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STATE OF MICHIGAN

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

November 4, 1997

Mr. John D. Pirich
Mr. Timothy Sawyer Knowlton
HONIGMAN MILLER SCHWARTZ AND COHN
222 North Washington Square
Lansing, Michigan 48933-1800

Dear Messrs. Pirich and Knowlton:

This is in response to your request for a declaratory ruling or an interpretive statement under the Michigan Campaign Finance Act, 1976 PA 388, as amended (MCFA). Your request concerns the application of section 55(1) and (6) of the Act (MCL 169.255) to corporate separate segregated funds.

Background

Section 55(1) authorizes a corporation to make expenditures for the establishment, administration and solicitation of contributions to a separate segregated fund (SSF) to be used for political purposes. A corporation may only establish one SSF. 1977-1978 OAG, No 5344, p 549 (July 20, 1978).

Section 55(6) imposes certain restrictions on soliciting and obtaining contributions to a SSF. This section states, in pertinent part:

> Sec. 55. (6) . . . A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization shall not solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or (5) on an automatic or passive basis including but not limited to a payroll deduction plan or reverse checkoff method. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or

> (5) 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.

In an October 26, 1983 declaratory ruling to Robert P. Duff, the Department of State indicated that a joint or multi-state SSF is permissible under the MCFA, so long as the SSF conforms with the requirements of section 55.

The Department reaffirmed its position in a July 11, 1997 declaratory ruling and interpretive statement issued to Robert S. LaBrant. The interpretive statement indicates that a joint SSF operating in Michigan must conform with the affirmative consent requirements of section 55(6).

The LaBrant ruling and statement, as it applies to the Michigan State AFL-CIO and its affiliates, has been temporarily enjoined by the Ingham County Circuit Court. However, the statute itself remains effective during the pendency of the ongoing litigation. Therefore, SSFs that operate in Michigan must comply with both section 55(1) and (6).

You represent a number of corporations that maintain joint SSFs. You have asked a series of questions concerning the "propriety of certain aspects" of their plans to ensure that the requirements of section 55(1) and (6) are met. Those questions, and the Department's response to each question, are as follows.

Discussion

1. May a corporation establish and maintain two or more SSFs where only one of the SSFs will make contributions in elections governed by the MCFA?

2. May a corporation with two or more SSFs -- only one of which contributes to MCFA-governed elections -- solicit its Michigan employees (under the conditions of § 55(6)) to contribute to the MCFA-governed SSF, as well as solicit its Michigan employees to contribute to SSFs established for non-MCFA governed elections?

The MCFA applies to contributions and expenditures that are made to support or oppose candidates for state and local elective offices and questions appearing on Michigan ballots. The MCFA does not regulate contributions and expenditures made to support or oppose candidates for federal office or offices in other states.

While a corporation that chooses to support state and local candidates in Michigan must do so through the establishment and administration of a single SSF, there is nothing in section 55(1) that prevents a corporation from establishing additional SSFs to participate in elections that are governed by the Federal Election Campaign Act or other states' campaign finance laws.

Similarly, there is nothing in the MCFA that would prevent a corporation from soliciting Michigan employees for contributions to a MCFA-governed SSF and contributions to a federal or out-of-state SSF, as long as contributions solicited and accepted by the Michigan SSF conform with the requirements of section 55(6).

3. Under the Declaratory Ruling issued July 11, 1997 to Robert S. LaBrant by the Secretary of State, a corporation which previously obtained affirmative written consent from its employees contributing to that corporation's joint federal/other states SSF may continue to make contributions to MCFA-governed elections throughout 1997. In order to establish a SSF that will begin making contributions on January 1, 1998 for MCFA-governed elections, may the corporation continue to make such contributions throughout 1997 while at the same time soliciting employees in 1997 to contribute, commencing January 1, 1998 to the SSF dedicated to MCFA-governed elections?

The thrust of your question is whether a corporation will be operating two SSFs in violation of section 55(1) if it continues to operate an existing multi-jurisdiction SSF while obtaining affirmative consent for a Michigan only SSF that will begin to operate on January 1, 1998. The enjoined LaBrant ruling has no bearing on the response to this question.

The new Michigan SSF is required to file a statement of organization within 10 days after forming a committee. MCL 169.224(1). A committee must be formed when contributions received or expenditures made total $500.00 or more in a calendar year. MCL 169.203(4).

According to your request, the starting date for actual collection of contributions to the Michigan SSF would be January 1, 1998. As of that date, the multi-jurisdiction SSF will cease making contributions in MCFA-governed elections. In these circumstances, no violation of section 55(1) would arise if a corporation receives contributions to a multi-jurisdiction SSF during the remainder of 1997 while soliciting eligible employees to give affirmative consent to make contributions beginning January 1, 1998 to a Michigan only SSF.

4. May a corporation maintain a single SSF that receives contributions from some employees pursuant to annual affirmative consents in accord with § 55(6) of the MCFA and from other employees without obtaining annual affirmative consents so long as the amount of campaign contributions made by the SSF to candidates in MCFA-governed elections does not exceed the amount received by the SSF from employees providing annual affirmative consents in compliance with § 55(6)?

Your final question suggests that compliance with section 55(6) can be achieved by using an accounting method to differentiate between contributions obtained pursuant to affirmative consent and contributions obtained without such consent. Under this scenario, automatic contributions obtained in compliance with section 55(6) would be commingled with automatic contributions obtained without affirmative consent. However, an accounting method would be used to ensure that expenditures made by the SSF to support or oppose Michigan candidates are less than or equal to the amount of contributions received through affirmative consent.

In written comments submitted pursuant to section 15(2) of the MCFA (MCL 169.215), Mr. Andrew Nickelhoff, from the Sachs, Waldman law firm, suggested using 11 CFR § 102.5(b) as a model for accounting and allocation measures that can be used to enforce the requirements of section 55(6). The federal rule authorizes the use of a "reasonable accounting method" to demonstrate that an "organization has received sufficient funds subject to the limitations and prohibitions of the [Federal Election Campaign] Act" to make a specific contribution, expenditure or payment.

The Department of State has not promulgated a rule similar to 11 CFR § 102.5(b). Moreover, the federal rule does not apply to SSFs but is limited in its application to organizations that are not political committees. Therefore, the federal rule cannot be relied upon to distinguish between commingled contributions obtained from employees.

Section 55 limits the source of contributions to a SSF and restricts the manner in which those contributions can be solicited and received. These are the only funds that a SSF may use to participate in MCFA-governed elections. If contributions obtained through affirmative consent are commingled with funds obtained by other methods, the distinction between those funds would be irretrievably lost. It would then be impossible to determine whether contributions obtained through a reverse checkoff or another unacceptable method were used to make expenditures in Michigan elections.

The scenario you describe does not prevent a SSF from making expenditures from automatic contributions obtained without affirmative consent. Consequently, a SSF may not make expenditures in MCFA-governed elections after contributions obtained from employees with affirmative consent are commingled with contributions obtained from employees without affirmative consent.

Conclusion

In light of the foregoing, the Department of State concludes as follows:

- A corporation does not violate section 55(1) of the MCFA by establishing one separate segregated fund to participate in MCFA-governed elections and one or more separate segregated funds to participate in elections governed by the laws of other jurisdictions.

- A corporation may solicit its Michigan employees for contributions to both separate segregated funds, provided the contributions solicited and accepted by the MCFA-governed fund conform with the requirements of section 55(6).

- A corporation that has received affirmative consent from contributors may continue to receive contributions to a multi-jurisdiction separate segregated fund during the remainder of 1997 while soliciting eligible employees to give affirmative consent to make contributions beginning January 1, 1998 to a Michigan only separate segregated fund.

- A separate segregated fund may not make expenditures in MCFA-governed elections after contributions obtained with affirmative consent are commingled with automatic contributions obtained without affirmative consent.

This response is an interpretive statement and does not constitute a declaratory ruling, as the request did not include a statement of actual facts.

Sincerely,

Robert T. Sacco

ROBERT T. SACCO
Deputy Secretary of State

RTS:rlp