



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

December 3, 1993

**MEMORANDUM**

**TO:** The Commission

**THROUGH:** John C. Surina  
Staff Director

**FROM:** Lawrence M. Noble   
General Counsel

N. Bradley Litchfield   
Associate General Counsel

Jonathan M. Levin   
Senior Attorney

**SUBJECT:** Draft AO 1993-21

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for December 9, 1993.

**Attachment**

1  
2  
3 ADVISORY OPINION 1993-21

**DRAFT**

4 Scott W. Spencer  
5 Spencer & Ehrie  
6 6100 Channingway Boulevard  
Columbus, OH 43232

7 Dear Mr. Spencer:

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

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

27  
28 1/ Because of the burden on county organizations in  
29 administering their share of the funds, several of the  
30 smaller organizations sign over their checks in partial  
satisfaction of their state quotas to the state party.

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

11 The funds distributed may be used for a number of  
12 purposes related to support of party activities, but not  
13 related to furthering the election or defeat of any  
14 particular candidate or paying a party debt incurred as the  
15 result of an election. Permissible uses include the  
16 defraying of operating and maintenance costs associated with  
17 party headquarters, including rent, staff salaries, supplies,  
18 and computer needs; the administration of party fundraising  
19 drives; and the organization of registration and  
20 get-out-the-vote drives. R.C. §3517.18.<sup>2/</sup>

21  
22 2/ The permissible and non-permissible uses are set out as  
23 follows:

24 (A) A political party receiving moneys from the Ohio  
25 political party fund may expend the moneys only for the  
26 following purposes:

27 (1) The defraying of operating and maintenance costs  
28 associated with political party headquarters, including  
29 rental or leasing costs, staff salaries, office equipment and  
30 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 fundraising drives;

(4) Paid advertisements in the electronic or printed  
media, sponsored jointly or by two or more qualified

3 Since 1991, the Party has utilized an "allocation  
4 account," pursuant to 11 CFR 106.5, "to allocate  
5 administrative expenses associated with the lease and  
6 maintenance of the state headquarters office, staff salaries,  
7 office supplies, etc." In order to maintain the income tax  
8 receipts separately from the other party assets, those  
9 receipts have been deposited in a "separate segregated  
10 account" known as the Income Tax Check-Off Account.  
11 Periodically, as needed, the party would transfer funds from  
12 the tax check-off account to the allocation account to pay  
13 the above-described administrative expenses; checks would be  
14 drawn from the latter account to pay the vendors. The  
15 allocation account also received funds transferred from other  
16 accounts or sources and was used to pay for the  
17 administrative expenses.<sup>3/</sup> No payments have been made from  
18

19 \_\_\_\_\_  
20 (Footnote 2 continued from previous page)  
21 political parties, to publicize the Ohio political party fund  
22 and to encourage taxpayers to support the income tax checkoff  
23 program;

24 (5) Direct mail campaigns or other communications with  
25 the registered voters of a party that are not related to any  
26 particular candidate or election;

27 (6) The preparation of reports required by law.

28 (B) Moneys from the Ohio political party fund shall not be  
29 used for any of the following purposes:

30 (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 a result of any  
election;

(3) To make a payment clearly in excess of the market  
value of that which is received for the payment.

<sup>3/</sup> 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

3 the allocation account for candidates' campaigns.

4 In June 1992, the state auditor initiated an audit of  
5 the income tax check-off account for the years 1990 and 1991.  
6 One year later, the auditor released a report asserting that  
7 the Party had violated State law by failing to maintain the  
8 income tax check-off funds in a separate account. The Party  
9 was accused of commingling the income tax check-off funds  
10 with other funds also deposited into the allocation account,  
11 and of failing to maintain proper accountability of income  
12 tax check-off funds. Recently, the state auditor referred  
13 the commingling allegation to the Ohio Elections Commission  
14 for investigation and possible prosecution. The Party  
15 continues the above-described practices, and the state  
16 auditor initiated an audit as to the Party's use of check-off  
17 funds in 1992.

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

- 23 (1) Is the Party "correct" in transferring the tax check-off  
24 funds from the "separate segregated account" to the  
25 allocation account and thereafter paying vendors for the  
26 described administrative expenses?
- (2) Are the funds derived from the income tax check-off

27 (Footnote 3 continued from previous page)  
28 endorsements; or (ii) for the staff and maintenance of the  
29 headquarters, or for a political poll, survey, or index that  
30 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."

3 scheme "appropriately designated" as Federal dollars for  
4 the purposes of the allocation formula set forth in  
5 Commission regulations?

- 6 (3) Does Federal law supersede or preempt Ohio law requiring  
7 that the tax check-off funds be maintained in an account  
8 separate from other assets of the party and may not be  
9 moved to the allocation account? Must all expenditures  
10 made for administrative expenses associated with the  
11 support of the Party headquarters and its staff,  
12 "including purposes required by R.C. §3517.18(A)," be  
13 made from the allocation account?
- 14 (4) Is the requirement that the tax check-off funds be  
15 maintained "in an account separate from all other assets  
16 of the political party" satisfied when such funds are  
17 transferred to the allocation account simultaneously or  
18 in conjunction with payment to the vendors?

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

25 In interpreting the first question, the Commission notes  
26 that there are a number of aspects to determining whether the  
27 Party behavior described in the question is "correct,"  
28 including what the Federal law is, whether State law should  
29 apply, and if so, what State law requires. In view of what  
30 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., 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



3 volunteers, and voter registration and GOTV drives for  
4 presidential nominees, where such activities are conducted in  
5 conjunction with non-federal activities; and (iv) generic  
6 voter drives or other activities that urge the public to  
7 support candidates of a particular party or associated with a  
8 particular issue without mentioning a specific candidate. 11  
9 CFR 106.5(a)(2)(i), (ii), (iii), and (iv).

10 Commission regulations provide that committees that have  
11 established separate Federal and non-Federal accounts shall  
12 pay the expenses of mixed Federal and non-Federal activities  
13 in one of two ways. 11 CFR 106.5(g)(1). The committee can  
14 pay the entire amount from one of its regular Federal  
15 accounts and transfer funds from one of its non-Federal  
16 accounts to the Federal account solely to cover the  
17 non-Federal share of the allocable expense. 11 CFR  
18 106.5(g)(1)(i). See Federal Election Commission Regulations  
19 on Methods of Allocation Between Federal and Non-Federal  
20 Accounts; Payments; Reporting, Explanation and Justification,  
21 55 Fed. Reg. 26058, 26066 (June 26, 1990).

22 In the alternative, the committee can establish a  
23 separate allocation account into which funds from its Federal  
24 and non-Federal accounts will be deposited solely for the  
25 purpose of paying the allocable expenses of mixed Federal and  
26 non-Federal activity. Funds from the Federal and non-federal  
27 accounts will be transferred in amounts proportionate to the  
28 Federal and non-Federal share of each allocable expense.  
29 Once a committee has established a separate allocation  
30

3 account, all allocable expenses must be paid from that  
4 account as long as the account is maintained. Furthermore,  
5 no funds maintained in this account may be transferred to any  
6 other account of the committee. 11 CFR 106.5(g)(1)(ii).

7 The Act states that its provisions and the rules  
8 prescribed thereunder, "supersede and preempt any provision  
9 of State law with respect to election to Federal office." 2  
10 U.S.C. §453. The House committee that drafted this provision  
11 intended "to make certain that the Federal law is construed  
12 to occupy the field with respect to elections to Federal  
13 office and that the Federal law will be the sole authority  
14 under which such elections will be regulated." H.R. Rep. No.  
15 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the  
16 Conference Committee report on the 1974 Amendments to the  
17 Act, "Federal law occupies the field with respect to criminal  
18 sanctions relating to limitations on campaign expenditures,  
19 the sources of campaign funds used in Federal races, the  
20 conduct of Federal campaigns, and similar offenses, but does  
21 not affect the States' rights" as to other areas such as  
22 voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d  
23 Cong., 2d Sess. 69 (1974). The Conference report also states  
24 that Federal law occupies the field with respect to reporting  
25 and disclosure of political contributions to and expenditures  
26 by Federal candidates and political committees, but does not  
27 affect state laws as to the manner of qualifying as a  
28 candidate, or the dates and places of elections. Id. at  
29 100-101.  
30

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 also points out that its conclusion does not necessarily resolve your dispute with the State of Ohio. 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 and determining whether they were used in accordance with state law restrictions. (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.<sup>4/</sup>

---

<sup>4/</sup> 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

3 This response constitutes an advisory opinion concerning  
4 application of the Act, or regulations prescribed by the  
5 Commission, to the specific transaction or activity set forth  
6 in your request. See 2 U.S.C. §437f.

7 Sincerely,

8  
9 Scott E. Thomas  
10 Chairman

11 Enclosures (AOs 1993-17, 1991-22, 1991-14, 1988-33, 1983-15,  
12 1982-17, and 1980-103)

13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
29 

---

  
(Footnote 4 continued from previous page)  
30 administrative expenses.