

AGENDA DOCUMENT #95-133



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

RECEIVED  
FEDERAL ELECTION  
COMMISSION  
SECRETARIAT

Nov 30 2 20 PM '95

November 30, 1995

**AGENDA ITEM**  
For Meeting of: DEC 7 1995

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina *12/5/95*  
Staff Director

FROM: Lawrence M. Noble *L.M.N.*  
General Counsel

N. Bradley Litchfield *NBL*  
Associate General Counsel

Michael G. Marinelli *on 2 emi*  
Staff Attorney

SUBJECT: Draft AO 1995-41

Attached is a proposed draft of the subject advisory opinion.

We request that this draft be placed on the agenda for December 7, 1995.

Attachment

1  
2  
3 ADVISORY OPINION 1995-41

4 Robert F. Bauer  
5 Perkins Coie  
6 607 Fourteenth Street, N.W.  
Washington, D.C. 20005-2011

**DRAFT**

7 Dear Mr. Bauer:

8 This responds to your letter dated October 30, 1995,  
9 as counsel for the Democratic Congressional Campaign  
10 Committee, who inquires on behalf of Representative Carolyn  
11 Maloney and Maloney for Congress, concerning application of  
12 the Federal Election Campaign Act of 1971, as amended ("the  
13 Act"), and Commission regulations to Federal preemption of  
14 certain reporting obligations of New York State campaign  
finance laws.

15 Maloney for Congress (the "Committee") is the principal  
16 campaign committee of Carolyn Maloney, a member of the U.S.  
17 House of Representatives for the New York 14th Congressional  
18 District. She is currently a candidate for re-election. You  
19 state that New York law requires all candidates for public  
20 office to disclose certain information about polling activity  
21 for public reporting purposes. Specifically, the statute  
22 requires that any candidate preparing to release poll results  
23 to the public must file within 48 hours, with the appropriate  
24 New York state regulatory authority, a report which states  
25 the poll sample size, the wording of the questions asked, and  
26 the full results of the poll. See 9 NYCRR §6201.2.<sup>1/</sup>

27 1/ The cited provision states:

28 No candidate, political party or committee shall  
29 attempt to promote the success or defeat of a candidate by  
30

3           You note that the New York State Board of Elections  
4 ("the Board") has taken the position that this reporting  
5 requirement applies to Federal, as well as other candidates,  
6 and that the Board communicated this position to Ms.  
7 Maloney.<sup>2/</sup> You therefore ask whether the Act, Commission  
8 regulations, and prior Advisory Opinions issued by the

9  
10 (Footnote 1 continued from previous page)

11       directly or indirectly disclosing or causing to be  
12 disclosed the results of a poll relating to a candidate  
13 for such an office or position, unless within 48 hours  
14 after such disclosure, they provide the following  
15 information concerning the poll to the board or officer  
16 with whom statements or copies of statements of campaign  
17 receipts and expenditures are required to be filed by the  
18 candidate to whom such poll relates:

19       (a) The name of the person, party or organization that  
20 contracted for or who commissioned the poll and/or paid  
21 for it.

22       (b) The name and address of the organization that  
23 conducted the poll.

24       (c) The numerical size of the total poll sample, the  
25 geographic area covered by the poll and any special  
26 characteristics of the population included in poll sample.

27       (d) The exact wording of the questions asked in the  
28 poll and the sequence of such questions.

29       (e) The method of polling—whether by personal  
30 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  
numbers contacted who responded to each specific poll  
questions; the number of persons contacted who did not so  
respond.

      (h) The results of the poll.

23 <sup>2/</sup> In a May 3, 1984 Opinion, the Board stated that  
24 section 6201.2 "app[lies] to all campaigns conducted in New  
25 York State where the intent is to influence the voters of the  
26 state. There are no Federal laws, rules or regulations known  
27 to the Board which would supersede the regulation of the New  
28 York State Board of Elections." New York Board of Elections  
29 1984 Opinion #1. Furthermore, the Board has previously found  
30 that a Federal committee, the Committee to Elect John  
Bouchard to Congress, was in violation of section 6201.2.  
See Times Union v. Committee to Elect John Bouchard, New York  
State Board of Election, Final Determination FC89-7  
(September 7, 1990).

Commission, indicate that the New York reporting requirement is preempted by Federal law.

The Act states that its provisions and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. §453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "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, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that

3 the regulations follow section 453 and that, specifically,  
4 Federal law supersedes state law with respect to the  
5 organization and registration of political committees  
6 supporting Federal candidates, disclosure of receipts and  
7 expenditures by Federal candidates and political committees,  
8 and the limitations on contributions and expenditures  
9 regarding Federal candidates and political committees.  
10 Federal Election Commission Regulations, Explanation and  
11 Justification, House Document No. 95-44, at 51. 11 CFR  
12 108.7(b). The regulations provide that the Act does not  
13 supersede state laws concerning the manner of qualification  
14 as a candidate or political party organization, dates and  
15 places of elections, voter registration, voting fraud and  
16 similar offenses, or candidates' personal financial  
17 disclosure. 11 CFR 108.7(c). The Commission explained that  
18 "[t]hese types of electoral matters are interests of the  
19 states and are not covered in the Act." House Document  
20 95-44, at 51.

21 The Commission has previously concluded that the Act  
22 supersedes and preempts state law with respect to the  
23 reporting requirements of Federal committees and State  
24 committees which engage in Federal activity. See Advisory  
25 Opinions 1993-14, 1986-27 and 1978-54. Given this legal  
26 authority, the Act would preempt New York State law with  
27 respect to the reporting of contributions, disbursements and  
28 expenditures, including expenditures for polling activity in  
29 Federal election campaigns. New York State may not impose  
30

any obligation for reporting Federal contributions, disbursements and expenditures since those obligations fall only within the purview of the Act and Commission regulations. See 2 U.S.C. §434(b) and 11 CFR 104.3. Therefore, the Commission concludes that 9 NYCRR §6201.2 may not be applied to Maloney for Congress, Carolyn Maloney or any other Federal candidate or committee with respect to polling activity that is done as part of a Federal election campaign.

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,

Danny L. McDonald  
Chairman

Enclosures (AOs 1993-14, 1986-27, and 1978-54)