FEDERAL ELECTION COMMISSION
Washington, DC 20463

September 29, 2000

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2000-23

Joseph E. Sandler
Neil P. Reiff
6 E Street SE
Washington, D.C. 20003

Dear Mr. Sandler and Mr. Reiff:

This refers to your letter dated August 28, 2000, concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to a New York State statute regulating political contributions made by a State party committee.

FACTS

You are counsel to the New York State Democratic Committee ("the Committee") and request an advisory opinion as to whether section 2-126 of the New York Election Law, purporting to prohibit any party committee from expending any funds in aid of a Federal candidate seeking the party's nomination in a primary election, is pre-empted by the Act and Commission regulations, pursuant to the Act's preemption provision at 2 U.S.C. §453, and Commission regulations at 11 CFR 108.7.

> Section 2-126 of the New York Election Code reads as follows:
> No contributions of money, or the equivalent thereof, made, directly or indirectly, to any party, or to any party committee or to any person representing or acting on behalf of a party or party committee, or any moneys in the treasury of any party, or party committee, shall be expended in aid of the designation or nomination of any person to be voted for at a

> primary election either as a candidate for nomination for public office, or for any party position.

NY CLS Elec. §2-126.

You explain that, pursuant to New York statutes, the Congressional primary elections are held on the first Tuesday following the second Monday in September, which this year falls on September l2. The Committee seeks a determination that the Act preempts section 2-126 of the New York election law as applied to the Committee's direct or indirect support of Federal candidates for the House of Representatives or the United States Senate prior to September 12. You explain that the Committee has filed with the Commission and is a qualified multi-candidate committee. As such, it may contribute up to $5,000 per election to a candidate for House or Senate under 2 U.S.C. §44la(a)(2)(A). Your request outlines the types of activity which you believe the Committee is permitted to undertake prior to a general election, and during a primary election campaign period, to support Federal candidates.[1]

You advance two arguments that support the Federal preemption of section 2-126. First, application of this section to Federal candidates would prohibit the Committee from supporting candidates directly, in connection with the primary election, as permitted by 2 U.S.C. §44la(a)(2). Second, the Committee may be precluded from supporting its presumptive nominees, prior to the September primary, in other respects consistent with the Act, even if such support is designed to influence the general election. You maintain that both of these principles are essential to the framework of the Act and the Commission's regulations, as the Federal regulatory regime pertains to the Committee's support of Federal candidates.

ACT AND COMMISSION REGULATIONS

The Act states that its provisions and the rules prescribed thereunder "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. §453; 11 CFR 108.7(a). The House committee that drafted this provision explains its meaning in sweeping terms, stating that it is intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974).* According to the

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[1] For example, you state that the Committee, as a State party committee, may make expenditures supporting its Senatorial and Congressional candidates within the limits provided under 2 U.S.C. §441a(d)(3). The Committee also may, under 2 U.S.C. §431(9)(B)(iv), (ix) and (x), make unlimited "exempt" expenditures on behalf of its nominees for House and Senate with respect to the distribution of slate cards and campaign materials by volunteers, as well as certain get-out-the-vote activities that "incidentally" mention House and Senate candidates. The Committee may also, you state, undertake unlimited get-out-the vote and voter registration activities that do not mention specific candidates. Such activities may be paid for with a combination of Federal and non-Federal dollars and may be coordinated with Federal candidates. 11 CFR 106.1(a); 106.5(a)(2)(iv).

Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. *H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974)*. The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections. *Id*. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on State law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. *Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51*; 11 CFR 108.7(b). As the legislative history of 2 U.S.C. §453 shows, "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinion 1999-12.

APPLICATION TO REQUEST

The New York provision, as applied to Federal candidates, does not regulate those areas defined as interests of the State. Instead, it places restrictions on the Federal election activities of party committees, specifically on the ability of party committees to make contributions to Federal candidates during a specific period of time, during and before a primary election. As noted above, 11 CFR 108.7(b)(3) specifically preempts State laws concerning limitations on contributions and expenditures regarding Federal candidates and political committees. Section 2-126 of the New York Election Law would clearly fall into this category.[2]

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[2] Your request notes a recent case in which a New York Federal district court made an initial determination that Section 2-126 was not preempted as applied to disbursements by the Committee prior to the September 12 primary. In *Seltzer v. New York State Democratic Committee*, No. 00-CV-4077 (E.D.N.Y., August 21, 2000) the district court, citing *Stern v. General Electric Corp*., 924 F.2d 472 (2nd Cir. 1990), determined that "FECA is given a narrow preemptive effect in light of its legislative history." *Seltzer* at 5. The District Court then concluded that the Section 2-126 did not impact any of the categories found in 11 CFR 108.7 that mandate preemption. *Id*.

The Commission cannot agree with the reasoning of *Seltzer* nor with its reading of the legislative history of the preemptive effect of the Act. As noted above, Section 2-126 would fall within the parameters of 11 CFR 108.7(b)(3) as it specifically lists the preemption of State laws concerning limitations on contributions and expenditures regarding Federal candidates and political committees. The Commission notes that case law exists which support its past conclusions regarding the scope of 11 CFR 108.7(b)(3). In *Teper v. Miller*, 82 F.3d 989 (11th Cir. 1996), the 11th Circuit Court of Appeals noted its agreement with several of the past advisory opinions cited in this opinion (Advisory Opinions 1995-48, 1994-2, 1993-25 and 1992-43) preempting State laws concerning restrictions on the timing and status of contributors. *Teper* at 996.

Apart from the regulations, an examination of the Act itself confirms that the timing and permissibility of contributions to Federal candidates is an area to be regulated solely by Federal law. The Act prescribes prohibitions and limitations on contributions with respect to Federal candidates and political committees. *See* 2 U.S.C. §§441a, 441b, 441c, and 441e. The Commission has clarified how the timing of a contribution determines which election limit applies, and when a contribution made after an election for debt retirement is impermissible. 11 CFR 110.1(b) and 110.2(b). The Act and Commission regulations also address the brief time periods in which contributions must be forwarded and deposited. 2 U.S.C. §432(b); 11 CFR 102.8 and 103.3.

Party committees that have filed as "political committees" under the Act and Commission regulations are permitted, within the appropriate contribution limits of the Act, to make contributions to Federal candidates either in the primary or the general election. The Act contains no limitation such as that found in New York statutes; under the broad preemptive powers of the Act, only Federal law could limit the ability of a State party committee to make contributions to Federal candidates. Further, as the request notes, the Act provides several opportunities, apart from making contributions, that permit State party committees to support Federal candidates. This support, if made to influence the general election, can be provided during the period of the primary election campaign. *See* 2 U.S.C. §§441a(d)(3), 431(9)(B)(iv) and (ix) and 11 CFR 106.1(a), 106.5(a)(2)(iv) and footnote one. The New York provision not only impedes the general ability of a party committee to make contributions, it would curtail the power of a State party committee to avail itself of these other opportunities specifically granted to it under the Act.[3]

The Commission, therefore, concludes that NY CLS Elec. §2-126 is preempted with respect to contributions, expenditures and exempt payments by the New York State Democratic Committee that are made to or on behalf of Federal candidates in New York,

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Additionally, the Commission's interpretation of the Act's preemption provisions has been supported by other circuits in other circumstances. For example, the 8th Circuit Court of Appeals affirmed the Commission's position in Advisory Opinion 1991-22 that the Act and Commission regulations preempted Minnesota's public funding law to the extent it purported to make State tax revenues available to Federal candidates. *See Weber v. Heaney,* 995 F.2d 872 (8th Cir. 1993).

[3] A conclusion that section 2-126 is preempted by the Act would be consistent with prior Commission determinations that similar State restrictions based on the status of contributor or the timing of the contribution are preempted. For example, the Commission has concluded that the Act preempts State law prohibitions on contributions by State lobbyists during a State legislative session to Federal candidates and prohibitions on contributions made by State lottery contractors to a U.S. Senate candidate. Advisory Opinions 1995-48, 1993-25 and 1989-12. The Commission has concluded that the Act preempts a county provision limiting contributions by "County Influence Brokers" to the Federal campaign of a member of the County Board of Supervisors, and a State law prohibition on contributions by lobbyists to the Federal campaign of an elected State officer. Advisory Opinions 1994-2, 1988-21, and 1978-66. The Commission has also held that the Act preempts State time limits for the acceptance by a State legislator's Federal campaign of contributions to retire the Federal campaign debt. Advisory Opinion 1992-43.

if otherwise lawful under the Act, during the period before the New York Congressional Primary.

The Commission recognizes that the Act and Commission regulations do not compel deference or adherence by New York State officials to the Commission's conclusions with respect to the Act's preemption of New York statutes. It is also clear that the judicial review process is the appropriate means for a final and binding determination of Federal preemption questions such as those addressed in this advisory opinion.

This response constitutes an advisory opinion concerning the 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)

Darryl R. Wold
Chairman

Enclosures (AOs 1999-12, 1995-48, 1994-2, 1993-25, 1992-43, 1991-22, 1989-12, 1988-21, and 1978-66).