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FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 23, 1999

AGENDA ITEM
For Meeting of: 12-2-99

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence M. Noble *L.M.N./RL*
General Counsel

N. Bradley Litchfield *NBL*
Associate General Counsel

Jonathan M. Levin *JML*
Senior Attorney

Subject: Draft AO 1999-30

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for December 2, 1999.

Attachment

1 ADVISORY OPINION 1999-30

2

3 Kenneth W. Haar
4 Executive Director
5 Nebraska State Democratic Party
6 985 So. 27th Street
7 Lincoln, NE 68510

DRAFT

8

9 Dear Mr. Haar:

10 This responds to your letter dated October 12, 1999, on behalf of the Nebraska
11 State Democratic Party ("NDP"), concerning the application of the Federal Election
12 Campaign Act of 1971, as amended ("the Act") and Commission regulations to the
13 allocation of non-Federal points for mixed Federal/non-Federal activity.

14 The NDP's political committee is registered with the Commission as the Nebraska
15 Democratic State Central Committee. Pursuant to 11 CFR 106.5 and 104.10(b)(1), the
16 NDP, as a State party committee with separate Federal and non-Federal accounts, must
17 allocate its administrative and generic voter drive costs between those accounts using the
18 "ballot composition method." As discussed below, State party committees in States with
19 bicameral legislatures are usually able to avail themselves of a non-Federal point with
20 respect to each of the houses in computing the ballot composition formula for
21 determining the allocation of administrative expenses and generic voter drive costs. See
22 11 CFR 106.5(d). Unlike every other State legislature, the Nebraska legislature consists
23 of one house; the individual members of the legislature each hold the office of State
24 Senator.¹ The NDP has therefore been using only one non-Federal point with respect to
25 the legislative office represented, and you request an advisory opinion that would allow
26 the NDP to take two points in the future. You state that the one Nebraska house "serves
27 as both the senate and representative body," and that Nebraska State parties "spend as
28 much time, energy, and money on our legislative races" as State parties in other States
29 because of the significance of the one body.²

¹ One half of the house is up for election every two years.

² As indicated on the Schedule H1 of its 1999 Mid-Year report, the Nebraska Republican Party also uses one non-Federal point with respect to State legislative races.

1 Under the ballot composition method, the allocation by a State party committee of
2 administrative and generic voter drive expenses is based on the ratio of Federal offices
3 expected on the ballot to total Federal and non-Federal offices expected on the ballot in
4 the next general election to be held in the State. This ratio is determined by the number
5 of categories of Federal offices on the ballot and the number of categories of non-Federal
6 offices on the ballot. 11 CFR 106.5(d)(1)(i). The regulations list the relevant Federal and
7 State offices and how they should be counted for purposes of the ratio. The offices of
8 President, U.S. Senator, and U.S. Representative count as one Federal point each, and the
9 offices of Governor, State Senator, and State Representative count as one non-Federal
10 point each, if such offices are expected on the ballot in the next general election. 11 CFR
11 106.5(d)(1)(ii).

12 Other non-Federal offices appearing on the ballot are also counted in a limited
13 manner. If other partisan statewide executive candidates will be on the next general
14 election ballot, these offices count as no more than two non-Federal points in the ratio. If
15 any partisan local offices are expected on the ballot in any regularly scheduled election
16 during the two-year cycle, a State party committee may use another non-Federal point.
17 Finally, the rules allow State party committees to include an additional non-Federal point.
18 11 CFR 106.5(d)(1)(ii).

19 The Explanation and Justification for the allocation regulations explains that the
20 ballot composition method uses an "average ballot" approach to determine a State party
21 committee's allocation ratio. *Methods of Allocation Between Federal and Non-Federal*
22 *Accounts; Payments; Reporting*, 55 Fed. Reg. 26058, 26064 (June 26, 1990). In other
23 words, the ratio is designed to reflect the ballot that will be seen by the voter in the next
24 general election. The average ballot concept is a simplified approach that produces a
25 ratio "by counting the categories of offices on the ballot rather than counting each
26 individual office." *Id.* In its Explanation and Justification of the 1992 amendments to the
27 regulations on the ballot composition ratio, the Commission, in its discussion of the
28 addition of a non-Federal point for every State and local party committee, noted that the
29 ratio "was never anticipated to precisely reflect all state and local party activity in all
30 states in all election cycles." The Commission stated that the average ballot approach

1 provided "the necessary flexibility in this area" and represented a "reasoned balance"
2 between the need for greater standardization and the need to reflect differences between
3 different States and types of political committees. *Allocation of Federal and Non-*
4 *Federal Expenses*, 57 Fed. Reg. 8990, 8991 (March 13, 1992).

5 You refer to the effort made by Nebraska State parties to elect the members of the
6 one house. There may be a number of variations as to the efforts that parties in different
7 States choose to exert with respect to particular offices. Nevertheless, in arriving at a
8 reasoned balance as to Federal/non-Federal allocation, the Commission regulations are
9 explicit, allocating one point per State legislative office on the ballot.

10 With respect to your equitable arguments for the ability to use two points, the
11 Commission also notes that permitting the NDP to use an extra point may create a
12 different type of inequity. This may occur when Nebraska is compared to the States in
13 which the entire State Senate is elected every four years and the lower house is elected
14 every two years.³ In those two-house States, a State party committee may normally use
15 only one state legislative point in the election cycle in which the State Senate is not
16 elected. By contrast, an affirmative answer to your request would permit a Nebraska
17 State party committee to use two points in every cycle, in an election involving only one
18 half of the seats in one house.

19 Based on the foregoing, the Commission concludes that the approach of the ballot
20 composition formula as set out in the regulations should be applied to the NDP, and,
21 therefore, it may only take one point with respect to elections to the State legislative
22 office. As indicated above, in developing a uniform formula, the Commission was aware
23 that there may be different circumstances in various States.

³ These States include Kansas, Michigan, Minnesota, New Mexico, and South Carolina.

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

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Sincerely,

Scott E. Thomas
Chairman