Legislative Analysis

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CAMPAIGN FINANCE ACT AMENDMENTS

House Bill 6182 (Substitute H-3)
Sponsor: Rep. Ellen Cogen Lipton

House Bill 6183 (Substitute H-6)
Sponsor: Rep. Dan Scripps

House Bill 6184 (Substitute H-2)
Sponsor: Rep. Fred Miller

House Bill 6185 (Substitute H-2)
Sponsor: Rep. Tim Bledsoe

House Bill 6186 (Substitute H-3)
Sponsor: Rep. Jennifer Haase

House Bill 6187 (Substitute H-2)
Sponsor: Rep. Rashida Tlaib

House Bill 6188 (Substitute H-2)
Sponsor: Rep. Pam Byrnes

Committee: Ethics and Elections

First Analysis (6-21-10)

BRIEF SUMMARY: The bills would amend various sections of the Michigan Campaign Finance Act to regulate—by requiring reports of, disclaimers for, and in some instances prohibiting—corporate and labor union independent expenditures during election campaigns.

FISCAL IMPACT: The bills would have an indeterminate fiscal impact on state and local governments. See ***Fiscal Information***.

THE APPARENT PROBLEM:

Earlier this year, the U. S. Supreme Court reversed more than 100 years of campaign finance precedent dating from the 1907 Tillman Act passed by the U.S. Congress that banned all corporate contributions to candidates standing for election. According to critics of the decisions, the action of the Court was unexpected, since five justices acted on their own initiative, at the request of no party to the suit.

On January 21, 2010, by a 5-4 vote, the Court published a majority opinion authored by Justice Anthony Kennedy entitled *Citizens United v Federal Election Commission* (concurred in by Justices Roberts, Scalia, Alito, and Thomas [in part]; dissent authored by Justice John Paul Stevens, and concurred in by Justices Ginsburg, Breyer, and Sotomayor). That opinion overruled (among others), a 1990 case called *Austin v Michigan Chamber of Commerce*, 494 U.S. 652, which had upheld the principle that corporations, which are only fictitious persons created by law, do not have the same First Amendment rights to political activity as real people do. In overruling *Austin*, the U.S. Supreme Court denied the U.S. Congress and state legislatures any basis for allowing the government to limit corporate independent expenditures—that is, expenditures paid for

by corporations for or against candidates. Instead, the Court declared that corporations and unions have a constitutional right to spend as much as they wish on television election advertising specifically supporting or targeting particular candidates, on behalf of candidates. (However, the decision left standing the ban on using corporate or union funds to contribute directly to a candidate.) See Background Information.

Until the Court decided *Citizens United v Federal Election Commission* to invalidate all statutory restrictions on corporate independent expenditures, the federal Bipartisan Campaign Reform Act of 2002 had prohibited corporations and unions from using their general treasury funds to make independent expenditures for speech that was an "electioneering communication" or for speech that expressly advocated the election or defeat of a candidate. [Under the law, an electioneering communication was "any broadcast, cable, or satellite communication" that "refers to a clearly identified candidate for Federal office," made within 30 days of a primary election, and that was "publicly distributed."]

Michigan's Campaign Finance Law also banned corporate independent expenditures on behalf of candidates—one of the 24 states to ban or restrict corporations from funding advocacy for or against state candidates. To violate Michigan's law was to risk being convicted of a felony. According to nonpartisan research, in the 22 states that prohibit corporations from giving to candidates, individuals contributed about half of the money raised by candidates, and non-individuals provided less than one-fourth. The reverse is true in the 28 states that allow corporate giving. See ***Background Information***.

Prior to the recent ruling by the U. S. Supreme Court, instead of using their general treasury funds, corporations and unions were allowed under the law to establish political action committees (customarily called PACs) whose individual members can make contributions for express advocacy or electioneering communication purposes. Contributions from PACs continue to be allowed nationwide. In Michigan, according to committee testimony, 400 for-profit and nonprofit corporations have formed PACs, and 79 of those raised more than $50,000 in the 2008 election cycle. And, some PACs make independent expenditures on behalf of candidates.

To respond to *Citizens United v FEC,* members of the U. S. Congress—spearheaded by Rep. Chris Van Hollen (D-Md) in the House of Representatives and Senator Charles Schumer (D-NY) in the Senate—have proposed legislation that would address (but not reverse) some of the electioneering changes the U. S. Supreme Court's Opinion puts in place. Among the changes proposed are provisions in federal law that would forbid corporate advertising by corporate recipients of federal TARP (Troubled Asset Relief) funds who have not paid back their government loans; and a total ban on electioneering by corporations controlled by foreigners. In addition, in offering its ruling, the U. S. Supreme Court's Opinion left open the possibility of the Congress requiring public disclosure of a corporation's expenses for electioneering—for example, prompt disclosure of contributions on the Internet quickly available to voters, and the ample disclosure within a television advertisement naming an ad's front organization and the major corporate contributors. Some have also argued that any corporation that wishes to engage

in electioneering obtain at least the annual consent of its stockholders, and that ads report the percentage of stockholders who have refused that blanket consent. (See *the New York Review,* 5-13-10; *The Washington Post,* 6-14-10)

Legislators in Michigan have offered a similar set of bills. Given that unlimited election contributions on behalf of candidates are now allowed from corporations, unions, and Indian tribes (so-called 'domestic sovereigns'), federal and state laws are needed to require reporting and disclosure of these independent expenditures. To put a state regulatory framework in place that would better ensure transparency, bills have been introduced to amend Michigan's Campaign Finance Act. The bills would make known to the public the independent expenditures of corporations and labor unions that expressly advocate the election or defeat of a candidate.

THE CONTENT OF THE BILLS:

The bills would amend various sections of the Michigan Campaign Finance Act to regulate—by requiring reports of, disclaimers for, and in some instances prohibiting—corporate and labor union independent expenditures during election campaigns.

Each bill is tie-barred to all the others, so that none of the bills could go into effect unless all of the bills were enacted into law. A detailed description of each bill follows.

House Bill 6182 (H-3) would amend the Michigan Campaign Finance Act (MCL 169.55g) to require that a corporation, joint stock company, domestic dependent sovereign, or labor organization that makes an independent expenditure expressly advocating the election or defeat of a candidate comply with all applicable sections of the act.

House Bill 6183 (H-6) would amend the Michigan Campaign Finance Act (MCL 169.55a) to require certain reports and disclaimers when corporations make independent expenditures. The bill requires that a corporation or joint stock company that makes an independent expenditure submit a report to the Secretary of State at least five days before the date of the expenditure. That report would have to be submitted electronically over the internet, in the manner prescribed by the Secretary of State, and be immediately posted on the Secretary of State's website. The report would include the dates of the expenditure, the candidate to whom the communication funded by the expenditure refers, the amount of the expenditure, the name and address of the person to whom the expenditure would be paid, the name and address of the person filing the report, and the names and addresses of all of the contributors to the expenditure.

Further, the bill requires that a corporation or joint stock company that made an independent expenditure place one of the following disclaimers on the communication:

(A) *Printed communication disclaimers* would have to state: "Paid for with corporate or joint stock company funds by _____ (name and address of corporation or joint stock company)" and include the name and photograph of the president of that corporation or

joint stock company. The disclaimer would have to be of sufficient type size to be clearly readable, be contained in a printed box set apart from the other content of the communication, and be legible.
(B) *Electronic communication disclaimers* would have to comply with (A) above, and be clearly readable during the entire broadcast of the advertisement. Under the bill, electronic communication would include any electronic means of visual communication, such as television and the internet.
(C) *Radio communication disclaimers* would have to include the voice of the president of the corporation or joint stock company making the statement in (A) above, and identifying himself or herself as the president of the corporation or joint stock company.

House Bill 6184 (H-2) would amend the Michigan Campaign Finance Act (MCL 169.55b) to require that independent expenditures to election campaigns be disclosed to and approved by shareholders.

The bill would prohibit a corporation or joint stock company from making an independent expenditure unless it disclosed the amount and nature of the independent expenditure to each shareholder or member at least 30 days prior to when the expenditure was made, and a majority of the shareholders or members consented to the expenditure in advance, and in writing. Under the bill, a corporation or joint stock company would be required to maintain records demonstrating compliance with this requirement, and those records would have to be promptly provided to any Michigan elector who requested them.

House Bill 6185 (H-2) would amend the Michigan Campaign Finance Act (MCL 169.55c) to prohibit independent expenditures by certain corporations.

The bill would prohibit a corporation or joint stock company that had entered into a contract with the State of Michigan (or any political subdivision of the state), that had received a grant funded in whole or in part by the state (or any political subdivision), or that had received a tax incentive or tax credit from the state (or any political subdivision), from making an independent expenditure until that contract, grant, incentive, or credit had expired.

Further, a corporation or joint stock company that had applied for, submitted a bid for, or requested a contract, grant, or tax incentive or credit (or any renewal or extension), would be prohibited from making an independent expenditure while that application, bid, or request was pending.

In addition, a corporation or joint stock company that accepted federal financial assistance under the federal Troubled Asset Relief Program (TARP), or any similar federal program, would be prohibited from making an independent expenditure until it repaid any federal financial assistance received from that program. (Under the bill, "Troubled Asset Relief Program" would mean the Troubled Asset Relief Program established under 12 USC 5211.)

House Bill 6186 (H-3) would amend the Michigan Campaign Finance Act (MCL 169.55d) to prohibit campaign contributions by foreign corporations.

More specifically, the bill would prohibit independent expenditures from a corporation or joint stock company, if they met any of the following conditions:

- Was incorporated in, organized under the laws of, or created by the laws of a foreign country.
- Was a subsidiary, affiliate, division, or joint venture of a corporation or joint stock company incorporated in, organized under the laws of, or created by the laws of a foreign country.
- Had received, directly or indirectly, funds from any source in a foreign country, except funds received as bona fide payment for goods or services sold by the corporation or joint stock company in a foreign country.
- A foreign national directly or indirectly owned or controlled 20 percent or more of the voting shares of the corporation or joint stock company.
- A majority of the members of the board of directors of the corporation or joint stock company were foreign nationals.
- One or more foreign nationals had the power to direct, dictate, or control the decision-making process of the corporation or joint stock company with respect to its interest in the United States.
- One or more foreign national had the power to direct, dictate, or control the decision-making process of the corporation or joint stock company with respect to activities in connection with a federal, state, or local election, including the making of an independent expenditure.

Further, the bill prohibits a person from making an independent expenditure using funds that the person had received from a corporation or joint stock company prohibited from making an independent expenditure under the act. However, the bill also specifies that this subsection would not apply to salary or compensation a person received from that person's employment with a corporation or joint stock company.

The bill would define "foreign national" to mean any of the following: (a) an individual who was not a citizen of the United States, (b) a government of a foreign country or of a political subdivision of a foreign country, and (c) a person who is not an individual and who is not incorporated in, organized under the laws of, or created by the laws of the United States or its states and territories.

House Bill 6187 (H-2) would amend the Michigan Campaign Finance Act (MCL 169.55f) to hold corporations, joint stock companies, domestic dependent sovereigns, and labor organizations responsible for improper independent expenditures.

The bill specifies that a corporation, joint stock company, domestic dependent sovereign, or labor organization that made an independent expenditure that violated the act would be subject to a civil fine of up to four times the amount of the independent expenditure.

House Bill 6188 (H-2) would amend the Michigan Campaign Finance Act (MCL 169.254) to add references to the new independent expenditure provisions that would be added by House Bills 6183, 6184, 6185, and 6186.

Current law prohibits corporations, joint stock companies, domestic dependent sovereigns, and labor organizations from making contributions or expenditures, or providing volunteer personal services during election campaigns, with certain exceptions and conditions. House Bill 6188 (H-2) would expand those exceptions to require that those corporations (both for- and nonprofit) and where applicable, trade unions, meet certain disclosure conditions that would be established by "*Sections 55a* (created by House Bill 6183, which would require disclosure reports to the Secretary of State, and disclaimers on print, electronic, and radio ads), *55b* (created by House Bill 6184, which would require disclosure to, and the approval of, shareholders of all corporate contributions), *55c* (created by House Bill 6185, which would ban contributions from those corporations having government loans, grants, and tax credits), *and 55d* (created by House Bill 6186, which would ban contributions from foreign corporations).

BACKGROUND INFORMATION:

To read the United States Supreme Court Opinion *Citizens United v FEC* in its entirety, visit the court's website at:
http://www.supremecourt.gov/opinions/09pdf/08-205.pdf

To investigate the nation's most complete nonpartisan foundation-funded resource for tracking state campaign contributions, see the website of the National Institute for Money in State Politics at http://www.followthemoney.org

FISCAL INFORMATION:

The package of bills (House Bills 6182-6188) would have an indeterminate fiscal impact on state and local governments. Presumably, the Secretary of State would see costs increase by an indeterminate amount as a result of administrative costs associated with oversight, filing and reviewing reports submitted by corporations, joint stock companies, domestic dependent sovereigns, or labor organizations. The provisions of the bill require the Secretary of State to develop a method for online submission of reports and would require the Secretary of State to immediately post the reports to their website.

The bill would also create a civil fine penalty of not more than $1,000 for any violations under the provisions of the bill. However, the bill does not classify the violations as civil infractions and it does not direct the fine revenue to any specific fund. In these cases, it is assumed that a provision of the Management and Budget Act would apply and the fines would be deposited into the state General Fund (MCL 18.1443). (In cases where the statute states the violation is a civil infraction, the civil infraction fine would be dedicated to public libraries.) The number of potential violations under this provision is unknown and cannot be determined with any accuracy.

The effect of the package of bills would be to increase corporation, joint stock company, domestic dependent sovereign, and labor organization independent campaign expenditure disclosure and increase the level of transparency. Moreover, the package of bills would limit the corporations, joint stock companies, domestic dependent sovereigns, and labor organizations that would be allowed to provide independent expenditures in campaigns. (See the description of the bill in the first portion of this summary.)

ARGUMENTS:

For:

Those who favor the bills argue that the 5-4 decision of the U. S. Supreme Court in *Citizens United v FEC* was unexpected since five justices acted on their own initiative, at the request of no party in the suit, to overturn a more than century-old ban on corporate campaign contributions made on behalf of federal and state candidates. They note that corporations are only fictitious persons created by law, and because they can neither vote nor run for office—arguably sound prerequisites for determining who is a person having protected political speech—corporations do not have the same First Amendment rights to political activity as real people do.

Proponents of these bills note that in overruling *Austin v Michigan Chamber of Commerce* 494 U.S. 652, which firmly upheld the principle that corporations do not have the same First Amendment rights as real people, the Court's opinion left a large hole in Michigan's Campaign Finance Law. They argue that the state Campaign Finance Law should be amended to require disclosure, disclaimers, shareholder consent, and contribution bans—both on those corporations having government grants, loans, and tax credits; and on those corporations that are foreign-held. Concerned that corporate spending will overwhelm the political process, proponents of the bills, such as the spokesperson for Common Cause of Michigan, quote the author of the minority opinion, Justice John Paul Stevens, who urged legislative action. In his dissent, Stevens said: "Our lawmakers have a compelling constitutional basis, if not also a democratic duty, to take measures designed to guard against the potentially deleterious effects of corporate spending in local and national races."

Until the U. S. Supreme Court's ruling, Michigan's Campaign Finance Law prohibited corporate independent expenditures, one of 24 states that banned or restricted corporations from funding advocacy for or against state candidates. Specifically, the state statute prohibits corporations, joint stock companies, domestic dependent sovereigns (Indian tribes), and labor organizations from making contributions or expenditures, or providing volunteer personal services during election campaigns, with certain exceptions and conditions. The state's policy helped to ensure that money raised by candidates to pay for their election expenses would come from individuals, and not from special interests whose businesses are regulated by government agencies whose officials work to advance the public interest. Indeed, according to nonpartisan research published by the National Institute for Money in State Politics, in the 22 states that prohibit corporations from giving to candidates, individuals contributed about half of the money raised by

candidates, and non-individuals provided less than one-fourth. The reverse is true in the 28 states that allow corporate giving.

Proponents of the bills note that the August 2010 primary election is just weeks away. They argue that legislation is urgently needed to require that corporate contributions—like most all other political contributions—be disclosed in reports to the Secretary of State, and that in the case of foreign corporations, political contributions be banned all-together.

Proponents of the bills note that Michigan's state statute prohibits corporations, joint stock companies, domestic dependent sovereigns, and labor organizations from making contributions or expenditures, or providing volunteer personal services during election campaigns, with certain exceptions and conditions. They support legislation to expand those exceptions in four ways. They argue that the public should know the source of the money that will influence electioneering, and that in particular, corporations (both for- and nonprofit) and, where applicable, trade unions, should be required (1) to disclose contribution reports to the Secretary of State, and put disclaimers on print, electronic, and radio ads (as would be required by House Bill 6183); and (2) disclose to, and obtain the approval of, shareholders for all corporate contributions (as would be required by House Bill 6184). Further, proponents argue that (3) contributions should be banned if their source is corporations having government loans, grants, and tax credits (as required by House Bill 6185); and (4) also banned from all foreign-held corporations (as required by House Bill 6186).

For:

Although many of these bills are needed to ensure that the public knows whether, and how much, corporate officials contribute on behalf of candidates during campaigns for election, they do not go far enough. The spokesman for the Michigan Campaign Finance Network argues that the disclosure requirements for independent expenditures should be extended to "electioneering communication," and says that term should be added to the Michigan Campaign Finance Act, defined as follows: "Electioneering communication means any broadcast or cable advertisement that features the name or image of a candidate for office within 90 days before an election involving that candidate."

The Campaign Finance Network spokesman notes: "In Part IV of its decision in the case of *Citizens United v Federal Election Commission*, the U.S. Supreme Court established a rock-solid foundation for [the legislature] to regulate electioneering communications. The plaintiff, the nonprofit advocacy organization, Citizens United, pled that disclosure should be limited to the functional equivalent of express advocacy. The Court said: 'We reject this contention.' The Court said, 'The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.'" The spokesman for the Campaign Finance Network notes that "this part of the Court's opinion was supported by a vote of 8-1."

By extending disclosure requirements to cover "electioneering communication", citizens would know the source of funding for candidate-focused issue ads, a phenomenon of electioneering that the spokesman for the Campaign Finance Network has documented to amount to at least $45 million over the past decade. In candidate-focused issue ads, unknown organizations focus their advertising on ads that are designed to avoid the words we understand to be instruments of 'express advocacy' such as "vote for," "vote against," "elect," or "defeat." That way they can keep the money they spend in a campaign off the books. A *Detroit News* editorial entitled "More Disclosure Is Needed on Funding Behind Campaign Issue Ads," notes that these ads constitute a "wild-west atmosphere in which shadowy groups are free to raise and spend as much as they want without any transparency, as long as they don't specifically urge voting for or against a candidate." (6-1-10)

Against:

Opponents of the bills advance four arguments in opposition to the legislation. First, they note that the 5-4 *Citizens United v. FEC* Opinion, authored by Justice Anthony Kennedy, is now the law of the land, and that the Opinion now extends to corporations (who are, after all, simply groups of citizens) the constitutional protections offered by the free speech provisions of the First Amendment to individual citizens. The opponents quote Justice Kennedy, who while writing for the majority of the Court, said: "If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, from simply engaging in political speech." Further, one opponent of the bills argues that the bills in this package of legislation that would require disclosure, disclaimers on ads, shareholder consent, and bans on contributions by foreign-held corporations can be seen as an effort to "undermine our Republic" since they can be interpreted as an effort to ignore or reject "the opinions of the Supreme Court and proudly flaunt the fact that (the legislature) is adopting a course of action contrary to the Court's opinion."

Second, opponents of the legislation, such as the Michigan Chamber of Commerce, note that to the extent the bills (other than House Bill 6182) apply only to corporations, and not also to labor unions and domestic dependent sovereigns (Indian tribes), their "principal aim is to deter—if not intimidate—business from exercising its rights in the political process." That intimidation is unacceptable and unfair, and is now also unlawful.

Third, opponents of the legislation argue that any prohibitions on independent campaign expenditures by categories of businesses—such as businesses receiving grants, tax credits, TARP funds and other loans—would likely be unconstitutional. Spokespersons for both the Michigan Chamber of Commerce and Common Cause of Michigan have noted that some of these bills would no doubt be challenged in courts of law. Common Cause cautioned in its committee testimony that the "U. S. Supreme Court has repeatedly ruled that regulation of First Amendment freedom of speech rights cannot overly burden political speech, and that it must be narrowly tailored to serve a compelling state interest." In addition, the spokesman for the Michigan Chamber has argued that "the bill

which provides that a majority of shareholders must give affirmative consent 30 days before an ad is run (by a corporation)…" will likely constitute "prior restraint."

Fourth, opponents of the bills argue that those who fear that corporate contributions will overwhelm the political process are making "hysterical claims." The spokesman for the Michigan Chamber offered the following overview of corporate political activity. He said: "The Michigan Department of Energy, Labor and Economic Growth (DELEG), reports that 1,250,000 corporations, non-profit corporations, professional corporations, limited liability companies, [and] limited liability partnerships are registered with them. The same alarmists back in 1976 when the MCFA [Michigan Campaign Finance Act] was enacted may have made the very same arguments about the potential of 1,250,000 corporate PACs overwhelming the political process. When in fact, just 400 corporations and non-profit corporations have formed Political Action Committees in Michigan. Only 79 of those 400 PACs raised more than $50,000 in the 2008 election cycle. None of the for-profit corporate PACs made independent expenditures. Seven non-profit corporate PACs made independent expenditures. On average, they made $15,917 in independent expenditures."

POSITIONS:

Common Cause supports the bills. (5-19-10)

The Michigan Campaign Finance Network supports the bills, and urges that they be amended to also require disclosure of "electioneering communication," following the same rules as those proposed for independent expenditures. (5-26-10)

The Michigan Chamber of Commerce supports House Bill 6182 without the tie-bar, and opposes House Bills 6183-6188. (5-26-10)

The Michigan Manufacturers Association opposes the bills. (5-26-10)

The League of Women Voters of Michigan is neutral on the bills. (5-19-10)

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