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March 26, 2003

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Lawrence Norton, Esq.
General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 2003-11

re: advisory opinion request

Dear Mr. Norton:

I am writing on behalf of the Michigan Democratic State Central Committee ("MDSCC") to request, pursuant to 2 U.S.C. § 437f(a)(a) and 11 C.F.R. § 112.2, an advisory opinion from the Federal Election Commission as to the following question:

Should amounts expended by MDSCC for fringe benefits for 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 the FEC regulations?

Factual Background

The MDSCC is a State committee pursuant to 11 C.F.R. § 110.14(a) and is a state central political party committee as defined in the Michigan Campaign Finance Act, MCL § 169.211(5). The MDSCC is responsible for the day-to-day operation of the Democratic Party in the State of Michigan. The MDSCC employs a number of full time employees on a regular and ongoing basis at its headquarters in Lansing, Michigan. In addition to salaries, the MDSCC provides its employees with other forms of compensation, including: medical, dental, and prescription drug insurance coverage; short term disability (wage loss) and long term disability insurance benefits; a life insurance benefit; and a 401(k) plan with employer matching contributions. In addition, MDSCC's labor costs include standard payroll taxes. All of the foregoing non-payroll forms of compensation are referred to herein as "fringe benefits." The MDSCC's cost for the fringe benefits it provides constitutes approximately 38% of the total labor cost MDSCC incurs, on average, for each employee.

The MDSCC has established separate Federal and non-Federal accounts under 11 C.F.R. § 102.5(a)(1)(i).

Analysis

The FEC's Regulations state that: "Salaries 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. 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." 11 C.F.R. § 300.33(c)(2); see also, 11 C.F.R. §§ 106.7(c)(1), (d)(1). This regulation was adopted recently by the FEC in order to bring its regulations into conformity with the Bipartisan Campaign Reform Act of 2002 (BCRA).

Unless "salaries and wages" as used in the regulation is interpreted to include other forms of compensation, such as the fringe benefits provided to employees at the MDSCC's expense, different allocation rules will be in effect for the two forms of compensation. For example, an MDSCC employee who spends more than 25% of her time on activities in connection with a Federal election will have her salary paid from the MDSCC's Federal account, while her fringe benefits will be handled as administrative costs under 11 C.F.R. § 106.7(c)(2) and will be paid jointly from the Federal and non-Federal accounts (assuming the employee is not working in connection with a clearly identified federal candidate). Conversely, for an employee who does not meet the Federal election activity threshold, MDSCC would pay only the salary, but not fringe benefits, exclusively with non-Federal funds.

Differential treatment of salaries and fringe benefits does not promote the FEC's enforcement objectives. It makes more sense to treat all employer-paid compensation, including both salaries and fringe benefits, in the same manner. In that case, both the salary and the fringe benefits of an MDSCC employee who meets the Regulation's threshold for Federal election activity would be paid from the Federal account, rather than only the employee's salary.

There is no provision in the Act, or any compelling enforcement policy, which supports differential treatment of cash compensation and fringe benefits for purposes of the MDSCC's Federal/non-Federal expense allocation. Both are forms of employee compensation. Cash compensation and fringe benefit expenses receive the same tax treatment (from a taxable employer's perspective) under the Internal Revenue Code.

Employee fringe benefit expenses are not listed among the examples of administrative costs in 11 C.F.R. § 106.7(c)(2). Unlike the examples of general overhead expenses listed as administrative costs in the regulation, fringe benefit expenses, like salaries and wages, are determined on an employee-by-employee basis, and vary depending on the employment status and activity of each employee. Fringe benefit costs can be quantified easily for each employee; there is no need to estimate the fringe benefit expenditure for any particular employee. For these reasons, it makes practical sense to

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treat cash compensation paid to employees and fringe benefits provided to employees in the same manner.

Additionally, treating fringe benefits in the same manner as salary payments is consistent with and better reflects the purposes of the BCRA. In passing BCRA Congress concluded that any employee who devotes more than 25% of his compensable time to Federal election activity is sufficiently engaged in Federal election-related activities that the salary of such an employee should be paid entirely from funds subject to the limitations, prohibitions and reporting provisions of Federal law. It is difficult to discern a reasonable basis for treating other forms of individual compensation differently.

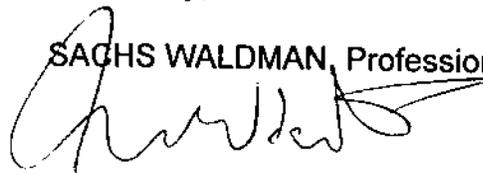
To illustrate the illogic of disparate treatment, consider an employee who is presented a choice between a higher base salary or greater deferred compensation. What conceivable reason would there be for allowing the employee's choice of compensation to dictate how payment of that employee is treated for election law purposes? The form of compensation should be irrelevant. Had Congress specifically addressed this issue, it is hard to imagine that it would have come to any other conclusion.

Uniform treatment has the distinct benefit to committees such as the MDSCC of simplifying bookkeeping and reporting. MDSCC's reporting for employees who engage in minimal Federal election activity, with respect to salaries and to other paid compensation such as fringe benefits, should be uniformly governed by state law. Consistent treatment of employee compensation would eliminate the bookkeeping task of reconciling state and Federal reporting regimes. For organizations such as the MDSCC, simplicity and common sense regulation is a real virtue and facilitates compliance with both Federal and state law.

We look forward to your response to this request. Please contact me if you have any questions or if additional information is needed.

Yours truly,

SAGHS WALDMAN, Professional Corporation



Andrew Nickelhoff

cc: Mark Brewer, Chair