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MEMORANDUM

TO: The Commission
Staff Director
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FROM: Marjorie W. Emmons
Secretary of the Commission *MWE*

DATE: December 8, 1993

SUBJECT: COMMENT: PROPOSED AO 1993-21

The attached four page comment from Scott W. Spencer, Esq., was timely received by the FEC Office of General Counsel on December 7, 1993.

Proposed AO 1993-21 is on the agenda for the meeting of December 9, 1993.

OAC 0574

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December 3, 1993

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93 DEC -1 PM 3:32

Re: The Ohio Republican Party's "Political Party Fund Account"
Audit for Calendar Years 1990 and 1991
Request for Advisory Opinion No. 1993-21

Dear Mr. Levin:

It was a pleasure speaking with you yesterday concerning the pending request noted above. We have had the opportunity to examine the proposed draft and would offer the following comments on behalf of the Ohio Republican Party concerning the same.

We disagree that a decision concerning the fourth question¹ concerning the state statutory requirement that recipients of income tax check-off account funds "maintain such moneys in an account separate from all other assets of the political party" is outside the scope of authority granted to the Federal Election Commission by the Act, given the provision that federal law preempts state statutes which conflict with the federal statutory scheme. 2 U.S.C. § 453. [See Proposed Advisory Opinion, at page 5.]

Regulations of the Commission require that expenditures for administrative expenses

¹(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?"

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within the purview of R. C. § 3517.18(A)² be spent in accordance with one of the two allocation options set forth in 11 C.F.R. 106.5(g)(1). Because R. C. § 3517.18(B)³ prohibits income tax check-off account funds to be used for the election or defeat of a candidate or issue election, the Ohio Republican Party chose the second option⁴ and created a segregated allocation account for the payment of administrative expenses and to not transfer state funds to the federal campaign account from which such expenses could otherwise have been paid.⁵

It is axiomatic that while the Ohio Republican Party could, and did, maintain its income tax check-off account funds in the separate segregated account as provided by R. C. §

²R. C. § 3517.18(A) provides that the permitted uses of funds received from the "Ohio Political Party Fund" are:

- (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 and 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.*

³R. C. § 3517.18(B) specifies the purposes for which income tax check-off account funds may not be used:

- (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.*

⁴11 C.F.R. 106.5(g)(1)(ii)

⁵11 C.F.R. 106.5(g)(1)(i)

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3517.17(A)(1), it could not pay for administrative expenses from the allocation account from which all such party expenses are required to be paid without first transferring the income tax check-off account funds from the separate segregated account to the allocation account. To have made payments for administrative purposes from the segregated income tax check-off account without first transferring the funds to the allocation account would have been a violation of 11 C.F.R. 106.5)(1)(ii), which prohibits the payment of administrative expenses from any other account for so long as the allocation account is maintained.

The federal Act preempts contrary state statutory provisions. 2 U.S.C. § 453. Therefore, the Ohio Republican Party is of the opinion that the fourth question posed by the Party can and should be addressed by the Commission inasmuch as federal law required the party to spend the income tax check-off account funds which could only be spent for administrative purposes from the allocation account which was created for that very purpose. For the Party to have spent the income tax check-off account funds directly from that account without first transferring them to the allocation account would have violated 11 C.F.R. 106.5)(1)(i) and 2 U.S.C. § 453.

We would therefore encourage the Commission to respond to the issues presented in question number 4.

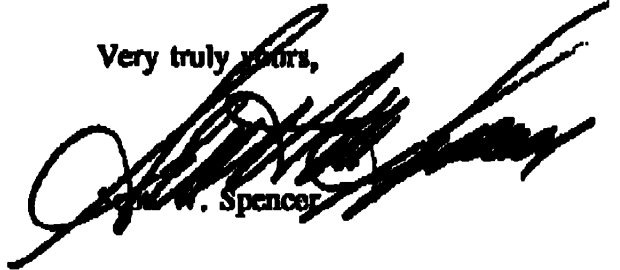
Secondly, insofar as the Ohio Republican Party's "dispute with the State of Ohio" [See Proposed Advisory Opinion, at page 11], is concerned, we would propose that the Commission address that matter in one of two ways. First, the Party has not requested the Commission to interject itself into the question of whether the documentation provided to the auditor did or did not satisfy him. That is not before the Commission and we would suggest that it is not an appropriate subject for comment by the advisory opinion and references to it should be stricken from the draft.

In the alternative, we would propose that the Commission reiterate that given the fact that the federal statutes and regulations require the expenditure of all administrative expenses from an allocation account (if that option is selected in light of the circumstances), commingling of income tax check-off account funds and other moneys used for administrative expenses will necessarily occur. We would note that the auditor has confirmed that all of the expenditures made from the allocation account were for strictly administrative purposes associated with the support and maintenance of the headquarters office and staff. In conjunction with this comment, we have provided the Commission with copies of the Ohio Republican Party's responses to the various unsubstantiated and false statements which have been made by the auditor and his counsel. The unfortunate fact of the matter is that nothing the Ohio Republican Party does in this regard will ever compel the auditor to honestly admit that the Party has documented the appropriate expenditure of many times the revenues received from the income tax check-off account during 1990 and 1991. We believe, however, that is a matter which is beyond the scope of this request and is better left alone.

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Thank you for providing us a copy of proposed Advisory Opinion 1993-21 in order to allow us to submit this comment. We look forward to receiving the Commission's decision in this regard.

Very truly yours,



John W. Spencer

cc: Robert T. Bennett, Chairman
Ohio Republican Party
Thomas Whatman, Acting Executive Director
Ohio Republican Party