



FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 30, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-25

Mr. Anthony May
Executive Director
Pennsylvania Democratic State Committee
510 N. Third Street
Harrisburg, PA 17101

Dear Messrs. May and Druce:

This responds to your joint letter dated July 16, 1991, requesting an advisory opinion on behalf of the Pennsylvania Democratic State Committee and the Pennsylvania Republican State Committee, concerning application of the Federal Election Campaign Act ("FECA" or "the Act") and Commission regulations to certain committee expenditures in view of the upcoming special election for United States Senator in Pennsylvania.

Both of your committees are "state committees" within the meaning of the Act. 2 U.S.C. 431(15); 11 CFR 100.14(a). Under the new allocation regulations, which became effective on January 1, 1991, 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." 11 CFR 106.5(d). This method is

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. 11 CFR 106.5(d)(1)(i).

The ballot composition ratio is determined at the start of each two-year Federal election cycle. The 1991-92 election cycle ratio in Pennsylvania is based on the offices which will appear on the November 1992 general election ballot in that state.

Senator Heinz' death created a vacancy in the office of U.S. Senator. The material you have provided indicates that, pursuant to 25 Pa. Stat. 2776, this vacancy is scheduled to be filled at a

special election, to be held in conjunction with the next general election, in November, 1991. See also Trinsey v. Pennsylvania, Nos. 91-1490 and 91-1491 (3d Cir. filed Aug. 6, 1991).

Although this is not specifically provided for in the regulation, the Commission believes that you should be allowed to include a non-federal point for the 1991 Pennsylvania local elections in computing your ballot composition ratio for the 1991-92 election cycle. The regulations do not contemplate your situation, where statewide offices are elected in even-numbered years, but local offices are elected in odd-numbered years.

The final allocation rules dropped a non-federal point which had been proposed for "partisan statewide judicial offices," and added a point for partisan local offices. The Explanation and Justification ["E&J"] for that section notes that this change was made in response to comments asserting "that the scope of party activity at state and local levels was not adequately reflected" in the proposed rules. 55 Fed. Reg. 26058, 26064 (June 26, 1990). The Commission's stated intent in making this change was to create a "non-federal slot [that would be] available to virtually every state party committee." Id. See also Advisory Opinion 1991-6. This approach would be consistent with this expressed intent.

Should you choose to add this point to your ballot composition ratio, this would result in 3 Federal and 5 non-federal points, for a Federal/non-federal ratio of 37%/63%. This ratio could be used throughout the 1991-92 election cycle.

The E&J to the allocation rules states that the formula set forth at 11 CFR 106.5(d)(1) generally covers years in which a special election is held. However, because of the varying situations that might arise, the Commission has not spelled out rules to cover each variation. The allocation formula to be used and attribution of disbursements to specific candidates will have to be determined on a case-by-case basis. 55 Fed. Reg. at 26064.

The Commission has twice previously considered ballot composition questions involving a special election. See Advisory Opinions 1991-6, 1991-15. Advisory Opinion 1991-6 involved a vacancy for U.S. Senate, and held that, when two U.S. Senate seats are on the same ballot in the same general election, they should be counted separately (i.e., as 2 Federal points) in computing the ballot composition ratio.

However, the situations presented in those Opinions differ from yours, in that they involved vacancies which occurred prior to the start of the 1991-92 election cycle which will be filled at the November 1992 general election. Thus, the proper allocation formulas could be calculated at the start of the cycle, for use throughout the cycle.

The vacancy for U.S. Senate in Pennsylvania, however, did not exist until April 4, 1991; and it is scheduled to be filled before the November, 1992, general election. It is only the period between April 4 and the date of the special election held to fill this vacancy that will be affected by a change in the ballot composition ratio.

The Commission concludes that your committees should add an additional Federal point to the ballot composition ratio for that period only, making the Federal portion 44% (4 Federal points

out of 9 total points, if the additional non- federal point for local offices is taken during this period) and the non-federal portion 56%. The 44%/56% calculation would have to be applied only to generic voter drive activity, not administrative expenses. See 11 CFR 106.5(a)(2)(i) and (iv); cf. 11 CFR 106.5(d)(2). For the sake of administrative convenience, you may opt to start using this new ratio on the first day of the month following the date on which the vacancy occurred, or May 1, 1991. This ratio will return to 37% Federal/63% non-federal (again assuming the additional non-federal point is taken) the day after the special election.

Your letter states that both committees are continuing to allocate administrative expenses and generic voter drive costs under the ballot composition formula based on the number of candidates expected on the 1992 General Election ballot. Due to the special election for U.S. Senate, it may be necessary for you to recalculate the amount allocable to the Federal account as of May 1, 1991, and transfer funds from your Federal to your non-federal accounts to reflect the higher Federal percentage for this period.

In Advisory Opinion 1991-15, the Commission permitted a party committee which had incorrectly computed its ballot composition ratio to make a corrective transfer from its non-federal to its Federal account within 30 days after the date of that opinion. A 30-day post-triggering event "window" is also consistent with the allocation rules' time frame for a non-federal committee to reimburse a Federal committee for its share of joint expenditures, 11 CFR 106.5(g)(2)(ii)(B); and for a connected organization to reimburse its separate segregated fund ("SSF") for expenditures that have been paid by the SSF, 11 CFR 114.5(b)(3).

The Commission believes that a 30-day window is also appropriate in this situation. Thus, you should make the necessary transfers from your Federal to your non-federal accounts within 30 days from the date of this opinion.

Should either committee wish to add the additional non- federal point to its allocation ratio, this action can be done prospectively at any time. However, if a committee opts to make the change retroactive to January 1, 1991 (or some other date in 1991), this action must be taken within 30 days after the date of this opinion.

For reporting changes necessitated by the special election for U.S. Senator, each committee should file an amended Schedule H1 with its next due report, on which it notes the change in the ballot composition ratio as of May 1, 1991, and the reason for this change. See Advisory Opinion 1991-15. The first report filed following the special election should similarly note and explain the reason for the change in the ballot composition ratio, which occurred on the day after the special election held to fill the U.S. Senate vacancy. If the additional non-federal point is taken, this action should be reported and explained as well.

It is not necessary for the committees to go back and recalculate the entries on Schedule H4 using the adjusted ratio(s). Rather, after each committee calculates the amount that needs to be transferred in connection with an adjustment, the transfer of this amount should be noted on Schedule H4, with a notation explaining why the adjustment was made.

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)

Joan D. Aikens
Vice-Chairman for the Federal Election Commission

Enclosures (AOs 1991-15 and 1991-6)