FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

OFFICE OF THE CHAIRMAN

ADVISORY OPINION 1999-4

DISSENTING OPINION
OF
CHAIRMAN SCOTT E. THOMAS

The Federal Election Campaign Act ("the Act") and Federal Election Commission regulations require a local party organization to register and report as a political committee when it makes payments for the purpose of influencing federal elections in excess of $1,000 in a calendar year. Advisory Opinion 1999-4, however, fails to give full meaning to the statutory and regulatory mandate. This omission creates a potential loophole allowing the non-disclosed use of soft money by local party committees engaged in federal activity. Because the use of these funds should be publicly disclosed and monitored for compliance with FEC restrictions, I dissent.

I.

The Act and Commission regulations explicitly provide that a local party committee becomes a "political committee" if it "makes *expenditures* aggregating in excess of $1,000 during a calendar year." 2 U.S.C. §431(4)(C)(emphasis added);[1]

[1] In its entirety, §431(4)(C) provides:

> [A]ny local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) of this section aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or *makes expenditures aggregating in excess of $1,000 during a calendar year.*

2 U.S.C. §431(4)(C)(emphasis added). Indeed, the legislative history for this provision confirms that the $5,000 threshold for exempt activities was not meant to serve as the threshold for political committee registration in all respects:

> Local committees of political parties also have a separate test for determining when they become political committees under the Act. In keeping with the Committee intent to encourage the participation of local party committees in Federal elections, the definition of

11 C.F.R. §100.5(c). The statute and regulations broadly define "expenditure" to include "*any*. . . payment . . . made . . . for the purpose of influencing any election for federal office." 2 U.S.C. §431(9)(A)(i); 11 C.F.R. 100.8(a)(1)(emphasis added). In my opinion, local party committee payments for certain so-called "allocable activities" which are part federal in nature plainly fall within the definition of "expenditure."

For those generic expenses that relate to both federal and non-federal party building activity, the Commission has specifically required allocation so that the federal share will be paid for with federally permissible funds. The Commission's allocation regulations state:

> Organizations that are not political committees but have established separate federal and non-federal accounts under 11 C.F.R. 102.5(b)(1)(i), or that make federal and non-federal disbursements from a single account under 11 C.F.R. 102.5(b)(1)(ii) ***shall also allocate their federal and non-federal expenses*** according to this section.

11 C.F.R. 106.5(a)(1)(emphasis added). The regulations further define which disbursements are considered to be, in part, federal in nature. In particular, the Commission's regulations require allocation of not only administrative expenses and fundraising expenses where both federal and non-federal funds are collected, but also "[g]eneric voter drives 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). When a local party committee engages in and makes payments for such allocable activities, a portion of these payments are considered to be federal in nature.

In my view, the Commission should count the federal share of administrative, fundraising, and generic get-out-the-vote expenses towards the political committee registration threshold. These payments are plainly expenditures made "for the purpose of influencing" a federal election. 2 U.S.C. §431(9)(A)(i). Indeed, it is precisely because these activities were recognized as having a federal election component that the Commission required their allocation under 11 C.F.R. §106.5. Thus, if the federal share

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political committee establishes a higher threshold for local party committees which engage only in volunteer activities. Accordingly, if local party committees engage only in these "exempted activities", such as slate cards [301(8)(B)(v)], "buttons and bumper stickers" [301(8)(B)(x)], and registration and get-out-the-vote activities on behalf of Presidential nominees [301(8)(B)(xii)] the threshold for registration and reporting is $5,000. *If, on the other hand, the local party committee makes contributions to candidates or makes expenditures which are not exempted, the registration and reporting threshold is $1,000.*

H. Rep. No. 96-422, 96th Cong., 1st Sess. 5-6 (1979) *reprinted in* Legislative History of the Federal Election Campaign Act Amendments of 1979, at 189 (GPO 1983) (emphasis added).

of these payments by a local party committee exceeds the $1,000 expenditure threshold, it seems appropriate that it must register as a political committee.

This result makes practical sense. Suppose, for example, that a local party committee spends $250,000 on a generic voter drive the week before a federal election which involves a television and newspaper campaign urging voters to "Vote Democratic." Let us further suppose that under the applicable allocation formula, *see, e.g.*, 11 C.F.R. §106.5(d), the federal share of this activity is $150,000. Under my view of the statute and the regulations, the $150,000 in federal activity engaged in by the local party committee far surpasses and triggers the $1,000 expenditure threshold for political committee status found at 2 U.S.C. §431(4)(C). Within ten days of becoming a political committee, the local party committee must file a statement of organization with the Commission and comply with the Act's reporting requirements. 2 U.S.C. §§433(a) and 434(a). As a result of these reports, the public would know how much the local party spent for these ads, how much soft money was used and from whom the local party raised hard money contributions to pay for the ads.

Unfortunately, Advisory Opinion 1999-4 requires none of this. The opinion fails to state that a local party committee, engaging in massive advertising, phone bank activity, and get-out-the-vote drives (a portion of which influences federal elections according to the Commission allocation regulations) must register as a political committee. Consequently, large amounts of important campaign finance information and activity may be kept from the voting public. Such a result is clearly inconsistent with the important disclosure purposes of the Act.

II.

Significantly, Advisory Opinion 1999-4 does provide that a local party committee, even though unregistered with the Commission as a political committee, must nevertheless follow the Commission's allocation regulations. Footnote four of the opinion expressly states that "organizations that are not political committees (regardless of whether they have separate Federal and non-Federal accounts) are subject to the allocation rules." Advisory Opinion 1999-4 at 5, n.4.[2] Accordingly, local party committees still have to make sure that sufficient permissible money is available to pay

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[2] This language is confirmed by the following dialogue between myself and the maker of the motion to approve Advisory Opinion 1999-4:

Chairman Thomas: On the question of whether or not the local party committees would still have to follow the allocation rules, even though they might not have to register, is it your intent that they would have to follow the allocation rules?

Commissioner Elliott: Yes.

Commission Meeting, April 15, 1999.

for the federal share of allocable items. This is important because absent this language, national and state party committees could funnel large amounts of soft money to local party committees who, in turn, could use that soft money to undertake unlimited generic voter drives and completely escape federal allocation rules.

Application of this allocation requirement, however, may be a somewhat hollow gesture under the result reached in Advisory Opinion 1999-4. The allocation regulations detail for local party committees what expenses need to be allocated, what formulas to use,[3] and how to make payments to insure that the federal share will be paid with federally permissible funds. Yet, without the reports provided by a registered political committee, it is impossible for the Commission to review compliance with these regulations. How, for example, is the Commission to monitor a local party committee's compliance with the Commission's allocation rules if the local party committee does not have to file reports with the Commission? The answer is obvious. Under Advisory Opinion 1999-4, the Commission will have little ability to enforce local party committee compliance with its allocation regulations.

III.

In reporting the Senate bill that eventually led to the enactment of FECA, the Senate Rules Committee stated that "[d]isclosure, if it is to be effective, must mean total disclosure." S. Rep. No. 229, 92d Cong., 1st Sess. 57 (1971), *reprinted in* Legislative History of the Federal Election Campaign Act of 1971, at 215 (GPO 1981). Moreover, the Commission's allocation rules "serve the dual purposes of curbing the use of money raised outside of the FECA's requirements [soft money] in federal elections, and of allowing the Commission and the public to monitor compliance with these requirements." 57 Fed. Reg. 8990 (March 13, 1992). Because Advisory Opinion 1999-4 fails to count the federal portion of allocable administrative and get-out-the vote drive expenses for local party committees toward the registration threshold needed to require public reporting, the Opinion represents a step backward for those interested in total disclosure and the enforcement of the Act, particularly where it relates to the use of soft money. For these reasons, I dissent.

5/10/99
Date

Scott E. Thomas
Chairman

[3] 11 C.F.R. §106.5(d)(1)(i) requires local party committees with separate federal and non-federal accounts to allocate their administrative expenses and generic voter drive costs based on the ratio of federal offices expected on the ballot in the next general election to be held in the committee's geographical area. The ratio is determined by the number of categories of federal offices and the number of categories of non-federal offices on the ballot as described in paragraph (d)(1)(ii) of this section.