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BILL ANALYSIS

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Senate Bill 1263 (as enacted)
House Bill 4001 (as enacted)
Sponsor: Senator Michelle A. McManus (S.B. 1263)
Representative Steve Bieda (H.B. 4001)
Senate Committee: Campaign and Election Oversight
House Committee: Ethics and Elections

PUBLIC ACT 289 of 2008
PUBLIC ACT 288 of 2008

Date Completed: 4-30-09

CONTENT

Senate Bill 1263 amended the lobbyist registration Act to prohibit a lobbyist or lobbyist agent from giving money or anything of value to aid the defense of a legislative or executive branch official against any legal action not directly related to his or her governmental duties, but allow a contribution to a legal defense fund. The bill also establishes procedures and a timeline for the Secretary of State to respond to a request for a declaratory ruling.

House Bill 4001 created the "Legal Defense Fund Act" to do the following:

- Require an elected official who is the beneficiary of a legal defense fund to file statements of organization and dissolution with the Secretary of State (SOS).**
- Require the treasurer of a fund to file quarterly transaction reports.**
- Establish late filing fees.**
- Require the SOS to make statements and reports available for public inspection and reproduction, and to preserve statements and reports for 15 years.**
- Prohibit anonymous contributions to legal defense funds.**
- Require monetary contributions to a legal defense fund to be deposited in a single account in a financial institution.**
- Allow expenditures from a fund only for administration, attorney fees, and related legal costs.**

-- Prescribe misdemeanor penalties for various violations of the Act.

The bills were tie-barred to each other, and took effect on October 6, 2008.

Senate Bill 1263

Gift to Legal Defense Fund

The lobbyist registration Act prohibits a lobbyist or lobbyist agent, or anyone acting on behalf of a lobbyist or lobbyist agent, from giving a gift or loan, other than a loan made in the normal course of business by a financial institution listed in the Act, an insurance company issuing a loan or receiving a mortgage in the normal course of business, a mortgage company, or a licensee under the Motor Vehicle Sales Finance Act.

If the value of the gift is \$3,000 or less, a person who violates this provision is guilty of a misdemeanor punishable by a maximum fine of \$5,000, imprisonment for up to 90 days, or both; if the person is other than an individual, the person may be fined up to \$10,000. If a person knowingly gives a gift in violation of this provision and the value of the gift is more than \$3,000, the person is guilty of a felony punishable by a maximum fine \$10,000, imprisonment for up to three years, or both, if the person is an individual, or a maximum fine of \$25,000 if the person is not an individual.

The lobbyist registration Act defines "gift" as a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value, whose value exceeds \$25 in any one-month period, unless consideration of equal or greater value is received for it. The bill refers to \$25 as adjusted under Section 19a (which requires monetary amounts in the Act to be adjusted annually by the percentage increase or decrease in the Detroit consumer price index).

The bill specifies that "gift" includes a payment, advance, forbearance, or the rendering or deposit of money, services, or anything of value to aid the defense of an official in the legislative or executive branch against a legal action not directly related to the governmental duties of the official.

Under the Act, "gift" does not include:

- A campaign contribution otherwise reported as required by the Michigan Campaign Finance Act.
- A loan made in the normal course of business by an entity listed in the lobbyist registration Act.
- A gift received from a member of the person's immediate family, a relative of a spouse, a relative within the seventh degree of consanguinity, or from the spouse of the relative.
- A breakfast, luncheon, dinner, or other refreshment consisting of food and beverage provided for immediate consumption.

The bill also excludes a contribution to a legal defense fund that is registered with the Secretary of State under the Legal Defense Fund Act and whose purpose is to defend an elected official against any criminal, civil, or administrative action, that arises directly out of the conduct of the elected official's governmental duties.

Declaratory Rulings

The lobbyist registration Act authorizes the Secretary of State to promulgate rules and issue declaratory rules to implement the Act.

Under the bill, the SOS must issue a declaratory ruling only if the person requesting it has provided a reasonably complete statement of facts necessary for the ruling or, with the permission of the

SOS, has supplied supplemental facts necessary for the ruling. A request for a declaratory ruling that is submitted to the SOS must be made available for public inspection within 48 hours after its receipt. An interested person may submit written comments regarding the request to the SOS within 10 business days after the date the request is made available to the public. Within 45 business days after receiving a declaratory ruling request, the SOS must make a proposed response available to the public. An interested person may submit written comments regarding the proposed response within five business days after the date the proposal is made available to the public.

Except as otherwise provided, the Secretary of State must issue a declaratory ruling within 60 business days after receiving a request. If the SOS refuses to issue a declaratory ruling, he or she must notify the person making the request of the reasons for the refusal, and issue an interpretive statement providing an informational response to the question presented within the time limits applicable to a declaratory ruling. A declaratory ruling or interpretive statement issued may not state a general rule of law, other than what is stated in the Act, until the general rule of law is promulgated by the Secretary of State as a rule under the Administrative Procedures Act or under judicial order.

Under extenuating circumstances, the SOS may issue a notice extending for up to 30 business days the period during which he or she must respond to a request for declaratory ruling. The Secretary may not issue more than one notice of extension for a particular request. A person requesting a declaratory ruling may waive the time limits in writing.

The Secretary of State must make available to the public an annual summary of the declaratory rulings and interpretive statements he or she issues under the lobbyist registration Act.

House Bill 4001

Definitions

The Legal Defense Fund Act defines "legal defense fund" as all contributions received, held, or spent for the legal defense of an

elected official. The term does not include a fund of a local government association that is an exempt organization under Section 501(c)(4) of the Internal Revenue Code, or of a local government organization, if money in the organization's fund is excluded from the definition of "gross income" under Section 115 of the Code. (Section 501(c)(4) applies to a nonprofit civic league or organization operated exclusively for the promotion of social welfare, and a local association of employees whose membership is limited to employees of a designated person or persons in a particular municipality and whose net earnings are devoted to charitable, educational, or recreational purposes. Under Section 115, "gross income" does not include income from any public utility or the exercise of any essential governmental function and accruing to a state or political subdivision of a state.)

"Elected official" means an individual who holds an elective office in State or local government in Michigan. "Elective office" means a public office filled by an election. A person who is appointed to fill a vacancy in a public office that is ordinarily elective holds an elective office. The term does not include the office of precinct delegate, a school board member in a school district with a pupil membership of 2,400 or less, or a Federal office.

"Contribution" means a payment, gift, subscription, assessment, expenditure, contract, payment for services, dues, advance, forbearance, loan, or donation of money or anything of ascertainable monetary value to a person, made for or allocated to the purpose of defending an elected official in a criminal, civil, or administrative action that arises directly out of the conduct of his or her governmental duties. The term includes an office holder's own money or property, except homestead, used on behalf of the office holder's defense; the granting of discounts or rebates not available to the general public; and the endorsing or guaranteeing of a loan for the amount the endorser or guarantor is liable. The term does not include an offer or tender of a contribution if expressly and unconditionally rejected, returned, or refunded within 30 business days after receipt.

Statements of Organization & Dissolution

An elected official who is the beneficiary of a legal defense fund must file a statement of organization with the SOS within 10 days after the date the fund first receives or first spends a contribution, whichever is earlier.

A statement of organization must include all of the following information:

- The name, street address, and telephone number of the legal defense fund and of the individual designated as its treasurer.
- The name and address of each financial institution in which money of the fund is or is intended to be deposited.
- The full name of and office held by the elected official who is the beneficiary of the fund.
- A description of the criminal, civil, or administrative action arising directly out of the elected official's duties for which a contribution to or expenditure from the fund was made.

The name of the fund must include the first and last name of the elected official who is its beneficiary, and the words "legal defense fund". If any of the information required in a statement of organization changes, the fund must file an amended statement of organization when the next transaction report is required to be filed.

An elected official who fails to file a statement of organization must pay a late filing fee of \$10 for each business day the statement remains unfiled, up to \$300. An elected official who fails to file a statement of organization is guilty of a misdemeanor punishable by imprisonment for up to 93 days or a maximum fine of \$1,000, or both.

When a legal defense fund is dissolved, the elected official must file a statement of dissolution with the Secretary of State, in the form required by the SOS, and must return any unspent funds to the contributor or forward them to the State Treasurer for deposit into the General Fund or to the State Bar of Michigan for deposit into the Client Protection Fund.

Transaction Report

From the date a legal defense fund receives its first contribution or makes its first expenditure, whichever is earlier, until the

elected official files a statement of dissolution, the treasurer of the fund must file transaction reports according to the schedule described below. A transaction report must disclose the legal defense fund's name, address, and telephone number and the full name, residential and business addresses, and telephone numbers of the fund's treasurer. The report also must include the name and address, the amount contributed, the date each contribution was received, and the cumulative amount contributed, for each person from whom a contribution was received during the covered period. If the person is an individual whose cumulative contributions exceed \$100, his or her occupation, employer, and principal place of business also must be included.

In addition, as to each expenditure from the fund that exceeds \$50, and as to expenditures made to one person that cumulatively total \$50 or more during a covered period, the transaction report must include the amount, date, and purpose of the expenditure, and the name and address of the person to whom it is made.

The treasurer of a legal defense fund must file a transaction report by each of the following dates covering the period beginning on the day after the closing date for the preceding report and ending on the indicated closing date:

- January 25, with a closing date of December 31 of the previous year.
- April 25, with a closing date of March 31.
- July 25, with a closing date of June 30.
- October 25, with a closing date of September 30.

The beginning date of the first transaction report must be the date the first contribution is received by the fund.

The treasurer of a legal defense fund must file a final transaction report with its statement of dissolution. The final report must cover the period beginning on the day after the closing date of the preceding transaction report and ending on the last date that the fund received a contribution, made an expenditure, or transferred unspent fund and dissolved.

A transaction report must include a verification statement, signed by the

treasurer and the elected official, stating that he or she used all reasonable diligence in preparing the report and that to his or her knowledge the statement is true and complete.

A treasurer or elected official who knowingly submits false information under these provisions is guilty of a misdemeanor punishable by imprisonment for up to 180 days or a maximum fine of \$5,000, or both.

A treasurer or other individual designated on the statement of organization as responsible for the fund's record-keeping, report preparation, or report filing must keep detailed accounts, records, bills, and receipts as required to substantiate the information contained in a statement or report required under the Act. The records of a fund must be preserved for five years and made available for inspection as authorized by the SOS. A treasurer who knowingly violates these requirements is subject to a maximum civil fine of \$1,000.

If a report is filed late, the legal defense fund or the elected official must pay a late filing fee. If the fund received contributions of \$10,000 or less during the previous two years, the late filing fee is \$25 for each business day the report remains unfiled, up to \$500. If the fund received more than \$10,000 during the previous two years, the late filing fee must be determined as follows, but may not exceed \$1,000:

- \$25 for each business day the report remains unfiled.
- An additional \$25 for each business day after the first three business days the report remains unfiled.
- An additional \$50 for each business day after the first 10 business days the report remains unfiled.

A treasurer who fails to file two transaction reports, if both reports remain unfiled for more than 30 days, is guilty of a misdemeanor punishable by imprisonment for up to 93 days or a maximum fine of \$1,000, or both.

A treasurer who knowingly files an incomplete transaction report is subject to a maximum civil fine of \$1,000.

Statement Availability; Preservation

The Secretary of State must make a statement or report available for public inspection and reproduction beginning as soon as practicable but not later than three business days following the day of receipt, during regular business hours of the filing official. The SOS also must make a report or all of its contents available to the public on the internet, without charge, as soon as practicable, at a single website established and maintained by the SOS.

The SOS must provide copy of a statement or part of a statement at a reasonable charge.

A statement open to the public under the Act may not be used for any commercial purpose.

Except as otherwise provided, the Secretary of State must preserve a statement of organization filed with the SOS for 15 years from the official date of dissolution. Any other statement or report filed under the Act must be preserved for 15 years from the date of filing. Upon a determination that the Act has been violated, all complaints, orders, decisions, or other documents related to the violation must be preserved by the SOS or the filing official who is not the SOS for 15 years from the date of the court determination or the date the violation is corrected, whichever is later.

Statements and reports filed under the Act may be reproduced pursuant to the Records Media Act.

After the required preservation period, statements and reports, or their reproductions, may be disposed of as prescribed in the Management and Budget Act.

Filing Requirements

A filing official may not collect a charge for the filing of a required statement or report or for a form upon which it is to be prepared, except a late filing fee.

The Secretary of State must determine whether a statement or report filed under the Legal Defense Fund Act complies, on its face, with the Act. The SOS must determine whether a statement or report that is

required to be filed is in fact filed. Within four business days after the filing deadline for a statement or report, the SOS must notify the filer by registered mail of an error or omission in the statement or report, and notify a person the SOS has reason to believe is someone required to file a statement or report and failed to do so. The SOS's failure to give notice is not a defense to a criminal action against the person required to file.

Within nine business days after a statement or report is required to be filed, the filer must make any corrections in the filed statement or report. If the statement or report is not filed, then it must be filed within nine business days after the deadline, and will be subject to late filing fees.

After nine business days and before 12 business days after the filing deadline has expired, the SOS must report uncorrected errors or omissions and failures to file to the Attorney General.

Contributions & Expenditures

An elected official, or a person on his or her behalf, may not solicit or accept a contribution for the purpose of defending the elected official in a criminal, civil, or administrative action that arises directly out of the conduct of the elected official's governmental duties unless the contribution is included in a legal defense fund that complies with the Legal Defense Fund Act.

A person may not make, and the elected official or treasurer of a legal defense fund may not accept, an anonymous contribution. An anonymous contribution to a legal defense fund may not be deposited into the account the fund maintains with a financial institution, but must be given to a person that is exempt from taxation under Section 501(c)(3) of the Internal Revenue Code. The person receiving the contribution from the legal defense fund must give it a receipt, which the fund's treasurer must retain.

A contribution may not be made by a person to another person with the agreement or arrangement that the recipient will then transfer the contribution to a particular legal defense fund.

Contributions to a legal defense fund that are received as or converted to the form of

money, checks, or other negotiable instruments must be deposited in a single account in a financial institution for all contributions to the fund. The fund's treasurer must designate the financial institution that is the official depository of the fund. A contribution that is received and retained by a legal defense fund must be maintained in a separate account at the official depository and may not be deposited in or commingled with any other account of the elected official.

Except for expenditures upon dissolution that are made as prescribed in the Act, or except as provided for anonymous contributions, a person may make expenditures from a legal defense fund only for its administration, attorney fees, or related legal costs, which may not include direct or indirect payments for media purchases, media consulting, or mass mailings. An expenditure must be made for the legal defense of only the one elected official for whom the fund was established.

A person who knowingly violates these contribution or expenditures provisions is guilty of a misdemeanor punishable as follows:

- If the person is an individual, by imprisonment for up to 93 days or a maximum fine of \$1,000, or both.
- If the person is other than an individual, by a maximum fine of \$10,000.

Other Provisions

The Secretary of State may promulgate rules to implement the Act and may issue declaratory rulings pursuant to the Administrative Procedures Act.

The Legal Defense Fund Act applies to any contribution made, received, or spent after the Act's effective date. The Act also applies to any contribution received before the effective date if the contribution was not returned to the contributor within 90 days after that date.

MCL 4.414 & 4.429 (S.B. 1263)
15.521-15.539 (H.B. 4001)

Legislative Analyst: Suzanne Lowe

FISCAL IMPACT

Senate Bill 1263

The bill may have an indeterminate fiscal impact on the Department of State for costs associated with issuing declaratory rulings. There also may be unknown additional costs to the Department associated with providing the public with an annual summary of declaratory rulings and interpretive statements. The extra workload and associated costs may be absorbed within the Department's current appropriations; however, any excess costs may require additional appropriations, the amount of which is unknown.

The bill will have no fiscal impact on local government.

House Bill 4001

The bill may have an indeterminate fiscal impact on the Department of State for costs associated with administering the Legal Defense Fund Act; however, these costs may be offset by the late filing fees and the civil fines established by the bill. Previously, legal defense funds were not required to file statements of organization or transaction reports with the Secretary of State. Depending on the number of legal defense funds that are created, the extra workload and associated costs may be absorbed within the Department's current appropriations. Any excess costs associated with administering the Act not covered by the late filing fees and civil fines may require additional appropriations; however, the amount is unknown.

The bill will have an indeterminate fiscal impact on local government. There are no data to indicate how many offenders will be convicted of the new offenses. Local governments will incur the costs of incarceration in local facilities, which vary by county. Additional penal fine revenue will benefit public libraries.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.