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FEDERAL ELECTION COMMISSION

Washington, DC 20463

AGENDA ITEM
For Meeting of: 6-17-99

June 10, 1999

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon 
Staff Director

FROM: Lawrence M. Noble 
General Counsel

N. Bradley Litchfield 
Associate General Counsel

Jonathan M. Levin 
Senior Attorney

Subject: Draft AO 1999-12

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for June 17, 1999.

Attachment

1 **ADVISORY OPINION 1999-12**

2
3 **Bobby R. Burchfield**
4 **Covington & Burling**
5 **1201 Pennsylvania Avenue, N.W.**
6 **P.O. Box 7566**
7 **Washington, D.C. 20044-7566**

8
9 **Dear Mr. Burchfield:**

10
11 **This responds to your letters dated April 26 and May 6, 1999, on behalf of the**
12 **Campaign for Working Families ("CWF"), concerning the application of the Federal**
13 **Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to**
14 **Pennsylvania statutes requiring disclosures by charitable organizations.**

15 **In brief, your request centers on the issue of whether the Act preempts the**
16 **application of the disclosure requirements of Pennsylvania statutes (cited and summarized**
17 **below) to CWF, and it is prompted by the fact that the State is attempting to apply the**
18 **statute's registration, reporting, and disclaimer requirements to CWF.**

19 ***Background***

20 ***Description of CWF and its Activities***

21 **CWF is a non-connected, multicandidate political committee and has been**
22 **registered with the Commission since November 26, 1996. It solicits contributions for**
23 **use in influencing the election or defeat of candidates for Federal office. You state that,**
24 **from time to time, CWF solicits contributions in each of the 50 states through direct**
25 **mailings that discuss important public policy issues but do not mention specific**
26 **candidates. CWF places contributions received from such fundraising into the same**
27 **Federal account as the funds raised in solicitations that mention Federal candidates.**
28 **From that account, CWF makes contributions to and independent expenditures on behalf**
29 **of Federal candidates.¹ You state that CWF's solicitations display the disclaimers**
30 **required by 2 U.S.C. §441d and 11 CFR 110.11. CWF has a non-Federal account but you**
31 **assert that it "does not specifically solicit contributions" for that account. CWF uses the**

¹ You state that, during the 1998 election cycle, CWF made contributions to 129 Federal candidates and made independent expenditures on behalf of several others.

1 non-Federal funds for candidate contributions and coordinated expenditures on the State
2 level and does not use them for issue advocacy in connection with any Federal elections.

3 You enclose a sample form that CWF uses in its contribution solicitations. This
4 form has information (or data input) fields that a solicitee is invited to use for denoting
5 the amount of his contribution and to provide a credit card number, if desired. The
6 solicitation form includes a statement to be signed by the contributor stating that she/he/it
7 is enclosing a contribution "to help CWF continue to support and elect pro-family
8 candidates," and the form displays a disclaimer stating that the solicitation was paid for
9 by CWF. At the bottom of the form, CWF informs the contributor of the need to provide
10 his/her occupation and place of business, and requests additional phone and business
11 address information. Along with CWF's request for contributor information, its
12 solicitation document states that, unless otherwise prohibited, all contributions will be
13 deposited in CWF's Federal account and that corporate contributions, and contributions
14 exceeding \$5,000, would be deposited in CWF's "state account." The form also includes
15 a box wherein contributors who prefer to use credit cards may indicate whether the card
16 they are using is either a personal or corporate credit card.

17 ***Relevant Pennsylvania Statutes***

18 The Bureau of Charitable Organizations of the Pennsylvania Department of State
19 ("the Bureau") administers the State's Solicitation of Funds for Charitable Purposes Act.
20 10 P.S. §162.1 *et seq.* This statute imposes extensive registration and information
21 disclosure requirements on charitable organizations, professional fundraisers and
22 professional solicitors that solicit in Pennsylvania. Documents filed with the Bureau
23 become public records. 10 P.S. §162.11. The coverage of the statute is not limited to
24 those charitable organizations that are exempt from Federal taxation under 26 U.S.C.
25 §501(c)(3), nor to those that hold themselves out to be established for any charitable
26 purpose. Instead, the statute purports to include those entities "who in any manner
27 emplo[y] a charitable appeal as a basis of any solicitation or an appeal which has a
28 tendency to suggest there is a charitable purpose to any solicitation." 10 P.S. §162.3.
29 Charitable purpose is defined to include any "benevolent, educational, philanthropic,

1 humane, scientific, patriotic, social welfare or advocacy, public health, environmental
2 conservation, civic or other eleemosynary” objective. *Id.*

3 The State statute requires a covered organization to file an annual registration
4 statement with a registration fee. 10 P.S. §162.5(a) and (p). The registration must
5 include detailed and extensive information.² With each registration, the statute requires
6 the covered organization to file a comprehensive financial report for the preceding fiscal
7 year.³ In addition, the statute contains disclaimer requirements for an organization’s
8 solicitations.⁴

² This information includes the organization name, with addresses and phone numbers within Pennsylvania; the names and addresses of officers, trustees or directors, principal salaried executives, and persons in charge of solicitation activities; a copy of filings as to tax exempt status; whether the organization or its trustees or key personnel have been found to have engaged in unlawful charitable activity and how they have been penalized; a clear description of the specific programs for which contributions will be used; the names and addresses of professional solicitors, “professional fundraising counsels,” and “commercial coventurers” acting on behalf of the organization; the family relationships among the personnel of and vendors to the organization; and a copy of the organization’s articles of organization, bylaws, and other governing documents. 10 P.S. §162.5(b) and (c).

The statute also imposes detailed registration requirements on professional solicitors and “professional fundraising counsels” before they can act in such positions. 10 P.S. §§162.8 and 162.9. In addition, a counsel must pay a registration fee and also must file with the State the written contract with a charitable organization prior to the performance of his service. 10 P.S. §162.8(d). A solicitor must pay a registration fee and post a bond with the State. In addition, he must file a copy of the written contract with a charitable organization for each solicitation campaign before the commencement of the campaign, and a financial statement after one year of the campaign or its completion. 10 P.S. §162.9(e), (f) and (l).

³ The financial report or statement shall include a balance sheet and statements of revenue, expenses, and changes in fund balances. The statements should indicate gross revenue, amounts received from solicitations or other fundraising activities, and expenditures for goods, services, activities and programs, and the distribution of net proceeds, as well as a detailed list of wages and expenses to any officer or employee if the organization does not have to file an IRS Form 990 (which is filed by section 501(c) tax exempt organizations). 10 P.S. §162.5(e). The statute also requires that the financial report of an organization that receives contributions in excess of \$100,000 must be audited by an independent public accountant. 10 P.S. §162.5(f).

⁴ The organization must include its name, a full description of the charitable purposes of the solicitation, a source for written information, and a statement that the official registration and financial information may be obtained from the Department of State. 10 P.S. §162.13(b) and (c). The statute also requires a “professional solicitor” acting on behalf of a “charitable organization” to disclose his name and that the solicitation is being conducted by a compensated professional solicitor. 10 P.S. §162.9(h).

The Pennsylvania statute also imposes other requirements including recordkeeping by organizations, solicitors, and counsels; limitations on the solicitation and contracting activities of the organizations; and prohibition of certain acts with respect to charitable solicitations or sales promotions. 10 P.S. §§162.5(o), 162.12, 162.13, and 162.15. The statute provides for an enforcement process with administrative, civil, and criminal penalties. 10 P.S. §§161.16, 162.17, 162.18, and 162.19.

1 ***Actions of Bureau***

2 The Bureau has construed CWF's solicitations for contributions as charitable
3 appeals subject to the State statute, as summarized above, so long as those solicitations do
4 not name one or more specific candidates. It has issued an order to CWF to "cease and
5 desist" from making its solicitations until it registers with the Bureau or proves itself
6 exempt from that law, and the Bureau has subpoenaed documents from CWF.
7 Responding to CWF's arguments that the Act preempts the application of the
8 Pennsylvania statute, counsel for the Bureau has stated that the State statute is not
9 preempted because its purpose is not to regulate Federal political committees *per se* and
10 that it seeks to apply the law only to the CWF fundraising solicitations that do not name a
11 specific candidate. The Bureau argues that such solicitations discuss public policy issues
12 and thus implicate a "social welfare or advocacy objective" or "charitable appeal." The
13 Bureau, in an apparent effort to further understand CWF's activities in Pennsylvania,
14 requested detailed information from CWF as to the circumstances of each solicitation it
15 has made, the personnel involved in such solicitation activities, contracts associated with
16 the solicitations, the contributors responding to the solicitations, the bank accounts
17 associated with those activities, and the financial statements of CWF.⁵

18 ***Questions Presented***

19 In view of the situation described above, you ask the following questions: (1)
20 Does the Act govern CWF's solicitation of funds for deposit into its account for use in
21 Federal elections even if those solicitations do not mention a specific Federal candidate?
22 (2) If so, does the Act preempt the registration, reporting, and disclaimer provisions of
23 the Pennsylvania statute on charitable solicitations even if CWF's solicitations are
24 considered to be charitable appeals under the Pennsylvania law?

⁵ Among the information and items requested were the entities that conducted solicitations on behalf of CWF in Pennsylvania and their methods; copies of written materials utilized with respect to those solicitations; the amount of solicitations printed; the locations from which they were conducted; the identification of the individuals exercising financial or other control over CWF and the solicitations; persons contracting with CWF as to the solicitation activities and copies of the contracts; addresses used for the receipt of mail, funds or documents pertaining to the solicitation activities; the account numbers, opening dates, and authorized signers of the bank accounts associated with the solicitation activities; and the name, address, and phone number of each Pennsylvania resident or business that contributed, along with the date and amount.

1 Legal Analysis

2 The contents of this request, including the sample CWF contribution solicitation
3 form, and the CWF reports filed with the Commission clearly indicate that CWF is
4 engaging in Federal election activity that is governed by the Act. Whether or not CWF's
5 contribution solicitation messages include the names of any Federal candidates or
6 political parties, they are regulated by and subject to the Act since CWF is a registered
7 political committee and is soliciting contributions that are to some extent (and perhaps
8 almost entirely) expended by it for the purpose of influencing Federal elections.

9 Although this opinion does not attempt to delineate the parameters of activity governed
10 by the Act, the explicit solicitation of contributions, as defined in 2 U.S.C. §431(8), to be
11 used for the support of Federal candidates makes indisputable the Act's application. For
12 example, such solicitations are subject to the disclaimer requirements of 2 U.S.C. §441d
13 and 11 CFR 110.11. Contributions to CWF in response to the solicitations, as well as
14 contributions by CWF of the funds it receives, would be subject to the limitations and
15 prohibitions of the Act. See 2 U.S.C. §§441a, 441b, 441c, 441e, 441f, and 441g.

16 Moreover, CWF, as a Federal political committee is required to file a statement of
17 organization (and periodic amended statements, if necessary) and to comply with the
18 other disclosure and reporting requirements of the Act. Such reports would require the
19 disclosure of expenditures made by CWF, including those made to cover its contribution
20 solicitation expenses in any state. The reports of CWF would also require disclosure of
21 all contributions it receives, including those received in response to solicitations mailed to
22 Pennsylvania addresses or elsewhere. 2 U.S.C. §§433 and 434.

23 The Act states that its provisions and the rules prescribed thereunder "supersede
24 and preempt any provision of State law with respect to election to Federal office." 2
25 U.S.C. §453; 11 CFR 108.7(a). The House committee that drafted this provision explains
26 its meaning in sweeping terms, stating that it is intended "to make certain that the Federal
27 law is construed to occupy the field with respect to elections to Federal office and that the
28 Federal law will be the sole authority under which such elections will be regulated." H.R.
29 Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference
30 Committee report on the 1974 Amendments to the Act, "Federal law occupies the field

1 with respect to criminal sanctions relating to limitations on campaign expenditures, the
2 sources of campaign funds used in Federal races, the conduct of Federal campaigns, and
3 similar offenses, but does not affect the States' rights" as to other areas such as voter fraud
4 and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference
5 report also states that Federal law occupies the field with respect to reporting and
6 disclosure of political contributions to and expenditures by Federal candidates and
7 political committees, but does not affect state laws as to the manner of qualifying as a
8 candidate, or the dates and places of elections. *Id.* at 100-101.⁶

9 When the Commission promulgated regulations at 11 CFR 108.7 on the effect of
10 the Act on State law, it stated that the regulations follow section 453 and that,
11 specifically, Federal law supersedes State law with respect to the organization and
12 registration of political committees supporting Federal candidates, disclosure of receipts
13 and expenditures by Federal candidates and political committees, and the limitations on
14 contributions and expenditures regarding Federal candidates and political committees.
15 Federal Election Commission Regulations, *Explanation and Justification*, House
16 Document No. 95-44, at 51; 11 CFR 108.7(b).⁷

17 As the legislative history of 2 U.S.C. §453 shows, "the central aim of the clause is
18 to provide a comprehensive, uniform Federal scheme that is the sole source of regulation
19 of campaign financing ... for election to Federal office." Advisory Opinion 1988-21.
20 The Commission notes that, with respect to disclosure requirements, including the
21 reporting of receipts and expenditures and, by implication, the registration of political

⁶ The reference to *criminal* sanctions is of only limited significance since, as amended in 1976, violations of the Act may result in either criminal or civil sanctions, or both. The House report should thus be read as reflecting Congress' intent that the Act would occupy of the field of Federal election campaign financing, both under the language of 2 U.S.C. §453 and under an identical Federal preemption amendment to the criminal code in 1974. Although the statement at p. 69 of the Conference report referred to substantive criminal provisions of Title 18 that were repealed in 1976, they were, in virtually all respects, renumbered and relocated in Title 2. For example, the contribution limits formerly in 18 U.S.C. §608 became 2 U.S.C. §441a(a), and the corporate prohibitions in 18 U.S.C. §610 became 2 U.S.C §441b. The disclosure provisions were already in Title 2 and were explicitly covered by the discussion cited above at pp. 100-101 of the Conference Report which expressed a sweeping preemptive intent with respect to them.

⁷ The regulations provide that the Act does not supersede State laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that these "types of electoral matters are interests of the states and are not covered in the Act." House Document No. 95-44, at 51.

1 committees, Congress was particularly emphatic. The House committee report, cited
2 above, in discussing the revised (in 1974) preemption provision, referred to the parallel
3 part of the 1971 Act that, although mandating the filing of Federal reports (and
4 "statements") with the States, merely required the Federal supervisory officers to
5 cooperate with and encourage State officials to develop procedures to eliminate the
6 necessity of multiple filings by permitting the filing of such copies to satisfy State
7 requirements. The House report, looking ahead to the 1974 repeal of the 1971 provision,
8 states that under the 1974 legislation, the Federal reporting requirements would be "the
9 only reporting requirements" with respect to Federal elections (and copies of the Federal
10 reports would be filed with the States). H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10
11 (1974); see also 2 U.S.C. §439.

12 In numerous advisory opinions, the Commission has applied the Act's broad
13 preemptive power. These opinions include several that considered State or local laws that
14 would have added certain disclosure requirements to those that the Act already imposed
15 on Federal political committees. For example, the Commission determined that the Act
16 preempted the application to a Federal candidate of a State law requiring that any
17 candidate preparing to release poll results to the public must file, with the State, a report
18 stating the sample size, the wording of the questions, and the full results. Advisory
19 Opinion 1995-41. The Commission has also concluded that the Act preempted a State
20 law requiring a Federal political committee or State party committee's Federal account,
21 used solely in connection with Federal elections, to register with and report to the State as
22 a result of a contribution by the former to the latter. Advisory Opinion 1993-14.⁸ See
23 also Advisory Opinion 1986-27.

24 In addition to finding that the Act preempted State laws as to registration and
25 reporting requirements, the Commission has determined that the Act preempts State and
26 local laws as to the disclaimers that must appear on advertisements or solicitations,

⁸ In this opinion, the Commission also concluded that the Act preempted State requirements as to the limits on contributions to the Federal account and as to the number of candidates to which a Federal political committee must contribute.

1 treating such disclaimers as related to the issues of disclosure and “the conduct of Federal
2 campaigns,” which were designated as subject to preemption in the legislative history
3 described above. Advisory Opinions 1981-27 (FECA preempted a warning on Federal
4 candidate’s campaign ads as to a local anti-littering provision) and 1978-24 (FECA
5 preempted a statement of party affiliation on candidate advertising); see also Advisory
6 Opinions 1986-11 (use of certain words in campaign logo) and 1980-36 (the name and
7 address of the candidate committee’s chairman or secretary).

8 Based on the preemptive provisions of the Act and Commission regulations, the
9 purpose of the preemptive power, and Commission precedent, the Commission concludes
10 that the Act would preempt the application of the registration, reporting, and disclaimer
11 provisions of Pennsylvania’s Solicitation of Funds for Charitable Purposes Act to CWF
12 with respect to the activities of its Federal account so long as CWF is raising funds for
13 use with respect to Federal and not other elections. See Advisory Opinions 1993-14,
14 1990-6, and 1982-29 (where the Commission upheld preemption with the condition that
15 the funds would be raised for use in Federal elections only); see also Advisory Opinion
16 1986-27 (discussed below). This conclusion is compelled by the need for one set of
17 requirements for Federal campaign finance activities, rather than subjecting Federal
18 political committees such as multicandidate committees, to a multiplicity of requirements
19 depending upon the number of States in which they solicit contributions.⁹

⁹ The Commission notes that the State law at issue is not a campaign finance statute, and that the State has argued that it is regulating the solicitation of funds for charitable purposes and not the organization and registration of political committees. The Act’s preemptive powers, however, are not limited only to its effect on State or local campaign finance statutes and have been applied to other statutes having an impact on Federal election activity. For example, in the context of Federal elections, the Act has been determined to preempt the application of State laws that restricted the practices of lobbyists, State officials, a State lottery commission and those contracting with it, and a local ordinance requiring political advertising to post a warning as to an anti-littering provision. Advisory Opinions 1993-25, 1992-43, 1989-12, and 1981-27. Another example is found in Advisory Opinion 1995-10 wherein the Commission determined that the Act preempted State law with respect to legal title and control over committee records in circumstances that involved an internal committee dispute as to whether the committee retained title to records that were held by its former treasurer. (See also Advisory Opinion 1982-29 where the Commission spoke generally about preempting any State law prohibiting the proposed use of a payroll deduction as a means of facilitating voluntary contributions by eligible employees to an SSF without reference to any specific State law.) Furthermore, in addressing the use of a candidate’s name in the title of an unauthorized political committee, a Federal court ruled that the Act preempted the application of a State law that prohibited the unauthorized use of a person’s name for advertising or commercial purposes; the law was one of general

1 You have stated that CWF has a non-Federal account for the receipt and
2 disbursement of funds in connection with State elections. In addition, the CWF
3 solicitation documents enclosed in this request specifically provide for the acceptance of
4 contributions that are outside the limits and prohibitions of the Act and state that such
5 funds will be placed in CWF's non-Federal account. Thus, as already indicated, the
6 above conclusion does not resolve all aspects of the Federal preemption issues that may
7 be raised with respect to CWF's activities affecting Pennsylvania or other States.
8 Commission conclusions applying preemption in past advisory opinions have been
9 premised on the assumption of the political committee's involvement in Federal, and not
10 State or local, election activity. A State might not be precluded from imposing some
11 restrictions or conditions as a result of a Federal account's participation in non-Federal
12 election activity. See Advisory Opinion 1993-14.

13 In Advisory Opinion 1986-27, the Commission provided an example of the
14 limitations of the preemptive effect with respect to Federal and non-Federal election
15 financing. In that opinion, the Commission addressed whether the State of Alaska could
16 require a political committee to file a consolidated report of both its Federal and non-
17 Federal accounts because the Federal account transferred surplus funds from raffles
18 conducted by it (which were the primary fundraising activity for both accounts) to the
19 non-Federal account. The Commission stated that, under the circumstances presented, it
20 should interpret the Act's preemption provision in a manner that recognizes the State's
21 interest with respect to the reporting obligations of a non-Federal political committee and
22 the receipts and disbursements for non-Federal election purposes. The Commission
23 concluded that the Act would not preempt the State from requiring the non-Federal
24 account to report the original source of the funds transferred from the Federal account and
25 the fundraising expenses allocable to such transferred funds. It also concluded that the
26 Act would preempt the State from requiring the non-Federal account to report all other
27 receipts and disbursements of the Federal account in a consolidated report because such a
28 requirement would impose reporting and itemization requirements on the Federal account

1 that would exceed those of the Act. Advisory Opinion 1986-27. See also Advisory
2 Opinion 1986-5 (Commission concluded that, with respect to a transfer from a Federal
3 candidate's committee to his committee for election to non-Federal office, the Act would
4 not preempt application of the State law, citing, as examples, any State statute limits on
5 the amount of the transfer or the reporting of the transfer "by the transferee committee");
6 Advisory Opinion 1986-29 (Commission concluded that the Act preempted the
7 application of State law to Federal candidates with respect to proposed slate card
8 activities, but did not preempt the State's requirement that the Federal candidate provide
9 certain information to the non-Federal candidates that they needed for reporting
10 purposes).

11 Based on the foregoing, the Commission concludes that the CWF solicitation
12 materials as presented and the activities of the CWF non-Federal account are not
13 protected from the application of the State statute by 2 U.S.C. §453. Specifically, the Act
14 would not preempt the application of the disclaimer requirements of State law to the
15 CWF solicitations of donations to its non-Federal account from solicitees in
16 Pennsylvania. In addition, the Act would not preempt the application of the Pennsylvania
17 registration and reporting requirements to CWF's non-Federal account and with respect
18 to professional fundraising counsels or professional solicitors conducting services with
19 respect to such solicitations (as well as such persons who provide services solely with
20 respect to the operations of the non-Federal account). The Act would not preempt the
21 Bureau from requiring that certain amounts expended by the Federal account be included
22 in any financial statements required to be filed by the CWF non-Federal account. These
23 would be the amounts spent for contribution solicitation (and other) expenses that are
24 allocable (on some reasonable basis) to the non-Federal portion of the CWF receipts.
25 Under the circumstances presented, the Act would preempt the application of the State's
26 registration and reporting requirements to the Federal account, or with respect to
27 solicitations that solicit contributions to the Federal account only. See Advisory Opinion
28 1986-27.

