

April 27, 2006

**AO DRAFT COMMENT PROCEDURES**

The Commission permits the submission of written public comments on draft advisory opinions when proposed by the Office of General Counsel and scheduled for a future Commission agenda.

Today, DRAFT ADVISORY OPINION 2006-13 is available for public comments under this procedure. It was requested by, Neil Reiff, Esq. on behalf of Dennis Spivak.

Proposed Advisory Opinion 2006-13 is scheduled to be on the Commission's agenda for its public meeting of Thursday, May 4, 2006.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00 noon (Eastern Time) on May 3, 2006.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

**CONTACTS**

Press inquiries: Robert Biersack (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2006-13, contact the Public Records Office at (202) 694-1120 or (800) 424-9530.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

**MAILING ADDRESSES**

Commission Secretary  
Federal Election Commission  
999 E Street, NW  
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Rosemary C. Smith  
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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

APR 27 P 2:59

April 27, 2006

**AGENDA ITEM**

For Meeting of: 5-04-06

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** Robert J. Costa *RJC*  
Acting Staff Director

**FROM:** Lawrence H. Norton *LHN*  
General Counsel

Rosemary C. Smith *RS*  
Associate General Counsel

Brad C. Deutsch *BCD*  
Assistant General Counsel

Jonathan M. Levin *JL*  
Senior Attorney

**Subject:** Draft AO 2006-13

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for May 4, 2006.

Attachment

1 **ADVISORY OPINION 2006-13**

2  
3 **Neil Reiff, Esquire**  
4 **Sandler, Reiff & Young**  
5 **50 E Street, S.E., Suite 300**  
6 **Washington, D.C. 20003**

**DRAFT**

7  
8 **Dear Mr. Reiff:**

9 **We are responding to your advisory opinion request on behalf of Dennis Spivack,**  
10 **concerning the application of the Federal Election Campaign Act of 1971, as amended (the**  
11 **"Act"), and Commission regulations to compensation received in connection with his work as an**  
12 **equity partner in a law firm while he is a candidate for Federal office. You ask whether the**  
13 **compensation paid to Mr. Spivack by his law firm will constitute a contribution to Mr. Spivack's**  
14 **candidacy for the U.S. House of Representatives in view of the fact that the time he devotes to**  
15 **his candidacy this year will most likely cause his productivity to be lower than that of previous**  
16 **years. The Commission concludes that, so long as the firm follows the practices of its long-**  
17 **established compensation plan, the firm's compensation to Mr. Spivack will not constitute a**  
18 **contribution to him or his authorized committee.**

19 ***Background***

20 **The facts presented in this advisory opinion are based on your letters received on**  
21 **February 15 and March 10, 2006.**

22 **Mr. Spivack is a candidate for the Democratic nomination for the at-large seat in the U.S.**  
23 **House of Representatives from Delaware.<sup>1</sup> He currently practices law at the firm of Morris,**

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<sup>1</sup> **On January 31, 2006, Mr. Spivack filed his Statement of Candidacy, and his principal campaign committee, Spivack for Congress, filed its Statement of Organization.**

1 James, Hitchens & Williams LLP (the "Firm"). He joined the Firm in 1999 and became an  
2 equity partner in 2001.<sup>2</sup> Although Mr. Spivack does not intend to take a full leave of absence  
3 during his campaign, he expects to devote a considerable amount of time to the campaign,  
4 particularly during the Summer and Autumn of 2006. While he intends to continue to service  
5 clients and to refer new clients to the Firm during the campaign, he also anticipates that his  
6 productivity will not be as high as in previous years.

7 Under the Firm's compensation plan administered by the Firm's Compensation  
8 Committee, an equity partner's compensation consists of three types of income: (1) basic  
9 compensation; (2) individual incentive compensation; and (3) firm incentive compensation. The  
10 Firm's compensation plan has been in effect for at least 20 years.

11 "Basic compensation" is paid out of 50 to 60 percent of the Firm's projected net income.  
12 For each equity partner, "basic compensation" is reset by the Firm's Compensation Committee in  
13 January of every odd-numbered year and remains in effect for two years until the next reset.  
14 "Basic compensation" is based on a look-back at each partner's productivity level for the six  
15 years preceding the reset and, once reset, does not change until the next reset two years later. In  
16 addition, an aggregate amount not to exceed five percent of the Firm's projected net income is  
17 used to adjust upwardly the "basic compensation" of equity partners for factors not recognized by  
18 the productivity calculation. This upward adjustment is considered part of "basic compensation"  
19 and is also fixed at the reset. The factors determining the upward adjustment relate to

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<sup>2</sup> As of the end of 2005, there were 24 equity partners in the Firm.

1 participation in Firm leadership and marketing.<sup>3</sup> You indicate that Mr. Spivack's status as a  
2 Federal candidate "will not impact any upward adjustments he may receive."

3 An equity partner's "basic compensation" reflects the minimum amount of compensation  
4 that will be received by that partner. It is intended to provide stability for equity partners by  
5 providing a minimum compensation during the natural ebb and flow of a partner's practice, and  
6 the six-year look-back provides for gradual increases and decreases in "basic compensation."  
7 Once set for a two-year period, "basic compensation" for an equity partner has never been  
8 reduced due to reduced productivity within that period. Nevertheless, reductions in productivity  
9 would negatively impact the next reset of a partner's "basic compensation" after the end of such  
10 two-year period.

11 The second type of partner income, individual incentive compensation ("IIC"), is based  
12 on an equity partner's productivity during the current year, rather than on the six-year look-back  
13 period used to determine "basic compensation." Specifically, IIC is based on fixed percentages  
14 of the fees received by the Firm from (i) clients obtained by the partner and (ii) work actually  
15 performed by the partner, regardless of who obtained the client. The extent to which the dollar  
16 amount of those percentages exceeds a partner's "basic compensation" determines the proportion  
17 of the Firm's available IIC funds that will be paid to that partner. IIC is paid to each partner  
18 shortly after the end of the year. The aggregate of IIC paid to the equity partners may not exceed  
19 20 percent of the Firm's net income. Depending upon the extent to which campaign activities

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<sup>3</sup> Specifically, the following factors are considered in the determination of the upward adjustment: (i) participation in Firm management; (ii) collaborative marketing activities promoting the Firm which do not result in direct "production credits" for determining a partner's individual incentive compensation; (iii) effective leadership of, or extraordinary contribution to, the Firm; (iv) extraordinary efforts to enhance the productivity of a practice group within the Firm; and (v) extraordinary efforts to mentor and train associates.

1 result in a reduction in Mr. Spivack's productivity, he may receive lower IIC for 2006 than for  
2 previous years, or no IIC at all.

3 The third type of partner income, "firm incentive compensation," is drawn from the  
4 balance of the Firm's net income (approximately 20 percent of the Firm's net income) and is  
5 distributed to each equity partner in the proportion that his or her "basic compensation" bears to  
6 the aggregate "basic compensation" of all equity partners. Hence, as with "basic compensation,"  
7 no equity partner has ever had his "firm incentive compensation" reduced due to reduced  
8 productivity within a given two-year "basic compensation" period.

9 Equity partners receive monthly draws in accordance with a schedule based on the  
10 amount of the partner's "basic compensation." In addition, distributions of "firm incentive  
11 compensation" are typically made in June, August, September, and December. By the end of the  
12 year, each partner is paid approximately 80 percent of his or her 2006 income (reflecting "basic  
13 compensation" and "firm incentive compensation"), and the balance, which generally reflects  
14 IIC, is paid the following year in two installments, one in January and one in April.

15 During 2006, Mr. Spivack will receive his normal "basic compensation" and "firm  
16 incentive compensation" payments. If Mr. Spivack is elected to the House of Representatives, he  
17 will work at the Firm at least until the end of 2006. Regardless of whether he is elected and  
18 leaves the Firm, or is defeated and remains an equity partner with the Firm, he will be entitled to  
19 be paid his IIC for 2006 (if any) in January and April 2007. If he is defeated, and remains an  
20 equity partner at the Firm, his basic compensation for the 2007-2008 period will be reset in  
21 January 2007, reflecting any reduced productivity in 2006.

1 ***Question Presented***

2 ***Will the compensation paid to Mr. Spivack by the Firm, in accordance with the Firm's***  
3 ***compensation plan, constitute a contribution to Mr. Spivack or his authorized campaign***  
4 ***committee?***

5 ***Legal Analysis and Conclusions***

6 **No, so long as Mr. Spivack is compensated in accordance with the Firm's established**  
7 **compensation plan, the Firm's compensation to Mr. Spivack will not constitute a contribution to**  
8 **him or his authorized committee.**

9 **The term "contribution" is defined in the Act and Commission regulations to include**  
10 **"any gift, subscription, loan, advance, or deposit of money or anything of value made by any**  
11 **person for the purpose of influencing any election for Federal office."<sup>4</sup> 2 U.S.C. 431(8)(A)(i); 11**  
12 **CFR 100.52(a). Under Commission regulations implementing the Act's prohibition on the**  
13 **"personal use" of campaign funds, 2 U.S.C. 439a, a third party's payment of a candidate's**  
14 **expenses that would otherwise be deemed a "personal use" under 2 U.S.C. 439a(b)(2) is**  
15 **considered a contribution by the third party unless the payment would have been made**  
16 **"irrespective of the candidacy." 11 CFR 113.1(g)(6). The Commission's regulations provide**  
17 **that certain types of employment-related compensation are considered to be payments made**  
18 **"irrespective of the candidacy":**

19 **(iii) Payments for that expense were made by the person making the payment before the**  
20 **candidate became a candidate. Payments that are compensation shall be considered**  
21 **contributions unless –**

22  
23 **(A) The compensation results from *bona fide* employment that is genuinely**  
24 **independent of the candidacy;**

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<sup>4</sup> As a partnership, the Firm may not make a contribution to any Federal candidate or a candidate's authorized committee in excess of \$2,100 per election. 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b)(1) and 110.1(e).

1  
2 (B) The compensation is exclusively in consideration of services provided by the  
3 employee as a part of this employment; and  
4

5 (C) The compensation does not exceed the amount of compensation which would  
6 be paid to any other similarly qualified person for the same work over the  
7 same period of time.  
8

9 11 CFR 113.1(g)(6)(iii).  
10

11 The Firm's compensation plan is a hybrid formula that takes into account (i) historical  
12 productivity levels of each equity partner ("basic compensation" and "firm incentive  
13 compensation"); (ii) each equity partner's participation in Firm leadership and marketing that is  
14 not recognized in the productivity calculations (upward adjustments to the "basic  
15 compensation"); and (iii) each equity partner's role in generating revenue for the Firm in the  
16 current year by originating and servicing clients during the year (IIC). So long as Mr. Spivack is  
17 compensated in accordance with the Firm's compensation plan, his compensation will satisfy the  
18 three criteria in 11 CFR 113.1(g)(6)(iii).

19 Under the usual and normal application of the Firm's compensation plan, Mr. Spivack's  
20 compensation will result from *bona fide* employment that is genuinely independent of his  
21 candidacy. See 11 CFR 113.1(g)(6)(iii)(A). Mr. Spivack has been an equity partner in the Firm  
22 for five years, has worked regularly for the Firm during those years and has been, and will  
23 continue to be, paid in accordance with the Firm's compensation plan. He intends to continue, as  
24 an equity partner, to work for the Firm this year at a reduced level in a manner contemplated by  
25 the Firm's compensation plan, which "is designed to handle all situations regarding the short-  
26 term fluctuation or reduction of productivity by any partner in the Firm," including leaves of  
27 absence to deal with personal and family issues. Historically, the Firm has reduced  
28 compensation for equity partners under its compensation plan. For example, one partner's

1 billable hours were reduced significantly due to personal reasons, and his overall compensation  
2 was reduced by approximately 20 percent over the past several years as a result.

3 Under the usual and normal application of the Firm's compensation plan, compensation  
4 to Mr. Spivack will be exclusively in consideration of services provided by him as part of his  
5 employment. See 11 CFR 113.1(g)(6)(iii)(B). Productivity calculations for determining an  
6 equity partner's "basic compensation" and "firm incentive compensation" are based on objective  
7 criteria and are unrelated to a partner's political candidacy. See Advisory Opinion 2004-08  
8 (American Sugar Cane League). Further, Mr. Spivack's candidacy will not result in any upward  
9 adjustment to his "basic compensation." Thus, "basic compensation" and "firm incentive  
10 compensation" are paid exclusively in consideration of services provided by Mr. Spivack as part  
11 of his employment. Although "basic compensation" and "firm incentive compensation" for Mr.  
12 Spivack will not be reduced *during* 2006 because of any reduced productivity in 2006, these  
13 types of compensation will be affected by his reduced 2006 productivity if Mr. Spivack remains  
14 with the Firm when his "basic compensation" is reset in January 2007 for the next two-year  
15 period.<sup>5</sup> Moreover, Mr. Spivack's IIC for 2006 will be affected by his reduced 2006  
16 productivity, regardless of whether he remains with the Firm beyond 2006.

17 Finally, based on the normal application of the Firm's compensation plan, the

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<sup>5</sup> This is no different from the effect on the compensation of any other equity partner with reduced productivity during 2006. Moreover, although Mr. Spivack will not experience a reduction in subsequent "basic compensation" and "firm incentive compensation" if he is elected and leaves the Firm at the end of 2006, he will be in no different position from any other equity partner who leaves the Firm at the end of a year.

1 compensation to Mr. Spivack would satisfy 11 CFR 113.1(g)(6)(iii)(C). Although the "basic  
2 compensation" and firm incentive compensation" paid to Mr. Spivack during calendar year 2006  
3 will not be reduced, he will be paid the same as any equity partner with the same past  
4 productivity and upward adjustment factors. In addition, he will be subjected to the effects of  
5 decreased productivity in his IIC for 2006 and in the reset of his "basic compensation" in January  
6 2007, in the same manner as any other equity partner with similarly decreased productivity  
7 during 2006.

8 Based on the foregoing analysis, the Commission concludes that the Firm's compensation  
9 to Mr. Spivak will be made irrespective of his Federal candidacy and, hence, will not constitute a  
10 contribution.

11 This response constitutes an advisory opinion concerning the application of the Act and  
12 Commission regulations to the specific transaction or activity set forth in your request. See 2  
13 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or  
14 assumptions presented, and such facts or assumptions are material to a conclusion presented in  
15 this advisory opinion, then the requestor may not rely on that conclusion as support for its  
16 proposed activity.

17 Sincerely,

18  
19  
20 Michael E. Toner  
21 Chairman

22  
23 Enclosure (AO 2004-08)