



FEDERAL ELECTION COMMISSION
Washington, DC 20463

April 25, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-6

Lance H. Olson
Olson, Connelly, Hagel, Fong & Leidigh
300 Capitol Mall, Suite 350
Sacramento, California 95814

Dear Mr. Olson:

This is in response to your letters of February 19 and March 4, 1991, requesting an advisory opinion on behalf of the California Democratic Party ("CDP") regarding the application of the Federal Election Campaign Act of 1971, as amended, and Commission regulations to the allocation of CDP expenses and disbursements that influence both Federal and nonfederal elections.

You acknowledge that CDP is a "state committee" within the meaning of the Federal Election Campaign Act. 2 U.S.C. 431(15); 11 CFR 100.14(a). Under the new allocation regulations, which became effective on January 1, 1991, state and local party committees with separate Federal and nonfederal accounts must allocate their administrative expenses and generic voter drive costs between those accounts using the "ballot composition method". 11 CFR 106.5(d). This method is

based on the ratio of federal offices expected on the ballot to total federal and non-federal offices expected on the ballot in the next general election to be held in the committee's state or geographic area.

11 CFR 106.5(d)(1)(i).

You state that in the next California general election, scheduled for November, 1992, voters will be able to cast votes for Federal candidates for president, fifty-two U.S. Congressional seats and "either one or two [U.S.] Senate seats."¹ Nonfederal offices on the ballot will include twenty state senate seats, eighty state assembly seats, and at least several hundred local government

offices. You pose three questions regarding the application of the allocation regulations. Two concern how CDP should calculate its ballot composition ratio for the 1992 election cycle. The third asks whether the new allocation ratios and payment procedures apply to allocable expenses incurred before the effective date of the new regulations but paid after that date.

Nonpartisan Local Offices

Your first question asks whether CDP may include one point in its ballot composition ratio for local candidates. In California, elections for judicial, school, county, and city office are nonpartisan pursuant to Article II, section 6(a) of the California Constitution. Prior to 1986, you note that this section operated only to prohibit party nominations for local offices; all other forms of political activity by parties, including endorsing, supporting or opposing local candidates, were permissible. See Unger v. Superior Court, 37 Cal. 3d 612 (1984); Geary v. Renne, 911 F. 2d 280 (9th Cir. 1990)(en banc), cert. granted 59 U.S.L.W. 3481 (1991). In 1986, California voters passed Proposition 49, which amended the state constitution to add Article II, section 6(b): "No political party ... may endorse, support or oppose a candidate for nonpartisan office." The United States Court of Appeals for the Ninth Circuit, in Geary v. Renne, recently held that section 6(b) violates the first and fourteenth amendments of the U.S. Constitution.

Your request indicates that CDP has actively participated in local elections over the last ten years by endorsing and supporting local candidates. Following the issuance of the Geary decision, CDP endorsed local candidates in slate cards distributed in at least five California jurisdictions during the 1990 general election. Therefore, your question concerns the ability of a state party to count nonpartisan local races in the calculation of its ballot composition ratio.

The Commission's allocation regulations set forth specific categories of offices that must be included by party committees when calculating the ballot composition ratio. In addition to the points attributed for particular statewide executive offices on the ballot, section 106.5(d)(1)(ii) directs state party committees to "include in the ratio one additional non-federal office if any partisan local candidates are expected on the ballot in that election." The Explanation and Justification ("E&J") for that section notes that the ballot composition method was revised during the Commission's rulemaking process in response to comments asserting "that the scope of party activity at state and local levels was not adequately reflected." 55 Fed. Reg. 26058, 26064 (June 26, 1990). Therefore, the Commission reworked the categories of offices included in the ballot composition ratio, adding "an additional non-federal office to reflect state party support for partisan local candidates" in place of the category of "partisan statewide judicial offices". Id. The Commission's stated intent was to create a "non-federal slot [that would be] available to virtually every state party committee." Id.

The first issue presented by your request concerns the meaning of the phrase "partisan local candidates" in section 106.5(d)(1)(ii). The E&J for this section, as noted above, indicates the Commission's focus on "state party support" for such candidates and its intention that this slot be available to augment the nonfederal component of "virtually every state party committee" that supports local candidates. Thus, while this phrase clearly includes local candidates who appear on the ballot as affiliated with a political party, it can also be read to cover those situations in

which parties actively support, endorse or oppose candidates even though the candidates are not denoted as candidates of a particular party on the ballot.

Your request presents an additional question, however, as a result of the addition of Article II, section 6(b) to the state constitution, which purports to prohibit parties from endorsing, supporting or opposing candidates for nonpartisan office. This provision, by barring party activity in local races, would preclude CDP from claiming a nonfederal point in its ballot composition calculation for its support of "partisan local candidates." However, section 6(b) is currently inoperative, given the holding in Geary. The Commission therefore concludes that CDP is not now under any constraints regarding its activity in local races and may claim a point for local candidates in its ballot composition calculation for the 1992 election cycle. The Commission also notes that the Supreme Court has granted certiorari in the Geary case, and that the outcome of that appeal may remove the premise on which the Commission's conclusion is based if the holding of the Ninth Circuit is reversed. Thus, the Commission's conclusion is limited to the circumstances as they now exist, in which California law provides no impediment to the participation of parties in local races, other than their ability to nominate candidates for such offices.

U.S. Senate Elections

Following the normal Senate election cycle, California voters will elect a replacement for Senator Alan Cranston in November, 1992, who will be retiring at the end of his term. Due to an unusual sequence of events, however, California's other Senate seat will also be contested during this cycle. See footnote 1, supra. Your second question asks whether CDP must count each senatorial election as a separate Federal point in its ballot composition calculation or whether it can treat the two senatorial contests together as one Federal slot.

You note that the response to this question turns on the meaning of the term "office" and the phrase "expected on the ballot in the next general election" as they are used in 11 CFR 106.5(d)(1)(ii). That section provides, in relevant part:

In calculating a ballot composition ratio, a state or local party committee shall count the federal offices of President, United States Senator, and

United States Representative, if expected on the ballot in the next general election, as one federal office each.

Id.

In support of your contention that CDP should only have to count the two upcoming Senate races as one Federal office, you make several arguments. First, you rely on the language of section 106.5(d)(1)(ii) quoted above as specifying that the Federal offices named count as "one federal office each". You seek further support in the instructions for new Schedule H1, as providing only two exceptions from the rule that committees count only one point for each listed category, both of which apply to nonfederal categories. Finally, you contend that while it is likely the vacant Senate seat will be filled at the November, 1992 general election, there is the possibility under

California law that the governor may call a special election at another time. California Elections Code § 25001.

The Commission notes at the outset that, to answer your question, section 106.5(d)(1)(ii) must be read as a whole and not broken down into several phrases. Thus, the Federal offices on the ballot in the next general election should be counted as one Federal office each. Normally, only one Senate seat is on the ballot in any one year. In California, however, the 1992 election cycle presents the unusual case in which both Senate seats will be filled at the same election.² Therefore, in 1992, two U.S. Senate seats are "expected on the ballot in the next general election."

In addition, this section must be interpreted in the context of the Commission's stated intention in the E&J for section 106.5(d). The Commission's approach in adopting the final version of the ballot composition method reflects the use of an "average ballot" concept in which the number of Federal offices counted corresponds to the number of Federal candidates the average voter can cast ballots for in the general election. Thus, while there will be 52 Congressional races in California in 1992, a voter will only have the opportunity to cast a ballot for the Congressional race in his or her district, and therefore the ballot composition method assigns one point for all Congressional races in the state. In contrast, a U.S. Senate seat, as a state-wide office, appears on all ballots in the state. If two Senate seats are on the ballot in the general election, the average voter will have the ability to vote for candidates for each office. This situation is comparable to the example noted in the E&J which distinguishes between the assignment of one nonfederal slot in states where candidates for governor and lieutenant governor run together as a single ticket and states such as California where the governor and lieutenant governor are independently elected. In the latter case, a party committee may count the office of lieutenant governor separately, in the category of "other partisan statewide executive candidates", because voters have the opportunity to cast ballots for each office and may elect candidates from different parties to these positions. See, 55 Fed. Reg. at 26064.

The Commission therefore concludes that CDP must include a point for each U.S. Senate seat on the November 1992 general election ballot in its calculation of the Federal portion of its ballot composition ratio.³

Pre-1991 Expenses

Your third question seeks advice on the application of the allocation regulations to expenses incurred before the effective date of the rules but not paid until after that date. You pose two situations. One of these concerns the payment of administrative expenses that were incurred during 1990, such as attorney's fees, which have not yet been paid. You ask what allocation ratio should be applied when payment is made: the ratio in effect at the time the expenses were incurred or the one in effect at the time they are paid? You also ask what payment method should be used - the one required by the new rules or the system in place before that time - and how this activity should be reported?

On October 3, 1990, the Commission published a notice in the Federal Register announcing that the new allocation regulations would become effective on January 1, 1991. 55 Fed. Reg. 40377.

This notice stated that reports filed by affected committees, such as CDP, for reporting periods ending prior to January 1, 1991 were not required to include the additional information or forms required by the new regulations. Reports covering periods beginning on or after January 1, 1991 were directed to comply with the new rules. The issue presented here is whether this direction applies to allocable expenses which straddle this time line, since they are incurred during the period covered by the old rules, but paid during the period in which the new rules apply.

The allocation methods for administrative expenses under new section 106.5(d) operate, in the case of state party committees, on a two-year Federal election cycle basis. Committees governed by this rule are required to calculate a new ballot composition ratio at the beginning of each two-year cycle and apply this ratio to all administrative costs incurred during this period.⁴ See 11 CFR 106.5(d)(1)(i). January 1, 1991 was the beginning of the current Federal election cycle for purposes of the allocation regulations and therefore provided a useful effective date for the Commission's rules as committees would be able to implement the new requirements from the outset of that cycle. Since the current ballot composition ratio only relates to administrative expenses incurred on or after the beginning of the 1991-1992 election cycle, debts for goods or services provided during the previous election cycle are governed by the rules in place for 1990. Thus, CDP may use its allocation ratio for 1990 and need not follow the payment procedures set forth in 11 CFR 106.5(g) or the reporting requirements prescribed by 11 CFR 104.10(b)(1) for these particular administrative costs. CDP should note, in each report reflecting a payment under the prior allocation system, that the payment relates to an administrative expense for goods or services provided in 1990.⁵

The second situation involves the allocation of expenses for committee fundraising, where a solicitation made by CDP in 1990 results in donations received in 1991. Under new 11 CFR 106.5(f), party committees are required to use the "funds received method" for allocating expenses associated with fundraising efforts designed to raise funds for the committee's Federal and nonfederal accounts. The committee must calculate a separate allocation ratio at the outset of each fundraising program or event under these rules, which may later be adjusted based on the actual ratio of Federal to nonfederal funds received. As in the case of administrative expenses, it is the Commission's intention to apply the new allocation rules and procedures to fundraising expenses incurred for solicitations made on or after January 1, 1991. Again, CDP should note, in each report reflecting a payment for pre-1991 fundraising costs, that the payment relates to goods or services provided in 1990. Contributions received in 1991 which can be determined to relate to a 1990 solicitation, as through the presence of a coded response card accompanying the check, may be applied to the allocation formula used for the 1990 fundraising effort.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

John Warren McGarry

Chairman for the Federal Election Commission

1/ California's recently elected governor vacated his U.S. Senate seat following his election to state office. Since his Senate term had not expired, an election to fill the remainder of his term will be held during the current two-year election cycle.

2/ Telephone conversations with the California Elections Division indicate that, while a special election is a technical possibility under the law, they are proceeding with the assumption that the November, 1992 general election ballot will include both Senate seats. The prohibitive cost of a statewide special election was one of the key factors cited as underlying this assumption. Based on this information, it is unnecessary for the Commission to reach the question of how a special election for U.S. Senate would affect CDP's ballot composition formula.

3/ The Commission notes that under the terms of this opinion CDP's ballot composition ratio, if calculated to the nearest one-hundredth, would be 57.14 (Federal) to 42.86 (nonfederal). However, the Commission will permit committees, in all cases in which a ratio does not result in a whole number, to round to the nearest whole number. For CDP, then, its ballot composition ratio can be expressed as 57% Federal and 43% nonfederal.

4/ As noted in the E&J, the Commission will determine on a case by case basis whether any change in a ballot composition ratio is necessary due to special elections held during the election cycle. See 55 Fed. Reg. 26064.

5/ The Commission emphasizes that this approach can be used only for debts that are both incurred in a prior election cycle and which relate to goods or services received during that period. In future election cycles, committees must apply the allocation ratio for the election cycle in which goods and services are received even if the contract for such goods or services is signed, and a debt thereby incurred, during the previous election cycle.