ADR 2014-04

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April 23, 2014

BY HAND DELIVERY

Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, DC 20463

Re: Advisory Opinion Request (Enterprise Holdings, Inc.)

Dear Commissioners:

On behalf of Enterprise Holdings, Inc. ("Enterprise Holdings"), we request an advisory opinion from the Federal Election Commission ("Commission" or "FEC") pursuant to 2 U.S.C. § 437f of the Federal Election Campaign Act of 1971, as amended (the "Act"). Specifically, we seek confirmation that a New York State labor statute and Department of Labor regulations are preempted by 2 U.S.C. § 453, insofar as the state law purports to prohibit payroll deductions for voluntary contributions from Enterprise Holdings' and its subsidiaries' executive or administrative personnel to the company's federal separate segregated fund, Enterprise Holdings, Inc. Political Action Committee (the "Enterprise PAC").

BACKGROUND

Enterprise Holdings, Inc. is the corporate parent of Enterprise Rent-A-Car, Alamo Rent-A-Car, and National Car Rental. With annual revenues of $16.4 billion and more than 78,000 employees, Enterprise Holdings is the largest car rental service provider in the world measured by revenue, employees, and fleet.

Pursuant to 2 U.S.C. § 441b(b)(2)(C), Enterprise PAC is the separate segregated fund ("SSF") of Enterprise Holdings and is registered with the Commission (FEC Committee ID C00219642). Enterprise PAC makes contributions to federal candidates, other federal political committees, and to certain candidates for nonfederal office in states other than New York where such contributions by federal political committees are permitted. A majority of Enterprise PAC's contributions are made to nonfederal candidates in states other than New York. Enterprise PAC does not make, and does not plan to make, any contributions to New York state non-federal candidates or political committees. Pursuant to 2 U.S.C. § 441b(b)(5) and 11 C.F.R. § 114.1(f), Enterprise Holdings uses a payroll deduction program to facilitate the making of voluntary contributions from its restricted class employees

(as well as those of its subsidiaries) – including those in New York State – to Enterprise PAC.

Enterprise Holdings has a separate New York State political committee, Enterprise Holdings, Inc. New York State Political Action Committee ("Enterprise NYS PAC"), established under the New York State campaign finance laws, which makes political contributions to New York State non-federal candidates and political committees.

A New York State labor law statute provides that employers may not use payroll deductions except for those that, *inter alia*, "a) are made in accordance with the provisions of any law or any rule or regulation issued by any governmental agency... ; or (b) are expressly authorized in writing by the employee and are for the benefit of the employee . . . ," provided that "[s]uch authorized deductions shall be limited to payments for" a list of enumerated purposes, none of which include political contributions. NY CLS Labor § 193.

In 2012, New York State amended the statute to enumerate several additional permissible purposes for payroll deductions (again, none of which include political contributions), and those additional purposes are to sunset on November 6, 2015. *See* New York L. 2012, ch. 451, § 1.

The New York State Department of Labor subsequently adopted regulations in 2013 to implement the statutory changes. The regulations, in relevant part at 12 NYCRR § 195-4.5, provide specifically that employers are prohibited from deducting "[c]ontributions to political action committees, campaigns and similar payments" from their employees' wages (even on a voluntary basis). The regulations on their face do not appear to limit their applicability only to contributions made to New York State political committees or campaigns, and thus purport to apply to contributions made to federal political committees.

The publicly available rulemaking record does not include any explanation for this particular provision in the regulations. *See* Deduction from Wages, Dept. of Labor, NYS Register, Oct. 9, 2013 at 32-35.

The Act and Commission regulations, at 2 U.S.C. § 441b(b)(5) and 11 C.F.R. § 114.1(f), specifically permit corporations such as Enterprise Holdings to offer payroll deductions to their restricted class employees to facilitate the making of voluntary contributions to the corporations' federal SSFs.

QUESTION PRESENTED

Does 2 U.S.C. § 453 preempt NY CLS Labor § 193 and 12 NYCRR § 195-4.5 insofar as the state provisions purport to prohibit the use of payroll deductions for employees to make voluntary contributions to Enterprise PAC?

DISCUSSION

The provisions of the Act and Commission regulations issued thereunder "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453; 11 C.F.R. § 108.7(a). As the Commission has noted previously, "Congress 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.'" AO 2012-10 (Greenberg Quinlan Rosner Research, Inc.)[1] (quoting H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)); *see also* AO 2009-21 (West Virginia Secretary of State) (same).

"According to the 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." AOs 2012-10 and 2009-21 (quoting H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974)).

The Commission previously has addressed state statutes that prohibited the use of payroll deduction to collect contributions to an SSF. In AO 1982-29 (United Telecom PAC), the Commission was presented with circumstances that appear to

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[1] In AO 2012-10, the Commission concluded as to Question 1 that the Act and Commission regulations preempted New Hampshire's disclaimer requirement for telephone surveys paid for by federal candidates, their authorized committees, and other federal political committees. However, the Commission was unable to approve a response as to Question 2, which related to telephone surveys paid for by nonprofit organizations (other than federal political committees) that referred to federal candidates but did not contain express advocacy. The concern was whether the Act and Commission regulations could preempt state law with respect to activities that are not explicitly regulated by the Act and Commission regulations. *Compare* AOR 2012-10, Draft A with Draft B.

Here, Enterprise PAC is a federal political committee that makes federally regulated contributions. Therefore, this request does not present the same concerns as Question 2 in AO 2012-10 and should be analyzed under the reasoning of the Commission's response to Question 1.

be indistinguishable in all material respects from the circumstances presented in this advisory opinion request. There, United Telecommunications, Inc. asked whether its subsidiaries could offer payroll deductions for facilitating the making of contributions from its restricted class employees to its federal separate segregated fund, UniPAC, and whether the Act supersedes any state laws concerning payroll deductions to UniPAC.

The Commission answered both questions in the affirmative. The Commission explained that:

> [I]n amending the Act in 1976, Congress expressly intended to supersede and preempt any provision of State or Federal law that would prohibit the use of payroll deduction as a means of facilitating the making of voluntary contributions to separate segregated funds.

The Commission then quoted from the 1974 House Conference Committee Report (H.R. Conf. Rep. No. 1057):

> The House amendment was intended to acknowledge the use by corporations of various methods, such as check-off systems, to solicit voluntary contributions to separate segregated political funds.... The House amendment also intended to authorize such methods notwithstanding any other provision of law.

(Emphasis in the original.)

On this basis, the Commission concluded that "the Act would supersede or preempt any State law prohibiting the proposed use of payroll deductions as a means of facilitating voluntary contributions to UniPAC." While the Commission noted that "UniPAC contributes only to Federal candidates," that was not a fact that was material to the Commission's analysis or conclusion. To wit, neither the Commission's discussion of the 1976 amendments to the Act nor the amendments themselves qualified the permissibility of the use of payroll deductions only to those federal SSFs that make contributions exclusively to federal candidates.

The Commission's response to United Telecom PAC was consistent with its earlier opinion in AO 1976-23 (Conoco Employees Good Government Fund), in which the Commission, citing the same authorities, stated, "State laws regarding payroll deduction plans would not be applicable to separate segregated funds established

for the purpose of making contributions or expenditures in connection with Federal elections." As in AO 1982-29, the Commission did not state that an SSF had to be established *exclusively* for the purpose of making contributions or expenditures in connection with Federal elections in order for the Act to preempt state law.

At one time, the New York State Attorney General concluded that the Act preempts another provision of New York State law with respect to payroll deductions for a union's federal separate segregated fund.[2] In 1984, the New York Governor's Office of Employee Relations asked whether it should permit the Civil Service Employees Association ("CSEA") to use payroll deductions to collect contributions from union members in New York for CSEA's federal separate segregated fund, the Committee on Political Education (COPE). 1984 N.Y. Op. Atty. Gen. 28.

At issue in the inquiry was New York State Civil Service Law § 107(3), which provides, in relevant part, with respect to "political assessments," that:

> No officer or employee of the state or any civil division thereof shall, directly or indirectly, use his authority or official influence to compel or induce any other officer or employee of the state or any civil division thereof, to pay or promise to pay any political assessment, subscription or contribution.

Id. (quoting NY CLS Civil Service § 107(3)).

The Attorney General concluded that, "to the extent that section 107(3) of the Civil Service Law may prohibit the giving of notice at the workplace of a voluntary

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[2] The New York State Attorney General does not issue opinions to the general public. As the Attorney General's website explains, the office "provides formal opinions to Executive Branch departments and agencies, public authorities, the Office of Court Administration and the State's public university system; renders informal advisory opinions to municipal attorneys to assist local governments; and issues opinions on proposed state constitutional amendments to the Legislature." Attorney General Eric T. Schneiderman, Appeals & Opinions Division, *at* http://www.ag.ny.gov/bureau/appeals-opinions-division (last visited Mar. 27, 2014).

Similarly, the New York State Department of Labor has announced that it "will no longer issue opinions on a case-by-case basis. Instead of individual responses to opinion requests, the Department will generally respond by providing references to statutes, regulations, interpretations and cases without an analysis of the specific facts presented." New York State Department of Labor, Counsel, *at* https://labor.ny.gov/legal/counsel.shtm (last visited Apr. 12, 2014).

payroll deduction plan, we believe that [the Federal Election Campaign Act] would supersede and preempt this restriction." *Id.*

The instant request presents circumstances comparable to those in AOs 1982-29 and 1976-23, in that the New York State labor law and regulations purport to prohibit Enterprise Holdings from using voluntary payroll deductions to facilitate contributions from its restricted class to Enterprise PAC – a mechanism explicitly permitted by the Act and Commission regulations.

Additionally, while the 1984 New York State Attorney General's opinion letter addressed specifically the question of whether a union could "giv[e] notice" of a voluntary payroll deduction option to employees wishing to contribute to the union's separate segregated fund, the conclusion that the Act preempts the state's apparent prohibition against giving *notice* of the mechanism necessarily presupposes preemption with respect to the actual *implementation* of the mechanism.

The Commission's preemption precedents in contexts other than payroll deduction also are instructive here. For example, in AO 1999-12 (Campaign for Working Families), the Campaign for Working Families ("CWF"), a non-connected multicandidate federal political committee registered with the Commission, asked whether the Act and Commission regulations preempted certain Pennsylvania state laws. Specifically, the state was attempting to require CWF to register and file reports under the state's charitable solicitations law, as well as to include state-specific disclaimers on certain solicitations. The Commission concluded that, "since CWF is a registered political committee and is soliciting contributions that are to some extent (and perhaps almost entirely) expended by it for the purpose of influencing Federal elections," the Act preempts Pennsylvania's charitable solicitation law "with respect to solicitations of contributions to [CWF's] Federal account so long as CWF is raising funds for the Federal account, and not the non-Federal account."[3]

The Commission noted that "[t]he Act's preemptive powers . . . are not limited only to its effect on State or local campaign finance statutes and have been applied to

[3] The Commission concluded the Act did not preempt Pennsylvania state law with respect to CWF's solicitations for its non-Federal account. Here, Enterprise Holdings does not ask whether the Act preempts New York State law with respect to Enterprise NYS PAC.

other statutes having an impact on Federal election activity." (citing AOs 1993-25, 1992-43, 1989-12, and 1981-27). The Commission explained:

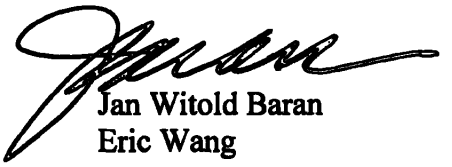
> Preemption with respect to the solicitation of funds for the Federal account is compelled by the need for one set of requirements for Federal campaign finance activities, rather than subjecting Federal political committees such as multicandidate committees to a multiplicity of requirements depending upon the number of States in which they solicit contributions.

Similarly, preemption is compelled here by the need for a uniform set of requirements governing Enterprise Holdings' use of a payroll deduction program to facilitate contributions to its federal PAC, rather than a multitude of different requirements in each state where Enterprise Holdings operates. Although Enterprise PAC makes a majority of its contributions to nonfederal candidates in states other than New York, like CWF, it is still a federal PAC that solicits contributions that, to a significant extent, are expended for the purpose of influencing Federal elections. Unlike CWF, Enterprise is not claiming preemption with respect to its "non-federal" entity, Enterprise NYS PAC. The New York restriction on federal PACs using payroll deductions, like the Pennsylvania requirement regarding solicitation disclaimers, is thus preempted by the Act.

CONCLUSION

For the reasons discussed above, the Commission should confirm that NY CLS Labor § 193 and 12 NYCRR § 195-4.5 are preempted by 2 U.S.C. § 453 and Commission regulations, insofar as the New York statute and regulation apply to Enterprise Holdings' use of payroll deductions to facilitate the making of voluntary contributions from its restricted class to Enterprise PAC.

Sincerely,



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