



MISSOURI ETHICS COMMISSION
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James Klahr
Executive Director

August 25, 2017

Re: Advisory Opinion No. 2017.08.CF.017

Dear .

At the August 25, 2017 meeting of the Missouri Ethics Commission, your request for an opinion was discussed.

Opinion

Pursuant to §105.955.16, RSMo, the Missouri Ethics Commission may issue a written opinion regarding any issue on which the Commission can receive a complaint pursuant to §105.957, RSMo. The Commission receives complaints alleging violation of campaign finance provisions of Missouri law. This opinion is issued within the context of Missouri's laws governing such issues, and assumes the facts presented by you in your letter.

The questions presented and the Commission's opinion are as follows:

Does Article VIII, Section 23.3(3)(a) ban on corporate contributions to candidate committees apply to a non-profit corporation registered as a 501(c)(4)? The non-profit corporation does not engage in business activities and has never received donations from business corporations or labor organizations.

Also, the non-profit corporation has an outstanding unsecured loan that was used for startup purposes. Does this encumbrance create a "security holder" or "claim on its assets" as Section 23.3(3)(b)(ii) contemplates?

Given the foregoing, may the non-profit corporation contribute from general treasury funds to a candidate committee?

Additional information gained from the Articles of Incorporation states that the corporation is a public benefit corporation under Chapter 355 of the Missouri Revised Code. The corporation is organized for the exclusive purpose of the promotion of social welfare, and in particular, for the purpose of protecting animals from abuse, neglect and exploitation by monitoring and facilitating the passage of animal welfare laws, thereby enhancing the quality of life for people and animals in Missouri.

No part of the net earnings of the corporation shall inure to the benefit of any private shareholder or individual. No substantial part of the corporation's activities shall consist of providing commercial-type insurance, nor shall the corporation engage in any way which is inconsistent with, or in violation of, the corporation's status of a social welfare organization under Section 501c(4) of the United States Internal Revenue Code.

In the event of the dissolution of the corporation, any remaining assets of the corporation, after payment of any debts for other obligations of the corporation shall be distributed to animal humane organizations that are tax exempt under Section 501c(3) or which are social welfare organizations under Section 501c(4) of the Internal Revenue Code.

Analysis

MO CONST. Art. VIII, §23.3(3) (a) and (b) provide prohibitions on corporate and labor organization contributions as follows:

(3) (a) It shall be unlawful for a corporation or labor organization to make contributions to a campaign committee, candidate committee, exploratory committee, political party committee or a political party; except that a corporation or labor organization may establish a continuing committee which may accept contributions or dues from members, officers, directors, employees or security holders.

(b) The prohibition contained in subdivision (a) of this subsection shall not apply to a corporation that:

(i) Is formed for the purpose of promoting political ideas and cannot engage in business activities; and

(ii) Has no security holders or other persons with a claim on its assets or income; and

(iii) Was not established by and does not accept contributions from business corporations or labor organizations.

As discussed below, the language in §23.3(3)(b) is substantially similar to the three-part test set forth in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) as well as the Colorado Constitution, CO CONST Art. 28, § 3.¹ While the Court ultimately found that federal bans on independent expenditures by corporations are unconstitutional in *Citizens United v. Federal Election Com'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed 2d 753 (2010), the Court's discussion of the so-called *MCFE* (*Massachusetts Citizens for*

¹ The Colorado Constitution prohibits both contributions and independent expenditures. Subsection (4) of this section was held unconstitutional in the case of In Re: Interrogatories Propounded by Governor Bill Ritter, Jr., Concerning the Effect of Citizens United v. Federal Election Commission, 558 U.S. _____ (2010) on Certain Provisions of Article XXIII of the Constitution of the State of Colorado, 227 P.3d 892 (Colo. 2010). The Court found it unconstitutional to the extent that it makes it unlawful for a corporation or labor organization to make expenditures expressly advocating the election or defeat of a candidate, or that makes it unlawful for a corporation or a labor organization to provide funding for an electioneering communication.

Life) organizations is instructive in interpreting the provision as it applies to contributions made by such organizations in Missouri.

In *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 107 S. Ct. 616, 93 L. Ed. 2d 539 (1986), the United States Supreme Court held that a federal statute requiring corporations to make independent political expenditures only through special segregated funds (SSF) could not be imposed on a voluntary nonprofit political organization. *MCFL* was a nonprofit, nonstock corporation established under Massachusetts law, whose purpose was “to foster respect for human life and to defend the right to life of all human beings, born and unborn, through educational, political, and other forms of activities.” To further this purpose, the nonprofit published a newsletter that was distributed to contributors and to non-contributors who expressed support for the organization. *MCFL* did not accept contributions from business corporations or unions. Its resources came from voluntary donations from “members,” and from various fund-raising activities such as garage sales, bake sales, dances, raffles, and picnics. The corporation considered its “members” those persons who have either contributed to the organization in the past or indicated support for its activities.

In its opinion, the Court discussed the “hurdles” a small nonprofit corporation would face in establishing and administering a fund. The Court identified the following 3 features that distinguish a nonprofit advocacy organization (*MCFL* organizations) from a corporation it stated was constitutionally subject to the federal prohibitions on corporate treasury funds.

1. The organization is formed for the purpose of promoting political ideas and cannot engage in business activities, and
2. The organization has no shareholders or other persons who would have a claim on its earnings or assets, and
3. The organization is not established by a corporation or labor union and cannot, therefore, be used as a conduit for the type of direct spending that is constitutionally prohibited.

The Court explained these three features as follows:

“*First*, it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. If political fundraising events are expressly denominated as requests for contributions that will be used for political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support. *Second*, it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. This ensures that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity. *Third*, *MCFL* was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities. This prevents such corporations from serving as conduits for the type of direct spending that creates a threat to the political marketplace.” *Id.* at 264

The court applied the three features of a nonprofit political organization in *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 110 S.Ct. 1391, 108 L.Ed.2d 652 (1990).² The Court upheld a State of Michigan ban on direct campaign expenditures by an incorporated chamber of commerce, organized for a variety of purposes in addition to its political goals. The chamber was funded through annual dues required of all members, three-quarters of whom were for-profit corporations. The Court distinguished an organization such as a chamber from *MCFL* organizations. Because the members of the chamber derived benefits from the association beyond its political goals, withdrawal from the organization in disagreement with the Chamber's political positions would entail the loss of non-political benefits. *Id* at 663. In addition, the Chamber largely was financed by corporate contributions. Thus, the Chamber could serve as a conduit for the political expenditures of corporations that were otherwise constitutionally subject to limitation. *Id* at 663.

In *Federal Election Commission v. Beaumont*, 539 U.S. 146, 123 S. Ct. 2200, 156 L.Ed. 2d 179 (2003), the Court again discussed *MCFL* organizations. The Court upheld the direct contribution prohibition to nonprofit advocacy corporations, except as it applied to *MCFL* organizations. The corporation in *Beaumont* was organized under the laws of North Carolina to provide counseling to pregnant women and to urge alternatives to abortion, and as a nonprofit advocacy corporation it is exempted from federal taxation by § 501(c)(4) of the Internal Revenue Code. It had no shareholders and, although it received some donations from traditional business corporations, it was “overwhelmingly funded by private contributions from individuals.” The Court stated that not all corporations that qualify for favorable tax treatment under §501c(4) lack substantial resources, including corporate business funds. *Id.* at 160-161.

In *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 203–209, 124 S.Ct. 619, 157 L.Ed.2d 491(2003), the Court explained the reasoning behind the *MCFL* organization exception.³ Finally, the Court discussed the *MCFL* organizations in *Citizens United v. Federal Election Com'n*, 558 U.S. 310,130 S. Ct. 876, 175 L. Ed 2d 753 (2010). The Court noted that *Citizens United* did not qualify for the *MCFL* exemption, since some funds used to make the movie were donations from for-profit corporations. *Id.* at 327.

With guidance from the Court as noted above, the articles of incorporation for the nonprofit at issue as well as Missouri corporate and campaign finance law, the question is whether a nonprofit corporation falls within this narrow exception at the time it seeks to contribute to the enumerated committees. The following is the Commission’s opinion whether the exception §23.3(b) applies to this specific corporation under the facts presented at this particular time.

Formation for the Purpose of Promoting Political ideas

§3.3(b)(i) states the prohibition on corporate contributions shall not apply to a corporation that:

² As the Michigan statute prohibited use of corporate treasury funds to make independent expenditures, *Austin v. Michigan Chamber of Commerce* was overruled by *Citizens United v. Federal Election Com'n*, 130 S. Ct. 876, (2010).

³ *McConnell* was also overruled in *Citizens United* as the federal statute at issue barred independent corporate expenditures for electioneering communications.

(i) Is formed for the purpose of promoting political ideas and cannot engage in business activities; and

§355.025, RSMo, provides that nonprofit corporations may be organized under that chapter for many purposes, including charitable, benevolent, political, religious, cultural and social welfare. The chapter specifically excludes entities created for or engaged in business or activity for profit. The articles of incorporation for the corporation at issue state the corporation:

“is organized for the exclusive purpose of the promotion of social welfare, and in particular, for the purpose of protecting animals from abuse, neglect and exploitation by monitoring and facilitating the passage of animal welfare laws, thereby enhancing the quality of life for people and animals in Missouri.”

The nonprofit corporation at issue is also registered for purposes of exemption from federal income tax under 26 U.S.C. § 501(c)(4)(hereinafter IRC 501(c)(4)).⁴ According to 26 C.F.R. § 1.501(c)(4)-1(a)(2)(i), “an organization is operated exclusively for the promotion of social welfare if it is primarily engaged in promoting in some way the common good and general welfare of the community.” Revenue rulings have stated that seeking legislation germane to the organization’s programs is a permissible means of attaining social welfare purposes, and that organizations described in IRC 501(c)(4) may engage in lobbying, provided that the lobbying is related to the organization's exempt purpose.

As provided in the articles of incorporation, and with the guidance of the corporation’s federal tax status, it appears that this corporation meets the requirement of being formed for the promotion of political ideas.

Engaging in Business Activities

Art. VIII, §23.7 does not include a definition of “business activities.” In determining whether a corporation engages in business activities, guidance might be taken from its plain and ordinary meaning and reference in the Missouri Revised Code, which suggests “business activities” means “for profit” activities, i.e. §144.605(10), §148.097, §301.344, §371.010, §409.516, §620.1058, RSMo.

Guidance may also be taken from federal regulations and revenue rulings. For example 26 C.F.R. § 1.501(c)(4)-1(a)(2)(ii) provides that an organization is not operated primarily for the promotion of social welfare if its primary activity is carrying on a business with the general public in a manner similar to organizations which are operated for profit.

Finally, as noted by the Court in *Massachusetts Citizens for Life, 479 U. S. at 264*, if political fundraising events are expressly denominated as requests for contributions that will be used for

⁴ While not germane to this question, political organizations with a tax status under 26 U.S.C.A. § 527, are defined as “a party, committee, association, fund, or other organization (whether or not incorporated) organized and operated primarily for the purpose of directly or indirectly accepting contributions or making expenditures, or both, for an exempt function.”

political purposes, including direct expenditures, these events cannot be considered business activities. This ensures that political resources reflect political support.

The question posed states the nonprofit corporation at issue does not engage in business activities.

Security Holders or Other Persons with a Claim Assets or Income

§3.3(b) (ii) states the prohibition on corporate contributions shall not apply to a corporation that:

- (ii) Has no security holders or other persons with a claim on its assets or income...

In Massachusetts Citizens for Life, 479 U. S. at 264, the Court described this second feature as ensuring that persons connected with the organization will have no economic disincentive for disassociating with it if they disagree with its political activity.

§355.066 (28), RSMo defines a public benefit corporation as a domestic corporation which is formed as a public benefit corporation pursuant to §§355.096 to 355.121, RSMo, or is required to be a public benefit corporation pursuant to §355.881, RSMo.

§355.881(4), RSMo provides that a corporation “which is organized for a public or charitable purpose and which upon dissolution must distribute its assets to a public benefit corporation, the United States, a state or a person which is recognized as exempt under section 501(c)(3) of the Internal Revenue Code, or any successor section, is a public benefit corporation.”

The Articles of Incorporation for the corporation at issue provides that no part of the net earnings of the corporation shall inure to the benefit of any private shareholder or individual. In the event of the dissolution of the corporation, any remaining assets of the corporation, after payment of any debts for other obligations of the corporation, shall be distributed to animal humane organizations that are tax exempt under Section 501c(3) or which are social welfare organizations under Section 501c(4) of the Internal Revenue Code.

While the question indicates that the non-profit corporation has an outstanding unsecured loan that was used for startup purposes, the requester has provided additional information that repayment was to occur within one year, portions have been expressly forgiven, and the lender has not attempted to require repayment, with the statute of limitations soon to expire. Under the circumstances of this particular note, the requester has represented that there is no claim due to the nature of the promissory note.

Was not established by and does not accept contributions from Business Corporations or Labor Organizations

§3.3(b)(iii) states the prohibition on corporate contributions shall not apply to a corporation that:

(iii) Was not established by and does not accept contributions from business corporations or labor organizations.

§23.7(7) states “[a]s used in this section, the following terms have the following meanings:

...

(7) "Contribution", a payment, gift, loan, advance, deposit, or donation of money or anything of value for the purpose of supporting or opposing the nomination or election of any candidate for public office or the qualification, passage or defeat of any ballot measure, or for the support of any committee supporting or opposing candidates or ballot measures or for paying debts or obligations of any candidate or committee previously incurred for the above purposes...”⁵

However, to the extent that §23.3(3)(b) may apply to certain nonprofit corporations, it appears that the term “contribution” as intended in this section includes contributions to non-profit corporations as understood in terms of state corporate and federal treasury law.^{6 7} As stated by the Court in *Massachusetts Citizens for Life, and later cases, the question appears to be whether corporate funds are accepted by the nonprofit corporation.*

As indicated, this corporation was not established by and does not accept contributions from a business corporation or labor organization.

Sincerely,


James Klahr
Executive Director

⁵ This mirrors the definition of contribution in the campaign finance law, §130.011(12) RSMo.

⁶ While Chapter 355 does not include a specific definition of “contribution” §347.015(5) defines a contribution as: “cash, other property, the use of property, services rendered, a promissory note or other binding obligation to contribute cash or property or perform services or any other valuable consideration transferred by a person to the limited liability company as a prerequisite for membership in the limited liability company and any subsequent transfer to the limited liability company by a person in his capacity as a member.”

⁷ For examples of federal law, *See e.g.* 26 U.S.C.A. § 170, I.R.C. § 170; 26 U.S.C.A. § 501, I.R.C. § 501; 26 U.S.C.A. § 527, I.R.C. § 527. *See also* 26 C.F.R. § 1.503