

Michigan Department of Licensing and Regulatory Affairs
Office of Regulatory Reinvention
611 W. Ottawa Street; 2nd Floor, Ottawa Building
Lansing, MI 48909
Phone (517) 335-8658 FAX (517) 335-9512

REQUEST FOR RULEMAKING (RFR)

In accordance with MCL 24.239(1): "Before initiating any changes or additions to rules, an agency shall file with the Office of Regulatory Reinvention (ORR) a request for rulemaking." The agency will complete this form and send an electronic copy to the ORR at orr@michigan.gov. The ORR will review the request for rulemaking and send its response to the agency (see last page).

The ORR is "not required to approve a request for rule-making and shall do so only after it has indicated in its response to the request for rule-making submitted by an agency that there are appropriate and necessary policy and legal bases for approving the request for rule-making." MCL 24.239(3).

Department or agency	State
Bureau/Division	Bureau of Elections/Disclosure Division
Address	Richard H. Austin Building 1 st Floor 430 West Allegan Street Lansing, Michigan 48918
Contact person	Christopher Thomas
Telephone	(517) 335-2789
Email	ChristopherT@michigan.gov

1. Title of proposed rule(s) or rule set:

Expenditures for Communications Regarding Candidates and Ballot Questions and Independent Expenditures by Corporations, Labor Organizations, and Domestic Dependent Sovereigns.

2. Rule number(s) or rule set range of numbers:

169.36a and 169.39f

3. Estimated timetable for completion, or statutory deadline, if applicable:

12 to 18 months

4. Describe the general goal/purpose of these rules. Include a discussion of the problem(s) the rule rescissions, additions, or amendments intend to address:

Rule 169.36a is necessary for the Department to include communications that are the "functional equivalent" of express advocacy within the definition of expenditure contained in the Michigan Campaign Finance Act (MCFA), 1976 PA 388, MCL 169.201 *et seq.*

Rule 169.39f is necessary under *Citizens United v FEC*, 130 S Ct 876, 175 L Ed 2d 753 (2010) and *Michigan Chamber of Commerce v Land*, 725 F Supp 2d 655 (2010). Currently, the Department is bound by these court decisions. Sections 9(2) and 54 of the MCFA are in conflict with them; therefore, sufficient clarification is necessary for corporations, labor unions and domestic independent sovereigns to properly maintain Super PACs and make independent expenditures with their treasury funds without violating the MCFA. The substance of this rule is consistent with the informational guidance provided to corporations, labor unions and domestic independent sovereigns subsequent to the two court decisions.

The definition of expenditure contained in the MCFA, which the Department administers, states that "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 of a candidate, the qualification, passage, or defeat of a ballot question, or the qualification of a new political party." MCL 169.206. The legislature did not further define "in assistance of" or "in opposition to." Because of constitutional vagueness and overbreadth concerns, the Department issued a 2004 interpretive statement to Robert LaBrant, *Interpretive Statement to Robert LaBrant, April 20, 2004*, indicating that the Department intended to use the "express advocacy" test outlined in *Buckley v Valeo*, 424 US 1, (1976) to determine whether a communication was in assistance of, or in opposition to, a candidate or ballot question and, thus, fell under the umbrella of the MCFA. Since *Buckley*, the United States Supreme Court has broadened its view of the types of communications that may fall within a disclosure regulation without triggering the constitutional problems noted above. In *Wisconsin Right to Life v FEC*, 127 S Ct 2652, 168 L Ed 2d 329 (2007), the Court stated that a communication can be viewed as the "functional equivalent" of express advocacy if "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

Additionally, the Department issued its interpretive statement to LaBrant, before the U.S. Supreme Court issued its opinion in *Citizens United v Federal Election Commission*, 130 S Ct 876, 175 L Ed 2d 753 (2010), which eliminated the ban on corporate and labor union monies to pay for functional equivalent communications. Any attempt to promulgate a similar rule before *Citizens United* would have advocated a ban on speech by corporations and labor unions because the MCFA prohibits those entities from making 'expenditures.' See rule 169.39b which advocated such a ban and was found to be unconstitutional in 1998 by both the United States District Court Western District of Michigan and the United States District Court Eastern District of Michigan. Post-*Citizens United* the only issue is disclosure of these expenditures by corporations and labor unions, not the ban of

their speech.

Finally, under *Citizens United* and *Michigan Chamber of Commerce v Land*, the Department is prohibited from banning independent expenditures made by corporations, unions, and domestic dependent sovereigns on behalf of candidates. Currently, the MCFA bans these independent expenditures. A rule setting forth the Department's administration of the MCFA to comply with *Citizens United* and *Michigan Chamber of Commerce v Land* is necessary to provide guidance on whether an expenditure made by a corporation, union or domestic dependent sovereign is a permissible independent expenditure or an impermissible in-kind contribution.

5. Please cite the specific promulgation authority for these rules (i.e. department director, commission, board, etc.), listing all applicable statutory references. Are these rules mandated by any applicable constitutional or statutory provision? If so, please explain.

Secretary of State. MCL 169.215(2) requires that the Secretary must promulgate a rule under the Administrative Procedures Act of 1969, 1969 PA 306, MCL 24.201 to 24.348, in order to state a general rule of law.

6. Please describe the extent to which the rules conflict with or duplicate similar rules or regulations adopted by the state or federal government [include statutory references and public acts, as applicable]:

There is no conflict or duplication of similar rules or regulations adopted by the state or federal government.

7. Is the subject matter of these rules currently contained in any guideline, handbook, manual, instructional bulletin, form with instructions, or operational memoranda?

The subject matter of Rule 169.36a is contained in an *Interpretive Statement to Robert LaBrant, April 20, 2004*. The subject matter of Rule 169.39f is contained in an instructional bulletin and the Independent Expenditure Political Committee Statement of Organization Form.

8. Will these proposed rules be promulgated under Sections 44 or 48 of the Administrative Procedures Act, 1969 PA 306, as amended, being MCL 24.244 or 24.248? Please explain. Or, will these rules be promulgated under the full rulemaking process?

These rules will be promulgated under the full rulemaking process.

Note: If this request for rulemaking applies to rules that will be promulgated pursuant to **Sections 44 or 48** of the Administrative Procedures Act, 1969 PA 306, as amended, MCL 24.244 or 24.248, you do not have to answer questions 9 to 13.

9. Please describe the extent to which the rules exceed national or regional compliance requirements or other standards:

Rule 169.36a will bring Michigan disclosure requirements for state and local candidates and ballot questions in line with federal disclosure requirements permitted by the U.S. Supreme Court for federal candidates.

10. Do these rules incorporate the recommendations of any Advisory Rules Committee formed pursuant to Executive Order 2011-5? If yes, please explain.

No.

11. Do these rules incorporate the recommendations received by the public regarding any complaints or comments regarding the rules? If yes, please explain.

No. This subject matter is not currently contained in the rules.

12. If amending an existing rule set, please provide the date of the last evaluation of the rules and the degree, if any, to which technology, economic conditions or other factors have changed the regulatory activity covered by the rules since the last evaluation.

The rules pertaining to the MCFA were last amended in 2000. Mandatory electronic disclosure was enacted in 1999 (1999 PA 238), making the disclosure of campaign contributions and expenditures less difficult.

13. Are there any changes or developments since implementation that demonstrate there is no continued need for the rules, or any portion of the rules?

No.

14. Is there an applicable decision record (as defined in MCL 24.203(6) and required by MCL 24.239(2))? If so, please attach the decision record.

No.

15. Reviewed by the following Departmental Regulatory Affairs Officer (RAO):

↓ To be completed by the ORR ↓

Date RFR received:

Based on the information provided in this RFR, the ORR concludes that there are sufficient policy and legal bases for approving the RFR.

ORR assigned rule set number:	
Date of approval:	Explanation:

Based on the information provided in this RFR, the ORR is not approving the RFR at this time.

Date of disapproval:	Explanation:
More information needed:	Explanation:

(ORR-RFR January 2012)

