



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

October 25, 1993

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-17

Maureen E. Garde, Executive Director  
Massachusetts Democratic Party  
45 Bromfield Street  
Boston, MA 02108

Dear Ms. Garde:

This responds to your letter dated August 26, 1993, on behalf of the Massachusetts Democratic Party ("the Party") concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation of the Party's expenditures for its Federal and non-Federal activities when the State law mandates its own payment procedures for the Party's administrative expenses.

Your request indicates that there is a conflict between the way the Party interprets Commission regulations on the allocation of state party administrative expenses and the interpretation by the Office of Campaign & Political Finance of the Commonwealth of Massachusetts ("OCPF") as put forth in an interpretive bulletin issued in April 1993. The differences pertain to the percentage of state party administrative expenses allocated for Federal activity and for non-Federal activity, based upon "points" assigned to each type of activity.

According to Commission regulations, state party committees with separate Federal and non-Federal accounts must allocate their administrative expenses and generic voter drive costs between those accounts using the "ballot composition method." This method is based on the ratio of Federal offices to total Federal and non-Federal offices expected on the ballot in the state's next general election. 11 CFR 106.5(d)(1)(i). The ballot composition ratio is determined at the start of each two-year Federal election cycle, in accordance with a point system set out in 11 CFR 106.5 (see below).

The Party has disclosed on its Schedule H1 (the Commission disclosure page showing the point allocation and percentage) for the 1993-94 election cycle an allocation of two Federal points and four non-Federal points for a Federal to non-Federal allocation of 33 percent to 67 percent. This ratio is based on having one point each for the U.S. Senate and the U.S. House, and one point each for the governor, other statewide offices, state senate, and state representative. No points were allocated for local candidates.

The Party's allocation for Federal activity is higher than the percentage set out by the OCPF's interpretive bulletin, based on the assignment of fewer non-Federal points than is required by the OCPF. You present a number of reasons for the Party's allocation formula, including the Party's belief that (a) the use of the word "may" in the Commission's "Instructions for Preparing the Method of Allocation Schedule H-1" indicates the discretionary nature of counting non-Federal points, and (b) the "local candidates" category should include no points because the Party does not participate in any local elections and these local elections "are almost exclusively non-partisan in nature."

OCPF asserts, however, that the Party's non-Federal account must pay the full amount of the state share permitted by Federal regulation for any mixed activity. OCPF contends that Federal law does not preempt State law where Federal law permits payment of the state share of a mixed expense while the State law mandates such payment. Specifically, OCPF has required a 25/75 Federal/state allocation for state party committees, unless the party committee adds to the ratio an extra non-federal point permitted in the regulation (thus resulting in a 22/78 allocation). The 25/75 ratio is derived by assigning two Federal points, one each for the U.S. Senate and the House, and six non-Federal points, one for governor, two for other statewide offices, one for state senate, one for state representative, and one for local candidates.

In a comment letter submitted to the Commission, OCPF addressed the Party's assignment of zero points to the category for local candidates. It points out that, although the Party does not participate in local elections, other state committees of other parties might, and the Party may do so in the future. In addition, although most local elections in Massachusetts are non-partisan, there are still 25 communities with "partisan preliminaries or caucuses."

You seek an advisory opinion as to whether the non-Federal points are discretionary or mandatory, according to Commission regulations. You also refer to the possible preemption of Massachusetts regulations by Commission regulations, and ask whether the Party may pay for all of its administrative costs out of its Federal account.

Commission regulations describe the ballot composition method as follows:

In calculating a ballot composition ratio, a state or local party committee shall count the federal offices of President, United States Senator, and United States Representative, if expected on the ballot in the next general election, as one federal office each. The committee shall count the non-federal offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each. The committee shall count the total of all other partisan statewide executive candidates, if expected on the

ballot in the next general election, as a maximum of two non-federal offices. State party committees shall also include in the ratio one additional non-federal office if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. Local party committees shall also include in the ratio a maximum of two additional non-federal offices if any partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle. State and local party committees shall also include in the ratio one additional non-federal office. 11 CFR 106.5(d)(1)(ii).

### Discretionary Nature of the Non-Federal Points

The Commission notes language throughout 11 CFR 106.5(d)(1)(ii) using the word "shall." Although the word "shall" carries a presumption that it is used in the imperative, legislative history and purpose are relevant in making such a determination. See Sutherland Statutory Construction 57.01-57.05 (5th Ed.). The Explanation and Justification of the regulation as initially promulgated in June 1990, and, as amended in March 1992, indicates the non-imperative nature of the assignment of non-Federal points. In March 1990, when the Commission promulgated comprehensive regulations on allocation, the Commission expressed its view that

allocating a portion of certain costs to a committee's non-federal account is a permissive rather than a mandated procedure. Thus, the amounts that would be calculated under the rules for a committee's federal share of allocable expenses represent the minimum amounts to be paid from the committee's federal account, without precluding the committee from paying a higher percentage with federal funds. 55 Fed. Reg. 26058, 26063 (June 26, 1990).

When discussing the points for "other partisan statewide executive candidates," the Explanation and Justification referred to independently elected lieutenant gubernatorial candidates, and stated that that office "may be counted separately from the governor." [emphasis added]. Id. at 26064. In addition, when the Commission amended the rules on allocation of administrative costs by state and local party committees, the Explanation and Justification stated that party committees "may add an additional non-federal point" and "may also include non-federal point(s) for local offices if partisan local candidates are expected on the ballot in any regularly scheduled election during the two-year congressional election cycle." [emphasis added]. 57 Fed. Reg. 8990 (March 13, 1992). In further discussing the additional points for local office races, the Commission referred to the Notice of Proposed Rulemaking, whose approach was being affirmed, as proposing that "(d)(1)(ii) be amended to allow" the inclusion of the points [emphasis added]. Id. at 8991.

Based on the foregoing, the Commission concludes that the non-Federal points are not mandatory under Federal law. The allocation regulations impose a floor on Federal points and a ceiling on non-Federal points. A state party committee may take the highest number of non-Federal points allowable and must take the minimum number of Federal points that are required. A state party committee that proposes to apply a ratio entailing a higher Federal percentage may do so.<sup>1/</sup>

## Federal Preemption of State Law

Although the Commission has determined that the non-Federal points in the allocation ratio are discretionary, the practical effect of this determination with respect to your request depends upon whether Federal law preempts the application of State requirements.

The Act states that its provisions and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. Id. at 100-101.

These principles are codified in the Commission regulations which provide for Federal preemption with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51. 11 CFR 108.7(b).

Through its allocation regulations, the Commission has asserted broad authority with regard to allocable expenses that by their very nature are inextricably intertwined with Federal election activity. For example, the full amount of such expenses must be disclosed at the Federal level, along with the allocation formulas used, and an explanation of the transfers from the non-Federal account. 11 CFR 104.10.

The Commission's allocation regulations were clearly designed to allow affected committees the flexibility to pay for more than the minimum Federal share of allocable expenses with funds raised under the Federal restrictions. Recognizing that the allocation rules would be imposing more Federal responsibilities on committees (e.g., the need to disclose even the non-Federal share of disbursements), the Commission intended to leave committees with the option of paying for allocable expenses in a way that is less burdensome if they so choose. This intent is reflected in the language in the Explanation and Justification of the regulations quoted above on pages 3 and 4.

The OCPF interpretive bulletin contradicts the Commission's allocation regulations in that it would deny the Party the flexibility to pay more than the Federal minimum share with Federally

restricted funds. Accordingly, the Commission concludes that the applicable part of the interpretive bulletin is preempted by Federal law.<sup>2/</sup>

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)

Scott E. Thomas  
Chairman

P.S. Vice-Chairman Potter voted against approval of this opinion and will submit a dissenting opinion at a later date.

#### ENDNOTES

1/ If a state party committee chooses to pay a higher than minimum Federal share for any particular administrative expense, it may not make adjustments in other administrative expenditures in order to "recapture" the difference between that optional higher Federal share and the required Federal minimum share.

2/ Since you have not raised it, the Commission does not reach the issue of whether the portion of the interpretive bulletin that would require the Party to disclose the non-Federal share of allocable disbursements at the State level also would be preempted.