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VIA FACSIMILE

Mr. Jonny Levin
Federal Election Commission
Office of the General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Comments On
AOR 1993-25

Dear Mr. Levin:

This letter is in response to your invitation to the Wisconsin Ethics Board to comment on the request for an advisory opinion submitted by Wisconsin State Representative Robert T. Welch of Wisconsin. Representative Welch has asked whether the federal campaign finance law preempts Wisconsin's lobbying law. The two United States Courts of Appeals which have addressed the issue have concluded that the federal law does not preempt state laws aimed at eliminating corruption.

Wisconsin's lobbying law, Chapter 13, subch. III, of the Wisconsin statutes, regulates the conduct of Wisconsin public officials, as well as Wisconsin lobbyists and their employers (lobbying principals). It arises from, and is part of, Wisconsin's long tradition of clean and open government. The law is designed to guard against corruption and the appearance of corruption by prohibiting the furnishing of anything of pecuniary value by a lobbyist or his or her employer to an official of the State of Wisconsin and an official's receipt thereof. Sec. 13.625, Stats. There are several exceptions to this general prohibition, one of which permits all but partisan elected state officeholders (legislators, the Governor, Lt. Governor, Treasurer, and Secretary of State) to receive campaign contributions from lobbyists and lobbying principals. Partisan elected state officeholders are also permitted to receive campaign contributions but only during the year of the candidate's election when the state Legislature is not in session (usually beginning in June). The purpose of the timing restriction is to prevent contributions from lobbyists and lobbying principals to legislators at the very time the Legislature is being lobbied on matters before it. It is this timing restriction about which Representative Welch has complained.

The United States Court of Appeals for both the Second and Eighth Circuits have addressed the issue of preemption in similar circumstances and have upheld the state regulations at issue. In both Stern v. General Electric Co., 924 F.2d 472 (2d Cir. 1991) and

Reader v. Kansas City Board of Police Commissioners, 733 F.2d 543 (8th Cir. 1984), the Courts of Appeals have held that neither the language of 2 U.S.C. § 453 nor the legislative history of FECA supported the view that Congress had preempted the entire field of political contributing. In Stern, the Court upheld the continuing validity of state law that restricted corporate contributions to candidates for federal offices. The Court there emphasized that FECA is "designed to limit corporate political spending to preserve the integrity of the political process." 924 F.2d at 476. Thus, state law regulations that sought further restrictions did not impede FECA's goals.

Almost directly on point is Reader. In that case, the Court upheld the validity of a state law that prohibited the furnishing of campaign contributions by a specific category of public officials, police department employees. In upholding the state law against a preemption claim, the Court agreed with the reasoning of the Missouri Supreme Court in Pollard v. Board of Police Commissioners, 665 S.W.2d 333 (Mo. 1984), cert. denied, 473 U.S. 907 (1985) which recognized that there is a "substantial state interest and concern in eliminating corruption and political interference" in state government. The Court found persuasive legislative history establishing a congressional "intent that any State law regulating the political activities of State and local officers and employees is not preempted or superseded" by FECA. 665 S.W.2d at 337.

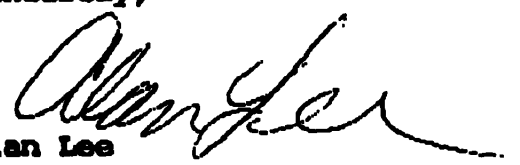
Wisconsin's lobbying law is indistinguishable, in a preemption analysis, from the state laws upheld in Stern and Reader. Wisconsin's law is a regulation of its own public officers and those individuals, businesses, and organizations substantially involved in the state's legislative process. It is a regulation of the conduct of state officers qua officers, and only incidentally and marginally affects federal elections; any partisan elected state official who no longer wishes to be bound by the lobbying law's restraints may resign from state office and be free to accept anything of value from lobbyists and lobbying principals at any time, including campaign contributions.

With this understanding in mind, it is also important to note the United States Supreme Court's holding that "there are attributes of sovereignty to every state government which may not be impaired by Congress[;]" "Congress may not exercise power so as to force directly upon the States its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." National League of Cities v. Usery, 426 U.S. 833, 845, 855 (1976).

For these reasons, it is clear that Wisconsin's lobbying law has not been preempted by FECA. To hold otherwise would be to ignore both the nature and purpose of Wisconsin's lobbying law and existing case law precedent and would call into question a myriad of anti-corruption laws in other states.

Thank you for providing us with the opportunity to comment. If Mr. Becker or I can be of any further assistance, do not hesitate to call or write.

Sincerely,



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cc: Jonathan Becker

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