

July 24, 2003

**NOTICE AO DRAFT COMMENT PROCEDURES**

The Commission has approved a revision in its advisory opinion procedures that permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2003-11 is available for public comments under this procedure. It was requested by counsel, Andrew Nickelhoff on behalf of the Michigan Democratic State Central Committee. The draft may be obtained from the Public Disclosure Division of the Commission.

Proposed Advisory Opinion 2003-11 will be on the Commission's agenda for its public meeting of Thursday July 31, 2003.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (EDT) on July 30, 2003.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case by case basis in special circumstances.

4) All comments timely received will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Disclosure Division.

**CONTACTS**

Press inquiries: Ron Harris (202) 694-1220

Acting Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copy of draft AO 2003-11 contact Public Records Office-  
Public Disclosure Division (202) 694-1120, or 800-424-9530.

For questions about comment submission procedure contact  
N. Bradley Litchfield, Associate General Counsel, (202) 694-1650.

**ADDRESSES**

Submit single copy of written comments to:

Commission Secretary  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

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SECRETARIAT



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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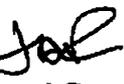
**AGENDA ITEM**  
For Meeting of: 07-31-03

**MEMORANDUM**

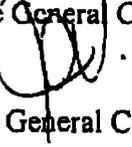
TO: The Commission

THROUGH: James A. Pehrkon   
Staff Director

FROM: Lawrence H. Norton   
General Counsel

James Kahl   
Deputy General Counsel

Rosemary C. Smith   
Acting Associate General Counsel

John C. Vergelli   
Acting Assistant General Counsel

Jonathan M. Levin   
Senior Attorney

Subject: Draft AO 2003-11

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 31, 2003.

Attachment

1 ADVISORY OPINION 2003-11

2  
3 Andrew Nickelhoff, Esquire  
4 Sachs Waldman  
5 1000 Farmer  
6 Detroit, Michigan 48226-3464

**DRAFT**

7  
8 Dear Mr. Nickelhoff:  
9

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

15 ***Background***

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

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

1 benefits" category.<sup>1</sup> You state that "fringe benefits" amount to approximately 38% of the  
2 total labor cost MDSCC incurs, on average, for each employee.

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

14 ***Questions presented***

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

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

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<sup>1</sup> 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.

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

5 *Question 1 - Analysis and conclusions*

6 On November 6, 2002, the Bipartisan Campaign Reform Act of 2002 (Pub. L.  
7 107-155 (Mar. 27, 2002)) ("BCRA") took effect. As amended by BCRA, the Act  
8 regulates, among other things, the financing of "Federal election activity" by State party  
9 committees. Specifically, 2 U.S.C. 441i(b)(1) provides that, with the exception of certain  
10 situations described in 2 U.S.C. 441i(b)(2), "an amount that is expended or disbursed for  
11 Federal election activity by a State . . . committee of a political party . . . shall be made  
12 from funds subject to the limitations, prohibitions, and reporting requirements of this  
13 Act." 2 U.S.C. 431(20)(A) defines "Federal election activity" to include "services  
14 provided during any month by an employee of a State, district, or local committee of a  
15 political party who spends more than 25 percent of that individual's compensated time  
16 during that month on activities in connection with a Federal election." 2 U.S.C.  
17 431(20)(A)(iv). See 11 CFR 100.24(b)(4). The Commission's regulations at 11 CFR  
18 300.33(c)(2), which implement this statutory provision, provide that, for State party  
19 committees,

20 [s]alaries and wages for employees who spend more than 25% of their  
21 compensated time in a given month on Federal election activity or  
22 activities in connection with a Federal election must not be allocated  
23 between or among Federal, non-Federal and Levin accounts.<sup>2</sup> Only

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<sup>2</sup> "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."

1 Federal funds may be used. Salaries and wages for employees who spend  
2 25% or less of their compensated time in a given month on Federal  
3 election activity or activities in connection with a Federal election shall be  
4 paid from funds that comply with State law.

5  
6 *See also* 11 CFR 106.7(c)(1), (d)(1), and (c)(2).

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

17 Second, prior to the enactment of BCRA, the relevant Commission regulations  
18 did not treat the costs of employee salary and wages differently than the costs of  
19 employee-specific “fringe benefits” for allocation purposes.<sup>3</sup> The former 11 CFR

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<sup>3</sup> 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).

1 106.5(a)(2)(i), in listing costs that party committees were permitted to allocate between  
2 Federal and non-Federal activities, included "salaries" in a broader "administrative  
3 expenses" category, along with rent, utilities and office supplies. While these regulations  
4 were in effect, Commission advisory opinions analyzed salaries and fringe benefits  
5 together for allocation purposes. See Advisory Opinions 2001-14 and 1992-2.

6 Finally, to treat these employee-specific "fringe benefits" differently from  
7 "salaries and wages" for purposes of allocation by State party committees could lead to  
8 the anomalous result that there would be different allocation treatment for the various  
9 components of the compensation package provided to the same employee. For instance,  
10 under such an approach, an employee who spent more than 25% of her time on Federal  
11 election activity or activity in connection with a Federal election would have her salary  
12 paid only with Federal funds under 11 CFR 106.7(d)(1), but her "fringe benefits" would  
13 presumably be allocated between Federal and non-Federal funds as administrative costs  
14 under 11 CFR 106.7(d)(2).

15 The Commission is aware of no compelling reason to treat State party committee  
16 employee-specific "fringe benefits" of the types you describe differently from "salaries  
17 and wages" for purposes of allocation under 11 CFR 106.7. Accordingly, the  
18 Commission concludes that amounts spent by State party committees for employee-  
19 specific "fringe benefits," consisting of health insurance, disability insurance, life  
20 insurance, and retirement benefits, must be treated in the same manner as "salaries and  
21 wages." When an MDSCC employee spends 25 percent or less of his compensated time  
22 during a month on Federal election activity or activities in connection with a Federal  
23 election, these fringe benefits may be paid entirely from the non-Federal account

1 (assuming that the funds in that account comply with State law). In the alternative, if the  
2 funds deposited in MDSCC's Federal account on or after January 1, 2003, and the funds  
3 deposited in the Federal account in the future, are permissible under Michigan law, then  
4 these fringe benefits may be paid, in whole or in part, by the Federal account. See 11  
5 CFR 106.7(c)(1) and (d)(1). This conclusion also applies to MDSCC's payments for  
6 payroll taxes.

7 *Question 2 – Analysis and conclusions*

8 The new regulations controlling salary and wage payments by State party  
9 committees took effect on January 1, 2003. See 11 CFR 106.5(h). Your request  
10 indicates that, since that date, MDSCC's fringe benefit payments for employees who  
11 have spent 25% or less of their compensated time in a month on Federal election activity  
12 and activities in connection with a Federal election have been treated as administrative  
13 costs under 11 CFR 106.7(c)(2). Thus, MDSCC allocated these payments between  
14 Federal and non-Federal funds in accordance with the ratio for a two-year election cycle  
15 in which there will be a presidential candidate but no Senate candidate on the ballot. This  
16 means that MDSCC paid 28 percent of such costs using funds in its Federal account and  
17 72 percent out of funds in its non-Federal account. 11 CFR 106.7(d)(2)(i). As indicated  
18 above, such fringe benefit payments may be made entirely from funds in MDSCC's non-  
19 Federal account (where the funds therein comply with State law) for any employee who  
20 spent 25 percent or less of his or her compensated time in a month on Federal election  
21 activity and activities in connection with a Federal election. You wish to have MDSCC's  
22 non-Federal account reimburse its Federal account for the Federal share of allocated

1 payments that have already been made for the expenses addressed in this advisory  
2 opinion.

3 Under Commission regulations, a State party committee may transfer funds from  
4 its non-Federal account to its Federal account solely to cover the non-Federal portion of a  
5 payment for an allocable expense. Such a transfer must be made no more than 10 days  
6 before, and no more than 60 days after, the payments for which they are designated are  
7 made by the committee. 11 CFR 106.7(f)(2)(i). Any transfer from the non-Federal  
8 account made outside this window is "presumed to be a loan from the non-Federal  
9 account to the Federal account, in violation of the Act." 11 CFR 106.7(f)(2)(ii). Much of  
10 the transfer that MDSCC proposes to make from the non-Federal account to the Federal  
11 account would relate to fringe benefit payments by MDSCC that occurred more than 60  
12 days ago.

13 The Commission has, however, allowed retroactive adjustments or allocation  
14 reimbursements that would otherwise be outside the permissible transfer window during  
15 the transition period following major changes in the allocation regulations at 11 CFR  
16 106.5 and 106.6. See Advisory Opinions 1993-3, 1992-27, 1992-2, and 1991-15. The  
17 Commission's decisions to allow the retroactive changes recognized the fact that the  
18 applicable regulations were new and represented significant revisions from past practice,  
19 so that a brief period of adjustment was allowed on a case-by-case basis for committees  
20 acting in good faith.

21 Your request comes in response to significant changes in the allocation rules  
22 resulting from BCRA, i.e., the separation of employee salary and wages from the  
23 category of administrative costs, and reflects a need to clarify what constitutes "salaries

1 and wages.” In this respect, your request is materially similar to the requests in the  
2 advisory opinions that were issued during the prior transition period. The Commission  
3 concludes, therefore, that, notwithstanding 11 CFR 106.7(f)(2), MDSCC may make a  
4 one-time transfer of funds from its non-Federal account to its Federal account in the  
5 amount of the Federal funds it has used to pay, since the beginning of calendar year 2003,  
6 for the employee-specific fringe benefits it has addressed in this advisory opinion.  
7 Specifically, this amount will consist of the payments it has made for those benefits with  
8 respect to the compensated time since January 1, 2003, that the employee has worked.<sup>4</sup>  
9 This one-time transfer must be made within 30 days of your receipt of this advisory  
10 opinion.

11 MDSCC must disclose the transfer on the regularly scheduled report covering the  
12 date on which the transfer is made. See 11 CFR 104.5(c)(2) and (3), and 300.36(c). It  
13 must itemize the transfer to the Federal account on Schedule A, line 12 – “Transfers from  
14 Affiliated/Other Party Committees.” The purpose is to be disclosed as follows (in  
15 conformance with the limited character spaces and other features available for MDSCC  
16 because it is an electronic filer using FEC software). In the description field, which will  
17 appear below the amount, the entry should state “Fringe Ben Reimb of Fed Acct-AO  
18 2003-11.” MDSCC must also include an electronic cover letter (in text record format)  
19 referring to the entry for the transfer, explaining why the transfer was made, and listing  
20 the individual entries of fringe benefit payments reported in the Schedules H4 from the

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<sup>4</sup> See 11 CFR 106.5(h), which states that the provisions of the previous allocation rules apply until December 31, 2002, and that the provisions at 11 CFR 106.7, the newly promulgated allocation regulation, apply after that. Included in those 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 on or after January 1, 2003.

1 previous and current reports that relate to the transferred amount. For each entry, the list  
2 must include the recipient of the disbursement, the date, and the Federal share amount.<sup>5</sup>

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

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<sup>5</sup> 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 transferor, noting that the letter is at the end of the report; e.g., "MDSCC Non-Federal Account (see letter at end of report)."

1 cautions that the legal analysis in this advisory opinion may be affected by the eventual  
2 decision of the Supreme Court.

3 Sincerely,

4

5 Ellen L. Weintraub  
6 Chair

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

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