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August 28, 2000

By Hand

AOR 2000-23

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Request for Advisory Opinion

Dear Mr. Noble:

Pursuant to 11 C.F.R. §112.1, the New York State Democratic Committee ("NYSDC"), through undersigned counsel, hereby requests 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 Federal Election Campaign Act of 1971, as amended (the "Act") and the FEC's regulations, pursuant to the Act's preemption provision, 2 U.S.C. § 453, and regulations promulgated thereunder, 11 C.F.R. § 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.

New York's fall primary is held on the first Tuesday following the second Monday in September, NY CLS Elec. § 8-100(1)(a), which this year falls on September 12, 2000. The NYSDC seeks an opinion from the FEC that the Act pre-empts section 2-126 of the New York election law as applied to the NYSDC's direct or indirect support of federal candidates for the House of Representatives ("House") or United States Senate ("Senate") prior to that time.1

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1 An action seeking to apply section 2-126 to NYSDC disbursements prior to the

DISCUSSION

A. FECA's Comprehensive Regulation of Party Spending Including Pre-Primary Spending

The Act provides a comprehensive framework for the regulation of the support of federal candidates by a state party committee:

1) The NYSDC, as a qualified multi-candidate committee, may contribute up to $5,000 per election to a candidate for House or Senate. 2 U.S.C. § 441a(a)(2)(A). The primary and general elections each count as a separate election. 11 C.F.R. § 110.2(i). Contributions designated for the general election may be made prior to the date of the primary election. See 11 C.F.R. § 110.2(b).

2) The NYSDC may expend up to $10,000 and $.02 x voting age population for candidates for the United States House and Senate, respectively in connection with the general election for those candidates. 2 U.S.C. § 441a(d)(3). The limitations of this section are indexed for inflation pursuant to 2 U.S.C. § 441a(c). Accordingly, the limits for the 2000 election cycle allow the NYSDC to expend up to $33,780 for the general election for a House candidate and $929,355 for the general election for a Senate candidate. Furthermore, the Commission has ruled that such expenditures may be made prior to the date of a primary. See e.g. FEC Advisory Opinion 1984-15; see 11 C.F.R. § 110.11(a)(2)(ii)(providing for disclaimer requirements for party communications made pursuant to section 441a(d) prior to the primary).

3) The NYSDC may 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. 2 U.S.C. § 431(9)(B)(iv),(ix) & (x); 11 C.F.R. § 100.8(b)(18)(iv). The Commission has determined that such volunteer grassroots "exempt activities" may be undertaken prior to a primary election. See MUR 4471.

4) The NYSDC may undertake unlimited get-out-the vote and voter registration activities that do not mention specific candidates, without limit. Such activities may be paid for with a combination of federal and non-federal dollars, and may be coordinated with federal candidates. 11 C.F.R. § 106.1(a); 106.5(2)(iv). See also FEC Advisory Opinion 1978-50.

5) The NYSDC may run certain television, newspaper and radio advertising that is limited

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September 12 primary was recently filed in the Supreme Court of the State of New York Suffolk County. The action was removed to the United States District Court for the Eastern District of New York, but a motion for remand was granted in a decision which, in our view, clearly erroneously, found that section 2-126 is not preempted by FECA. Seltzer v. New York State Democratic Committee, No. CV 00-4077 (E.D.N.Y., Aug. 21, 2000).

to the discussion of issues in accordance with FEC Advisory Opinion 1995-25. Such advertising may mention the name of a federal candidate.

B. The Preemption Provisions of FECA

The Act specifically states that:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

The Commission's regulations further clarify § 453 by acknowledging that federal law pre-empts state laws in the following areas:

> (1) Organization and registration of political committees supporting Federal candidates;
> (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.
>
> 11 C.F.R. § 108.7(b).

C. Section 2-126 Is Preempted by FECA

The Commission should rule that section 2-126 of the New York Election Law is preempted by FECA and the Commission's regulations, for two reasons. First, application of this section to federal candidates would prohibit the NYSDC from supporting candidates directly in connection with the primary election, as permitted by 2 U.S.C. § 441a(a)(2). Second, NYSDC may be precluded from supporting its presumptive nominees prior to the September primary, even if such support is designed to influence the general election. 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 NYSDC's support of federal candidates.

It is well-established that the Commission's regulations "occupy the field" with respect to both the amount and timing of contributions and expenditures made in connection with federal elections and, therefore, that state statutory schemes that in any way attempt to regulate the making of contributions and expenditures in connection with federal elections are clearly pre-empted. In Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993), the Court found that a state statutory scheme that provided for voluntary spending limits in federal elections was preempted by the Act. Similarly, in Bunning v. Kentucky, 42 F.3d 1008 (6th Cir. 1994), the Court ruled that an investigation by the Kentucky Registry of Election Finance into the purpose of a poll conducted by a federal campaign committee was precluded by the preemption provisions of the Act. Again, in Teper v. Miller, 82 F.3d 989 (11th Cir. 1996), the Court held that a Georgia law prohibiting a member of the Georgia General Assembly from accepting contributions for a federal campaign while the legislature was in session, was pre-empted by the Act.

The Commission has also consistently ruled that state laws purporting to regulate the expenditure of funds in support of federal candidates are preempted by the Act. In particular, these rulings have made clear that the Act preempts any state law that attempts to limit a party committee's ability to make contributions to and expenditures on behalf of federal candidates.

In Advisory Opinion 1989-25, the Commission ruled that a New Hampshire law designed to limit the amount of expenditures made on behalf of a federal candidate as a condition of ballot access was preempted to the extent that the state law purported to limit expenditures made by a state party committee pursuant to 2 U.S.C. § 441a(d). The Commission reasoned that:

> The FEC has previously recognized that in permitting these political party expenditures, the Act conveys a right to the party committees. Advisory Opinion 1980-119. The New Hampshire limits would, however, inhibit that right where such spending, when attributed to the Federal candidate beneficiary, would cause the candidate to exceed the limit and become subject to a monetary fine. Similarly, even where the party's expenditures would not of themselves cause the State limit to be exceeded, the exercise of the party's expenditure right under the Act would be significantly curtailed and chilled by the State statute. This chilling effect would occur because attribution of the party's expenditures to the Federal candidate could directly result in a reduction of the party's expenditures out of deference to conserving the limit for the candidate alone.
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> For the foregoing reasons, the FEC concludes that by attributing the party's § 441a(d) expenditures to any Federal candidate's State limit, the New Hampshire statute imposes restrictions and penalties on those party expenditures which are expressly allowed by the Act. The statute thereby encroaches upon the regulatory area in which the Act "occupies the field."

The Commission went on to make clear that state party committee disbursements made pursuant to the exemptions found in 2 U.S.C. § 431(9)(B) would also be preempted by the Act.

Similarly, in Advisory Opinion 1991-22, the Commission ruled that a Minnesota law that provided voluntary public funding to federal candidates was preempted by the Act. Again, the Commission ruled, in Advisory Opinion 1993-14, that federal activities conducted by the federal account of a state party committee were not subject to state regulation.

State laws purporting to regulate the timing of contributions and expenditures affecting federal candidates have also been held to be preempted by the Act. For example, the Commission has ruled that the Act preempts a state law restricting the time period during which a state office-holder may solicit funds for a federal campaign. "Under the broad preemptive powers of the Act, only Federal law could limit the time during which a contribution may be made to the Federal election campaign of a State legislator." FEC Advisory Opinion 1995-48. See also Teper v. Miller, 82 F.3d 989 (11th Cir. 1996); FEC Advisory Opinions 1994-2, 1993-25 and 1992-43.

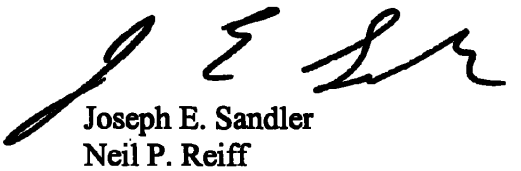
Section 2-126 of the New York State Election Law purports to prohibit the NYSDC from

expending any funds "in aid of" any candidate for nomination in a primary election. Thus, the state law purports to prohibit NYSDC, prior to a primary election, from making direct contributions pursuant to section 441a(a) of the Act; from making expenditures in support of its presumptive nominee pursuant to section 441a(d); from undertaking exempt activities in support of its presumptive nominee pursuant to sections 431(9)(B)(iv), (ix) & (x); from undertaking generic voter drive activities pursuant to 11 C.F.R. §106.5; and from undertaking, pursuant to Advisory Opinion 1999-25, communications referencing a federal candidate standing for election in a primary. In these circumstances, it is clear that the state law directly contradicts and interferes with the operation of the Act and the Commission's regulations.

For this reason, the Commission should rule that section 2-126 of the New York State Election Law is preempted by the Act and the Commission's regulations.

If you have any questions or need additional information in connection with this Advisory Opinion Request, please contact the undersigned. Thank you for your time and attention to this request.

Respectfully submitted,



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