

DRAFT

Robert S. LaBrant
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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), 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 from those organizations to candidates and committees.

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 comprise 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 your request available to the public. Comments were received from Richard L. Robinson, Executive Director, Michigan Campaign Finance Network. Comments were also received from Jeff Kowalski.

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 urges 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.

Turning to your questions, the Department's responses are as follows.

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 it meets the \$500.00 expenditure threshold, MCPAC III will be a "committee" as that term is defined in section 3(4) of the MCFA (MCL 169.203). It would 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 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 corporations 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 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 is derived from the treasury funds of the Chamber?*

Yes. 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 funds are transferred to MCPAC III and the

Michigan Chamber's independent expenditures are reported in periodic campaign statements filed as required by section 33. MCL 169.233.

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 question 3, a corporation's political speech must be funded by that corporation. Therefore, treasury funds from anyone other than the Michigan Chamber cannot be contributed to MCPAC III and would not be reported by MCPAC III.

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

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. The remainder of this question is premised on your suggestion that provisions of the MCFA related to ballot questions should also be applied to corporate independent expenditures made to support or oppose candidates.

Pursuant to section 3(4) of the MCFA, a corporation that makes a contribution to a ballot question committee "shall for that reason not be considered a committee unless the person solicits or receives contributions for the purpose of making an expenditure to that ballot question committee." MCL 169.203(4). You assert that this provision should apply to corporations and other persons that make contributions to MCPAC III.

Once again, the ban on corporate contributions remains in effect. Any corporation that contributes to MCPAC III would violate section 54 of the MCFA and be subject to criminal penalties. Consequently, there is no basis for applying section 3(4) or other ballot question provisions in the manner you suggest.

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 to Michigan Chamber PAC III?*

The Department has indicated that after a corporation makes independent expenditures and forms a political committee, it must file campaign statements disclosing the transfer of its treasury funds to the committee and the independent expenditures made with those funds. Section 55 of the MCFA specifically allows a corporation to pay the administrative and solicitation expenses of a separate segregated fund. MCL 169.255. This authority aligns with the exception to the definition of "expenditure", which provides that "expenditure" does not include "an expenditure for the establishment, administration, or solicitation of contributions to a separate segregated

fund or independent committee.” MCL 169.206(2). Since MCPAC III is not a separate segregated fund or independent committee, transfers from the Chamber to MCPAC III are the only funds available for payment of the political committee’s administrative expenses. Direct and in-kind contributions from other persons are not permitted.

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.

In conclusion, *Citizens United* opens a narrow window to corporate political speech. It does not result in carte blanche authority to participate in Michigan elections but only allows independent expenditures of corporate treasury funds to engage in its own political speech.

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