FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 7, 2003

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2003-11

Andrew Nickelhoff, Esquire
Sachs Waldman
1000 Farmer
Detroit, Michigan 48226-3464

Dear Mr. Nickelhoff:

This responds to your letters dated March 26 and April 3, 2003, requesting an advisory opinion on behalf of the Michigan Democratic State Central Committee ("MDSCC" or "Requestor") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to MDSCC's provision of "fringe benefits" such as insurance and retirement benefits to its employees.

Background

You state that MDSCC is a State committee pursuant to 11 CFR 100.14(a) and that it is responsible for the day-to-day operation of the Democratic Party in the State of Michigan. In addition, you state that MDSCC has established separate Federal and non-Federal accounts pursuant to 11 CFR 102.5(a)(1). To date, MDSCC has filed quarterly reports with the Commission.

You report that MDSCC pays its employees and also provides them with other forms of compensation that you refer to as "fringe benefits." You note that these "fringe benefits" include MDSCC's payments for: an employee's medical, dental, and prescription drug insurance coverage; coverage for the employee's short-term disability (wage loss) and long-term disability insurance benefits; coverage for the employee's life insurance benefit; and employer matching contributions to the 401(k) retirement plan. For the purposes of this request, you also include "standard payroll taxes" in this "fringe

benefits" category.[1] You state that "fringe benefits" amount to approximately 38% of the total labor cost MDSCC incurs, on average, for each employee.

Currently, MDSCC treats its payments for the above-listed fringe benefits to its employees under the provisions specifically addressing the allocation of administrative expenses (11 CFR 106.7(c)(2) and (d)(2)), rather than under the provisions addressing the allocation of State party employee "salaries and wages" (11 CFR 106.7(c)(1) and (d)(1)). No MDSCC employee has spent more than 25 percent of his or her compensated time in any month on Federal election activity or activity in connection with a Federal election since January 1, 2003. This means that MDSCC's payments of what strictly constitutes "salaries and wages" has been made entirely from the non-Federal account. The fringe benefit payments by MDSCC, however, have been made from a mix of funds from the Federal and non-Federal accounts in accordance with the requirements for State party administrative costs.

Questions presented

You ask the following two questions related to the payment of these fringe benefits:

(1) May amounts spent by MDSCC for "fringe benefits" for its employees, such as insurance and retirement benefits, be treated in the same manner as "salaries and wages" for purposes of allocating such expenses between Federal and non-Federal accounts under Commission regulations?

(2) If the MDSCC may treat the amounts spent for the "fringe benefits" as "salaries and wages," may its Federal account be reimbursed for amounts that had already been expended from that account in prior payroll payments for periods in which MDSCC allocated those amounts as administrative costs? [2]

Question 1 - Analysis and conclusions

On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L. 107-155 (Mar. 27, 2002)) ("BCRA") took effect. As amended by BCRA, the Act regulates, among other things, the financing of "Federal election activity" by State party committees. Specifically, 2 U.S.C. 441i(b)(1) provides that, with the exception of certain situations described in 2 U.S.C. 441i(b)(2), "an amount that is expended or disbursed for Federal election activity by a State . . . committee of a political party . . . shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 431(20)(A) defines "Federal election activity" ("FEA") to include "services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election." 2 U.S.C. 431(20)(A)(iv). *See* 11 CFR 100.24(b)(4). The Commission's regulations at

[1] The Commission assumes that the term "standard payroll taxes" consists of the employer's payment obligation for Social Security and Medicare taxes, and for Federal and State unemployment taxes.

[2] The Commission is addressing this question with respect to activity since January 1, 2003.

11 CFR 300.33(c)(2), which implement this statutory provision, provide that, for State party committees,

> [s]alaries and wages for employees who spend more than 25% of their compensated time in a given month on Federal election activity or activities in connection with a Federal election must not be allocated between or among Federal, non-Federal and Levin accounts.[3] Only Federal funds may be used. Salaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election shall be paid from funds that comply with State law.

See also 11 CFR 106.7(c)(1), (d)(1), and (e)(2).

For the purposes of applying 11 CFR 300.33(c)(2) and 106.7, there is no evident reason to distinguish between monetary compensation a State party committee pays directly to an employee and employee-specific compensation it provides in some other form, such as through insurance or retirement benefits. The "fringe benefits" you describe are — like salaries and wages — employee-specific and easily attributed to a particular employee who benefits from them. The Commission also notes that 2 U.S.C. 431(20)(A)(iv) covers services provided by an employee who spends more than 25% of that individual's "compensated time" during a particular month on Federal election activity or activities in connection with a Federal election (emphasis supplied). Thus, the Act itself defines FEA in the broader context of "compensated time," rather than just "salary" or "wages."

Second, prior to the enactment of BCRA, the relevant Commission regulations did not treat the costs of employee salary and wages differently than the costs of employee-specific "fringe benefits" for allocation purposes.[4] The former 11 CFR 106.5(a)(2)(i), in listing costs that party committees were permitted to allocate between Federal and non-Federal activities, included "salaries" in a broader "administrative expenses" category, along with rent, utilities and office supplies. While these regulations

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[3] "Levin" accounts, which are not implicated in your request, are for funds that comply with the requirements of 2 U.S.C. 441i(b)(2) regarding certain other types of "Federal election activity."

[4] Commission regulations also cover spending by State, district, and local party committees for activities other than Federal election activities. State party committees "that make expenditures and disbursements in connection with both Federal and non-Federal elections for activities that are not Federal election activities pursuant to 11 CFR 100.24 may use only funds subject to the prohibitions and limitations of the Act, or they may allocate such expenditures and disbursements between their Federal and their non-Federal accounts." 11 CFR 106.7(b). To this end, 11 CFR 106.7(c)(2) provides that State party committees "may either pay administrative costs, including rent, utilities, office equipment, office supplies, postage for other than mass mailings, and routine building maintenance, upkeep and repair, from their Federal account, or allocate such expenses between their Federal and non-Federal accounts, except that any such expenses directly attributable to a clearly identified Federal candidate must be paid only from the Federal account." *See also* 11 CFR 106.7(d)(2).

were in effect, Commission advisory opinions analyzed salaries and fringe benefits together for allocation purposes. *See* Advisory Opinions 2001-14 and 1992-2.

The Commission seeks to avoid the anomalous result that there would be different allocation treatment for the various components of the compensation package provided to the same employee, i.e., an employee who spent more than 25% of her time on Federal election activity or activity in connection with a Federal election would have her salary paid only with Federal funds under 11 CFR 106.7(d)(1), but her "fringe benefits" would presumably be allocated between Federal and non-Federal funds as administrative costs under 11 CFR 106.7(d)(2).

The Commission concludes that amounts spent by State party committees for employee-specific "fringe benefits," consisting of health insurance, disability insurance, life insurance, and retirement benefits, fall into the category of compensated time. Therefore, when an MDSCC employee spends 25 percent or less of his compensated time during a month on Federal election activity or activities in connection with a Federal election, these fringe benefits may be paid entirely from the non-Federal account (assuming that the funds in that account comply with State law). In the alternative, if the funds deposited in MDSCC's Federal account on or after January 1, 2003, and the funds deposited in the Federal account in the future, are permissible under Michigan law, then these fringe benefits may be paid, in whole or in part, by the Federal account. *See* 11 CFR 106.7(c)(1) and (d)(1). This conclusion also applies to MDSCC's payments for payroll taxes.

Question 2 – Analysis and conclusions

The new regulations controlling salary and wage payments by State party committees took effect on November 6, 2002. Your request indicates that, since January 1, 2003, MDSCC's fringe benefit payments for employees who have spent 25% or less of their compensated time in a month on Federal election activity and activities in connection with a Federal election have been treated as administrative costs under 11 CFR 106.7(c)(2). Thus, MDSCC allocated these payments between Federal and non-Federal funds in accordance with the ratio for a two-year election cycle in which there will be a presidential candidate but no Senate candidate on the ballot. This means that MDSCC paid 28 percent of such costs using funds in its Federal account and 72 percent out of funds in its non-Federal account. 11 CFR 106.7(d)(2)(i). As indicated above, such fringe benefit payments may be made entirely from funds in MDSCC's non-Federal account (where the funds therein comply with State law) for any employee who spent 25 percent or less of his or her compensated time in a month on Federal election activity and activities in connection with a Federal election. You wish to have MDSCC's non-Federal account reimburse its Federal account for the Federal share of allocated payments that have already been made for the expenses addressed in this advisory opinion.

Under Commission regulations, a State party committee may transfer funds from its non-Federal account to its Federal account solely to cover the non-Federal portion of a payment for an allocable expense. Such a transfer must be made no more than 10 days before, and no more than 60 days after, the payments for which they are designated are

made by the committee. 11 CFR 106.7(f)(2)(i). Any transfer from the non-Federal account made outside this window is presumed to be a loan from the non-Federal account to the Federal account, in violation of the Act. 11 CFR 106.7(f)(2)(ii). Much of the transfer that MDSCC proposes to make from the non-Federal account to the Federal account would relate to fringe benefit payments by MDSCC that occurred more than 60 days ago.

The Commission has, however, allowed retroactive adjustments or allocation reimbursements that would otherwise be outside the permissible transfer window during the transition period following major changes in the allocation regulations at 11 CFR 106.5 and 106.6. *See* Advisory Opinions 1993-3, 1992-27, 1992-2, and 1991-15. The Commission's decisions to allow the retroactive changes recognized the fact that the applicable regulations were new and represented significant revisions from past practice, so that a brief period of adjustment was allowed on a case-by-case basis for committees acting in good faith.

Your request comes in response to significant changes in the allocation rules resulting from BCRA, i.e., the separation of employee salary and wages from the category of administrative costs, and reflects a need to clarify what constitutes "salaries and wages." In this respect, your request is materially similar to the requests in the advisory opinions that were issued during the prior transition period. The Commission concludes, therefore, that, notwithstanding 11 CFR 106.7(f)(2), MDSCC may make a one-time transfer of funds from its non-Federal account to its Federal account in the amount of the Federal funds it has used to pay, since the beginning of calendar year 2003, for the employee-specific fringe benefits it has addressed in this advisory opinion. Specifically, this amount will consist of the payments it has made for those benefits with respect to the compensated time since January 1, 2003, that the employee has worked.[5] This one-time transfer must be made within 30 days of your receipt of this advisory opinion.

MDSCC must disclose the transfer on the regularly scheduled report covering the date on which the transfer is made. *See* 11 CFR 104.5(c)(2) and (3), and 300.36(c). It must itemize the transfer to the Federal account on Schedule A, line 12 – "Transfers from Affiliated/Other Party Committees." The purpose is to be disclosed as follows (in conformance with the limited character spaces and other features available for MDSCC because it is an electronic filer using FEC software). In the description field, which will appear below the amount, the entry should state "Fringe Ben Reimb of Fed Acct-AO 2003-11." MDSCC must also include an electronic cover letter (in text record format) referring to the entry for the transfer, explaining why the transfer was made, and listing the individual entries of fringe benefit payments reported in the Schedules H4 from the

[5] Included in the new provisions is a requirement that the party committee keep a monthly log of the percentage of time each employee spends in connection with a Federal election. 11 CFR 106.7(d)(1). Thus, salary and wages must be treated differently than administrative costs for any compensated work by the employee.

previous and current reports that relate to the transferred amount. For each entry, the list must include the recipient of the disbursement, the date, and the Federal share amount.[6]

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this opinion, then the Requestor may not rely on that conclusion as support for its proposed activity. The Commission notes that this advisory opinion analyzes the Act, as amended by BCRA, and Commission regulations, including those promulgated to implement the BCRA amendments, as they pertain to your proposed activities. On May 2, 2003, a three-judge panel of the United States District Court for the District of Columbia ruled that a number of BCRA provisions are unconstitutional and issued an order enjoining the enforcement, execution, or other application of those provisions. *McConnell v. FEC*, 251 F.Supp. 2d 176 (D.D.C. 2003), *probable jurisdiction noted*, 123 S.Ct. 2268. (U.S. 2003). Subsequently, the District Court stayed its order and injunction in *McConnell v. FEC*, 253 F.Supp. 2d 18 (D.D.C. 2003). The Commission cautions that the legal analysis in this advisory opinion may be affected by the eventual decision of the Supreme Court.

Sincerely,

(signed)

Ellen L. Weintraub
Chair

Enclosures (AOs 2001-14, 1993-3, 1992-27, 1992-2, and 1991-15)

[6] Under electronic filing, the cover letter will not appear until the end of the report. Therefore, for ease of reference, MDSCC should include words in parentheses, after the entry stating the name of the tranferor, noting that the letter is at the end of the report; e.g., "MDSCC Non-Federal Account (see letter at end of report)."