STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
MUTUAL BUILDING, LANSING, MICHIGAN 48918

July 11, 1997

Mr. Robert S. LaBrant
Vice President, Political Affairs
and General Counsel
Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

The following constitutes the response to your requests for a declaratory ruling and an interpretive statement concerning the applicability of the Michigan Campaign Finance Act (the MCFA), 1976 PA 388, as amended; MCL 169.201 to MCL 169.282. Both requests concern payroll deductions for campaign contributions to a separate segregated fund regulated by section 55(6) of the MCFA.

FACTS

The Michigan Chamber of Commerce Political Action Committee is a separate segregated fund established under section 55 of the MCFA by the Michigan Chamber of Commerce, a nonprofit corporation. The Michigan Chamber of Commerce administers a payroll deduction program for its employees who have policy making, managerial, professional, supervisory, or administrative non-clerical responsibilities for use in making contributions to its separate segregated fund. Several members of the Chamber are for profit corporations, which have also established separate segregated funds under the MCFA.

DECLARATORY RULING QUESTIONS

Your declaratory ruling request concerns the timing, manner and effect of the "affirmative consent" required to initiate a payroll deduction plan. These questions may be disposed of by addressing the following issues:

(1) Is a "reverse checkoff" plan for automatic contributions to a separate segregated fund prohibited by section 55(6) of the MCFA?

(2) May automatic payroll deductions continue in the calendar year which immediately follows the calendar year in which the affirmative consent was given?

(3) Must affirmative consent be in writing, and must the contributor sign the consent? What is necessary to evidence affirmative consent?

Your questions will be addressed in the following discussion.

Statutory Regulation

Section 55(6) of the MCFA regulates contributions to separate segregated funds through payroll deduction plans and reverse checkoff methods. The section provides, in pertinent part:

> Sec. 55. (6) . . . A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization shall not solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or (5) on an automatic or passive basis including but not limited to a payroll deduction plan or reverse checkoff method. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or (5) on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year. (Emphasis added.)

This section was added to the MCFA by 1994 PA 117. However, enforcement of these provisions was enjoined from March 31, 1995 through May 19, 1997, when the United States Court of Appeals issued a mandate vacating the injunction. The mandate followed the Court of Appeals determination that the amendments to section 55(6) were constitutional. Michigan AFL-CIO v Miller, 103 F 3d 1240 (CA 6, 1997).

Passive Consent

The MCFA functions both as a regulatory statute and as a disclosure statute. One of its primary purposes is to regulate campaign financing by restricting the manner of making and receiving campaign contributions. The requirement of affirmative consent for automatic contributions to a separate segregated fund is such a restriction.

Another fundamental purpose of the affirmative consent requirement is not only to prohibit automatic contributions which are not expressly authorized by the contributor but also to avoid the singular danger of passive contribution systems, such as a reverse checkoff method. A reverse checkoff places the burden on the contributor to terminate automatic contributions for which no affirmative consent was obtained or to apply for refunds of contributions obtained without affirmative consent. Simply put, section 55(6) is intended to avoid automatic contributions by mistake or inadvertence.

This point was emphasized in Michigan State AFL-CIO, supra, where the Court of Appeals observed:

> By verifying on an annual basis that individuals intend to continue dedicating a portion of their earnings to a political cause, § 169.255(6) both reminds those persons that they are giving money for political purposes and counteracts the inertia that would tend to cause people to continue giving funds indefinitely even after support for the message may have waned. The annual consent requirement ensures that political contributions are in accordance with the wishes of the contributors.

To accomplish this objective, section 55(6) emphatically prohibits the solicitation or receipt of contributions to separate segregated funds by the use of any scheme operating on a passive basis. A scheme for the solicitation or receipt of contributions will operate on a passive basis if it:

- Does not require the prior affirmative consent of the contributor;
- Provides for the solicitation or receipt of contributions, unless the contributor expressly refuses to participate in the scheme; or
- Is based upon implied, imputed, or constructive consent, or the failure to expressly deny consent.

Affirmative Consent

Further, section 55(6) of the MCFA also prohibits the solicitation or receipt of contributions on an automatic basis, such as a payroll deduction plan, unless the contributor affirmatively consents to the contribution. Affirmative consent is the *sine qua non* for any scheme of allowable automatic contributions under section 55(6).

The term "affirmative consent" implies a prior agreement to an act rather than an approval of something that has already taken place. As indicated in Bathurst v Turner, 533 So 2d 939, 941 (Fla App 1988):

> The term "consent" commonly connotes and requires a previous affirmative agreement to the act in question rather than a mere acquiescence in or approval of action . . . which has already taken place.

Evidence of Consent

An essential characteristic of a statute which operates as both a regulatory statute and a disclosure statute is the maintenance of written records to corroborate regulatory compliance. In furtherance of this dual purpose, section 22 of the MCFA, MCL 169.222, requires a committee to keep detailed records "as required to substantiate information contained in a statement or report filed pursuant to this act", including contributions obtained through affirmative consent. This provision also requires a committee to preserve its records for five years and to make them available for inspection by the Secretary of State.

A separate segregated fund which solicits or receives automatic contributions has the burden of proving each contributor has affirmatively consented to the contribution at least once in every calendar year. Moreover, the separate segregated fund must prove it had the affirmative consent of the contributor prior to initiation of the payroll deduction. In the instance of automatic contributions regulated by section 55(6), a separate segregated fund must maintain a record of the affirmative consent of each contributor. A record is a written memorial. In order to fulfill the purposes of section 55(6), the "affirmative consent" that is required is a written memorial signed by the contributor. Attached is a suggested form that may be used to comply with this requirement.

Length of Consent

Your remaining question concerns the effective length of affirmative consent once it has been given. As noted previously, section 55(6) allows the solicitation or receipt of contributions to a separate segregated fund by the use of a scheme operating on an automatic basis, such as a payroll deduction plan "only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year."

A calendar year is the period from January 1 through December 31 of the same year. Once an individual has given prior written affirmative consent for the initiation of an automatic contribution to a separate segregated fund, the affirmative consent is effective only until the end of the calendar year for which it was given or until it is revoked or withdrawn by the contributor,

whichever is earlier. (For example, if a newly hired employee gives affirmative consent on July 1, 1997 for calendar year 1997, the consent is effective from July 1, 1997 until December 31, 1997, unless it is revoked or withdrawn by the contributor before the end of 1997.) Affirmative consent given for one calendar year is not effective for any subsequent calendar year. Therefore, in order for payroll deductions to continue into a succeeding calendar year, a separate affirmative consent for the succeeding calendar year must be obtained and placed on file by January 1 of the calendar year in which deductions will occur.

Conclusion

In light of the foregoing analysis, the Department of State will apply the following statutory construction of section 55(6) to contributions that are obtained or transferred to separate segregated funds in and after the first reporting period to commence after the preliminary injunction was lifted. This reporting period begins July 20, 1997.

- Section 55(6) of the MCFA prohibits the use of any scheme operating on a passive basis, such as a reverse checkoff system.
- Section 55(6) prohibits multi-year approval or consent.
- Affirmative consent evidenced by a writing signed by the contributor must be obtained prior to taking any automatic contributions.
- Affirmative consent under section 55(6) is effective only for the calendar year for which it was given and must be renewed to continue into the next calendar year.
- In order for payroll deductions to continue into a succeeding calendar year, affirmative consent must be in writing and on file January 1 of the calendar year in which those deductions occur.
- In order to implement orderly and efficient inauguration of the affirmative consent requirement of section 55(6), affirmative consent evidenced by a writing signed by the contributor on or before July 20, 1997 is effective for all automatic contributions taken prior to January 1, 1998.
- Affirmative consent evidenced by a writing signed by the contributor after July 20, 1997 is effective only for automatic contributions taken after the date affirmative consent was given for the remainder of 1997.
- Affirmative consent may be withdrawn or revoked by the contributor at any time.

The Department will not apply this construction to contributions that were obtained or transferred during a reporting period that ended before July 20, 1997. These funds may be used to make expenditures to support or oppose state and local candidates and ballot questions.

Interpretive Statement Questions - Discussion

You also submitted questions on behalf of certain for profit corporations who are members of the Michigan Chamber of Commerce. Your first two questions are paraphrased as follows:

(1) Is a joint state/federal PAC prohibited from making contributions in state and local elections in Michigan if it has not received affirmative consent from one or more eligible employees but continues to deposit payroll deductions from those employees into the joint separate segregated fund account?

(2) Can an out-of-state separate segregated fund make contributions to committees registered under the MCFA, or independent expenditures on behalf of a Michigan candidate, if the out-of-state separate segregated fund uses funds collected by means of a reverse checkoff or by a payroll deduction plan that does not require the contributor to give annual affirmative consent for the payroll deductions?

A declaratory ruling issued to Robert P. Duff on October 26, 1983, stated:

> The Department has determined that a Michigan separate segregated fund may also be registered with the Federal Election Commission or in other states, and may participate in elections in these jurisdictions.

However, any separate segregated fund that participates in a Michigan election is required to comply with section 55 of the MCFA. Section 55(6) prohibits a separate segregated fund from soliciting or obtaining contributions on an "automatic basis", by means of payroll deduction or otherwise, for an election which is governed by the MCFA, unless the contributor has given affirmative consent. It is a necessary corollary that a separate segregated fund is prohibited from making expenditures for an election which is governed by the MCFA from contributions solicited or obtained from a person who has not given affirmative consent.

The proscription of section 55(6) of the MCFA applies whether the eligible employee is a Michigan employee or an out-of-state employee. However, a separate segregated fund which does not obtain the affirmative consent of an eligible individual for his or her contribution to the separate segregated fund by automatic payroll deduction to be expended for an election which is not governed by the MCFA is not prohibited from doing so by section 55(6).

The application of sections 54 and 55 of the MCFA to persons residing outside of Michigan is further demonstrated by section 42(2), MCL 169.242. This section provides in pertinent part:

> Sec. 42. (2) A contribution of more than $20.00, from a person whose treasurer does not reside in, whose principal office is not located in, or whose funds are not kept in this state, shall not be accepted by a person . . . unless accompanied by a statement certified as true and correct by an officer of the contributing person . . . that the contribution was not made from an account containing funds prohibited by section 54. This subsection does not apply if the contributing person is registered as a committee under section 24.

Subsection 54(1) prohibits a corporation or labor organization from making a contribution unless it complies with the provisions of section 55 of the MCFA. Section 55 allows a corporation or labor organization to make contributions from funds contributed to its separate segregated fund. Section 55(6) requires an eligible individual's affirmative consent for his or her automatic contribution to the separate segregated fund of a corporation or labor organization by payroll deduction.

Section 42(2) of the MCFA prohibits a person from accepting a contribution of more than $20.00 from any person, including the separate segregated fund of a labor organization or corporation, if any of the following conditions exist: (1) the person's treasurer does not reside in Michigan, (2) the person's principal office is not located in Michigan, or (3) the person's funds are not kept in Michigan, unless the person making the contribution certifies that the contribution was not made from an account containing funds prohibited by section 54. It follows that contributions and expenditures made by out-of-state separate segregated funds to influence state and local elections must be made from funds that are obtained pursuant to the requirements of the MCFA, including section 55(6).

Your final question is restated as follows:

(3) Is a corporation required to make available a payroll deduction plan to be used for automatic contributions to the separate segregated fund of a labor organization that represents its employees? If required by a collective bargaining agreement, is the labor organization required to reimburse the corporation?

The MCFA does not require a corporation to make available to its employees a payroll deduction plan to be used for automatic contributions to the separate segregated fund of a labor organization that represents its employees.

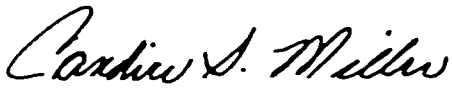
Except for establishment, administration, and solicitation of contributions to its separate segregated fund, and except for ballot questions or loans made in the ordinary course of business, section 54 of the MCFA prohibits a corporation from making a contribution or expenditure, unless the corporation is formed for political purposes.

Costs incurred in the implementation and operation of a payroll deduction plan for automatic contributions is an expenditure under the MCFA. Such costs are similar to providing postage and pre-addressed envelopes, and other costs associated with the collection and delivery of contributions. The amount of the payroll deduction is a contribution of the person from whose wages the contribution is being deducted, but costs incurred in the collection and delivery of contributions are expenditures by the person who pays for the payroll deduction system. Expenditures made by a corporation for the collection and delivery of contributions to a separate segregated fund other than its own is an in-kind contribution of the corporation and is prohibited by section 54(1) of the MCFA. (Declaratory Rulings issued to Ms. Judith L. Corley and Mr. Timothy Sponsler on November 2, 1993.)

A corporation is prohibited from making a contribution to the separate segregated fund of a labor organization. However, a labor organization may compensate a corporation for all expenses incident to its instituting a payroll deduction plan for the solicitation of contributions to the labor organization's separate segregated fund.

This response is a declaratory ruling with respect to the questions submitted on behalf of the Michigan Chamber of Commerce and an interpretive statement with respect to the questions submitted on behalf of Chamber members.

Sincerely,



Candice S. Miller
Secretary of State

Attachment

CSM/rlp

Affirmative Consent to Political Contribution

Section 55(6) of the Michigan Campaign Finance Act provides that a corporation, a joint stock company, a domestic dependent sovereign, or a labor organization "may solicit or obtain contributions for a separate segregated fund established on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year."

I, _____ , authorize _____

First Name, Middle Initial, Last Name — Name of Employer

to withhold $_____ per: pay period / week / month / year from my earnings in order to make political

Circle One

contributions to _____. This consent is for calendar year 1997.

Name of Committee

Signature: _____ Date: _____

STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
LANSING, MICHIGAN 48918

September 30, 1998

COMPLIANCE & RULES DIV.
OCT 0 2 1998

Mr. Robert S. LaBrant
Vice President, Political Affairs
and General Counsel
Michigan Chamber of Commerce
600 South Walnut Street
Lansing, Michigan 48933-2200

Dear Mr. LaBrant:

In light of the May 22, 1998 Court of Appeals decision in Michigan State AFL-CIO v Secretary of State, ____ Mich App ____ (1998) and the commencement of the permanent rulemaking process established in the Administrative Procedures Act of 1969, MCL 24.201 et seq, I am hereby withdrawing the declaratory ruling and interpretive statement issued to you on July 11, 1997.

The form and length of the affirmative consent required by section 55(6) of the Michigan Campaign Finance Act, MCL 169.255(6), will be addressed in permanent administrative rules that are being promulgated pursuant to the requirements set forth in the Administrative Procedures Act, MCL 24.201 et seq.

Sincerely,

Candice S. Miller

Candice S. Miller
Secretary of State

CSM:rlp

The following opinion is presented on-line for informational use only and does not replace the official version. (Mich Dept of Attorney General Web Site - www.ag.state.mi.us)

STATE OF MICHIGAN

FRANK J. KELLEY, ATTORNEY GENERAL

ATTORNEYS:

ELECTIONS:

JUDGES:

Application of Const 1963, art 6, § 19(2), requirement that judges be admitted to practice of law for five years

Const 1963, art 6, § 19(2), which establishes a length of experience requirement for judges, mandates that a person be admitted to the practice of law for at least five years as of the date of taking judicial office.

Opinion No. 6946

July 25, 1997

Honorable Douglas Carl
State Senator
The Capitol
Lansing, MI

You have asked whether Const 1963, art 6, § 19(2), which establishes a length of experience requirement for judges, mandates that a person be admitted to the practice of law for at least five years as of the date of taking judicial office. Stated another way, you have inquired whether section 19(2) requires admission to practice for five years from the date of filing one's candidacy, from the date of election, or from the date of taking office.

At the general election held November 5, 1996, Senate Joint Resolution D of 1995 was submitted to the people and adopted as Ballot Proposal B, amending Const 1963, art 6, § 19, regarding qualifications for judicial office. New section 19(2), effective December 21, 1996, requires that judges be admitted to the practice of law for at least five years.

> (2) To be *qualified to serve* as a judge of a trial court, a judge of the court of appeals, or a justice of the supreme court, a person shall have been admitted to the practice of law for at least 5 years. This subsection does not apply to any judge or justice appointed or elected to judicial office prior to the date on which this subsection becomes part of the constitution.

(Emphasis added.)

Where the provisions of a statute are clear and unambiguous, they are to be applied as written without interpretation. *Owendale-Gagetown School Dist v State Bd of Education*, 413 Mich 1, 8; 317 NW2d 529 (1982). By its express terms, the new section 19(2) length of experience requirement establishes one's qualifications to *serve* as a judge. Section 19(2) is silent regarding one's qualifications to *file* for judicial office, to be a *candidate* for judicial office, or to be *elected* to judicial office.

In addressing eligibility for public office, Michigan recognizes clear distinctions between qualifications for candidacy, for election, and for serving in office. A statute that establishes a residency requirement for candidates means that the residency must exist at the time of filing for election to office, since that is when one becomes a candidate. *Okros v Myslakowski,* 67 Mich App 397, 241 NW2d 223 (1976). Statutes imposing maximum age limits for judges consistently specify that at the time of election or appointment, one must be less than 70 years of age.[1]

In *Ransford v Graham*, 374 Mich 104, 107; 131 NW2d 201 (1964), the court interpreted the term *serving* as it was used in Const 1963, art 6, § 19, sched § 7, as follows:

> [T]he exemption, contained in section 7 of the schedule, from the requirement that a judge of probate must be a person who is licensed to practice law in this State, is
> . . . expressly stated to apply only to "any judge of probate *serving* on the effective date of this Constitution." "*Serving" means discharging a function or duty, rendering a service.*

(emphasis added).

Applying the *Ransford* court's definition of *serving* to new section 19(2) compels the conclusion that a judge must be *qualified to serve as a judge* at the time he or she will be *discharging a function or duty, rendering a service*. See also, OAG, 1929-1930, p 810 (March 24, 1930), which concluded that where the condition precedent consists of a qualification for holding public office, rather than for being a candidate for the office, such eligibility refers to the capacity to hold the office and not merely the right to be elected to it.

It is my opinion, therefore, that Const 1963, art 6, § 19(2), which establishes a length of experience requirement for judges, mandates that a person be admitted to the practice of law for at least five years as of the date of taking judicial office.

FRANK J. KELLEY
Attorney General

[1] One must be less than 70 years of age at the time of *election or appointment* as a district court judge (MCL 168.467; MSA 6.1467); at the time of *election* as a probate court judge (MCL 168.431; MSA 6.1431); at the time of *election* as a circuit court judge (MCL 168.411; MSA 6.1411); at the time of *election or appointment* as a court of appeals judge (MCL 168.409; MSA 6.1409); and at the time of *election or appointment* as a supreme court justice (MCL 168.391; MSA 6.1391).

STATE OF MICHIGAN

CANDICE S. MILLER, Secretary of State
MICHIGAN DEPARTMENT OF STATE
TREASURY BUILDING, LANSING, MICHIGAN 48918-9900

November 4, 1997

Mr. John D. Pirich
Mr. Timothy Sawyer Knowlton
HONIGMAN MILLER SCHWARTZ AND COHN
222 North Washington Square
Lansing, Michigan 48933-1800

Dear Messrs. Pirich and Knowlton:

This is in response to your request for a declaratory ruling or an interpretive statement under the Michigan Campaign Finance Act, 1976 PA 388, as amended (MCFA). Your request concerns the application of section 55(1) and (6) of the Act (MCL 169.255) to corporate separate segregated funds.

Background

Section 55(1) authorizes a corporation to make expenditures for the establishment, administration and solicitation of contributions to a separate segregated fund (SSF) to be used for political purposes. A corporation may only establish one SSF. 1977-1978 OAG, No 5344, p 549 (July 20, 1978).

Section 55(6) imposes certain restrictions on soliciting and obtaining contributions to a SSF. This section states, in pertinent part:

> Sec. 55. (6) . . . A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization shall not solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or (5) on an automatic or passive basis including but not limited to a payroll deduction plan or reverse checkoff method. A corporation organized on a for profit or nonprofit basis, a joint stock company, a domestic dependent sovereign, or a labor organization may solicit or obtain contributions for a separate segregated fund established under this section from an individual described in subsection (2), (3), (4), or

> (5) on an automatic basis, including but not limited to a payroll deduction plan, only if the individual who is contributing to the fund affirmatively consents to the contribution at least once in every calendar year.

In an October 26, 1983 declaratory ruling to Robert P. Duff, the Department of State indicated that a joint or multi-state SSF is permissible under the MCFA, so long as the SSF conforms with the requirements of section 55.

The Department reaffirmed its position in a July 11, 1997 declaratory ruling and interpretive statement issued to Robert S. LaBrant. The interpretive statement indicates that a joint SSF operating in Michigan must conform with the affirmative consent requirements of section 55(6).

The LaBrant ruling and statement, as it applies to the Michigan State AFL-CIO and its affiliates, has been temporarily enjoined by the Ingham County Circuit Court. However, the statute itself remains effective during the pendency of the ongoing litigation. Therefore, SSFs that operate in Michigan must comply with both section 55(1) and (6).

You represent a number of corporations that maintain joint SSFs. You have asked a series of questions concerning the "propriety of certain aspects" of their plans to ensure that the requirements of section 55(1) and (6) are met. Those questions, and the Department's response to each question, are as follows.

Discussion

1. May a corporation establish and maintain two or more SSFs where only one of the SSFs will make contributions in elections governed by the MCFA?

2. May a corporation with two or more SSFs -- only one of which contributes to MCFA-governed elections -- solicit its Michigan employees (under the conditions of § 55(6)) to contribute to the MCFA-governed SSF, as well as solicit its Michigan employees to contribute to SSFs established for non-MCFA governed elections?

The MCFA applies to contributions and expenditures that are made to support or oppose candidates for state and local elective offices and questions appearing on Michigan ballots. The MCFA does not regulate contributions and expenditures made to support or oppose candidates for federal office or offices in other states.

While a corporation that chooses to support state and local candidates in Michigan must do so through the establishment and administration of a single SSF, there is nothing in section 55(1) that prevents a corporation from establishing additional SSFs to participate in elections that are governed by the Federal Election Campaign Act or other states' campaign finance laws.

Similarly, there is nothing in the MCFA that would prevent a corporation from soliciting Michigan employees for contributions to a MCFA-governed SSF and contributions to a federal or out-of-state SSF, as long as contributions solicited and accepted by the Michigan SSF conform with the requirements of section 55(6).

3. Under the Declaratory Ruling issued July 11, 1997 to Robert S. LaBrant by the Secretary of State, a corporation which previously obtained affirmative written consent from its employees contributing to that corporation's joint federal/other states SSF may continue to make contributions to MCFA-governed elections throughout 1997. In order to establish a SSF that will begin making contributions on January 1, 1998 for MCFA-governed elections, may the corporation continue to make such contributions throughout 1997 while at the same time soliciting employees in 1997 to contribute, commencing January 1, 1998 to the SSF dedicated to MCFA-governed elections?

The thrust of your question is whether a corporation will be operating two SSFs in violation of section 55(1) if it continues to operate an existing multi-jurisdiction SSF while obtaining affirmative consent for a Michigan only SSF that will begin to operate on January 1, 1998. The enjoined LaBrant ruling has no bearing on the response to this question.

The new Michigan SSF is required to file a statement of organization within 10 days after forming a committee. MCL 169.224(1). A committee must be formed when contributions received or expenditures made total $500.00 or more in a calendar year. MCL 169.203(4).

According to your request, the starting date for actual collection of contributions to the Michigan SSF would be January 1, 1998. As of that date, the multi-jurisdiction SSF will cease making contributions in MCFA-governed elections. In these circumstances, no violation of section 55(1) would arise if a corporation receives contributions to a multi-jurisdiction SSF during the remainder of 1997 while soliciting eligible employees to give affirmative consent to make contributions beginning January 1, 1998 to a Michigan only SSF.

4. May a corporation maintain a single SSF that receives contributions from some employees pursuant to annual affirmative consents in accord with § 55(6) of the MCFA and from other employees without obtaining annual affirmative consents so long as the amount of campaign contributions made by the SSF to candidates in MCFA-governed elections does not exceed the amount received by the SSF from employees providing annual affirmative consents in compliance with § 55(6)?

Your final question suggests that compliance with section 55(6) can be achieved by using an accounting method to differentiate between contributions obtained pursuant to affirmative consent and contributions obtained without such consent. Under this scenario, automatic contributions obtained in compliance with section 55(6) would be commingled with automatic contributions obtained without affirmative consent. However, an accounting method would be used to ensure that expenditures made by the SSF to support or oppose Michigan candidates are less than or equal to the amount of contributions received through affirmative consent.

In written comments submitted pursuant to section 15(2) of the MCFA (MCL 169.215), Mr. Andrew Nickelhoff, from the Sachs, Waldman law firm, suggested using 11 CFR § 102.5(b) as a model for accounting and allocation measures that can be used to enforce the requirements of section 55(6). The federal rule authorizes the use of a "reasonable accounting method" to demonstrate that an "organization has received sufficient funds subject to the limitations and prohibitions of the [Federal Election Campaign] Act" to make a specific contribution, expenditure or payment.

The Department of State has not promulgated a rule similar to 11 CFR § 102.5(b). Moreover, the federal rule does not apply to SSFs but is limited in its application to organizations that are <u>not</u> political committees. Therefore, the federal rule cannot be relied upon to distinguish between commingled contributions obtained from employees.

Section 55 limits the source of contributions to a SSF and restricts the manner in which those contributions can be solicited and received. These are the only funds that a SSF may use to participate in MCFA-governed elections. If contributions obtained through affirmative consent are commingled with funds obtained by other methods, the distinction between those funds would be irretrievably lost. It would then be impossible to determine whether contributions obtained through a reverse checkoff or another unacceptable method were used to make expenditures in Michigan elections.

The scenario you describe does not prevent a SSF from making expenditures from automatic contributions obtained without affirmative consent. Consequently, a SSF may not make expenditures in MCFA-governed elections after contributions obtained from employees with affirmative consent are commingled with contributions obtained from employees without affirmative consent.

Conclusion

In light of the foregoing, the Department of State concludes as follows:

- A corporation does not violate section 55(1) of the MCFA by establishing one separate segregated fund to participate in MCFA-governed elections and one or more separate segregated funds to participate in elections governed by the laws of other jurisdictions.

- A corporation may solicit its Michigan employees for contributions to both separate segregated funds, provided the contributions solicited and accepted by the MCFA-governed fund conform with the requirements of section 55(6).

- A corporation that has received affirmative consent from contributors may continue to receive contributions to a multi-jurisdiction separate segregated fund during the remainder of 1997 while soliciting eligible employees to give affirmative consent to make contributions beginning January 1, 1998 to a Michigan only separate segregated fund.

- A separate segregated fund may not make expenditures in MCFA-governed elections after contributions obtained with affirmative consent are commingled with automatic contributions obtained without affirmative consent.

This response is an interpretive statement and does not constitute a declaratory ruling, as the request did not include a statement of actual facts.

Sincerely,

Robert T. Sacco

ROBERT T. SACCO
Deputy Secretary of State

RTS:rlp