FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2003-19

CONCURRING OPINION OF
COMMISSIONER SCOTT E. THOMAS

In Advisory Opinion 2003-19 the Commission approved the proposed disposition of assets by the Democratic Congressional Campaign Committee (DCCC). Two issues warrant further comment. First, given the use of an 'arm's length transaction' test in other recent advisory opinions involving committee disposition of assets, how does the concept apply, here and in those opinions? Second, given that the assets in question probably were purchased in part with 'soft money,' should the DCCC be able to apply the entire amount of sale proceeds to its federal election efforts?

Application of an 'arm's length transaction' analysis

Recently, in Advisory Opinion 2002-14 involving the Libertarian Party's rental of lists, the Commission concluded, "[T]he list must be leased at the usual and normal charge in a bona fide, arm's length transaction." Further, in Advisory Opinion 2003-16 involving national parties' provision of supporter lists to a bank undertaking a credit card affinity program, the Commission wrote: "[T]he list must be used in a commercially reasonable manner consistent with a *bona fide* arms-length agreement. *See* Advisory Opinion 2002-14." Such 'arm's length' assurances help prevent the making of disguised contributions in the form of 'sweetheart' deals.

Technically, the 'arm's length transaction' issue is not in play in the DCCC situation. The DCCC indicated in its request that the sales would be "in arm's length transactions." Request of June 24, 2003, p. 2. Nonetheless, for purposes of clear guidance to the regulated community, the Commission should try to explain whether and how the concept applies as a matter of law. In my view, the concept does apply, even to the DCCC's sale of used assets; but the concept should not be applied in a manner requiring parties to the sale themselves to be separately controlled, disinterested persons or entities.

The 'arm's length transaction' doctrine has two practical applications in the context of a political committee selling or renting assets, as I see it. First, if the parties to a transaction are not separately controlled and disinterested, the Commission should be able to operate with a rebuttable presumption that the "usual and normal charge," 11 CFR

100.52(d), is not being applied. This would allow the Commission to find reason to believe a violation had occurred in appropriate circumstances in an enforcement proceeding. *See* 2 U.S.C. 437g(a)(2). With a rebuttable presumption, of course, a clear showing by the parties to such a transaction that "usual and normal charge" was paid would overcome the presumption.

The second application of the 'arm's length transaction' doctrine is in the definition of "usual and normal charge" itself. In essence, the Commission should evaluate whether parties have used the "usual and normal charge" based on whether the amount is what a willing buyer would pay a willing seller in the commercial marketplace *if each were separately controlled, disinterested persons or entities*. In other words, the parties to the transaction do not have to be separately controlled and disinterested; they must nonetheless assure that the amount paid in the transaction is what separately controlled, disinterested persons would pay.

The approach I suggest still would leave a host of difficult issues in particular situations, such as how to value the consideration exchanged by the parties and whether there truly is a "usual" and "normal" charge. Given the frequency with which political committees sell or rent assets, and the complications arising from having to assure all transactions are with separately controlled, disinterested persons, the regulated community ought to have assurance at least on whether transactions with the latter are *per se* impermissible.

Receiving proceeds for assets purchased in part with 'soft money'

When the DCCC request came to the Commission, I first noted that the assets involved probably were purchased in part with 'soft money.' Thus, I thought the primary issue was going to be whether that would require part of the sales proceeds to be treated as 'soft money.' To be fair, the Commission faced this issue in the Libertarian Party advisory opinion as well, but gave no hint of the matter. The DCCC request offers a chance to give some guidance on the point.

In the post-BCRA (Bipartisan Campaign Reform Act) world, whereby national party committees are not allowed to have 'soft money' accounts, there will come a time where virtually all party assets can be traced to purchases using federally permissible funds only. Given the need for reasonable transition rules, and given the fact that Congress only expressed a desire to have national parties dispose of "funds" not federally permissible by a date certain, Sec. 402(b)(2) of BCRA, the Commission can operate with a legal fiction that all assets of national party committees as of that date certain can be sold without regard to 'soft money' origins. This legal fiction underlies the Commission's conclusion that the DCCC may use all the proceeds of its assets sales for federal election purposes.

I would add a caution, though, for other types of committees that, post-BCRA, still can purchase assets legally with a combination of 'soft money' and federally permissible funds. State parties, for example, when disposing of assets purchased in part with 'soft money' should not read Advisory Opinion 2003-19 as a license to place the full proceeds in a federal account. In my view, such committees must apportion the sale proceeds appropriately under the commission's allocation regulations so that the amount going to the federal account does not consist of any 'soft money.' This conforms with my understanding of the longstanding application of the law in such situations.

8/22/03
Date

Commissioner