STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF [illegible]
LANSING, MICHIGAN [illegible]

August 26, 2002

Norman C. Witte
119 E. Kalamazoo
Lansing, Michigan 48933

Dear Mr. Witte:

This is a response to your request for a declaratory ruling under the Michigan Campaign Finance Act (MCFA), 1976 P.A. 388, as amended.

FACTS

Your request presents the following facts:

You state that your office represents a number of entities that are prohibited by Section 54 of the MCFA from making contributions and expenditures in Michigan elections (Hereafter Section 54 entities). These Section 54 entities intend to use their treasury funds to produce issue ads during the 2002 election cycle. (For purposes of this letter, the term "issue ad" shall mean any communication that does not expressly advocate the election or defeat of a candidate.) To produce the ads, the entity plans to hire vendors that may also be producing ads for the candidate.

You also state that notwithstanding any request or suggestion by a candidate (or any vendor or agent of a candidate) the Section 54 entity shall exercise exclusive direction, control, or decision-making authority over the content, timing, location, mode, intended audience, volume or distribution or frequency of placement of the issue ads. Furthermore, no candidate shall be allowed to organize, supervise, or create any issue advocacy communication distributed by the Section 54 entity. However, the entities plan to conduct meetings with the candidate and may ask the candidate for photographs and other information.

While the Department accepts your statement of facts, we do not necessarily accept that the Section 54 entity shall exercise exclusive direction, control, or decision-making authority over the content, timing, etc. of the ads. Ultimately, whether direction, control, and decision-making authority is exercised by a Section 54 entity, a candidate committee, or some combination thereof is a legal conclusion, rather than a factual contention.

QUESTIONS PRESENTED

You ask us to:

1) Confirm that the Section 54 entity's issue advocacy activities, which are not otherwise subject to the Act's requirements, do not become subject to the Act's requirements where the Section 54 entity intends to employ certain vendor(s) or agent(s) (who may also be rendering services to a candidate who may be referenced in the Section 54 entity's issue ads) in order to create, produce, or distribute issue advocacy ads.

2) Please confirm that the Section 54 entity's issue advocacy activities, which are not otherwise subject to the Act's requirements, do not become subject to the Act's requirements where the Section 54 entity communicates with a candidate within the parameters as outlined above.

ANSWER

With respect to your first question, the Department would not consider the employment of a vendor or agent that also works for a candidate committee to be *per se* evidence of direction or control by the committee. Certainly a person that is employed by both a candidate committee and a Section 54 entity could be in a position to direct or control an issue ad on behalf of one or the other. If other circumstances create the appearance of direction or control by the candidate committee, we may seek more information regarding the vendor's or agent's role in the creation of the issue ads

With respect to your second question, please see our explanation below.

STATUTORY LAW

The MCFA governs "contributions" and "expenditures". "Contribution" is defined, in relevant part, as "[A] payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, 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 for the qualification, passage or defeat of a ballot question."

"Expenditure" means "[A] payment, donation, loan, or promise of payment or anything of ascertainable monetary value 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. Expenditure includes . . . A contribution or transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question."

"Independent expenditure" means an "expenditure by a person if the expenditure is not made at the direction of, or under the control of, another person and if the expenditure is not a contribution to a committee."

CASE LAW

While both definitions of contributions and expenditures use terms of influencing, assisting, or opposing candidates or ballot questions, the U.S. Supreme Court has limited the reach of this language. In *Buckley v. Valeo*, 424 U.S. 1 (1976) the Court held that, in effect, money was speech and that any regulation of the amount of money spent constituted a burden on a person's first amendment rights.

According to the Court's "strict scrutiny" test, any law or regulation that burdens constitutional rights must be shown to serve a compelling governmental interest and be narrowly tailored to meet that interest.

Based on that test, the court concluded that Congress could not cap independent expenditures. The court found that any limitation on spending infringed on political speech and did not relate to any governmental interest in prohibiting corruption, because the speaker was independent of the candidate. In addition, the Supreme Court required words of express advocacy—"vote for", "vote against", "elect", "defeat", etc.—before a communication could be deemed an independent expenditure and therefore subject to governmental regulation. As a consequence, communications that do not expressly advocate the election or defeat of a candidate are generally exempt from regulation.

The Court treated contributions differently. The Court held that the government had a compelling interest in preventing the corruption, or even the appearance of corruption, that could occur if wealthy contributors were allowed to give large sums of money to candidate committees. Further, unlike expenditures, the limitation of contributions burdened only a limited degree of political speech—"the symbolic expression of support" between a contributor and a candidate.

This bifurcated treatment of contributions and expenditures has left a middle ground that has yet to be addressed in Michigan—the issue ad that is produced with the active participation of the candidate or candidate committee. Under this scenario, a third party, such as a Section 54 entity, produces an issue ad with the cooperation of the candidate committee, but the ad does not expressly advocate the candidate's election or defeat.

Case law on this issue has been minimal. Neither the U.S. Supreme Court, the sixth Circuit Court of Appeals, nor the Michigan Supreme Court has addressed this issue. Undoubtedly the strongest case in favor of regulating these coordinated issue ads is the *Federal Election Commission v. Christian Coalition*, 52 F.Supp.2d 45 (1999). In that case, the FEC had brought charges against the Christian Coalition and several candidate committees, alleging that the coordination between them amounted to corporate contributions. The court dismissed nearly all of the charges (except one where the coalition provided a valuable

mailing list to a campaign). However, the court noted the FEC could regulate what it called "expressive coordinated expenditures"—issue communications (ads, fliers, booklets, etc.) which a corporation or union closely coordinated the location, timing or volume with a candidate committee.

> It is worth noting that the court rejected the FEC's broad interpretation of coordination, in which virtually any contact between a candidate committee and a corporation or union that was later followed by the production of issue communication would be deemed an illegal contribution. The court rejected this theory, noting that "Discussion of campaign strategy and discussion of policy issues are hardly two easily distinguished subjects . . . The FEC's tidy distinction between discussion of campaign strategy and mere lobbying is cold comfort for those who seek to discuss with a candidate an issue that is at the time dominating the campaign . . . The record demonstrates that a candidate's decision when to take a stand, where to stand, and how to communicate the stand on a policy issue are often integral parts of the campaign strategy. . . a candidate frequently listens to the concerns of sympathetic constituencies or factions before making those important strategic decisions.

Christian Coalition is noteworthy for two other reasons. First, the FEC had a law and regulations that prohibited coordination and arguably allowed it to take action against the coalition and the campaigns. The Department of State has only the "direction or control" standard. Second, the court admitted that to find this close coordination would require a thorough investigation that would be very fact-intensive. The FEC has subpoena power and can compel the production of documents and sworn testimony. Indeed, the *Christian Coalition* case took 6 ½ years and involved 81 separate depositions of 48 individuals. It involved 49 Coalition state affiliates that produced over 100,000 pages of material. The Michigan Department of State does not have subpoena power, cannot compel witness testimony, and, quite simply, is limited in creating a factual record from which it might argue that a candidate has exercised direction or control over the creation of an issue ad.

Other courts have held that the FEC does not have the authority to regulate issue communications. For example, in *Orloski v. Federal Election Commission*, 795 F.2d 156 (D.C. Cir. 1986), which concerned the corporate funding of a political rally, the D.C. Circuit stated:

> The mere fact that corporate donations were made with the consent of the candidate does not mean that a contribution within the meaning of the Act has been made. Under the Act this type of "donation" is only a "contribution" if it first qualifies as an "expenditure" and, under the FEC's [then] interpretation, such a donation is not an expenditure unless someone at the funded event expressly advocates. . . the election or defeat of a candidate. An objective, bright-line test for distinguishing between permissible and impermissible corporate donations . . . is necessary to enable donees and

> donors to easily conform their conduct to the law . . . A subjective test based upon the totality of the circumstances would inevitably curtail permissible conduct . . . in this politically charged area, bright-line tests are virtually mandated even though they may occasionally lead to what appears, at first glance, to be somewhat artificial results."

Other courts have also curtailed the government's efforts to regulate coordinated issue advocacy. The District Court in Colorado in *FEC v. Colorado Republican Campaign Committee* 839 F. Supp. 1448 ((D. Col 1993) prohibited the FEC from regulating expenditures that did not contain issue advocacy, holding that the FEC's statutory powers to regulate expenditures did not begin until words of express advocacy were spoken. The District Court of Maine, in *Clifton v. FEC*, 927 F. Supp 493 (D. Me. 1996), also required express advocacy before the FEC could regulate expenditures, holding "As long as the Supreme Court holds that expenditures for issue advocacy have broad First Amendment protection, the FEC cannot use the mere act of communication to turn a protected expenditure into an unprotected contribution to a candidate."

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The Department has not had many occasions to address the question of coordinated issue advocacy. It has tried to limit issue ads in Michigan elections. In 1998, at the direction of Secretary of State Candice Miller, the Department promulgated a rule that prohibited Section 54 entities from running issue ads that contained a candidate's name or likeness 45 days before an election. 1999 AC, R 169.39b. The rule was struck down as unconstitutional in both the Western and Eastern District Courts of Michigan. *Right to Life of Michigan v. Miller*, 23 F. Supp.2d 766 (1998); *Planned Parenthood of Michigan v. Miller*, 21 F. Supp.2d 740 (1998). The Department has also issued an interpretive statement that concerned Section 54 entities and their involvement in elections. The statement affirmed that Section 54 entities were free to use treasury dollars to run ads that did not expressly advocate the election or defeat of a candidate. However, the statement did not address whether a candidate committee could direct or control a Section 54 entity to run issue ads on its behalf. (Statement to Katherine Corkin Boyle, dated June 15, 2001.)

Finally, the Department dismissed a complaint in which express advocacy advertisements were produced by a political party after it informed the candidate of its intention to create the ads and asked for items—such as photographs and the names of supportive constituents—to assist it in creating the ads. The Department deemed these communications to be independent expenditures, for, unlike the FECA and its accompanying regulations, coordination between a candidate and a third party is irrelevant to a determination of whether a contribution has been made. Only if a candidate directs or controls the creation of an express advocacy communication would it be deemed a contribution. While this matter concerned the distinction between an independent expenditure and a contribution, it utilized the same analysis that would be employed to determine whether an issue ad had, in fact, become a contribution. (March 15, 2002 dismissal letter of LaBrant v. Virg Bernaro and the Michigan Democratic Party.)

CONCLUSION

After a thorough review of the MCFA, federal case law, and previous departmental declaratory rulings and complaints, we conclude that we do not have the authority to regulate issue ads.

This in no way endorses some of the so-called issue ads, which are often more vicious than election ads. Clearly, many if not most of these issue ads are campaign ads without words of express advocacy. Moreover, because they are not considered campaign ads, relevant information, such as who paid for them, is often not disclosed.

However, the Department's responsibility is to enforce the law, regardless of whether we like it or not. Our reading of both Michigan and federal law indicates that we do not have the authority to regulate ads that do not contain words of express advocacy. Because the communication itself may not be regulated, the Department also does not have the authority to investigate whether a candidate has directed or controlled an issue ad. Moreover, even if the law were changed to give us that responsibility, we do not have the tools to do so. Without subpoena power and other tools needed to create a factual record, any determination of what was direction or control and what was mere communication between a candidate committee and a Section 54 entity would be mere speculation, which is not the same thing as due process or equal protection of the law.

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

Robert T. Sacco, Director
Legal and Regulatory Affairs Administration

RTS/kc