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November 26, 1993

VIA FACSIMILE
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DIVISION

Bradley Litchfield, Esq.
Associate General Counsel
Office of the General Counsel
99 E Street, N.W.
Washington, D.C. 20463

Comments On
AOR 1993-21

Re: Request for Comments, Ohio Republican Party Advisory
Opinion AOR 1993-21

Dear Mr. Litchfield:

We have received the ten page facsimile from the Federal Election Commission containing the Ohio Republican Party's request for an advisory opinion dated October 15, 1993 and file stamped received by your office on October 25, 1993. After discussions with Mr. Jonathan Levin, concerning the FEC's desire for comment, the Auditor of State is pleased to provide you with his comments concerning the issues raised by Mr. Spencer's request.

Our comments will not include a discussion of the threshold issue of the Auditor's authority to audit the Ohio Political Party (income tax check-off) Funds, although as you can see by the enclosed letter to Mr. Spencer it is the position of the Auditor of State that he was within his specific statutory authority to audit these funds. Nor will these comments address the extreme difficulty encountered by the Auditor's staff in conducting the audit. However, we do note that it became necessary to subpoena documents in order to complete the 1990 and 1991 audit. We note that Mr. Spencer's letter states that the Party has provided additional documentation concerning expenditures of income tax check-off funds. This documentation was not provided until well after field work was completed and generated a great deal of extra work for the audit team to review data that should have been provided during the initial field work. The Auditor of State believes that these issues, although relevant and important in the context of the proceedings before the Ohio Elections Commission are beyond the scope of the specific issues presented for consideration to the FEC.

I. FACTUAL BACKGROUND

As you are aware from the material submitted in connection with the Party's request for an opinion, permissible expenditures of income tax check-off monies are governed by R.C. 3517.18(A). Permissible expenditures include 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; organization of voter registration and get-out-the-vote campaigns; administration of party fundraising drives; paid advertisements sponsored by two or more qualified parties to publicize the political party fund; direct mail campaigns or communications with registered voters of the party that are not related to any particular candidate or election; and preparation of reports required by law.

It is well settled under Ohio Law that public funds may only be disbursed by clear authority of law, and when there is doubt as to the right to expend public monies, the doubt must be resolved in favor of the public and against the grant of authority. See Ohio Elections Commission Advisory Opinion No. 88-3, overruled in part by Op. No. 89-1 (Copies of which are enclosed herein).

It is equally well settled that public funds may not be used to assist a private enterprise, but must serve a public purpose. See, Ohio Const. Art. VIII, Section 4. In apparent adherence to this constitutional limitation, the Ohio General Assembly set forth in division (B) of R.C. 3517.18 prohibitions on the use of income tax check-off monies. Unlike the specific purposes authorized by division (A), the prohibitions in division (B) are general in nature. R.C. 3517.18(B)(1) and (2) provide that monies from the Ohio Political Party Fund shall not be used: to further the election or defeat of any particular candidate or to influence directly the outcome of any candidate or issue election; to pay party debts incurred as a result of any election; or, to make a payment clearly in excess of the market value which is received for the payment.

Division (B) serves as a limitation upon the scope of the categories of permissible purposes set forth in division (A). By its inclusion, the General Assembly sought to insure that the public purposes, such as encouraging voter registration and participation, to be served by the use of these public funds could not be turned to partisan political advantage. It should be noted that the General Assembly carefully inserted the word "directly" in connection with influencing the outcome of elections but made no such distinction with respect with promotion of the election or defeat of particular candidates. This is a recognition of the fact that activities such as voter registration and get-out-the-vote campaigns indirectly influence elections. However, so long as they are conducted so as not to affect the outcome of particular candidate or issue elections, they serve a public purpose. On the other hand, any use of tax check-off fund monies to directly or indirectly further the election or defeat of a particular candidate is

prohibited. Furthering the election or defeat of a particular candidate includes furthering the election or defeat of more than one particular candidate. See OEC Advisory Opinions No. 88-3, 89-1, 89-2. (copies enclosed).

Having set forth the general principles that guide decisions regarding the use of income tax check-off monies, attention is now turned to the specific issues raised in the Auditor's report of the Ohio Republican Party, Ohio Political Party Fund regular audit for the period January 1, 1990 through December 31, 1991.

II. ISSUES PRESENTED

The Ohio Republican Party Did Not Maintain Its Records In Sufficient Detail To Allow The Auditor To Verify The Actual Use of Taxpayer Dollars.

The audit report indicated that the documentation provided by the Party was insufficient to allow the auditor to verify that approximately \$600,000.00 in monies from the income tax check-off account were expended in accordance with Ohio law. The specific and most significant areas concerning lack of documentation are set forth below:

1. From June 14, 1990 through December 20, 1990 the Party wrote 9 checks from the income tax check-off account, totaling \$335,513.10, and deposited those checks into its payroll account. The \$335,513.10 deposited into the Party's payroll account could not be audited to determine if those monies were expended in accordance with law as required by R.C. 3517.17. Even though staff salaries are legitimate expenses under R.C. 3517.18 the party was unable or unwilling to provide the Auditor with the supporting records or documents to confirm that employees paid with income tax check-off monies were not performing unallowable activities such as working on candidate campaigns. Therefore, the auditor recommended that the party return the \$335,513.10 to the tax check-off account until party officials could provide documentation to verify the actual use of those monies. (Audit report at 8).
2. In calendar year 1991, \$52,384.87 of tax check-off monies paid to Tailored Management Inc. for staff salaries could not be audited to ascertain that those monies were expended in accordance with R.C. 3517.18. In order to ascertain whether employees paid with those income tax check-off monies were performing unallowable activities, the Auditor needed to examine underlying source documentation including the pay periods and employees who were paid with political party funds, the gross

and net pay for each employee per pay period, verification of deductions, employee position descriptions, if any exist, and access to verify proper purpose as defined in R.C. 3517.18 which could include interviewing employees, and any reconciliations the Party had involving political party funds. (Audit report at 10-11).

3. Also in calendar year 1991, \$203,455.76 of income tax check-off funds were deposited into the Party's operating account. The \$203,455.76 deposited into the operating account was commingled with \$1,724,332.82 of deposits from other Party accounts. Reports the Party filed with the Secretary of State did not denote the manner in which the public monies were expended, nor did the Party provide other documents or accounting records to enable the Auditor to ascertain the actual use of the \$203,455.76. Consequently, the Auditor recommended that the Party return the \$203,455.76 to the income tax check-off account until Party officials provided documents or records to verify the actual use and purpose of those monies. (Audit report at 15).

These three items all relate to the Party's failure to provide supporting documentation in sufficient detail to afford a reasonable basis for an opinion by the Auditor as to whether income tax check-off monies were expended in accordance with R.C. 3517.18. It is the position of the Auditor of State that federal regulations require committees to maintain records including bank records, vouchers, receipts, bills, and accounts to provide in sufficient detail the necessary information from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness. 11 C.F.R. §104.14. This requirement allows both the Auditor of State and the Federal Election Commission to track the flow of non-federal funds (such as income tax check-off funds) into federal accounts and to insure that the use of the taxpayers' funds is strictly limited to payment for permissible activities. See 55 Federal Register 26068, June 28, 1990.

Therefore, it is the opinion of the Auditor of State that both federal regulations and state law require a party to maintain its records in a manner that enables the Auditor to ascertain the actual use of income tax check-off monies. This requirement is critical to the Auditor's ability to account for income tax check-off funds since certain administrative expenses that may be permissible under federal law may not be permitted under Ohio law. For example, utility bills including cable T.V. for the Party chairman's personal residence were paid out of the allocation account.

The Auditor does not believe that there exists any conflict between state and federal law that would prohibit the Ohio Republican Party's in-house accountants from detailing the actual

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use of income tax check-off monies for state purposes. (See memo of David W. McGuckin dated May 13, 1993). Therefore, it is our position that the Republican Party should maintain an accounting system which can identify the actual use of income tax check-off monies for state purposes.

Commingling Of Funds

In addition to the issue of lack of documentation, there is another issue before the Commission; namely, the commingling of income tax check-off account funds with other monies. R.C. 3517.17(A)(2) provides in relevant part that:

Each party treasurer receiving public monies from the Ohio Political Party Fund shall maintain such monies in an account separate from all other assets of the political party and shall file statements of contributions and expenditures as required by Sections 3517.10 and 3517.11 of the Revised Code. Each treasurer of a state executive committee who files such a statement shall file it with the Secretary of State* * * *. All such statements filed shall clearly state the amount of public monies received and the manner of their expenditure. The Auditor of State shall annually audit statements of the State Committee of a political party that has received public monies collected during the previous year, to ascertain that such monies are expended in accordance with law.

The Ohio Republican Party has taken the position that federal election law requires the Party to commingle funds since all payments for overhead and administrative costs must be paid out of a federal allocation account. Our review of the applicable statutes and regulations indicates that federal election law does not *require* the Ohio Republican Party to commingle these public funds. 11 CFR §106.5(g)(1) offers committees an option of two procedures by which they may pay for their administrative expenses and shared federal and non-federal activities. Under the first procedure, committees would pay an entire bill from their original regular accounts and would transfer funds from their non-federal accounts to their federal accounts to cover the non-federal share of the allocable expenses.

The second procedure allows committees to establish a separate allocation account, and to transfer funds to that account from their regular federal accounts and their non-federal accounts solely for the purpose of paying allocable expenses. Regardless of which procedure is utilized, transfers of non-federal funds must be itemized in the committees reports to show the allocable activities for which they are intended to pay, and must occur within 10 days before or 30 days after the bills for those activities are paid. Each allocated disbursement from a

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committees federal account or allocation account also must be itemized to show the particular expenses covered by that disbursement. In addition 11 CFR §104.14 requires committees to maintain records including bank records, vouchers, receipts, bills, and accounts to provide in sufficient detail the necessary information from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness. Therefore, it is the opinion of the Auditor of State that federal regulations do not require income tax check-off monies to be transferred to an allocation account.

III. EFFECT OF AN ADVISORY OPINION ADOPTING THE POSITION OF THE OHIO REPUBLICAN PARTY

With respect to the specific questions posed by the Ohio Republican Party, the Auditor of State provides the following response:

1. Is the Ohio Republican Party correct in transferring the "income tax check-off" funds established by R.C. §3517.16 from the separate, segregated account to the "allocation account" and thereafter paying vendors of headquarters administrative expenses, including the lease of the office, staff salaries, and expenses, lease of office equipment, etc.?

The Auditor of State takes the position that federal law does not require the Ohio Republican Party to elect to transfer income tax check-off funds to an allocation account. Even if the Commission should determine that the Republican Party must transfer income tax check-off funds to an allocation account, the Auditor of State maintains that he cannot properly perform his duties to determine the actual manner of expenditures unless proper source documentation is provided. In Mr. Spencer's presentation before the Ohio Elections Commission on October 18, 1993, he indicated that he had received oral assurances from the Federal Election Commission that the Ohio Republican Party did handle money in an appropriate fashion and complied with federal law. (Transcript of proceedings at page 8). Mr. Spencer also indicated that he has anticipated the results of the FEC advisory opinion and that the Republican Party already knows the answer to the questions presented. (Transcript of proceedings at page 26).

In the course of the audit of the income tax check-off funds, the audit team obtained and reviewed a number of letters from the FEC indicating the Ohio Republican Party was not maintaining its accounts in a manner satisfactory to the FEC. (Copies attached). It is the position of the Auditor of State that income tax check-off monies are taxpayer monies and the statutory scheme enacted by the General Assembly was intended to provide a level of accountability to the people of Ohio that would enable them to know how their taxpayer dollars were being spent.

If the Ohio Republican Party maintains a subsidiary ledger tracking the flow of funds into

the income tax check-off account, the expenditures for which the funds are used and documentation as to the exact manner of those expenditures, the Auditor believes this procedure is compatible with both federal and state law. If, however, the Ohio Republican Party is permitted merely to transfer funds from the income tax check-off account to the allocation account and then to its employee leasing company without providing documentation concerning the actual duties performed by those employees paid with income tax check-off funds, it becomes impossible for the Auditor of State to determine whether or not any of those employees were in fact being paid with income tax check-off funds while performing prohibited activities such as working on candidate campaigns. We do not believe that the reports filed with the Secretary of State and the Federal Election Commission contain sufficient information to determine how income tax check-off monies are actually expended without additional source documentation being made available to the Auditor. Therefore, the Party should provide the Auditor's staff with original source documentation to enable the Auditor to determine whether income tax check-off monies (particularly staff salaries) were expended in accordance with the express statutory provisions of R.C. 3517.18.

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 C.F.R. §106.1, et seq.?

It is the position of the Auditor of State that income tax check-off monies are public monies derived from individual Ohio taxpayers and must be accounted for in accordance with state law. Even if the FEC determines income tax check-off funds are "federal" dollars for purposes of an allocation formula, such a determination does not preempt or supersede the requirements that the Ohio Republican Party must expend income tax check-off monies for statutorily enumerated purposes and account dollar for dollar how those monies are expended.

3. Does the "allocation" process supersede and/or otherwise preempt the Ohio law require (sic) that the "income tax check-off funds" be maintained "in an account separate from all other assets of the political party," that is to say, must all expenditures made for administrative expenses associated with the support of the state headquarters and its staff, including purposes required by R.C. §3517.18(A), be made from the federally established "allocation account"?

It is the position of the Auditor of State that federal regulations do not require the Ohio Republican Party to utilize an allocation account. If the Ohio Republican Party wants to receive income tax check-off monies from the state treasury it must comply with both federal and state law if both federal and state statutes and regulations can be reconciled. Otherwise, if the Ohio Republican Party elects for whatever reason to use an allocation account, the Auditor of State takes the position that the Party can decline to receive income tax check-off monies, or it must maintain a proper level of accountability over the use of these funds.

4. Is the requirement that "income tax check-off funds" be maintained "in an account separate from all other assets of the political party" satisfied when "income tax check-off" funds are transferred to the "allocation account" simultaneously, or in conjunction, with payment to vendors of administrative expenses, office and equipment lease payments, staff salaries and support costs, etc.?

The Auditor of State believes that an option exists under 11 C.F.R. §106.5 that satisfies both state and federal law. However, if the FEC were to determine that the method of payment set forth in question four is required, the Auditor of State must still be able to audit dollar for dollar the actual use of income tax check-off monies. If income tax check-off monies are commingled with other funds in the allocation account, a mechanism must exist that allows the Auditor to determine the actual use of income tax check-off funds. Expenditures that may be permitted under federal law may not be appropriate under R.C. 3517.18. Only if such a level of accountability is maintained can the Auditor of State comply with the mandate of R.C. 3517.17(A) to annually audit the statements of the state committee of a political party to ascertain that income tax check-off monies are expended in accordance with law. Mr. Spencer's statements before the Ohio Elections Commission acknowledge the Ohio Republican Party's current willingness and ability to account for transfers and expenditures of income tax check-off funds literally to the penny. (Transcript before the Commission at 12). Since the Party has indicated that it is now willing and capable of maintaining this level of accountability it appears the problems with the 1990-91 audit were related to the Party's internal accounting problems rather than any purported conflict between state and federal law. Accordingly, the Auditor believes the Party should make such source documentation available.

IV. CONCLUSION

In conclusion, it is the Auditor's position that the state and federal law require the party to maintain and make available its records in such a manner that the actual use of income tax check-off monies can be ascertained. An opinion by the FEC to the effect that state law can be reconciled with federal law concerning the level of accountability would serve the public policy of the State of Ohio, as well as the stated purposes of federal election law. As set forth in the Federal Election Campaign Financing Guide one of the purposes of 11 C.F.R. §106.5 is to provide detailed instructions as to how committees are to allocate their administrative expenses and costs for combined federal and non-federal activities. These rules set forth procedures by which committees are to pay the bills for these allocable expenses. The rules are designed to allow the FEC to track the flow of non-federal funds into federal accounts, and to ensure that the use of such funds is strictly limited to payment for a non-federal share of allocable activities. Such disclosure is critical to the commission's ability to monitor whether expenses have been allocated as required. Such disclosure is also critical to the Auditor of State's ability to audit the statements of the state committee of a political party that has received public monies collected during the previous year in order to ascertain that such monies are expended in

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accordance with law.

If we may be of further assistance, or you require clarification of any comments, please do not hesitate to contact us.

Respectfully submitted,



JOSEPH H. WILLIS
Chief Legal Counsel
DAVID W. McGUCKIN, CFE
Audit Manager

Enclosures

cc: Jack Gregg Haught, Chair, Ohio Elections Commission
Scott W. Spencer, General Counsel, Ohio Republican Party

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APPENDIX

1. **Letters to the Federal Election Commission, Office of the General Counsel, from Scott Spencer, Esq., dated October 15, 1993 and October 25, 1993**
2. **Article VIII, Section 4, Ohio Constitution and; Ohio Revised Code Sections**
3. **Ohio Elections Commission, Advisory Opinions**
4. **Ohio Republican Party, Ohio Political Party Fund, Regular Audit, January 1, 1990 through December 31, 1991**
5. **Memorandum from David McGuckin, Assistant Auditor of State, dated May 13, 1993**
6. **Transcript before the Ohio Elections Commission, October 18, 1993**
7. **Letters issued by the Federal Election Commission concerning the Ohio Republican Party's non-compliance with federal regulations**
8. **Letter to Scott Spencer, Esq. from Marianne Neal, Assistant Attorney General, dated November 24, 1993**
9. **Ohio Campaign Finance Reporting Handbook**