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AOR 2000-24

August 30, 2000

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Federal Election Commission
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COMMISSION
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COUNSEL
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Dear Mr. Noble:

I am writing on behalf of the Alaska Democratic Party ("ADP") to request an advisory opinion relating to the operation of Alaska campaign finance laws and their interaction with the preemption clause of the Federal Election Campaign Act ("FECA"), 2. U.S.C. § 453, and regulations promulgated thereunder, 11 C.F.R. § 108.7.

On July 10, 2000, the ADP received the attached letter from the Alaska Public Offices Commission ("APOC"). In this letter, APOC indicated that the Democratic and Republican state party committees are required to pay for their administrative and voter drive expenses with a fixed percentage of federal and non-federal dollars, which would be based upon the ADP's ballot composition ratio for the 2000 election cycle (40% federal/60% non-federal). 11 C.F.R. § 106.5(d)(1). In other words, the use of non-federal funds for such expenditures would be mandatory.

The ADP desires to pay for its administrative and voter drive expenses with a higher portion of funds from its federal account because new Alaska contribution restrictions make it difficult for the ADP to raise funds into its non-federal account. Consequently, the overwhelming majority of funds raised by the ADP are deposited into the committee's federal account. Therefore, the APOC would require the ADP to raise three dollars of non-federal funds in order to spend two dollars of federal funds.

Accordingly, the ADP requests that, in accordance with FEC Advisory Opinion 1993-17, the Commission rules that APOC is preempted from requiring the ADP to pay for administrative and generic voter drive expenses with a required 60% non-federal funds, but rather, allow the ADP to use its discretion in paying for such costs with a higher proportion of federal funds.

DISCUSSION

The FECA specifically states that:

The provisions of this Act, and of rules prescribed under this Act, supercede and preempt any provision of State law with respect to election to federal office.

2 U.S.C. § 453

FEC regulations further clarify section 453 at 11 C.F.R. § 108.7:

(a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.

(b) Federal law supersedes State law concerning the-

(1) Organization and registration of political committees supporting Federal candidates:

(2) Disclosure of receipts and expenditures by Federal candidates and political committees; and

(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

The FEC has previously addressed a factually indistinguishable situation from this matter in Advisory Opinion 1993-17. In this opinion, the Massachusetts Democratic Party ("MDP") requested an opinion that it may spend more federal funds than the federal portion of its ballot composition ratio for administrative expenses.¹ The Commission found that the MDP was permitted to utilize more federal dollars than the federal portion of their ballot composition ratio since it was the Commission's intent that the ratio act as a floor for the amount of federal dollars that would be required to be spent on administrative expenses, and not as a mandated federal share:

¹ In that opinion, the Commission did not address whether generic voter drive expenses should also be subject to preemption. Accordingly, the ADP requests that the logic of 1993-17 be extended to generic voter drive expenses. It should be noted that the ADP is not seeking preemption with respect to fundraising or direct candidate support expenditures.

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In March 1990, when the Commission promulgated comprehensive regulations on allocation, the Commission expressed its 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.

FEC Advisory Opinion 1993-17, quoting 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).

The Commission continued:

Based on the foregoing, the Commission concludes that the non-Federal points are not mandatory under Federal law. The allocation regulations impose a floor on Federal points and a ceiling on non-federal points.

FEC Advisory Opinion 1993-17.

The Commission's Opinion in 1993-17 establishes that its regulations "occupy the field" with respect to the ability of a state party committee to utilize a larger proportion of federal funds that are required for administrative and generic voter drive expenditures. Federal law is clear on this point. Federal courts, as well as the FEC, have consistently determined that the FECA preempts any state law that frustrates the purpose of the federal election laws, as well as interpretations of federal law and regulations of the FEC. See Weber v. Heaney, 995 F.2d 872 (8th Cir. 1993); Bunning v. Kentucky, 42 F.3d 1008 (6th Cir. 1994); Teper v. Miller, 82 F.3d 989 (11th Cir. 1996); FEC Advisory Opinions 1998-8; 1998-7; 1997-14; 1993-9 1995-48; 1994.2; 1993-25; 1993-17; 1993-14; 1991-22; 1991-5; 1989-25; 1986-40; 1983-8.

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Accordingly, the Commission found that, in order to effectuate this interpretation of the allocation regulations, Massachusetts election authorities were preempted from requiring the MDP spend a mandated amount of non-federal funds for its administrative expenses:

The OCPF interpretative bulletin contradicts the Commission's allocation regulations in that it would deny the Party the flexibility to pay more than the Federal share with Federally restricted funds. Accordingly, the Commission concludes that the applicable part of the interpretive bulletin is preempted by Federal law.

FEC Advisory Opinion 1993-17.

Since the facts in this request are indistinguishable from Advisory Opinion 1993-17, it is clear that the Commission should issue an opinion that APOC's attempt to require party committees to pay for administrative and generic voter drive expenses with a minimum of 60% non-federal funds is preempted by federal law for the reasons stated above.

If you have any questions or need additional information in connection with this Advisory Opinion Request, please contact me at (202) 543-7680. Thank you for your time and attention to this matter.

Sincerely yours,



Neil Reiff
Counsel to the Alaska Democratic Party

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July 10, 2000

Ms. Joelle Hall
Alaska Democratic Party
PO Box 104199
Anchorage, AK 99510

Dear Ms. Hall:

I am writing to follow up on our recent conversations with representatives from the Alaska Democratic Party and the Republican Party of Alaska. We recently met with representatives from both parties to discuss our concerns about the disclosure and use of federal and state (nonfederal) money. We have two concerns in this area: (1) The parties' campaign disclosure reports must clearly identify what money the parties have used to influence the outcome of state and local elections. (2) Political parties with federal and state funds must use a percentage of their state funds to pay for administrative and generic voter drive expenses.

Disclosure

In the interest of giving the public a complete picture of party activity, both major parties currently disclose all activity the party undertakes including federal activity. However, the distinction between state and federal activity should be clear. We have discussed two options to make this distinction clear.

The first option is to file all activity using the state format with a clear distinction of accounts. This report consists of three "sections". The first section is a "combination" summary sheet that combines both state and federal activity. This will give the public an overall view of the total party activity. The next section includes a summary sheet consisting of only state activity with the detail sheets (income, expenses, etc...) following. This second section must be clearly labeled indicating that it represents state activity only. The third section includes a summary sheet (with detail sheets following) disclosing federal activity. Again, this section must be clearly marked indicating that it consists of federal activity only. The combination of the three sections will give the public a full view of the party activity that clearly distinguishes between state and federal activity.

The second option is similar to the first, however, for the "third section" disclosing federal activity, you may attach the appropriate FEC reports for the reporting period. If this option is chosen, it is important to remember to attach all FEC reports that correspond to the reporting period.

RE: Reporting Requirements

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Use

The second concern regarding party operations relates to the payment of administrative and generic voter drive expenses. It is our understanding that federal law sets a minimum percentage of joint costs that must be paid from the federal account. This percentage is based on the number of federal and state candidates in a two year election cycle. Under federal law, it is permissible for 100% to be paid with federal dollars. However, since part of the parties business is to influence state elections, a portion of the administrative and generic voter drives expenses must be paid from the state account.

It is our understanding that the federal law requires checks for administrative and other expenses to be written from a federal account. You then have a 70 day window (10 days prior to and 60 days after the expenditure) to reimburse a portion of the costs from the non-federal (state) account. Thus, to avoid making an illegal non-monetary contribution from federal funds, the party must reimburse the federal account with state funds. The amount of that reimbursement is the maximum amount that may be spent from state (nonfederal) funds.


Another alternative is to set up an Allocation account. The federal allocation account allows you to make periodic deposits from both federal and nonfederal accounts. Thus, deposits can be made with the correct percentages and checks written from this account.

Whether you decide to use the allocation account, or reimburse the federal account within 60 days, there should be a system in place to report the shared expenditures. You should have the procedure in place for the 10 Day Post-Primary Report due September 1, 2000.

If you have any questions or concerns, feel free to contact us at 276-4176. Thank you.

Sincerely,

ALASKA PUBLIC OFFICES COMMISSION



Therese Greene
Group Coordinator