



THE COMMONWEALTH OF MASSACHUSETTS
OFFICE OF CAMPAIGN & POLITICAL FINANCE

ONE ASHBURTON PLACE, ROOM 411
BOSTON, MASSACHUSETTS 02108

MICHAEL J. SULLIVAN
DIRECTOR

TEL: (617) 979-8300
(800) 462-OCPF
FAX: (617) 727-6549

August 3, 2016

Paul Craney, Executive Director
Mass Fiscal Alliance
18 Tremont St, Suite 707
Boston, MA 02108

Re: CPF 16-20

Dear Mr. Craney:

This office has completed its review of a complaint we received which alleged that Massachusetts Fiscal Alliance ("MFA") solicited and received funds to support or oppose candidates in a special election without registering as a political committee and providing the required disclosure of donors, as required by M.G.L. c. 55, the Massachusetts campaign finance law. OCPF initiated a review to determine whether MFA solicited funds, and for what purpose those funds may have been solicited. For the reasons set forth below, OCPF has determined that MFA is not, by definition, a political committee, but that MFA's activity did not comply with the campaign finance law because, in one instance, it did not disclose the source of funds received to make electioneering communications, as required by M.G.L. c. 55, § 18F.

Facts

MFA is a § 501(c)(4) tax-exempt organization which, on its website, declares as its mission "advocating for fiscal responsibility, transparency, and accountability in state government and increased economic opportunity for the people of our Commonwealth." MFA has stated to OCPF that, since 2013, it has focused its efforts on voter education through the use of candidate scorecards, questionnaires, mailings, door hangers, and other media. To fund its activities, MFA solicits and accepts donations on an ongoing basis, as well as offering multiple levels of membership at annual dues ranging from \$30 to \$5,000.

On February 23, 2016, Jordanne Anderson ("Anderson"), MFA's Finance Director, sent an email to the MFA mailing list. Approximately 2,500 people received the following email:

Just one week remains until the special elections in Fitchburg and Peabody. I'm not going to mince words with you: to execute Mass Fiscal's mission, I must raise \$23,000 in seven days. Can you help? Every bit counts. Your contribution TODAY...can make the difference...The plan is an all-out blitz. Your help is important to our success, and the sooner you can send your donation, the greater our chances are.



In addition to the above language, the email also contained a link that, when clicked, brought email recipients to MFA's donation page. Of the 2,500 people who received the email, MFA's records reveal that approximately 700 people actually opened the email. Of those 700, ten recipients clicked on the donation link. Four of those individuals ultimately made donations to MFA as a direct result of Anderson's appeal, totaling \$700, including one donation of \$500. During OCPF's review, you stated that MFA received eight additional donations in the days following the February 23 email that were, for various reasons, unrelated to Anderson's request for funding.¹ You further stated, in conversations with OCPF staff, that Anderson's reference to raising \$23,000 was not an indication of the amount needed to fund activity relating to the Fitchburg and Peabody special elections but, rather, was the total sum MFA needed to raise to meet its monthly budgetary goals, and that such exhortations are common in end-of-the-month emails to MFA's members.

Between February 22 and March 7, 2016, MFA filed four separate Electioneering Communication reports with OCPF, all in regard to the Fitchburg special election.² Three of the reports disclosed expenditures totaling approximately \$2,800 for a handbill that referenced two candidates, Stephan Hay and Dean Tran.³ The handbill highlighted three issues and each candidate's stance on those issues, and then asked recipients to contact the candidates and share their opinions on those issues with the candidates. Approximately 3,900 handbills were distributed through the U.S. Mail, and 6,100 were distributed by hand. None of the reports indicated that MFA received any donations in excess of \$250 for the purpose of funding electioneering communications.⁴

In addition to the handbill, MFA also paid to print get-out-the-vote door hangers, which were distributed door-to-door by paid canvassers. The canvassers also distributed the 6,100 handbills mentioned in the previous paragraph. Prior to the commencement of canvassing, the canvassers were instructed to tell residents that they were not endorsing candidates but, rather, asking voters to

¹ You stated that, in the days following Anderson's email, MFA received donations from individuals who sought to upgrade or renew their memberships, from personal friends of members of MFA's leadership team, and from at least one board member who makes regular quarterly donations. MFA also received one check, via U.S. Mail, the day after the email was sent. Based upon the circumstances surrounding each of these donations, MFA asserts and OCPF concludes that these donations were not made as a result of the February 23 email.

² The Fitchburg seat also includes one precinct in Lunenburg. MFA did not produce or distribute any electioneering communications relating to the special election in Peabody; therefore, no Electioneering Communication reports regarding that election were filed.

³ MFA filed the fourth Electioneering Communication report (on March 7, 2016) on the belief that the invoice of \$222.77 from its printing vendor pertained to the handbills. Subsequent discussion with its vendor revealed that the charge actually related to the printing of door hangers which, as discussed below, are not electioneering communications. Accordingly, OCPF acknowledges the expenditure of \$222.77 did not need to be disclosed.

⁴ An electioneering communication is defined in Section 1 of the campaign finance law, M.G.L. c. 55, as "any broadcast, cable, mail, satellite, or print communication that: (1) refers to a clearly identified candidate; and (2) is publicly distributed *within 90 days* before an election in which the candidate is seeking election or reelection; provided, however, that 'electioneering communication' shall not include the following communications: (1) a communication that is disseminated through a means other than a broadcast station, radio station, cable television station or satellite system, newspaper, magazine, periodical, billboard advertisement, or mail; (2) a communication to less than 100 recipients; (3) a news story, commentary, letter to the editor, news release, column, op-ed or editorial broadcast by a television station, radio station, cable television system or satellite system, or printed in a newspaper, magazine, or other periodical in general circulation; (4) expenditures or independent expenditures or contributions that must otherwise be reported under this chapter; (5) a communication from a membership organization exclusively to its members and their families, otherwise known as a membership communication; (7) email communications; and (8) internet communications which are not paid advertisements."

consider fiscal responsibility when voting. The door hangers did not reference a candidate. MFA paid approximately \$13,000 in total for the door hangers and canvassers, in addition to the \$2,800 MFA paid for the handbill. MFA was not required to file Electioneering Communication reports to disclose the expenditures for the door hangers and canvassers, because the door hangers did not reference a clearly identified candidate, and materials distributed door-to-door are excluded from the definition of electioneering communications. See M.G.L. c. 55, § 1. MFA did not undertake similar activities in Peabody.

Questions and Analysis

MFA's activities in relation to the 2016 special elections in Fitchburg and Peabody raise two issues under the campaign finance law, as discussed below.

1. Is MFA a political committee?

No. The campaign finance law defines a "political committee" as any association, organization, or other group of persons "which receives contributions or makes expenditures for the purpose of influencing the nomination or election of a candidate, or candidates ..." M.G.L. c. 55, § 1. IB-88-01 narrowed the definition of "political committee" to include only groups that: 1) raise money for the purpose of influencing Massachusetts elections; *and* 2) subsequently expend those funds to influence Massachusetts elections. 970 CMR 1.22(5); IB-88-01. Therefore, to be considered a political committee subject to the campaign finance law, an organization or group must meet two criteria: 1) it solicits or receives money or any other thing of value to influence a Massachusetts state, county, or municipal election, and 2) it then spends that money for that purpose.

A communication or expenditure is considered made to influence a Massachusetts election if it is one of two things: 1) a direct contribution to a candidate, or 2) an independent expenditure that *expressly* advocates a vote for or against a clearly identified candidate or candidates. See IB-06-01. An independent expenditure is defined as "an expenditure made or liability incurred by an individual, group, association, corporation, labor union, political committee, or other entity as payment for goods or services to expressly advocate the election or defeat of a clearly identified candidate; provided, however, that the expenditure is made or incurred without cooperation or consultation with...or...in concert with or at the request or suggestion of the candidate, a nonelected political committee organized on behalf of the candidate, or an agent of the candidate." M.G.L. c. 55, § 1. A communication is "express advocacy" when it contains a clear call to electoral action, whether the communication uses specific words (e.g., "vote for", "cast your ballot for", "Smith in 2016", etc.) or images (e.g., a check mark in a box next to the candidate's name) to convey that message. See Buckley v. Valeo, 424 U.S. 1 (1976). A communication without those elements may still be express advocacy only if there is *no other reasonable interpretation* of the communication other than as an appeal to vote for or against a particular candidate. See Wisconsin Right to Life, Inc., v. FEC, 551 U.S. 449, 451 (2007)(emphasis added).

If a communication is an issue ad – e.g., it references a particular issue, but does not ask the viewer or reader to vote for or against a particular candidate – it could, depending on several factors, meet the definition of an electioneering communication. Electioneering communications are defined as any broadcast, cable, mail, satellite, or print communications that are distributed within 90 days of an election and that refer to a clearly identified candidate, but stop short of expressly asking readers

or viewers to vote for that candidate. M.G.L. c. 55, § 1. Under the campaign finance law, electioneering communications are not expenditures made to expressly influence a Massachusetts election; accordingly, a group that raises money for the purpose of making electioneering communications is not a political committee. See id.; IB-88-01.

In this instance, although MFA's email clearly referenced an election while it solicited funds, the email did not ask for contributions to support or oppose individual candidates. OCPF notes that MFA has a substantial history of making electioneering communications, but has never made direct contributions to candidates. In addition, MFA has not made any independent expenditures since 2012.⁵ In light of these facts, OCPF does not believe that MFA raised money *for the purpose* of making direct contributions to candidates or independent expenditures and, therefore, MFA does not meet the first criteria to be considered a political committee.

The second criteria for determining whether or not a group is a political committee focuses on how funds are spent. The funds MFA received as a result of its email were not used to "influence an election", as that phrase is defined by M.G.L. c. 55 and various United States Supreme Court decisions. MFA did not make contributions to candidates, nor did it fund independent expenditures that expressly advocated a vote for or against a particular candidate. See Wisconsin Right to Life, 551 U.S. at 451; Buckley, 424 U.S. at 1; M.G.L. c. 55, § 1; IB-06-01. MFA deposited the funds it received as a result of the February 23 email into its general treasury account. That account was used to pay for handbills (some of which became electioneering communications upon mailing), door hangers, and canvassers.⁶

OCPF determined that approximately 3,900 of the handbills distributed by U.S. Mail were electioneering communications because the handbills referenced clearly identified candidates without expressly advocating a vote for or against those candidates, and they were distributed by mail within 90 days of an election.⁷ The approximately 6,100 handbills that were distributed by hand by canvassers were not, by definition, electioneering communications because, although they referenced a clearly identified candidate, communications distributed by hand are excluded from the definition of electioneering communications. See M.G.L. c. 55, § 1.

The door hangers did not meet the definition of an electioneering communication both because they were distributed by hand (which, as noted above, is a method of distribution specifically excluded from the definition of electioneering communications), and because the door hangers did not reference a clearly identified candidate. See id. In addition, the door hangers were not independent expenditures because they did not contain express advocacy – they did not urge the recipient to take electoral action for or against a candidate. See id. For the same reasons, the cost of the canvassers was neither an electioneering communication or an independent expenditure. See id. As a result, because MFA's expenditures were not made to expressly influence Massachusetts

⁵ MFA's website contains the following disclaimer: "Massachusetts Fiscal Alliance does not solicit contributions for the stated purpose of attempting to influence the selection, nomination, election or appointment of any person to any federal, state or local public office or to an office in a political organization."

⁶ Neither the door hanger nor the canvassers referenced a candidate and, therefore, they were not, by definition, electioneering communications.

⁷ Had the same communication been distributed by mail more than 90 days before the election, it would not have been an electioneering communication, as materials distributed more than 90 days before an election are excluded from the definition of "electioneering communication." M.G.L. c. 55, § 1.

elections, e.g., they were not direct contributions to candidates or independent expenditures, the expenditures for the handbills and the production and distribution of the door hangers do not meet the second test for determining whether or not a group is a political committee. See M.G.L. c. 55, § 1; Wisconsin Right to Life, 551 U.S. at 451; Buckley, 424 U.S. at 1; IB-88-01.

Accordingly, MFA is not a political committee because: 1) MFA did not solicit funds for the purpose of expressly influencing a Massachusetts election, and 2) the funds raised by MFA in response to the February 23 email were not used to influence a Massachusetts election within the meaning of the Massachusetts campaign finance law. See id.

2. Even though MFA is not a political committee, was it required to disclose donors who gave in excess of \$250 in response to the February 23 email?

Yes. M.G.L. c. 55, § 18F requires that any individual, entity, or group that makes electioneering communication expenditures exceeding \$250 in a year to file a report disclosing the expenditure, including the identity of the entity making the expenditure, the candidate referenced, the vendor used for the communication, and the amount or value of the expenditure. M.G.L. c. 55, § 18F further states that, "any individual, group, association, corporation, labor union or other entity *not defined as a political committee* who makes electioneering communication expenditures in an aggregate amount exceeding \$250 during a calendar year who receives funds to make electioneering communications shall include in the electronic filing the date the funds were received, the name and address of the provider of funds in excess of \$250, if any, and the value of the funds received...." (emphasis added).⁸

A donor must be disclosed if the donor requests or knows that a payment made to an organization will be used to make an electioneering communication. For purposes of the Massachusetts campaign finance law, a donor "knows" that a payment will be used to make an electioneering communication if the donor makes a donation in response to a message or a solicitation indicating the organization's intent to make an electioneering communication, *or if other circumstances, including the timing and context of the donations, indicate that a donor knew that the payment would be used for such purpose* (emphasis added). 970 CMR 1.22(7).

MFA has stated, during the course of this review, that the funds it received as a result of the February 23 email were used exclusively for door hangers or handbills distributed by hand, and not for electioneering communications. MFA further maintains that, because the February 23 email did not expressly solicit for donations to fund electioneering communications, the donor would not have known that the \$500 donation would be used to fund such activity. Therefore, MFA argues, it is not required to disclose the identity of the donor who gave \$500 as a direct result of the February 23 email.

We are not persuaded, however, that the \$700 in funds received as a result of the email were used solely for non-electioneering communications. Both the door hangers and the handbills – some

⁸ Pending legislation, H.543, would require that any electioneering communications distributed by direct mail, such as the 3,900 handbills sent via U.S. Mail in this case, include language disclosing the top contributors to the entity making or funding the electioneering communication. The "Top Five Contributor" disclaimer would identify the top five contributors who gave in excess of \$5,000 to the entity, *for any purpose*, during the 12 months preceding the electioneering communication. H.B. 543, 189th General Court (Mass. 2016).

of which were distributed by U.S. Mail and which are, accordingly, electioneering communications – were purchased by MFA shortly after the February 23 email was sent. The funds used to pay for the electioneering communication expenditure were not separated by MFA from the funds used to pay for the door hangers, canvassers, or handbills distributed by hand, nor did MFA separate the donations it received based upon any instruction from the donors. Consequently, MFA cannot conclusively demonstrate that the donations received were not used to make electioneering communications.

In addition, OCPF has determined that the donor knew, as that term is defined by the campaign finance law and the related regulations, that his or her donation would be used to fund electioneering communications. See 970 CMR 1.22(7). MFA acknowledges that the donor received the February 23 email, which referenced an upcoming election and MFA's intention to engage in an "all-out blitz." Within a short period of time after having received that email, the donor made a donation to MFA by using the link contained therein. Given the content of Anderson's email, the timing of the donation, and MFA's longstanding practice of making frequent, last-minute expenditures for electioneering communications prior to other elections, OCPF has determined that the \$500 donor knew, within the meaning of Chapter 55 and the regulations promulgated thereunder, that his or her donation would be used to make electioneering communications. See 970 CMR 1.22(7).

Accordingly, OCPF concludes that, pursuant to M.G.L. c. 55, § 18F and the related regulations, MFA should have disclosed the identity of the donor who contributed \$500 as a result of the February 23 email. OCPF maintains that MFA should therefore amend its Electioneering Communication report to disclose the identity of the donor referenced above. OCPF further notes that the parties attempted to come to an agreement to resolve this singular issue, but were unable to do so.

Additionally, OCPF strongly suggests that MFA, as it now does, should continue to request OCPF's review of all solicitations for funds, regardless of the recipient. Such submission will ensure future compliance with the campaign finance law.

In accordance with the opinion of the Supervisor of Public Records, this letter is a matter of public record. A copy is being provided to the person(s) who brought this matter to our attention.

Sincerely,



Michael J. Sullivan
Director