



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 11, 2000

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-19

Benjamin Ginsberg
Patton Boggs LLP
2550 M Street, NW
Washington, DC 20037-1350

Dear Mr. Ginsberg:

This responds to your letter of June 20, 2000, requesting an advisory opinion on behalf of the Republican Party of Florida ("RPF"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations, to the allocation of administrative and get-out-the-vote drive expenses incurred by RPF during the 2000 election cycle.

You state that on March 5, 1999, Senator Connie Mack, whose current term in the U.S. Senate expires in January of 2001, announced that he would not seek another term. Shortly thereafter, two Florida state officeholders expressed an interest in seeking Senator Mack's seat. According to your request, Bill Nelson, Florida State Treasurer and Insurance Commissioner, filed a statement of candidacy for the Senate seat on March 22, 1999, and Tom Gallagher, Florida State Education Commissioner, "established the structure to begin accepting contributions to run for the Senate seat" in April of 1999.

You also explain that Florida has a "resign-to-run" law that requires state officeholders to resign from state office in order to run for Federal office. Thus, by seeking the Senate seat, Commissioners Nelson and Gallagher would, at some point, create vacancies in their state offices. Under Florida law, elections for those offices would be held in conjunction with the next general election. FLA. STAT. ch. 100.111(1)(a). According to your request, "the State Governor could not officially declare these elections until federal ballot qualification week, which did not commence until noon May 8, 2000." Nevertheless, not

long after Commissioners Nelson and Gallagher expressed an interest in pursuing the Senate seat, state candidates began registering for the anticipated vacancies in the two state offices.

You state that, in accordance with applicable Commission regulations, the Republican Party of Florida calculated its ballot composition ratio for the 1999-2000 election cycle based on the offices that were expected to be on the November 2000 ballot as of January 1, 1999. At that time, RPF's ratio was 3 Federal points and 4 nonfederal points, resulting in a ratio of 43% Federal and 57% nonfederal. You further state that, notwithstanding Senator Mack's announcement and the resulting actions of the state officeholders and the would-be state candidates, RPF did not adjust its ballot composition ratio to reflect the vacancies in the two state offices until they were officially added to the ballot in May of 2000.¹

Nonetheless, you state that RPF was "compelled to give consideration to the elections and begin devoting fixed resources to the campaigns" on the date that the state officers announced their candidacies for federal office and filed their papers, and thus has been supporting candidates for the two state offices since May of 1999. Consequently, you assert that the 43%, Federal 57% nonfederal ratio used by RPF prior to the "official" announcement of the ballot composition in May of 2000 did not accurately reflect the "administrative and generic expenses that were in fact devoted to state elections" by RPF. Therefore, you ask whether the RPF may now adjust its ballot composition ratio to retroactively include the two nonfederal points for the period between June 1, 1999, and May 8, 2000.²

State and local party committees are required to allocate their administrative expenses and costs of generic voter drives using the "ballot composition method." 11 CFR 106.5(d). Under this method, committees determine their ballot composition ratios at the start of the election cycle "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." The regulations explain how Federal and state offices should be counted for purposes of the ratio. When anticipated on the next general election ballot, the offices of President, U.S. Senator, and U.S. Representative each count as one Federal point, while the offices of Governor, State Senator, and State Representative are counted as one nonfederal point each. The rules require committees to count the total of all other partisan statewide executive candidates expected on the ballot as a maximum of two nonfederal offices and include up to two points for those offices in their ratios. State party committees may also include an additional nonfederal point. 11 CFR 106.5(d)(1)(ii).

Your request emphasizes that under Florida's "resign-to-run" law, both Commissioner Nelson and Commissioner Gallagher were required to resign from their state offices in order to run for the U.S. Senate seat. Florida's resign-to-run law provides that any state officeholder who "qualifies for federal public office must resign from the office he or

¹ Your request indicates that on May 8, 2000, RPF began using a ballot composition ratio of 33% Federal and 67% nonfederal.

² You state that although RPF began its activities on behalf of candidates during the month of May, 1999, for administrative convenience, the party seeks permission to re-allocate its expenses from June 1, 1999.

she presently holds if the terms or any part thereof run concurrently with each other.”³ FLA. STAT. ch. 99.012(4)(a). Once submitted, these resignations are irrevocable. FLA. STAT. ch. 99.012(4)(b). You assert that the existence of this law, combined with the state officeholders’ expressions of interest in the Senate seat, made the vacancies in the state offices inevitable.

However, the resign-to-run law does not require state officeholders to submit their resignations until the start of the qualifying period for the office they intend to seek. FLA. STAT. ch. 99.012(4)(c). In Florida, the qualifying period for U.S. Senate candidates is from “the 120th day prior to the first primary, but not later than noon of the 116th day prior to the date of the first primary,” which, for the 1999-2000 election cycle, was from May 8 to May 12, 2000. FLA. STAT. ch. 99.061(1). Thus, neither Commissioner Nelson nor Commissioner Gallagher was required to submit a resignation prior to May 8, 2000.

Furthermore, the resign-to-run law also states that “the resignation creates a vacancy in office to be filled by election, thereby permitting persons to qualify as candidates for nomination and election as if the officer’s term were otherwise scheduled to expire.” FLA. STAT. ch. 99.012(4)(g). Thus, prior to the officeholder’s submission of his or her resignation, or his or her resignation by operation of law,⁴ no vacancy exists.

Commissioner Nelson submitted his resignation on May 8, 2000, and Commissioner Gallagher submitted his resignation on May 12, 2000. Thus, notwithstanding their expressions of interest in the Senate seat and subsequent campaign activity during 1999, Commissioner Nelson and Commissioner Gallagher did not vacate their state offices until May of 2000.

However, the Commission notes that you submitted your request on June 21, 2000, more than a month after the state officeholders submitted their irrevocable resignations. Thus, the offices are now vacant, and are certain to be on the ballot for the November 2000 election. Under these circumstances, the Commission concludes that RPF may now retroactively reallocate its administrative expenses for the period prior to May 8, 2000.

There remains the issue of the starting point for this reallocation period. As indicated above, you state that RPF has been supporting candidates for the two state offices since May of 1999, and thus seeks permission to retroactively include two nonfederal points for the period between June 1, 1999, and May 8, 2000.

The Commission notes that several events occurred prior to June 1, 1999 that support RPF’s assertions that it began supporting candidates for the two state offices prior to that date. Senator Mack announced his retirement on March 5, 1999. Commissioner Nelson filed a Statement of Candidacy for the Senate seat on March 22, 1999. Commissioner Gallagher

³ The failure of a candidate who qualifies for federal office to submit a resignation in accordance with the law constitutes an “automatic irrevocable resignation, effective immediately, from the office he or she presently holds.” FLA. STAT. ch. 99.012(4)(f)(1).

⁴ See footnote 3, above.

established a testing the waters committee sometime during April of 1999, and by April 30, 1999, he had announced his intention to seek the Senate seat and had begun accepting contributions. On May 13 and 14, 1999, state candidates began registering for the anticipated vacancies in the offices of State Treasurer and Insurance Commissioner and State Education Commissioner. In addition, according to their Federal disclosure reports, Commissioner Nelson and Commissioner Gallagher had collected enough Federal contributions to cross the threshold for Federal candidacy prior to June 1, 1999. *See* 2 U.S.C. §431(2)(A).⁵

Under these circumstances, the Commission concludes that RPF may reallocate its administrative expenses starting on June 1, 1999, using a ballot composition ratio that includes points for the two state offices that are now on the November, 2000 ballot. RPF has thirty days from the date of issuance of this opinion to submit an amended Schedule H1 for the period from June 1, 1999 to May 8, 2000, and to transfer funds between accounts to correct its prior allocation for this period.

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

Sincerely,

(signed)

Darryl R. Wold
Chairman

⁵ 2 U.S.C. §431(2) reads in part: “The term ‘candidate’ means an individual who seeks nomination for election, or election, to Federal office, and for purposes of this paragraph, an individual shall be deemed to seek nomination for election, or election -- (A) if such individual has received contributions aggregating in excess of \$5,000”