



FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 22, 1998

CERTIFIED MAIL
RETURN RECEIPT RETURNED

ADVISORY OPINION 1998-7

Christine M. Tartaglione, Acting Chairman
The Pennsylvania Democratic Party
510 North Third Street
Harrisburg, Pennsylvania 17101

Dear Ms. Tartaglione:

This responds to your letters dated April 3, and March 27, 1998, on behalf of the Pennsylvania Democratic Party ("PDP"), concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the establishment of a building fund by the PDP.

PDP PROPOSAL

The PDP proposes to solicit contributions and donations from individuals and corporations for the following purposes:

- 1) The establishment and maintenance of a building fund to satisfy the existing mortgage loan debt on the PDP headquarters facility;
- 2) The establishment and maintenance of a building fund to purchase or construct a new building to serve as the new headquarters of the PDP;
- 3) The establishment and maintenance of a building fund to purchase or construct three new buildings to serve as new regional headquarters for the PDP in Pittsburgh, Harrisburg and Philadelphia.
- 4) The establishment and maintenance of a building fund to pay for necessary repairs and improvements to the existing PDP headquarters such as the construction of a new roof,

the installation of new electrical wiring, and the expansion of the size of the building and the number of rooms within the building, and/or

5) The establishment and maintenance of a building fund to purchase or construct a parking lot, adjacent to the PDP headquarters, for the primary use of PDP personnel, members, visitors, but with excess parking spaces being offered to the general public at a usual and normal rate.¹

You affirm that the PDP uses its headquarters facility to influence Federal and non-Federal elections and for other campaign purposes. However, the headquarters facility is not used for the exclusive purpose of influencing the election of a particular candidate for office.

You further state that the PDP would take several measures and observe certain limitations regarding the establishment and maintenance of a building fund. It would only solicit and accept corporate, union and individual contributions that are exclusively designated for the building fund(s). It would advise all potential corporate, union and individual contributors that all contributions will be used exclusively for the building fund(s). A separate and segregated account would be created for the deposit of all corporate, union and individual contributions designated for the building fund. All funds placed in the account would be used only for the purposes detailed above.

Regarding the parking lot, funds obtained from the use of the excess capacity by the public would either be placed in the same separate, segregated account as other building funds, or placed in its own separate, segregated account. If a “parking fund” were created for this purpose, you affirm that PDP would only use the funds deposited in the “parking fund” to: (a) defray the ordinary and necessary capital expenses associated with the operation and maintenance of the headquarters facility and parking lot (e.g., utility and property tax costs), or (b) pay for the cost of constructing or purchasing a new headquarters facility (e.g., transfer to the building fund), or (c) for both purposes. You explain that PDP would not use the funds deposited in the “parking fund” for the purpose of influencing any Federal or non-Federal election, nor transfer such funds to any account for the purpose of influencing any Federal or non-Federal elections.

Finally, your request notes that the Pennsylvania Election Code explicitly prohibits corporations from making any contributions for any political purposes. Therefore, your request not only inquires as to the application of the Act and related regulations to your proposal, but also asks whether Pennsylvania law is preempted to the extent it would prohibit your proposal.²

¹ Your request states that the rate would be based on an independent market value of parking spaces in the metropolitan area in which the proposed parking facility is located.

² The Pennsylvania election code provides under 25 PA CONS. STAT. ANN. § 3253 that:

It is unlawful for any National or State bank, or any corporation, incorporated under the laws of this or any other state or any foreign country or any unincorporated association, except those corporations formed primarily for political purposes or as a political

ACT AND COMMISSION REGULATIONS

Under the Act and Commission regulations, a gift, subscription, loan, advance, or deposit of money or anything of value made to a national committee or a State committee of a political party, that is specifically designated to defray the costs incurred for construction or purchase of an office facility, is not considered to be a contribution or expenditure, provided that the facility is not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office. 2 U.S.C. §431(8)(B)(viii); 11 CFR 100.7(b)(12), 100.8(b)(13), and 114.1(a)(2)(ix). The Commission has applied these provisions to permit a number of State party committees and a national party committee to accept corporate donations to building funds set up for the purpose of purchasing or constructing an office facility for those party committees. Advisory Opinions 1997-14, 1993-9, 1991-5, 1986-40, and 1983-8; see also Advisory Opinion 1996-8.

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. Congress intended that the Federal law should be “construed to occupy the field with respect to elections to Federal office” and would be the sole authority under which such elections would be regulated. H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). It specifically defined this field as covering “limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses” but not 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).³ Commission regulations rely on this legislative history and embody the explicit Congressional intent to preempt. They provide that the Act supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, the disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. 11 CFR 108.7(a) and (b). See Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51 (1977).

committee, to make a contribution or expenditure in connection with the election of any candidate or for any political purpose whatever except in connection with any question to be voted on by the electors of this Commonwealth. Furthermore, it shall be unlawful for any candidate, political committee, or other person to knowingly accept or receive any contribution prohibited by this section, or for any officer or any director of any corporation, bank, or any unincorporated association to consent to any contribution or expenditure by the corporation, bank or unincorporated association, as the case may be, prohibited by this section.

³ The first report cited is the report of the House Committee that drafted section 453 as part of the 1974 amendments. The second report is the Conference Committee report on the 1974 amendments.

APPLICATION TO PDP PROPOSAL

Preemption of Pennsylvania law

In all four of the opinions that were issued to State parties, the Commission concluded that the Act and Commission regulations preempted the application of State law with respect to the prohibitions on corporate donations to a State party office building fund. Advisory Opinions 1997-14, 1993-9, 1991-5, and 1986-40. Two of the opinions noted that, in addressing the building fund donations and the entities receiving them, the Act spoke to a subject matter involving the areas set out in the regulations, and that Congress explicitly decided not to place restrictions on the subject, even though it could have determined that the purchase of such a facility was for the purpose of influencing a Federal election. The opinions stated that Congress, instead, took the affirmative step of deleting the receipt and disbursement of funds for such activity from the specific proscriptions of the Act, and that there is no indication that Congress intended to limit the preemptive effect to some allocable portion of the purchase costs. Advisory Opinions 1993-9 and 1991-5; see also Advisory Opinion 1997-14 and 1986-40. Therefore, to the extent that PDP's proposal to purchase or construct party headquarters is consistent with 2 U.S.C. §431(8)(B)(viii), 11 CFR 100.7(b)(12) and 11 CFR 100.8(b)(13), the Commission concludes that Pennsylvania State law is preempted with respect to the prohibitions on corporate donations and contribution limitations to the PDP building fund.

Establishment and uses of building fund

The Commission notes that your proposal to establish a building fund would, for the most part, fall within the parameters established by the opinions cited above. For example, in Advisory Opinion 1993-9, the Commission permitted a State party to use a building fund to pay off the balance of its land contract on an existing party headquarters. The Commission reasoned that this was a necessary part of the transaction to enable the party to acquire new office space. Therefore, the Commission concludes that PDP may use a building fund to pay off the existing mortgage loan debt on a current or future PDP headquarters or office facility.

However, you also delineate several other uses of the moneys collected for the building fund. These include the rebuilding of the current Party headquarters (including related improvements, such as new roofing and improved electrical wiring) and the purchase of multiple offices located throughout the State. The Commission concluded in Advisory Opinion 1983-8 that the building fund exception extends to donations to defray costs incurred for the construction or purchase of an office facility, but does not extend to donations to pay such ongoing, operating costs as property taxes and assessments. See Advisory Opinions 1991-5 and 1983-8. However, the Commission has not previously detailed the specific ways in which a building fund could be used in accordance with section 431(8)(B)(viii) and Commission regulations.

A parallel may be made between permissible uses of the building fund and the description and treatment of capital expenditures found in the Internal Revenue Code and related IRS regulations. Under the IRS regulations, a capital expenditure includes the cost of the acquisition, construction, or erection of buildings, machinery and equipment, furniture and fixtures and similar property. 26 CFR 1.263(a)-1 and 1.263(a)-2. Under the Internal Revenue Code, while business expenses produce tax deductions, no deduction is permitted for capital expenditures. Therefore, the distinction between what is a business expense and what is a capital expenditure has important tax consequences. 26 U.S.C. §263(a) and 26 CFR 1.263(a) -1. In the same manner, items that would fall under the category of capital expenditures would also be considered the type of expenditures that are legitimately part of the construction of a Party office facility. Items which instead are classified as business expenses would be seen as operating expenditures that fall outside the scope of the Act's building fund exception.

In the Internal Revenue Code, a distinction is made between capital expenses and "the cost of incidental repairs which neither materially add to the value of the property nor appreciably prolong its life, but keep it in an ordinary efficient operating condition." 26 CFR 1.162-4. The latter is not considered a capital expense. However, past case tax law has determined that when repair work reaches a level to constitute wholesale restoration or renovation of a structure, those expenses that might have individually constituted repair work were then treated as capital expenditures. See *True v. United States*, 894 F.2d 1197 (10th Cir. 1990) and *Stoelizing v. C.I.R.*, 266 F.2d 374 (9th Cir. 1959). Since the type of reconstruction proposed (the necessary repairs and improvements to the existing PDP headquarters, the construction of a new roof, the installation of new electrical wiring and the expansion of the size of the building and the number of rooms within the building) in your request would fall under the definition of capital expenditures, the Commission concludes this use of the building fund would also meet the requirements of the Act and Commission regulations.

Regarding the construction of State party office headquarters in separate locations, the Commission concludes that this also falls within the parameters of section 431(8)(B)(viii) and Commission regulations. Other than specifying that the office facility may not be used to support a specific candidate, the Act and Commission regulations do not specify the number of office facilities that are permitted under the building fund exception or where they must be located.⁴ Moreover, it is not unreasonable for a State political party to construct office facilities in three different cities where each city, as is the case here, is classified as a distinct Metropolitan Statistical Area by the United States Census Bureau.

⁴ In Advisory Opinion 1983-8, the requester was permitted to establish and maintain a building fund with reference to office headquarters consisting of several buildings at one location.

Establishment and uses of "parking fund"

Your proposal regarding the "parking fund" is more problematic. The Commission notes that parking areas provided for the PDP headquarters would be an expected and, in many cases, necessary part of any office facility. However, the construction or acquisition of additional parking space capacity, not needed for the direct use of the Party (for its personnel and visitors to the Party office), may fall outside the building fund exception. At this time the Commission does not have complete and specific information from PDP regarding its plans and intentions for the acquisition and use of any parking lot facility. The Office of General Counsel will pursue this matter further with PDP to ascertain if it wishes to submit a separate advisory opinion request limited to the parking lot questions.

This response constitutes an advisory opinion concerning the 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
Chairman

Enclosures (AOs 1997-14, 1996-8, 1993-9, 1991-5, 1986-40 and 1983-8)