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September 23, 1983

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ADVISORY OPINION NO. 12-1983

Dear Mr. Kozlov:

Your letter to the Election Law Enforcement Commission requesting an advisory opinion has been considered by the Commission and I have been directed to issue this response. You have asked whether any portion of the cost of a media campaign to be paid for by the New Jersey Republican State Committee would be allocable to a potential re-election campaign by Governor Kean pursuant to recently enacted "testing the waters" regulations. N.J.A.C. 19:25-3.1 et seq. For the reasons stated herein, the Commission finds that the contemplated media campaign as described in your letter request of September 15, 1983, are not expenditures subject to the "testing the waters" reporting requirements.

You have written the Commission that the Republican State Committee anticipates purchasing television or other media advertising for use during the 1983 legislative election campaign. The advertising will consist of a video featuring Governor Kean, together with an audio delineating pledges made by the Governor and Republican legislators generally, followed by a recitation of the Governor's and Republican legislators' efforts to carry out those pledges. At the conclusion of the advertisement, there will be remarks by the Governor requesting voter participation via support of Republican legislative candidates in the November 8, 1983 general election.

At the Commission meeting conducted on September 19, 1983, Frank B. Holman, Chairman of the Republican State Committee, and yourself appeared personally to further amplify the circumstances surrounding the campaign. You indicated that no specific legislative candidate will be identified by name, by picture, or by any other means.

The Commission has recently promulgated regulations governing pre-candidacy or "testing the waters" activity, 15.N.J.R.1182(e), July 18, 1983. Under those regulations, any individual, or any committee acting on the behalf of an individual, that receives funds or makes payments solely for the purpose of determining whether that individual should become a candidate for public elective office in this State is subject to certain record keeping and reporting requirements. If the individual does become a "candidate," within the meaning of that term as defined in N.J.S.A.19:44A-3(c), the funds received and the payments made become "contributions" and "expenditures" subject to

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the limitations, prohibitions and requirements of the Reporting Act. N.J.A.C.19:25-3.1. In a gubernatorial election, funds expended for "testing the waters" activity on behalf of an individual who becomes a candidate are included in determining the total amount the gubernatorial candidate is permitted to expend on behalf of the gubernatorial candidacy. N.J.A.C. 19:25-16.9(a)(3); 19:25-15.11(a)(3).

In Advisory Opinion 33-1981 the Commission considered a related issue whether a State political party committee may allocate the cost of institutional advertising to non-gubernatorial candidates when such advertising occurs during the course of a gubernatorial campaign. While the opinion is not directly applicable to the question presented today, Advisory Opinion 33-1981 continues to provide guidance with respect to the allocation of expenditures in the context of a gubernatorial campaign.

Essential to the determination of the issue presented today is whether the advertisement in question could be said to have been made, at least in part, on behalf of a gubernatorial candidate or in furtherance of an assessment by an individual who is considering the initiation of a candidacy for the office of Governor. Among the many factors that are relevant to the determination of this issue are: The timing of the advertisement in relation to a gubernatorial election; whether an advertisement can be said to contain an unambiguous reference to Governor Kean as a candidate or a potential candidate for the office of Governor; the individual or organization which is sponsoring or underwriting the cost of the advertisement; whether the advertisement arises in the context of an election in which the individual in question can be expected to play a role independent of a potential gubernatorial candidacy; whether the thrust of the advertisement is to promote the institutional interests of a state political party committee or, in contrast, the personal views of a candidate or potential candidate for the office of Governor.

In the case at hand, the Commission is of the opinion that none of the cost of the advertising described in the request would be allocable to a future candidacy of Governor Kean for re-election. The advertisements are being produced and paid for by the Republican State Committee in furtherance of its institutional function to promote the election of Republican candidates. The advertisements will appear in the context of a biennial legislative campaign, two years prior to the general election in which the office of Governor will be contested. Moreover, Governor Kean's participation in these ads can properly be described as being in furtherance of his responsibilities as a leader of the Republican party in New Jersey.

