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Supplement for AOR 2000-24

October 6, 2000

Jonathan Levin, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Advisory Opinion 2000-24

Dear Mr. Levin:

Per our conversation, you requested further clarification from my client, the Alaska Democratic Party ("ADP") with regards to their request in the above referenced Advisory Opinion Request. In addition, the ADP would like to address certain issues raised by the Alaska Public Offices Commission ("APOC") in response to the ADP's Advisory Opinion Request.

After reviewing the comments filed by APOC, and further to our conversation, it is the position of the ADP that the Commission should issue an opinion, consistent with FEC Advisory Opinion 1993-17, that the ADP should have the flexibility to allocate administrative and generic voter drive expenses as follows:

1) At the beginning of an election cycle, the ADP would establish a federal/non-ballot allocation ratio in accordance with 11 C.F.R § 106.5(d)(1).

2) The ADP would prefer to utilize this ratio for all administrative and generic voter drive expenses throughout the cycle. However, cash flow considerations, as well as the FEC's requirement that all allocation transfers be made no earlier ten days before or sixty days after a disbursement is made, may not allow the ADP to fully avail itself of the right to transfer the appropriate portion of non-federal funds for each disbursement. 11 C.F.R. § 106.5(g)(2)(ii)(B).

3) To the extent that cash flow considerations, as well as FEC regulations, preclude the transfer of non-federal funds within the proscribed seventy-day window, the ADP wishes to confirm that, in accordance with Advisory Opinion 1993-17, it may forego the option of making such allocation transfers for all or a portion of each administrative or generic voter drive such that some or all of these expenditures may be paid for either exclusively from its federal account, or, in the alternative, the ADP may, in some instances, not fully avail itself of the entire non-federal portion of a particular administrative or generic voter drive that it would be permitted to transfer under the ballot composition formula.

4) Accordingly, the ADP asks that APOC be preempted, by federal law and regulations, from compelling the ADP to pay for such expenses with the full non-federal ratio for administrative and generic voter drive expenses as determined by the ballot composition ratio, or to pay for such expenses that utilizes any other mandated ratio that would be inconsistent with the flexibility to pay such expenses consistent with this request.

5) The ADP is not requesting preemption for disbursements for fundraising or direct candidate support expenditures.

DISCUSSION

APOC Comments

The ADP has reviewed the comments filed by APOC and believes that the comments filed by APOC further demonstrate why preemption is appropriate in this matter.

Preemption

As a threshold matter, the ADP disagrees with APOC's contention that preemption is not appropriate in this case. APOC contends that "neither 11 C.F.R. § 106.5 nor its underlying statute expressly state that state law is preempted. Therefore, there is no explicit preemption of state law." APOC comments of September 20, 2000, page 6. This is simply untrue. The FEC's allocation regulations at 11 C.F.R. § 106.5 were promulgated pursuant to 2 U.S.C. § 441b, as well as a federal court order. Common Cause v. Federal Election Commission, 692 F.Supp. 1391 (D.D.C. 1987). [1] Accordingly, the FEC's allocation regulations were a direct outgrowth of a

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1 It should be noted that Common Cause, in this lawsuit, attempted to prohibit the use of any non-federal funds for administrative expenses by party committees.

judicial determination that FEC Advisory Opinions which permitted reasonable estimates of the allocation of federal and non-federal funds were not in compliance with the Act.

Furthermore, "the Act states that its provisions and the rules prescribed thereunder "supercede and preempt any provision of State law with respect to election to Federal office."" FEC Advisory Opinion 2000-23, citing 2 U.S.C § 453 (emphasis added). In this opinion, the Commission continued that:

> The House committee that drafted the provision [2 U.S.C. § 453] explains its meaning in sweeping terms, stating that it is intended "to make certain that 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 and that the Federal law will be the sole authority under which elections will be regulated." *H.R/ Rep. No. 93-1239, 93d Cong., 2d Sess. (1974).*
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> The Commission concluded:
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> As the legislative history of 2 U.S.C. § 453 shows, "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing...for election to Federal office." FEC Advisory Opinion 2000-23.

With respect to 11 C.F.R. § 106.5, the Commission has previously ruled that a state would be preempted from requiring a state party committee to pay a portion of its administrative expenses from a non-federal account. FEC Advisory Opinion 1993-17.[2]

Finally, APOC suggests that the FEC would not purposefully preempt more restrictive state contribution limits. To ascribe to this view would serve to completely eviscerate the FECA's preemption clause and would validate any state's attempt to further restrict contribution and expenditure limits for federal candidates and committees.

Policy Issues

Alaska election law is more restrictive the federal election law

While the Commission's consideration of this opinion cannot turn on whether Alaska law is more restrictive than state law, APOC's contention that Alaska law is more restrictive than federal law, while probably true as a technical matter, should not be of a practical concern for

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2 For a full discussion of the ADP's position regarding preemption of allocable expenditures please consult our original Advisory Opinion Request of August 30, 2000.

APOC. Both federal and Alaska law prohibit corporations and unions from making contributions to party committees. Also, individual contributions are limited to $5,000 per calendar year, the same limit as federal law. The only practical difference between federal and Alaska law is that there is a 10% cap in the amount of funds that Alaska party committees may accept from out-of-state non-federal sources.[3]

Indeed, the reason that the ADP is seeking this advisory opinion is due to the fact that almost every dollar this it raises is compliant with both federal and state election laws. As a general matter, the ADP fundraising is targeted to low-dollar direct mail and telemarketing contributors. All of this fundraising is targeted strictly to Alaska residents. Furthermore, to the extent that the ADP raises funds through events, such events are usually low-dollar events, and are conducted within the state of Alaska. In fact, it is very rare for the ADP to receive contributions from any source that would exceed $5,000 in a calendar year. A much rarer occasion is the receipt of a contribution from a non-Alaska resident. Accordingly, the only source of out-of-state funds for the ADP would be from its affiliated national party committees.[4] As of this date, the ADP has not received, other than proceeds of joint fundraising activities raised from Alaska residents, any federal funds from any national party committee during the 2000 election cycle.

Accordingly, APOC's concern that this opinion will permit the ADP to subsidize its non-federal activity by using exclusively federal funds for administrative expenses is unfounded.

Selection of a Split

In its comments, APOC request that the ADP select a good faith allocation ratio that reflects support for federal and non-federal funds for candidates. Indeed, this position alone cries out for preemption in this case.

First, this approach is precisely the one that was rejected by the court in Common Cause and, ultimately, the Commission in its promulgation of 11 C.F.R. § 106.5. 55 Fed. Reg. 26058

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3 Although the out-of-state limit's constitutionality has been challenged, the limit has been upheld by the Alaska Supreme Court in State v. Alaska Civil Liberties Union, 978 P.2d 597 (Alaska 1999), cert. denied 120 S. Ct. 1156 (2000). However, two federal courts have ruled out-of-state limitations unconstitutional. Vannatta v. Keisling, 151 F.3d 1215 (9th Cir. 1998), cert. denied 119 S.Ct. 870 (1999); Landell v. Sorell, Docket No. 2:99-cv-146 (D.Vt. August 10, 2000). See also Whitmore v. FEC, 68 F.3d 1212 (9th Cir. 1995).

4 It should be noted that non-federal contributions from national party committees are subject to the 10% out-of-state limit. See APOC Advisory Opinion 97-08-CD.

(June 26, 1990). Thus, in promulgating this regulation, the Commission specifically rejected the "reasonable methods" approach of allocation to provide for a uniform methodology of determining the minimum amount of federal funds required for administrative and generic voter-drive expenses for state party committees.

Second, in the event that the ADP determines that the actual support for federal candidates is lower, as a percentage of total candidate support, than the federal ratio as determined by the ballot composition ration, it appears that APOC could compel ADP to spend less federal funds than the ratio requires. This would result in the ADP's violation of federal law.

Third, to the extent that the ADP is compelled to utilize the exact federal portion for administrative and generic voter drive expenses in accordance with the ballot composition ratio, the ADP would become paralyzed since it would be forced to separately raise at least three non-federal dollars in order to spend two federal dollars on such disbursements. To be sure, the FEC mandates that all expenditures for administrative and generic voter drive expenses be paid for from a federal account, and that all transfers of non-federal funds be transferred within a seventy day window. Unless the ADP is granted relief by the FEC from transferring funds within this window, the ADP would be unable to make any administrative or generic voter drive expenditures until the appropriate mix of funds were in both its federal and non-federal accounts. Furthermore, if the ADP were required to deposit its funds in such a way to comply with a mandated formula it would have to randomly select federally permissible contributions, at its own discretion, to deposit into its non-federal account in order to meet the mandated allocation formula. Such a practice appears to undermine the FEC's regulations at 11 C.F.R. § 102.5(a)(2) & (3). In the alternative, the ADP would be required to conduct all of its fundraising activity as joint fundraising between its federal and non-federal accounts to ensure that it had enough non-federal funds to meet the mandated formula. Such fundraising activity would add untold layers of complexity to the ADP's compliance systems and would require that each contribution be split between its federal and non-federal accounts.

Federal Account used to Influence Non-Federal Elections

In its comments, APOC argues that the ADP should not be permitted to use its federal account to influence non-federal elections. Accordingly, APOC's premise is based on the incorrect belief that administrative and generic voter-drive expenses should be considered contributions or expenditures on behalf of specific non-federal candidates. This is simply untrue. Administrative and generic expenses are defined by the FEC to include only those ordinary administrative and get-out-the-vote activities that are not considered to directly benefit or influence any specific candidate's election for office. See 11 C.F.R. § 106.1. It is was with APOC's concern in mind that the ADP did not request preemption for fundraising and direct

candidate support, since it is clear that such activities have a direct relationship to non-federal accounts and elections.

Conclusion

The case for preemption in this matter is clear and compelling. During the process of promulgating the allocation regulations, the FEC acknowledged that the use of non-federal funds for administrative expenses was permissive and not mandatory. Indeed, the ballot allocation ratio merely sets a minimum percentage of federal funds that a state party must utilize for administrative and generic voter drive expenses and does not provide for a strict formula for the allocation of such expenses. This view was affirmed by the Commission in Advisory Opinion 1993-17 and should be reaffirmed in this matter.[5] It is the ADP's understanding that numerous state party committees do not allocate the non-federal portion of its administrative and voter-drive expenses to the fullest extent permitted by the Commission's rules. In fact, some have abandoned allocation completely. The ADP merely requests that it be permitted, as all other party committees may, and as the Commission permitted in Advisory Opinion 1993-17, to have the flexibility to forego the complete allocation of the non-federal portion of administrative and generic voter drive expenses when cash flow and fundraising conditions preclude it from doing so.

If you have any further questions or concerns, do not hesitate to contact me at (202) 543-7680.

Sincerely yours,

Neil Reiff
Counsel to the Alaska Democratic Party

5 APOC attempts to distinguish this Advisory Opinion Request from 1993-17 by distinguishing its position on the issues from those of the Massachusetts election authorities. However, none of these distinctions asserted by APOC were germane to the ultimate disposition of AO 1993-17, nor would they lead to a different result in this matter.