



STATE OF MICHIGAN
TERRI LYNN LAND, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

Draft

Robert S. LaBrant
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Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

The Department of State (Department) acknowledges receipt of your correspondence dated July 28, 2009, in which you asked the Department to issue a declaratory ruling pursuant to the Michigan Campaign Finance Act (MCFA or Act), 1976 PA 388, MCL 169.201 *et seq.*, to determine the point at which certain preparatory activities may trigger application of the Act's registration requirements. Your letter describes specific preliminary actions to be taken by the Michigan Chamber of Commerce (Chamber) with respect to one or more ballot proposals. A copy of your request was published on the Department's website beginning August 3, 2009, yet no written comments were submitted for the Department's consideration.

The MCFA and Administrative Procedures Act authorize the Department to issue a declaratory ruling if the person who submits the request is as an interested party, recites a reasonably complete statement of facts, states the legal question presented, and puts forth the request in a signed writing. MCL 24.263, 169.215(2). Your letter satisfies all of the statutory criteria and therefore, your request for a declaratory ruling is granted.

According to your letter the Chamber will publicly announce its intention to select which of several ballot proposals to advance through the ballot question qualification process at an upcoming press conference. Following the event, the Chamber plans to use numerous techniques to gauge public support for its proposals, including online surveys, focus groups, polling, ballot testing, and fundraising. The Chamber also intends to create a PowerPoint presentation for the purpose of soliciting support from potential allies. The Chamber's anticipated expenses include the drafting of petitions, hiring consultants, performing research, and obtaining legal advice with respect to the proposed ballot questions. You advise that the costs associated with these preparatory activities will certainly exceed \$500.00, and that the cost of the initial event, the press conference, itself may exceed that amount. The Chamber indicates that it plans to circulate petitions on or after November 27, 2009, and also pledges to timely file a statement of organization with respect to these ballot questions.

You submitted several questions for the Department's consideration which may be summarized as follows: (1) whether and to what extent do the Chamber's preliminary actions directly

influence or attempt to influence the qualification, passage, or defeat of a ballot question; (2) at what point in time does a ballot question exist for purposes of the Act; (3) which of the Chamber's proposed activities are sufficient to establish that a ballot question is intended to be submitted to a popular vote, regardless of whether it actually qualifies for the ballot; (4) at what point in time does a ballot question committee exist for purposes of the Act; and (5) when must the Chamber file a statement of organization for a ballot question committee.

The Act's registration and reporting requirements apply to any "committee", which is defined as "a person who receives contributions or makes expenditures for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question, if contributions received total \$500.00 or more in a calendar year or expenditures made total \$500.00 or more in a calendar year." MCL 169.203(4). A ballot question committee is a particular type of committee "acting in support of, or in opposition to, the qualification, passage, or defeat of a ballot question [.]" MCL 169.202(3).

Under the MCFA, a committee is required to file its statement of organization within 10 days of its formation. MCL 169.224(1). For purposes of determining whether the monetary threshold has been met, the words "contribution" and "expenditure" are generally defined, in pertinent part, to include anything of ascertainable monetary value that is used to influence, assist, or oppose the qualification, passage or defeat of a ballot question. MCL 169.204(1), 169.206(1). Thus, a ballot question committee's obligation to register is triggered not more than ten days after it receives contributions or makes expenditures of at least \$500.00 in a single calendar year to influence or attempt to influence the qualification, passage or defeat of a ballot question.

A "ballot question" must exist before any of these provisions can fairly be applied to the Chamber's proposed course of conduct. Under the Act, a ballot question is defined as "a question that is submitted or intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot." MCL 169.202(2). A cursory reading of the statutory definition may suggest that the ballot question proponent's mere intention to achieve qualification is determinative, yet this interpretation gives no effect to the phrase "*a question that is submitted or intended to be submitted [.]*" *Id.* (emphasis added). "It is a cardinal rule of statutory construction that full effect shall be given to every part of the act under consideration. Every clause and every word is presumed to have some force and meaning. No portion should be rendered nugatory."¹ Applying this maxim, the Department reads the statutory definition of ballot question to include a question that actually is submitted to a popular vote (and necessarily qualifies for the ballot), or a question that is intended to be submitted to a popular vote but falls short of qualifying for the ballot.

In the Declaratory Ruling to Peter Ellsworth (April 3, 1995) the Department described the integral steps of the qualification process, which include the option of seeking the approval of the Board of State Canvassers for a ballot question petition as to form, the mandatory tasks of petition circulation, filing, and canvassing, and if the ballot question is certified by the Board of State Canvassers, the ballot question election. The *Ellsworth* ruling also establishes an objective test to determine whether a contribution or expenditure has been made with respect to a ballot question, "whether the payment directly influences or attempts to influence the qualification of a

¹ *Atty Gen ex rel Zacharias v Bd of Ed of Detroit*, 154 Mich 584, 589 (1908).

ballot question or an election regarding that question [,]" and the corollary that no expenditure occurs if its impact is incidental to the qualification, passage, or defeat of the ballot question. Finally, *Ellsworth* instructs us that "expenses incurred before a ballot question exists are not expenditures under the ... Act."

To answer which, if any, of the Chamber's preparatory activities trigger the application of the MCFA, the Department must first determine the precise moment of a ballot question's formation. In the Department's view, this moment occurs when the proponents of an idea craft a precise ballot question² to be placed before the public *and* begin the process of seeking qualification of the ballot proposal; when, by way of illustration and not limitation, the proponents seek approval as to the form of the ballot question petition, print the petition, solicit contributions, or engage in similar activities that are intended to culminate in the qualification of the ballot question. In other words, the state's regulatory interest arises when the proponents of a ballot question act on their intent to qualify the measure for the ballot, whether or not they are ultimately successful in achieving qualification.

This objective test encompasses activities that are reasonably calculated to result in the qualification of the ballot question, but is not so broad as to sweep within the Act's reach "brainstorming", research, or public opinion polling that is preliminary to the creation of the ballot question in its final form. The impact of such preparatory activities undertaken at the nascent stages, before an idea evolves into a definitive ballot question, is negligible and does not directly affect the qualification (or nonqualification) of the ballot question. On the other hand, each of the actions described in the paragraph above represent a tangible, integral step taken toward the qualification of the ballot question.

This standard is consistent with the Attorney General's position that "the Michigan Campaign Finance Act applies to activities of a group with regard to the preparation, circulation and filing of a petition [.]". Op Atty Gen No 6710 (emphasis added). Furthermore, "[i]t is clear that by the time a ballot question committee is formed the relevant issue is no longer an idea but is a question 'intended to be submitted to a popular vote at an election.'" Interpretive Statement to Deane Baker (September 5, 1981). And most importantly, the test comports with the statutory definitions of ballot question and ballot question committee, as it captures the time in which the measure's proponents are "acting" on their "inten[t] to ... submit[t] [the ballot question] to a popular vote", regardless of whether it eventually qualifies for the ballot. MCL 169.202(2)-(3).

The Department also notes that from a regulatory perspective, the statutory definition of candidate³ allows an individual to determine the precise date on which he or she becomes a candidate for purposes of the Act by filing an affidavit of identity or nominating petition,

² The Department is cognizant that in many instances, the final form of an initiative, referendum, or constitutional amendment may not exist in the form of a question, except to the extent that the 100-word statement of purpose may be presented to voters as a question. The use of the phrase "ballot question" throughout this declaratory ruling is intended to include the final version of a proposal as it will appear on the petition.

³ "'Candidate' means an individual: (a) who files a fee, affidavit of incumbency, or nominating petition for an elective office; (b) whose nomination as a candidate for elective office by a political party caucus or convention is certified to the appropriate filing official; (c) who receives a contribution, makes an expenditure, or gives consent for another person to receive a contribution or make an expenditure with a view to bringing about the individual's nomination or election to an elective office, whether or not the specific elective office for which the individual will seek nomination or election is known at the time of the contribution is received or the expenditure is made; or (d) who is an officeholder who is the subject of a recall vote." MCL 169.203(1).

winning a party's nomination, or receiving a single contribution or making a single expenditure (or authorizing another to do so on one's behalf) with a view to winning the nomination or election. Likewise, the objective standard set forth above enables the supporters of a ballot question to readily discern the exact date on which the Act begins to govern their activities.

With these principles in mind, the Department provides the following answers to your questions.

- (1) *"Whether payment for the Chamber's preparatory activities referenced in this Request directly influence or attempt to influence the qualification of a ballot question or an election regarding that question?"*

Activities that precede the Chamber's formulation of a precise ballot question do not directly influence or attempt to influence the qualification, passage, or defeat of the ballot question.

- (2) , (3) *"Does the answer to Question No. 1 above change if the Chamber never circulates a petition containing the ballot question to registered voters?" and "Does the answer in Question No. 1 above change if the Chamber never seeks the approval of the ballot petition from the Board of State Canvassers as to form?"*

As this declaratory ruling explains, whether the Chamber circulates a petition or exercises the option of obtaining the Board of State Canvassers' approval as to the form of its petition is not determinative. Instead, the Department will evaluate whether the Chamber has created a precise ballot question *and* initiated the process of qualifying for the ballot. Evidence that the Chamber has acted on its intent to qualify the measure may include, but is not limited to, whether it has sought approval as to the form of the ballot question petition, printed the petition, solicited potential supporters for contributions, or engaged in other similar activities that are intended to result in the qualification of the ballot question.

- (4) *"When does a ballot question exist for the purposes of the Michigan Campaign Finance Act?"*

It is the Department's position that a ballot question arises on the date that the proponents of an idea (1) formulate a final, precise ballot question *and* (2) begin the qualification process. The earliest stage of qualification may vary for different committees, but arises at the first occurrence of any of the following: the proponents request approval as to the form of the ballot question petition, hire a printer to produce multiple copies of the petition, engage in fundraising, or undertake any other tangible step that is intended to culminate in the qualification of a specific ballot question.

- (5) *"Are the Chamber's preparatory activities referenced in this Request sufficient to establish that a question is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot?"*

The Chamber's preliminary activities do not directly influence or attempt to influence the qualification, passage, or defeat of the ballot question, unless and until the Chamber drafts a specific ballot question in its final form and takes any of the tangible, integral steps described in response to Question 4 (above).

(6) *“Is the initial press conference to be held by the Chamber (when the Chamber announces ballot questions it will be considering placing on the November 2010 general election ballot) sufficient to establish that a question is intended to be submitted to a popular vote at an election whether or not it qualifies for the ballot?”*

No. The Chamber’s announcement is incidental to the qualification, passage, or defeat of a particular ballot question.

(7) *“With respect to the Chamber’s proposed activities referenced in this Request, when is a ballot question committee formed?”*

It is not apparent from your request at which stage, if any, the Chamber will prepare a precise ballot question in its final form and therefore, the Department is unable to answer this question.

(8) *“When is the Chamber required to file a Statement of Organization to form a ballot question committee with the Michigan Department of State with respect to these ballot questions?”*

The Chamber’s obligation to file a statement of organization is triggered not more than ten days after (1) it has settled on a specific ballot question in its final form, and (2) it receives contributions or makes expenditures of at least \$500.00 in a single calendar year while engaging in activities (such as those described above) that are objectively intended to result in the qualification of the ballot question.

The people of Michigan have reserved for themselves the powers to initiate legislation, approve or reject enacted laws by referendum, and amend the state constitution, directly or through their elected representatives. MI Const. Art. II, Sec. 9, Art. IV, Sec. 34, Art. XII, Sec. 1, and Art. XII, Sec. 2. The people’s choice to exercise these cherished rights should be encouraged to flourish free from government regulation until such time as the proponents have taken a tangible, integral step toward achieving the qualification of a specific ballot question. This step occurs when the proponents act on their intent to qualify a defined ballot question by requesting approval as to form, printing the petition, fundraising, or undertaking similar activities that are designed to result in qualification, and does not reach the efforts of those who are engaged solely in preliminary research regarding whether it is feasible to pursue their idea for a ballot proposal.

Sincerely,

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