July 30, 2003

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

Dear Mr. Norton:

We are writing to provide comments regarding the Office of General Counsel's ("OGC") Draft Advisory Opinion 2003-11. By way of background, Neil Reiff is a partner in the firm of Sandler, Reiff & Young, P.C. and serves as special counsel to several Democratic state party committees, as well as General Counsel to the Democratic National Committee, advising them on matters concerning federal and state campaign finance laws. Charles Spies serves as Election Law Counsel to the Republican National Committee, and in that capacity, advises Republican state party committees on issues pertaining to federal and state campaign finance laws.

In this matter the Commission is presented with the question of how a state party committee should pay for certain fringe benefits that are being provided to its employees. The two options that are before the Commission are to permit a state party committee to treat such expenses as either an administrative expense (subject to the Commission's allocation regulations found at 11 C.F.R § 106.7(d)(2)), or as a "salary or wage" expense, subject to the new 25% rule instituted by the Bipartisan Campaign Reform Act of 2002 ("BCRA"). See 2 U.S.C. § 431(20)(A)(iv); 11 C.F.R. § 106.7(d)(1).

In its draft opinion, the OGC recommends that the Commission conclude that such fringe benefits, including health and life insurance coverage, be treated in the same manner as salaries and wages under Commission regulations. Although this may be a viable interpretation of the Act with regards to such expenses, it should not be the exclusive permissible method of making such payments. To be sure, neither the BCRA and/or its legislative history, nor the Commission's regulations, provide any specific definition as to the meaning of the terms "salary" or "wages." Accordingly, the draft opinion does not point to any provision or legislative history of the BCRA that would mandate the result that the OGC recommends in this matter. Thus, due

to the ambiguities inherent in these terms, as well as the practical difficulties inherent in such an approach (as described below) the Commission should provide state parties with the maximum flexibility with respect to these types of expenses.[1]

The purpose of this comment is not to object to the ultimate approach recommended by OGC, but instead to insist that such an approach should not be mandated by the Commission. Rather than mandating extra-statutory restrictions, the Commission should provide state party committees with the option of treating such fringe benefits either as an administrative expense or as a "salary or wage" expense.

At the beginning of 2003, due to the lack of clarity regarding the issue presented in this matter, state parties were given a choice of paying fringe benefit expenses using one of the two methods described above. It is our understanding that the several state parties have chosen to pay for such expenses as an administrative expense (including the Michigan Democratic Party) and not as a "salary" or "wage" expense, and, in fact, we believe that several state parties had received informal advice from Commission staff that it would be more appropriate to treat such expenses as administrative expenses than as "salary" or "wage" expenses. It is our further understanding that, due to several practical difficulties presented by the Commission's approach, several of these committees wish to continue to treat such expenses as administrative, rather than payroll, in the future.

The Commission should note that, as a practical matter, the approach taken in this opinion poses several problems for state party committees. For example, most fringe benefits are required to be paid for in advance – for example, insurance companies generally require advance payment for health insurance coverage. Thus, a state party's health insurance payment for the month of August would be made some time in the month of July. However, the state party committee would not be able to determine whether each employee for whom it had paid health insurance payments had met the 25% threshold until the end of August. Such a system would require state parties to predict, for each employee, a month in advance, whether that employee would spend more than 25% of their time working on federal elections. This will likely require each state party committee to constantly reevaluate such expenses and make constant cross-transfers between federal and non-federal accounts to adjust for any potential errors in their predictions as to whether a specific employee spent more than 25% of their time on federal

1 Treatment of payroll taxes as "salaries and wages" in connection with this opinion request may be distinguished.

elections.[2] Another practical problem is that other types of insurance policies, such as life insurance, are not billed on a monthly basis, but rather on a quarterly or even annual basis. To require state parties to attempt to continuously reallocate such expenses on a monthly basis, is an unfair and unnecessary expectation and burden on such committees.

In the absence of clear guidance by Congress, there is no reason to mandate the result recommended by OGC in this matter. Although we have no objections to that approach as an option, it should not be an exclusive, mandatory approach. In Advisory Opinion 2002-2, which is cited by OGC in its Draft Advisory Opinion, the Commission granted a national party committee the flexibility to choose as to whether to treat fundraising payroll expenses between the administrative or fundraising allocation methods when paying such expenses. The flexible approach taken by the Commission in that matter stemmed from the fact that it had recently promulgated new and extensive regulations regarding the process of allocating expenses that were split between federal and non-federal activities.

Similarly, the BCRA has provided the Commission and the regulated community with several new challenges in administering, interpreting and complying with campaign finance laws and regulations. The 25% threshold is one of the most perplexing and difficult rules for state party committees to deal with, especially with respect to the questions posed in this matter, and that difficulty argues for flexibility – not rigidity – from the Commission.

Based upon the above, we urge the Commission to provide state party committees with maximum flexibility by permitting them to allocate fringe benefits as described by the OGC in its recommended opinion or to treat such expenditures as administrative expenses under the Commission's allocation regulations.

If you would like to discuss the matters addressed in this letter, or any other issues regarding this opinion, feel free to contact Neil Reiff at (202) 479-1111 or Charles Spies at (202) 863-8638.

Sincerely yours,

Neil Reiff

Charles Spies

2 Other than the ability to recoup the non-federal share of administrative expenses as permitted by OGC in its draft opinion, there is no provision in the Commission's regulations that appears to permit a party committee to recoup non-federal funds if the party pays for a fringe benefit from its federal account for a non-allocable expense, and then ultimately determines that the employee spent less than 25% of his or her time in a given month in connection with federal elections.