FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

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STAFF MEMBER: Dominique Dillenseger

COMPLAINANTS: California Republican Party
Michael Schroeder, Chairman

RESPONDENTS: California Democratic Party
Democratic State Central Committee of California—Federal
and Katherine Moret, as treasurer
Democratic State Central Committee of California—Non-Federal
and Katherine Moret, as treasurer
Friends of Lois Capps and David Powdrell, as treasurer

RELEVANT STATUTES: 2 U.S.C. § 431(9)(A)
2 U.S.C. § 431(17)
2 U.S.C. § 431(18)
2 U.S.C. § 434(b)(4)(H)(iii) and (6)(B)(iii)
2 U.S.C. § 441a(a)(2)(A)
2 U.S.C. § 441a(d)
2 U.S.C. § 441a(f)
2 U.S.C. § 441b(a)
2 U.S.C. § 441d(a)
11 C.F.R. § 100.16
11 C.F.R. § 100.17
11 C.F.R. § 100.22
11 C.F.R. § 102.5(a)
11 C.F.R. § 104.3(b)(1)(viii) and (3)(viii)
11 C.F.R. § 104.3(b)(4)(H)(iii) and (6)(B)(iii)
11 C.F.R. § 104.3(b)(1)(vii) and (3)(vii)(B)
11 C.F.R. § 106.5
11 C.F.R. § 109.1(a)
11 C.F.R. § 114.2 (b)

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter arises from a Complaint filed with the Federal Election Commission ("the Commission"), on August 12, 1998, by the California Republican Party (CRP), by and through its Chairman Michael Schroeder. The Complaint alleges that "the Democratic State Central Committee of California (a.k.a. the California Democratic Party (CDP))"[1] made $99,079.06 in illegal expenditures, including $77,281.67 in "soft money" expenditures, to the special election campaign of Lois Capps. Specifically, the Complaint alleges that the expenditures were for direct mail pieces that expressly advocated Ms. Capps' election in the March 10, 1998, special election in the 22nd Congressional District of California.

The CDP and the Friends of Lois Capps and its treasurer, David Powdrell, ("Capps Committee"), were notified of the Complaint on August 19, 1998. Counsel for the CDP responded to the Complaint on September 4, 1998. The Capps Committee responded to the Complaint on September 24, 1998.

[1] The Democratic Central Committee of California—Federal ("Federal Committee" or "Federal Account") with Katherine Moret, as treasurer, is a political committee registered with the Commission and is a Federal account of the California Democratic Party. The Democratic State Central Committee of California—State ("non-Federal committee" or "non-Federal account") is listed on disclosure reports (Schedule H3, Transfers from non-Federal accounts) as a non-Federal account and is a non-Federal account of the California Democratic Party. The non-Federal committee is registered with the Secretary of State of California with Katherine Moret, as treasurer. In this report, "the CDP" refers collectively to the California Democratic Party, its Federal and non-Federal Committees/Accounts, and Katherine Moret as treasurer.

II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

Under the Federal Election Campaign Act of 1971, as amended ("the Act") and Commission regulations, contributions[2] made and accepted for the purpose of influencing a Federal election are subject to certain limitations and prohibitions.[3] 2 U.S.C. §§ 431(8), 441a, 441b, 441c, 441e, 441f, and 441g; 11 CFR Parts 100, 110, 114, and 115. Similarly, disbursements by committees that constitute expenditures[4] for the purpose of influencing a Federal election must be made only with funds that are subject to the limitations and prohibitions of the Act. 2 U.S.C. § 431(9)(A); and 114.2(b).

An organization which is a political committee under the Act must follow prescribed allocation procedures when financing political activity in connection with Federal and non-Federal elections. 11 C.F.R. §§ 102.5 and 106.5(g). These rules implement the contribution and expenditure limitations and prohibitions established by 2 U.S.C. §§ 441a and 441b.

Each political committee, including a party committee, which finances political activity in connection with both Federal and non-Federal elections is required to establish a separate Federal account for all disbursements, contributions, expenditures and transfers by the committee in connection with any Federal election, unless it receives only contributions subject to the prohibitions and limitations of the Act. 11 C.F.R. § 102.5(a)(1)(i) and (ii). No transfers may be

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[2] The Act defines "contribution" as including "any gift, subscription, loan, advance, . . . or anything of value made by any person for the purpose of influencing any election for Federal office . . . ." 2 U.S.C. § 431(8)(A)(i) and 11 C.F.R. § 100.7(a)(1).

[3] The prohibitions on contributions by national banks, by corporations organized by authority of Federal statute, and by foreign nationals also apply to State and local elections.

[4] The Act defines "expenditure" as "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office . . . ." 2 U.S.C. § 431(9)(A)(i) and 11 C.F.R. § 100.8(a)(1).

made to such Federal account from any other account(s) maintained by such committee for the purpose of financing activity in connection with non-Federal elections, except as provided for in 11 C.F.R. § 106.5(g), and only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate Federal account. *Id.* Pursuant to 11 C.F.R. § 106.5(a), disbursements made by party committees in connection with Federal and non-Federal elections must consist entirely of funds subject to the prohibitions and limitations of the Act, or funds from accounts established pursuant to 11 C.F.R. § 102.5.

A party committee that has established separate Federal and non-Federal accounts under 11 C.F.R. § 102.5 must pay the expenses of joint Federal and non-Federal activities in either one of two ways: (1) the committee shall pay the entire amount of an allocable expense from its Federal account and subsequently transfer funds from its non-Federal account to its Federal account solely to cover the non-Federal share of that allocable expense, or (2) the committee shall establish a separate allocation account into which funds from its Federal and non-Federal accounts are deposited solely for the purpose of paying the allocable expenses of joint Federal and non-Federal activities. 11 C.F.R. § 106.5(g)(1)(i) and (ii).

For state and local party committees, administrative expenses and generic voter drive costs are allocated using the "ballot composition method," using the ratio of Federal and non-Federal offices expected to be on the ballot in the next general election in that particular state. 11 C.F.R. § 106.5(d).[5]

[5] The Explanation and Justification to the allocation regulations at 55 Fed. Reg. 26064 (June 26, 1990) states that 11 C.F R. § 106.5(d)(1) "also generally covers years in which a special election is held." It also states that "because of the varying situations that might arise, the Commission has not spelled out rules to cover each variation," and that "the allocation formula to be used and attribution of disbursements to specific candidates will have to be determined on a case-by-case basis." *See* Advisory Opinions 1991-25, 1991-15, and 1991-6.

Section 106.5(a)(2) sets out costs to be allocated for committees that make disbursements in connection with Federal and non-Federal elections. The categories of activity to which allocation applies include, *inter alia*, administrative expenses and expenses for generic voter drive activities. "Administrative expenses" are defined as "including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate." 11 C.F.R. § 106.5(a)(2)(i). "Generic voter drives" are described as "including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate." 11 C.F.R. § 106.5(a)(2)(iv).

2 U.S.C. § 431(8) defines "clearly identified" as meaning "(A) the name of the candidate involved appears; (B) a photograph or drawing of the candidate appears; or (C) the identity of the candidate is apparent by unambiguous reference." 11 C.F.R. § 100.17 further defines "clearly identified" as meaning:

> the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as 'the President,' 'your Congressman,' or 'the incumbent,' or through an unambiguous reference to his or her status as a candidate such as 'the Democratic presidential nominee' or 'the Republican candidate for the Senate in the State of Georgia.'

Based on the foregoing, activity which is candidate-specific such as that pertaining to a clearly identified or specific candidate is not generic voter activity and is therefore not allocable under Section 106.5. Such candidate-specific disbursements, if made for the purpose of influencing a Federal election, would be considered "contributions" or "expenditures" and would be subject to the limitations and prohibitions under the Act.

Communications that call for the election or defeat of a clearly identified candidate constitute express advocacy. Commission regulations define "express advocacy" to include such phrases as "vote for the President" "Smith for Congress" "support the Democratic nominee" or "cast your ballot for the Republican challenger for U.S. Senate in Georgia" or other words which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate. 11 C.F.R. § 100.22(a).

In Advisory Opinion 1998-9, the Commission addressed whether certain proposed generic party disbursements for communications such as telephone calls or mailings that ask the public to "Vote Republican," or "Vote Republican on" a specific election date or "On Election Day," became expenditures for "clearly identified candidates" when combined with the date of the special election. The Commission found that while such communications would fall within the category of generic voter activity where the election in question is held on a date when there are a number of offices on the ballot, Federal and non-Federal, with candidates from the same party listed for two or more of these offices, this would not be the case if the election at issue involves only one race and only one Republican on the ballot. In such a case, the communication could mean no other candidate but the Republican nominee in that special election. The Commission concluded that the proposed communications would not be generic voter activity but communications urging the public to vote for a clearly identified candidate i.e., express advocacy, and therefore within the category of either independent expenditures or coordinated expenditures.

Disbursements for communications that expressly advocate the election or defeat of a clearly identified candidate and that are not made in coordination with the candidate are "independent expenditures." 2 U.S.C. § 431(17); 11 C.F.R. § 100.16; see 2 U.S.C.

§ 441a(a)(7)(B)(i). Independent expenditures are not limited by the Act, but must come entirely from funds subject to the limitations and prohibitions of the Act.

A party committee that makes independent expenditures has specific reporting requirements. 2 U.S.C. § 434(b)(4)(H)(iii) and 6(B)(iii); 11 C.F.R. § 104.3(b)(1)(vii) and (3)(vii)(B). The party committee must report the name and address of the candidate to whom the expenditure pertains, including the date, amount, and purpose of the independent expenditure. The party committee must further indicate whether the expenditure is in support of, or in opposition to, a candidate, and certify, under penalty of perjury, that the expenditure was not made in coordination with the candidate.

The Act provides, *inter alia*, that whenever any person makes an expenditure for the purpose of financing communications expressly advocating the election or defeat of a clearly identified candidate, such communication shall contain a disclaimer in accordance with 2 U.S.C. § 441d(a); *see also* 11 C.F.R. § 110.11(a)(1). For such a communication, the disclaimer must explicitly state both who paid for it and whether or not it was authorized by any candidate or campaign committee. 2 U.S.C. § 441d(a)(1)-(3); 11 C.F.R. § 110.11(a)(1).

A disbursement for a communication that depicts a clearly identified candidate and conveys an electioneering message is subject to the combined limits of 2 U.S.C. §§ 441a(a)(2)(A) and 441a(d)[6] if the communication results from coordination[7] between the

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[6] Pursuant to 2 U.S.C. § 441a(d)(3)(B) and 11 C.F.R. § 110.7(b)(2)(ii), the national committee and state committee of a political party may each make expenditures in connection with the general election campaigns of candidates for the United States House of Representatives in that State. The limit set out at 2 U.S.C. § 441a(d)(3)(B) is adjusted at the beginning of each calendar year based upon changes in the Consumer Price Index. The limit for each 1998 general election in California for a U.S. House seat was $32,550. 2 U.S.C. § 441a(c); 11 C.F.R. § 110.9(c).

[7] Definitions of "coordination" are found only indirectly in the Act and in the Commission's regulations. 2 U.S.C. § 441a(a)(7)(B)(i) states that "expenditures made by any person in cooperation, consultation, or concert,

expender and the recipient candidate. Advisory Opinion 1985-14; *see also* Advisory Opinion 1984-15 and *Colorado Republican Federal Campaign Committee v. Federal Election Commission,* 116 S.Ct. 2309 (1996) (where the Court concluded that expenditures by a political party are not presumed to be coordinated with the party's candidate, and that the limitations of 2 U.S.C. § 441a(d) would apply only to expenditures that are coordinated with the candidate). Electioneering messages include statements that garner or diminish support for a candidate. *See* Advisory Opinion 1984-15.

The Act limits to $5,000 per election the amount which any multicandidate committee, including a state party committee, may contribute to a candidate and his or her political committee. 2 U.S.C. § 441a(a)(2)(A). 2 U.S.C. § 441a(f) prohibits political committees from

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with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents, shall be considered to be a contribution to such candidate . . . ." *See Buckley v Valeo*, 424 U S. 1, 46 (1976). The applicable statute and regulations at 2 U.S.C. § 431(17) and 11 C.F.R. § 109.1(a) and (b)(4) each address what constitutes coordination in the context of defining an expenditure as not independent when it is "made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of the candidate." Section 109 1(b)(4) then further defines the concept of non-independent, and therefore coordinated, expenditures related to communications as follows:

> "Made with the cooperation or with the consent of . . . .
>
> > (I) Means any arrangement, coordination, or direction by the candidate or his or her agent prior to the publication, distribution, display, or broadcast of the communication. An expenditure will be presumed to be so made when it is -
> >
> > > (A) Based on information about the candidate's plans, projects, or needs provided to the expending person by the candidate, or by the candidate's agents, with a view toward having an expenditure made; or
> > >
> > > (B) Made by or through any person who is, or has been, authorized to raise or expend funds, who is, or has been, an officer of an authorized committee, or who is, or has been, receiving any form of compensation or reimbursement from the candidate, the candidate's committee or agent."

knowingly accepting contributions or making expenditures in violation of the statutory limitations.

Party committees are entitled to make both direct and in-kind contributions to candidates up to $5,000 and also to make coordinated expenditures in connection with the campaigns of the same candidates up to their Section 441a(d) limitations. A state party committee may assign its expenditure limitation to a national committee of the party, thereby designating that committee as its agent for purposes of making coordinated party expenditures. *See FEC v. Democratic Senatorial Campaign Committee*, 484 U.S. 27 (1981). When such coordinated expenditures by a party committee, alone or in combination with direct contributions to a candidate made pursuant to Section 441a(a)(2)(A), exceed the combined limitations of Sections 441a(a)(2)(A) and 441a(d), violations of 2 U.S.C. § 441a(a)(2)(A) and of 2 U.S.C. § 441a(f) by these committees respectively result.

Coordinated party expenditures are reported by the party committee only, while contributions are reported by both the party committee and the recipient candidate committee. Specifically, under 11 C.F.R. § 109.1(c), an expenditure which does not qualify as an independent expenditure is considered an in-kind contribution to the candidate and results in several reporting obligations on behalf of both the donor, when it is a reporting entity, and the recipient committee. The donor must disclose the expenditure as a contribution, the date and amount of such contribution and, in the case of a contribution to an authorized committee, the candidate's name and office sought. 2 U.S.C. § 434(b)(4)(H)(i); 11 C.F.R. § 104.3(b)(3)(v). The recipient committee must disclose the expenditure as an in-kind contribution, the identity of the donor and the year-to-date aggregate total for such donor. 2 U.S.C. § 434(b)(2)(D); 11 C.F.R. § 104.3(a)(4).

The Act states that only those funds that comply with the prohibitions and limitations of the Act can be used in Federal elections, i.e., to support Federal candidates. Contributions or expenditures that are not permissible under the Act ["soft money"] are to be used exclusively for state and local campaign activity or other party committee activities that do not influence Federal elections. The Act prohibits the making or knowing acceptance of corporate or labor organizations contributions or expenditures in connection with a Federal election. 2 U.S.C. § 441b(a). In 1998, the State of California law allowed individuals, PACs, the national party committee, corporations and labor unions each to contribute up to $5,000 per year to political parties.[8]

B. Facts

Following the death of Representative Walter Capps,[9] who represented the 22nd Congressional District of California, a special election to fill the vacancy in the House seat for the rest of Mr. Capps' term was held on January 13, 1998, and on March 10, 1998. The special runoff election on March 10, 1998, involved only the race to fill the U.S. House vacancy, and there was only one candidate nominated by the Democratic Party, Lois Capps.[10] The CDP paid for several direct mail pieces that referenced the March 10, 1998, special runoff election. The Complaint included three of these direct mail pieces. Complaint, pp. 7, 9-12. All three mailings contain statements urging the public to "Continue the Walter Capps Tradition," and to "Vote

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8 *See* Cal. Gov't. Code §§ 82047, 85303 (West 1998).

9 Representative Walter Capps died on October 28, 1997.

10 An open primary for the special election was held on January 13, 1998. Because no candidate received more than 50 percent of the vote, the top vote-getter in each party participated in the runoff election Lois Capps, Walter Capps' widow, won the special election (runoff) garnering 53.46% of the vote. Representative Capps later ran unopposed in the June 2, 1998, Democratic Primary for the 22nd Congressional District and was reelected in the 1998 General Election.

Democratic" in the "Special Election, Tuesday, March 10th." The CDP treated these expenses as generic party disbursements under 11 C.F.R. § 106.5(a)(2)(iv) and allocated the costs for these mailings between its Federal and non-Federal accounts. Disclosure reports reflect that between late February and early March 1998, the CDP spent a total of $99,079.06 in generic voter contact and production costs for voter contact. *See* Schedule H4, 1998 April Quarterly Report. Of this amount, $77,281.67 reflected the non-Federal share for these expenses. Disclosure reports also reflect that the CDP made a $5,000 contribution to the Capps Committee on February 19, 1998. The reports do not reflect that the CDP made any coordinated expenditures or independent expenditures in support of the Capps campaign during the period of the special election.[11]

C. Complaint and Responses

Relying on the Commission's Advisory Opinion 1998-9, discussed *supra*, which involved the same set of facts as this matter, the Complaint alleges that the CDP mailings were not generic voter activity but "constitute[d] express advocacy of a clearly identified candidate" and should have been paid solely from the Federal account. Complaint, p. 2. The Complaint further alleges that the funds spent by the CDP on these ads were excessive and prohibited contributions from the CDP to the Capps Committee. *Id.* at 3-4. The Complaint also argues that the funds spent on the ads were not independent expenditures because the disclaimers on the ads were "not consistent with independent expenditures and [the] CDP did not report them as such (as would have been required)." *Id.* at 3. Finally, the Complaint requests that the Commission investigate to determine the extent of coordination between the parties, actual costs of mailings, "and whether any further 'generic voter contacts' were unlawfully made." *Id.* at 4.

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[11] It appears, however, that the CDP may have assigned its entire coordinated party limit to the national party. *See* footnote 14, *infra*.

By letter dated September 4, 1998, the CDP acknowledged paying for several direct mail pieces that included the language "Vote Democratic" and referred to the March 10, 1998, election in the 22nd Congressional District. CDP Response, p. 1. The CDP, however, maintains that none of the mailings contained express advocacy or mentioned Lois Capps, and thus the costs of the mailings were for generic voter activity properly allocated between its Federal and non-Federal accounts under 11 C.F.R. § 106.5. *Id.* The CDP requests that the Commission take no further action on the Complaint. *Id.* at 4.

Specifically, the CDP argues that the application of the allocation regulation as pertained to generic voter activity does not rest on whether there are multiple races or a single race but on "whether there is any reference to a specific candidate." *Id* at 2. In that regard, the CDP argues that the Commission in Advisory Opinion 1998-9 "misconstrued" Section 106.5 and announced a new rule of law by "exclud[ing] generic voter activity in connection with special elections." *Id.* at 2-4. The CDP also argues that the Commission "circumvent[ed] the 'specific candidate' requirement" under the generic voter activity provision by using "clearly identified candidate" to analyze the communications at issue. *Id.* The CDP further argues that even if the terms "specific candidate" triggered "clearly identified candidate," the communications did not refer to a clearly identified candidate because there were no unambiguous references to Lois Capps. *Id.* Finally, the CDP argues that it "acted in good faith reliance upon the regulations" and that as the Advisory Opinion was issued two months after the activity at issue here, the CDP "was not put on notice of the interpretation subsequently adopted by the Commission." *Id.* at 4.

In its September 24, 1998, response, the Capps Committee requests that the Commission dismiss the Complaint and take no further action. The Capps Committee argues that there is no evidence in the Complaint that it "was responsible for or in control of the advertisements," that it

will "defer" to the CDP to explain the expenditures at issue, and that the Complaint "appears to rely for legal authority on an advisory opinion issued after the expenditures in question were made." *Id.* The response does not address whether there was coordination.

D. Analysis

The allocation rules under Section 106.5 apply only to disbursements made in connection with both Federal and non-Federal elections and they specifically exclude disbursements for activities or communications which are candidate-specific. Allocation is used for mixed or shared activities that are not easily broken down into Federal and non-Federal components, e.g., administrative expenses and generic voter drive costs, and those activities which indirectly benefit both Federal and non-Federal candidates, such as by increasing voter turnout among party supporters generally, or by raising funds to pay the committee's administrative expenses.

Contrary to the CDP's assertion, the Commission did not misconstrue Section 106.5 or announce a new rule of law. The Commission's analysis in Advisory Opinion 1998-9 properly applied the allocation rule in determining that communications which are candidate-specific are not generic voter activity. Moreover, the Commission did not "exclude generic voter activity in connection with special elections." The allocation formula for generic voter drive costs has been applied to periods covering a special election. *See* footnote 5, *supra*. The Commission's analysis in Advisory Opinion 1998-9 was not focused on the type of election but on the fact that the message conveyed in the mailings combined with the reference to a specific election involving only one race resulted in a clear identification of the candidate.

The CDP argues that the Commission's use of the term "clearly identified candidate" to analyze the communications in the Advisory Opinion was inappropriate because the term used in the regulations for generic activity, "specific candidate," is "the more specific phrase." Advisory

Opinion 1998-9, however, dealt with the same set of facts and language as the mailings at issue and the Commission found that the communication "clearly identified" the candidate. Given the definition of "clearly identified candidate," there does not appear to be any basis to differentiate between "specific candidate" and "clearly identified candidate."

As provided under Section 106.5 and as explained in Advisory Opinion 1998-9, disbursements for communications that urge the public to vote for a clearly identified candidate are not generic voter drive costs. Although the language in the mailings at issue did not include the name or the photo of the candidate "Lois Capps," her identity was apparent through unambiguous reference. The mailings urged the public to "Continue the Walter Capps Tradition," and to "Vote Democratic" in the "Special Election, Tuesday, March 10th" This message on its face is exclusively directed at one specific election—the special election on March 10th.[12] Since there was only one office at stake in the March 10th special election and only one Democrat on the ballot, the communication can mean no other candidate but the Democratic nominee in the March 10th special election for the House seat for the 22nd District of California. Based on the foregoing, it appears that the mailings at issue expressly advocated the election of a clearly identified or specific candidate, Lois Capps, and thus, the disbursements were not generic voter drive costs. Therefore, it appears that the disbursements for the mailings should have been made exclusively from Federal funds.

[12] The message also mentions by name Walter Capps, the previous officeholder, deceased incumbent of the Congressional District, and spouse of the Democratic nominee, Lois Capps. One of the ads also includes photographs of Mr. Capps.

In light of the clear identification of the candidate and the message conveyed in the mailings, the CDP's expenses for the mailings would be either independent expenditures or coordinated expenditures.

Disbursements for communications that are not coordinated with the candidate and that expressly advocate the election or defeat of a clearly identified candidate are "independent expenditures." Because the communications contained express advocacy, the CDP should have included disclaimers in the mailings. Moreover, if the expenditures were not coordinated, they would be considered independent and would have to be reported as such by the CDP.

If the mailings resulted from coordination[13] between the CDP and the Capps Committee, the disbursements for them would be expenditures subject to the combined limits for direct and in-kind contributions (2 U.S.C. § 441a(a)(2)(A)) and coordinated expenditures (2 U.S.C. § 441a(d)) and would have had to be funded entirely from contributions subject to the limitations and prohibitions of the Act, i.e., paid for from the Federal account only. Any expenditures exceeding the coordinated party limits would have to be reported as both contributions made by the CDP and received by the Capps Committee.

The Complaint argues that the expenditures were not independent because the CDP did not report them as such and did not include disclaimers consistent with such expenditures. The Complaint also contends that the expenditures were excessive and prohibited contributions from the CDP to the Capps Committee and requests that the Commission investigate "to determine the

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[13] Disbursements for a communication that depicts a clearly identified candidate and conveys an electioneering message are expenditures if the communication results from a coordination between the donor and the recipient candidate. Electioneering messages include statements that garner or diminish support for a candidate. *See* Advisory Opinion 1984-15. Given that the message to vote Democratic in the special election on Tuesday, March 10th, constitute express advocacy, it would also constitute, at a minimum, an electioneering message.

full extent of coordination between the candidate and party with regard to these mailings, their actual costs, and whether any further 'generic voter contacts' were unlawfully made." Given that the record is inconclusive as to whether the expenditures were coordinated or independent, an investigation is necessary to determine the nature of these expenditures. Therefore, this Office recommends that the Commission make alternative reason to believe findings based on violations stemming from both coordination and independent expenditures. Also, based on the above, this Office recommends that the Commission reject the CDP's request to take no further action on the Complaint and reject the Capps Committee's request to dismiss the Complaint.

E. Violations

1. Excessive/In-Kind Contributions

Pursuant to 2 U.S.C. § 441a(d), the CDP was allowed to expend $32,550 on behalf of Lois Capps' 1998 special election campaign. In addition, pursuant to 2 U.S.C. § 441a(a)(2)(A), the CDP was allowed to contribute $5,000 to the Capps Committee. Thus, the CDP could have made $37,550 in combined contributions/coordinated party expenditures to the Capps Committee and remained within prescribed limits. The CDP, however, spent at least $104,079.06 in support of the Capps campaign (a $5,000 direct contribution to Capps' special runoff election and the $99,079.06 in combined Federal/non-Federal funds for the mailings at issue). Given the clear identification of the candidate Lois Capps and the message conveyed in the mailings, coordination between the CDP and the Capps Committee would mean that the amount spent on the mailings were expenditures made pursuant to 2 U.S.C. § 441a(d). The amount spent on the mailings which exceeded $37,550 would not qualify as Section 441a(d) expenditures, but would be considered an excessive in-kind contribution, pursuant to 2 U.S.C. § 441a(a)(2)(A).

Therefore, it appears that the CDP exceeded the Section 441a(a)(2)(A) limitations.[14] The excessive in-kind contribution made by the CDP in violation of 2 U.S.C. § 441a(a)(2)(A) would have been accepted by the Capps Committee, in apparent violation of 2 U.S.C. § 441a(f). Therefore, this Office recommends that the Commission find reason to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441a(a)(2)(A) and that the Friends of Lois Capps and David Powdrell, as treasurer, violated 2 U.S.C. § 441a(f).

2. **Prohibited Expenditures/Use of Non-Federal Funds**

Because the CDP's mailings apparently urged the public to vote for a clearly identified or specific candidate, they were not generic voter activity. All disbursements for these mailings, whether coordinated or independent, had to be funded entirely from funds subject to the limitations and prohibitions of the Act. The CDP acknowledges having paid for several direct mail pieces that referenced the special election. Its disclosure reports state that the CDP spent $99,079.06 in generic voter contact and production costs for voter contact. Of this amount, $22,797.39 was reported as the Federal share and $77,281.67 as the non-Federal share. As noted above, the State of California in 1998 allowed corporations and labor organizations to contribute to a political party. Therefore, it appears that payments from the CDP's non-Federal account for the expenditures at issue were made with moneys which were prohibited under 2 U.S.C. § 441b.

[14] As noted earlier, the coordinated party expenditure limit for the 1998 general election in California for a U.S. House seat was $32,550. The national party committee and state party committee each has its own separate spending limit for the party's nominee in that state. The CDP did not report making coordinated expenditures in support of Lois Capps during the period of the special election. Disclosure reports, however, reflect that the Democratic Congressional Campaign Committee spent nearly $64,000 in coordinated party expenditures in support of Capps during the period of the 1998 special election. The fact that the national party's coordinated expenditures in support of Capps exceeded its own limits by nearly $32,000 indicates that the CDP assigned its entire coordinated party limit to the national party.

In addition, the Commission's regulation at 11 C.F.R. § 102.5(a)(1)(i) requires that payments for Federal activity be made only from a committee's Federal account.

Based on the above, the amount disbursed from the non-Federal account apparently included impermissible funds, resulting in either prohibited independent expenditures by the CDP or prohibited in-kind contributions from the CDP to the Capps Committee, in violation of 2 U.S.C. § 441b. Thus, this Office recommends that the Commission find reason to believe that California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i),[15] and that the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i). Correspondingly, if the expenditures were coordinated, the Capps Committee would have violated 2 U.S.C. § 441b by accepting prohibited contributions from the CDP. Accordingly, this Office recommends that the Commission find reason to believe that the Friends of Lois Capps and David Powdrell, as treasurer, violated 2 U.S.C. § 441b.

3. Disclaimer Violations

Under the Act, all communications that expressly advocate the election or defeat of a clearly identified candidate must contain a disclaimer that both states who paid for the communication and whether or not it was authorized by any candidate or principal campaign committee of the candidate. 2 U.S.C. § 441d(a). Because the CDP's mailings apparently expressly advocated the election of Lois Capps, they were required to have such disclaimers.

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[15] The Commission has found that where an organization with Federal and non-Federal accounts appears to have violated 11 C.F.R. § 102.5 by disbursing funds from its non-Federal account in connection with a Federal election, the organization, or at least its Federal committee, may have also violated 2 U.S.C. § 441b if the non-Federal account contained corporate or labor organization funds at the time of the disbursement. *See* MUR 4413.

The CDP mailings only state "Paid for by the California Democratic Party" and do not state whether they were authorized by any candidate or campaign committee.

Based on the above, this Office recommends that the Commission find reason to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441d(a).

4. **Reporting Violations**

The CDP reported the expenditures at issue as allocable administrative/voter drive expenditures. Because these expenditures apparently were not generic voter activity but, coordinated or independent expenditures, the CDP has misreported them. If the expenditures were independent, the CDP was required under 2 U.S.C. § 434(b)(4)(H)(iii) to report these as 100 percent independent expenditures and certify on Schedule E of their reports that the expenditures were not made in coordination with the candidate. If the expenditures were coordinated, the CDP was required under 2 U.S.C. § 434(b)(4)(H)(i) and (iv) and (6)(B)(iv) to report them as such. Whether coordinated or independent expenditures, the CDP failed to properly report these expenditures in violation of 2 U.S.C. § 434(b). Based on the above, this Office recommends that the Commission find reason to believe that the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b).

If the expenditures were in-kind contributions to the Capps Committee, they were required to be reported as contributions made and received. As noted above, the CDP would have been required to report the expenditures as contributions to the Capps Committee and the Capps Committee would have been required to disclose the expenditures as in-kind contributions from the CDP. 2 U.S.C. § 434(b)(2)(D); 11 C.F.R. § 104.3(a)(4). Based on the above, this

Office recommends that the Commission find reason to believe that the Friends of Lois Capps and David Powdrell, as treasurer, violated 2 U.S.C. § 434(b).

III. PROPOSED DISCOVERY

At this juncture, it is not clear whether these expenditures were independent or coordinated and what additional expenditures, if any, the CDP may have made that were candidate-specific to Lois Capps. In light of the above, this Office believes that an inquiry into the nature and amount of expenditures made by the CDP in support of the Capps campaign is warranted. Accordingly, this Office plans to investigate this matter in the form of subpoenas and orders to the CDP and to the Capps Committee. Attached for the Commission's approval are proposed Subpoenas to Produce Documents and Orders to Submit Written Answers that will be issued to these two parties. Attachments 1-2.

IV. RECOMMENDATIONS

1. Reject the request from the California Democratic Party, the Democratic State Central Committee of California--Federal and Katherine Moret, as treasurer, and the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, to take no further action on the Complaint.

2. Reject the request from the Friends of Lois Capps and David Powdrell, as treasurer, to dismiss the Complaint.

3. Find reason to believe that the California Democratic Party and the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. §§ 441b, 441a(a)(2)(A), 441d(a), and 11 C.F.R. § 102.5(a)(1)(i).

4. Find reason to believe that the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 434(b).

5. Find reason to believe that the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer, violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5(a)(1)(i).

6. Find reason to believe that the Friends of Lois Capps and David Powdrell, as treasurer, violated 2 U.S.C. §§ 441b, 441a(f), and 434(b).

7. Approve Subpoenas for documents and Orders for written answers to the California Democratic Party; the Democratic State Central Committee of California—Federal and Katherine Moret, as treasurer; the Democratic State Central Committee of California—Non-Federal and Katherine Moret, as treasurer; and the Friends of Lois Capps and David Powdrell as treasurer.

8. Approve the attached Factual and Legal Analyses and the appropriate letters.

5/6/99
Date

Lawrence M. Noble
General Counsel

Attachments:
1. Subpoena and Order—CDP
2. Subpoena and Order—Capps Committee
3. Factual and Legal Analysis—CDP
4. Factual and Legal Analysis—Capps Committee