right to make independent expenditures and the current statute’s reporting constraints. This is best accomplished by the Chamber making independent expenditures directly from its treasury funds and reporting those expenditures through the only disclosure method currently available under the Act. That is, the Chamber will comply with the Act’s reporting requirements by filing a campaign statement consisting of a cover page, a summary page, Schedule 2B-1 (Itemized Independent Expenditures) and Schedule 2A-1 (Itemized Other Receipts). The latter schedule would report those receipts as “treasury funds” and would always correspond to the amount of the independent expenditures made during that reporting period.

It should be noted that this response relies upon the definition of “treasury funds” provided in paragraph 8.b. of your statement of facts. Specifically, this paragraph states that “For the purposes of this Declaratory Ruling request, the term, ‘treasury funds’ shall mean all funds of a person *except those funds that were specifically solicited or received for the express purpose of making a contribution.*” (Emphasis added.) You further define “treasury funds” to include “all funds paid to a person such as dues, assessments, gifts, vendor payments, refunds, rebates, or any other payment to the person received in the ordinary course of business.” In the Department’s view, funds solicited or received for the purpose of making a contribution are not treasury funds raised in the ordinary course of business and cannot be used by the Chamber to make independent expenditures.

6. *“Whether Michigan Chamber PAC III will comply with the reporting provisions of the Act where the contributors to Michigan Chamber PAC III will be reported as the makers of the Michigan Chamber PAC III Contributions where the Michigan Chamber PAC III Contributions are derived from the treasury funds of the maker?”*

As indicated in the response to questions 3 and 5, a corporation’s political speech must be funded exclusively by that corporation. The plain language of the Act prohibits a corporation from

making a contribution. MCL 169.254(1). Therefore, treasury funds derived from third parties cannot be contributed to MCPAC III and would not be reported by MCPAC III.

This interpretation does not restrict current or potential members from associating with the Michigan Chamber. Any corporation is free to join the Chamber and support the purposes described in the Chambers' Articles of Incorporation and by-laws. Moreover, there is nothing that would prohibit one or more corporate members of the Chamber from making joint independent expenditures using each corporation's respective treasury funds.

7. *"Whether the Chamber or the makers of the Michigan Chamber PAC III Contributions, by virtue of making these contributions to Michigan Chamber PAC III, will themselves trigger committee status under the Act?"*

While the Chamber's committee status is triggered when it makes independent expenditures of \$500.00 or more, as indicated in the response to question 1, it is important to emphasize that other entities, including members of the Chamber, are not authorized to make contributions to MCPAC III, rendering your question moot. Similarly, members are prohibited from paying special dues or assessments to the Chamber for use in making independent expenditures.

In his comments on the request for a declaratory ruling, Mr. Robinson provided copies of the Chamber's Form 990 filed with the Internal Revenue Service for tax years ending on June 30, 2005, June 30, 2007 and June 30, 2009. The Chamber reported funding its "issue advocacy program" with "special dues" and "special membership assessments." Special dues and assessments levied for the express purpose of funding the Chamber's independent expenditures would clearly be "for the purpose of influencing the nomination or election of a candidate". MCL 169.204(1). As such, the payment of special dues or assessments for this purpose would be contributions that are prohibited by section 54(1) of the MCFA. A violation of section 54(1) is a felony, punishable by fines and/or imprisonment.

8. *"Whether the Chamber or any other person may make in-kind contributions to Michigan Chamber PAC III including, but not limited to, in-kind contributions relating to the administration and solicitation of contributions to Michigan Chamber PAC III?"*

This question presupposes that MCPAC III would solicit and receive contributions from third parties. As indicated above, MCPAC III is limited to serving as the vehicle for reporting the Michigan Chamber's own independent expenditures. Consequently, MCPAC III will not incur costs associated with administering and soliciting contributions to the committee.

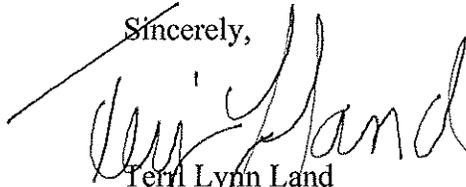
9. *"Whether there are any circumstances upon which a contribution to Michigan Chamber PAC III must be accompanied by a certified statement by an officer of the contributing person setting forth the full name and address, along with the amount contributed, of each person who contributed to the total amount of the contribution, where the contribution is derived from the treasury funds of a person?"*

This question references section 42(2) of the MCFA (MCL 169.242), which addresses a “contribution from a person whose treasurer does not reside in, whose principle office is not located in, or whose funds are not kept in” Michigan.

Section 42(2) prohibits acceptance of a contribution under those circumstances unless accompanied by a certified statement which, among other things, states that the contribution from the out-of-state contributor “was not made from an account containing funds prohibited by section 54.” If the potential contributor is a corporation, labor organization, or domestic dependent sovereign, there are no circumstances in which the accompanying certified statement is required. The MCFA does not permit contributions from those entities.

The foregoing statement constitutes a declaratory ruling concerning the facts and questions presented in your February 19, 2010 correspondence.

Sincerely,



Terri Lynn Land
Secretary of State