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July 11, 2000

LATE COMMENT
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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

The Honorable Daryl Wold
Chairman, Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion Request 2000-19

Dear Chairman Wold:

We are counsel to the Florida Democratic Party. On its behalf, we submit these comments requesting full approval of Advisory Opinion Request 2000-19, sought by the Republican Party of Florida.

INTRODUCTION

There are two principal questions now before the Commission. The first is at what point state political party expenditures became governed by a revised administrative and generic ballot allocation ratio, with the addition of special elections for State Insurance Commissioner and State Education Commissioner to the Florida 2000 general election ballot. The second is whether the parties may retroactively apply the revised ratio.

The Florida Democratic Party believes that an allocation ratio of 33% federal and 67% nonfederal applies to all administrative and generic ballot expenses incurred throughout the 1999-2000 election cycle. Moreover, the Commission should grant state parties 30 days from the issuance of this opinion to amend their allocation schedules for the entire election cycle and transfer appropriate amounts to their Federal accounts.

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The Honorable Daryl Wold
July 11, 2000
Page 2

DISCUSSION

A. The Commission Should Hold That a Ballot Composition Ratio of 33% Federal and 67% Nonfederal Applies to All Expenses Incurred During the 1999-2000 Election Cycle.

With the State of Florida having certified the addition of two, statewide nonfederal elections to the 2000 November general election ballot, it is beyond doubt that the Republican Party of Florida should count these offices as it allocates its future administrative and generic ballot expenditures. The only genuine questions before the Commission are when the new ratio took effect, and whether it may be applied retroactively. The Florida Democratic Party submits that the revised allocation ratio should apply to all expenditures made during the current election cycle, and should be applied retroactively.

Since 1991 and before, a state political party's administrative and generic ballot allocation ratio has been linked "to the ballot which an average voter would face in that committee's state or geographic area . . ." Methods of Allocation Between Federal and Nonfederal Accounts, 55 Fed. Reg. 26,058, 26,064 (1990). See also Advisory Opinion Request 1976-72. The regulations now require parties to calculate "the ratio of federal offices expected on the ballot to total federal and nonfederal offices expected on the ballot in the next general election" and apply that ratio accordingly. 11 C.F.R. § 106.5(d)(i) (2000).

The Commission has consistently advised that the ratio is to be calculated "at the start of each two-year Federal election cycle." See Advisory Opinion 1991-15. However, it has also held that when special elections occur, "the allocation formula to be used . . . will have to be determined on a case-by-case basis." 55 Fed. Reg. at 26,064.

The Commission has made this case-by-case determination on three occasions, all during the 1991-1992 election cycle. First, the Commission considered the effect of a California U.S. Senate special election on the ballot composition ratio and held that the election should be counted, despite the fact that another, regular Senate election was to occur on the same ballot. Advisory Opinion 1991-6. Significantly, it did so even though the special election had not yet been formally scheduled for the November 1992 general election ballot:

The Honorable Daryl Wold
July 11, 2000
Page 3

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.

Id. n.2.

Second, the Commission weighed the effect of a Georgia nonfederal special election, also to be held in conjunction with the 1992 general election, and found that it should be counted in the ballot composition ratio. Advisory Opinion 1991-15. The Commission observed that "the fact that this office would be on the November 1992 general election ballot was known prior to January 1, 1991," pointing to the state labor commissioner's November 1990 announcement that he would not take office. See id.

Finally, the Commission considered the impact of a Pennsylvania special U.S. Senate election on the ballot composition ratio, only this time when the election was to be held in November 1991 and not during a general election at which Federal offices were ordinarily elected. Advisory Opinion 1991-25. Again, the Commission concluded that the election was to count toward a revised ratio, but only for the period between when the vacancy arose and the date of the special election. Id.

Under these opinions, both the Florida Democratic Party and the Republican Party of Florida could have altered their allocation ratios as early as May 1999, when it first became apparent that there would be two additional nonfederal offices on the November 2000 general election ballot. The fact that there was no formal state action placing these offices on the general election ballot until May 2000 is wholly irrelevant.

The Commission's prior advisory opinions squarely support this conclusion. For example, the Commission applied a revised ratio to the California Democratic Party even though a special election held before November 1992 remained "a technical possibility under the law." Advisory Opinion 1991-6. Moreover, the

The Honorable Daryl Wold
July 11, 2000
Page 4

Commission held the Georgia state party responsible for calculating a revised ratio upon a state official's mere announcement that he would not assume office. Advisory Opinion 1991-15. Finally, in the case of the Pennsylvania special election, the Commission found that a revised allocation ratio was triggered by the death of the U.S. Senator whose office was to be filled, not by the formal state action that placed his vacancy on the ballot. Advisory Opinion 1991-25. Under the logic of these earlier advisory opinions, if the two special elections in this case had been federal elections, the Florida state parties would have been required to change their allocation ratios to the detriment of their federal accounts. Surely the reverse should be true, as well.

In fact, the plain language of the regulation and its underlying logic suggests that the revised allocation ratio should apply beyond May 1999 to expenditures made as early as the beginning of the election cycle. The logic behind the ballot composition ratio is that it reflects the proportionate impact of party administrative and generic spending on federal and nonfederal elections respectively. See, e.g., 55 Fed. Reg. at 26,064-65. Though neither party could have known it at the time, a single dollar spent on an administrative expense in January 1999 would have had the same proportionate impact on federal and nonfederal elections as a dollar spent in October 2000. To treat the former expenditure disadvantageously solely because of the parties' then-limited vantage point would be inconsistent with the underlying purpose of the rules.

B. The Commission Should Grant the Parties 30 Days From the Issuance of the Advisory Opinion to Amend Their Allocation Schedules Back to January 1999, and to Transfer Appropriate Amounts Into Their Federal Accounts.

The Republican Party of Florida correctly notes that the Commission has consistently allowed party committees to amend past allocations retroactively after clarifying the proper method of allocation. See, e.g., Advisory Opinions 1991-6, 1991-15, 1991-25 and 1993-3. Indeed, the only circumstance in which the Commission has declined to allow a retroactive allocation is when a committee failed to act reasonably under the circumstances. For example, the Commission disallowed a proposal by the National Republican Senatorial Committee to revise its past allocations when it proposed a method of allocation that explicitly deviated from Commission rules. See Advisory Opinion 1998-21.

The Honorable Daryl Wold
July 11, 2000
Page 5

Accordingly, the Commission should adhere to past precedent and grant the parties 30 days in which to amend their allocations through the beginning of the election cycle. Should the Commission decline to permit retroactive allocation, it should at least clarify that the Republican Party of Florida acted reasonably in adopting a new allocation ratio prior to issuance of the advisory opinion and shield allocations made under that ratio from enforcement action.

Very truly yours,



Marc E. Elias
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Counsel to the Florida Democratic Party