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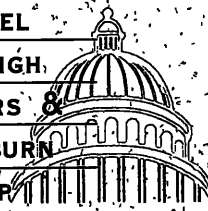
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September 4, 1998

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VIA FACSIMILE AND U.S. MAIL

F. Andrew Turley, Esq.
Central Enforcement Docket
Federal Election Commission
999 E St., N.W.
Washington, D.C. 20463

Re: MUR 4788

Dear Mr. Turley:

This letter is in response to your communication dated August 19, 1998 concerning a complaint filed against the Democratic State Central Committee of California (also referred to herein as the California Democratic Party or CDP) by the California Republican Party. This office represents the CDP and Katherine Moret, Treasurer.

CDP acknowledges that it paid for several direct mail pieces in Spring 1998, urging voters to "Vote Democratic" and referring to the Special Election scheduled for March 10, 1998 in the 22d Congressional District. These pieces also referred to the voting record and traditions of the late Congressman Walter Capps. Contrary to the allegations of the complaint, however, none of those pieces "expressly advocated [Lois] Capps' election" or even mentioned Lois Capps.

The costs for these mailings were allocated between CDP's federal and non-federal accounts as required by 11 CFR 106.5. Specifically, section 106.5(a)(2) provides:

(2) **Costs to be allocated.** Committees that make disbursements in connection with federal and non-federal elections shall allocate expenses according to this section for the following categories of activity:

(iv) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the

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public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

The communications at issue here were generic voter activity; they urged the reader to vote Democratic, but did not mention a specific candidate.¹

The complaint filed by the Republican Party argues that the Commission's finding in Advisory Opinion 1998-9 leads to the conclusion that CDP violated the law here. CDP submits that this conclusion is wrong for two reasons: (1) the Commission's decision in Advisory Opinion 1998-9 misconstrued the language of 11 CFR 106.5 and should be corrected, and (2) to the extent the Commission has announced a new rule regarding generic voter activity in special elections, it must do so by a formal rule-making proceeding and cannot do so through an advisory opinion.

In Advisory Opinion 1998-9, the Commission considered a communication similar to those at issue here, which urged voters to "Vote Republican [in the] Special Election, Tuesday, June 23". The Commission acknowledged that a communication which asks the public to Vote Republican on a specific election date or "on election day" is "usually a message that falls definitely within the category of generic voter drive cost." However, without citing any authority, the Commission then distinguished between elections which included multiple races, and a special election, which includes only one race. The reason for this omission is obvious: section 106.5 does not distinguish between types of elections, but makes the availability of allocation turn on whether there is any reference to a specific candidate.

The Commission attempted to circumvent the "specific candidate" requirement by stating that disbursements for a communication that urges the public to vote for a "clearly identified candidate" cannot be considered generic voter drive costs. This leap is inappropriate for two reasons.

First and foremost, section 106.5 does not use the term "clearly identified candidate"; it uses the term "specific candidate". Since subsection (i) of section 106.5 refers to allocation of administrative expenses, except "such expenses directly attributable to a clearly identified candidate", it must be assumed that use of the more specific phrase "specific candidate" in subsection (iv) was deliberate and not inadvertent.

Second, even if use of the term "specific candidate" somehow triggers the definition of "clearly identified candidate" in 11 CFR 100.17, the mailings here did not refer to a

¹ 11 CFR 100.3 defines a "candidate" as "an individual who seeks nomination for election, or election, to federal office". The reference to Walter Capps could not be a reference to a "candidate" since he was deceased; it was akin to invoking the name of John Kennedy or other well-known Democrats to rally support for the party.

"clearly identified candidate" Section 100.17 states that the term means:

....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 Senate in the State of Georgia."

The communications here contain no such unambiguous references. They merely urge the reader to vote Democratic at the Special Election. Although it may be determined from extrinsic information that there is only one Democrat in that election, nothing on the face of the communication suggests this. There is every reason to believe that the average reader would conclude that there were multiple Democratic candidates (since the communications do not refer to any one candidate) and that he or she is being urged to vote for all Democratic candidates. Since all readers would not come to the conclusion that the communication referred to a particular candidate (in fact, just the opposite) it is clearly not "unambiguous".

Similarly, because these communications do not refer to any clearly identified candidate, the disbursements for these communications are not expenditures subject to the limits of 2 U.S.C. §441a(d) or the contribution limits of 2 U.S.C. §441a(a)(2)(A). See, Advisory Opinion 1984-15:

If, however, the reference [in an advertisement] is to Democratic candidates generally without identifying (by visual image or audio content) any specific candidate or office, the disbursements would not then be attributable to any candidate or to any campaign for any particular Federal office. Instead, they would be characterized as advertisements promoting [one party over the other] and to encourage voters to support the Republican Party generally.

As such, the disbursements for such advertising would not be reportable as contributions to any specific candidate or as coordinated party expenditures in connection with any specific general election campaign.

See also, Advisory Opinion 1985-14 (limitations of §441a(d) apply where communication both depicts a clearly identified candidate and conveys an electioneering message.

Although the Commission might wish otherwise, it is apparent that the current regulations do not specifically exclude generic voter activity in connection with special elections.² Put another way, disbursements for communications which do not identify a

² In this regard, it must be kept in mind that 11 CFR 106.5(d) requires that allocation be done according to a particular ballot composition method which is calculated on a two-year election cycle, and does not isolate particular elections.

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particular candidate, even in the context of a special election, are not defined as expenditures in connection with a campaign for a Federal office for purposes of the FECA's limitations.

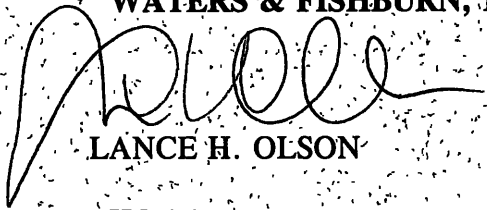
To the extent that Advisory Opinion 1998-9 interpreted the regulations to include these communications in the contribution limitations, it announced a new rule of law. Use of an advisory opinion in this manner is impermissible. 2 USC §437(b) and 11 CFR 112.4 provide that any rule of law which is not stated in the Act or in the Commission's regulations may be initially proposed only as a rule or regulation pursuant to procedures established in 2 USC 438(d). See also, United States Defense Committee v. Federal Election Commission, 861 F.2d 765 (CA 2, 1988)(rule of law must be proposed as rule or regulation; except to extent that advisory opinion approves a proposed transaction, it is not binding on Commission or third parties). If the Commission wishes to change the definition of generic voter activity, it is free to initiate a formal proceeding to amend the regulation.

However, insofar as the current regulations allow communications to be classified as generic voter activity so long as they do not refer to any specific candidate, CDP has relied on the language of the existing regulations and acted in good faith reliance upon them. Since the decision in AO 1998-9 was issued approximately two months after the disbursements which are the subject of this complaint, it could not possibly have put CDP on notice of the interpretation subsequently adopted by the Commission in that Opinion. For these reasons, as well as the substantive arguments above, CDP submits that sanctions are not appropriate. See, 2 USC §438(e).

Based on the foregoing, we submit that no violation of the Act has been committed and request that no further action be taken on the complaint in this case. If additional information is necessary, please contact this office.

Sincerely,

**OLSON, HAGEL, LEIDIGH,
WATERS & FISHBURN, LLP**



LANCE H. OLSON

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cc: Kathy Bowler (via facsimile)