FEDERAL ELECTION COMMISSION
Washington, DC 20463

December 10, 1993

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1993-21

Scott W. Spencer
Spencer & Ehrie
6100 Channingway Boulevard
Columbus, OH 43232

Dear Mr. Spencer:

This responds to your letters dated October 15 and October 25, 1993, on behalf of the Ohio Republican Party ("the Party") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the application of a state law forbidding a political party from depositing funds received from a state tax check-off into the party's allocation account.

In 1987, the Ohio legislature enacted a law creating the Ohio Political Party Fund. Under this law, filers of Ohio income tax returns may designate one dollar of their return to be deposited into the Fund without increasing or decreasing their tax liability. R.C. §3517.16. This money is divided equally among all qualified political parties, with one-half of a party's share paid to the treasurer of the party's executive committee and one-half distributed to the treasurer of each county executive committee in accordance with the ratio of the number of check-offs in that county to the total number of check-offs. R.C. §3517.17(A).[1/]

Ohio law provides that each party receiving such income tax funds must maintain the funds "in an account separate from all other assets of the political party" and file statements of contributions and expenditures, indicating the amounts received and the purposes for which it is spent. The Ohio state auditor audits the statements of each party's state committee and county committees to ascertain that such funds are expended lawfully. R.C. §3517.17(A).

The funds distributed may be used for a number of purposes related to support of party activities, but not related to furthering the election or defeat of any particular candidate or paying a party

debt incurred as the result of an election. Permissible uses include the defraying of operating and maintenance costs associated with party headquarters, including rent, staff salaries, supplies, and computer needs; the administration of party fundraising drives; and the organization of registration and get-out-the-vote drives. R.C. §3517.18.[2/]

Since 1991, the Party has utilized an "allocation account," pursuant to 11 CFR 106.5, "to allocate administrative expenses associated with the lease and maintenance of the state headquarters office, staff salaries, office supplies, etc." In order to maintain the income tax receipts separately from the other party assets, those receipts have been deposited in a "separate segregated account" known as the Income Tax Check-Off Account. Periodically, as needed, the party would transfer funds from the tax check-off account to the allocation account to pay the above-described administrative expenses; checks would be drawn from the latter account to pay the vendors. The allocation account also received funds transferred from other accounts or sources and was used to pay for the administrative expenses.[3/] No payments have been made from the allocation account for candidates' campaigns.

In June 1992, the state auditor initiated an audit of the Income Tax Check-Off Account for the years 1990 and 1991. One year later, the auditor released a report asserting that the Party had violated State law by failing to maintain the income tax check-off funds in a separate account. The Party was accused of commingling the income tax check-off funds with other funds also deposited into the allocation account, and of failing to maintain proper accountability of income tax check-off funds. Recently, the State Auditor referred the commingling allegation to the Ohio Elections Commission for investigation and possible prosecution. The Party continues the above-described practices, and the State Auditor initiated an audit as to the Party's use of check-off funds in 1992.

In view of these circumstances, which involve an ongoing State audit and investigation, as well as continuation of the practices that are the subject of the State's actions (see 11 CFR 112.1(b)), the Party seeks an advisory opinion as to the following questions:

> (1) Is the Party "correct" in transferring the tax check-off funds from the "separate segregated account" to the allocation account and thereafter paying vendors for the described administrative expenses?
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> (2) Are the funds derived from the income tax check-off scheme "appropriately designated" as Federal dollars for the purposes of the allocation formula set forth in Commission regulations?
>
> (3) Does Federal law supersede or preempt Ohio law requiring that the tax check-off funds be maintained in an account separate from other assets of the party and may not be moved to the allocation account? Must all expenditures made for administrative expenses associated with the support of the Party headquarters and its staff, "including purposes required by R.C. §3517.18(A)," be made from the allocation account?

(4) Is the requirement that the tax check-off funds be maintained "in an account separate from all other assets of the political party" satisfied when such funds are transferred to the allocation account simultaneously or in conjunction with payment to the vendors?

The Commission notes that the fourth question calls for a response that is beyond the purview of the Commission's responsibilities. It calls for an interpretation of specific wording in a State statute rather than an interpretation concerning the application of the Act or the Commission regulations. See 2 U.S.C. 437f(a)(1); 11 CFR 112.1(a).

In interpreting the first question, the Commission notes that there are a number of aspects to determining whether the Party behavior described in the question is "correct," including what the Federal law is, whether State law should apply, and if so, what State law requires. In view of what the Commission is permitted to address and the subjects of your other questions, the opinion responds to this question in the course of answering question 3.

In response to question 2, the Commission concludes that the Party may treat the funds derived from the tax check-off as Federal dollars. In Advisory Opinion 1991-14, the Commission considered a program in Kentucky similar to the Ohio check-off. A state taxpayer could designate two dollars of his or her state income tax payment to be paid to the political party of his or her choice, without increasing or decreasing the tax liability, or reducing the size of a refund. The political party officers receiving these funds were to use them only for supporting the party's candidates in the general election and for the administrative costs of maintaining a party headquarters. They were to deposit these funds in a bank account separate from the party's other accounts. The state Republican Party wished to consider these check-off funds to be funds of its Federal committee.

The Commission observed that, although these funds would not be considered contributions from the taxpayers (since their tax liability was not increased) and would instead be miscellaneous receipts, the funds were from permissible sources, i.e., revenues generated by designations of individual taxpayers, and did not exceed the Act's limits. These funds, therefore, could be considered as funds of its Federal committee, be deposited into a Federal account, and be used for the support of Federal candidates. The Commission also noted that a political committee could have more than one account for its Federal committee. 2 U.S.C. 432(h)(1); 11 CFR 103.2. Advisory Opinion 1991-14.

The Commission has also issued a number of other opinions that have concluded, or assumed as a general rule, that funds from state tax check-offs or fees paid for a state service (e.g., personalized license plate fees) may be deposited in a state party's Federal account. Advisory Opinions 1983-15, 1982-17, and 1980-103. Compare Advisory Opinion 1988-33 where the Commission limited the amount of proceeds, resulting from a Florida candidate qualification fee and party assessment fee collected by the Department of State and distributed to the state's parties, that could be deposited into a party's Federal account because some of the sources may have been impermissible.

Your third question initially calls for a statement of what the Federal regulations require. Commission regulations provide for allocation of expenses by political party committees making disbursements for administrative expenses, fundraising, exempt activities, or generic voter drives in connection with both Federal and non-Federal elections. 11 CFR 106.1(e). More specifically, party committees that make disbursements in connection with Federal and non-federal elections shall allocate expenses for (i) administrative expenses not attributable to a clearly identified candidate, including rent, utilities, supplies, and salaries; (ii) the direct costs of a fundraising program or event, including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-federal funds are collected by one committee through such a program or event; (iii) party activities that are exempt from the Act's definition of contribution and expenditure such as the production and distribution of slate cards and sample ballots, campaign materials distributed by volunteers, and voter registration and GOTV drives for presidential nominees, where such activities are conducted in conjunction with non-Federal activities; and (iv) generic voter drives or other activities that urge the public to support candidates of a particular party or associated with a particular issue without mentioning a specific candidate. 11 CFR 106.5(a)(2)(i), (ii), (iii), and (iv).

Commission regulations provide that committees that have established separate Federal and non-Federal accounts shall pay the expenses of mixed Federal and non-Federal activities in one of two ways. 11 CFR 106.5(g)(1). The committee can pay the entire amount from one of its regular Federal accounts and transfer funds from one of its non-Federal accounts to the Federal account solely to cover the non-Federal share of the allocable expense. 11 CFR 106.5(g)(1)(i). See Federal Election Commission Regulations on Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, Explanation and Justification, 55 Fed. Reg. 26058, 26066 (June 26, 1990).

In the alternative, the committee can establish a separate allocation account into which funds from its Federal and non-Federal accounts will be deposited solely for the purpose of paying the allocable expenses of mixed Federal and non-Federal activity. Funds from the Federal and non-Federal accounts will be transferred in amounts proportionate to the Federal and non-Federal share of each allocable expense. Once a committee has established a separate allocation account, all allocable expenses must be paid from that account as long as the account is maintained. Furthermore, no funds maintained in this account may be transferred to any other account of the committee. 11 CFR 106.5(g)(1)(ii).

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 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 (1977). 11 CFR 108.7(b).

The Party may, therefore, rely on Federal law as preempting Ohio law which purports to bar the transfer of tax check-off funds from the "separate segregated account" to the allocation account set up by the party. Federal law requires that payments to vendors for certain mixed expenses be made from a Federal account, which may receive appropriate transfers from its non-Federal accounts, or, if the party sets up an allocation account, from the allocation account only. The expenses for headquarters, staff salaries, office supplies, and similar support are administrative expenses that must be paid from one of these two accounts, under Federal law. The Party has exercised one of the two options allowed under Federal law, and, under the Commission's broad preemptive powers, may not be prohibited by the State of Ohio from transferring funds from the "separate segregated account" to the allocation account to pay for administrative expenses. See Advisory Opinion 1993-17.

The Commission's conclusion does not attempt to fully resolve your dispute with the State of Ohio. In this context, Federal preemption extends only to the allocation requirements of Federal law. Although state revenues may, at some point after their receipt by a state party, be treated as Federal campaign funds or used for allocable expenses, nothing in the Act or Commission regulations prevents a state from auditing the use of those funds to determine whether they were used in accordance with state law restrictions.[4/] (Of course, the Act and Commission regulations may prevent the use of such funds in a manner inconsistent with Federal law.) The Commission distinguishes this situation from the proposed financing of Congressional campaigns by the State of Minnesota which was rejected in Advisory Opinion 1991-22. The Commission stated that permitting a state to deposit money in a party's Federal account is "a separate question from whether a state may regulate Federal campaign finance under the guise of a public funding mechanism conditioned on abiding by spending limits." In the situation presented here, however, funds were not given by the State for specifically Federal election purposes or for spending by a clearly identified Federal candidate.[5/]

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

Enclosures (AOs 1993-17, 1991-22, 1991-14, 1988-33, 1983-15, 1982-17, and 1980-103)

Endnotes

1/ Because of the burden on county organizations in administering their share of the funds, several of the smaller organizations sign over their checks in partial satisfaction of their state quotas to the state party.

2/ The permissible and non-permissible uses are set out as follows:

(A) A political party receiving moneys from the Ohio political party fund may expend the moneys only for the following purposes:
    (1) The defraying of operating and maintenance costs associated with political party headquarters, including rental or leasing costs, staff salaries, office equipment and supplies, postage, and the purchase, lease, or maintenance of computer hardware and software;
    (2) The organization of voter registration programs and get-out-the-vote campaigns;
    (3) The administration of party fund-raising drives;
    (4) Paid advertisements in the electronic or printed media, sponsored jointly by two or more qualified political parties, to publicize the Ohio political party fund and to encourage taxpayers to support the income tax checkoff program;
    (5) Direct mail campaigns or other communications with the registered voters of a party that are not related to any particular candidate or election;
    (6) The preparation of reports required by law.

(B) Moneys from the Ohio political party fund shall not be used for any of the following purposes:
    (1) To further the election or defeat of any particular candidate or to influence directly the outcome of any candidate or issue election;
    (2) To pay party debts incurred as the result of any election;
    (3) To make a payment clearly in excess of the market value of that which is received for the payment.

3/ Funds would be transferred into the allocation account from the "operating account," which is an account from which the party expends money either (i) to inform its members, by mail or other direct communication, of its activities or endorsements; or (ii) for the staff and maintenance of the headquarters, or for a political poll, survey, or index that is not on behalf of a specific candidate. R.C. §3517.08(B) and (C). In addition, "campaign funds" would be deposited into the allocation account "if necessary."

4/ The Commission does not reach any conclusion or make any evaluation of whether the Party is in compliance with the State's auditing standards. The Commission notes that Federal law requires compliance with specific standards for record-keeping and documentation. See, e.g., 11 CFR 102.9 and 104.14(b).

5/ A review of the permissible purposes of the use of tax check-off funds set out in R.C. §3517.18(A) (see footnote 2) and operating account set out in 3517.08(B) and (C) (see footnote 3) indicate an apparent similarity with the permissible uses of the allocation account. Because of the use of different terminology or phrasing, however, the Commission cautions that funds from those sources should not be transferred to the allocation account for payment by that account for any purpose that is not permitted to it by 11 CFR 106.5. Similarly, the Commission notes, consistent with 11 CFR 106.5(g)(1)(ii), that the Party should use the allocation account for all other properly allocable activity, not just administrative expenses.