FEDERAL ELECTION COMMISSION
Washington, DC 20463

June 27, 1986

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1986-17

Stephen Gillers
New York University School of Law
40 Washington Square South
New York, NY 10012

Dear Mr. Gillers:

This responds to your letter dated May 15, 1986, on behalf of Mark Green, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to (1) the party designation of a candidate for nomination and (2) the expenditure of general election contributions.

Mark Green has filed with the Commission a Statement of Candidacy as a candidate for the Democratic Party's nomination for the United States Senate from New York in 1986. He has also filed with the Commission a Statement of Organization for his principal campaign committee, "Friends of Mark Green." In its reports through the first quarter of 1986 the Committee has itemized all contributions it has received and has reported them as primary election contributions.

I. Party Designation

The New York primary election will be held on Tuesday, September 9, 1986. New York election law provides that between the fourteenth and fifteenth Tuesday preceding the primary election, the state committee of a political party shall meet and designate "a candidate for nomination" for any office to be filled by the voters of the entire state. New York Elec. Law 6-104(1). The person receiving the majority vote of the state committee, under a weighted voting system, becomes the party's designated candidate for nomination. All other persons who receive at least 25 percent of the vote on any ballot at this meeting may make a written demand that their names also appear on the ballot as candidates for nomination. Id. at 6-104(2) and (4). The state committee files with the state board of elections the names of all persons designated by the state

committee as candidates for nomination and all persons receiving at least 25 percent of the vote on any ballot and the office for which they receive such votes. Id. at §6-104(7).

Under New York law enrolled members of a political party may also file petitions that designate other candidates for nomination. Id. at §6-104(5) and 6-118. State law also permits enrolled members of a political party to petition for an opportunity to write in a candidate for nomination. Id. at §6-164. Where the nomination of a party for an office is contested, the person receiving the most votes in the primary election for that office becomes the party's nominee. Id. at §6-160(1). Where a party's nomination for an office is uncontested, the person designated for nomination will be deemed nominated without balloting. Id. at §6-160(2). In such case the primary election ballot will not contain a space for voting for such office unless a petition for an opportunity to write in a candidate has been filed. Id. at §7-102 and 7-114(1)(d).

You ask whether the designation of a candidate for nomination by the state committee of a political party under New York law is an "election" under the Act to which separate contribution limitations will apply.[1]

The Act places limitations on the aggregate amount of contributions that any person or any multicandidate political committee may make to a candidate with respect to any election for Federal office. 2 U.S.C. 441a(a)(1) and (2). These limitations apply separately with respect to each election. 2 U.S.C. 441a(a)(6); 11 CFR 110.1(j) and 110.2(d). The Act and regulations define "election" to include a general election, a primary election, and "a convention or caucus of a political party which has authority to nominate a candidate." 2 U.S.C. 431(1); 11 CFR 100.2. The Commission has previously stated that the question whether a particular event is an election, or a convention or caucus which has authority to nominate a candidate, is determined by state law. See generally Advisory Opinion 1984-16.

The provisions of New York's election law paraphrased above demonstrate that the state committee does not have authority to nominate a candidate but only to designate a candidate "for nomination." In this respect, the state committee's designation is an alternative means by which a person becomes a candidate for nomination with respect to the primary election and is, thus, a part of the primary election process. Where an office is uncontested and no petition for an opportunity to ballot has been filed, the primary election ballot will not list that office. Instead, the person designated as a candidate for nomination will be deemed nominated without balloting. Nevertheless, the certificate of nomination will issue after the date of the primary election. See 50 NY Jur.2d Elections 370 (1985). Thus, under New York election law, the state committee's designation of a candidate for nomination does not qualify as a "convention or caucus of a

[1] In your request you invoked the provisions of 2 U.S.C. 437f(a)(2) and 11 CFR 112.4(b), which direct the Commission to render an advisory opinion within 20 days if it receives a request on behalf of a candidate within 60 days of a Federal election and if the request presents a specific transaction or activity with respect to that election. In your case, however, the substantive question you ask poses the same issue that is presented by your request for the 20-day procedure: whether the state committee's designation of a candidate for nomination is an "election" under the Act. Since the Commission concludes that the designation by the state committee is not an "election" under the Act, your request does not qualify for the 20-day procedure.

political party which has authority to nominate a candidate." Accordingly, it is not an "election" under the Act to which separate contribution limitations will apply. This result is also indicated in Advisory Opinion 1982-47.

II. General Election Contributions

According to your request, Mr. Green[2] contemplates receiving contributions for the general election prior to the date of the primary election. You further state that such contributions will be separately accounted for pursuant to 11 CFR 102.9(e) and that these contributions will be refunded if Mr. Green does not become a candidate with respect to the general election. The Commission infers from your request that the contributors of these designated general election contributions will have already made their aggregate allowable contribution with respect to the primary election.

You ask whether Mr. Green may make expenditures of such general election contributions before he becomes a candidate with respect to the general election.[3]

As outlined above, the Act's limitations on contributions made to a candidate with respect to any election for Federal office apply separately with respect to each election. 2 U.S.C. 441a(a)(1), (2), and (6). Under Commission regulations, contributions made to Mr. Green or his principal or authorized campaign committees prior to the September 9, 1986, primary election will be considered made with respect to the general election on November 4, 1986, only if they are designated in writing by the contributor for such general election. See 11 CFR 110.1(a)(2). Commission regulations also provide that a candidate or his committee must separately account for contributions received prior to the primary election that are designated for the general election. See 11 CFR 102.9(e). In past advisory opinions, the Commission has further explained that contributions designated for a particular election such as a runoff or general election, may be accepted but become refundable to the contributors if the candidate does not participate in that election. See Advisory Opinions 1986-12, 1983-39, 1982-49, and 1980-122.[4] The Commission has also recognized that a contributor may in certain circumstances redesignate in writing a contribution (previously designated for a particular election) to another election provided that in doing so the contributor does not exceed his or her aggregate contribution limitation with respect to the election for which the contribution is redesignated. See Advisory Opinions 1986-12, 1984-32, and 1983-39.

In Advisory Opinion 1980-122, a candidate who lost the primary election had received contributions designated for the general election from contributors who had made their aggregate allowable contribution to the candidate with respect to the primary election. The Commission

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[2] In this opinion, your references to Mr. Green also encompass Mr. Green's principal campaign committee, since Mr. Green is deemed to be an agent of his committee for the purposes of receiving contributions and making disbursements. 2 U.S.C. 432(e)(2); 11 CFR 101.2.

[3] In a telephone communication with an attorney in the Office of General Counsel, you indicated that the Committee plans to use these general election contributions for activities to influence the primary election as well as for activities related to a potential general election candidacy.

[4] Commission regulations permit unlimited transfers of funds between the primary and general election campaigns of a candidate of funds unused for the primary election. 11 CFR 110.3(a)(2)(iii). This regulation, however, applies only in the case where an individual participates as a candidate in both the primary and general elections.

stated that the candidate could not use these general election contributions to pay outstanding primary election debts because doing so would result in a violation of the Act's contribution limitations. Instead, the Commission concluded that these general election contributions must be refunded because a separate contribution limitation was not available to these contributors since the candidate did not participate in the general election. The Commission has followed this position in several advisory opinions. See, e.g., Advisory opinions 1986-12 and 1983-39.

In Advisory Opinion 1982-49, the campaign committee of a candidate who received the nomination of the party convention (which qualified under the Act as an election) contracted with a firm for services with respect to a possible primary election. The contract called for the firm to contact independent voters in Connecticut to encourage them to register as Republicans in order to participate in the Republican Party's primary election. Thus, these services were related solely to the possible primary election and would not have influenced the convention. The committee made payments to the firm, including nonrefundable payments, prior to and after the convention from its convention account. The committee had also received, and separately accounted for, contributions designated for the possible primary election from contributors who had made their aggregate allowable contribution with respect to both the convention and the general election.

The Commission concluded that the committee could not use these primary election contributions to defray the expenses it had incurred and paid with respect to the possible primary election. It stated that since there was a determination under state law not to bold the primary election, there was no separate contribution limitation available to these contributors with respect to that election. Instead, the Commission said that these primary election contributions must be refunded to the contributors to the extent that the contributors had made their aggregate allowable contribution with respect to the convention and general election.

Nevertheless, the Commission concludes that the Act does not prohibit your committee from using contributions designated for the general election to make expenditures, prior to the primary election, exclusively for the purpose of influencing the prospective general election in those limited circumstances where it is necessary to make advance payments or deposits to vendors for services that will be rendered, or goods that will be provided, to your committee after you have established your candidacy with respect to the general election. This limited, permissible use of such general election contributions does not include the expenditure of such contributions for activities that influence the primary election or nominating process or expenditure allocations for goods or services to be used in both the primary and general elections. See 2 U.S.C. 441a(f); Advisory Opinion 1980-122.

Furthermore, the Commission concludes that if you do not establish your candidacy with respect to the general election, your committee must refund within a reasonable time contributions designated for the general election, whether or not your committee has made any expenditure from these contributions, since a separate contribution limitation will not be available to these contributors with respect to the general election. See 11 CFR 103.3(b); Advisory Opinion 1986-12. Your committee should make a full refund to those contributors who have made their aggregate allowable contribution to you with respect to the primary election.

Finally, the Commission notes that portions of Advisory Opinion 1982-49 may suggest that contributions designated for a particular election may not be expended until it is established that the candidate will participate in that election. To the extent that Advisory Opinion 1982-49 may be so interpreted as to preclude expenditures of general election contributions in the limited circumstances permitted in this opinion, Advisory Opinion 1982-49 is superseded.

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 yours,

(signed)

Joan D. Aikens
Chairman for the
Federal Election Commission

Enclosures (AOs 1986-12, 1984-32, 1984-16, 1983-39, 1982-49, 1982-47, and 1980-122)

Commissioner Harris voted against approval of this opinion and will file a dissenting opinion at a later date.