

STATE OF MICHIGAN



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

June 15, 2001

Ms. Kathleen Corkin Boyle
White, Schneider, Baird, Young & Chiodini, PC
2300 Jolly Oak Rd.
Okemos, MI 48864

Dear Ms. Boyle:

This communication constitutes the Department of State's response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended. Below is a summary of the information that you provided, the questions that you have asked and a response to those questions.

FACTS PRESENTED

You state that the Michigan Education Association (MEA), an incorporated labor organization, maintains a website that contains information regarding the organization as well as services available to members. Although the website is maintained primarily for the benefit of MEA members, any Internet user can access the site.

The site currently includes information regarding pending state and federal legislation, the State Board of Education, and the names and addresses of state legislators. In the future, you would like to include information regarding candidates and ballot questions. This information would include hyperlinks that would allow the user to automatically connect to various candidates. You add that because the MEA website is already established and maintained for communicating with its members about other issues, the actual cost of posting additional information regarding political issues will be minimal.

DOES THE INCLUSION OF INFORMATION REGARDING SPECIFIC CANDIDATES FOR OFFICE OR TO SPECIFIC BALLOT QUESTIONS CONSTITUTE AN EXPENDITURE UNDER THE MCFA?

Section 4 of the MCFA (MCL 169.204) defines "contribution" as "a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance,

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forbearance, loan, or donation of money or anything of ascertainable monetary value, or a transfer of anything of ascertainable monetary value to a person made for the purpose of influencing the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question.”

Section 6 of the MCFA (MCL 169.206) defines “expenditure” as a “payment, donation, loan, or promise of payment of money . . . for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate or the qualification, passage or defeat of a ballot question.” Section 6(2)(b) states that expenditure does not include “an expenditure for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference.”

Finally, Section 9(3) (MCL 169.209) defines “in-kind expenditure or contribution” as an expenditure or contribution other than money.

Before analyzing whether the MEA’s hyperlinks to candidates constitute contributions or expenditures, we note that Section 6(2)(a) of the MCFA exempts expenditures “for communication by a person with the person’s paid members or shareholders and those individuals who can be solicited for contributions to a separate segregated fund under Section 55.” However, you state that the website is available to anyone who wishes to view it and that you do not utilize a password system to restrict access to members or shareholders. Thus, for purposes of this response, the possible exemptions afforded your group if it had a “members only” site will not be analyzed.

CANDIDATE AND BALLOT QUESTION INFORMATION

You have not provided enough information to determine whether the material on your website constitutes an expenditure under the MCFA. Suffice it to say that the law, as applied to Internet communication, is the same as that applied to “traditional” MCFA communication, such as print, radio or television advertisements.

In that regard, the MCFA parallels the Federal Election Campaign Act (FECA). The Federal Election Commission (FEC) has only recently begun to assess the impact of the Internet on the traditional FECA structure. Thus far, its opinions have treated Internet communications in a manner similar to “traditional” communications.

Advisory Opinion 1998-22 concerned a Connecticut citizen, employed as a website designer, who created a website which expressly advocated the election of a congressional candidate. The website also allowed visitors to indicate their desire to donate time or money to the candidate, and included the address of the campaign, and contained a link to the e-mail of the campaign committee. The FEC concluded that the website was something of value and constituted an expenditure under the FECA. While the citizen had argued that the website had been built at no cost, the FEC opined

that there were various costs associated with creating the website. For example, the overhead costs of running his business had to be apportioned to every website that he created, including the express advocacy website. These overhead costs included the fee to secure the registration of the domain name, the amount invested in hardware, and the utility costs to create the site.

The FEC has also specifically addressed organizations that use their websites to endorse candidates. Advisory Opinion 1997-16 concerned the Oregon Natural Resources Council Action (ONCRA), which wanted to announce the candidate endorsements that its PAC, ONCRA PAC, had made. ONCRA wanted to make these announcements on its website, rather than through the mail. The FEC ruled that the group could not list its endorsements on the site unless it instituted a screening mechanism to ensure that it could only be accessed by members. Corporations could communicate their endorsements to members, but if they communicate to the general public, they would make a contribution.

Since *Buckley v Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed. 2d 659 (1976), FECA's expenditure provisions have applied only to those political communications that contain words of "express advocacy." If a communication refers to a candidate, but does not use words that expressly advocate his or her election or defeat--"vote for," "vote against," etc.--it is not deemed an expenditure. The same standard is applicable to the MCFA. *Right to Life of Michigan v Miller*, 23 F. Supp. 2d 766 (E.D. Mich.1998). If the communication does not contain words of "express advocacy," it is generally not subject to MCFA regulation. Thus, while the MEA's website could certainly contain general information about candidates, it could not expressly advocate their election or defeat.

Because Section 54(3) of the MCFA (MCL 169.254) allows corporations to make expenditures on behalf of ballot question committees, MEA's website could expressly advocate the qualification, passage, or defeat of a ballot question. Those expenditures would have to be reported under the MCFA.

HYPERLINKS AS CONTRIBUTIONS OR EXPENDITURES

The more relevant part of your question concerns your reference to hyperlinks. The FEC has also addressed the specific issue of hyperlinks. In Matter Under Review 4340, the FEC accused the Dal LaManga for Congress Committee and the TWEEZERMAN Corporation of violating FECA's prohibitions against corporate contributions. In that case, a candidate for Congress who owned a corporation (TWEEZERMAN) placed a hyperlink and the following statement on the bottom of his corporate website: "Dal La Manga, the founder and President of Tweezerman, is running for U.S. Congress in New York." The corporate website contained no other reference to the candidate. The link took users to a website that raised money for the candidate.

The FEC ruled the link itself constituted a contribution because it promised “additional exposure to members of the general public, which is tantamount to advertising.” The company and the campaign asserted that the link was free of charge and that linking was necessary to navigate the Internet; thus, the link should not be considered an in-kind contribution. The FEC rejected the company’s logic, stating that “Although the respondents are correct in stating that links between sites are routinely used and that links make surfing the net easy, they are incorrect in further stating that these links are [customarily] free of charge. There is no disputing that paid advertising and paid hyperlinks on the WWW are a very big business.” The FEC also added that the mere fact that something is ordinarily provided free of charge does not alone answer the question of whether it has value—certainly something can be free of charge but still have value. The committee and the Company agreed to settle the charge, in which they admitted linking campaign and corporate websites constituted a contribution.

We see no reason to depart from the FEC’s rationale with regard to hyperlinks when interpreting the MCFA. A hyperlink is tantamount to a form of advertising, in that it is designed to induce the Internet viewer to visit a website he or she would not ordinarily visit. It eliminates the need to learn about candidates that the user supports or opposes, finding a candidate’s address (e-mail or traditional) and asking for more information. Instead, a hyperlink takes the viewer directly to the candidate—an electronic middleperson. While this process holds the potential to make campaigns and candidates more accessible, it still is something of value for the “linked” candidate, and would thus constitute an expenditure as defined in Section 6 of the MCFA.

PROHIBITION AGAINST CORPORATE OR UNION CONTRIBUTIONS OR EXPENDITURES

Section 54 of the MCFA reads, in relevant part: “Except with respect to the exceptions and conditions [regarding ballot questions and administering a separate segregated fund], and to loans made in the ordinary course of business, a corporation, joint stock company, domestic dependent sovereign, or labor organization [henceforth, “a corporation”] shall not make a contribution or expenditure . . .” Michigan’s prohibition against corporate independent expenditures on behalf of candidates has been upheld by the U.S. Supreme Court. *Austin v Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed. 2d 652 (1990).

While Section 54 strictly prohibits corporate contributions and expenditures, it does not mandate neutrality with regard to elections. For example, the original MCFA (1975 P.A. 227) prohibited corporations from making contributions and expenditures on behalf of candidates and ballot questions. The Michigan Supreme Court upheld the prohibitions with regard to candidates. However, it held that a ban on corporate contributions and expenditures on behalf of ballot questions would run afoul of the free speech and press provisions found in Const. 1963, Art. 1, §5. *Advisory Opinion on Constitutionality of 1975 PA 227*, 396 Mich. 123, 242 N.W. 2d 3 (1976). The legislature responded by placing a

\$40,000 cap on corporate contributions to ballot questions. This cap was also found unconstitutional. Michigan State Chamber of Commerce v Austin, 832 F. 2d 947 (6th Cir.1987). The constitutional prohibition against corporate contributions to ballot question committees was later codified in MCFA Section 54(3), which expressly authorizes corporations to make contributions to, and expenditures on behalf of, ballot question committees.

Other provisions of the MCFA, as well as court cases interpreting those provisions, seem to indicate that the legislature did not intend that a corporation maintain strict neutrality in elections. For example, Section 55 allows a corporation to spend treasury funds for the establishment, administration, or solicitation of contributions to a separate segregated fund. As indicated in previous interpretive statements to Phillip VanDam and David Lambert, corporations may also donate funds to political parties to fund non-campaign activities. They may also use treasury funds to run ads that discuss issues without expressly advocating the election or defeat of a candidate who is featured in that "issue ad". When the Department attempted to use its rule-making authority to curtail obvious political ads that ran as issue ads, it has met with judicial resistance. 1999 AC, R 169.39b prohibited the expenditure of corporate funds for ads which referenced a clearly identifiable candidate during the 45 days before an election. That rule was struck down by the Western District Court of Michigan on September 16, 1998 (Right to Life, supra) and the Eastern District Court of Michigan on September 21, 1998 (Planned Parenthood Affiliates of Michigan v. Miller, 21 F. Supp. 2d 740).

The MCFA and the court cases indicate that the MCFA prohibits corporate contributions and expenditures with regard to candidates. It does not mandate that a corporation stay out of politics altogether, or refrain from attacking candidates with words other than express advocacy. Therefore, if an activity does not constitute a corporate contribution to, or expenditure on behalf of, a candidate it is not prohibited by the MCFA.

A corporation does not make an expenditure or contribution to a candidate or committee if it is promptly reimbursed for the full value of the goods or services provided because no transfer of value occurs. With regard to a corporation that provides the goods and services in the ordinary course of business, this "prompt reimbursement" would be that which is offered to entities that are not subject to the MCFA. With regard to corporations that do not ordinarily provide the goods or services in question, the payment must be made prior to the transaction and determined by the methods explained below.

VALUATION

You ask how you would ascertain the value of the material that you provide on your website. In asking this question, you note that "Because the MEA website itself is already established and maintained for communicating with its members about other

issues, the actual cost of posting additional information regarding political issues will be minimal.” However, the marginal cost of adding additional material is not relevant for purposes of determining its value.

The test for a corporation that provides the goods and services in question in the ordinary course of its business is simple: the corporation must treat the committee in the same way that it would treat a similarly situated non-committee.

A PAC that provides goods and services must provide them at the market price. For example, a PAC that purchases services for a candidate would pay the market price for those services. Thus, if a PAC hired a production company to produce a commercial for a candidate, the PAC would have to pay the market price for those services and would record the expense as an in-kind contribution. A PAC that provided a link on its website would value it at the market value and then report it as in-kind contribution or independent expenditure

It is more difficult to determine the value of goods or services provided by a corporation outside of its ordinary course of business. A corporation could spend a large sum of money in order to produce something that does not have a high market value. For example, a craftsman may produce a mug or plate that has a message such as “Joe Smith—a true friend of all librarians—June 25, 2000.” A handcrafted mug or plate may be very expensive to make. However, the market value of the product, because of its unique message, may be less than the cost. Likewise, a corporation may produce something that is worth far more than the cost to make or provide.

There is nothing in the MCFA that prevents a corporation from receiving reimbursement for a product or service it provides. Because the intent of Section 54 is to prevent the use of a corporate treasury to enrich a candidate committee, reimbursement must be based on the total cost of the goods or services provided (including all overhead, such as benefits, salary, equipment, etc.) or the market value of the goods or services—whichever is higher. That way, there will be no question over whether the corporation has made a contribution.

If the corporation chooses to avail itself of this option, it is the responsibility of the corporation to prove that the goods or services provided are correctly valued. Moreover, if the expenditure is a contribution, the corporation should be reimbursed prior to providing the services. In addition, a corporation may never pay for a communication that expressly advocates a candidate. Finally, if a candidate or PAC purchases an advertisement on the corporate website, it must contain the relevant identification and disclaimer statements that are required by Section 47.

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PAYMENT BY A SEPARATE SEGREGATED FUND

You have also asked whether the MEA-PAC can reimburse the MEA for posting information on the MEA website. MEA-PAC may do so, as long as it reimburses the MEA at either the total cost of creating and placing the links or the market value of the placement of the links, whichever is higher. The MEA-PAC would then report this reimbursement as an in-kind contribution or an independent expenditure, whichever is appropriate.

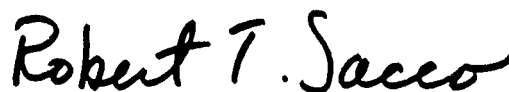
CONCLUSION

To summarize, a corporation may place certain information on its website but may not expressly advocate the election or defeat of a candidate. Features on a corporate website which take viewers to a candidate website, such as hyperlinks, constitute expenditures. However, a committee can reimburse a corporation for placing a hyperlink or advertisement on its website. A corporation would have to charge the total cost or the market value, whichever is greater.

At the risk of redundancy, we close by noting that this process could be avoided if the MEA "password protected" its website. Moreover, the MEA-PAC could place "express advocacy" information on its website and then attribute the market value of it as in-kind contribution or independent expenditure.

Because your request does not include a statement of facts sufficient to form the basis for a declaratory ruling, this response is informational only and constitutes an interpretive statement with respect to your inquiries.

Sincerely,



Robert T. Sacco, Director
Regulatory Services Administration

RTS/AC/kk