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AOR 2004-12

March 23, 2004

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

RE: AOR on behalf of Western State Party Committees

Dear Mr. Norton:

This Advisory Opinion Request is submitted on behalf of the following Democratic state party committees of the following states: Arizona, New Mexico, Nevada, Colorado, Utah, Wyoming, Idaho, Montana and Alaska ("the Committees"). The Committees seeks guidance as to how to establish a regional party committee in compliance with the Federal Election Campaign Act of 1971 ("FECA") as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA").

The committees wish to establish a regional party organization, the Democrats for the West ("DFW"), in order to provide the participating party committees with a regional entity to develop regional strategy and research and to assist the Committees in developing regional thematic message and campaign tactics for electoral activity at both the federal and non-federal levels. The Committees believe that the Western states share unique political attributes and values that are distinct from the rest of the country and wish to explore the opportunity to identify those attributes and successfully coordinate the development of those attributes with respect to message and strategy. The DFW entity would allow the Committees to build an organizational infrastructure to help ensure a stronger and more vital Democratic Party in the Western states.

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In general, the DFW would operate as follows:

1) Establishment

DFW would be financed, established, maintained and controlled solely by the Committees. No officer, agent or employee acting on behalf of any other organization, including any other state or national party committee will be involved in the establishment, maintenance or control of the organization.¹

2) Financing

DFW would propose to finance its activities as follows:

Federal Funds

The DFW federal account would be financed initially by transfers of federal funds from the Committees. The DFW also wishes to solicit other state and national party committees for federal transfers. The DFW would expect that such transfers would represent a modest portion of its fundraising totals. As its primary source of Federal revenue, the DFW wishes to solicit contributions from sources (i.e. individuals, Federal PACs) that are permissible under the Federal Election Campaign Act ("FECA").

Non-Federal Funds

The DFW would also like to establish and solicit contributions from sources that are not permissible under the FECA.² The use of such funds is described below in further detail. No

1 At this time the Committees have not developed an organizational infrastructure for DFW. Such decisions are contingent on the guidance received in connection with this request. However, the DFW has created two ad-hoc committees to assist in the development of the organization. First the DFW has created a founders committee of prominent westerners who have served as public officials who will serve as the spokespersons and public face of the DFW. Second, the DFW has established a steering committee of state party officers and other activities to assist in the creation of the DFW. A list of each committee is attached to this request.

2 The DFW acknowledges that the state laws of the requesting state party committees vary and recognize that the Commission does not have the jurisdiction to determine as to whether the activities proposed herein are permissible under the varying state laws of the participating committees. The DFW, where necessary, will obtain the requisite legal opinions from the appropriate state agencies regarding the permissibility of the participation and activities of any committee that is a member of the DFW.

officer, employee or agent acting on behalf of any national party committee, will solicit funds on behalf of the DFW, nor will any federal candidate or officeholder.

3) Activities

The DFW proposes to undertake the following activities:

Staff – The DFW may maintain a small, full-time staff to administer the organization. The Committees would also play a direct role in administering the organization.

Operations – The DFW would operate as an ordinary party organization which would generally incur the usual and normal administrative expenses, including, but not limited to, office rent, office supplies, computers, furniture, utilities, etc. The DFW would also likely retain professional consultants to undertake fundraising, polling, training and strategic functions.

Activities – The DFW would primarily serve as an organization that would permit the Committees to better identify regional issues and campaign strategies that are unique to the Western states. This would be accomplished through research, polling, training and periodic conferences among and between the Committees. It is anticipated that the activities of the DFW would not be specific to any particular candidate, and would be limited to issue and tactical polling, research and training. The DFW would not disseminate any public communications or any other activity that (1) expressly advocate the election or defeat of any federal candidate; (2) “promotes or supports or attacks or opposes” any federal candidate; (3) undertake any other direct electoral activity, including voter registration, voter identification or get-out-the-vote activity; or (4) direct, solicit or make any direct contribution to or expenditure on behalf of any federal candidate; or (5) make any transfers or contributions to any other federal political committee or party committee that are not members of the DFW.

Ultimately, any work product of the DFW with respect to its research and polling would either (1) be shared solely with the participating Committees of the DFW; (2) if permissible, shared with other state or local party committees or national party committees; or (3) publicized through press releases, or through a publicly available website maintained by the DFW.

Based upon the above, the Committees pose the following questions:

(1) Establishment

DFW intends to register as a political committee with the Commission once it has met the definition of committee as defined at 2 U.S.C. § 431(4)(A). Based upon the facts above, the Committees wish to confirm that the DFW itself would be treated as a "state committee" of a political party within the meaning of 11 C.F.R. § 100.14(a). It seems clear this should be the case. Each Committee that has established the DFW is itself a "state committee." The Commission's regulations provide that a "state committee" also includes "any entity that is directly or indirectly established, financed, maintained or controlled by that organization, as determined by the Commission." By determining that the DFW is a state committee, the Commission will allow for streamlined regulation of the DFW by ensuring that all of its activities are regulated consistently amongst the participating Committees (who have taken considerable time and effort to familiarize itself with the new requirements of the BCRA) and will ensure that state committees of a political party do not establish "unofficial" party committees that can operate outside of the regulatory scheme established by the BCRA and the FECA.

Consequently, the Commission should determine that the DFW is a "state committee" of a political party.

(2) Financing

As stated above, the DFW would initially be financed by transfers from the Committees. The DFW assumes that such transfers are permitted both by virtue of 11 C.F.R. §§ 102.6(a)(i) & (ii), as well as 11 C.F.R. § 110.3(c)(1). The DFW also believes, assuming that it is considered a "state committee," that it should be permitted to receive unlimited transfers of federal funds from other national or state committees pursuant to the sections cited above. It should be noted that the DFW will not undertake any "Levin Activities" as described in Subpart B of Part 300 of the Commission's regulations. Further, in the event that the DFW makes a transfer of funds to one of its participating Committees, it will admonish the committee that such funds may not be used for the federal portion of any allocable "Levin Activity." 11 C.F.R. § 300.34(a). Also, in the event of such transfers, to the extent that the DFW has raised funds through a "funds received" method (as described below) it will admonish the recipient committee that such funds must be segregated and not used for ANY Federal election activity. See 11 C.F.R. § 300.33(c)(3).

As stated above, the DFW wishes to solicit contributions from permissible sources under the FECA to finance its activities. The DFW seeks guidance as to the appropriate contribution limit to its Federal account. Therefore, the DFW poses the following questions:

- (a) What is the incoming contribution limit from persons into the federal account of the DFW?

It appears that there are two viable options.

Scenario 1 - The first scenario would be a straight \$10,000 per person annual limit for all contributions to DFW pursuant to 11.C.F.R. § 110.1(c)(5). Multi-candidate committees would be limited to a \$5,000 per calendar year for direct contributions pursuant to 11 C.F.R. § 110.2(c). FEC regulations do not appear to provide guidance as to whether each contribution would be proportionally allocable to each participating Committee's contribution limit for any contribution made directly to the DFW. Therefore, DFW requests clarification as to whether each contribution counts against the limit of each participating committee. If an allocation is required, what methodology should be used? Should each contribution be attributed proportionately to the participating Committees? What procedure should be utilized in the event that a contribution, when aggregated with contributions made directly to a participating Committee would cause a particular contributor to exceed their limit for the participating Committee. For example, if John Doe gave \$10,000 to the DFW but had already contributed \$10,000 directly to one of the participating committees, should the proportional share of the contribution be redistributed amongst the remaining participating Committees? Should it be refunded to the donor?

Scenario 2 - Since the DFW is merely an amalgamation of the participating Committees, would the DFW limit merely be the combined limit of all of the participating Committees? For example, if John Doe wanted to contribute the maximum allowable by law, could John Doe contribute up to \$37,500 (pursuant to 2 U.S.C. § 441a(a)(3)(B)) which would then be proportionally allocated to each participating Committee. Could a political committee (assuming it will not contribute directly to any participating Committee in the calendar year) contribute up to \$45,000 to the DFW to be equally allocated to each participating Committee?

- (b) **Could the DFW raise funds that are not subject to the prohibitions and limitations of the Act?**

The answer to this question clearly seems to be in the affirmative. The FECA, as amended by the Bipartisan Campaign Reform Act of 2002, permits political committees, including state party committees, to continue to raise and spend non-federal funds (funds that are not subject to the prohibitions and limitations of the FECA). See 11 C.F.R. § 300.37(a)(3)(ii). The only entities that are prohibited from raising non-federal funds are national party committees, as well as its officers or agents acting on behalf of the committee. 2 U.S.C. § 441i(a). Notwithstanding this prohibition, the DFW would not permit any non-federal funds to be solicited, directed or otherwise donated by or from any national party committee, or its officers or agents acting on behalf of the national committee. Furthermore, the DFW would not request any federal officeholder or candidate, or any agent acting their behalf, to solicit, direct or otherwise donate any non-federal funds to the DFW. Finally, it is not anticipated that the DFW would make any non-federal donations to the participating Committees or any other state or local party committee. However, in the event that such donations are made, the recipient committee would be admonished that the funds may not be designated as Levin Funds or otherwise be deposited into an account into which Levin Funds are raised.

- (c) **Notwithstanding the above, the DFW may wish to invite national party officers, employees or agents, as well as federal candidates or officeholders, including their agents, to appear as guest or featured speaker at DFW events. Such events will include meetings, conferences or trainings for which no contributions would be solicited. Other events may include fundraising events, or regional training sessions in which attendees may be required to make a contribution or pay a modest fee to attend. If the DFW follows the guidelines prescribed by 11 C.F.R § 300.64, could such persons participate in these events?**

(3) Activities

Based upon the above, assuming that (1) the Commission agrees that the DFW is a "state committee" of a political party, and (2) the DFW is permitted to raise and spend non-federal funds, the DFW requests clarification as to how to pay for the following activities³:

- (a) How should the DFW pay for its ordinary day-to-day operational activities?

The DFW believes that the most appropriate way for it to pay its ordinary operating expenses would through the allocation of federal and non-federal dollars pursuant to 11 C.F.R. § 106.7(d)(2). The DFW recognizes that some committees within the participating Committees have different allocation ratios during a particular cycle. Therefore, the DFW would propose that it use the higher allocation ratio that applies during the cycle (i.e. 36% federal in a Presidential cycle; 21% federal in a non-Presidential cycle).

- (b) How should the DFW pay for the costs of fundraising events?

The DFW believes the most appropriate method of paying the costs of fundraising would be governed by 11 C.F.F. § 106.7(d)(4). This would allow the DFW to pay for fundraising events on the "funds received" method. Thus, the costs of fundraising events would be the same ratio of the funds that are received in connection with a particular fundraising program. The DFW is mindful of the requirements of 2 U.S.C. § 441i(c) and 11 C.F.R. § 106.7(e)(4). The DFW, with one possible exception described below, does not intend to engage in any "Federal election activity." Therefore, in the unlikely event that it does so, it will ensure that any funds raised through the partial use of non-federal funds are not used for any federal election activity. Furthermore, as described above, in the event that the DFW transfers funds to any of the Committees, it will admonish that committee that such funds should not be used for any Federal Election Activity described in 11 C.F.R. § 100.24.

³ The analysis for this section assumes that the DFW should be treated in the same fashion as any other state party committee. Consequently, as a general matter, the Commission should apply its regulations at 11 C.F.R. § 106.7 to the activities discussed in the opinion request.

(c) How should the DFW pay for research and polling?

The DFW believes that research and polling should also be subject to the federal/non-federal ratio for administrative costs under 11 C.F.R. § 106.7(d)(2) as described above. Such research and polling would focus exclusively on thematic and issue research and would not focus on any particular federal candidate or officeholder. Furthermore, the results of the research and polling would be shared exclusively with the Committees or publicized as described above. The DFW would also like to seek guidance as to whether, and under what circumstances, the DFW could share its polling and research information with other state and local party committees, or with any national party committee.

(d) How should the DFW pay for meetings and conferences?

The DFW plans to hold conferences where the officers, employees, and agents associated with the Committees would meet to discuss regional strategies and themes. At these conferences, the DFW intends to hold training sessions for employees, volunteers and agents of the Committees to assist in implementing regional strategies and themes, as well as to provide training on basic campaigning skills. The DFW believes that such conferences and meetings would be governed by 11 C.F.R § 100.24(c)(3). In the Explanation and Justification of this section, the Commission explained that such activities may be paid for solely with non-federal funds. Explanation and Justification, Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49070 (July 29, 2002). It is not anticipated that any meeting or conference paid for in this manner will have any fundraising component. In the event that a fundraising event is scheduled around such meetings, the fundraising event will be paid for separately pursuant to the "funds received" method described above. Assuming that no fundraising, or other solicitation or direction of contributions occur at DFW meetings or conferences, the DFW would like to confirm that it could invite national and state party committee officers and agents, as well as federal candidates and officeholders to attend or speak at such events or conferences.

(e) How should the DFW pay for its employees?

Initially, the DFW expects that its operations would be staffed by outside professional consultants with support from the staff and officers of the Committees. However, if the DFW is successful, the DFW may, in the future, wish to hire permanent staff to operate the DFW or support its professional consultants. In the event that employees are hired directly by the DFW, the DFW wishes to confirm that payment of salaries and wages of such employees (including fringe benefits) would be governed by 11 C.F.R § 106.7(d)(1). Accordingly, for any employee who spends 25% or less of their time in a given month working on activities that are in connection with a federal election or federal election activities, such employee's salaries, wages and benefits would be paid for with non-federal funds. In the event that any employee spends more than 25% of any given month on activities that are in connection with a federal election or federal election activities, the employee's salaries, wages and benefits would be paid for solely with federal funds.⁴

The Committees wish to establish the DFW as soon as possible due to the fact that the 2004 campaign season has already begun. Therefore, we request that this opinion be expedited to the fullest extent possible. We have attempted to anticipate the nuances of the application of the FECA to our proposal, but, in the event that the Commission has any additional questions or request for additional information in connection with this Advisory Opinion Request, please contact me at (202) 479-1111. Thank you for your time and prompt attention to this matter.

Sincerely yours,



Neil Reiff
Counsel to the Committees

⁴ The Committees seek guidance as to whether it is permissible for the DFW to use Federal funds to pay employees who work in excess of 25% in a given month in connection with federal elections if such Federal funds had been raised through events where the costs of such events had been paid for with a combination of federal and non-federal funds through the use of the "funds received" method. See 11 C.F.R. § 106.7(d)(4).

Founders Committee

Former New Mexico Governor Toney Anaya
Former Governor and U.S. Interior Secretary Cecil Andrus of Idaho
Former Nevada Governor and U.S. Senator Richard Bryan
Bethine Church, widow of former U.S. Senator Frank Church of Idaho
Former Idaho Attorney General Larry EchoHawk
Former U.S. Senator Dennis DeConcini of Arizona
Former Utah Governor Cal Rampton
Former U.S. Representative Karen Shepherd of Utah
Former Wyoming Governor and U.S. Ambassador Mike Sullivan
Former U.S. Representative and Interior Secretary Stewart Udall
Former Alaska Lieutenant Governor Fran Ulmer
Former Denver Mayor Wellington Webb
Former U.S. Representative Pat Williams of Montana

Steering Committee

Broward Atwater - Wyoming activist
Ralph Becker - Utah state legislator
Carolyn Boyce - Chair - Idaho Democratic Party
Kyle DeBeer - Executive Director - Wyoming Democratic Party
Barry Dill - Arizona activist
Donald Dunn - Chair - Utah Democratic Party
Helen Foley - Nevada activist - Former state legislator
Bridget Gallegher - Executive Director - Alaska Democratic Party
Paul Hegarty - Executive Director - Arizona Democratic Party
Brad Martin - Executive Director - Montana Democratic Party
Jim Noel - New Mexico activist
J.W. Postal - Colorado activist
Bob Ream - Chair - Montana Democratic Party
Scott Sterling - Chair - Alaska Democratic Party
Carolyn Warner - Arizona activist
Nan Stockholm Walden - Arizona activist
Maria Weeg - Executive Director - Idaho Democratic Party



FEDERAL ELECTION COMMISSION

Washington, DC 20463

April 2, 2004

Neil P. Reiff, Esq.
Sandler, Reiff & Young, P.C.
50 E Street, S.E., Suite 300
Washington, D.C. 20003

Dear Mr. Reiff:

This refers to your letter dated March 23, 2004, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a plan to establish an entity to be known as Democrats for the West ("DFW"). The request is submitted on behalf of the Democratic state party organizations of Arizona, New Mexico, Nevada, Colorado, Utah, Wyoming, Idaho, Montana and Alaska ("the Committees").

You state that DFW will be a "regional party organization" that will provide the Committees with "a regional entity to develop regional strategy and research and to assist the Committees in developing regional thematic messages and campaign tactics for electoral activity at both the federal and non-federal levels" and will "allow the Committees to build an organizational infrastructure to help ensure a stronger and more vital Democratic Party in the Western states." DFW has created two ad-hoc committees to assist in the development of DFW, a Founder's Committee of prominent westerners who have served as public officials who will serve as the spokespersons and public face of DFW, and a Steering Committee of state party officers to assist in the creation of DFW. You state that DFW will not "disseminate any public communications or any other activity that (1) expressly advocate the election or defeat of any federal candidate; (2) "promotes or supports or attacks or opposes" any federal candidate; (3) undertake any other direct electoral activity, including voter registration, voter identification or get-out-the-vote activity; or (4) direct, solicit or make any direct contribution to or expenditure on behalf of any federal candidate; or (5) make any transfers or contributions to any other federal political committee or party committee that are not members of the DFW."

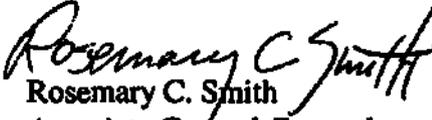
The Act authorizes the Commission to issue an advisory opinion request in response to a "complete written request" from any person with respect to a specific transaction or activity

by the requesting person. 2 U.S.C. 437f(a). Commission regulations explain that such a request "shall include a complete description of all facts relevant to the specific transaction or activity with respect to which the request is made." 11 CFR 112.1(c). Further information will be needed for your request to include a complete description of the relevant facts. Please provide responses to the following questions:

- (1) Have the Committees, the Founder's Committee and/or the Steering Committee for DFW agreed to any organic document (e.g. bylaws or articles of incorporation) for DFW? If so, please provide such document(s). If no such document(s) exist, please state or provide:
 - (a.) The date of organization of DFW;
 - (b.) The organizational form of DFW (e.g., corporation, section 527 organization, etc.); and
 - (c.) State whether any members of the Democratic National Committee ("DNC"), other than persons associated with the Committees (e.g., State Democratic chairs), are, or were, involved in the formation of, governance of, or supervision of, DFW, and describe the roles of such persons.
- (2) Will DFW perform any functions or activities that are currently performed by the DNC, or for which DFW will assume some of the responsibility from the DNC? Will DFW perform any functions or activities that are currently performed by the Western Regional Caucus of the Democratic Party, or for which DFW will assume some of the responsibility from that regional caucus? If so, please describe such functions or activities. Your response should include, but not be limited to, a description of any such assumed activities (e.g., assistance to State and local party organizations, promoting policy studies pertaining to the States in which the Committees operate, establishing and supporting a system of political research for those States, formulating statements of policy for those States, as well as those activities discussed on page three of your March 23 letter).
- (3) On page 3, under the paragraph headed "Activities," you state that DFW will not "direct, solicit or make any direct contribution to or expenditure on behalf of any federal candidate." Please describe what you mean by "direct contribution."
- (4) Please state whether DFW intends to pay for communications that republish campaign material prepared by a Federal candidate (11 CFR 109.37(a)(2)(i)) or for communications that refer to a clearly identified Federal candidate, is distributed within 120 days of a general or primary election, and is directed to voters in the jurisdiction of the clearly identified candidate (11 CFR 109.37(a)(2)(iii)).

Upon receipt of your responses, this Office will give further consideration to your inquiry. If you have any questions about the advisory opinion process or this letter, please contact Albert J. Kiss at 202-694-1650.

Sincerely,


Rosemary C. Smith
Associate General Counsel

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April 7, 2004

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OFFICE OF GENERAL
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Dear Ms. Smith:

This letter is in response to the Commission's letter of April 2, 2004 in which it requests additional information in connection with my letter dated March 23, 2004, on behalf of Democrats for the West ("DFW").

In response to your specific questions:

- (1) **Have the Committees, the Founder's Committee and/or the Steering Committee agreed to any organic document (e.g. bylaws or articles of incorporation) for DFW?**

No.

If no such document(s) exist, please state or provide:

- (a.) **The date of organization of DFW**

On March 24, 2004, the Committees announced the creation of the DFW, via press release, in conjunction with this request. The DFW will not raise or spend any funds until an affirmative opinion is received by the Commission.¹

¹ It should be noted that the Idaho and Utah Democratic Parties have incurred nominal costs associated with the exploratory phase of this project.

(b.) The organizational form of DFW

Since the DFW was established by state party committees it will clearly be organized under section 527 of the Internal Revenue Code.

(c.) State whether any members of the Democratic National Committee ("DNC"), other than persons associated with the Committees (e.g. State Democratic chairs), are, or were, involved in the formation of, governance of, or supervision of, DFW, and describe the roles of such persons.

Only one person involved with the formation of the DFW is a member of the DNC. Colorado activist, J.W. Postal is part of the DFW Steering Committee and is also a member of the DNC. Although Mr. Postal, at the recommendation of Colorado Democratic Party Chair, has been added to the DFW Steering Committee, Mr. Postal has had no involvement in the formation, governance or supervision of the DFW to date. In any event, the DFW is puzzled by this question. There does not appear to be any prohibition of members of a national committee of a political party² from participating in any other political activities. There is no reference to a "member" of a national party committee in either the Federal Election Campaign Act, as amended by the BCRA, or FEC regulations with respect to prohibited activities of national party committees. Those regulations only cover the activities of officers, employees or agents acting on behalf of a national party committee. See e.g. 11 C.F.R. § 300.10(c). Mr. Postal is neither an officer, employee or agent of the DNC, as defined in section 300.2(b)(1).

It should be further noted that one member of the Founders Committee, Wellington Webb, is an elected Vice Chair of the DNC. However, Mr. Webb's participation in the DFW came at the request of Chris Gates, Chair of the Colorado Democratic Party. Mr. Webb's participation in the DFW is based upon his position as former Mayor of Denver, and his prominence in the state of Colorado and other western states. Mr. Webb understands that his participation in the DFW may not be undertaken while acting on behalf of the DNC. Mr. Webb did not play a prominent role in the establishment of the DFW itself. Nor is Mr. Webb expected to play a prominent role in the governance or supervision of the DFW.

Other than Mr. Webb mentioned above, no officer, employee or agent of the DNC has or will play any role in the establishment, supervision or governance of the DFW.

² There are approximately 470 members of the Democratic National Committee, almost all of whom are active at the state and local levels of politics.

(2) Will the DFW perform any functions or activities that are currently performed by the DNC, or for which DFW will assume some of the responsibility from the DNC? Will DFW perform any functions or activities that are currently performed by the Western Regional Caucus of the Democratic Party, or for which DFW will assume some of the responsibility from that regional caucus? If so, please describe such functions or such assumed activities.

The DFW will not assume any responsibilities performed by any other organization. As stated in my letter of March 23rd, the DFW was formed in order for the participating committees to coordinate regional strategic research and planning. There was no attempt to supplant or supplement any other existing infrastructure within the national or state party structure.

(3) On page 3, under the paragraph headed "Activities," you state that the DFW will not "direct, solicit, or make any direct contribution to or expenditure on behalf of any federal candidate." Please describe what you mean by "direct contribution."

The word "direct" in this sentence is superfluous. The DFW does not intend to make any contribution to any federal candidate, either monetary or in-kind.

(4) Please state whether the DFW intends to pay for communications that republish campaign material prepared by a Federal candidate (11 C.F.R. § 109.37(a)(2)(i) or for communications that refer to a clearly identified Federal candidate, is distributed within 120 days of a general or primary election, and is directed to voters in the jurisdiction of the clearly identified candidate (11 C.F.R. § 109.37(a)(2)(iii)).

The DFW does not intend to pay for the republication of any campaign materials prepared by any Federal candidate, nor does it intend to pay for any public communication that refers to any federal candidate within 120 days of an election.³

If you have any additional questions or concerns, please call me at (202) 479-1111. Your expedited consideration of this request is most appreciated.

Sincerely,



Neil Reiff

³ Please note that 11 C.F.R. § 109.37(a)(2)(iii) only covers "public communications" and does not cover all types of communications (i.e. Internet, email).