STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

November 13, 2019
Andrew Nickelhoff
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Dear Mr. Nickelhoff:

This interpretive statement concerns your written request for a declaratory ruling or interpretive statement, submitted on behalf of the Michigan State AFL-CIO, regarding the applicability of the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.*, to the labor union's proposal to pay all costs incurred by a corporation that employs union members to collect and remit employees' contributions to the union's separate segregated fund (SSF). The Michigan Department of State (Department) concludes that the union's proposed course of action is not authorized by the MCFA.

The Michigan State AFL-CIO established an SSF to solicit and collect contributions from the following individuals or their spouses: individual members of the labor union or its officers or directors, or employees of the union who perform policymaking, managerial or supervisory, professional, or nonclerical administrative duties. MCL 169.255(4). With respect to individual members of the labor union, the Michigan State AFL-CIO asks whether it may enter into an agreement with a corporation that employs AFL-CIO members, under which the corporation would agree to collect and transfer the amounts authorized by employees for political contributions via payroll deduction, and the labor union would reimburse or pay in advance all costs incurred by the corporation for performing this service.

In accordance with the publication and public comment period requirements, the Department posted copies of your request on its website and informed email subscribers of the deadline to file written comments. MCL 169.215(2). Several public comments were received during the initial public comment period, including comments that were favorable toward and critical of the Michigan State AFL-CIO's legal position. Commenters expressed near universal agreement, however, that the answer to your request is governed by MCL 169.254(3).

Following publication of the preliminary response to your request, the Department received your written comments and comments submitted on behalf of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW). Both submissions urged the Department to reconsider its preliminary conclusion that the MCFA bars corporations from making expenditures to collect and remit contributions to another entity's SSF, and argued that the law clearly permits a labor union acting as a connected organization (rather than through its SSF) to reimburse or advance the corporation the cost incurred by the corporation for deducting voluntary contributions from union members' wages.

Public Act 269 of 2015 added a new subsection (3) to MCL 169.254, which provides,

> Except for expenditures made by a corporation in the ordinary course of its business, an expenditure made by a corporation to provide for the collection and transfer of contributions to another separate segregated fund not established by that corporation, or to a separate segregated fund not connected to a nonprofit corporation of which the corporation is a member, constitutes an in-kind contribution by the corporation and is prohibited under this section. Advanced payment or reimbursement to a corporation by a separate segregated fund not established by that corporation, or by a separate segregated fund not connected to a nonprofit corporation of which the corporation is a member, does not cure a use of corporate resources otherwise prohibited by this section.

Prior to the enactment of 2015 PA 269, it was relatively common for a corporation and labor union to agree to terms in their collective bargaining agreement requiring the corporation to deduct from workers' wages any voluntary[1] contributions to the union SSF, and the union SSF to reimburse the costs incurred by the corporation in administering this payroll deduction plan. These agreements were authorized by the MCFA and prior declaratory rulings and interpretive statements, despite the longstanding, general proscription against corporate and labor union contributions and expenditures,[2] until the MCFA was amended in 2015. As a result of the 2015 amendments, corporations may take advantage of checkoff plans to facilitate contributions from corporate employees to corporate PACs, but unions may no longer use the same system to facilitate contributions from the same employees to union PACs.

The Michigan State AFL-CIO concedes that as a result of the 2015 amendments, MCL 169.254(3) plainly prohibits a labor union's SSF from paying in advance or reimbursing costs incurred by a corporation when collecting and transferring members' voluntary contributions, but argues that it is permissible for the labor union to directly reimburse or pay those costs. In support of its position, the Michigan State AFL-CIO emphasizes that the second sentence of MCL 169.254(3) does not explicitly prohibit the labor union itself from directly paying or reimbursing a corporation for administering a PAC checkoff plan.

However, it is the Department's view that section 54(3) must be construed as containing two distinct yet related provisions which are indicative of the purpose of the statute, *first*, to bar corporations from making their payroll deduction function available for use to benefit another entity's SSF, as reflected in the first sentence; and *second*, to clarify or emphasize that reimbursement or advanced payment by the beneficiary SSF will not cure a violation by the corporation, as provided in the second sentence of MCL 169.254(3).

The first sentence of section 54(3) provides, "an expenditure made by a corporation to provide for the collection and transfer of contributions to another separate segregated fund not established by that corporation ... *constitutes an in-kind contribution by the corporation and is prohibited.*" (Emphasis added.) Under this provision, criminal liability for violations lies

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[1] Since workers authorized these wage deductions by an affirmative consent or checkoff method, these arrangements became known as "PAC check-offs."

[2] Under MCL 169.254(1), "a corporation ... or labor organization shall not make a contribution or expenditure or provide volunteer personal services [,]" except for loans made in the ordinary course of business and except as otherwise authorized by MCL 169.254(2)-(3) and 169.255. This prohibition has remained substantially unchanged since the 1976 inception of the MCFA.

squarely with the corporation or any officers, directors, stockholders, attorneys, agents or others acting on the corporation's behalf. MCL 169.254(2)-(3), 169.254(5). A violation constitutes a felony offense punishable by fines, imprisonment (if the violator is an individual), or both. MCL 169.254(5). Understanding the first sentence as separate from but related to the second sentence is consistent with the overall purpose of 2015 PA 269, which barred corporations from using their payroll deduction plans to collect and remit contributions to any SSF other than its own.

In addition to creating a new subsection (3) within MCL 169.254, Public Act 269 of 2015 amended the definitions of contribution and expenditure to exclude from the Act's ambit any contribution or expenditure made for the purpose of establishing or administering an SSF, or soliciting, collecting, or transferring contributions to an SSF, but only if the contribution or expenditure "was made by the person that established the separate segregated fund[.]" MCL 169.204(3)(d), 169.206(2)(c). By altering the statutory definitions of contribution and expenditure in this way, the 2015 amendments provided a limited exception from the broad prohibition against corporate and labor union expenditures under MCL 169.254(1). When read in conjunction with the first sentence of MCL 169.254(3), it is clear that the extent of authorized activity was limited to corporate expenditures made for the purpose of establishing or administering its own SSF, or expenditures for the solicitation, collection or transfer of contributions to the corporation's SSF.

Admittedly, Public Act 269 of 2015 narrowed the scope of permissible activity in relation to SSFs; yet if the Michigan State AFL-CIO is correct in its assertion that reimbursement or advanced payment by its SSF cures the corporation's violation of the first sentence of MCL 169.254(3), it would not have been necessary for the legislature to modify the definitions of contribution and expenditure in 2015 PA 269.

The second sentence of MCL 169.254(3) provides, "[a]dvanced payment or reimbursement to a corporation by a separate segregated fund not established by that corporation ... does not cure a use of corporate resources otherwise prohibited by this section." While this provision explicitly states that remuneration by *the beneficiary SSF* does not cure an illegal expenditure by the corporation, it is silent as to reimbursement or advanced payments made directly by *the labor union itself*.

The Michigan State AFL-CIO argues that this omission in the second sentence necessarily invites or authorizes a corporation's administration of a payroll deduction plan for collecting and remitting contributions to a labor union's SSF as long as any entity other than the SSF makes the reimbursement, based on the principle of statutory construction *expressio unius est exclusio alterius*, meaning the legislature's explicit reference to one object or thing necessarily excludes all others. In its response to the Department of State's preliminary determination, AFL-CIO reiterates this point, arguing that because the statute states that remuneration by *the beneficiary SSF* does not cure the reimbursement, then regardless of what the legislators intended the canon of *expressio unius* commands that the statute may only be interpreted such that reimbursement by *any other* entity must be permitted.

This argument misconstrues the role of *expressio unius* within the context of statutory interpretation. It is one of many tools used to interpret statutes, not the sole dispositive method of interpreting them. The Department of State's responsibility is to "ascertain and give effect to the intent of the legislature." *People v. Webb*, 458 Mich. 265, 274 (1998). In interpreting statutes, *expressio unius* is a tool "to ascertain the intent of the Legislature. It does not automatically lead to results." *Luttrell v. Dep't of Corr.*, 421 Mich. 93, 107 (1984). It is also a "recognized rule of

statutory interpretation" to "not construe a statute so as to achieve an absurd or unreasonable result." *Id.*

Here, interpreting the statute as AFL-CIO requests would achieve such a result. Under AFL-CIO's reading, the Michigan Campaign Finance Act would prohibit a corporation from administering a payroll deduction plan for an SSF other than one the corporation established. That violation could be cured, however, as long as the corporation is reimbursed by *any* entity other than the SSF – a loophole so gaping that the prohibition itself would become virtually meaningless. *Expressio unius* should not be applied when it would create such an unreasonable result.

In *People v Garrison*, 495 Mich 362, 372 (2014), the Supreme Court declined to apply *expressio unius* in a manner that "would allow the canon ... to overcome the plain meaning of the words in [a statute]." So here. The statute bars corporations from making expenditures on an SSF other than its own. The first sentence and associated changes to the definitions of contribution and expenditure clearly bar a corporation from collecting and transferring contributions to an SSF it did not establish. Criminal liability rests exclusively with the corporation and persons acting on its behalf. MCL 169.204(3)(d), 169.206(2)(c), 169.254(2)-(3), 169.254(5).

In response to the Department of State's preliminary statement, the UAW argued that 2015 PA 269 is best interpreted as expanding, rather than limiting, corporate expenditures on unconnected SSFs. Given that 2015 PA 269 expands and reaffirms a corporation's ability to contribute to corporate PACs, it might seem logical that the law would extend union PACs the same benefit.

But that is not what the Legislature did. On the one hand, 2015 PA 269 expressly affirmed that corporations can use payroll deductions to facilitate contributions to their own PACs. It further facilitated those contributions by removing a requirement that employees consent annually to the deduction; now, corporations do not have to ask their employees once a year whether or not they wish to deduct PAC contributions from their paycheck. But at the same time the Legislature streamlined and protected contributions to corporate PACs, it expressly prohibited corporate use of payroll deductions to contribute to PACs not connected to that corporation. Previously, these were used to facilitate contributions by the same employees of the corporations to union PACs.

It is difficult to divine any purpose from this statute other than to strengthen the hand of corporations' ability to raise and spend money in politics while at the same time undermining unions' ability to do the same. Before 2015 PA 269 was passed, corporate employees could easily contribute to corporate or union PACs through payroll deductions; now they can only contribute to corporate PACs.

Shortly after Public Act 269 of 2015 took effect, the Michigan State AFL-CIO and others filed suit challenging the constitutionality of the new law on two grounds: First, that it violated the Contracts Clause of the U.S. Constitution by purporting to invalidate provisions of existing collective bargaining agreements, and second, that it violated the First Amendment by precluding individual union members from making contributions to their union's SSF via payroll deduction administered by their corporate employer. *Michigan State AFL-CIO v Schuette*, 847 F3d 800 (CA6, 2017). The U.S. Court of Appeals for the Sixth Circuit held, "the elimination of a PAC check-off opportunity does not amount to a restriction on speech and thus does not abridge the speech rights of unions hoping to receive check-off donations." *Id.* at 805. However, the court went on to explain that under the Contracts Clause, Public Act 269 of 2015 was unconstitutional, but only to the extent that it purported to negate provisions of then-existing collective bargaining

agreements: "The Contracts Clause, then, provides relief to the unions in part, prohibiting the State from enforcing the contested provision against regulated entities with pre-existing PAC check-off obligations through the end of the relevant collective bargaining agreements." *Id.*

The Sixth Circuit also addressed the question posed here, albeit indirectly; on the issue of whether reimbursement by a labor union directly (rather than the union's SSF) can remedy a prohibited, in-kind contribution by a corporation, the court wrote, "[a]nd if the unions wish to enforce the PAC check-off provisions during the rest of the [pre-existing] collective bargaining agreement, they of course will have to reimburse the employers for those costs." *Id.* at 804. Even if this language is dicta, it is persuasive evidence that the language at issue here, read in context of the purpose of the statute, does not allow this type of prohibited expenditure to be cured by reimbursement regardless of which entity makes the reimbursement.

The U.S. District Court for the Eastern District of Michigan subsequently entered a consent judgement in the case, ordering that the Secretary of State and Attorney General,

> are permanently enjoined from enforcing MCL 169.254(3) as enacted by 2015 PA 269, against regulated entities with pre-existing PAC check-off obligations that were in effect on January 6, 2016, until the expiration or modification of the relevant affected collective bargaining agreements, provided that this order shall have no application to any extension or renewal, automatic or otherwise, of such collective bargaining agreements beyond the expiration date in effect on January 6, 2016.

The consent judgement does not authorize reimbursement by any person to avoid the statutory ban on a corporation's collection and transfer of contributions for an SSF that it did not establish. Thus, under *Michigan State AFL-CIO v Schuette,* the terms of the consent judgement, and the first sentence of MCL 169.254(3), "an expenditure made by a corporation to provide for the collection and transfer of contributions to another separate segregated fund not established by that corporation, ... constitutes an in-kind contribution by the corporation and is prohibited under this section." This provision may be enforced against a corporation or any persons acting on its behalf upon the expiration of a pre-existing collective bargaining agreement (i.e., once any collective bargaining agreements that were effective on or before January 6, 2016 expire).

In public comments filed after the preliminary response was published, the AFL-CIO and UAW assert that Public Act 269 authorizes (rather than forbids) a corporation to collect union members' voluntary contributions through payroll deduction, transfer them to the union's SSF, and receive reimbursement or advanced payment from the labor union itself, in the exact same manner as these arrangements existed for years prior to 2015. Yet if these agreements have been so plainly permissible all along, it is difficult to comprehend why the AFL-CIO filed suit attacking the constitutionality of 2015 PA 269, a statute these commenters now maintain did nothing to disrupt the prior practice. The Sixth Circuit opinion in *Michigan State AFL-CIO v Schuette* leads with the following description of the case:

> The Michigan Campaign Finance Act generally bars corporations and labor unions from contributing to political candidates and organizations. As an exception to this prohibition, it permits corporations and unions to form and contribute to political action committees, which in turn may make political contributions. A recent amendment to the Act defines a prohibited expenditure by corporations and unions to include the administrative expenses of operating a

> payroll deduction program unless the deductions go to (1) the corporation's or union's own political action committee or (2) a political action committee established by a nonprofit corporation of which the union or corporation is a member. Several unions and some of their members challenge this component of the Act on the grounds it violates (1) their Contracts Clause rights **by upsetting existing collective bargaining agreements that already permit payroll deductions to other entities** and (2) their First Amendment rights by preventing many union members from donating to their union's political action committee via automatic payroll deductions. The district court preliminarily enjoined enforcement of the law on both grounds. We affirm the district court's Contracts Clause ruling and reverse its First Amendment ruling.
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> *Michigan State AFL-CIO*, 847 F3d at 800 (emphasis added).

The AFL-CIO notes that the Sixth Circuit opinion is not controlling as to interpretation of 2015 PA 269 outside of the constitutional issues in that case. Nonetheless, the opinion demonstrates that at the time the case was argued and considered, the Sixth Circuit read the statute – as did, apparently, the litigants in the case – to prohibit payroll deductions to other entities.

In sum, the Department concludes that the MCFA, as amended by 2015 PA 269, bars corporations whose employees belong to labor unions from using the corporate payroll deduction system to collect union members' voluntary contributions, transfer the contributions to the union's SSF, and from obtaining reimbursement or advanced payment from the labor union directly. The law sought to undermine union PACs ability to raise money through the same corporate employee payroll deductions that corporate PACs use, and that is exactly what it did.

Finally, your request did not include "a reasonably complete statement of facts" on which to issue a declaratory ruling. MCL 169.215(2). The foregoing represents an interpretive statement with respect to the applicability of the Act to the Michigan State AFL-CIO's proposed course of action as described in your letter dated August 14, 2019.

Sincerely,

Michael J. Brady, Chief Legal Director