MICHIGAN
CHAMBER
OF
COMMERCE

February 4, 2004

By Facsimile Transmission
(202) 219-3923

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

Dear Mr. Norton:

Re: AOR 2003-38

The purpose of this letter is to provide our comments to the two proposed drafts of Advisory Opinion 2003-38, which respond to a request from United States Representative Eliot Engel, submitted by Cassandra Lentchner of Perkins Coie, LLP. Representative Engel seeks the Commission's determination whether funds he plans to raise and spend on behalf of a redistricting committee to defray legal expenses incurred in redistricting litigation are in connection with a Federal or non-Federal election within the meaning of 2 U.S.C. 441i(e)(1)(A) or (B). After reviewing these two drafts, the draft entitled "Draft A" adheres to the Commission's longstanding interpretation of the redistricting process and is consistent with the realities of the redistricting process; Draft B represents a dangerous expansion of how an activity can be classified to be in connection with a Federal or non-Federal election. Accordingly, the Michigan Chamber of Commerce respectfully requests the Commission to adopt Draft A as Advisory Opinion 2003-38.

After each decennial census, redistricting is primarily the responsibility of each state legislature, but voters always have the option of challenging any redistricting plan in litigation. Although redistricting is a political process which effects the outcome of future elections, effecting the outcome of future elections in which candidates are not identified, and influencing the election or nomination of a particular candidate, are two entirely different matters. No candidate has ever been elected upon the adoption of a redistricting plan. In fact, redistricting activities have nothing to do with candidates! Instead, whether before a state legislature or in litigation, the redistricting process is intended to protect the rights of voters. Nowhere in any bill before a state legislature or in any court pleading is there a statement that a particular redistricting plan elects a specific candidate. Stated simply: redistricting is for voters, elections are for candidates.

Accordingly, where redistricting activities are involved, the Commission has consistently ruled that the Federal Election Campaign Act (the "Act") is inapplicable to such activities. In Advisory Opinion 1981-35, the Commission observed:

> "The influencing of Federal elections by persons and organizations is regulated by the Act and the Commission's regulations. The influencing of the reapportionment

> decisions of a state legislature, although a political process, is not considered election-influencing activity subject to the requirements of the Act. The Constitution of the United States, Article 1, Section 2, Clause 3, mandates the orderly reapportionment of Congressional seats based on the results of the decennial census. It is thus incumbent on each state that loses or gains Congressional seats, to make the necessary decisions with regard to reapportionment. Essential aspects of the Federal election process for Congressional office are, in turn, dependent upon those decisions. Attempts to influence a state legislature's decisions on reapportionment plans may have political features, but are not necessarily election-influencing activity of the type subject to the Act and regulations. Similarly, the committee's financing of litigation which relates to reapportionment decisions made by the California legislature would not be viewed as election influencing under the Act and Commission regulations. "

See also Advisory Opinion 1982-14; Advisory Opinion 1982-37, and Advisory Opinion 1990-23.

Draft A represents a continuation of this longstanding interpretation by the Commission that the Act does not apply to redistricting activities.

Conversely, Draft B, claims to rely upon the Bipartisan Campaign Reform Act of 2002 ("BCRA") and McConnell v. FEC, 124 S. Ct. 619 (2003) to regulate redistricting activities. The only analysis or rationale for such regulation is set forth in the following single sentence of Draft B:

> "The outcome of the redistricting litigation will directly and significantly effect subsequent elections including decisions by individuals as to whether to become candidates."

According to the single-sentence analysis of Draft B, because redistricting litigation may effect future election, then redistricting activities must be regulated by the Act. Using such logic, what activities are not regulated by the Act? Sporting events? The weather? The stock market? What activity does not "effect" subsequent elections?

Under BCRA, there is no indication, either in the text or legislative history, that Congress intended BCRA to apply to fundraising activities and disbursements relating to redistricting purposes, which is an area that is the subject of longstanding interpretation by the Commission. The circumstances of AOR 2003-38 are similar to, if not identical to, the circumstances pertaining to the applicability of the Act which were recently addressed by the Commission in Advisory Opinion 2003-15. In Advisory Opinion 2003-15, the Commission confirmed its longstanding position set forth in numerous advisory opinions that money being raised and spent with respect to legal expense funds was not being raised and spent for the purpose of influencing a Federal election. In Advisory 2003-15, the

Commission concluded that there was no indication in the legislative history of BCRA that Congress intended that BCRA now bring legal expense funds within the purview of the Act. The same result should be obtained with respect to redistricting activities.

To suddenly regulate redistricting activities where such regulation is neither contemplated or authorized by BCRA or the Act, would exceed the Commission's authority. In promulgating advisory opinions, the Commission's duty is to explain to the members of the public what the law is, not what he or she thinks what the law ought to be. In other words, if a court were to adopt the rule proposed in Draft B, one would call this judicial activism at its worst.

Accordingly, we respectfully submit that Draft A adheres to the reality of the redistricting process and to the longstanding interpretation by the Commission with respect to redistricting activities, and this longstanding interpretation has not been changed by either the text or legislative history of BCRA.

Thank you for your consideration of our comments.

Sincerely,

Robert S. LaBrant
Senior Vice President, Political Affairs
and General Counsel