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October 30, 1995

Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

AOR 1995-41

Dear Sirs or Madams:

The Democratic Congressional Campaign Committee ("DCCC") files this Advisory Opinion Request seeking advice from the Commission on the question of whether the Federal Election Campaign Act of 1971, as amended, ("FECA" or "the Act"), preempts certain New York State law reporting requirements applicable to polling by Federal candidates.

The State of New York requires all candidates for public office to disclose certain information about polling activity that they make available to the public. See 9 NYCRR § 6201.2 ("Use of Public Opinion Polls"). The rule requires, in particular, that any candidate preparing to release poll results to the public must file within 48 hours, with the appropriate New York State regulatory authority, a report about the poll. The report requires such information about the poll as the sample size, the method of polling, the wording of questions asked and the results. A copy of § 6201.2 is attached for the Commission's review.

The New York State Board of Elections has taken the position that these reporting requirements apply to Federal as well as other candidates. The Board communicated this position to one such candidate, Congresswoman Carolyn Maloney, who has asked the DCCC, acting as her agent for these purposes, to seek an Opinion from the Commission on the preemption issues.

The Act and Advisory Opinions issued by the Commission would seem to indicate that the New York reporting requirements are preempted by federal law.

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Preemption principles apply where Congress provides expressly that its enactments within a field under Federal jurisdiction should supersede all state regulation of the same type. See generally, Lawrence H. Tribe, *American Constitutional Law* § 6-27 (2d ed. 1988). Section 453 of the FECA provides specifically as follows:

State laws affected. The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

The legislative history behind this provision confirms Congress' intention to occupy the field in all matters relating to the financing of Federal elections, including the reporting of contributions and expenditures.¹ Commission regulations, 11 C.F.R. § 108.7, state in relevant part:

- (b) Federal law supersedes State law concerning the
 - (2) Disclosure of receipts and expenditures by Federal candidates and political committees.

The regulation distinguishes between matters Congress intended for exclusive Federal treatment, such as public reporting of political committee activities, and other matters more typically addressed by the states under their various laws.² These other

¹ The House Committee which drafted § 453 explained that it reflected Congress' intention that Federal law be "construed to occupy the field with respect to elections to Federal office" and that such law be considered the "sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93 Cong., 2d Sess. 10 (1974).

² The regulations provide that specific state enactments are not superceded by Federal law, as follows:

- (1) Manner of qualifying as a candidate or political party organization;
- (2) Dates and places of elections;
- (3) Voter registration;
- (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses;
- or
- (5) Candidate's personal financial disclosure.

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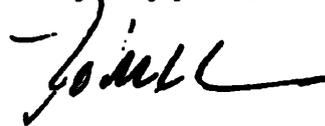
matters include, for example, certain disclosure requirements, but specifically only those which apply to reporting of *personal* financial information by candidates.

The Commission has specifically found that states may not add to the reporting obligations imposed upon candidates and committees under the Federal scheme in connection with federal election-related activities. See 11 C.F.R. section 108.7; see also Advisory Opinion 1986-27 Fed. Election Camp. Fin. Guide (CCH) ¶ 5867 (Aug. 21, 1986)(Alaska statute may not impose reporting requirements "that would exceed those required by the Act and Commission regulations.") See also Advisory Opinion 1993-14 Fed. Election Camp. Fin. Guide (CCH) ¶ 6094(Aug. 13, 1993) (State of Rhode Island may not impose additional reporting and registration requirements on contributors to the Federal account of a state party).

The Commission has also promulgated extensive regulations addressing the treatment and reporting of public opinion poll results. It has provided that an individual need not report a payment for polling conducted for "testing the waters" for a possible Federal candidacy, so long as the appropriate report is filed in the event of an affirmative decision on candidacy. See 11 C.F.R. § 100.7(b)(1)(i). Moreover, section 106.4 ("Allocation of Polling Expenses") addresses extensively the valuation and reporting of "contributions" in the form of polling results.

We appreciate the Commission's consideration of this request.

Very truly yours,



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RFB:smb

THE ELECTION LAW

Part 6201

Fair Campaign Code

§ 6201.2 Use of Public Opinion Polls.

No candidate, political party or committee shall attempt to promote the success or defeat of a candidate by directly or indirectly disclosing or causing to be disclosed the results of a poll relating to a candidate for such an office or position, unless within 48 hours after such disclosure, they provide the following information concerning the poll to the board or officer with whom statements or copies of statements of campaign receipts and expenditures are required to be filed by the candidate to whom such poll relates:

- (a) The name of the person, party or organization that contracted for or who commissioned the poll and/or paid for it.
- (b) The name and address of the organization that conducted the poll.
- (c) The numerical size of the total poll sample, the geographic area covered by the poll and any special characteristics of the population included in the poll sample.
- (d) The exact wording of the questions asked in the poll and the sequence of such questions.
- (e) The method of polling—whether by personal interview, telephone, mail or other.
- (f) The time period during which the poll was conducted.
- (g) The number of persons in the poll sample; the number contacted who responded to each specific poll question; the number of persons contacted who did not so respond.
- (h) The results of the poll.