1-93-CI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

48918-2110

April 14, 1993

Ms. Margaret M. Ayres
Davis Polk & Wardwell
1300 I Street, N.W.
Washington, D. C. 20005

Dear Ms. Ayres:

This is in response to your letter requesting a declaratory ruling with respect to the application of the Michigan Campaign Finance, 1976 PA 388, as amended, (the "Act"). Your request is made on behalf of an unnamed Delaware corporation which has done business in Michigan but does not maintain an office in this State.

The corporation maintains a separate segregated fund which has filed with the Federal Election Commission pursuant to the applicable provisions of the Federal Election Campaign Act. The corporation has never participated in Michigan candidate elections. You have stated the facts underlying your request as follows:

> " Recently, one of the Company's officers (the "Officer) responsible in part for the Company's business in Michigan requested that the PAC make a $2,500 contribution to the candidate committee of a candidate for elective office in Michigan (the "Candidate"). The PAC declined to make the suggested contribution. The Officer now wishes to make part of the contribution to the candidate himself and to ask other Company officers to make contributions to the Candidate as well. The Officer hopes that, as a result of his action, contributions aggregating $2,500 will be received by the Candidate from the officers of the Company. The Officer plans to collect the officers' contribution checks and pass them on directly to the Candidate's committee. The Company will not reimburse the officers for their contributions and has not provided officers with funds for the purpose of making these contributions. No officer will be required to make a contribution, nor will the Company reward the making of a contribution to the Candidate."

The question presented is whether the Officer and the other officers of the corporation may make the contributions as described above.

When your request was received it was circulated to the public for comments as required in section 15(2) of the Act (MCL 169.215). One set of comments was received. That commentator suggested that the activity cited in the request would require the officers to file as a committee pursuant to section 24 of the Act (MCL 169.224) because their activities met the definition of committee contained in the Act.

After the comment period ended one of your colleagues requested a copy of the comment. On February 12, 1993 you responded to the comments that had been submitted. In the response you modified the facts set forth in the original letter. The modification in the facts as outlined is that the Officer "could refrain from taking any action to facilitate contributions by other officers." In this scenario the Officer would "do no more than suggest possible political contributions to fellow officer-shareholders and pass on to them the solicitation cards provided by the proposed recipient-committee."

The Act prohibits a corporation or anyone acting on behalf of a corporation from making a contribution or expenditure in a candidate election (MCL 169.254). However, pursuant to section 6(3)(a) of the Act (MCL 169.206), corporate expenditures for communications with paid members or shareholders are exempt from this prohibition.

In an interpretive statement issued to Mr. George Watts, dated December 28, 1979, the Department of State was asked whether this exemption applied to a mailing that included literature produced by a candidate committee. The Department indicated that the exemption did not extend to the republication, reproduction or distribution of a communication prepared by a candidate or candidate committee.

This analysis would apply equally to an officer acting on behalf of a corporation. An officer may communicate with other shareholders and distribute literature produced at corporate expense. However, pursuant to section 54(2), the officer is prohibited from using corporate time, property or other resources to distribute solicitation cards provided by a candidate committee. In other words, the officer may communicate with other officer/shareholders for the purpose of soliciting contributions to Michigan candidates, but the officer may not distribute solicitation cards furnished by the candidate committee.

In addition, the officer may not collect contributions from the other officers and forward them to the candidate. Such bundling of contributions would be construed as joint activity by the individuals involved, making them subject to the Act's requirements because they would be a committee as defined in section 3(4) of the Act (MCL 169.203). In relevant part that definition provides:

> (4) "Committee" means a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of voters for or against the nomination or election of a candidate....."

Section 11 of the Act (MCL 169.211) defines the term "person" to include "any other organization or group of persons acting jointly."

In an interpretive statement issued to Mr. Carl Gromek September 24, 1992 the issue of joint activity was explored. That response concluded that there would be joint activity where a group set up a system for purchasing fund-raiser tickets. One of the key facts was the continuous communications proposed along with the maintenance of records to track who in the group had made contributions to candidates.

The facts, as modified, eliminate the joint activity inherent in the original proposal. If the officer simply discusses the candidates, there does not appear to be any joint activity among the officers. The communications would be in only one direction, no funds would be collected or "bundled" and no records of participation would be maintained. In these circumstances, the activity outlined in the amended request does not trigger the registration and reporting requirements of the Act.

This response is informational only and does not constitute a declaratory ruling because the facts provided lack specificity, including the name of the corporation requesting the ruling.

Sincerely,

Phillip T. Frangos
Deputy Secretary of State
State Services

130904

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6763

August 4, 1993

SCHOOLS AND SCHOOL DISTRICTS:

Lease of school facilities by a ballot committee

The board of education of a local school district may not allow a ballot committee to lease school facilities, including school offices and phone, for the purpose of contacting the electorate of the school district to advocate the committee's position on a school millage ballot proposal.

Honorable Susan Grimes Munsell

State Representative

The Capitol

Lansing, Michigan

You have asked a question which may be stated as follows:

> May the board of education of a local school district allow a ballot committee to lease school facilities, including school offices and phones, for the purpose of contacting the electorate of the school district to advocate the committee's position on a school millage ballot proposal?

The attachments to your letter indicate that a local school district permitted a group organized to promote the passage of a school millage proposal to use school board offices and phones to call voters in the district to solicit their support of the millage.

School districts possess only those powers granted to them by the Legislature expressly or by reasonably necessary implication. Senghas v L'Anse Creuse Public Schools, 368 Mich 557, 560; 118 NW2d 975 (1962).

OAG, 1987-1988, No 6423, p 33 (February 24, 1987), concluded that school districts could not rent or lease public facilities including school buildings and public offices to an independent political ballot or candidate committee. That opinion also concluded that school districts could not give or loan office supplies and office equipment to independent political ballot or candidate committees. This conclusion was based on the well-established principle that boards of education of school districts have no authority to expend public funds to influence the electorate in support of or in opposition to a particular ballot proposal. While school districts may objectively inform voters about facts and issues involved in ballot proposals, school district funds may not be used to endorse a particular candidate or position. OAG, 1965-1966, No 4291, p 1 (January 4, 1965); Mosier v Wayne County Bd of Auditors, 295 Mich 27, 31; 294 NW 85 (1940).

Boards of education of local school districts and intermediate school districts may grant the use of school facilities to

organizations and citizen groups. The School Code of 1976, 1976 PA 451, MCL 380.1268; MSA 15.41268, section 1268, provides:

> (1) The board of a school district or an intermediate school district, upon the written application of a responsible organization located in the school district or intermediate school district, or of a group of at least 7 citizens of the school district or intermediate school district, may grant the use of school grounds, schools, or building facilities of the school district or intermediate school district as community or recreation centers for the entertainment and education of the people, including the adults and children of school age, and for the discussion of topics tending to the development of personal character and of civic welfare. The occupation shall not infringe seriously upon the original and necessary uses of the properties.
>
> (2) The board of the school district or intermediate school district shall prescribe regulations for occupancy and use to secure fair, reasonable, and impartial use of the properties. [Emphasis added.]

This provision of the School Code of 1976 restricts the permissible uses of school facilities by public groups to those in which the facilities are used "as community or recreation centers for the entertainment and education of the people ... for the discussion of topics tending to the development of personal character and of civic welfare." This section does not authorize the board to grant unlimited access to all parts of a school building for any purpose.

The board of a school district may permit community groups to use school facilities for purposes of public assembly to engage in the free expression and exchange of thoughts and ideas. School facilities such as auditoriums, gymnasiums, and stadiums may be made available for public meetings and gatherings for activities which are traditionally carried on in public arenas. Subsection 1268(2) expressly requires that access to school facilities for such gatherings must be fair and impartial. Citizen groups and organizations may not be denied the use of school facilities which have been made available to other groups and organizations because they intend to discuss their opposition to a prior decision of the board of education. OAG, 1981-1982, No 5981, p 375 (September 18, 1981).

The lease of school board offices and telephones by a ballot committee seeking to advocate a particular position, however, must be distinguished from use of school premises by citizen groups for communicative purposes under section 1268 of the School Code of 1976. Use of school offices and school equipment by a ballot committee to carry on individual telephone conversations to solicit support of a school millage proposal is not the kind of public assembly permitted by section 1268. School districts may not permit their offices and phone equipment to be used in a restrictive manner for advocacy of one side of a ballot issue, especially when the issue being advocated is a school district millage proposal. See OAG, 1987-1988, No 6423, supra. School districts may not endorse a particular candidate or ballot proposal. OAG, 1965-1966, No 4291, supra.

It is my opinion, therefore, that the board of education of a local school district may not allow a ballot committee to lease school facilities, including school offices and phones, for the purpose of contacting the electorate of the school district to advocate the committee's position on a school millage ballot proposal.

Frank J. Kelley

Attorney General

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING

MICHIGAN 48918

48918-2110

August 4, 1993

Mr. D. Joseph Olson, Treasurer
Michigan Insurance Federation
Political Action Committee
645 W. Grand River
Howell, Michigan 48843

Dear Mr. Olson:

This is in response to your letter with respect to the application of the Michigan Campaign Finance Act, 1976 PA 388, as amended, (the "Act"). The letter asks the Department to rule that an independent committee may invest the funds held by the committee in investment vehicles other than the account it has in an official depository.

The Michigan Insurance Federation Political Action Committee (MIFPAC) maintains an account in a bank as its official depository. Your letter states:

> "All contributions received by MIFPAC are deposited into its official depository, ..., with all expenditures made out of that account. Consequently, MIFPAC's procedures comply with the provisions of section 21(6) of The Act.
>
> MIFPAC's practice of investing its funds in another investment vehicle is not inconsistent with The Act or the public policy it serves. The legislature's obvious intent was to create a regulatory scheme under which committee funds could be tracked and monitored; not to place restrictions on the types of investment vehicles in which committees may choose to invest their funds."

Since the Act first became effective the Department has responded to a number of inquiries regarding the establishment and use of an official depository. Among the previous communications from this Department on the permissible investments for committee funds was a letter issued to James Damstra the then chair of the Kent County Republican Committee.

The Damstra letter concluded that a committee could invest its funds in a certificate of deposit in a financial institution. The Damstra letter stated:

> "Section 21(3) [now section 21(6)] of the Act requires a committee

> to designate an account in a financial institution in this state as its official depository for the purpose of depositing all contributions which it receives and for the purpose of making all expenditures. The Act mandates that all contributions and expenditures pass through one account at the designated official depository.
>
> However, the Act in Section 28(1) contemplates that a committee may receive interest on an account consisting of funds belonging to the committee. The mere transfer of funds deposited in the official depository to an interest bearing account for investment purposes is not an 'expenditure' as defined in Section 6 of the Act. Thus, the Act would not preclude a transfer from the official depository account to an interest bearing account in any financial institution if the committee retains complete control of the funds at all times and full disclosure is made."

Subsequently, Senator Michael O'Brien requested an interpretive statement with respect to the acceptable investments that could be made with committee funds. In the interpretive statement issued to Senator O'Brien the Department concluded that committee funds must be held in a financial institution and that they could not be used to purchase shares of stock or invested in the commodities markets. A copy of the O'Brien interpretive statement is enclosed.

In 1987 the Department once again responded to an inquiry regarding the use of committee funds to make investments in holdings other than accounts in a financial institution. The interpretive statement issued to Tom Brakenrich of the Michigan Taxpayers for Good Government quoted the previous letters to Damstra and O'Brien and reached the same conclusion. A copy of that letter is also enclosed.

In 1989 the Act was extensively amended. One of the sections of the Act that was substantially changed was section 21. It was modified to permit out of state committees to have a treasurer and a depository outside of Michigan. However, the amendments did not alter the requirement that a Michigan based committee such as MIFPAC shall have an account in a financial institution as its official depository.

Contacts by the staff of this Department with the Financial Institutions Bureau in the Department of Commerce indicate that the general understanding is that a financial institution is a federal or state chartered bank, savings and loan association or credit union.

For example, in MCL 129.122, the statute prescribing appropriate depositories for surplus funds of local governments the term financial institution is defined as follows:

> "(b) 'Financial institution' means a bank, savings and loan association, or credit union which is insured by an agency or

instrumentality of the federal government and which is eligible to be a depository of surplus funds belonging to the state under sections 5 and 6 of Act No. 105 of the Public Acts of 1855, as amended, being sections 21.145 and 21.146 of the Michigan Compiled Laws."

By limiting committees to investing in accounts in financial institutions the legislation is insuring that committee funds are available to be used for the purpose they have been raised, i.e. supporting or opposing candidates or ballot questions. The emphasis is on preserving and protecting contributor's funds so that these funds are available for use in the political process.

Pursuant to the Act a committee is required to hold assets only in a bank, savings and loan association or credit union. A committee is precluded from holding its assets in another investment vehicle and using an account in a financial institution for the purpose of depositing contributions and making expenditures.

This letter is informational only and does not constitute a declaratory ruling. The request does not include an actual statement of facts necessary to form the basis for a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Deputy Secretary of State
State Services

Enc.

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3-93-CI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

48918-2110

August 11, 1993

Mark R. Fox
Fraser Trebilcock Davis & Foster, P.C.
1000 Michigan National Tower
Lansing, Michigan 48933

Dear Mr. Fox:

This is in response to your request for an interpretation of the Michigan Campaign Finance Act (the Act), 1976 PA 388, as amended. Specifically, you ask whether a contribution from a minor to a gubernatorial candidate committee is a "qualifying contribution" which may be matched with money from the state campaign fund.

Pursuant to the Act's public funding provisions, a gubernatorial candidate in a primary election is required to raise $75,000 in qualifying contributions before he or she may receive money from the state campaign fund. The candidate may then obtain $2.00 from the state campaign fund for each $1.00 of qualifying contribution, up to a maximum of $990,000.

"Qualifying contribution" is defined as follows:

> "Sec. 12. (1) 'Qualifying contribution' means a contribution of money made by a written instrument by a person other than the candidate or the candidate's immediate family, to the candidate committee of a candidate for the office of governor which is $100.00 or less and made after April 1 of the year preceding a year in which a governor is to be elected. Not more than $100.00 of a person's total aggregate contribution may be used as a qualifying contribution in any calendar year. Qualifying contribution does not include a subscription, loan, advance, deposit of money, in-kind contribution or expenditure, or anything else of value except as prescribed in this act." [MCL 169.212(1)]

This definition does not limit "qualifying contribution" to a contribution received from a person who has reached the age of majority. However, as you suggest in your letter, the dispositive issue is whether the minor must exercise ownership and control over the funds used to make the contribution.

You point out that under the Federal Election Campaign Act, a minor "may contribute to Federal candidates subject to the limits generally applicable to all persons" if the funds are owned and controlled exclusively by the minor and the decision to contribute is made knowingly and voluntarily. (Federal Election Commission Advisory Opinion 1976-13.) Exclusive ownership and control is required to ensure that a parent or guardian does not exceed his or her own contribution limitation by contributing additional funds in the

minor's name.

Section 53 of the Campaign Finance Act (MCL 169.253) states as follows:

> "Sec. 53. For purposes of sections 49 to 53 a contribution or expenditure by a dependent minor shall be reported in the name of the minor but shall be counted against the contribution limitations of the minor's parent or guardian, as set forth in section 52."

Contributions to a publicly funded gubernatorial candidate committee are subject to the contribution limitations of section 69 of the Act (MCL 169.269). Therefore, section 53 of the Act, which is limited in its application to sections 49 to 53, does not apply to a minor's contributions to a gubernatorial candidate committee. As a consequence, the minor's contribution is not automatically counted against the contribution limitation of the minor's parent or guardian.

However, notwithstanding the self-limiting clause of section 53, section 70 of the Act (MCL 169.231) makes it clear that a contribution from a minor that is directed or controlled by a parent or guardian is attributable to both the minor and parent. This section provides:

> "Sec. 70. A contribution or expenditure which is controlled by, or made at the direction of, another person, including a parent organization, subsidiary, division, committee, department, branch, or local unit of a person, shall be reported by the person making the expenditure or contribution, and shall be regarded as an expenditure or contribution attributable to both persons for purposes of expenditure or contribution limits."

Thus, in answer to your question, a contribution from a minor is matchable under the Act's public funding provisions and subject to the contribution limitation applicable to other individuals ($3,400 in an election cycle) if the contribution is made from funds directed and controlled solely by the minor.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Deputy Secretary of State
State Services

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

Opinion No. 6767

August 25, 1993

Contributions to or expenditures on behalf of a political committee by a corporate separate segregated fund

Section 55(1) of the Michigan Campaign Finance Act does not allow a separate segregated fund established by a corporation to make contributions to or expenditures on behalf of a political committee.

Honorable Richard H. Austin

Secretary of State

Treasury Building

Lansing, MI

MICHIGAN CAMPAIGN FINANCE ACT:

You have asked whether section 55(1) of the Michigan Campaign Finance Act, MCL 169.201 et seq; MSA 4.1703(1) et seq, allows a separate segregated fund established by a corporation to make contributions to or expenditures on behalf of a political committee. In order to answer this question, it is necessary to summarize pertinent provisions of that statute.

Section 54(1) of the Michigan Campaign Finance Act prohibits corporations from making contributions or expenditures in connection with state elections involving candidates. [(1)] Section 55(1) of the Act, however, does permit a corporation to make an expenditure for the establishment and administration of a separate segregated fund provided that the resulting separate segregated fund is limited to making contributions to four specifically enumerated types of committees:

> A corporation or joint stock company formed under the laws of this or another state or foreign country may make an expenditure for the establishment and administration and solicitation of contributions to a separate segregated fund to be used for political purposes. A fund established under this section shall be limited to making contributions to, and expenditures on behalf of, [1] candidate committees, [2] ballot question committees, [3] political party committees, and [4] independent committees. [Emphasis and bracketed numbers added.]

Sections 2 through 12 of the Act define the various words and phrases used in the Act, including each of the four types of committees enumerated in section 55(1). In 1977, the Legislature apparently became aware that the Act had failed to make allowance for certain other types of committees, such as committees formed to seek the recall of an elected public official. In an effort to address this omission, the Legislature adopted 1977 PA 314. This amendatory act revised section 11 by, inter alia, adding and defining a new type of committee, a "political committee." This new committee was designed as a catch-all category, defined so as to encompass any committee which does not fall within the definition of any of the other four committees. Significantly, however, the amendatory act did nothing other than to add this new definition; it did not amend any of the substantive provisions of the Act to incorporate any reference to this newly defined type of committee. Thus, section 55(1), supra, continues to refer only to the four specific types of committees listed in the above quotation.

Both OAG, 1977-1978, No 5279, 391, 392 (March 22, 1978), and OAG, 1977-1978, No 5344, 549, 552 (July 20, 1978), concluded that section 55(1) of the Michigan Campaign Finance Act does not allow a corporate separate segregated fund to make contributions to or expenditures on behalf of any committees except the four types of committees listed therein. To date, the Legislature has not amended section 55(1) to change that result.

Your letter contains quotes from documents filed with your office suggesting that Section 55(1) be given a contrary interpretation to render it constitutional. However, the doctrine that a statute be given, whenever possible, a constitutional construction, only applies where a statute is ambiguous and more than one interpretation is possible. Sullivan v Michigan State Board of Dentistry, 268 Mich 427, 429-430; 256 NW 471 (1934). The restriction in Section 55(1) on contributions to political committees is not ambiguous.

Moreover, research has not revealed any definitive case law compelling the conclusion that the restriction in Section 55 (1) is unconstitutional. In Austin v Michigan Chamber of Commerce, 494 US 652; 110 SCt 1391; 108 LEd2d 652 (1990), the United States Supreme Court upheld the prohibition in Section 54(1) of the Michigan Campaign Finance Act on corporate contributions or expenditures in connection with state elections involving candidates. In that case, the parties did not raise and the court did not discuss the constitutionality of the prohibition in Section 55(1) on a separate segregated fund established by a corporation making contributions to or expenditures on behalf of a political committee.

It is my opinion, therefore, that section 55(1) of the Michigan Campaign Finance Act does not allow a separate segregated fund established by a corporation to make contributions to or expenditures on behalf of a political committee.

The Legislature may amend the Michigan Campaign Finance Act to authorize corporate separate segregated funds to contribute to or make expenditures on behalf of political committees, thereby treating all five kinds of committees the same.

Frank J. Kelley

Attorney General

(1 This restriction does not extend to contributions for the qualification, passage, or defeat of a ballot question; pursuant to section 54(3), these contributions may be made without restriction as to amount)

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

48918-2110

September 13, 1993

Honorable John D. Pridnia
State Senator
Lansing, Michigan

Dear Senator Pridnia:

This is in response to your request for an interpretive statement concerning the provisions of the Campaign Finance Act (the Act), 1976 PA 388, as amended. You ask whether assets purchased by your officeholder expense fund (OEF) may be transferred directly to the Michigan State Senate upon dissolution, and, if so, whether you may condition the transfer upon the right to use the assets while you remain in office.

Section 49(1) of the Act (MCL 169.245) provides:

> "Sec. 49. (1) An elected public official may establish an officeholder expense fund. The fund may be used for expenses incidental to the person's office. The fund may not be used to make contributions and expenditures to further the nomination or election of that public official."

Rule 62, 1989 AACS R169.62, regulates disbursements from an OEF.

Rule 65, 1989 AACS R169.65, prescribes the method to be used for the dissolution of an OEF and the disposition of its assets. Rules 65(2) and (3) provide:

> "(2) After an official leaves public office, his or her officeholder's expense fund shall not accept donations or make disbursements, except to dispose of debts incurred before the date on which the official leaves public office.
>
> (3) An asset purchased with money donated to an officeholder's expense fund which is no longer used in a manner incidental to office, either during an official's term of office or when the official leaves public office, shall be sold at fair market value. A public official may purchase, at fair market value, an asset acquired by the official's officeholder's

> expense fund. As used in this subrule, 'fair market value' is the price that an asset of like type, quality, age, and quantity would bring in a particular market at the time of acquisition."

You identify the assets purchased by your OEF which you would donate to the Michigan State Senate as "office furniture, a filing cabinet, and etc." Although you did not expressly state, it is assumed the purchase of these assets were disbursements for expenses incidental to your elective office, as authorized by section 49 of the Act and rule 62(1)(c).

You are dissolving your OEF but will remain in office as an elected official after your OEF is dissolved.

Rule 65(3) governs the disposition of assets "no longer used in a manner incidental to office", and its provisions apply whether or not the OEF which purchased the assets is dissolving or continuing. An Asset purchased by an OEF must be used in a manner incidental to office. If the asset is not "used in a manner incidental to office", then the asset must be "sold at fair market value". The proceeds of the sale must be kept in the OEF depository account, in accordance with OEF rule 61(3), or must be disbursed in accordance with OEF rule 62.

However, this does not mean, in all cases, that assets purchased by OEF funds must be used by the officeholder or reduced to cash. It means the asset must be used "in a manner incidental to office", which includes disbursement as authorized under rule 62.

What you are proposing is a disbursement from your OEF in the form of a gift to the Michigan State Senate.

62(1)(h) provides:

> "Rule 62. (1) An officeholder's expense fund shall be used only for disbursements which are incidental to the office of the elected public official who established the fund. A disbursement is incidental to the office of the official if it is traditionally associated with, or necessitated by, the holding of a particular public office and is included within 1 or more of the following categories:
>
> * * *
>
> (h) Donations to a tax-exempt charitable institution, including the purchase of tickets to charitable or civic events."

The Internal Revenue Code provides in 26 USC 170(a)(1):

> "(1) There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year."

"Charitable contribution" is defined in 26 USC 170(c):

> "(c) For purposes of this section, the term 'charitable contribution' means a contribution or gift to or for the use of . . .
>
> (1) A State, a possession of the United States, any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes."

The State of Michigan and its agencies are constitutionally exempt from federal taxation. McCulloch v Maryland, 4 Wheat 316, 4 L Ed 579 (1819).

Therefore, gifts to the Michigan State Senate are "donations to a tax-exempt charitable institution" for purposes of rule 62(1)(h). Assets of an OEF may be transferred directly to the Michigan State Senate.

No disbursements under rule 62 will be allowed after an official leaves public office, except for debts previous incurred. This may be termed an involuntary dissolution, as compared to the dissolution of an OEF before an official leaves public office, which may be termed a voluntary dissolution. In the case of a voluntary dissolution, the officeholder may dispose of funds in the OEF by any disbursement allowed under rule 62.

You also ask whether you may donate OEF assets to the Michigan State Senate but continue to use them while you remain in public office.

Neither the Act, nor the rules, would allow you to dissolve your OEF and transfer the assets to the Michigan State Senate but continue to use the assets while you remain in public office. This is because assets purchased with OEF funds and continued to be used in a manner incidental to public office constitute an active OEF. An OEF is not dissolved if assets purchased with OEF funds are still being used by the elected public official who established the OEF in a manner incidental to his or her office.

This principle governs assets transferred upon dissolution of on OEF and would apply whether the assets were used by you while in public office because you donated the assets upon condition you retain the right to use them during your term of office, or whether the assets were allocated to you by the Michigan State Senate for your use while in public office.

You may transfer these assets directly to the Michigan State Senate and continue to use them while in public office, but your continued use of these

assets while in public office will constitute an ongoing OEF subject to all the provisions of the Act and rules governing OEFs.

This response is informational only and does not constitute a declaratory ruling.

Very truly yours,

Phillip T. Frangos
Deputy Secretary of State
State Services

RICHARD H. AUSTIN
SECRETARY OF STATE

MICHIGAN
DEPARTMENT
OF STATE
LANSING, MICHIGAN 48918

November 2, 1993

Mr. Timothy Sponsler
Venture Capitol
Suite 319, 850 North Randolph
Arlington, Virginia 22203

Dear Mr. Sponsler:

This is in response to your request for a declaratory ruling concerning the delivery of contributions to candidates under the Michigan Campaign Finance Act, 1976 PA 388, as amended.

Facts

According to your request, Venture Capitol is an unincorporated association that has recently established a national donor network of business people. An individual may become a member of the network by making a $100 contribution to Venture Capitol, to be used for administration, solicitation and communication costs, and pledging to make at least two contributions of $100 each to candidates recommended by Venture Capitol.

The donor network will operate as follows:

> "Venture Capitol will send a newsletter to its members recommending specific candidates for financial support. The Venture Capitol member writes a personal check made payable to the candidate committee he or she chooses to support. Venture Capitol, in the mailing recommending candidates for support, plans to include a postage paid reply envelope addressed back to Venture Capitol for return of those requested contributions. Venture Capitol will collect the returned checks and will deliver them either in person or by air express delivery to the candidate. The Candidate Committee reports those individuals as contributors on the Candidate Committee's financial report.
>
> "Venture Capitol will also host local fund-raising events in regional locations. Recommended candidates will appear at these events. Venture Capitol members in attendance will be asked to write out a personal check to the candidate committee and the

candidate will leave with those checks at the conclusion of the event."

Venture Capitol is considering recommending that its members support a candidate in the 1994 Michigan gubernatorial race and in several legislative races. Therefore, you ask a series of questions regarding the applicability of the Michigan Campaign Finance Act (the Act) to Venture Capitol's proposed activities. The answer to your first question will dictate the response to those that follow. This question asks:

> "If Venture Capitol collects and delivers to Michigan candidate committees checks totaling $500 or more in a calendar year would that action be considered 'Joint Activity' under the Act requiring Venture Capitol to be registered as a 'Committee' with the Michigan Department of State?"

Your inquiry resulted in the submission of written comments by two parties, as authorized under the Act. Ms. Judith L. Corley, counsel to EMILY's List, noted that Venture Capitol's proposed activities are strikingly similar to those of EMILY's List, a membership group incorporated for political purposes only that is registered as a committee with both the Federal Election Commission and the Michigan Secretary of State. However, since there are "significant differences in the fact pattern set out by Venture Capitol and the actual activities of EMILY's List," Ms. Corley asked for a separate declaratory ruling on behalf of her client. In her view, the dispositive issue in both cases is whether contributions made by individuals that are transmitted to a candidate through a third party count as contributions by both the individual contributor and the third party.

Mr. Robert S. LaBrant, Vice President, Political Affairs and General Counsel, Michigan Chamber of Commerce, stated that conclusions reached in previous interpretive statements to Mr. Carl L. Gromek (6-92-CI) and Ms. Margaret M. Ayres (1-93-CI) indicate that Venture Capitol's proposed activity would result in a "group of persons acting jointly" who would be subject to a single contribution limitation. He elaborated on this viewpoint in written comments submitted in response to Ms. Corley's ruling request. Mr. LaBrant also suggested that the Department of State use an audit procedure to disqualify all but the first $100 of "bundled money" from being matched with money from the State Campaign Fund.

Before responding to your questions and, where necessary, the comments submitted by Mr. LaBrant and Ms. Corley, it is first necessary to revisit the Gromek and Ayres interpretive statements.

Gromek and Ayres

The Gromek interpretive statement, issued on September 24, 1992, addressed a proposed system for purchasing fundraiser tickets for use by judges of the Michigan Court of Appeals. Under that proposal, the Court's administrative officer would determine which fundraising events representatives of the Court should attend. The administrative officer would then contact the judge whose name appeared at the top of a list maintained by the officer. The judge would be asked to purchase tickets to a particular fundraiser by writing a check to the committee conducting the event. If the judge declined, the administrative officer would contact the next person named on the list. The administrative officer would keep records of contributions made and distribute fundraiser tickets to judges wishing to attend the event.

Relying upon the Act's definitions of "committee" and "person" [MCL 169.203(4); MCL 169.211(1)], the Department concluded that the proposed system resulted in a "group of persons acting jointly" that functioned as a committee. As such, the judges and administrative officer would be required to file a statement of organization after contributing $500 or more in a calendar year.

The Department issued the Ayres interpretive statement on April 14, 1993. Ayres dealt with the proposed fundraising activities of a corporate officer, who first asked the corporation's separate segregated fund to contribute $2,500 to a specific, though unnamed, candidate committee. After the request was rejected, the corporate officer planned to collect contributions totaling $2,500 from other corporate officers and pass them on directly to the candidate committee. During the course of responding to the Ayres request, the corporate officer's proposed activity was modified further: he or she "could refrain from taking any action to facilitate contributions by other officers" and "would do no more than suggest possible political contributions to fellow office-shareholders and pass on to them the solicitation cards provided by the proposed recipient committee."

The Department concluded that the corporate officer could communicate with fellow officers and distribute political literature produced at corporate expense. However, section 54 of the Act (MCL 169.254), which prohibits a corporation from contributing to a candidate, would preclude the officer from distributing solicitation cards paid for by the candidate.

The Department further indicated that the corporate officer could not collect contributions from other officers and forward them to the candidate. This "bundling of contributions would be construed as joint activity by the individuals involved, making them subject to the Act's requirements because they would be a committee as defined in section 3(4) of the Act (MCL 169.203)."

The Gromek system for purchasing fundraiser tickets was cited as an example of joint activity regulated by the Act. However, neither the Gromek nor Ayres interpretive statement considered those provisions of the Act which recognize that contributions may be delivered to a candidate by someone other than the contributor. As a consequence, Gromek and Ayres cannot be regarded - nor were they intended to be regarded - as definitive statements on the practice of "bundling," a term not defined in the Act but generally used to describe the collection and delivery of contributions by a third party. For this reason, the Gromek and Ayres interpretive statements do not dispose of the questions raised by Venture Capitol.

Delivery of contributions

The Campaign Finance Act clearly anticipates that an intermediary may deliver contributions to a committee. Section 21(10) of the Act [MCL 169.221(10)] provides that "contributions received by an individual acting in behalf of a committee" shall be reported to the committee's treasurer not later than 5 days before the closing date of the committee's next campaign statement.

Similarly, section 42(1) [MCL 169.242(1)] states that a person who accepts a cash or an in-kind contribution "on behalf of another and acts as the intermediary or agent of the person from whom the contribution was accepted" must provide the contributor's name and address and the intermediary's name and address to the recipient of the contribution.

Under section 21(10) and section 42(1), contributions are delivered to the intended recipient through the combined actions of more than one person. However, this combined action does not give rise to registration and reporting obligations. Instead, the Act appears to create a distinction between the delivery of contributions by one person on behalf of another and "joint activity" that requires formation of a committee.

In Gromek, the Court of Appeals proposed establishing a system to ensure that representatives of the Court attended fundraising events selected by the Court's administrative officer. The administrative officer determined the recipient of the contribution, the number of tickets to be purchased, and who would attend the fundraiser. Although a particular judge could decline to make a requested contribution, the Court of Appeals directed and controlled the program through its administrative officer who, with the acquiescence of the judges, made all of the decisions in the group's behalf. The contributions, though drawn upon individual accounts, were intended to be contributions from the group itself.

By contrast, the Ayres interpretive statement concluded that where a corporate officer solicited fellow officers without collecting or "bundling" contributions for delivery to a candidate, joint activity did not exist.

However, Ayres does not stand for the proposition that delivery of contributions by a third party always requires the formation of a committee.

While not thoroughly addressed in Ayres, the restrictions upon corporate political activity significantly affect solicitations of corporate officers. Section 54 of the Act [MCL 169.254] prohibits a corporation or anyone acting on behalf of a corporation, other than a corporation formed for political purposes, from making contributions or expenditures in candidate elections. Corporate political activity must be channeled through a single separate segregated fund. [MCL 169.255] These restrictions cannot be avoided by allowing a corporate officer to solicit and collect contributions from other officers.

The joint activity inherent in Gromek does not exist in every cooperative effort that results in the delivery of contributions to a committee. For example, as noted by Ms. Corley, it is not uncommon for a friend or colleague of a candidate to host a fundraising event in his or her home. The host or hostess may play an active role in organizing the event and in the collection and delivery of contributions to the candidate. However, the fundraiser does not result in a "group of persons acting jointly" within the meaning of section 11(1) of the Act [MCL 169.211(1)] because there is no united activity resulting in the receipt of contributions for the group's collective use or the making of expenditures in the group's collective behalf. The decision to contribute to the candidate is left solely to each individual attending the event and is not controlled by the host or hostess. In these circumstances, the Act simply requires the person collecting the contributions to report them to the committee's treasurer within the time provided in section 21(10).

Neither section 21(10) nor section 42(1) apply to Venture Capitol's proposed activities. However, they do indicate that the delivery of contributions by a third party is not necessarily equivalent to joint activity. The issue you raise is whether the business persons who choose to contribute to one of several candidates endorsed by Venture Capitol become a "group of persons acting jointly," subject to a single contribution limit, by forwarding contributions made payable to the candidate to Venture Capitol for delivery to the recipient committees.

Before addressing this issue, a third provision of the Act that deals with the delivery of contributions by an intermediary must be considered. Specifically, section 44(3) [MCL 169.244(3)] states as follows:

> "Sec. 44. (3) An individual, other than a committee treasurer or the individual designated as responsible for the record keeping, report preparation, or report filing for a committee, who obtains possession of 1 committee's contribution for the purpose of delivering the contribution to another committee shall deliver the contribution to that committee, that committee's treasurer, or

> that committee's agent, or return the contribution to the payor, not later than 10 business days after obtaining possession of the contribution."

This section of the Act was added in 1989 after campaign statements filed with the Department disclosed that contributions to candidates reportedly made by independent and political committees (commonly referred to as "PAC's") had not been received by the candidates. This occurred because the contributions had been given to a lobbyist, who had not delivered the contributions to their intended recipients. Rather than prohibiting this activity, the Legislature responded by establishing a 10 day deadline for delivering the contributions.

As a result of this legislative determination, individuals with similar interests may contribute unlimited funds to one or more PAC's. An individual representing those PAC's may then accept contributions intended for the same candidate from each PAC and deliver those "bundled" contributions to the candidate within 10 days. Although the person's role in delivering the contributions is not disclosed, contributions from the individuals to the PAC's and expenditures by the PAC's to the candidate are reported in campaign statements filed with the Department. Thus, section 44(3) does not undermine the Act's disclosure purposes.

Similarly, the Act's contribution limitations are not threatened. Pursuant to section 52 and section 69 of the Act [MCL 169.252; MCL 169.269], the amount each PAC may contribute to a candidate is limited. In the case of a gubernatorial candidate, a PAC that is registered as a political committee is prohibited from contributing more than $3,400 in an election cycle. An independent committee may contribute 10 times that amount.

Any individual who contributes to the PAC may also directly contribute $3,400 in an election cycle to the candidate supported by the PAC. One could argue that an individual who contributes the maximum amount to the candidate may avoid the $3,400 limitation by giving unlimited funds to a PAC that contributes to the same candidate. However, if the PAC controls the subsequent use of the individual's contribution, the individual cannot be held responsible for a violation of section 52 or section 69. On the other hand, if that subsequent use is controlled by the individual, a violation of section 44(1) may occur.

Section 44(1) [MCL 169.244(1)] ensures that the Act's contribution limitations are heeded by prohibiting earmarked contributions. This section provides:

> "Sec. 44. (1) A contribution shall not be made by a person to another person with the agreement or arrangement that the person receiving the contribution will then transfer that contribution to a particular candidate committee."

In his written comments, Mr. LaBrant suggests that section 44(1) prohibits a person from delivering a written instrument drawn by another person and made payable to a specific candidate. However, Mr. LaBrant misconstrues the meaning of this section by failing to distinguish between *delivering* a contribution and *making* a contribution.

In the scenario described above, section 44(1) prohibits the individual from making a contribution to, and for the ostensible benefit of, the PAC with the agreement or arrangement that the PAC will deposit the contribution into its own account and then use the money to contribute to a particular candidate. By so doing, section 44(1) prevents the laundering of contributions and the circumvention of the Act's contribution limits.

Thus, the Act accepts the bundling and delivery of PAC contributions by individuals. However, the same activity, when engaged in by a person other than an individual on behalf of individual contributors, is not specifically addressed by the Act.

It is in the context of the foregoing that your questions may now be answered.

Joint activity

To reiterate, your first question is whether Venture Capitol becomes a committee subject to the Act's provisions by collecting and delivering checks totaling $500 or more in a calendar year from individual members made payable to Michigan candidate committees. This depends upon whether Venture Capitol and its members are a "group of persons acting jointly" within the meaning of section 11(1) of the Act and whether the individual members contributions are attributable to the group.

As noted earlier, Venture Capitol plans to communicate with its members and recommend candidates for support. Members would then choose whether or not to contribute to any of the candidates and, if so, to whom. If a member decides to make a contribution, he or she would write a check made payable to the selected candidate committee and send the check in a postage paid reply envelope addressed to and provided by Venture Capitol. Venture Capitol would then forward checks it receives to their intended recipients.

The answer to your question depends upon whether the collection and delivery of contributions totaling $500 to various candidates by Venture Capitol transforms the individual members contributions into expenditures made on behalf of the group, for that is the significance of joint activity. Joint activity itself is not enough - there must be contributions or expenditures attributable to the group as a whole. This becomes evident when the phrase a "group of persons acting jointly" is interpreted, not in isolation, but with reference to the Act's definition of "committee."

Section 3(4) of the Act describes when a "person", including a "group of persons acting jointly", becomes a committee. If the latter phrase is inserted for the word "person", section 3(4) states, in pertinent part:

> "Sec. 3. (4) 'Committee' means a [group of persons acting jointly] who 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, or the qualification, passage, or defeat of a ballot question, if contributions received total $500.00 or more in a calendar year or expenditures made total $500.00 or more in a calendar year. . ."

This definition indicates that the group becomes a committee when it receives contributions for the group's use or when it makes expenditures attributable to the group as a whole. The resources of the persons within the group are combined to become the resources of the group itself. Once combined, no member of the group retains exclusive control over the timing or use of money or resources the member has devoted to the collective effort. If the member does not relinquish control to the group or, as in Gromek, to a person acting in the group's behalf, there is no contribution attributable to joint activity as required by section 3(4).

In the proposal you have described, members of Venture Capitol retain exclusive control over the funds they choose to contribute. The member decides whether or not to make a contribution and, if so, which candidates the member will support. The member's check is made payable to the candidate committee and cannot be used for any other purpose. In short, the contribution is directed and controlled at all times by the individual member and not by a "group of persons acting jointly." As such, the contribution is attributable to the individual member and not to Venture Capitol.

In his comments concerning Ms. Corley's ruling request, Mr. LaBrant argues that this result "will permit the contribution limits of section 52 and 69 to be systematically evaded by a sophisticated 'bundling' operation."[1] However, just as the earmarking prohibition found in section 44(1) ensures that contribution limits are not avoided by laundering money through a PAC, section 31 of the Act operates to preclude Venture Capitol from exceeding its contribution limitations.

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[1]. In fact, this result may have the salutary effect of minimizing a candidate's reliance upon PAC contributions. As Mr. LaBrant has noted in an article appearing in Michigan Forward (May, 1993), "EMILY'S LIST may well be the model for the post-PAC era" in campaign finance.

Section 31 [MCL 169.231] states as follows:

> "Sec. 31. A contribution which is controlled by, or made at the direction of, another person, including a parent organization, subsidiary, division, committee, department, branch, or local unit of a person, shall be reported by the person making the contribution, and shall be regarded as a contribution attributable to both persons for purposes of contribution limits."

Therefore, if Venture Capitol controls or directs a contribution made by an individual member, the contribution must be attributed to both the individual and Venture Capitol.

This interpretation of the Michigan statute is consistent with the construction of the Federal Election Campaign Act. This act differs from the Michigan statute in that the federal law specifically authorizes a PAC to serve as a conduit for earmarked contributions. The earmarked contribution can be in the form of a check made payable to the candidate or the PAC. If made out to the candidate, it is simply passed along by the conduit. If made out to the PAC, it is deposited and an equivalent amount is forwarded to the candidate. These earmarked contributions count towards the PAC's contribution limit if the PAC "exercises any direction or control over the choice of the recipient candidate." Thus, even though the statutes differ, the attribution of contributions is determined by the same test - direction and control.

In Federal Election Commission v National Republican Senatorial Committee, 966 F 2d 1471 (DC Cir, 1992) the United States Court of Appeals considered whether the National Republican Senatorial Committee directed or controlled contributions from individuals by selecting the candidates included in a solicitation, depositing solicited funds in its account, dividing the money in accordance with the terms of the solicitation, and passing the funds on to the candidates. The Court concluded that direction or control did not exist.

In reaching this conclusion, the Court considered previous Advisory Opinions issued by the Federal Election Commission, including an opinion requested by the National Conservative Political Action Committee (NCPAC):

> "In the NCPAC opinion, the Commission held that 'a mass mailing advocating the election of a clearly identified candidate' and including 'a suggestion that a contribution . . . be mailed to NCPAC' did not constitute direction or control within the meaning of §110.6(d). Fed. Election Camp. Fin. Guide (CCH) at 10,589. The Commission's opinion rested mainly on the fact that 'the individual contributor, not NCPAC, chooses whether to make a contribution,' to which the Commission added that '[t]he fact that a potential contributor may decide against making a contribution indicates a lack of control over the choice of the recipient

> candidate by NCPAC.' *Id.* at 10,590. So here, where more than 90 percent of those solicited did not contribute. *See also* Matter Under Review 1028 (Council for a Liveable World) (1980). The one case in recent years where the Commission has found direction or control concerned a 'corporate-sponsored political contributions program' in which 'personnel from the corporate president's office . . . [sought] to convince . . . executive and adminsitrative [sic] personnel' to make contributions. Advisory Opinion 1986-4, Fed. Election Camp. Fin. Guide (CCH) ¶ 5846, at 11,246 (1986). The potential for 'control' in such context is apparent."

An additional factor mentioned in both the Court of Appeals decision and in the Federal Election Commission opinions is that the committee making the solicitation did not select the amount of the individual contributions. In your proposal, each member of Venture Capitol would agree to contribute $100 to each of two candidates. However, there is nothing preventing the member from contributing a different amount or choosing not to contribute at all.

Similarly, while the member who decides to make a contribution selects from a list of candidates recommended by Venture Capitol, this "pre-selection" does not establish direction or control. As stated by the Court of Appeals:

> "The problem is that if this establishes 'direction or control' within the meaning of §110.6(d)(2) then every solicitation qualifies for the same treatment. Every solicitation 'pre-selects' candidates to some degree. It is fanciful to suppose that national political committees of any party would expend their resources merely to urge individuals to contribute to the candidate of their choice. . . ." NRSC *supra* at 1477.

As stated at the outset, the Federal Election Campaign Act differs from the Michigan statute in that the federal law specifically authorizes a PAC to serve as a conduit for contributions made by individuals. These contributions count towards the conduit's contribution limit only if they are directed or controlled by the PAC. However, the same test - direction or control - determines whether a contribution is attributable to both the individual and the PAC which delivers the contribution. Similarly, control over the use of resources distinguishes between activity undertaken by an individual and activity resulting in a "group of persons action jointly."

In answer to your question, Venture Capitol does not become a committee by collecting and delivering $500 or more in contributions its members choose to make to candidates endorsed by Venture Capitol. However, under your proposal, Venture Capitol will make expenditures on behalf of those candidates. Under the Michigan act, these expenditures, including the cost of the postage paid, pre-addressed envelopes mailed back to Venture Capitol and the cost of sorting and delivering those contributions to the recipient candidate committees, are

considered in-kind contributions to the candidates and must be reported by the candidate committees.

Venture Capitol must file a statement of organization as a committee and is subject to the Act's requirements if its in-kind contributions to candidates total $500 or more in a calendar year. If organized as a political committee, Venture Capitol may not contribute more than $3,400 in an election cycle to a gubernatorial candidate committee. If qualified to operate as an independent committee, Venture Capitol may not contribute more than $34,000 to that committee.

Your remaining questions presuppose that Venture Capitol and its members were engaged in joint activity and subject to a single contribution limit. Consequently, there is no need to respond to these questions.

This response is a declaratory ruling concerning the facts and questions presented.

Sincerely,

Richard H. Austin

2-93-CD

RICHARD H. AUSTIN
SECRETARY OF STATE

MICHIGAN
DEPARTMENT
OF STATE
LANSING, MICHIGAN 48918

November 2, 1993

Ms. Judith L. Corley
Perkins Coie
607 Fourteenth Street, NW
Washington, DC 20005-2011

Dear Ms. Corley:

This is in response to your request for a declaratory ruling under the Michigan Campaign Finance Act (the Act), 1976 PA 388, as amended. Specifically, you ask whether contributions made by individuals that are transmitted to a candidate through a third party count as contributions by both the individual contributor and the third party.

Your ruling request was presented in response to a request submitted by Timothy Sponsler on behalf of Venture Capitol, whose proposed donor network of business persons would operate in much the same way as EMILY's List. The response to Mr. Sponsler is attached to this response and incorporated by reference.

As stated in that ruling, contributions made by individual members are not attributable to EMILY's List as long as the decision to contribute is left to the individual. However, pursuant to section 31 of the Act [MCL 169.231], if EMILY's List controls or directs the individual's contribution, the contribution is attributable to both the individual and EMILY's List for purposes of contribution limits.

In response to your request, Mr. Robert LaBrant of the Michigan Chamber of Commerce submitted written comments as authorized under section 15(2) of the Act. [MCL 169.215(2)] Those comments have been carefully considered, and many were addressed in the ruling issued to Venture Capitol. However, a comment not dealt with in that ruling must be addressed here.

Specifically, Mr. LaBrant maintains that EMILY's List at least "directs" the contributions of its members. Pointing out that the dictionary definition of "direction" includes the "management, supervision or guidance of some action," Mr. LaBrant states:

> "EMILY'S LIST requires as an act of membership the pledge to contribute at least $100 to two or more candidates during that election cycle who have been endorsed by EMILY'S LIST. As Ann Lewis

> said in her interview in Political Woman by requiring checks to be returned to EMILY'S LIST they are able to track the actions taken by its members. They can send follow-up letters to those who don't contribute. Eventually, the member who chooses not to contribute to any candidates that EMILY'S LIST has profiled in its support mailings, will begin to receive follow-up letters and telephone calls that will ultimately pressure the member to finally make good on his/her pledge to make (2) $100 contributions to candidates endorsed by EMILY'S LIST.
>
> "So much for freedom not to choose."

According to the facts you and Mr. Sponsler have presented, an individual who has joined EMILY's List receives regular mailings and newsletters describing candidates who the individual may choose to support. Although the individual has agreed to eventually support two candidates, she or he may decide not to contribute to any candidate named in the mailing. If, as Mr. LaBrant asserts, EMILY's List begins to dun members who have failed to contribute by sending follow-up letters and making telephone calls, at some point EMILY's List may arguably direct or control the individual's decision to contribute.

However, you have stated that EMILY's List does not telephone members or send separate follow-up letters to those who have not fulfilled their pledges.[1] In the 1992 election cycle, for example, EMILY's List made a series of 14 mailings. In the tenth mailing, a paragraph was added urging members who had not contributed to consider doing so at this time. No further communication was directed at members who had chosen not to contribute.

There is no bright line test that establishes when an individual's contribution is "directed" by another. This line would be extremely difficult to draw given the First Amendment speech and associational rights implicated by the interaction of EMILY's List and its members. However, it is clear that "direction" is something beyond informing individuals who have voluntarily joined a membership organization that persons who share their ideology are running for political office and worthy of support. As long as the individual decides whether or not to contribute and, if so, which candidate to support, EMILY's List does not direct or control the individual member's contribution.
As a consequence, EMILY's List may collect and deliver contributions its members choose to make to Michigan candidates. However, costs incurred in this process, including the cost of the postage paid, pre-addressed envelopes mailed back to EMILY's List and the cost of sorting and delivering contributions to the recipient candidate committees, are considered in-kind contributions to the candidates and must be reported by the candidate committees and by EMILY's List. If qualified to operate as an independent committee, EMILY's List may not

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[1]. There is no suggestion that a member's "pledge," which was removed from the Act's definition of "contribution" by 1989 PA 95, is in any way enforceable.

contribute more than $34,000 in an election cycle to a gubernatorial candidate committee. If not so qualified, EMILY's List may not contribute more than $3,400 to that committee.

This response is a declaratory ruling concerning the facts and questions presented.

Sincerely,

Richard H. Austin

attachment