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FEDERAL ELECTION COMMISSION  
Washington, DC 20463

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January 10, 2002

MEMORANDUM

**AGENDA ITEM**

For Meeting of: 01-17-02

TO: The Commission

THROUGH: James A. Pehrkon *JAP*  
Staff Director

FROM: Lawrence H. Norton  
General Counsel *LHN*

N. Bradley Litchfield  
Associate General Counsel *NBL*

Michael G. Marinelli *mm*  
Staff Attorney

SUBJECT: Draft AO 2001-19

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for January 17, 2002.

Attachment

1 **ADVISORY OPINION 2001-19**

2  
3 **Gary Kohut, Chair**  
4 **Oakland County Democratic Party**  
5 **P.O. Box 423**  
6 **Troy, MI 48099-0423**

**DRAFT**

7  
8  
9 **Dear Mr. Kohut:**

10  
11 **This refers to your letter dated November 1, 2001, as supplemented by letters of**  
12 **December 10 and 20, on behalf of the Oakland Democratic Campaign Committee ("the**  
13 **Committee") concerning the application of the Federal Election Campaign Act of 1971,**  
14 **as amended ("the Act"), and Commission regulations to the pre-emption of Michigan**  
15 **State law regarding the Committee's use of State bingo licenses to raise funds for Federal**  
16 **election campaigns.**

17 **You state that, as chair of the Committee, you seek advice to determine whether**  
18 **the Committee is prohibited by law from qualifying for a State bingo license. You**  
19 **indicate that the Committee is the Federal committee established by the Oakland County**  
20 **(MI) Democratic Party to receive and spend funds to influence Federal elections. You**  
21 **explain that, as part of its ongoing fundraising efforts, the Committee operates two bingos**  
22 **that were designated, as of October 17, 1995, as Federal bingos by the Michigan Bureau**  
23 **of State Lottery, which licenses bingos in Michigan.**

24 **A Michigan statute, passed in 1995, defines the qualifications an organization**  
25 **must satisfy to obtain a bingo license. 1995 PA 275, MCL 432.103 et seq. You explain**  
26 **that subsection 3(6) provides that:**

27 **Qualified organization does not include a candidate committee, political**  
28 **committee, political party committee, ballot question committee, independent**  
29 **committee, or any other committee as defined by, and organized pursuant to, the**

1 Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, being  
2 sections 169.201 to 169.282 of the Michigan Compiled Laws.

3  
4 You further state that the 1995 Michigan bingo statute was challenged in State  
5 court on constitutional and other grounds. The Michigan Court of Appeals upheld the  
6 statute and, on March 27, 2001, the Michigan Supreme Court denied an application for  
7 leave to appeal the Court of Appeals decision. *See, Reynolds v. Bureau of State Lottery,*  
8 *240 Mich. App. 84, 610 N.W.2d 597 (2000), leave to appeal denied, 624 N.W.2d 195*  
9 *(2001).* You note that on August 28, 2001 a motion for reconsideration was denied.

10 As a result of these events, the Michigan Bureau of State Lottery in a letter to you  
11 dated September 24, 2001, declared its intention to revoke the Committee's two bingo  
12 licenses, stating, in part:

13 According to records of the Bureau, the current and/or previous bingo license  
14 applications submitted by your organization indicate that it falls within the  
15 definition of a committee under the Michigan [statutes]. As a result of Act 275 of  
16 the Public Acts of 1995, such committees are no longer eligible for licensure  
17 under the Bingo Act.

18  
19 The Bureau scheduled an informal hearing for the Committee to demonstrate  
20 compliance. At the hearing, held October 19, the Committee argued that the Michigan  
21 statute did not apply because the Committee is organized under Federal, rather than State  
22 law. You explain that the Bureau has taken the matter under advisement and will  
23 probably issue a ruling by January 2002.<sup>1</sup>

24 In light of the above, you request that the Commission provide the Committee an  
25 opinion on the following questions:

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<sup>1</sup> You state that the Committee continues to rely heavily on bingo income to support its Federal election activities. You further explain that State officials informally advised you that the Bureau would permit the Committee to continue using bingos for its fundraising and would issue annual licenses permitting this activity until all appeals from adverse rulings are exhausted.

1 (1) As a committee that does not allocate receipts and expenditures between Federal and  
2 non-Federal activity, but rather has separate Federal and non-Federal committees, is the  
3 Committee, registered with the Federal Election Commission, "a 'committee' as defined  
4 by, and organized pursuant to, the Michigan campaign finance act, Act No. 388 of the  
5 Public Acts of 1976, being sections 169.201 to 169.282 of the Michigan Compiled  
6 Laws?"

7 (2) If so, does Federal law bar the application of the State bingo license prohibition to  
8 our Federal committee?

### 9 ACT AND COMMISSION REGULATIONS

10 The Act states that its provisions and the rules prescribed thereunder "supersede  
11 and preempt any provision of State law with respect to election to Federal office." 2  
12 U.S.C. §453; 11 CFR 108.7(a). The House committee that approved this provision  
13 explained its meaning in sweeping terms, stating that it is intended "to make certain that  
14 the Federal law is construed to occupy the field with respect to elections to Federal office  
15 and that the Federal law will be the sole authority under which such elections will be  
16 regulated." *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)*.<sup>2</sup> According to the  
17 Conference Committee report on the 1974 Amendments to the Act, "Federal law  
18 occupies the field with respect to criminal sanctions relating to limitations on campaign  
19 expenditures, the sources of campaign funds used in Federal races, the conduct of Federal  
20 campaigns, and similar offenses, but does not affect the States' rights" as to other election  
21 related conduct such as voter fraud and ballot theft. *H.R. Rep. No. 93-1438, 93d Cong.,  
22 2d Sess. 69 (1974)*. The Conference report also states that Federal law occupies the field  
23 with respect to reporting and disclosure of political contributions to and expenditures by

1 Federal candidates and political committees, but does not affect State laws as to the  
2 manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-101.

3 When the Commission promulgated regulations at 11 CFR 108.7 to clarify and  
4 explain the scope of the Act's preemption of State law, it stated that the regulations  
5 follow section 453 and that, specifically, Federal law supersedes State law with respect to  
6 the organization and registration of political committees supporting Federal candidates,  
7 disclosure of receipts and expenditures by Federal candidates and political committees,  
8 and the limitations on contributions and expenditures regarding Federal candidates and  
9 political committees. *Federal Election Commission Regulations, Explanation and*  
10 *Justification, House Document No. 95-44, at 51*; 11 CFR 108.7(b). In past opinions, the  
11 Commission has summarized the legislative history of 2 U.S.C. §453 as showing that  
12 "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that  
13 is the sole source of regulation of campaign financing . . . for election to Federal office."  
14 Advisory Opinions 2001-12, 2000-23 and 1999-12.

15 ***APPLICATION TO PARTY PROPOSAL***

16 In response to the first question posed in your inquiry, the determination as to  
17 whether the Committee falls under the definition of "committee," as set forth in the cited  
18 Michigan statute, is a matter to be decided by officials (including State courts) pursuant to  
19 the laws of Michigan, rather than by this Commission in exercising its powers pursuant to  
20 the Act or Commission regulations. Therefore, the Commission states no opinion with  
21 regard to your first question.

22 The Commission notes that the Act authorizes the Commission to issue an  
23 advisory opinion in response to a "complete written request" from any person with

1 respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a).  
2 The request must concern a specific transaction or activity that “the requesting person  
3 plans to undertake or is presently undertaking and intends to undertake in the future.” 11  
4 CFR 112.1(b). Inquiries presenting a general question of interpretation, or posing a  
5 hypothetical situation, or regarding the activities of third parties do not qualify as  
6 advisory opinion requests.

7 In the situation presented here, it is significant that State officials already have  
8 taken the position that, because the bingo statute “specifically prohibits the licensure of  
9 committees, your organization [Democratic Executive Committee, Oakland County] is no  
10 longer eligible to hold a bingo license.” Letter to Gary L. Kohut, dated September 24,  
11 2001, from State Licensing Director, Bureau of State Lottery. While this position  
12 remains on appeal and under review by higher level State officials, it does present a  
13 specific transaction or activity and one that is not hypothetical. The Committee continues  
14 to use bingo as a means of raising funds to influence Federal elections; however, there is  
15 a substantial risk that such activity may be held as prohibited by State authorities when  
16 final review and appeals are concluded. Thus, it is appropriate for the Commission to  
17 consider this inquiry as an advisory opinion request.

18 In response to your second question, the Commission concludes that the Act and  
19 Commission regulations do not bar the application of Michigan bingo license statutes to  
20 the activity and operations of the Committee.

21 The Commission has not previously considered the interaction of a State’s gaming  
22 laws with the Act’s preemption provisions. It notes, however, that the control of gaming

1 activity is a central feature of a State's regulatory authority, one that has been accorded  
2 explicit recognition elsewhere in the Commission's regulations. In particular, the  
3 separate segregated fund of a corporation or labor organization is permitted to use various  
4 fundraising and gaming devices such as raffles and others that involve a prize, but only  
5 "so long as State law permits" such use. 11 CFR 114.5(b)(2). The regulation does not  
6 exempt these fundraising events from the requirements of State law. This policy along  
7 with certain other differences in your circumstances, distinguishes the Committee's  
8 situation from several past opinions where the Commission concluded that the Act and  
9 Commission regulations would preempt and supersede State regulation of a Federal  
10 committee.

11 For example, the Commission has preempted State laws that purported to  
12 disqualify an entire class of potential contributors to Federal campaigns. *See* Advisory  
13 Opinion 2000-23 (prohibitions on contributions by party committees to Federal  
14 candidates prior to party nominations); *see also* Advisory Opinions 1995-48, 1993-25 and  
15 1989-12 (prohibitions on contributions by State lobbyists during a State legislative  
16 session to Federal candidates and prohibitions on contributions made by State lottery  
17 contractors to a U.S. Senate candidate). In the situation here, there is not total or absolute  
18 disqualification of a committee's fundraising ability. Nor is any specific group of  
19 prospective donors barred from making contributions. Instead, the statute reaches only  
20 one particular method of fundraising, bingo. Moreover, where a State law purported to  
21 bar a committee from using a fundraising method specifically sanctioned by Commission  
22 regulations, the Commission has preempted. *See* Advisory Opinion 1982-29  
23 (prohibitions on payroll deduction programs used by a corporation to facilitate voluntary

1 contributions by its restricted personnel to the corporation's separate segregated fund).  
2 The Commission notes that neither the Act nor Commission regulations specifically  
3 create a right to use bingo as a fundraising device. In Advisory Opinion 1990-6, the  
4 Commission preempted a State regulation prohibiting a corporation that sponsored a  
5 separate segregated fund (PAC) from making matching corporate donations to charities  
6 linked to an employee's contribution to the corporation's Federal PAC. However, the  
7 FECA-preempted State regulation addressed a very limited zone of activity that entailed  
8 only indirect and intangible inducements to persons who were solicited to make voluntary  
9 political contributions; it was not part of a State regulatory regime to license or control  
10 gaming ventures within the State.

11 Therefore, in light of the above and recognizing that final administrative and  
12 judicial review under State law is not yet completed, the Commission holds that pertinent  
13 sections of the Michigan Compiled Laws, to the extent they are construed to prohibit the  
14 Committee's use of bingo to raise funds for the purpose of influencing Federal elections,  
15 are not preempted or superseded by the Act or Commission regulations.

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

19 Sincerely,

20 David M. Mason  
21 Chairman  
22

23 Enclosures: (AOs 2001-12, 2000-23, 1999-12, 1995-48, 1993-25, 1990-6, 1989-  
24 12, and 1982-29)