AGENDA DOCUMENT NO. 00-110

FEDERAL ELECTION COMMISSION

Washington, DC 20463

October 26, 2000

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-02-00

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan Levin
Senior Attorney

SUBJECT: Draft AO 2000-24 - Alternative Drafts

Attached are two proposed drafts of the subject advisory opinion. We request that both drafts be placed on the agenda for November 2, 2000.

These drafts address the question of the application of the preemption provisions of the Act and regulations to a State election agency's restrictions on a State party with respect to the allocation of administrative and generic voter drive expenses. Specifically, the Alaska Democratic Party asks the Commission to conclude that the State of Alaska is preempted from imposing any requirement that would limit the amount of Federal funds that it uses to pay for administrative and generic voter drive expenses, including any APOC requirement that would prevent ADP from using only Federal funds (i.e., 100% Federal/0% non-Federal) for such expenses.

The Preemption Draft concludes that the Act and regulations preempt the State requirement because the allocation regulations provide the flexibility for party committees to use up to 100 percent Federal funds for allocable administrative and generic voter drive activities, and Federal law occupies the field for such mixed activities. This approach is similar to that taken in Advisory Opinion 1993-17, where the Commission concluded that a

State was preempted from requiring a State party to use the full amount of non-Federal points allowed by the regulations for such expenses.

The Non-Preemption Draft concludes that the Act and regulations do not preempt the State requirement, so long as the State does not interfere with the use of funds from the Federal account in accordance with the minimum requirements of 11 CFR 106.5. The draft states that the Act and regulations occupy the field, but that the allocation regulations specifically delineate a part of the field for the States and localities. Consistent with those conclusions, the draft states that Advisory Opinion 1993-17 is superseded to the extent that it preempted State power from requiring that a State party use certain non-Federal offices (allowed, but not mandated, by Commission regulations) in the ballot composition formula.

This office recommends adoption of the Non-Preemption Draft. That draft reaches conclusions that are consistent with the recognition, in the allocation regulations, of the benefits provided by allocable expenses to non-Federal candidates and committees. The draft is written in a way that preserves the Commission's regulatory options but recognizes the States' role in the regulation of non-Federal election activities.

Attachments

ADVISORY OPINION 2000-24 **PREEMPTION DRAFT**

Neil Reiff
Sandler & Reiff
6 E Street, S.E.
Washington, D.C. 20003

Dear Mr. Reiff:

This responds to your letters dated August 30 and October 6, 2000, on behalf of the Alaska Democratic Party ("ADP"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation of ADP's expenditures for mixed Federal and non-Federal activities and whether the Act would preempt a State's restrictions on ADP with respect to allocation.

For the 1999-2000 election cycle, ADP has disclosed that its allocation percentages for disbursements to finance activities that influence both Federal and non-Federal elections is 40% Federal and 60% non-Federal.[1] You state that "new Alaska contribution restrictions make it difficult" for ADP to raise funds for its non-Federal account, and, as a consequence, ADP raises substantially more funds for its Federal account than for its non-Federal account. Alaska's revised (in 1997) campaign finance statute provides for contribution limits and prohibitions for non-Federal activity that are more restrictive in some respects than the Act's limits and other provisions governing contributions made to influence Federal elections.[2] Although ADP would prefer to make payments reflecting its stated allocation percentages throughout the cycle, cash flow

[1] ADP has made this disclosure on its Schedule H1 (the Commission disclosure form showing the point allocation and percentage for ballot composition) which indicates an allocation of two Federal points and three non-Federal points. ADP designated one point each for U.S. President and U.S. Congress and one point each for State Senate, State Representative, and an extra non-Federal point. No points were allocated for local candidates.

[2] These more restrictive provisions include the following: (1) a "group" (which is essentially an Alaskan political committee) that is not a political party may contribute no more than $1,000 per year to another group or political party. Alaska Statutes ("AS") §15.13.070(c)(2); (2) a corporation, company, partnership, firm, association, organization, business trust or surety, labor union, or public funded entity that does not satisfy the definition of a group may not contribute to Alaskan candidates or groups, including political parties. AS §15.13.074(f); and (3) a group or political party may not accept more than ten percent of its total contributions during the calendar year from individuals that are not Alaska residents. AS §15.13.072(f).

considerations, as well as the requirement in Commission regulations that all allocation transfers be made no earlier than ten days before or later than sixty days after a disbursement, may not allow ADP to fully avail itself of the right to transfer the appropriate portion of non-Federal funds for each disbursement. *See* 11 CFR 106.5(g)(2)(ii)(B). Hence, although ADP has selected a ballot composition formula for such payments within the requirements of the Commission regulations, it has been utilizing funds from its Federal account in amounts significantly greater than the 40% Federal percentage.

ADP has engaged in discussions with the Alaska Public Offices Commission ("APOC"), which is the State of Alaska's agency for campaign finance regulation, about the Federal/non-Federal allocation of administrative and generic voter drive activity. APOC states that, because most of ADP's activity is non-Federal activity, some portion of its administrative and generic voter drive activity should be paid for with funds subject to the limits and prohibitions of Alaska law. APOC takes the position that funds in compliance with only Federal law, but not the more restrictive Alaska law, may not be used for non-Federal purposes. APOC has not asked ADP to select a Federal percentage that falls below 40% (the amount resulting from the ballot composition formula described in Commission regulations), nor has it specified any precise allocation percentage. Instead, APOC states that it will accept an allocation percentage that ADP determines, in good faith, to represent non-Federal funds for use in support of non-Federal activity and Federal funds in support of Federal activity, and it asks that ADP make payments accordingly.[3] APOC also states that if ADP ever determines in good faith that there is any change in the proportion of administrative and generic voter drive expenses supporting Federal and State activity, it may change the allocation. Because ADP expends Federal contributions to pay most of the administrative and generic voter drive expenses, APOC issued a letter to ADP to the effect that it must use funds that meet the

[3] APOC states that, for example, if ADP determines that their generic voter drives actually affect more Federal candidates than non-federal candidates, then their overall allocation percentage should reflect that.

requirements of Alaska law for activities conducted with respect to non-Federal elections.[4]

To the extent that cash flow considerations preclude the transfer of non-Federal funds within the 70-day window, ADP wishes the Commission to confirm that it may forego the option of making such transfers for all or part of the non-Federal portion of a administrative or generic voter drive expense, and thereby pay more than 40% of its allocable expenses with Federal account funds or even pay all such expenses with Federal funds. Accordingly, ADP asks the Commission to conclude that the Act and Commission regulations preempt any requirement imposed by APOC that would limit the amount of Federal account funds that it uses to pay for administrative and generic voter drive expenses, including any APOC requirement that would prevent ADP from using only Federal account funds for administrative and generic voter drive activity.[5]

ADP bases its request, in part, on the Commission's analysis and conclusion in Advisory Opinion 1993-17. In that opinion, the Commission concluded that the Act and Commission regulations preempted a State agency interpretation requiring a State party to include certain non-Federal points in its ballot composition formula, even when the State agency was not directing the party to adopt an allocation percentage that was contrary to the Federal allocation regulations.

The Commission's response to your question depends upon its interpretation of the regulations pertaining to the Federal/non-Federal division of allocable expenses, whether the regulations provide flexibility for the State party committee to use more Federal funds than the percentages derived from the regulations, and whether the Act or

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[4] This summary of APOC's position is derived from its letters dated September 20 and 21, 2000, which are comments on ADP's request. APOC also states that it does not necessarily require ADP to pay for the expenses allocable to non-Federal activity out of a non-Federal account. If the funds used are derived from contributions that meet the requirements of Alaska law, they would be permissible, even if they came from a Federal account.

[5] You state that ADP is not requesting preemption for disbursements for the direct costs of a fundraising program where Federal and non-Federal funds are collected by one committee through such program or event; and party committee activities exempt from the definition of contribution and expenditure under specific regulatory sections because "it is clear that such activities have a direct relationship to non-federal accounts and elections." 11 CFR 106.5(a)(2)(ii) and (iii). See footnote 6.

You observe that almost all the funds raised by both the Federal and non-Federal accounts of ADP are within the limits and prohibitions of Alaska law. Nevertheless, the Federal account might still raise funds

State law controls as to the ability of a committee to use more Federal account funds than the minimum provided for in the regulations.

Applicable Regulations on Allocation

Commission regulations at 11 CFR 106.5 provide that party committees that make disbursements in connection with Federal and non-Federal elections "shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5," which provides for the establishment of Federal and non-Federal accounts. 11 CFR 106.5(a) and 102.5(a).

Party committees that establish separate Federal and non-Federal accounts shall allocate specific categories of expenses between those two accounts according to section 106.5. Two of these categories are: (1) administrative expenses, including rent, utilities, office supplies, and salaries, except for expenses directly attributable to a clearly identified candidate; and (2) expenses for generic voter drives including voter identification, voter registration, and get-out-the-vote-drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue without mentioning a specific candidate.[6] 11 CFR 106.5(a)(2)(i) and (iv).

Commission regulations provide that state party committees with separate Federal and non-Federal accounts shall allocate their administrative expenses and generic voter drive costs between those accounts using the "ballot composition method." This method is based on the ratio of Federal offices to total Federal and non-Federal offices expected on the ballot in the state's next general election. 11 CFR 106.5(d)(1)(i). The ballot composition ratio is determined at the start of each two-year Federal election cycle, in accordance with a point system set out in 11 CFR 106.5. The offices of President, United States Senator, and United States Representative count as one Federal point each, and the

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that would not be permissible under Alaska law. You note, for example, that, under Alaska law, non-Federal contributions from national party committees are subject to the ten percent out-of-state limit.

[6] The other two types of expenses are: (1) direct costs of a fundraising program where Federal and non-Federal funds are collected by one committee through such program or event; and (2) State and local party activities exempt from the definition of contribution and expenditure under 11 CFR 100.7(b)(9), (15), or (17), and 100.8(b)(10), (16), or (18) where such activities are conducted in conjunction with non-Federal activities. 11 CFR 106.5(a)(2)(ii) and (iii).

offices of Governor, State Senator, and State Representative count as one non-Federal point each, if expected on the ballot in the next general election. If other partisan statewide executive candidates will be on the ballot, these offices count as no more than two non-Federal points in the ratio. Similarly, if any partisan local offices are expected on the ballot in any regularly scheduled election during the two-year cycle, these offices count as one non-Federal point. Finally, the rules also allow state parties to include an additional, generic non-Federal point. 11 CFR 106.5(d)(1)(ii).

Commission regulations also provide that committees with separate Federal and non-Federal accounts shall pay their allocable expenses in one of two ways. 11 CFR 106.5(g)(1). The committee can pay the entire amount of an expense (e.g., a billed amount) from its Federal account and transfer funds from its non-Federal account to its Federal account solely to cover the non-Federal share of the allocable expense. 11 CFR 106.5(g)(1)(i). In the alternative, the committee can establish a separate allocation account into which funds from its Federal account and its non-Federal account will be deposited solely for the purpose of paying the allocable expenses of mixed Federal and non-Federal activity. Funds from the Federal and non-Federal account will be transferred in amounts proportionate to the Federal and non-Federal share of each allocable expense. Once a committee has established a separate allocation account, all allocable expenses must be paid from that account so long as the account is maintained. Furthermore, no funds maintained in this account may be transferred to any other account or committee. 11 CFR 106.5(g)(1)(ii). Under either option, the committee must transfer funds from its non-Federal account to its Federal account, or from its Federal and non-Federal account to the separate allocation account, no more than 10 days before or more than 60 days after the bills for those activities are paid.

Partially Discretionary Nature of Allocation

The Commission notes that the regulations use the phrase "shall" in explaining the requirements pertaining to allocation. For example, the general rules for allocation state that political committees that have established Federal and non-Federal accounts "shall allocate expenses between those accounts" according to 11 CFR 106.5. 11 CFR 106.5(a)(1). In discussing the computation of the ballot composition formula, at 11 CFR

106.5(d)(1)(ii), Commission regulations use the phrase "shall" in stating which offices are to be used and how many points are to be assigned; for example, "The committee shall count the offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each." The word "shall" carries the presumption that it is used in the imperative. On its face, this suggests that the rules require party committees to use the exact ballot offices and the exact percentage of Federal and non-Federal funds derived from the use of the offices, i.e., no more and no less than the specified amount of both Federal and non-Federal funds.

Significantly, however, when the Commission promulgated comprehensive regulations on allocation in March 1990, it explained a general principle underlying the allocation regulations, as follows:

> One of the alternatives described in the Notice of Proposed Rulemaking offered committees the option of defraying the total cost of an allocable activity with funds raised under federal law. This option has been retained in paragraph 106.5(a)(1) reflecting the Commission's 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.

Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058, 26063 (June 26, 1990).

Moreover, the Explanation and Justification in 1990 and in 1992 indicated that such points were not mandatory. *Id.*, at 26064; *Allocation of Federal and Non-Federal Expenses*, 57 Fed. Reg. 8990, 8991 (March 13, 1992). The Explanation and Justifications used terms such as "may be counted," "may add," "may also include," and "allow" in providing for the use of specific non-Federal office categories.

Based on the language of the two Explanation and Justifications, the Commission concluded, in Advisory Opinion 1993-17, that the allocation regulations

> impose a floor on Federal points and a ceiling on non-federal points. A state party committee may take the highest number of non-Federal points allowable and must take the minimum number of Federal points that are

required. A state party committee that proposes to apply a ratio entailing a higher Federal percentage may do so.

This concept of a floor on Federal points and a ceiling on non-Federal points is derived in part from the general principle of allocation expressed above; that is, the Federal portion calculated by using the ballot composition formula represents the minimum amount "to be paid" from the Federal account, and does not preclude the payment of a higher percentage with Federal funds. This indicates that, despite the fact that a committee has computed a specific ballot composition formula for administrative and generic voter drive expenses applicable for the entire election cycle, it is not precluded by the Commission regulations from paying for particular expenses with a higher percentage of Federal funds, or with only Federal funds.[7]

Federal Preemption of State 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; 11 CFR 108.7(a). The House committee that drafted this provision explains its meaning in sweeping terms, stating that it is 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

[7] The Commission notes that, if a committee chooses to pay a higher Federal share for any particular administrative or generic party expense than is provided for in its ballot composition formula presented on Schedule H1, it may not make adjustments in other administrative or generic voter drive disbursements, entailing a payment below the formula's Federal percentage, to "recapture" the difference between the

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.[8]

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on State law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, *Explanation and Justification*, House Document No. 95-44, at 51; 11 CFR 108.7(b).[9] 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." Advisory Opinions 2000-23, 1999-12, and 1988-21.

By their very nature, the allocable expenses of a State party committee, as distinguished from funds raised for and spent solely for the support of a non-Federal candidate, are inextricably intertwined with, and affect, Federal election activity. Consequently, the Commission, through its regulations, has asserted broad authority with regard to allocable expenses. For example, in addition to setting the maximum amount of non-Federal funds that may be used for allocable expenses, Commission regulations provide that the full amount of such expenses must be disclosed at the Federal level,

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higher Federal amount paid for the first expense and the amount that would exactly reflect the Federal percentage in the formula.

[8] 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.

[9] 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.

along with the allocation formulas used and an explanation of the transfers from the non-Federal account. *See* 11 CFR 104.10.

As indicated above, the Commission's allocation regulations were clearly designed to allow affected committees the flexibility to pay for more than the minimum Federal share of allocable expenses with funds raised under the Federal restrictions. Moreover, as stated in Advisory Opinion 1993-17, the Commission recognized that the allocation rules would impose more Federal responsibilities on committees (for example, the need to disclose even the non-Federal share of disbursements), and the Commission intended to leave committees with the option of paying the allocable expenses in a way that is less burdensome if they so choose. In providing this flexibility, the Commission was acting within its authority to regulate in the Federal field and asserting the regulations' occupation of the field..

A requirement imposed by APOC that would force ADP to use a certain percentage of non-Federal funds for an allocable administrative or generic voter drive expense, therefore, would be preempted by the Act and Commission regulations. This includes any requirements that would compel ADP to use any non-Federal funds for such an expense. Such requirements would entail the exercise of authority by the State in an area that Commission regulations intended should remain subject to the discretion of the party committee.

The Commission notes that its conclusion as to preemption applies to the specific request and dispute in question. It does not address the application of preemption to ADP's disbursements for allocable direct fundraising costs or exempt activities. (*See* footnote 6.) Those subjects may entail additional considerations not analyzed in this opinion.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Darryl R. Wold
Chairman

Enclosures (AOs 2000-23, 1999-12, 1993-17, and 1988-21)

ADVISORY OPINION 2000-24 **NO PREEMPTION DRAFT**

Neil Reiff
Sandler & Reiff
6 E Street, S.E.
Washington, D.C. 20003

Dear Mr. Reiff:

This responds to your letters dated August 30 and October 6, 2000, on behalf of the Alaska Democratic Party ("ADP"), requesting an advisory opinion concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the allocation of ADP's expenditures for mixed Federal and non-Federal activities and whether the Act would preempt a State's restrictions on ADP with respect to allocation.

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[2] These more restrictive provisions include the following: (1) a "group" (which is essentially an Alaskan political committee) that is not a political party may contribute no more than $1,000 per year to another group or political party. Alaska Statutes ("AS") §15.13.070(c)(2); (2) A corporation, company, partnership, firm, association, organization, business trust or surety, labor union, or public funded entity that does not satisfy the definition of a group may not contribute to Alaskan candidates or groups, including political parties. AS §15.13.074(f); and (3) A group or political party may not accept more than ten percent of its total contributions during the calendar year from individuals that are not Alaska residents. AS §15.13.072(f).

transfers be made no earlier than ten days before or later than sixty days after a disbursement, may not allow ADP to fully avail itself of the right to transfer the appropriate portion of non-Federal funds for each disbursement. *See* 11 CFR 106.5(g)(2)(ii)(B). Hence, although ADP has selected a ballot composition formula for such payments within the requirements of the Commission regulations, it has been utilizing funds from its Federal account in amounts significantly greater than the 40% Federal percentage.

ADP has engaged in discussions with the Alaska Public Offices Commission ("APOC"), which is the State of Alaska's agency for campaign finance regulation, about the Federal/non-Federal allocation of administrative and generic voter drive activity. APOC states that, because most of ADP's activity is non-Federal activity, some portion of its administrative and generic voter drive activity should be paid for with funds subject to the limits and prohibitions of Alaska law. APOC takes the position that funds in compliance with only Federal law, but not the more restrictive Alaska law, may not be used for non-Federal purposes. APOC has not asked ADP to select a Federal percentage that falls below 40% (the amount resulting from the ballot composition formula described in Commission regulations), nor has it specified any precise allocation percentage. Instead, APOC states that it will accept an allocation percentage that ADP determines, in good faith, to represent non-Federal funds for use in support of non-Federal activity and Federal funds in support of Federal activity, and it asks that ADP make payments accordingly.[3] APOC also states that if ADP ever determines in good faith that there is any change in the proportion of administrative and generic voter drive expenses supporting Federal and State activity, it may change the allocation. Because ADP expends Federal contributions to pay most of the administrative and generic voter drive expenses, APOC issued a letter to ADP to the effect that it must use funds that meet the requirements of Alaska law for activities conducted with respect to non-federal elections.[4]

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[3] APOC states that, for example, if ADP determines that their generic voter drives actually affect more Federal candidates than non-federal candidates, then their overall allocation percentage should reflect that.

[4] This summary of APOC's position is derived from its letters dated September 20 and 21, 2000, which are comments on ADP's request. APOC also states that it does not necessarily require ADP to pay for the expenses allocable to non-Federal activity out of a non-Federal account. If the funds used are derived from contributions that meet the requirements of Alaska law, they would be permissible, even if they came from a Federal account.

To the extent that cash flow considerations preclude the transfer of non-Federal funds within the 70-day window, ADP wishes the Commission to confirm that it may forego the option of making such transfers for all or part of the non-Federal portion of a administrative or generic voter drive expense, and thereby pay more than 40% of its allocable expenses with Federal account funds or even pay all such expenses with Federal funds. Accordingly, ADP asks the Commission to conclude that the Act and Commission regulations preempt any requirement imposed by APOC that would limit the amount of Federal account funds that it uses to pay for administrative and generic voter drive expenses, including any APOC requirement that would prevent ADP from using only Federal account funds for administrative and generic voter drive activity.[5]

ADP bases its request, in part, on the Commission's analysis and conclusion in Advisory Opinion 1993-17. In that opinion, the Commission concluded that the Act and Commission regulations preempted a State agency interpretation requiring a State party to include certain non-Federal points in its ballot composition formula, even when the State agency was not directing the party to adopt an allocation percentage that was contrary to the Federal allocation regulations.

The Commission's response to your question depends upon its interpretation of the regulations pertaining to the Federal/non-Federal division of allocable expenses, whether the regulations provide flexibility for the State party committee to use more Federal funds than the percentages derived from the regulations, and whether the Act or State law controls as to the ability of a committee to use more Federal account funds than the minimum provided for in the regulations.

[5] You state that ADP is not requesting preemption for disbursements for the direct costs of a fundraising program where Federal and non-Federal funds are collected by one committee through such program or event; and party committee activities exempt from the definition of contribution and expenditure under specific regulatory sections because "it is clear that such activities have a direct relationship to non-federal accounts and elections." 11 CFR 106.5(a)(2)(ii) and (iii). See footnote 6. You observe that almost all the funds raised by both the Federal and non-Federal accounts of ADP are within the limits and prohibitions of Alaska law. Nevertheless, the Federal account might still raise funds that would not be permissible under Alaska law. You note, for example, that, under Alaska law, non-Federal contributions from national party committees are subject to the ten percent out-of-state limit.

Applicable Regulations on Allocation

Commission regulations at 11 CFR 106.5 provide that party committees that make disbursements in connection with Federal and non-Federal elections "shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5," which provides for the establishment of Federal and non-Federal accounts. 11 CFR 106.5(a) and 102.5(a).

Party committees that establish separate Federal and non-Federal accounts shall allocate specific categories of expenses between those two accounts according to section 106.5. Two of these categories are: (1) administrative expenses, including rent, utilities, office supplies, and salaries, except for expenses directly attributable to a clearly identified candidate; and (2) expenses for generic voter drives including voter identification, voter registration, and get-out-the-vote-drives, or any other activities that urge the general public to register, vote, or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.[6] 11 CFR 106.5(a)(2)(i) and (iv).

Commission regulations provide that state party committees with separate Federal and non-Federal accounts shall allocate their administrative expenses and generic voter drive costs between those accounts using the "ballot composition method." This method is based on the ratio of Federal offices to total Federal and non-Federal offices expected on the ballot in the state's next general election. 11 CFR 106.5(d)(1)(i). The ballot composition ratio is determined at the start of each two-year Federal election cycle, in accordance with a point system set out in 11 CFR 106.5. The offices of President, United States Senator and United States Representative count as one Federal point each, and the offices of Governor, State Senator and State Representative count as one non-Federal point each, if expected on the ballot in the next general election. If other partisan statewide executive candidates will be on the ballot, these offices count as no more than two non-Federal points in the ratio. Similarly, if any partisan local offices are expected

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on the ballot in any regularly scheduled election during the two-year cycle, these offices count as one non-Federal point. Finally, the rules also allow state parties to include an additional, generic non-Federal point. 11 CFR 106.5(d)(1)(ii).

Commission regulations also provide that committees with separate Federal and non-Federal accounts shall pay their allocable expenses in one of two ways. 11 CFR 106.5(g)(1). The committee can pay the entire amount of an expense (e.g., a billed amount) from its Federal account and transfer funds from its non-Federal account to its Federal account solely to cover the non-Federal share of the allocable expense. 11 CFR 106.5(g)(1)(i). In the alternative, the committee can establish a separate allocation account into which funds from its Federal account and its non-Federal account will be deposited solely for the purpose of paying the allocable expenses of mixed Federal and non-Federal activity. Funds from the Federal and non-Federal account will be transferred in amounts proportionate to the Federal and non-Federal share of each allocable expense. Once a committee has established a separate allocation account, all allocable expenses must be paid from that account so long as the account is maintained. Furthermore, no funds maintained in this account may be transferred to any other account or committee. 11 CFR 106.5(g)(1)(ii). Under either option, the committee must transfer funds from its non-Federal account to its Federal account, or from its Federal and non-Federal account to the separate allocation account, no more than 10 days before or more than 60 days after the bills for those activities are paid.

Partially Discretionary Nature of Allocation

The Commission notes that the regulations use the phrase "shall" in explaining the requirements pertaining to allocation. For example, the general rules for allocation state that political committees that have established Federal and non-Federal accounts "shall allocate expenses between those accounts" according to 11 CFR 106.5. 11 CFR 106.5(a)(1). In discussing the computation of the ballot composition formula, at 11 CFR 106.5(d)(1)(ii), Commission regulations use the phrase "shall" in stating which offices are to be used and how many points are to be assigned; for example, "The committee shall count the offices of Governor, State Senator, and State Representative, if expected on the ballot in the next general election, as one non-federal office each." The word

"shall" carries the presumption that it is used in the imperative. On its face, this suggests that the rules require party committees to use the exact ballot offices and the exact percentage of Federal and non-Federal funds derived from the use of the offices, i.e., no more and no less than specified amount of both Federal and non-Federal funds.

Significantly, however, when the Commission promulgated comprehensive regulations on allocation in March 1990, it explained a general principle underlying the allocation regulations, as follows:

> One of the alternatives described in the Notice of Proposed Rulemaking offered committees the option of defraying the total cost of an allocable activity with funds raised under federal law. This option has been retained in paragraph 106.5(a)(1) reflecting the Commission's 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.

Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting, 55 Fed. Reg. 26058, 26063 (June 26, 1990).

Moreover, the Explanation and Justification in 1990 and in 1992 (when the allocation regulations were revised) indicated that use of the term "shall" did not mean that the assignment of points to various non-Federal offices was mandatory. *Id.* at 26064; *Allocation of Federal and Non-Federal Expenses*, 57 Fed. Reg. 8990, 8991 (March 13, 1992). The Explanation and Justifications used terms such as "may be counted," "may add," "may also include," and "allow" in providing for the use of specific non-Federal offices.

Based on the language of the two Explanation and Justifications, the Commission concluded, in Advisory Opinion 1993-17, that the allocation regulations:

> impose a floor on Federal points and a ceiling on non-federal points. A state party committee may take the highest number of non-Federal points allowable and must take the minimum number of Federal points that are required. A state party committee that proposes to apply a ratio entailing a higher Federal percentage may do so.

This concept of a floor on Federal points and a ceiling on non-Federal points is derived in part from the general principle of allocation expressed above; that is, the Federal portion calculated by using the ballot composition formula represents the minimum amount "to be paid" from the Federal account, and does not preclude the payment of a higher percentage with Federal funds. This indicates that, despite the fact that a committee has computed a specific ballot composition formula for administrative and generic voter drive expenses applicable for the entire election cycle, it is not precluded by the Commission regulations from paying for particular expenses with a higher percentage of Federal funds, or with only Federal funds.[7]

Federal Preemption of State 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; 11 CFR 108.7(a). The House committee that drafted this provision explains its meaning in sweeping terms, stating that it is 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.[8]

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[7] The Commission notes that, if a committee chooses to pay a higher Federal share for any particular administrative or generic party expense than is provided for in its ballot composition formula presented on Schedule H1, it may not reduce its payments, below the prescribed Federal percentage, for other administrative or generic voter drive expenses to "recapture" the difference between the higher Federal amount paid for an earlier expense and an amount that would match the Federal percentage in the formula.

[8] 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

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on State law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, *Explanation and Justification*, House Document No. 95-44, at 51; 11 CFR 108.7(b).[9] 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." Advisory Opinions 2000-23, 1999-12, and 1988-21.[10]

The flexibility of the allocation regulations in providing a floor on the amount that must be paid from the Federal account (without barring the payment of a higher amount therefrom) represents, in effect, a line drawn by the Commission. This line delineates the part of the field of Federal election spending that the Commission has presently chosen to occupy by the actual exercise of its authority to regulate in that field. The expenses addressed in section 106.5 are unique in that they pertain to inherently mixed activities,

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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.

[9] 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.*

[10] In applying and interpreting 2 U.S.C. §453 and 11 CFR 108.7, the Commission has been mindful that the preemptive powers of the Act and regulations pertain to Federal elections, and do not extend to the regulation of matters pertaining only to non-Federal elections. For example, the Commission has concluded that the Act would not preempt the application of State law to the transfer of funds from a Federal candidate's committee to his committee for election to non-Federal office with respect to any State limit on the amount of the transfer or the reporting of the transfer by the recipient non-Federal committee. Advisory Opinion 1986-5; *see also* Advisory Opinions 1993-10 and 1993-8. In other opinions, the Commission has expressly recognized the rights of States to require disclosure by a committee's non-Federal account of allocable receipts or disbursements by the Federal account for the purpose of raising funds for the non-Federal account. Advisory Opinions 1999-12 and 1986-27.

and the spending for such activities has both Federal and non-Federal election components. The significant presence of the Federal component and the flexibility allowing committees to spend at levels above the minimum Federal percentages indicate that the field occupied by the Act and regulations includes the full extent of the allocable expenses. Nevertheless, the regulations clearly recognize the benefit and value of such expenses with respect to non-Federal candidates and elections. *Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting*, 55 Fed. Reg., at 26058. Hence, the Commission allowed for the use of funds raised outside most of the prohibitions and limits of Act, under specified formulae or subject to specified minimum percentages, for a part of these expenses. The Commission therefore decided to draw the line at this time in a manner that allows States (and localities) to choose to restrict or otherwise regulate the expenses paid for administrative and generic voter drive activities, provided they do not encroach upon spending for allocable activities that falls within the purview of the mandatory minimum Federal percentage under the ballot composition rules at 11 CFR 106.5(d).[11]

Accordingly, the Commission concludes that the Act and Commission regulations would not preempt APOC from prohibiting ADP to use funds only from its Federal account to pay its administrative and generic voter drive costs. Commission regulations would not preempt APOC from requiring that ADP use non-Federal funds for such costs so long as ADP is not constrained from using funds in its Federal account in accordance with the Federal percentage derived from the ballot composition formula that is based on the use of all the Federal and non-Federal points that can lawfully be taken under 11 CFR 106.5 (i.e., the minimum required Federal percentage). The Act and regulations would also not preempt APOC from allowing ADP to pay for its administrative and generic voter drive costs using Federal account amounts above the minimum Federal percentage. The Act and regulations would, however, preempt APOC from requiring ADP to use

[11] This does not preclude the Commission from future revisions to its regulations to provide, for example, that a higher (or lower) minimum portion or percentage of the mixed expenses covered by 11 CFR 106.5 shall be allocable as Federal election activity.

more funds from its Federal account than is mandated by the minimum Federal percentage formula in Commission regulations.

In view of the analysis and conclusions of this opinion, which describe the areas in which the State may regulate allocable administrative and generic voter drive costs, the Commission concludes that Advisory Opinion 1993-17 is superseded to the extent that it preempts the assertion of a State's power to require the use of certain non-Federal offices in a State party's ballot composition formula where such use remains within the permissive range of the Commission's allocation regulations at 11 CFR 106.5.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,

Darryl R. Wold
Chairman

Enclosures (AOs 2000-23, 1999-12, 1993-17, 1993-10, 1993-8, 1988-21, 1986-27, and 1986-5)