2-85-CI

MICHIGAN DEPARTMENT OF STATE

RICHARD H. AUSTIN • SECRETARY OF STATE

STATE TREASURY BUILDING

LANSING
MICHIGAN 48918

October 22, 1985

Richard D. McLellan
Dykema, Gossett, Spencer, Goodnow & Trigg
800 Michigan National Tower
Lansing, Michigan 48933

Dear Mr. McLellan:

This is in response to your request for an interpretation concerning the applicability of the Campaign Finance Act ("the Act"), 1976 PA 388, as amended, to the campaign finance activities of a certain nonprofit corporation.

Specifically, you inquire whether a nonprofit corporation organized for political purposes, which is registered as an independent committee, should report its receipts and expenditures pursuant to the Act.

Your inquiry implies that the corporation which you describe is, in fact, a corporation "formed for political purposes" as that term is used in sections 54(2) and (3) of the Act (MCL 169.254). The classification of the corporation is central to the question. Under the provisions of section 54(1) of the Act, a corporation is prohibited from making a contribution or expenditure or providing personal services, unless it qualifies for an exception pursuant to section 54(2) or (3) or operates within the provisions of section 55 of the Act (MCL 169.255). This response will consider whether the corporation you describe comes within any of the exceptions of section 54.

Section 54(2) prohibits a person acting for a corporation from making a contribution or expenditure or providing personal service, but excepts a corporation "formed for political purposes" from its prohibition. Section 54(3) prohibits a corporation from making a contribution or expenditure or providing personal services in excess of $40,000.00 to each ballot question committee, but again corporations "formed for political purposes" are excepted from these prohibitions.

The corrupt practices act, 1913 PA 109, was the progenitor of the present Campaign Finance Act. Section 14 of the corrupt practices act (1 Comp. Laws 1915, §3841) provided as follows:

"No . . . corporation, except corporations formed for political pur-

> poses, shall pay, give or lend . . . any money . . . to any candidate or to any political committee, for the payment of any election expenses . . . . "

Section 14 of the corrupt practices act was reenacted as section 919 of the Michigan election law, 1954 PA 116, §919; 1970 CL 168.919, which was eventually replaced by section 54 of the Act. It must be noted that each of these provisions prohibited corporate involvement in election financing, but provided an exception for "corporations formed for political purposes."

The corresponding federal election law governing corporate campaign contributions is 2 USC §441b(a) which has evolutionary roots similar to that of section 54 of the Act, but does not explicitly provide an exception for "corporations formed for political purposes."

> "The Federal Election Campaign Act of 1971 . . . makes it 'unlawful . . . for any corporation . . . to make a contribution or expenditure in connection with' certain federal elections, 2 U.S.C. §441b(a)." FEC v National Right to Work Committee, 103 S Ct 552, 554, fn 1 (1982).

Also in this case, the US Supreme Court summarized the development of federal regulation of corporate campaign contributions. In 1907,

> "[C]ongress first made financial contributions to federal candidates by corporations illegal by enacting the Tillman Act, 34 Stat. 864 (1907). * * * The Federal Corrupt Practices Act, passed in 1925, extended the prohibition against corporate contributions to include 'anything of value' . . .". Supra, p 560.

These provisions were later codified in the Federal Election Campaign Act of 1971, 86 Stat 3, as amended, specifically 2 USC §441b(a).

Both Michigan election law (section 55(1) of the Act) and federal election law (2 USC §441b(b)(2)(c)) provide for corporate participation in elections by the establishment, administration and solicitation of contributions to a separate segregated fund to be used for political purposes.

18 USC §610 was a criminal statute which prohibited corporations from making contributions or expenditures in connection with certain federal elections. This statute was repealed and replaced by 2 USC §441b which retained the prohibition in essentially identical language. In Cort v Ash, 422 US 66 (1974), the US Supreme Court discussed the purpose of 18 USC §610,

> "Thus, the legislation was primarily concerned with corporations as a source of aggregated wealth and therefore of possible corrupting influence . . .". Supra, p 82.

A secondary concern was to protect shareholders from having corporate funds used

to support political candidates to whom they may be opposed. Cort v Ash, supra and FEC v National Right to Work Committee, supra.

In FEC v National Right to Work Committee, the US Supreme Court stated:

> "Speaking of corporate involvement in electoral politics, we recently said:
>
> 'The overriding concern behind the enactment of statutes such as the Federal Corrupt Practices Act was the problem of corruption of elected representatives through the creation of political debts.' First National Bank of Boston v Bellotti, 435 US 765, 788, fn 26 (1978)". Supra, p 559.

Furthermore, the court stated:

> "In order to prevent both actual and apparent corruption, Congress aimed a part of its regulatory scheme at corporations. The statute reflects a legislative judgment that the special characteristics of the corporate structure require particularly careful regulation . * * * While §441b restricts the solicitation of corporations . . . without great financial resources, as well as those more fortunately situated, we accept Congress's judgment that it is the potential for such influence that demands regulation." Supra, p 560.

In 1976, the Michigan Supreme Court had occasion to discuss the purpose of Michigan's historic prohibition against corporate contributions in connection with state elections. The Court stated:

> "Corporations have been prohibited from contributing to electoral campaigns in Michigan since 1913, the year in which the corrupt practices act passed. The legislative intent in prohibiting financial involvement of corporations in the elective process was to prevent the use of corporate funds to impose undue influence upon elections.* * * The possibility of misuse of corporate assets by persons acting on behalf of uninformed or unwilling shareholders and the attempts at influence or importunity which might be exerted upon a successfully elected candidate by a contributing corporation represent abuse which the passage of the corupt practices act sought to eliminate." Advisory Opinion 1975 PA 227, 396 Mich 465, 491 (1976).

Since both Michigan and federal law have similar purposes for prohibiting corporate campaign contributions, it is appropriate to consider federal regulations and opinions of the Federal Election Commission (the "FEC").

In 1975, the FEC issued an advisory opinion concerning 18 USC §610, now 2 USC §441b. An issue addressed in this opinion was stated as follows:

> "[W]hether a political committee is prohibited by 18 USC 610 from accepting a contribuiton from a VFW Post which is incorporated." AO 1975-16, 40 FR 36242 (8/13/75).

The Commission responded:

> "The prohibitions in 610 apply, with limited exception, to contributions or expenditures by nonprofit corporations just as they apply to contributions or expenditures made by profit-making corporations. If a nonprofit corporation is created expressly and exclusively to engage in political activities, however, and has incorporated for liability purposes only, the general prohibitions in 610 will not apply to that corporation. That type of corporation is essentially a political committee and may contribute its assets to federal candidates the same as unincorporated political committees." AO 1975-16, supra. (Empasis added).

Subsequently, the FEC promulgated rule 114.12(a), 11 CFR §114.12(a), which reiterates precisely the interpretation of AO 1975-16. The rule states:

> "(a) An organization may incorporate and not be subject to the provisions of this Part if the organization incorporates for liability purposes only, and if the organization is a political committee as defined in 11 CFR 100.5."

In an Informational Letter to Terry F. Lenzner dated September 2, 1976, the FEC responded to an inquiry,

> "[w]hether the Council For a Livable World (the "Council"), a registered political committee, may incorporate for liability purposes only and continue to make contributions to candidates for Federal office without violating 2 U.S.C. §441b."

The FEC answered as follows:

> "The Commission has recently given approval to proposed regulations. Section 114.12(a) of those regulations is directly relevant to your question.
>
> * * *
>
> Obviously, any contributions to or by the Council is subject to the requirements of the Federal Election Campaign Act of 1971, as amended (the "Act"), including the limits of 2 U.S.C. §441a and Part 110 of the Commission's proposed regulations. Furthermore, this conclusion is premised on the assumption that all receipts and disbursements relating to all the Council's varied activities will be regarded as though they were contributions and expenditures under the Act. The exemption referred to in §114.12(a) is available only where the orga-

> nization is in its entirety, a "political committee." 2 U.S.C. §431(d). The Council, may, of course, incorporate and conduct its political committee functions as a separate segregated fund under 2 U.S.C. §441b and Part 114 of the proposed regulations." (Emphasis added).

Careful consideration reveals that the effect on corporate involvement in the electoral process is substantially similar under both Michigan and federal law. Federal law has allowed by FEC interpretation and promulgation of 11 CFR §114.12(a) what Michigan, historically, has allowed by statute, which is an exception for corporations formed for political purposes. Both Michigan and federal law require that two conditions be met for the exception to apply: (1) the organization must be incorporated for liability purposes only, and (2) the organization must be created solely to engage in political activities, that is, the organization must be in its entirety a political committee.

Similar to federal law, any contributions to or by a corporation formed for political purposes is subject to the requirements of the Act. Moreover, all receipts and disbursements relating to the activities of a coporation formed for political purposes will be regarded as contributions and expenditures under the Act.

"A corporation formed for political purposes" is not defined in the Act. However in OAG, 1967-1968, No 4605, p 190 (March 1, 1968), the Attorney General was asked to determine whether the Greater Grand Rapids Chamber of Commerce was a corporation formed for political purposes under section 919 of the Michigan election law, as it then existed. The opinion stated:

> "While it may be conceded that the policies and the administration of the government may affect the commercial interests of a locality, it does not follow that an association of businessmen in the form of a chamber of commerce to promote and protect those interests, is organized for political purposes." supra, p 191

The purposes of a corporation are not determined merely from a review of its articles of incorporation. The Wisconsin Supreme Court, in the leading case of State v Joe Must Go Club of Wisconsin, 270 Wis 108; 70 NW2d 681, 684 (1955), stated:

> "[T]he powers and purposes of a corporation cannot be determined entirely by its declaration thereof in its articles of incorporation and by-laws, but consideration must be given to the manner in which it is conducted . . .".

You state in your letter that:

> "The Articles of Incorporation for the corporation provide, in part, as follows:

'The purposes for which the corporation is organized are as follows:

* * *

3. To operate as a corporation formed for political purposes, as provided in Act No. 388 of the Public Acts of 1976, and to make contributions and expenditures for political purposes, to engage in political and election campaign activities, and to use assets of the corporation for such political purposes. . . .'"

In order to be deemed a corporation "formed for political purposes," it is not sufficient for a corporation to merely declare such in its articles of incorporation or through its by-laws. Consideration must be given to the manner in which the corporate enterprise is conducted. Importantly, your letter states that the above-quoted article of incorporation is the third article, clearly indicating a multi-purpose corporation. In order to be deemed a corporation "formed for political purposes" under the Act, such corporation must be formed solely for political purposes and must be incorporated for liability purposes only, as shown not only by its articles of incorporation or by-laws, but also by the manner in which the corporate enterprise is conducted.

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

Very truly yours,

Phillip T. Frangos
Director
Office of Hearings and Legislation

PTF/cw