FEDERAL ELECTION COMMISSION
Washington, DC 20463

July 31, 1989

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-12

Edward D. Feigenbaum
P.O. Box 383
Noblesville, Indiana 46060

Dear Mr. Feigenbaum:

This responds to your letter dated June 18, 1989, in which you request an advisory opinion whether the Federal Election Campaign Act of 1971, as amended, (the "Act" or "FECA") and Commission regulations preempt an Indiana statute that prohibits political contributions by and the awarding of contracts to certain vendors.

You explain that you are the sole proprietor of a newsletter on Indiana politics and government, Indiana Legislative Insight, which circulates by subscription only. Your paid subscribers have included State agencies, and you periodically mail your subscription solicitations to all the major State agencies.

The Indiana legislature recently established a new corporation, the Indiana Lottery Commission ("Lottery Commission"). You "would expect to solicit a subscription" to your newsletter from the Lottery Commission "when it is effectively up and running." Because you are "considering making a contribution to a campaign for a candidate for United States Senator [from Indiana] after [you] see who might round out the field," however, you are concerned that you will "run afoul" of Indiana Code section 4-30-3-19, added by House Enrolled Act 1409, P.L. 344-1989 (May 5, 1989)("section 19" of the "Indiana Act").

Section 19 forbids a person who enters into a contract as a "vendor" with the Lottery Commission to make a contribution to a "candidate for statewide elected office" during the three years following the last award or renewal of the contract. The section also provides that the Lottery Commission or its director may not enter into a contract with a person "to serve as a vendor" if the person has made a contribution to a "candidate for statewide elected office" within the three years preceding the award of the contract.[1]

Only contributions made after March 15, 1989, are subject to the Indiana Act. The knowing or intentional violation of the statute is a felony.

Under the Indiana Act, a "vendor" is "a person who provides or proposes to provide goods or services to the commission. The term does not include an employee of the commission, a retailer, or a state agency." Indiana code § 4-30-2-8. Because you are the publisher and distributor of a newsletter and seek to contract with the Lottery Commission for a subscription to your newsletter, you appear to come within this statutory definition of "vendor."

You ask, "May I make a contribution to a candidate for the U.S. Senate from Indiana in 1989 or 1990 and still be permitted to solicit or receive a subscription from the Indiana Lottery Commission for my newsletter . . . . without penalty?" That is, do the Act and FEC regulations preempt the Indiana statute?

Apparently no Indiana statute or regulation and no authoritative interpretation of Indiana law excludes candidates for Federal office who are elected on a statewide basis from the coverage of section 19. In a June 29, 1989, official opinion on the Indiana Act, the Indiana Attorney General noted that the "Indiana lottery legislation was patterned, but not copied exactly, after the Kentucky lottery legislation . . . . Indiana's statute applies to 'candidates for statewide elected office.' IC 4-30-3-19. Indiana, unlike Kentucky, does not distinguish between federal and state offices." Indiana AG Op. 89-14. For purposes of this advisory opinion, therefore, the Commission assumes that a contribution to a candidate for one of Indiana's U.S. Senate seats is a contribution to a candidate for "statewide elected office."[2]

The FECA and Commission regulations prescribed under the FECA "Supersede and preempt provisions of State law with respect to election to Federal office." 2 U.S.C. 453. See also 11 CFR 108.7(a and (b). The report of the House committee that drafted the preemption clause explains its intent in sweeping terms: Federal law is to be "construed to occupy the field with respect to elections to Federal office" and is to be "the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93D Cong., 2d Sess. 10 (1974). The conference committee report on the 1974 Amendments to the FECA states that "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the source of campaign funds in Federal races, [and] the conduct of Federal campaigns . . . . "H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974).

As the legislative history of section 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. The Act prohibits contributions by certain specified persons (national banks, corporations, and labor organizations using their treasury funds, and foreign nationals and Federal government contractors). The Act does not include persons who contract with state lottery commissions or other State-created corporations among those who may not contribute to candidates for Federal office. In several advisory opinions, the Commission has indicated that the Act permits any person, who is not otherwise prohibited by Federal law from doing so, to is not otherwise prohibited by federal law from doing so, to make a

contribution within the Act's limits in a Federal election. See, e.g., Advisory Opinions 1984-26 and 1979-28.

Section 19 criminalizes political conduct by vendors that the Act permits. Because the Act occupies the field with respect to Federal election campaign contributions, the Commission concludes that the Act preempts section 19's prohibition of contributions by a vendor to a Federal candidate "for a statewide elected office during the three years following the last award or renewal of the [vendor's] contract" with the Lottery Commission. See Advisory Opinions 1988-21 (Act preempts county ordinance limiting contributions by "County Influence Brokers" to candidates for Federal office) and 1978-66 (when State official is a candidate for Federal office, the act preempts State law prohibiting contributions to State officials by lobbyists).

The second part of the prohibition in section 19 provides that the Lottery Commission and its director may not enter into contracts for goods or services with persons who have made contributions to "a candidate for a statewide elected office within the three years preceding award" of the contracts. This part does not directly prohibit the making of contributions to "statewide" Federal candidates by those vendors doing business with the Lottery Commission, nor prohibit the acceptance by those candidates for Federal office of contributions from such vendors. However, this restriction upon the Lottery Commission's contracting authority inherently imposes a commercial penalty upon those vendors who financially support candidates for "statewide" Federal office.

The adverse business consequence for vendors contributing to those Federal candidates, and the inevitable restraint upon vendors' political activity to avoid such consequences, are not incidental or tangential effects of State regulation of activity otherwise within State authority. Rather, these consequences for support of Federal candidates result from the statute's specific purposes and broad language. Though operating through a restriction upon the official conduct of the Lottery Commission, the second part of the statute effectively acts as a limitation upon vendors' contributions to certain Federal candidates. See Advisory Opinion 1978-66. The part of section 19 that precludes a contributor from contracting with the Lottery Commission has the same effect as the part precludes a contractor from contributing.

Section 19 of the Indiana Act imposes restrictions and penalties upon the making of contributions to candidates for Federal office, and thereby encroaches upon the regulatory area in which the Act "occupies the field." Advisory Opinion 1988-21. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 704-705 (1984).[3] Therefore, the Commission concludes that the FECA preempts both the first and second parts of section 19 of the Indiana Act.

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)

Danny L. McDonald
Chairman for the Federal Election Commission

Enclosures (AOs 1988-21, 1984-26, 1979-28, and 1978-66)

1/ The text of Indiana Code section 4-30-3-19 reads:

(a) This subsection applies to contributions made after March 15, 1989. The commission or director may not enter into a contract with a person to serve as a vendor or to provide auditing services to the commission if the person has made a contribution to a candidate for a statewide elected office within the three (3) years preceding the award of the contract. A person that enters into a contract with the commission as a vendor or to provide auditing services may not make a contribution to a candidate for a statewide elected office during the three (3) years following the last award or renewal of the contract. A person is considered to have made a contribution if a contribution is made by:

(1) the person;
(2) an officer of the person; or
(3) a political action committee (as defined in IC 3-5-2-37) of the person.

(b) A person who knowingly or intentionally violates this section commits a Class D felony.

2/ Indiana's Election Code fails to define the key phrase "statewide elected office." The Code defines "State office" to include governor, lieutenant governor, secretary of state, and several other offices established under the Indiana Constitution. Indiana Code § 3-5-2-48. In defining "Elected office," however, section 3-5-2-17 of the Code refers, inter alia, to "a federal office," and section 3-5-2-24 states that a "Federal office" includes United States Senator. News reports in the local press indicate that Indiana "vendors" and the lottery's director are assuming that the Indiana Act encompasses statewide campaigns for Federal elective office. See, e.g., Peter L. Blum, "Lottery opinion has an escape," Indianapolis News, June 15, 1989, pp. C-1, C-3; James G. Newland, Jr., "Vendor ban sparks clash over lottery," Indianapolis Star, June 15, 1989, p. 1; Mary Dieter, "Pearson's opinion may delay lottery," Louisville Courier-Journal, June 15, 1989, pp. A1, A16.

3/ As the Commission observed in Advisory Opinion 1988-21, the court decisions that appear to support nonpreemption are factually distinguishable and inconsistent with the prevailing case law. Reeder v. Kansas City Board of Police Commissioners, 733 F. 2d 543 (8th Cir. 1984), cert. denied, _____ U.S. _____, 107 S.Ct. 951 (1987), and Pollard v. Board of Police Commissioners, 655 S.W.2d 333 (Mo. 1984) (en banc), cert. denied, 473 U.S. 907-8 (1985). Those decisions involved restrictions upon political contributions by public employees, and relied upon an interpretation of specific Congressional intent regarding Federal preemption of state "Hatch Acts."