



Senate Fiscal Agency  
P. O. Box 30036  
Lansing, Michigan 48909-7536

## BILL ANALYSIS



Telephone: (517) 373-5383  
Fax: (517) 373-1986

House Bill 5058 (as passed by the House)  
Sponsor: Representative Marty Knollenberg  
House Committee: Redistricting and Elections  
Senate Committee: Local Government and Elections

Date Completed: 5-16-12

**CONTENT**

**The bill would amend the Michigan Campaign Finance Act (MCFA) to do the following:**

- **Prohibit a candidate committee from making an expenditure to defend a public official and pay his or her legal costs, subject to certain exceptions.**
- **Require a candidate's unauthorized legal costs to be paid from a separate legal defense fund.**
- **Prohibit a candidate committee from making an expenditure for an individual's personal benefit.**
- **Make it a misdemeanor to use candidate committee funds to make a disbursement that did not qualify as an expenditure, incidental expense, or authorized transfer.**
- **Eliminate a reference to an Internal Revenue Code (IRC) section in the definition of "incidental expense".**

The MCFA allows a candidate committee of a candidate who is elected or appointed to an elective office to make an expenditure for an incidental expense for that office.

The bill would prohibit a candidate committee from making an expenditure to defend the elected or appointed official in a civil or criminal action or to pay legal costs, unless the action or legal costs did any of the following:

- Related to a recall election.
- Related to a recount of votes as provided in the Michigan Election Law.
- Related to compliance with the MCFA or the Michigan Election Law.
- Tangibly benefitted the nomination or election of a candidate.

Any other legal costs would have to be paid from a legal defense fund as provided in the Legal Defense Fund Act. (That Act provides for funds established specifically for the legal defense of elected officials. The Act requires periodic transaction reports documenting contributions to such funds to be filed with the Secretary of State.)

In addition to meeting any other MCFA requirements, a campaign statement of a candidate committee would have to contain the purpose of any expenditure for authorized legal costs made by the committee.

A candidate committee could make an expenditure only as defined by the Act. An expenditure could not be made for the personal benefit of the candidate or any other individual.

An individual who made a disbursement from candidate committee funds that did not qualify as an expenditure or incidental expense, or as a transfer under Section 45, would be guilty of a misdemeanor punishable by a maximum fine of \$1,000 and/or imprisonment for up to 90 days.

(Under Section 45, a person may transfer unspent funds from one candidate committee to another candidate committee of that person if the contribution limits for the committee receiving the funds are equal to or greater than the limits for the committee transferring the funds, and if the committees are held simultaneously by the same person.)

The MCFA defines "incidental expense" as an expenditure that is an ordinary and necessary expense, as described in Section 162 of the IRC, paid or incurred in carrying out the business of an elective office. The term includes a number of qualifying disbursements, such as one necessary to assist, serve, or communicate with a constituent.

The bill would eliminate the reference to Section 162 of the IRC, which allows a tax deduction of all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business.

The MCFA defines "expenditure" as a payment, donation, loan, or promise of payment of money or anything of ascertainable monetary value for goods, materials, services, or facilities in assistance of, or in opposition to, the nomination or election of a candidate, or the qualification, passage, or defeat of a ballot question. The term includes any of the following:

- A contribution or transfer of anything of ascertainable monetary value for purposes of influencing the nomination or election of a candidate or the qualification, passage, or defeat of a ballot question.
- Except as otherwise provided, an expenditure for voter registration or get-out-the-vote activities made by a person who sponsors or finances the activity or who is identified by name with it.
- Except as otherwise provided, an expenditure made for poll watchers, challengers, distribution of election day literature, canvassing of voters to get out the vote, or transporting voters to the polls.
- Except as otherwise provided, the cost of establishing and administering a payroll deduction plan to collect and deliver a contribution to a committee.

The term does not include any of the following:

- An expenditure for communication by a person with the person's paid members or shareholders and individuals who can be solicited for contributions to a separate segregated fund.
- An expenditure for communication on a subject or issue if the communication does not support or oppose a ballot question or candidate by name or clear inference.
- An expenditure for the establishment, administration, or solicitation of contributions to a separate segregated fund if the expenditure was made by the person who established that fund.
- An expenditure by a broadcasting station, newspaper, magazine, or other periodical or publication for a news story, commentary, or editorial in support of or opposition to a candidate for elective office or a ballot question in the regular course of publication or broadcasting.

- An expenditure for nonpartisan voter registration or get-out-the-vote activities made by a tax-exempt nonprofit organization.
- An expenditure for nonpartisan voter registration or nonpartisan get-out-the-vote activities performed by the Secretary of State and other registration officials who are identified by name with the activity.
- An expenditure by a State central committee of a political party or a person controlled by such a committee for the construction, purchase, or renovation of office facilities in Ingham County, if the facility is not constructed, purchased, or renovated for the purpose of influencing the election of a candidate in a particular election.
- Except as otherwise provided, an expenditure to or for a Federal candidate or committee.

MCL 169.209 & 169.221a

## **BACKGROUND**

In 2009, then-Attorney General Mike Cox issued Opinion No. 7240 in response to an inquiry as to whether the Michigan Campaign Finance Act permits the use of campaign funds to pay for expenses an officeholder incurs defending himself or herself against criminal charges.

The Opinion focused on the definition of "incidental expense", which means an expenditure that is an ordinary and necessary expense, as described in Section 162 of the IRC, paid or incurred in carrying out the business of an elective office. (Section 162 of the IRC pertains to tax deductions for all of the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business. Section 7701 of the IRC provides that "trade or business" includes the performance of the functions of a public office.)

The Attorney General noted that, while Section 162 does not define "ordinary and necessary expense", and does not pertain to the issue of attorney fees specifically, Federal case law addresses the question of whether such fees qualify as an ordinary and necessary expense. Citing several U.S. Supreme Court decisions, the Attorney General stated, "...one must look to the source of the claim or charge, or the character of the conduct from which the claim or charge stems. If the course of the criminal charge arose out of the business activities of the public official, the legal expenses will qualify as an 'ordinary and necessary expense' as described in 26 USC 162. If the charge originates from personal activity - activity unrelated to the performance of the functions of the public official's office - the expenses will not so qualify." The Attorney General then pointed out that the MCFA's language specifying that "incidental expense" refers to an expenditure *paid or incurred in carrying out the business of an elective office* parallels the Supreme Court's "origin of the claim" test, and may be reasonably understood to include legal expenses related to charges stemming from a person's capacity as an officeholder.

Also, as the Attorney General acknowledged, the MCFA contains a list of fairly broad categories of expenditures that qualify as "incidental expenses", and states explicitly that the list is not exclusive.

Thus, the Attorney General concluded that, under the MCFA, "...the candidate committee of an elected official is permitted to make an expenditure for an incidental expense to pay for legal fees incurred by the officeholder to defend against criminal charges, but only if the expense is an ordinary and necessary business expense of the elected official as described under section 162 of the Internal Revenue Code, 26 USC 162, and is paid or incurred in carrying out the business of an elective office."

Legislative Analyst: Julie Cassidy

## **FISCAL IMPACT**

The bill would create a new misdemeanor for improper spending of campaign funds. There are no data to indicate how many candidates would be found in violation of the proposed offense. In such instances, local units of government could see increased incarceration costs and/or increased costs of community supervision. The proposed penal fine of up to \$1,000 would benefit public libraries.

Fiscal Analyst: Dan O'Connor

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