



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 30, 1989

CERTIFIED MAIL,  
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1989-25

John P. Stabile II  
Chairman  
New Hampshire Republican State Committee  
134 North Main St.  
Concord, NH 03301

Dear Mr. Stabile:

This responds to your letter dated September 29, 1989, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), to "voluntary" campaign spending limits recently enacted by the State of New Hampshire.

Your letter states that New Hampshire has recently amended its campaign finance statutes to provide for "voluntary" campaign expenditure limits which would, under the statutory language, apply to 1990 candidates for the United States Senate and the United States House of Representatives.<sup>1</sup> N.H. RSA 664:1, 664:4-b, 664:5-a, 664:5-b, and 664:21. Other candidates for State and local offices are also covered. Application of the limits depends upon whether the candidates wish to obtain a waiver of ballot filing fees and primary petition signatures which would otherwise be required.<sup>2</sup> The limit prescribed by the statute includes campaign expenditures made by the candidate, each of his or her committees, as well as expenditures made on the candidate's behalf by a political party. N.H. RSA 664:5-a.

Expenditures in excess of the limits subject the candidate to fines on a sliding scale: for expenditures which exceed the limit by less than \$1,000 the fine is 1% of the excess; for expenditures exceeding the limit by over \$10,000 the fine is 50% of the excess.

Your letter explains that you seek an advisory opinion from the Federal Election Commission as to whether the cited New Hampshire statutory provisions are preempted by the Act pursuant to 2 U.S.C. 453. You further explain that you are requesting this opinion on behalf of the New Hampshire Republican Party ("the party") in its "role as a recruiter of" Federal office candidates

and as "a contributor to" those candidates. You also states that an opinion is necessary so that the party can "comply with the law" in making contributions to its Federal candidates and "in advising" them as to their own campaign contributions and expenditures.<sup>3</sup> You do not identify any specific Federal candidate, and it does not appear that any such candidate has authorized the party to submit this request on his or her behalf.

The Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. 437f(a). Commission regulations explain that requests on behalf of a requesting person, such as a candidate, may be made by an "authorized agent of such person," but the agent must identify his or her principal. 11 CFR 112.1(a). The request must also concern a specific transaction or activity that "the requesting person plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). Inquiries presenting only a general question of interpretation, or the activities of third parties, do not qualify as advisory opinion requests. 11 CFR 112.1(d).

In view of these requirements, your inquiry qualifies as an advisory opinion request only with respect to the possible Federal preemption of the New Hampshire statute as applicable to the party's own specific expenditures on behalf of Federal candidates. The party's "role" as a recruiter or advisor of Federal candidates, who have not expressly authorized the party to make this request as their agent, does not constitute a specific activity or transaction of the party for purposes of the advisory opinion process. Accordingly, those aspects of the party's inquiry that relate to a candidate's expenditures, or use of campaign funds, do not qualify as an advisory opinion request at this time. Of course, any Federal candidate who contemplates applying for a waiver of the ballot fee may directly, or through any authorized agent, present such proposed conduct and ask whether New Hampshire statutes would be preempted by the Act if they obtain a waiver.

Your request does not present specific activity of the party on behalf of Federal candidates in New Hampshire because you indicate that the party will be a "contributor" to them by making general election expenditures under 2 U.S.C. 441a(d). That section allows a state party committee to make expenditures of a limited amount in connection with the general election campaigns of the party's Congressional candidates.<sup>4</sup> 2 U.S.C. 441a(d)(3). Such limited expenditures may be made in consultation and cooperation with the candidates, but are not considered contributions to them. See 2 U.S.C. 441a(a)(7)(B) and 11 CFR 110.7(b)(3), (b)(4). In addition, these limited expenditures may be made "[n]otwithstanding any other provision of law with respect to limitations on expenditures... ." 2 U.S.C. 441a(d)(1).

Under the New Hampshire statute, the party's campaign expenditures on behalf of any Federal candidate, who has obtained a waiver of the ballot fee and petition requirements, would be attributed to such candidate's State limit. N.H. RSA 664:5-a. The Act provides, however, that its provisions, and rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. Commission regulations further specify that Federal law supersedes State law concerning any limitation on expenditures regarding Federal candidates.<sup>5</sup> 11 CFR 108.7(b)(3).

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 Act states that "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, [and] the conduct of Federal campaigns. . . ." H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974).

As the legislative history of 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 expressly permits the party to make limited expenditures in connection with the general election campaigns of its Congressional candidates, and it provides that those expenditures are permitted notwithstanding any other provision of law. The Commission 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.

For the foregoing reasons, the Commission 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." Advisory Opinions 1989-12 and 1988-21. See Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 704-705(1984). Accordingly, to the extent that N.H. RSA 664:5-a attributes the party's 441a(d) expenditures to the State limits of Federal candidates who receive ballot fee waivers, it is preempted by the Act and Commission regulations.

Although not directly presented in your request, the Commission notes that, in view of the foregoing conclusion and analysis, any party payments to support Federal candidates that are exempt from the definition of "expenditure" in 2 U.S.C. 431(9) would also be outside the purview of any limitations in the cited New Hampshire statute. The relevant exemptions allow, under certain conditions, various State political party activities such as distribution of printed slate cards or sample ballots, and political party use of campaign materials in connection with volunteer activities. 2 U.S.C. 431(9)(B)(iv), (9)(B)(viii). Accordingly, application of the cited New Hampshire statute to such party disbursements would similarly be preempted by 2 U.S.C. 453.

The Commission further notes that nothing in this opinion should be interpreted as expressing or implying any views with respect to the Act's preemption of the New Hampshire statute's ballot

fee waiver provisions or the enforcement of its fine schedule if a Federal candidate who receives a fee waiver exceeds the State limit. For the reasons discussed at the beginning of this opinion, those issues are not properly presented to the Commission in this advisory opinion request.

This request constitutes an advisory opinion concerning application of the Act and Commission regulations 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 1980-119, 1988-21, and 1989-12)

1/ The applicable limits are \$400,000 per election for Senate candidates and \$200,000 per election for House candidates. N.H. RSA 664:5-b.

2/ The statute requires payment of a \$5,000 filing fee at the time a Senate or House candidate files a declaration of candidacy. N.H. RSA 655:19. It also requires the filing of "primary petitions made by members of the [candidate's] party... ." N.H. RSA 655:20. Senate candidates file 2,000 petitions and House candidates file 1,000. N.H. RSA 655:22. Any candidate who files a timely affidavit "voluntarily agreeing to limit his expenditures and those...on his behalf by his committee or...party, and his immediate family" may obtain a waiver of the filing fee. N.H. RSA 664:5-a. If a waiver is not obtained, the filing fee must be paid and the primary petitions must be filed. N.H. RSA 655:19, 655:19-b, 655:20.

3/ The party's contributions to Federal candidates in New Hampshire would, according to your request, be made under 2 U.S.C. 441a(d), 441a(a)(2), and 11 CFR 110.2(e). The Commission notes that contributions by the party under 441a(a)(2) are limited to \$5,000 per candidate, per election, because the party's Federal committee has qualified as a multicandidate committee. The cited New Hampshire statutes do not preclude the party from making those contributions. The party may not make contributions under 11 CFR 110.2(e) because that regulation implements 2 U.S.C. 441a(h) which, by its terms, only applies to contributions to Senate candidates by specified national party committees, not by state party committees. The party's expenditures pursuant to 2 U.S.C. 441a(d) are permitted, as discussed elsewhere in this opinion, notwithstanding the cited New Hampshire statutes.

4/ The most recent information available to the Commission indicates that the State party's expenditure limits for the 1990 general election campaign will be \$47,980 for the party's U.S. Senate candidate and \$23,990 for each of its two U.S. House of Representatives candidates in the general election.

5/ Commission regulations also state that the Act does not supersede State laws which provide for the "manner of qualifying as" a Federal candidate. 11 CFR 108.7(c)(1). This opinion does not

reach the issue of whether the above-cited New Hampshire ballot fee waiver provisions would constitute a State law pertaining to the manner of qualifying as a candidate.