OGC 0059

Democratic National Committee

October 4, 1993

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

Comment On
AOR 1993-17

Re: AOR 1993-17

Dear Mr. Noble:

The Democratic National Committee ("DNC") is writing to comment on Advisory Opinion Request 1993-17. Pursuant to 11 C.F.R. § 112.3(b), the DNC requests that the Commission grant an extension of time for submission of these comments so that they can be considered.

As discussed below, the Commission's regulations require state party committees to pay for a portion of their administrative and generic activity expenses from their federally-regulated accounts, but permit such state party committees to pay for up to 100% of those expenses from their federal accounts. The central question posed by this AOR is whether a state may interpret and enforce its law so as to prohibit a state party from paying up to 100% of administrative and generic costs from its federal account--i.e., whether a state can interpret and enforce its state law so as to prohibit a state party from doing what the Commission's regulations intentionally and expressly permit the state party to do.

Under 2 U.S.C. § 453, the answer to this question is clearly no. In response to this AOR, therefore, the Commission should rule that the Commonwealth of Massachusetts Office of Campaign and Political Finance ("OCFP") cannot prohibit the Massachusetts Democratic Party, or any other state party, from paying up to 100% of its administrative and generic expenses from its federal account, should the state party choose to do so. In addition, the Commission should rule that OCFP cannot require state parties to file information about payees paid from the federal account and, therefore, that paragraph IV(C) of OCPF's Interpretative Bulletin IB-93-01 is preempted by federal law and unenforceable.

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1. Optional Payment of Allocable Expenses Entirely from Federal Account

Under the Commission's regulations, state party committees which make disbursements in connection with both federal and non-federal elections are to make such disbursements "entirely from funds subject to prohibitions and limits of the Act, or from" their federal and non-federal accounts. 11 C.F.R. § 106.5(a)(1)(emphasis added). Thus, the regulations expressly give state parties the option of paying allocable expenses 100% from their federally-regulated funds or allocating such expenses between federally-regulated and state-regulated funds.

State parties which have established such separate federal and non-federal accounts, and choose to allocate, must pay a minimum percentage of their administrative costs and generic party activity from their federal accounts. 11 C.F.R. § 106.5(a). That percentage is based on a "ballot allocation ratio" calculated in accordance with 11 C.F.R. § 106.5(d)(1).

In promulgating these regulations, the Commission made clear that, while a state party is required to pay the specified minimum percentage of the costs from its federal account, it was the Commission's intent to permit a state party to pay more than the minimum percentage--up to 100% of the costs of the allocable activity--from its federal account, if the state party desires to do so:

> One of the alternatives described in the Notice of Proposed Rulemaking offered committees the option of defraying the total cost of an allocable activity with funds raised under the federal law. This option has been retained in paragraph 106.5(a)(1), reflecting the Commission's view that allocating a portion of certain costs to a committee's non-federal account is a permissive rather than a mandated procedure. Thus, the amounts that would be calculated under the rules for a committee's federal share of allocable expenses represent the minimum amounts to be paid from the committee's federal account, without precluding the committee from paying a higher percentage with federal funds.

Explanation and Justification of Regulations on Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058 at 26063 (June 26, 1990).

Given that the Commission's rules address the issue of whether a state party may pay up to 100% of allocable expenses from its federal account, and clearly permit the state party to do so, the Massachusetts OCPF cannot apply Massachusetts law so as to prohibit a state party from doing so.

The Act provides that its provisions and the Commission's

regulations "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453. In Advisory Opinion 1991-5, 2 CCH Fed. Elec. Camp. Fin. Guide ¶ 6015, the Commission considered the effect of a Tennessee statute which prohibited the donation of corporate funds to any political party. The Tennessee Democratic Party requested an advisory opinion as to whether this statute would prohibit corporate contributions to the Tennessee Democratic Party's building fund. The Commission noted that the Federal Election Campaign Act and Commission regulations "specifically address building fund donations [from corporate funds] and clearly permit them." The Commission ruled that:

> In addressing such donations and the entities receiving them, i.e., political committees or organizations specifically not attaining such status, the Act speaks to subject matter involving the organization of political committees, limitations and prohibitions under the Act, and the disclosure of receipts and expenditures. Congress explicitly decided not to place restrictions upon a subject, the cost of construction and purchase of an office facility by a national or state political party committee, which it might otherwise have chosen to treat as election influencing activity. . . .[T]here is no indication that Congress envisioned any sort of limitation on its preemption to some allocable portion of the costs of purchasing or constructing a building. . . . The Commission concludes, therefore, that the Act and Commission regulations preempt the application of Tennessee State or local law with respect to the prohibitions on corporate donations to the [Tennessee Democratic Party] building fund.

2 CCH Fed. Elec. Camp. Fin. Guide ¶6015 at pp. 11,697-98 (emphasis added).

Similarly, in Advisory Opinion 1986-40, 2 CCH Fed. Elec. Camp. Fin. Guide ¶ 5880, the Commission ruled that a West Virginia statute that prohibited or limited receipt of corporate donations by the West Virginia Republican State Executive Committee building fund "would be superseded and preempted" by the federal law. Id. at p. 11,337.

Even more recently, in Advisory Opinion 1993-9, 2 CCH Fed. Elec. Camp. Fin. Guide ¶ 6091, the Commission considered a Michigan law that, as interpreted by the Michigan Department of State, prohibits the donation of corporate funds to be used to purchase or construct a party headquarters. The Commission again ruled that the "Act and Commission regulations specifically address building fund donations and clearly permit them." 2 CCH Fed. Elec. Camp. Fin. Guide ¶ 6091 at p. 11,893. Accordingly, the Commission ruled, under 2 U.S.C. § 453, "the Act and Commission regulations preempt the application of Michigan State law with respect to the

prohibitions on corporate donations to the [Michigan State Republican Party] building fund." Id. at p. 11,894.

In Advisory Opinion 1993-14, the Commission considered a Rhode Island law that imposed restrictions on contributions to a state party's federal account, by federal multi-candidate political committees, in addition to those imposed by the FECA and Commission regulations. In other words, Rhode Island law purported to restrict certain contributions which were permitted by federal law. The Commission ruled that the state law was preempted.

Here, too, federal law (in the form of the Commission's regulations) "specifically address" the issue of payment by a state party of 100% of administrative and generic expenses from its federal account and "clearly permit" the state party to do so. Therefore, as in the above-cited advisory opinions, Commission regulations preempt the application of Massachusetts state law so as to prohibit a state party from doing what those regulations permit.

Massachusetts OCPF argues that preemption does not apply in the "narrow circumstance" where federal law merely permits payment of the allowable state share from state-regulated funds while state law "mandates" such payment. OCPF letter to the Commission, September 13, 1993 at p. 2. But that argument simply misstates the issue. Federal law does not merely permit payment of the maximum state share (under the allocation formula) from state-regulated funds; it also expressly permits payment of that share from federally-regulated funds. In other words, federal law intentionally gives state parties an option. Massachusetts law cannot take that option away.

OCPF further contends that a state party may theoretically comply both with the state law and the federal law and that the two are, in that sense, not inconsistent. OCPF letter at p. 2. But "'[n]othing in the language' of § 453 suggests that FECA's 'pre-emption is limited to inconsistent state regulation.' . . . Thus, supplemental and consistent state regulation is preempted as well." Weber v. Heaney, 995 F.2d 872, 875 n. 4 (8th Cir. 1993), citing Morales v. Trans World Airlines, Inc., 112 S. Ct. 2031, 2038 (1992)(emphasis in original).

For these reasons, the Commission should rule that the requirement of Massachusetts OCPF Interpretative Bulletin IB-93-01 that a state party must pay the full amount of the minimum state share from state-regulated funds is preempted by federal law and is unenforceable.

2. Reporting Requirements

The Commission should also take this opportunity to rule that the requirement of Massachusetts OCPF IB-93-01, paragraph IV(C),

that state parties file with the state agency reports of payments from their federal account, is likewise preempted and unenforceable.

In Advisory Opinion 1993-14, the Commission considered whether Rhode Island law could subject a state party's federal account to the registration and reporting requirements of federal law. The Commission ruled that:

> The imposition of Rhode Island registration and reporting requirements on a committee engaged in Federal activity only would be an encroachment upon the sole authority of the Act and regulations as to these areas. The Act thus preempts Rhode Island law, and the Federal Account needs to comply only with the Federal registration and reporting requirements.

Advisory Opinion 1993-14 at p. 4. Likewise, in this case, OCPF cannot require the Massachusetts Democratic Party to file, with the state agency, reports of payments from its federal account.

CONCLUSION

For the reasons stated above, the Commission should rule that (i) the requirement of Massachusetts OCPF Interpretative Bulletin IB-93-01 that a state party must pay the full amount of the minimum state share from state-regulated funds is preempted by federal law and is unenforceable and (ii) the requirement of IB-93-01, paragraph IV(C), that state parties file with the state agency reports of payments from their federal account, is likewise preempted and unenforceable.

We appreciate the opportunity to submit these comments on a matter of great significance to Democratic state party committees.

Respectfully submitted,

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