



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

October 27, 2022

Robert S. LaBrant
12411 Pine Ridge Drive
Perry, MI 48872

Dear Mr. LaBrant:

The Department of State (Department) acknowledges receipt of your letter dated August 5, 2022, in which you sought a declaratory ruling or interpretive statement under the Michigan Campaign Finance Act (Act or MCFA).

In accordance with publication and public comment period requirements, the Department posted your request on its website and informed email subscribers of the deadline to file written comments. MCL 169.215(2). The Department did not receive any public comments during the initial public comment period.

The Department issued its preliminary response on October 10, 2022 and posted it for public comment in accordance with the MCFA and APA requirements. The Department also notified email subscribers of the preliminary response and the deadline to file public comments. No public comments were received within 5 business days after the preliminary response was made available to the public. MCL 169.215(2). "Given that no public comments were received, the Department's preliminary response is provided as its final interpretive statement regarding your question.

The MCFA and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 et seq., require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 24.263, 169.215(2). If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement "providing an informational response to the question presented[.]" MCL 169.215(2). As required by section 15(2) of the MCFA, the Department has reviewed your request and determines that it does not contain a sufficient statement of facts to warrant issuance of a declaratory ruling, as there is no specific factual scenario provided in which you ask the Department to opine. Rather, you ask five general questions regarding the Department's interpretation of the Act, and as interpretation of the MCFA often rests on discrete fact patterns that are not contemplated when providing a response to general questions, the Department declines to issue a declaratory ruling, and instead, offers the following interpretive statement.

For the sake of efficiency, the Department notes that your questions 2-5 are closely linked and considers them jointly as its second answer.

1. ***If a SuperPAC pays for the placement of an internet advertisement on a third party's site which expressly advocates to the general public the election or defeat of a candidate, is that advertisement required to have the identification or disclaimer required of a print or broadcast advertisement under Section 47 of the MCFA?***

Your first question asks whether section 47 of the Act requires a paid for by statement on advertisements placed on a third party's site that expressly advocate for or against a candidate. In asking this question, there is no context provided or factual support for the Department to analyze, but rather, you seek an answer to an entirely hypothetical situation. As is customary, the Department does not opine on purely hypothetical questions without evidence of factual occurrence. As these questions presented do not contain specific facts or argument, the Department must only reiterate the standard as it exists under the MCFA. MCL 169.215(2) ("A declaratory ruling or interpretive statement issued under this section shall not state a general rule of law, other than that which is stated in this act.")

Section 47 states that any printed matter which references a candidate or election must contain a proper paid for by statement, and where applicable, a disclaimer. MCL 169.247(1). The Act explicitly refers to "printed" and broadcast materials and clearly applies to advertisements placed on the internet and thus not "printed" in the traditional sense. While the Act is silent as to the application of the paid for by statement to internet advertising, the relevant section of the Administrative Code provides that "any other medium used for campaign purposes shall clearly include the identification or disclaimer, or both, provided in section 47 of the act." R 169.36. (emphasis added). Section 47 requires use of an identification "that contains the name and address of the person paying for the matter[]" and, in the case of certain independent expenditures, a disclaimer that the advertisement is "[n]ot authorized by any candidate" or candidate committee. MCL 169.247(1)-(2).

Accordingly, internet advertising expressly advocating for the election or defeat of a candidate or ballot question must contain a paid for by statement.¹

2. ***Does it continue to be the Department's position that a hyperlink has an ascertainable monetary value? Is the hyperlink an in-kind contribution, an independent expenditure, or neither?***

Questions 2-5 in your request ask the Department to determine whether a hyperlink has an ascertainable monetary value, and if so, in what contexts does it constitute an independent expenditure. Because all the answers to these questions depend on each other, the Department will take these four questions together.

Under the MCFA, a contribution is defined 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 money to a person, made for the purpose of influencing the nomination or election of a candidate, for the qualification, passage, or defeat of a ballot question, or for the qualification of a new political party." MCL 169.204(1).

¹ The Department is aware of instances where compliance with the paid for by statement is not possible; for example, where character limitations do not allow the address to be present. However, because you have not provided sufficient facts in your request, the Department does not opine on this situation, but rather reiterates the general principles outlined under the Act.

Crucially, the definition explicitly states that an independent expenditure is not a contribution. MCL 169.204(3)(e). An “independent expenditure” is, in turn, defined as “an expenditure by a person if the expenditure is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a ballot question committee or a candidate, a candidate committee or its agents, or a political party committee or its agents, and if the expenditure is not a contribution to a committee.” MCL 169.209(2) An “independent expenditure committee” is “a committee formed under 24b for the purpose of making independent expenditures under this act.” MCL 169.209(3). An independent expenditure committee is more commonly known as a SuperPAC.

Comparatively, an “expenditure” is defined as “a payment, donation, loan, or promise of payment of money 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.” MCL 169.206(1).

An “in-kind expenditure or contribution” is defined as an expenditure or contribution other than money. MCL 169.209(4).

As in the Department’s 2001 interpretive statement to Kathleen Boyle regarding similar questions,² the Department notes here 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.” MCL 169.206(2)(a). Because your question relates to a hypothetical website that advocates to the general public, however, the Department will not consider the hyperlink question as it relates to a “members only” site.

In considering any potential changes in policy in the 20 years since *Boyle* was issued, the Department acknowledges that the time, skill, and effort needed to include a hyperlink on a webpage has diminished since *Boyle* held that a hyperlink had an ascertainable monetary value. However, those same factors have increased the potential reach of such a link, or the output factors. Over the intervening twenty-one years, more work and extracurricular activities have moved online, a substantial majority of people have access to the internet, and mobile devices ensure constant connection to websites. A link that might have been accessed by only a few people in *Boyle*’s time is now a portal for a nearly unlimited pool of donors or other campaign-related activity.

Further, there is still a cost to obtaining a hyperlink. For example, a committee intending to utilize a hyperlink must purchase the rights or maintain a website platform usually at the cost of monthly fees or an upfront expense associated with the website. Accordingly, the Department reiterates its position that a hyperlink has an ascertainable monetary value.

Because the hyperlink has an ascertainable monetary value, the Department proceeds to the consideration of whether it should be classified as an in-kind contribution, an independent expenditure, or neither.

You question whether the inclusion of a hyperlink is an in-kind contribution. Similar to above, the Department is unable to fully answer this question without having sufficient factual support because the answer is fact dependent. Because an in-kind contribution is, by definition, a contribution, and corporations, labor unions, and domestic dependent sovereigns are prohibited

² *Interpretive Statement to Kathleen Boyle* (June 15, 2001). [Boyle_2001.pdf \(michigan.gov\)](#)

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from making contributions or expenditures under section 54 of the MCFA,³ classification of the hyperlink as an in-kind contribution would render it a violation of the MCFA.

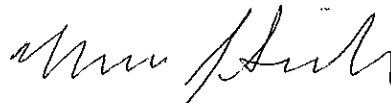
However, the violation would depend on whether there is coordination between the corporate entity and the candidate. Corporate entities remain free to make independent expenditures – i.e. expenditures that are not coordinated with the candidate. See MCL 169.224c (describing the defeat of the independent nature of expenditures). If a corporation were to print a flyer which expressly advocates for a candidate, and as part of that, includes the candidate’s platform, the question as to whether a violation exists depends on whether the corporation coordinated with the candidate. If the corporation used a link that was publicly available and did not communicate with the candidate or the candidate’s committee, there potentially is no violation. On the contrary, if the corporation asks the candidate which hyperlink should be utilized, that is potentially a violation of section 54.

Further, advanced reimbursement by the candidate would not cure the coordination. In considering whether the inclusion of a hyperlink is an independent expenditure, the Department notes one change in policy necessitated by a change in statute. While the statement that “there is nothing in the MCFA that prevents a corporation from receiving reimbursement for an in-kind contribution” was accurate in *Boyle* in 2001, subsequent changes in statute require updated guidance. In 2017, the definition of an independent expenditure—the type of expenditure made by a SuperPAC or corporation—added the requirement that it not be “in cooperation, consultation, or concert with, or at the request or suggestion of, a ballot question committee or a candidate, a candidate committee or its agents, or a political party committee or its agents[.]” MCL 169.209(2).

Similarly, in prior interpretive statements, the Department has routinely concluded that advance reimbursements do not cure deficiencies. See *Interpretive Statement to Andrew Nickelhoff*, Issued November 13, 2019; *Interpretive Statement to Andrew Nickelhoff*, Issued August 8, 2020. While these interpretive statements interpret different provisions of section 54, the rationale remains applicable as reimbursement is the essence of cooperation and therefore would defeat the independent nature of the independent expenditure. This proposed cure to a perceived violation of the MCFA would be, itself, a violation.

Ultimately, as long as there is no cooperation between the parties, the expenditure may retain its independent nature and is potentially a permissible independent expenditure by the SuperPAC.

Sincerely,



Melissa J. Smiley, PhD
Chief of Staff

³ With specified exceptions, “a corporation, joint stock company, domestic dependent sovereign, or labor organization shall not make a contribution or expenditure or provide volunteer personal services that are excluded from the definition of a contribution under section 4(3)(a).” MCL 169.254(1).