



FEDERAL ELECTION COMMISSION
Washington, DC 20463

November 13, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-33

Bob Slagle, Chairman
Texas Democratic Party
815 Brazos
Suite 200
Austin, Texas 78701

Dear Mr. Slagle:

This responds to your letter dated September 25, 1991, requesting an advisory opinion on behalf of the Republican Party of Texas and the Texas Democratic Party concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the payment and reporting of expenses for the administration of primary elections.

Under Texas law, the state and county party executive committees administer the primary elections (i.e., general primary and runoff primary) for the State of Texas. The administration of primary elections is funded with a combination of candidate filing fees (ballot access fees) collected by the state and county executive committees and funds from the general revenues of the state. The parties may also raise and expend additional donations, including corporate and labor union donations, to fund the administration of primary elections.

All filing fees, funds from the state, and any additional funds raised by the party to administer the primary must be deposited by the party executive committee in a separate primary fund bank account, which is the property of the state. (Such funds may not be commingled with any other fund or account.) Any funds remaining after primary administration expenses have been paid must be returned to the state.

The Texas Secretary of State promulgates rules, contained in Title 1, Texas Administrative Code, governing the use of primary administration funds. According to section 81.100, only expenses necessary and directly related to the conduct of primary elections are payable from primary funds. That section further explains:

Political expenses, those expenses which would be incurred if there were no election, and expenses for any activity forbidden by statute or rule are not primary election costs subject to primary fund reimbursement. Examples of non-payable expenses include, but are not limited to: expenses incurred in connection with a convention of a political party, all costs associated with voter registration drives and get out the vote campaigns.

Materials submitted by you provide a further indication of the activities paid for from the primary administration fund. These expenses entail making the arrangements for county-designated polling places and for the use, as polling places, of other public or private buildings; the procurement and distribution of necessary election supplies such as ballots, ballot boxes, and voting machines; education and payment of election clerks and judges; arrangements for data tabulation personnel and equipment; payment of personnel responsible for primary administration; and allocable costs for office space, office equipment, utilities, and furniture. Personnel involved in primary administration fulfill such functions as providing information and advice on candidate eligibility and election administration, and verifying completeness of filing forms.

Each state and county executive committee must submit a proposed budget for the approval of the Secretary of State, including estimated receipts from filing fees and other sources, projected expenditures, and an indication of whether additional state funds will be needed to finance the primary.

The state may advance money to an executive committee for primary administration costs incurred before the executive committee receives filing fees from candidates, but not before a budget request has been approved. Deviations from an approved budget must normally be approved in writing by the state. The rules require the filing of a final report on receipts and disbursements, and the return of any primary fund balance to the state, by July 1 of the election year. In unusual circumstances, e.g., legal contests involving contract disputes, candidate eligibility, certification of nominees, or vacancies occurring after the primary is held, expenditures allocable to primary administration may occur later. The state may audit the primary funds.

Under state rules, a party executive committee may allocate a share of its rent, utilities, telephone costs, and other overhead and office costs to primary administration. The executive committees may also allocate a share of the salaries and employee taxes for employees whose duties include but are not limited to primary administration. No expenditures for personnel or overhead, however, may be allocated until December 1 of the year before the election. There is no particular allocation formula provided for by the state. Instead, the state decides on a case-by-case basis whether the allocation requested by the party is reasonable.

You describe two ways in which payments for primary administration have been made. Expenses that were entirely for primary administration, e.g., salary and taxes for the Primary Director, bonds required by the state for any person handling primary funds, were paid directly from the primary fund. Expenses that were partially for primary administration, e.g., pro-rated share of

rents, utilities, and certain salaries, were paid from the party's non-federal account with periodic reimbursement from the primary fund for the portion allocated to primary administration.

You explain that under formerly applicable Commission regulations governing Federal and non-federal allocation of party committees' administrative expenses, the primary administration expenses were deducted before making any allocation, based on the assumption that those expenses affected neither Federal nor non-federal elections. You express concern, however, that under current Commission regulations all payments for the party's administrative costs are assumed to influence both Federal and non-federal elections and that they must be paid from a Federal account with restricted reimbursement from non-federal accounts.

In light of these concerns, you ask the following three questions:

- (1) Under the present regulations, may administrative expenses that are wholly for primary administration be paid entirely from the primary administration fund?
- (2) How may a party committee allocate, pay and report those administrative expenses that are partly for primary administration? Specifically, may the Federal share of an administrative expense that is partially for primary administration be based on the total payment minus the state's share of the expenses? If so, how are the party committees to pay these expenses and report them on Schedule H4 to reflect the three-part allocation (Federal, non-federal, governmental)?
- (3) May state funds to reimburse the party committee for the primary administration share of administrative costs be deposited into a Federal account as Federal funds? If so, what is the reportable receipt category for these state funds?

Commission regulations provide for allocation of expenses by political party committees making disbursements for administrative expenses in connection with both Federal and non-federal elections. 11 CFR 106.1(e). According to 11 CFR 106.5(a)(2), 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 event where Federal and non-federal funds are collected by one committee through such an 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; 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). A party committee with separate Federal and non-federal accounts may pay for such allocable expenses in one of two ways: (1) It may make all payment from the Federal account with the non-federal account transferring funds to the Federal account no more than 10 days before or 30 days after the payment is made. (2) It may establish a separate allocation account into which funds from both the Federal and non-federal accounts may be deposited solely for paying the allocable expenses of joint Federal and non-federal activity. 11 CFR 106.5(g)(1)(i) and (ii), and 106.5(g)(2)(ii)(B).

It appears from your description that the state and county party committees act as the state's agents in performing the ministerial function of administering the primaries, i.e., providing for the mechanics of filing for candidacy, ensuring that there is adequate information as to filing, and providing the necessary equipment and personnel for voting. These activities do not involve the kinds of expenses described in section 106.5(a)(2), i.e., expenses not allocable to specific candidates that relate to promoting the political party or enabling it to function and influence elections. The Commission thus concludes that the administrative expenses that are wholly for primary administration should not be included in the funds to be allocated between Federal and non-federal activity.

Under the present regulations, therefore, expenses wholly for primary administration may be paid entirely from the primary administration fund. Furthermore, you represent that the primary administration expenses are paid entirely from the primary administration fund or the non-federal account, as opposed to the Federal account or the separate allocation account containing Federal and non-federal funds. The Commission also notes that you cannot use the allocation account to pay the primary administration expenses.

With respect to the second question as to administrative expenses that are partially for primary administration and partially for other political party operations, the party committee must determine what share of its administrative expenses for all kinds of activities is allocable to primary administration. When that is determined, the remainder is allocable under 11 CFR 106.5. The party committee may pay its primary administration expenses from its non-federal account, with reimbursement from the primary administration account, as long as the payments for primary administration expenses from the non-federal account are not included when determining the amount of expenses to be allocated for Federal and non-federal elections under 11 CFR 106.5(a)(2). Accordingly, reporting of the primary administration expenses under such circumstances is not required by Commission regulations.

Based on the responses to questions 1 and the first part of question 2, the Commission concludes that there is no need to respond to the remainder of question 2 and question 3. Those questions unnecessarily presume that primary administration expenses must be included in the amounts to be allocated under 11 CFR 106.5.

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. 2 U.S.C. 437f.

Sincerely,

John Warren McGarry
Chairman for the Federal Election Commission