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WASHINGTON, DC 20463

AGENDA ITEM

For Meeting of: 2-21-02

SUBMITTED LATE

MEMORANDUM

DATE: February 20, 2002

TO: Commissioners
Office of the General Counsel

FROM: Commissioner Darryl R. Wold DRW

RE: AOR 2002-02 (Maryland Lobbyist)

I am somewhat undecided about the proper response to this Advisory Opinion Request, but I do have substantial reservations about the analysis in the draft AO that is on the Commission's agenda for February 21. I would like some additional time to consider this matter further, so have asked the Chairman to postpone a vote on this matter until the Commission's meeting on February 28. In the meantime, however, I want to advise you of my concerns at this point and invite your comments at the meeting on February 21 or at any time later.

The draft AO concludes that the Maryland law that prohibits a registered lobbyist from soliciting or transmitting contributions to a member of the state legislature, or from serving on a committee supporting a member of the state legislature, is preempted by the Act to the extent it would impose those restrictions on the lobbyist's activity on behalf of the state legislator's candidacy for federal office.

The draft AO concludes, first, that the provisions of state law prohibiting the solicitation or transmittal of contributions are preempted by the provisions of the Act regulating "the sources of funds used in Federal races." The basis for this conclusion is presumably our regulation describing what the Act preempts, in 11 C.F.R. § 108.7. Subdivision (b)(3) provides that the Act preempts any provision of state law concerning the "Limitation on contributions and expenditures regarding Federal candidates and political committees". I would agree that "sources of funds" is included in "limitation on contributions." But the draft AO goes on to conclude that "who may solicit" or "transmit" is also included in "limitation on contributions". This is far more debatable.

"Who may solicit" is not necessarily included in a category described as "limitation on contributions" in the ordinary use of those terms. The question is really whether the Act in fact does regulate "who may solicit" to such an extent that it is reasonable to conclude that Congress intended that the Act's provisions in that regard would be exclusive and accordingly that all state limitations on who may solicit were intended to be preempted.

The draft AO rests its conclusion that "who may solicit" is included within the scope of Congress' preemptive intent because there are a few instances in which the Act prohibits the solicitation of contributions. I do not think that those scattered references to solicitation in the Act, however, reasonably support a conclusion that those were intended to be the exclusive provisions concerning solicitation. Each of the references in the draft AO to limitations on solicitations in the Act or regulations is connected to a prohibited or restricted contribution. That is a very limited scope of regulation of solicitations. Congress' enactment of these limited prohibitions against solicitation of prohibited or restricted contributions does not strike me as extensive enough to evidence an intent that those provisions be exclusive of any other regulation of solicitations under state law.

The provisions in the Act and regulations concerning "transmittal" are similarly limited.

On the other side is the considerable interest that the state has in regulating the relations between its registered lobbyists and the state legislators that those lobbyists contact. I think that the state can properly conclude that permitting lobbyists to solicit contributions for the benefit of a member of the state legislature raises sufficient questions of the possibility of impermissible influence over legislative decision-making that the state may regulate that activity. The possibility of impermissible influence may be only somewhat diminished if the solicitation is for the legislator's candidacy for some office other than the state legislature. I might not agree with the necessity or wisdom of that kind of regulation, especially as so applied, but I think it is within the permissible area of state regulation under current First Amendment jurisprudence. I think considerable restraint on our part is called for in deciding whether this type of regulation is nevertheless preempted by the Act.

The draft AO concludes, secondly, that the provisions in Maryland law prohibiting lobbyists from serving on a fundraising committee or on a political committee are preempted because they pertain to "the organization of political committees." This conclusion is presumably based on the provision in our regulations, in 11 C.F.R. § 108.7, subdivision (b)(1), that the Act preempts any provision of state law concerning the "Organization and registration of political committees supporting Federal candidates."

The provision of Maryland law that prohibits lobbyists from serving on political committees arguably concerns the "organization" of political committees, in some senses of the term. But the provisions of the Act pertaining to the "organization" of a political committee are minimal. The draft AO points only to the requirements that a political

committee have a treasurer and a custodian of records (both of which are related to the more substantive requirements of the Act that reports be filed and that records be maintained for the purpose of enforcement and audits), and to the prohibition in the Commission's regulations against foreign nationals serving on committees (which is directly connected to the substantive prohibition in the Act against contributions by foreign nationals). In this light, it is far from clear that Congress intended that these minimal references to the "organization" of a committee were intended to be exclusive and to preempt any provision of state law on the subject.

Indeed, the contrary conclusion is fairly evident -- there are any number of areas of state law concerning the organization of political committees that I think we would agree are not preempted by the Act or by the Commission's regulations. Those would include, for instance, provisions of state law concerning the incorporation of political committees and the requirements for officers and directors of those incorporated committees, provisions for the registration of committees that are unincorporated associations, and for the liability of members of committees that are unincorporated associations. Thus, I cannot conclude that Congress intended that all provisions of state law concerning the "organization" of political committees be preempted by the Act, or that all such provisions fall within the scope of § 108.7(b)(1).

In the context of this AOR, I cannot conclude that the minimal extent of actual regulation of political committees in the Act or in our regulations can support the conclusion that Maryland's prohibition against lobbyists serving on political committees of members of the state legislature, even for campaigns for other offices, is preempted by that regulation.