May 29, 2002

Via E-Mail

Rosemary C. Smith, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money

Dear Ms. Smith:

These comments are submitted on behalf of the Michigan Democratic Party (MDP) in response to the Commission's above-referenced Notice of Proposed Rulemaking, 67 Fed. Reg. 35654 (May 20, 2002), proposing regulations to implement certain provisions of the Federal Election Campaign Act of 1971 as amended ("FECA"), as further amended by the Bipartisan Campaign Reform Act of 2002, P.L. 107-55 ("BCRA").

The Michigan Democratic Party is one of the two major political parties recognized under Michigan election law. The MDP is extensively involved in partisan and nonpartisan state and local candidate elections and ballot questions in both odd- and even-numbered years in Michigan. The MDP also maintains a federal political party committee.

The MDP welcomes the opportunity to comment on these proposed regulations which are of such critical importance to the future operation of the MDP and the nearly 150 local party organizations and thousands of state and local candidates affiliated with it. Although the MDP is filing its own comments, the MDP endorses and supports the comments submitted by the Association of State Democratic Chairs (ASDC).

The MDP also requests an opportunity to testify, through the undersigned, at the hearing on the proposed rules to be held before the Commission on June 4 and 5, 2002.

I. Background

A. The Critical Role of Political Parties Generally

"On the preservation of parties, public liberty depends."

-Anonymous letter to Maryland Gazette, 1788

"Parties are great instruments of basic democracy."

-MDP Chair and Original FEC Commissioner Neil Staebler

As these quotes spanning two centuries of American history demonstrate, political parties have long played and continue to play a vital role in the American democratic political system. Their crucial role has been widely acknowledged by many including scholars such as E.E. Schattschneider who in his classic study of American political parties observed that the "parties, in fact, have played a major role as makers of democratic government." Party Government at 1 (New York, 1942).

The United States Supreme Court also has repeatedly recognized the critical role of political parties. As Justice Scalia wrote for the Court in California Democratic Party v. Jones:

> Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views. The formation of national political parties was almost concurrent with the formation of the Republic itself. See Cunningham, The Jeffersonian Republican Party, in 1 History of U. S. Political Parties 239, 241 (A. Schlesinger ed., 1973).

500 U.S. 567, ___ (2000).

Consistent with this recognition, the Supreme Court has protected the First Amendment rights of political parties to speak, associate and organize. See, e.g., Jones, supra; Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989); Tashjian v. Republican Party of Connecticut, 479 U.S. 208 (1986).

Interpretation and enforcement of BCRA must be sensitive to the critical role political parties play and to their constitutional rights to speak, associate and organize.

Moreover, because the vast preponderance of state political party work occurs at the state and local - not federal - levels, respect for the principles of federalism as well as the Tenth Amendment requires that BCRA be interpreted and enforced so as not to intrude on state and local activities. Not only should there be no intrusion on such activities but the regulations should not create a chilling or deterrent effect on state and local grassroots political activity.

B. The Vital Role of State and Local Parties in Michigan

The Michigan Democratic Party is a voluntary unincorporated association under Michigan law, see Op. Att'y Gen'l No. 4209 (1963), which by virtual of its electoral success in state elections is recognized as a "major political party" under Michigan election law, see, e.g., M.C.L. §§168.16, 168.22a, 168.674(2)-(4). The MDP nominates candidates for state and local office through primaries, biennial party conventions and state and local party committees. See id. §§168.59, 168.72, 168.75, 168.162, 168.165, 168.169, 168.199, 168.282, 168.282a, 168.285, 168.392, 168.395, 168.973.

The MDP's principal functions are to elect candidates, partisan and nonpartisan, to state and local office; to campaign for and against state and local ballot questions; and to perform all the tasks necessary to carry out those functions – state and local candidate recruitment, training of state and local candidates and campaign workers, communications on state and local candidates and issues, holding Party meetings and state conventions, fundraising and so forth. Indeed, if there were no federal elections and no national party structure, the MDP would continue to exist and little would change in terms of its structure and functions.

Fundraising for these state and local activities is done in compliance with the detailed provisions of the Michigan Campaign Finance Act of 1976 as amended (MCFA), M.C.L. §§169.201-.282.

The MDP plays an essential role in the Democratic Party's efforts to organize and communicate with voters on behalf of the entire Democratic ticket in Michigan. Since 1988, the Democratic Party's voter contact and field activities in Michigan have been carried out through the Michigan Democratic Coordinated Campaign, a project of the MDP in which the MDP carries out, on behalf of the entire Democratic ticket, the core functions of voter registration, identification of voters likely to vote Democratic and turning out voters on Election Day. Federal, state and local candidates and organizations and their representatives work together to raise the necessary funds for the MDP to carry out these activities, and plan the activities themselves, which are undertaken with a combination of a small paid staff and thousands of grassroots volunteers.

The MDP plays a significant role in the process of nominating the Democratic Party's candidate for President. Every presidential election cycle, the MDP develops and implements a plan for the allocation and selection of delegates to the Democratic National Convention. These plans must conform to national party rules, but typically in Michigan MDP members and activists caucus at the local level to express their presidential preference. Those results are used to elect delegates at the congressional district and state levels. Thousands of people participate in this process.

Complying with the complex, burdensome regulatory schemes imposed by current federal campaign finance law requires two (2) full-time staff out of a total staff of 12 at the MDP, in addition to meeting the services of lawyers and accountants. Additional

compliance staff is required in even-numbered years. The much more burdensome regulations called for by BCRA will increase this work substantially. At the local level party level in Michigan where all Party officials are volunteers, the MDP already experiences difficulty finding people willing to serve as local Party officials because they are deterred by the complexity and penalties of the campaign finance laws. BCRA and its regulations will exacerbate this problem, deterring and hindering local party activity instead of encouraging it.

C. Title I Generally

The MDP strongly believes along with the ASDC that many provisions of BCRA criminalize and deter ordinary aspects of political organization and communication at the grassroots level and will thereby make it difficult if not impossible for the MDP and its local party committees to carry out their core functions. There is no governmental interest at all that could justify many of these criminal prohibitions. Indeed, these prohibitions run counter to the spirit of federalism if not the letter of the Tenth Amendment. The California Democratic Party has raised some of these issues in its suit, brought together with the California Republican Party and a number of other plaintiffs, including local party committees, challenging the constitutionality of a number of provisions of BCRA. See Complaint, California Democratic Party et al. v. Federal Election Commission et al., Case No. 1:02CV00875 (CKK) (D.D.C., filed May 7, 2002).

The MDP understands that the Commission is obligated to implement the BCRA as enacted and has no power at all to rule on the constitutionality of any provision of the law. The Commission does, however, have not merely the power but the inherent obligation to issue regulations that will construe and implement the statute in a way least likely to raise constitutional concerns. See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 574-77 (1988)(no deference due to agency construction that raises constitutional problems).

Accordingly, the MDP strongly urges the Commission to interpret and implement BCRA in a way that is least likely to create an infringement of the constitutional rights of the MDP, its local party committees and state and local candidates.

II. Comments on Proposed Regulations

The following specific comments follow the order in which the proposed new regulations appear in the NPRM.

A. Definitions

1. Proposed definition of "Federal election activity"

a. Voter identification

The NPRM raises the question of how "voter identification" should be defined for purposes of the terms "Federal election activity." Like the ASDC, the MDP believes that the proposed definition of "voter identification" is far too broad and instead should be defined to include only activity that involves actual contact of voters, by phone, in person or otherwise, to determine their likelihood of voting generally or their likelihood of voting for a specific Federal candidate. In particular, the term "voter identification" should not include the expenditure of funds merely for the acquisition or enhancement of a list of voters, or the acquisition of publicly available demographic information regarding those voters, which is part of the fundamental functions of the MDP and should therefore be treated as an administrative expense.

Nor should "voter identification" include contacting registered voters merely to determine their party affiliation or preference. In Michigan, voters do not register by party. Simply to create a list of party adherents—similar to the basic list of registered voters in states which do provide for registration by party—requires MDP to contact voters to determine their affiliation. Including such contacts in the scope of "voter identification" would create an indefensible distinction between the way such expenses are paid for by state and local parties in states which provide for registration by party, and states such as Michigan which do not. In other words, if such contacts were included as "voter identification," then acquisition of party affiliation information would be treated as an administrative expense in states with party registration, but in states without registration by party like Michigan the MDP would be required to pay for acquisition of this basic information with 100% Federal contributions or with a combination of Federal funds and highly-restricted "Levin Amendment" contributions. That is unfair.

For these reasons, the proposed definition of Federal election activity, 11 C.F.R. §100.24(a)(2)(i), should be amended by deleting all the material after the word "determine" and replacing that language with "preference for or views regarding a Federal candidate or likelihood of voting."

The NPRM also raises the question of whether voter identification should be read in conjunction with get out the vote such that it reaches only those activities designed to identify voters for GOTV purposes. BCRA uses "voter identification" and "get out the vote" as distinct terms. We believe that "voter identification" should be limited to voter contact for the specific purposes suggested above and that "get out the vote" should refer to actual communications with voters for the purpose of encouraging them to vote on election day.

The NPRM offers the example of an activity designed solely to identify supporters of a gubernatorial candidate. Such activity should never be considered

"Federal election activity," regardless of timing or other factors, assuming there is no other content to the communication. The MDP is required, under state law, to pay for such communications 100% with funds subject to the requirements of Michigan law.

b. Get out the vote activity

Proposed section 100.24(a)(2)(iii) includes, as an example of GOTV activity, the distribution of slate cards, sample ballots, palm cards, etc. The MDP does not believe that any such materials referring to candidates should ever be regarded as "GOTV" activity. If such materials are a public communication, as defined by new FECA section 301(22), which refers to any Federal candidate, and promotes or supports that candidate, then it is a "Federal election activity" under new FECA section 301(20)(A)(iii) regardless of other content, or other factors. Even if such a public communication refers to both Federal candidates and state and local candidates, and promotes or supports any Federal candidate, then likewise it must be treated as a "Federal election activity."

If such materials do not qualify as a "public communication" as defined in new section 301(22), then their costs should continue to be allocated between Federal and non-Federal funds in accordance with the Commission's regulations, by amending new section 300.33 to allow for the allocation of slate cards between Federal and non-Federal funds. A communication that promotes a party without mentioning candidates is defined by BCRA as a "generic campaign activity," which makes it "Federal election activity." Sample ballots, palm cards, etc. which refer only to state or local candidates are clearly excluded from the definition of "Federal election activity" under new FECA section 301(20)(B)(iv) and their costs must be paid for 100% with state-regulated funds.

For these reasons, the reference to slate card, palm cards, sample ballots or other printed listings of candidates should be removed from proposed section 100.24(a)(2)(iii).

The NPRM questions whether slate cards and sample ballots that qualify as exempt activities under 2 U.S.C. §431(8)(b)(v) should be treated as "Federal election activities." The answer is no. Activities that qualify under these exemptions should not be treated as "Federal election activity." Such activities are exempted from the definitions of "contribution" and "expenditure" under FECA. The BCRA does not repeal or amend these exemptions which Congress could have done, but did not. The purpose of these exemptions is to encourage the undertaking of grassroots volunteer activities by political parties on behalf of both federal and non-federal candidates. The applicability of these exemptions is already subject to a number of conditions to effectuate this purpose; for example, none of the exemptions covers broadcast communications. To federalize such grassroots activities would be inconsistent with the purpose of the exemptions and not supported by the language or intent of BCRA. Thus the costs of such slate costs and sample ballots, and other exempt activities, their costs should be allocated between Federal and regular non-Federal funds on a time/space basis as prescribed in the Commission's current regulations.

c. Timing

The NPRM asks whether there should be a defined time period that distinguishes "voter identification" and GOTV activities. It is the view of the MDP that each of these definitions should be determined by the content of the communication, and that the timing of the communication should not be relevant.

d. Exempt activities

As a general matter, the MDP believes that the NPRM incorrectly assumes that all exempt activities, as described in 11 C.F.R. §§ 100.8(b)(10), (16) & (18), are by definition "Federal election activity." For the reasons set forth above, exempt grassroots activities should not be treated as Federal election activity.

2. Proposed 11 C.F.R. 300.2 Definitions

a. Definition of "agent"

Because of the important interrelationships between the governing structures of the national, state and local Democratic party committees, the definitions of "officer," "agent" and "acting on behalf of" are critically important. In this regard, it appears that the NPRM does not comport with the language or intent of BCRA.

The plain language of BCRA requires that, to be liable, an individual must meet two tests. First, the individual must be an "agent" of the party organization at issue. Second, the individual must be "acting on behalf of" that party organization. It is the intent of BCRA that an agent of an organization is subject to a prohibition or restriction only when he or she is "acting on behalf" of that organization with respect to the restricted activity. For example, the Chair of the MDP is a member of the DNC and arguably therefore an agent of the DNC. Is the Chair of the MDP restricted from raising non-Federal funds for the MDP? Surely not, because when raising those funds the MDP Chair is not "acting on behalf of" the DNC. To make clear that he or she is not so restricted, the regulation should provide that an individual will be treated as an agent of an organization with respect to a restricted or prohibited activity only when he or she is "acting on behalf" of the organization with respect to that activity. The Commission should therefore clarify that the term "acting on behalf of" qualifies both officers and agents.

With respect to the definition of "agent," the MDP believes the Commission should utilize the current, well-established definition set forth in its regulations, 11 C.F.R. §109.1(b)(5).

With respect to the definition of "acting on behalf of," the proposed regulation, §300.2(b), provides a useful standard: a person is "acting on behalf of" a party organization only if he or she has actual express oral or written authority, to act on behalf

of that organization, with respect to the particular activity that is forbidden to the party organization itself.

To clarify these issues, section 300.2(b) be revised to add a new definition as follows:

> "Acting on behalf of" an entity with respect to a particular prohibited or restricted activity means to have actual express oral or written authority to undertaken that activity for that entity, in the form or instructions, either oral or written, from an authorized official of that entity.

b. Definition of "directly or indirectly establish, finance, maintain or control"

The proposed definition of "establish, finance, maintain or control" is unnecessary. The term is adequately defined in the affiliation rule of the Commission's current regulation, 11 C.F.R. §100.5(g)(4). The current regulation has been applied in a number of enforcement proceedings and cases, and the meaning of the regulation is relatively well-established and well-understood. The Congress is presumed to be aware of the regulation and its exegesis. If Congress intended to alter it, BCRA would have so stated. Congress did not but instead used a standard phrase with a known meaning. Accordingly, the new regulation should simply provide that an entity is "directly or indirectly established, financed, maintained or controlled" by a parent entity if it is affiliated with that parent entity, as defined in section 100.5(g)(4) of the Commission's rules, on or after the effective date of BCRA, i.e., November 6, 2002.

c. Definition of "Levin funds" and "Levin accounts"

The MDP is particularly concerned that the Levin Amendment offered by Michigan Senator Carl Levin be given an accurate interpretation enabling the grassroots party activity it encourages to flourish.

First, the Levin Amendment should be interpreted to permit the spending of Levin funds on non-Federal activity, as contemplated by the proposed definition. Nothing in BCRA or its legislative history would suggest any contrary interpretation.

Second, although it would seem generally prudent for state and local parties to establish separate "Levin accounts," imposing such a requirement in the regulations is onerous and problematic. The establishment of separate Levin accounts should be optional.

d. Definition of "promote or support or attack or oppose"

The term "promote, support or attack or oppose" is unconstitutionally vague and overbroad. The FEC has failed to supply a constitutionally valid limiting construction. The proposed definition itself is beyond any formulation that has been approved by any

court and will not likely withstand constitutional scrutiny. Accordingly, the MDP believes that the definition is too broad.

e. Definition of "to solicit or direct"

Proposed section 300.2(m) would define a forbidden solicitation or direction to include any request, suggestion or recommendation to make a contribution or donation. The unconstitutional vagueness of the terms "request, suggest and recommend" is an invitation for endless investigations by the Commission of conversations between and among party officials, workers, volunteers, etc. which would clearly violate the freedom of association of party committees by forcing such individuals to choose and consider carefully every word as well as the tone, context and nuance of what they say under threat of criminal liability. The term "solicit" must be limited to an explicit request that an individual or entity make a contribution. The First Amendment requires no less.

B. State, District and Local Party Committees, and Organizations

1. Proposed Revisions to 11 C.F.R. §100.14

The phrase "as determined by the Commission" should be deleted from the definition of district or local committee in proposed section 100.14(c). As the NPRM suggests, "the key criterion for determining status as a district or local party committee" should be state law or party bylaws; these are objective criteria and there should be no discretion left to the Commission to decide whether a particular organization is or is not a local party committee.

2. Proposed Revisions to 11 C.F.R. 106.5

As noted above under the discussion of "Federal election activity," the NPRM confuses the relationship of "Federal election activity" with "exempt activities," and ignores a category of activity which still requires allocation of costs on a time/space basis.

Any material or communication which mentions a Federal candidate is potentially a "public communication," as defined in BCRA, new 2 U.S.C. §431(22). If such material or communication is a "public communication," and is not an exempt activity, the costs must be paid 100% from Federal funds; there is no allocation at all, and no permissible use of Levin funds. If such activity constitutes an exempt activity under 11 C.F.R. §§100.8(b)(10), (16) or (18), then, as noted above, it should not constitute Federal election activity. BCRA did not repeal or amend provisions relating to exempt activities. Thus, the costs of such activity should continue to be allocated between Federal and regular (non-Levin) non-Federal funds on a time/space basis, as under the Commission's current regulations.

3. Proposed 11 C.F.R. 300.30 Accounts

The question of whether state and local party committees should be required to maintain separate Levin Amendment accounts is addressed above.

The proposed regulations, at section 300.30(b)(2), provide that a state or local committee could deposit into its Levin account only donations specifically designated by the donor for the Levin account or donations from donors who have been informed that donations will be subject to the special donation limitations and prohibitions of the Levin account provisions of BCRA. The MDP strongly objects to this requirement. These restrictions have no basis whatsoever in the language of BCRA or in its legislative history. To the contrary, the legislative history makes clear that the Levin amendment was intended to allow state and local parties to use regular non-Federal donations, as permitted by state law, but only up to $10,000 per donor, in combination with Federal funds for the purposes of voter registration and GOTV. There are no other restrictions such as those found in the proposed regulations.

The Levin Amendment already imposes very explicit restrictions on the way such non-Federal donations can be raised. None of these restrictions refers to any special language that has to be used in the solicitation by the state or local party. It would be utterly inconsistent with the intent of the language and Amendment to require that the MDP meet additional conditions not even mentioned in the statute, in order to receive Levin funds.

Proposed section 300.30(b)(2) should therefore be deleted. Proposed section 300.30(b)(4)(iii), referring to the solicitation conditions, should also be deleted.

4. Proposed 11 C.F.R. 300.31 Receipt of Levin Funds

First, it is clearly the intent of the sponsors of BCRA that state, district and local committees of the same political party are not considered to be affiliated for purposes of applying the $10,000 donation limitation in new FECA section 323(b)(2)(B)(iii). The statement of Representative Chris Shays (R-Ct), cited in the NPRM, 148 Cong. Rec. H410 (Feb. 13, 2002), could not be clearer.

Second, the proposed regulations do not adhere to the clear legislative intent of BCRA as to which activities by state or local parties constitute "joint fundraising" for purposes of the restriction set forth in proposed section 300.31(f). The legislative history indicates that this restriction is intended to prohibit only joint fundraising events sponsored by more than one state or local party committee. Rep. Shays stated that, "joint fundraisers between state committees or state and local committees are not permitted. . . . The joint fundraising prohibition will prevent a single fundraiser for multiple state and local party committees." 148 Cong. Rec. H410 (Feb. 13, 2002). It is clear, then, that the statutory restriction was not intended to prohibit state and local parties from assisting each other in raising Levin contributions, other than through a joint fundraising event,

albeit no Levin contributions may be actually transferred from any state or local party to another.

Accordingly, proposed sections 300.31(a) and 300.34(b) should not include the word "solely" and section 300.31(f) should be revised to read "....a State, district or local committee of a political party must not raise Levin funds by means of a joint fundraising event held in accordance with 11 C.F.R. §102.17, with any other State, district or local committee of any political party....." The MDP believes that the restriction applies only if two conditions are met: the activity must be undertaken pursuant to a joint fundraising agreement in accordance with Commission rules and the funds are raised at a single event.

5. Proposed 11 C.F.R. 300.32 Expenditures and Disbursements

The NPRM raises the very important issue of the exact requirements applicable to local party committees under BCRA. The proposed regulations would provide that local committees that do not qualify as political committees must nevertheless use Federal funds for Federal election activity. The MDP supports this requirement. However, it must also be made clear that a local committee that does not otherwise qualify as a "political committee" under current law (2 U.S.C. §431(4)) is not required to register or file reports with the Commission. See discussion of proposed section 300.36 below.

With respect to proposed section 300.32(a)(3), the Commission's proposed regulation is overly broad. This subsection is being included in the regulations pursuant to section 323(c) of BCRA. However, the Commission's approach misstates the statute by providing that a state party committee may not use Federal funds for any fundraising in which non-Federal funds are raised. However, section 323(c), by its explicit terms, only applies to funds raised for "Federal election activity." To be sure, not every Federal dollar is used for "Federal election activity" and there are other expenditures of Federal funds that do not fall within its scope. Accordingly, a state party committee could hold a fundraising event in which it raises Federal funds (that are not used for "Federal election activity") and non-Federal (non-Levin) funds. Under such circumstances, a state committee should continue to be permitted to allocate the expenses for such an event utilizing the funds received method described in section 106.5(f). Accordingly, the term "Federal activities" in section 300.32(a)(3) should be revised to read "Federal election activity." Furthermore, the Commission should add a new section that clarifies that the funds received method should be utilized for fundraising where the funds raised at that event or program are not used for "Federal election activity."

The MDP supports the inclusion of proposed section 300.32(b)(2) which allows Levin funds to be used for any lawful purpose under state law.

6. Proposed 11 C.F.R. 300.33 Allocation of Expenses

This proposed regulation raises the important issue of how state and local parties should pay for administrative costs that are not defined as "Federal election activity" and

are not included in the list of items specifically excluded in 2 U.S.C. §431(20)(B). As the NPRM notes, because BCRA requires Federal election activities, as defined, to be paid 100% with Federal funds, "significant amounts of activity that were once allocable will have to be paid for exclusively with Federal funds." To the extent BCRA does not treat categories of expenses as being sufficiently linked to Federal elections to be treated as "Federal election activity," state and local parties should have the choice of allocating such expenses between their Federal and regular non-Federal accounts (as proposed in the NPRM), or paying such expenses entirely with non-Federal funds.

This should include the salaries of employees who spend less than 25% of their time in a particular month on activities in connection with a Federal election. This should also include the costs of voter registration activity undertaken more than 120 days before an election.

With respect to the specific language of the proposed regulation, first, section 300.33(a)(1) misstates the statutory provision regarding salaries of state and local party employees. New 2 U.S.C. §431(20)(A)(iv) refers to an employee of a state or local party "who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election" (emphasis added). Significantly, the statute does not use the phrase "Federal election activity." The difference in phraseology cannot be assumed to be meaningless. The phrase, "in connection with" a Federal election is used elsewhere in FECA and has a defined meaning requiring that an activity expressly advocate the election or defeat of a Federal candidate or otherwise result in a direct in-kind contribution to a specific Federal candidate. Proposed section 300.33(a)(1) should be revised to delete the phrase "Federal election activity" and replace it with "activities in connection with a Federal election."

Further, for the reasons stated above, section 300.33(a)(1) should be revised to provide that salaries of employees who spend less than 25% of their time can be allocated or paid for entirely with non-Federal funds. In addition, the Commission should provide a procedure by which a state or local party can adjust its initial allocation of the time expected to be spent by an employee, when an employee's salary is paid in advance and the actual time spent by the employee on various activities may not be known until the end of the month.

Second, the NPRM seeks comments on whether the proposed regulations should require that state and local party committees document the time spent by their employees to justify the decisions as to the accounts from which their salaries are paid. The first two alternatives are not practical. To require employees of state and local party committees, most of which have a handful of employees at most, to keep time sheets like lawyers or accountants would be absurdly burdensome. To require employees to certify in writing the percentage or amount of time spent on activities in connection with a Federal election would be equally impractical. The third alternative, requiring a responsible party official to keep a tally sheet for all employees, is more reasonable. However, parties should be afforded the opportunity to utilize any reasonable method to document the time spent by their employees. Accordingly, the Commission should not by regulation require a

particular method of documenting the time spent by employees on activities in connection with a Federal election.

Third, as noted above, state and local party committees should be able to pay for those administrative costs which are not defined as Federal election activity, entirely with non-Federal funds, or to allocate such expenses, at the discretion of the state or local party.

Fourth, to the extent any allocation of administrative expenses is required or permitted, and for purposes of allocating Levin activities between Federal funds and Levin funds, the Commission must determine the minimum appropriate percentage of such expenses to be paid from Federal funds. The Commission proposes a fixed formula to be applied in all states, depending only on whether the cycle is a presidential cycle and whether a Senate candidate appears on the ballot. The MDP supports this approach, which will greatly simplify the allocation process for state and local party committees.

Fifth, the MDP supports proposed section 300.33(b)(5), which would permit expenses for voter identification, generic campaign activity and GOTV, undertaken during a period in which no Federal candidate is on the ballot, to be paid for entirely with non-Federal funds. Indeed, for the reasons stated above, every state and local party committee should be able to undertake voter identification and generic campaign activity entirely with non-Federal funds, during the calendar year prior to a Federal election year.

Finally, the MDP believes that, for purposes of allocation, fundraising costs should be deemed to include only those expenses directly associated with a particular fundraising event or program. Consistent with A.O. 1992-2, party committees should also be afforded discretion to treat the costs of fundraising staff either as fundraising expenses or as administrative expenses. Further, party committees should be able to pay costs related to raising funds only for non-Federal activity, entirely from a non-Federal account.

7. Conforming Amendments to 11 C.F.R. 104.10 and 106.1

The MDP supports the proposed amendments to section 104.10.

With respect to the proposed amendments to section 106.1, as stated above, exempt activities should not be considered Federal election activity. In addition, not every activity that mentions a clearly identified Federal candidate is required, in any event, under BCRA, to be paid for exclusively with Federal funds. Materials and communications that reference both Federal and non-Federal candidates, but are not "public communications" and do not otherwise meet the definition of Federal election activity, should continue to be subject to allocation based on time/space as under the Commission's current regulations.

8. Proposed 11 C.F.R. 300.34 Transfers

The MDP believes that the various restrictions on transfers of Levin funds, and the restriction on transfer of "hard" money between national, state and local parties for use in combination with Levin funds, are all unconstitutional. For this reason, the MDP opposes all of proposed section 300.34.

In the event that the Commission believes it is compelled, at this juncture, to implement the restrictions of the use of funds "provided" to a state or local party by a national party or other state or local party, as that term is used in new FECA section 323(b)(2)(A)(iv), the term "provide" should be defined to refer only to funds that are earmarked for use in combination with Levin funds. See MUR 3204.

9. Proposed 11 C.F.R. 300.36 Reporting Federal Election Activity; Recordkeeping

Proposed subparagraph (a)(1) of new section 300.36 would provide that district and local committees that have not qualified as "political committees" would not be subject to BCRA reporting requirements, but would be required to demonstrate that they had sufficient Federal funds on hand to pay the required Federal portion of the costs of Federal election activity. The MDP supports this provision.

Proposed subparagraph (a)(2), however, would provide that the Federal portion of any payment by local or district committee for Federal election activity would constitute an "expenditure" under FECA, even in such activity does not reference any Federal candidate. The effect of this new provision is to rewrite section 301(4)(C) of FECA, which governs the circumstances under which any local or district committee of a party is deemed to be a "political committee" and thus required to register and file reports with the Commission. If the Congress had desired to amend section 301(4)(C) it would have done so expressly, but it did not.

In A.O. 1999-4, the Commission ruled that only disbursements that influence a specific Federal election count towards the dollar thresholds set forth in section 301(4)(C) of FECA. Thus, the mere expenditure by a local committee for generic activity would not trigger "political committee" status. By contrast, under proposed section 300.36(a)(2) of the new regulations, a local committee spending as little as $1,001 on generic voter registration activity—without ever spending a penny on any communication referencing a Federal candidate—would be required to register and file reports as a Federal "political committee."

The effect of this new rule would be to impose Federal "political committee" status on thousands of local and district committees not currently required to register or file reports with the Commission. There is nothing in the language or history of BCRA to suggest that the Congress intended such a result. Further, the Commission itself has effectively acknowledged, in the language of proposed 300.36(a)(1), that Congress did

not intend first-dollar disclosure of funds disbursed for Federal election activity by local and district party committees.

In addition, the NPRM requests comments on the applicability of the new reporting requirements imposed under this section to the $50,000 threshold for electronic filing. As a practical matter, the Federal portion of receipts and expenditures disclosed pursuant to this section will also be disclosed on the party committee's regularly filed reports. Accordingly, the Commission need not include funds disclosed under this section in determining whether a committee has met the $50,000 threshold for electronic filing. Of course, to the extent that at a committee has already qualified for mandatory electronic filing, it would not appear unduly burdensome to require such a committee to file these monthly reports electronically as well.

The MDP strongly opposes any requirement that Federal receipts for Levin activity be disclosed. Although it may be readily apparent which non-Federal receipts are used for Levin activity, Federal receipts will be used fungibly for multiple purposes. Since state and local parties will not isolate specific Federal funds for Levin activity, it is impractical and burdensome to require such party committees separately to disclose such Federal receipts on the monthly reports required by this section.

Finally, just as local party committees should be subject to FECA registration and reporting requirements only if they are "political committees," so too associations of state and local elected officials should not be required to register or reports merely because they undertake Federal election activity, unless such an association independently qualifies as a Federal "political committee."

10. Proposed 104.17 Reporting of Allocable Expenses by Party Committees

Proposed new section 104.17(a) assumes that all payments on behalf of both Federal and non-Federal clearly identified candidates must be made exclusively with Federal funds. As noted above, however, that assumption is incorrect. Communications on behalf of both Federal and non-Federal candidates that are not "public communications," and are not otherwise defined as Federal election activity, should continue to be subject to allocation between Federal and non-Federal funds.

Generally, the MDP notes that the Commission is contemplating the use, in several instances in the rulemaking, of unique identifying codes that would require detailed descriptions of various activities. Under the Commission's current reporting requirements, unique identifying codes are utilized to distinguish between activities that have different allocation ratios. The Commission appears to be unnecessarily extending the use of identifying codes to activities that share the same allocation ratio. Due to the several additional burdens placed upon state and local party committees under the BCRA, the MDP fails to see the utility in requiring additional recordkeeping and reporting requirements that are not necessary to distinguish between different classes of allocable activity.

11. Proposed 11 C.F.R. 300.37 Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations

Proposed section 300.37, prohibiting state and local parties from donating to or fundraising for certain tax-exempt organizations, mirrors the regulations set out in proposed section 300.11 imposing the same restrictions on national parties.

Section 300.37 would use the term "501(c) organization that makes expenditures or disbursements in connection with a Federal election" as defined in proposed new section 300.2(a). Under this broad definition, a state or local party would be prohibited from soliciting funds for or donating to any nonprofit organization that "[f]inances voter registration at any time" or "[ma]kes expenditures or disbursements for Federal election activity." As noted in the discussion of proposed section 300.11, no time frame is provided.

The prohibitions, in combination with the definition, are over broad. The MDP makes memorial contributions to 501(c) organizations in the name of deceased Party leaders and elected officials. If the MDP continues to do so under BCRA and that organization has ever exhorted people to register or vote the Chair of the MDP has committed a felony punishable by up to five years imprisonment. The BCRA could not possibly have intended that result.

It is therefore imperative that a safe harbor provision be provided, as suggested in the NPRM, for state and local parties that enables them, by taking certain actions, to determine that an organization does not engage in Federal election activity. As suggested in the NPRM, if a state or local party committee obtains a nonprofit organization's application for tax-exempt status of Form 990 and determines from such materials that the organization has not reported making, and was not organized to make, disbursements for Federal election activity, the party committee should be able to determine, conclusively, that such party committee (and its officers, agents, etc.) can contribute to or raise funds for the organization.

In discussing proposed section 300.37, the NPRM requests comments on whether state and local party committees should be able to donate or raise funds for state PACs, i.e., section 527 organizations that are State-registered political action committees supporting only non-Federal candidates. The MDP supports interpreting the term "political committee" to permit such activity by state and local party committees.

C. Federal Candidates and Officeholders

As the NPRM notes, while BCRA prohibits a Federal candidate or officeholder from raising any non-Federal funds for any party committee, the law provides an exemption allowing such candidates and officeholders to attend, speak or appear as a featured guest at a State, district or local party fundraising event, even if non-Federal funds or Levin funds are raised at such an event.

The NPRM seeks comments on whether the fundraising event provision is a total exemption from the general solicitation ban, or whether, instead, there should be some restriction on what Federal candidates or officeholders do and/or say at such events to ensure that they do not solicit any funds. Proposed section 300.64 provides that a Federal candidate or officeholder "shall not solicit, receive, direct, transfer, or spend funds or participate in any other fundraising aspect of any such event," but does not define what it means to "participate" in an "fundraising aspect" of the event.

First, in answer to the Commission's specific questions, the language of the BCRA exemption, allowing a Federal officeholder or candidate to be a "featured guest" clearly contemplates permitting reference to such officeholders and candidates in invitation materials for the event and allowing a party committee to honor such individuals at the event. To do otherwise would effectively bar federal officials and candidates from speaking at the numerous state and local party Jefferson-Jackson, Wilson, Roosevelt, Truman, Kennedy, Williams and other dinners and events held every year throughout Michigan by Michigan Democratic.

Second, any attempt to restrict or prohibit what Federal officeholders and candidates say or do at such events would literally put the Commission in the position of policing speech. Can the Federal officeholder or candidate say positive things about the work of the party committee, implicitly suggesting (but not saying expressly) that the party deserves financial support? Can the Federal officeholder or candidate work a rope line or receiving line at the event where he or she might thank an individual donor for supporting the party? Can he shake hands, but not say anything? That is a constitutional morass.

Clearly it is impractical and undesirable for the Commission to attempt to create a detailed scheme of regulation of speech and conduct of Federal candidates and officeholders at state and local party events. Federal candidates and officeholders must be able to attend and speak and act freely at state and local party events, without restriction or regulation.

III. Conclusion

For these reasons, the MDP requests that the proposed regulations be adopted and/or amended as indicated.

Respectfully submitted,

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