FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 11, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-33

Jan W. Baran
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Baran:

This is in reply to your letter of July 18, 1988, as supplemented by letter dated September 7, requesting an advisory opinion on behalf of the Republican Party of Florida and its Federal political committee concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the use in Federal elections of fees collected by the State of Florida and distributed by the State to political parties.

Your letter explains that, with limited exceptions, a person seeking to qualify for nomination or election to Federal, State, county, or multicounty district office in the State of Florida must pay a qualification fee and a party assessment to the Florida Department of State. Fla. Stat. Ann. §99.061(1) (West 1982 & Supp. 1988).[1] Payment of the sums is a condition precedent to having the candidate's name printed on the official election ballot. The qualification or filing fee is 3 percent of the annual salary of the office sought by a candidate. Id. §99.092(1). The party assessment (also called a committee assessment) is 2 percent of the annual salary. Id. If the state executive committee of the candidate's political party complies with statutory requirements,[2] the Department of State remits a portion of the qualification or filing fee and the party assessment to the party's state executive committee. See generally id. §99.103.[3] The Republican Party of Florida was scheduled to receive its fees and assessments in August 1988. See id. §99.061(1) and 99.103(2).

You state that the Republican Party of Florida ("the Party") intends to deposit its share of the fees and assessments into the account of the Republican Party of Florida-Federal Campaign Committee, the Party's Federal registered political committee, for use in connection with Federal elections. You seek the Commission's opinion about the Party's proposed action:

> May the Party deposit all monies distributed to it by the Department of State pursuant to Florida State law . . . into the Republican Party of Florida-Federal Campaign Committee Account for use in connection with federal elections?

In your September 7 letter you "clarify" the Party's question to include the following issues:

> If monies received from State candidates are subject to the prohibitions of the Act, may the Party deposit these monies into the Republican Party of Florida - Federal Campaign Committee Account. Further, may the Party use an allocation basis for depositing money from State candidates into its Federal account. If not, what would constitute a sufficient demonstration that the money is subject to the prohibitions of the Act?

The Florida election statutes do not specify the sources of the funds with which candidates may pay their qualification fees and party assessments. It appears, therefore, that a person seeking ballot access for a non-Federal office in Florida may use contributions from any source permitted by Florida law to pay the required fees and assessments.

Florida law on contributions differs significantly from the Federal law on contributions. For example, under the Act and Commission regulations no labor organization or corporation may make a contribution or expenditure in connection with any election for Federal office. 2 U.S.C. 441b(a); 11 CFR 114.2(b). And candidates and political committees may not knowingly accept or receive any prohibited contributions. 2 U.S.C. 441b(a). See 11 CFR 114.2. Florida law, in contrast, does not forbid contributions from labor organizations or corporations. See, e.g., Fla. Stat. Ann. §§106.04, 106.081 and 106.011(1) and (8). Also see Advisory Opinion 1987-23. Further, Florida permits a donor to contribute up to $3,000 to a candidate who seeks Statewide office. Fla. Stat. Ann. §106.08(1)(c). The Act and Commission regulations forbid any person from contributing more than $1,000 per election to any Federal candidate and his or her authorized committees. 2 U.S.C. 441a(a)(1)(A); 11 CFR 110.1(b)(1).

As a result of these differences between Florida law and Federal law, the State's non-Federal candidates may accept contributions forbidden to the State's Federal candidates. They may then choose to apply some or all these contributions to the payment of their fees and assessments.[4] These funds "pass through" the State and thereafter, under the requester's proposal, enter the Federal election process. Florida's Federal candidates may not use contributions prohibited by the Act and Commission regulations in order to help pay their fees and assessments. Therefore, when the State passes on their payments to the state political parties, only money subject to the Act's prohibitions and limitations enters the Federal election process.

Citing Advisory Opinion 1982-17, you maintain that the fees and assessments distributed by the State of Florida to the Party are not contributions under the Act; the State required payment of the fees, and the persons paying them did so not for the purpose of influencing a Federal election but because payment was mandatory. You imply that the Commission's acceptance of this conclusion should end its examination of your proposal. Whether the sums upon distribution by the State to the Party are the candidates' contributions is not, however, the key issue raised by your proposal.

Your proposal raises the issue whether the Act and Commission regulations permit a political committee to deposit in its Federal account, and then use in connection with Federal elections, funds that may have as their source contributions by individuals or entities whom the Act prohibits from contributing directly to the political committee for such a use. Advisory Opinion 1982-17 does not fully set forth or squarely address this issue. It concerns an Indiana statute under which the State distributed to qualified state and county party committees $30 of the $40 fee that the State charged persons who wished to purchase personalized automobile license plates. The Commission permitted the requester, a state party committee, to deposit its share of the license plate proceeds ($7.50 per license plate) in its Federal account. The opinion points out that those who purchased personalized license plates presumably did so to obtain a specialized version of a nonpolitical item that the State of Indiana required all automobiles to display; by paying the required fee, the license plate purchasers were not trying to influence any election and were not making a political "contribution."

The Commission agrees that, under the reasoning of Advisory Opinion 1982-17, Florida's candidates, like Indiana's license-plate buyers, made no "contribution" to their state political party when they paid the fees required by the State. Further, the Act and Commission regulations expressly provide that payments made by Federal candidates or their authorized committees as a condition of ballot access are not "contributions." See 2 U.S C. 431(8)(B)(xiii) and 11 CFR 100.3(a) and 100.7(b)(18).[5] But this conclusion does not resolve the issue whether the Act permits a political committee to use in Federal elections money the source of which may be contributions from, say, corporate or union treasury funds.[6]

Congress has prohibited the infusion of funds from certain sources into the Federal election process and has limited the amount that permissible sources may give. The importance of ensuring that only funds permissible under the Act will be used in connection with Federal elections is evident from the repetition of the requirement in various provisions of the Act and the regulations. See, e.g., the provisions governing contributions, coordinated party expenditures, payments for exempt activities, and intra-party transfers. 2 U.S.C. 431(8)(B)(x)(2) and (xii)(2), 431(9)(B)(ix)(2), 441a(a)(2) and (a)(4), 441a(d), and 441b(a) and (b); 11 CFR 100.7(b)(9), (b)(15)(ii), and (b)(17)(ii), 100.8(b)(10), (b)(16)(ii), and (b)(18)(ii), 102.5(a)(1)(i), and 102.6(a)(1)(iv).

The Act and Commission regulations assume that the Commission, in enforcing the prohibitions and limitations, will need to trace the sources of funds proposed to be infused into the Federal election process. The Act, for example, defines "contribution or expenditure" to include any direct or indirect payment, distribution, . . . deposit, or gift of money, . . . or anything of value . . . to any candidate, campaign committee, or political party or organization, in connection with any [Federal] election . . . ." 2 U.S.C. 441b(b)(2) (emphasis added). See also 11 CFR 114.1(a)(1). In prior advisory opinions, the Commission has taken into account the source of funds used in connection with Federal elections. In Advisory Opinion 1980-38, for instance, the Commission held that where a state candidate committee that was not a "political committee" under the Act and a Federal candidate committee agreed jointly to rent a computer and to share the expense of entering common data, the state committee could reimburse the Federal committee for the state committee's share of computer expenses only with funds subject to the Act's prohibitions and

limitations. Similarly, in Advisory Opinion 1980-130, the Commission advised a state candidate committee that it could not use funds donated by corporations or labor organizations to repay money it had borrowed from a Federal candidate committee, even though the repayment would not be considered a contribution under the Act. The source of repayment had to be funds subject to the prohibitions of the Act and the regulations. Cf. Advisory Opinion 1981-19 (explaining, inter alia, that the proposed money market investment avoided "the evil . . . [of] commingling and intertwining funds so as to obscure their sources").

The same goal--to prevent the infusion, directly or indirectly, of prohibited funds into the Federal election process--explains why the Act and Commission regulations impose certain affirmative duties on the various participants in the Federal election process. See, e.g., Advisory Opinion 1982-38 (on the responsibilities of party organizations that contribute to Federal campaigns and on the responsibilities of the political committees that receive the contributions). Under 11 CFR 102.5(a)(1), an organization such as the Party that qualifies as a "political committee" and that finances political activity in connection with both Federal and non-Federal elections has the affirmative duty to adopt one of two accounting plans. The Party has chosen the plan outlined in 11 CFR 102.5(a)(1)(i): the establishment of a separate account into which the committee deposits only funds subject to the prohibitions and limitations of the Act. Because this account is to contain no commingled funds, only funds permissible under the Act, the regulation requires the political committee choosing this option to make all its contributions, expenditures, and exempted payments in connection with Federal elections from this separate account.

Florida law permits Florida's non-Federal candidates to accept contributions forbidden to the State's Federal candidates and to use those contributions to help pay the non-Federal candidates' filing fees and party assessments. State parties receive a portion of these fees and assessments. Under these circumstances, the Commission concludes that the Party may deposit in its Federal account a sum that represents its portion of the qualification/fees and party assessments paid by Florida's Federal candidates.[7] With respect to fees and assessments paid by non-Federal candidates, however, the Commission considered several alternative approaches that would have allowed under specified conditions, or barred altogether, the deposit of such payments in the Party's Federal account, but did not approve any opinion regarding this issue by the required affirmative votes of 4 members.[8] See 2 U.S.C. 437c(c).

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,

(signed)

Thomas J. Josefiak
Chairman for the Federal Election Commission

Enclosures (Advisory Opinions 1987-23, 1983-15, 1982-38, 1982-17, 1981-19, 1980-130, 1980-38, and 1978-9)

1/ The statutes imply that the state executive committee of each political party decides whether an assessment will in fact be levied on behalf of the party. See Fla. Stat. Ann. §§99.021(1)(b), 99.061(1), and 99.092. Also, a candidate may, it seems, pay the party assessment directly to his or her party. Then, when the candidate formally seeks to qualify, he or she submits the original or signed duplicate of the receipt for the party assessment. Id. §§99.092(1). See also id. §99.021(1)(b).

2/ See, e.g., Fla. Stat. Ann. §103.121(5)(b) (state executive committee that endorses a candidate for nomination forfeits its share of party assessments).

3/ The Florida Department of State retains 15 percent of the filing fees. It deposits the retained amount in Florida's General Revenue Fund. Fla. Stat. Ann. §99.103(1) and (2). The state chairman of each state executive committee must distribute to the appropriate county executive committees the 2-percent party assessments that have been levied on county candidates, providing that the county committees certify that they have complied with all applicable Florida statutes and party requirements. Id. §103.121(6).

4/ Each non-Federal Florida candidate must pay his or her fees by a check drawn on the candidate's campaign account. Letter dated September 21, 1988, from the Division of Elections, Florida Department of State, to the Commission.

5/ The same provisions exclude from the definitions of "contribution" the party assessments paid directly to the state executive committees by Florida's Federal candidates as a condition of ballot access. See note 1, supra. Further, "payments made to the appropriate State official of fees collected from candidates or their authorized committees as a condition of ballot access are not expenditures." 11 CFR 100.8(b)(19); 2 U.S.C. 431(9)(B)(x).

6/ The Commission has issued several other advisory opinions in which it has approved the deposit of State-collected funds into Federal accounts. None of the State-sponsored plans discussed in those opinions, however, raised the danger that thousands of dollars from sources and in amounts prohibited by the Act might be used in connection with Federal elections. See Advisory Opinion 1983-15 (individual Virginia taxpayers could designate on their State returns that two dollars of refund due them be paid to any eligible state party central committee); Advisory Opinion 1980-103 (voluntary one dollar check-off by individual North Carolina taxpayers on their State income tax returns; monies collected by State and disbursed by state party to Federal candidates were contributions from the state party and as such were subject to the $5,000 contribution limit of 2 U.S.C. 441a); Advisory Opinion 1978-9 (Iowa's voluntary one dollar tax check-off system; "[c]ounty or auxiliary party units may not be conduits for passing along to candidates for Federal office any contribution which may not be made directly to those candidates").

7/ The fees that may be deposited directly into the Party's Federal account are easy to ascertain. The Division of Elections, Florida Department of State, pays the sums representing fees paid by

Florida's Federal candidates separately from the sums associated with Florida's non-Federal candidates. The Division of Elections issues a total of four checks to each state party executive committee. It first issues two checks (one for Federal candidates and one for State candidates) that represent 95 percent of the filing fees (less the amount deposited in the general revenue fund). Later, it issues two more checks (one for Federal candidates and one for State candidates); these checks represent the remainder of the filing fees or party assessments. Letter dated September 21, 1988, from the Division of Elections, Florida Department of State, to the Commission.

8/ Two of these alternatives are set forth in Agenda Documents #88-105, #88-105-A, and #88-105-B for the agenda of September 29, 1988.