AGENDA DOCUMENT NO. 99-88

FEDERAL ELECTION COMMISSION
Washington, DC 20463

AGENDA ITEM
For Meeting of: 7-29-99

July 22, 1999

SUBMITTED LATE

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

Subject: Draft AO 1999-18

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for July 29, 1999.

Attachment

ADVISORY OPINION 1999-18

DRAFT

C. April Boling, CPA
7185 Navajo Road
Suite L
San Diego, CA 92119

Dear Ms. Boling:

This responds to your letter dated June 22, 1999, on behalf of the San Diego County Republican Central Committee ("the Committee" or "the local party"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation of Committee administrative expenses and generic voter drive costs.

You state that the Committee is a local party committee. See 11 CFR 100.14(b). Under the Commission's regulations on allocation of expenses by party committees, State and local party committees with separate Federal and non-Federal accounts must allocate their administrative expenses and generic voter drive costs between those accounts using the "ballot composition method." 11 CFR 106.5(d). Under this method, expenses are allocated "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." This ratio is determined by the number of categories of Federal offices on the ballot and the number of categories of non-Federal offices on the ballot. 11 CFR 106.5(d)(1)(i). The regulations then list the relevant Federal and state offices and how they should be counted for purposes of the ratio. 11 CFR 106.5(d)(1)(ii).

In addition, the regulations address local party committees separately and provide that their ratios may include "a maximum of two additional non-federal offices if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle." 11 CFR 106.5(d)(1)(ii).

You state that local candidates will appear on the 2000 ballot in San Diego County, and the local party will endorse and support candidates in at least two of those local races. In accordance with Article II, section 6(a) of the California Constitution,

local elections are to be "nonpartisan."[1] You ask whether the Committee may avail itself of the two additional local party points in the ratio. You raise this question because of previous Commission opinions that addressed the issue of points for local races in the context of court decisions on the constitutionality of California's ban on political party support of candidates in local nonpartisan races.

In Advisory Opinion 1991-6, the Commission considered a request from a California State party committee with respect to the inclusion in its allocation ratio of an additional non-Federal point, which the regulations allot to State party committees for partisan local candidates.[2] The State party committee intended to endorse and support candidates in local nonpartisan elections. Article II, section 6(b) of the California Constitution provided that "[n]o political party ... may endorse, support, or oppose a candidate for nonpartisan office." Because a decision by the United States Court of Appeals for the Ninth Circuit in *Geary v. Renne*, 911 F.2d 280 (9th Cir. 1990)(*en banc*) ruled section 6(b) to be unconstitutional and thus rendered it inoperative, the Commission concluded that the State party committee could include the additional non-Federal point in its ratio,[3] but noted that the U.S. Supreme Court had granted certiorari and that the outcome of the appeal might remove the premise of the Commission's conclusion. Advisory Opinion 1991-6. The Supreme Court vacated the Ninth Circuit decision, ruling that the case was not ripe for resolution. *Renne v. Geary*, 501 U.S. 312, 315 (1991).[4] Based on the apparent reinstatement of section 6(b), the Commission concluded, in Advisory Opinion 1991-27, that the State party could no longer include the additional

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[1] That subsection states: "All judicial, school, county, and city offices shall be nonpartisan." California law defines "nonpartisan office" to mean "an office for which no party may nominate a candidate." Cal. Elections Code §334.

[2] That advisory opinion and Advisory Opinion 1991-27, discussed below, pertained to the same regulatory section at issue here, which grants one additional non-Federal point (not two, as with local party committees) to State party committees if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle.

[3] The Commission stated that, while the phrase "partisan local candidates" clearly includes 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." Advisory Opinion 1991-6.

[4] The Court did not reach the merits. It remanded the case to the lower courts with instructions to dismiss the relevant cause of action without prejudice. 501 U.S. at 315.

non-Federal point. The Commission has not addressed a situation involving section 6(b) since that opinion was issued.

In 1996, a United States District Court addressed the constitutionality of section 6(b) in a suit brought by the California Democratic Party against the State's Attorney General to prevent enforcement of that section. *California Democratic Party v. Lungren,* 919 F.Supp. 1397 (N.D. Cal. 1996). The court ruled that the section was unconstitutional, as a violation of the First and Fourteenth Amendment. Moreover, the court ordered that the Attorney General (as well as his agents or attorneys, and anyone acting in concert with him) was permanently enjoined from enforcing the section. 919 F.Supp. at 1405.[5] The decision was not appealed.

You state that, as a result of this decision, political parties in California are once again permitted to endorse and support candidates for nonpartisan office. The Commission further assumes that, as a result of the District Court's decision, section 6(b) is not being enforced by the State or by local authorities in the areas in which the endorsed candidates will run for office. The Commission concludes that, under these circumstances, the Committee may treat the candidates it endorses and supports as partisan local candidates and may, therefore, use the two additional non-Federal points in its allocation ratio. As was indicated in Advisory Opinions 1991-6 and 1991-27, the Commission's position may change if there are future legal developments indicating that section 6(b) can be lawfully applied or enforced.

[5] The court referred to the history of *Geary v. Renne,* which was first heard in that district. 919 F.Supp. at 1399. It also cited opinions from the two substantive Court of Appeals decisions in the *Geary* case (the *en banc* decision cited above and a three-judge panel decision reversed by the *en banc* decision). 919 F.Supp.1401-1405 *passim.*

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

Sincerely,

Scott E. Thomas
Chairman

Enclosures (AOs 1991-27 and 1991-6)