# SANDLER, REIFF & YOUNG, P.C.

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AOR 2006-13



February 15, 2006

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

RE: <u>AOR on Behalf of Dennis Spivack</u>

Dear Mr. Norton:

This Advisory Opinion Request is submitted on behalf of Dennis Spivack. Mr. Spivack intends to seek the Democratic nomination for at large member of the United States House of Representatives for the State of Delaware. Specifically, Mr. Spivack seeks confirmation that compensation received in connection with his work as an equity partner in his law firm will not be considered a contribution by his law firm to him or his authorized campaign committee, but rather, *bona fide* compensation in accordance with 11 C.F.R. § 113.1(g)(6)(iii).

## FACTS

On February 1, 2006, Dennis Spivack filed Forms 1 and 2 with the Commission that indicate that he is a candidate for the Democratic nomination for the House of Representatives for the State of Delaware. Mr. Spivack intends to make a formal announcement regarding his candidacy in March 2006. The primary election for Delaware is on September 12, 2006. If Mr. Spivack receives the Democratic nomination, the general election would be on November 7, 2006.

Mr. Spivack currently practices law at the law firm of Morris, James, Hitchens & Williams LLP ("MorrisJames" or "Firm"). Mr. Spivack has been a partner of the Firm since he joined the Firm in 1999; he became an equity partner upon the earliest possible date which was as of January 1, 2001. Mr. Spivack has been actively engaged in the practice of law for more than thirty years. Prior to joining MorrisJames, Mr. Spivack served as a Deputy Attorney General for the State of Delaware and was first an associate and then an equity partner at other

Delaware law firms. Mr. Spivack currently practices in the Firm's real estate practice group. Among equity partners, Mr. Spivack's level of productivity can be summarized as follows:

| Year | Number of Equity Partners with Productivity Higher Than Mr. Spivack | Number of Equity Partners with Productivity Lower Than Mr. Spivack |
|---|---|---|
| 2001 | 9 | 12 |
| 2002 | 15 | 8 |
| 2003 | 10 | 13 |
| 2004 | 16 | 7 |
| 2005 | 5 | 18 |

Although Mr. Spivack does not intend to take a full leave of absence from the Firm to run for office, Mr. Spivack expects that he will devote a significant amount of time to his campaign especially as he approaches the Summer and Fall of 2006. Notwithstanding, Mr. Spivack intends to, on a part-time basis, service clients and continue to refer new clients to the Firm during his campaign. However, Mr. Spivack believes that his productivity level will not be as high as it was in prior years.

The compensation plan for equity partners at MorrisJames consists of three tiers. First, the Firm sets a "basic compensation". The aggregate of basic compensation is designed to constitute approximately 50 to 60% of the Firm's projected net income. Basic compensation is reset by the Firm Compensation Committee in January of every odd-numbered year and remains in effect for two years. Basic compensation is based upon a look back at the partner's productivity level for the six years preceding the reset and does not include the partner's productivity level within the two years that the basic compensation will be paid.[1] In addition, an aggregate amount not to exceed 5% of projected net income is used to adjust the basic compensation of equity partners for factors which are not recognized by the productivity calculation. In the 2005 reset of basic compensation, Mr. Spivack received 2.7% of this aggregate adjustment. Twenty-four partners participated in this subjective adjustment. The basic compensation for each equity partner recommended by the Compensation Committee is approved by a vote of the equity partners.

This basic compensation amount reflects the minimum amount of compensation to be received by an equity partner.[2] Ultimately, the plan attempts to provide stability for equity partners by providing a minimum compensation during the natural ebb and flow of the lawyer's practice, and the six-year look-back provides for gradual increases and decreases in basic compensation. Since the creation of this compensation system, it is our understanding that no equity partner

1 Basic compensation is reduced for partners who have not been at the Firm for at least six years.
2 It should be noted that many of Mr. Spivack's clients are billed on a flat-fee basis and not on an hourly basis.

has ever had their basic or firm incentive compensation reduced (firm incentive compensation is described below), However, several years ago, an equity partner was moved to non-equity status due to his failure to remain productive over a several year period. In addition, there were other non-productive factors considered which led to the change in status.

The second tier of compensation, "individual incentive compensation," is designed to compensate for individual production beyond what is necessary to meet basic compensation. An equity partner is eligible for individual incentive compensation if the partner's production credits exceed the amount of the partner's basic compensation. Production credits are the sum of 25% of a partner's origination credits (fees received by the Firm from clients originated by the partner regardless of whether another attorney does the work), and 75% of a partner's service credits (total of fees received by the Firm for work actually performed by the partner regardless of whether another attorney originated the work). Each partner's share, if any, of individual incentive compensation is determined by the proportion of that partner's incentive credits (the extent which production credits exceed the partner's basic compensation) bears to the aggregate of incentive credits for all equity partners having incentive credits. The aggregate of individual incentive compensation shall not exceed 20% of the Firm's net income. Mr. Spivack expects that his production credits for 2006 will equal or exceed his basic compensation level.

The third tier of compensation is Firm incentive compensation. The balance of net income (approximately 20% of Firm net income in 2005) is distributed to each equity partner in the proportion that the basic compensation of such equity partner bears to the aggregate basic compensation of all equity partners.

Equity partners at MorrisJames receive monthly draws in accordance with a draw schedule tied to the amount of a partner's basic compensation. In addition, distributions of current-year income are typically made in June, August, September and December. Such distributions in the aggregate total approximately 15% to 20% of the Firm's net income, and are distributed to each partner in the proportion that the basic compensation of such equity partner bears to the basic compensation of all equity partners. Generally, by the end of a year, each partner is paid approximately 80% of the partner's projected income, and the balance (which generally reflects "individual incentive compensation") is paid the following year in two installments (January and April).

Ultimately, the MorrisJames compensation plan is a hybrid formula that takes into account historical productivity levels of the equity partner, to a limited extent, non-monetary contributions to the Firm by the equity partner, as well as the equity partner's role in generating revenue for the Firm in the current year, both by originating and servicing of clients during the existing calendar year.

In the event that Mr. Spivack is successful in winning a seat in the United States House of Representatives, Mr. Spivack anticipates that he would terminate his partnership with MorrisJames by the end of 2006 and would be entitled to basic compensation, Firm incentive compensation, and individual incentive compensation if his production credits exceed his basic compensation. In addition, he would also receive payment of his capital account, and a payment for receivables and work in progress. In the event that Mr. Spivack is unsuccessful in his campaign for the House of Representatives, Mr. Spivack intends at this time to continue the practice of law at MorrisJames. It is assumed that any reduction in productivity encountered by Mr. Spivack in 2006 would be reflected in (1) a lower basic compensation for 2007 and beyond as established by the compensation formula and (2) a reduction or elimination of individual incentive compensation to be received in connection with work performed in 2006.

For the years 2005 and 2006, Mr. Spivack's basic compensation was set at $195,000. For 2005, Mr. Spivack will receive $73,651 in individual incentive compensation, and $64,771 in Firm incentive compensation. Thus, for 2005, individual incentive compensation accounted for approximately 22% of Mr. Spivack's total compensation, and Firm incentive compensation accounted for approximately 19% of Mr. Spivack's total compensation. Equity partners at MorrisJames are required to pay for their own benefits, including health, disability and life insurance out of their own compensation.[3] Each equity partner can maintain a 401(k) account which is funded solely by that equity partner; there is not a matching Firm contribution.

In the event that Mr. Spivack's productivity is reduced by his campaign activity, the existing MorrisJames compensation formula will reflect that reduction by lowering or eliminating his share of the individual incentive compensation plan, but the amount of his basic compensation and his share of the Firm incentive compensation would be unaffected by the decrease in productivity. Mr. Spivack wishes to confirm that the MorrisJames compensation formula complies with the requirements of 11 C.F.R. § 113.1(g)(6)(iii).

## DISCUSSION

The Federal Election Campaign Act limits contributions from partnerships to $2,100 per election. 2 U.S.C. § 441a(a)(1)(A). However, payments received by a candidate for *bona fide* employment are not subject to the limitations of section 441a. See 11 C.F.R. § 100.33 & 113.1(g)(6)(iii).

3 The Firm maintains a Keogh and 401(k) plans. In 2005, partners over the age of 50 were able to contribute up to approximately $33,000 to these plans.

In determining whether funds are received in connection with *bona fide* employment, the Commission's regulations look at three factors:

(1) whether the compensation results from *bona fide* employment that is genuinely independent of the candidacy;
(2) the compensation is exclusively in consideration of services provided by the employee as part of this employment; and
(3) the compensation does not exceed the amount of compensation which would be paid to any other similarly qualified person for the same work over the same period of time.

11 C.F.R. § 113.1(g)(6)(iii)

The Commission has previously considered whether an equity partner who takes a leave of absence to work on political campaigns or run for federal office may receive compensation during such leaves of absence. For example, in FEC Advisory Opinions 1978-6 and 1980-115, the Commission concluded that a failure to reduce compensation for an attorney who runs for federal office was unlawful where the compensation system is based, at least, partially on the number of hours worked by the partner. By contrast, in Advisory Opinions 1979-58 and 1980-107, the Commission ruled that in instances where compensation is not tied to billable hours, that a reduction in compensation would not be required if the firm compensation plan was not based upon billable hours.

Taken as a whole, the MorrisJames compensation plan ensures that each equity partner earns a minimum basic compensation by taking into accounts several factors that reward equity partners for their historical productivity, and other non-financial contributions to the Firm. Thus, a review of the compensation plan of MorrisJames makes clear that the pre-established compensation plan for equity partners complies with Commission regulations and any compensation received by Mr. Spivack during 2006, in accordance with the compensation plan, would be consistent with the Commission's regulations and Advisory Opinions and would not result in an excessive contribution by MorrisJames to Dennis Spivack or Spivack for Congress during his campaign for Congress.

Specifically, the MorrisJames three-tiered compensation plan is designed to reward equity partners who have participated in the long-term success of the Firm by ensuring that they are provided with a minimum basic compensation regardless of their productivity during a two-year compensation cycle. As of 2006, Mr. Spivack had been a partner with the Firm for more than six years and an equity partner for more than five years. Further, to a limited extent, the plan rewards other intangible contributions to the Firm in its basic compensation package.

The Firm's compensation plan is not tied to "billable hours"; instead, the plan ties the most substantial portion of a partner's compensation package to a six-year look-back at production credits on behalf of the Firm for work that is originated by the partner regardless of who performs the work and serviced by the partner regardless of who originated the work. To the extent that an equity partner does not adequately provide such production, the partner's individual incentive compensation (typically, approximately 20% of total compensation) may either be reduced or completely eliminated as set forth in the plan. Thus, in order to qualify for individual incentive compensation, a partner's "production credits" must be greater than the partner's basic compensation. Therefore, to the extent Mr. Spivack does not meet minimum productivity levels, he may be denied or receive reduced compensation through the Firm's individual incentive compensation plan which, for 2005, represented 22% of Mr. Spivack's total compensation.

Regardless of whether Mr. Spivack intends to continue to practice law, either full or part time throughout his campaign, we believe that the MorrisJames compensation plan will adequately reduce Mr. Spivack's compensation in connection with his 2006 activities to account for any time that Mr. Spivack otherwise devotes to his 2006 campaign for the House of Representatives.

Thank you for your time and prompt attention to this matter. If you have any questions regarding this request, feel free to contact me at (202) 479-1111.

Sincerely yours,

Neil Reiff
Counsel to Dennis Spivack

MorrisJames
DELAWARE

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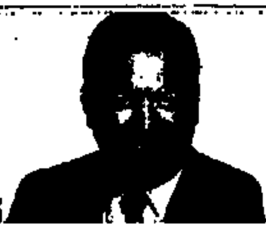

## **DENNIS SPIVACK** PARTNER

Dennis Spivack is a partner in the Real Estate Practice Group in the Wilmington and Dover, Delaware offices. He concentrates on real estate acquisitions, development and finance, tax credit transactions involving affordable housing projects, commercial leasing and commercial law matters. Mr. Spivack received a Bachelor of Arts degree, *magna cum laude*, from the University of Pennsylvania in 1969, and his J.D. degree from the University of Michigan Law School in 1975.

Mr. Spivack served as a Deputy Attorney General in the State Attorney General's Office, and was with the law firms of Schnee & Castle, and Prickett, Jones, Elliott, Kristol & Schnee before joining Morris, James, Hitchens & Williams LLP. He has represented a diverse group of clients including the Delaware State Housing Authority in connection with tax credit transactions; the Apartment Council in connection with the drafting of the current Landlord/Tenant Code; LaSalle Partners; and various local developers, commercial brokers and businesses.

Mr. Spivack has donated his services to numerous charitable endeavors. He has worked with The Wellness Community-Delaware, the Komen Foundation and the Breast Health Institute.

He served two tours of duty in Southeast Asia as an officer in the U.S. Navy prior to entering law school. He is admitted to practice law in Delaware and is a member of the American and Delaware State Bar Associations.

**Practice Focus**
Real Estate Law

**Bar Admissions**
Delaware

**Memberships**
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| | | |
|---|---|---|
| **Jonathan Levin /FEC/US** | To | reiff@sandlerreiff.com |
| 02/23/2006 06:39 PM | cc | Brad Deutsch/FEC/US@FEC |
| | bcc | |
| | Subject | Request on Behalf of Dennis Spivack- Questions |

On Wednesday afternoon, February 22, Brad Deutsch and I engaged in a phone conversation with you pertaining to your request for an advisory opinion, dated February 15, on behalf of Dennis Spivack. Brad and I asked you a number of questions in order to clarify certain information in the request letter and to supplement that information. At your request, we are putting those questions in writing.

1. Please state the factors that the Firm uses in determining the "upward adjustment" to a partner's "basic compensation" figure. Will the fact that Mr. Spivack was a Congressional candidate in 2006 have any impact on his upward adjustment?

2. Other than the equity partner described on the top of page 3 of your letter, please describe the changes in compensation for partners in circumstances similar to those of Mr. Spivack, *e.g.* , where the partner worked part-time for a period of time or where the partner's productivity was otherwise reduced. Include in your description any pay out compensation for those partners who left at the end of such a year, as well as for those who stayed.

3. Please describe more clearly, using an example, how the Firm determines "individual incentive compensation" (IIC) for a partner.

4. On the top of page 4 of the letter, you refer to the compensation that Mr. Spivack will receive if he leaves the Firm at the end of 2006 because of his election to Congress. You indicated in our conversation that Mr. Spivack would receive IIC for his work in 2006 if his production credits exceed his basic compensation. Please explain whether he will receive IIC in advance of January and April 2007, and how such IIC will be determined if the Firm does not make its determinations of the IIC for each partner until early 2007. Explain how the Firm has treated the IIC distribution in other situations where a partner has left before the normal January and April distribution dates.

During the conversation, we also discussed the need for clarification as to a few smaller points. Specifically, these were: (a) how long the current compensation plan has been in effect; (b) whether other partners had run for elective office and how their compensation was affected under the current plan; and (c) a confirmation that basic and firm incentive compensation has never been reduced for any partner *within any two-year period* after the Firm's determination of such compensation based on the six-year lookback.

Upon receipt of your responses, the Office of General Counsel will give further consideration to your request for an advisory opinion.

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March 10, 2006

**VIA EMAIL**

Jonathan Levin
Office of the General Counsel
999 E Street, NW
Washington, DC 20463

Dear Mr. Levin:

In response to your emailed questions of February 23, 2006:

1) The following factors are considered when determining any "upward adjustment" to basic compensation:

   a) Participation in Firm management;
   b) Collaborative marketing activities promoting the firm which no not result in direct production credits for that partner;
   c) Effective leadership of, or extraordinary contribution to, the Firm;
   d) Extraordinary efforts to build, expand or enhance the productivity of a practice group within the firm; or
   e) Extraordinary efforts to mentor and train associates.

Mr. Spivack's status as a federal candidate will not impact any upward adjustments he may receive.

2) As noted in our request letter, no partner has ever had any reduction to basic or firm compensation due to reduced productivity within the two year basic compensation period period. Of course, reductions in production may have negatively affected a partner's reset of basic compensation at the end of any given two-year period. By way of examples, one equity partner has seen his hours reduced to 800 to 1000 hours per year for personal reasons. Based upon the regular operation of the compensation formula, the partner has seen an approximate 20% reduction in overall compensation over the past several years. In another example, two equity partners reduced their productivity to write a treatise on Limited Liability Companies. During this period, their basic compensation was not reduced within the original two-year basic compensation period that they originally took leave to write the treatise. It is our understanding that one of the partners did not see any degradation of their productivity. However, the other partner did see a long term drop in productivity as a result of the book project as well as for unrelated personal reasons. Of course, any adjustments to their compensation resulted due to the ordinary application of the compensation formula itself. In several cases, partners have taken short and long term leaves of absence over the years to handle personal and family issues. In no case was the basic compensation for any partner reduced for lowered productivity until the next two-year reset of basic compensation. As a general matter, the Firm compensation formula is designed to handle all situations regarding the short-term fluctuation or reduction of productivity by any partner in the Firm.

3) Attached is an example of how the firm compensation system is administered.

4) In general, the firm does not pay individual incentive compensation (IIC) until the end of the applicable calendar year regardless of whether a partner leaves the firm prior to the end of any given year. Thus, Mr. Spivack will be paid on the same schedule as other partners regardless of whether he leaves the firm before the end of the year. Notwithstanding, Mr. Spivack intends to work at the Firm at least until the end of this year if he is successful in winning the November general election.

With respect to the last three questions in your email:

a) The plan has been in effect for at least 20 years.
b) No partner has run for federal office at the firm. It is believed that partners have run for state or local office over thirty years ago, prior to the institution of the current compensation plan.
c) As stated above, no partner has ever received reduced basic or firm compensation due to a reduction of production within any two-year period after the Firm's determination of compensation based upon the six-year lookback.

Let me know if you have any additional questions.

Sincerely,

Neil Reiff

**MORRIS, JAMES, HITCHENS & WILLIAMS LLP**
**EQUITY PARTNER COMPENSATION EXAMPLE FOR FEC**

| PARTNER | BASIC COMPENSATION | PERCENT SHARE | PRODUCTION CREDITS | INCENTIVE CREDITS | INCENTIVE PERCENT | INCENTIVE COMP SHARE | BONUS PERCENT | BONUS COMP SHARE | (A) TOTAL COMP. |
|---|---|---|---|---|---|---|---|---|---|
| A | $ 248,000 | 17.43% | $ 565,017 | $ 317,017 | 13.32% | $ 53,274 | 17.43% | $ 30,848 | $ 332,122 |
| B | 184,000 | 12.93% | 419,516 | $ 235,516 | 9.89% | 39,578 | 12.93% | 22,887 | 246,465 |
| C | 174,000 | 12.23% | 283,436 | $ 109,436 | 4.60% | 18,391 | 12.23% | 21,643 | 214,034 |
| D | 247,000 | 17.36% | 730,319 | $ 483,319 | 20.31% | 81,221 | 17.36% | 30,723 | 358,944 |
| E | 136,000 | 9.56% | 473,857 | $ 337,857 | 14.19% | 56,777 | 9.56% | 16,916 | 209,693 |
| F | 165,000 | 11.60% | 569,009 | $ 404,009 | 16.97% | 67,893 | 11.60% | 20,524 | 253,417 |
| G | 269,000 | 18.90% | 762,102 | $ 493,102 | 20.72% | 82,865 | 18.90% | 33,460 | 385,325 |
| TOTAL | $ 1,423,000 | 100.00% | $ 3,803,256 | $ 2,380,256 | 100.00% | $ 400,000 | 100.00% | $ 177,000 | $ 2,000,000 |

BASIC COMPENSATION = Compensation Committee determination based upon 6-year look back
PERCENT SHARE = Relationship of each equity partner's Basic Compensation to the Total Basic Compensation
PRODUCTION CREDITS = The total cash receipts for each partner for the year, calculated at 25% of each partner's origination plus 75% of each partner's service credits.
INCENTIVE CREDITS = The difference between each partner's Production Credits and his/her Basic Compensation
INCENTIVE PERCENT = The relationship of each equity partner's Incentive Credit number to the Total Incentive Credits of all partners.
INCENTIVE COMP SHARE = The application of each equity partner's Incentive Percent to 20% of the firm's Net Income for the Year (here assumed to be 20% of $2,000,000).
BONUS PERCENT = Same as Percent Share from Column #2
BONUS COMP SHARE = The application of the Percent Share to the firm's Net Income in excess of the Total Basic Compensation and the Total Incentive Comp Share.

**Partner Net Income Example for FEC**
**My Documents**
**3/1/2006**