

August 20, 2009

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

DRAFT ADVISORY OPINION 2009-21 is available for public comments under this procedure. It was requested by Timothy G. Leach, Assistant General Counsel, on behalf of West Virginia Secretary of State.

Draft Advisory Opinion 2009-21 is scheduled to be on the Commission's agenda for its public meeting of Thursday, August 27, 2009.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on Wednesday, August 26, 2009.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Commission Secretary: Mary Dove (202) 694-1040

Other inquiries:

To obtain copies of documents related to AO 2009-21, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

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AGENDA ITEM
For Meeting of: 8-27-2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan *pch*
General Counsel *for*

Rosemary C. Smith *RCS*
Associate General Counsel

Robert M. Knop *RMK*
Assistant General Counsel

Alexander W. Tausanovitch *AWT*
Law Clerk

Subject: Draft AO 2009-21 (West Virginia Secretary of State)

Attached is a proposed draft of the subject advisory opinion. We request that this draft be placed on the agenda for August 27, 2009.

Attachment

1 ADVISORY OPINION 2009-21

2 Timothy G. Leach
3 Assistant General Counsel
4 Office of the Secretary of State
5 Building 1, Suite 157-K
6 1900 Kanawha Blvd. East
7 Charleston, WV 25305

DRAFT

8 Dear Mr. Leach:

9 We are responding to your advisory opinion request on behalf of the West
10 Virginia Secretary of State, concerning the possible preemption of West Virginia state
11 law by the Federal Election Campaign Act of 1971, as amended (“the Act”), and
12 Commission regulations. The Commission concludes that the West Virginia campaign
13 finance statute restricting payment of polling expenses by candidates and political
14 committees is preempted by the Act and Commission regulations insofar as it purports to
15 apply to expenditures by Federal candidates and their principal campaign committees.

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 July 10, 2009, and publicly available materials, including the West Virginia Secretary of
19 State’s website and reports filed with the Commission.¹

20 West Virginia law permits political committees, defined as “any candidate
21 committee, political action committee or political party committee,” to pay for a limited
22 number of specific election expenses, including, among others, “conducting public
23

¹ See FEC Form 1, Statement of Organization, available at
<http://query.nictusa.com/pdf/801/28039632801/28039632801.pdf#navpanes=0>.

1 opinion poll or polls.” W.Va. Code §§ 3-8-1a (22), 3-8-9(a)(10).² The West Virginia
2 statute defines such public opinion polls as “limited to the gathering, collection, collation
3 and evaluation of information reflecting public opinion, needs and preferences as to any
4 candidate, group of candidates, party, issue or issues,” and prohibits polls from being
5 “deceptively designed or intentionally conducted in a manner calculated to advocate the
6 election or defeat of any candidate or group of candidates or calculated to influence any
7 person or persons so polled to vote for or against any candidate, group of candidates,
8 proposition or other matter to be voted on by the public at any election.” *Id.* Chapter 3
9 of the West Virginia Code, concerning elections, by its terms applies to “every general,
10 primary and special election in which candidates are nominated or elected or in which
11 voters pass upon any public question submitted to them. . . .” W.Va. Code, §3-1-2. The
12 statute further defines “any election” or “all elections” to include elections for Federal
13 offices as well as state, county, and municipal offices. *Id.*

14 The West Virginia Secretary of State received a complaint from a citizen alleging
15 that Ms. Anne Barth, a candidate for the U.S. House of Representatives for the 2nd
16 Congressional District of West Virginia, and Anne Barth for Congress (“the Barth
17 Committee”), her principal campaign committee, conducted a poll on or about September
18 27, 2008, that violated W.Va. Code § 3-8-9(a)(10). The Secretary of State applied the

² The West Virginia statute defines a “candidate,” in relevant part, as an individual who “has filed a certificate of announcement under section seven, article five of this chapter [providing that candidates must file with the Secretary of State].” W.Va. Code § 3-8-4(A). A “candidate’s committee” is a “political committee established with the approval or in cooperation with a candidate” *Id.* § 3-8-5. The West Virginia Secretary of State’s website indicates that Federal candidates declare their candidacies with that office, consistent with Sections 3-5-7, 3-8-4, and 3-8-5 of the West Virginia statute. *See* <http://www.wvsos.com/elections/candidates/data/candidatesearch.asp>. Therefore Section 3-8-9 of the West Virginia statute, which governs “election expenses” of “candidates” and “candidate committees,” appears to apply to Federal candidates and their authorized committees, who also are subject to the Act and Commission regulations.

1 West Virginia statute to the Barth Committee and, in the course of investigating the
2 alleged violation, sought further information about the poll from the polling company and
3 the Barth Committee. The candidate's counsel responded that Federal law preempts
4 West Virginia law on this subject, citing Advisory Opinion 1995-41 (Maloney). The
5 Secretary of State maintained that the advisory opinion cited by the candidate's counsel
6 did not apply, and sought this advisory opinion.

7 ***Question Presented***

8 *Is a West Virginia statute regulating spending for election expenses by political*
9 *committees, W.Va. Code § 3-8-9(a)(10), preempted by the Act or Commission regulations*
10 *with respect to Federal candidates?*

11 ***Legal Analysis and Conclusions***

12 Yes, the West Virginia statute regulating payment for polling expenses by
13 candidates and political committees is preempted by the Act and Commission regulations
14 insofar as it purports to apply to expenditures by Federal candidates and their principal
15 campaign committees.

16 The Act states that its provisions and the rules prescribed thereunder "supersede
17 and preempt any provision of State law with respect to election to Federal office."
18 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history indicates that Congress
19 intended "to make certain that the Federal law is construed to occupy the field with
20 respect to elections to Federal office and that the Federal law will be the sole authority
21 under which such elections will be regulated." *H.R. Rep. No. 93-1239*, 93d Cong.,
22 2d Sess. 10 (1974). According to the Conference Committee Report on the 1974
23 Amendments to the Act, "Federal law occupies the field with respect to criminal

1 sanctions relating to limitations on campaign expenditures, the sources of campaign funds
2 used in Federal races, the conduct of Federal campaigns, and similar offenses, but does
3 not affect the States' rights" as to other areas such as voter fraud and ballot theft. *H.R.*
4 *Rep. No. 93-1438*, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report
5 also states that Federal law occupies the field with respect to reporting and disclosure of
6 political contributions to, and expenditures by, Federal candidates and political
7 committees, but does not affect State laws as to the manner of qualifying as a candidate,
8 or the dates and places of elections. *Id.* at 100-101.

9 In promulgating 11 CFR 108.7, the Commission stated specifically that Federal
10 law supersedes State law with respect to the organization and registration of political
11 committees supporting Federal candidates, disclosure of receipts and expenditures by
12 Federal candidates and political committees, and the limitations on contributions and
13 expenditures regarding Federal candidates and political committees. *Explanation and*
14 *Justification of the Disclosure Regulations*, House Document No. 95-44, at 51 (1977).
15 Section 108.7 also specifies that the Act does not supersede State laws relating to the
16 manner of qualifying as a candidate or political party organization, dates and places of
17 elections, voter registration, voting fraud, ballot theft, candidates' personal financial
18 disclosures, or funds used for the purchase or construction of State or local party office
19 building. 11 CFR 108.7(c). The Commission has previously stated that the legislative
20 history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide a
21 comprehensive, uniform Federal scheme that is the sole source of regulation of campaign
22 financing . . . for election to Federal office." Advisory Opinion 1988-21 (Wieder).

23 with respect to Federal elections, the West Virginia statute at issue here on its face

1 limits expenditures by Federal political committees (including candidate committees) –
2 one of the areas regulated by the Act and Commission regulations. *Compare* 2 U.S.C.
3 431(9), 439a; 11 CFR 100.110-100.155 *with* W.Va. Code § 3-8-9. Moreover, with
4 respect to Federal elections, the West Virginia statute does not address any of the areas
5 that Congress intended to leave exclusively to the jurisdiction of the States (*e.g.*, voter
6 fraud, ballot theft, ballot qualification, or dates and places of elections). *See H.R. Rep.*
7 *No. 93-1438* at 69, 100-101 and 11 CFR 108.7(b)(3). Accordingly, with respect to
8 Federal elections, the West Virginia statute is expressly preempted by Federal law. 2
9 U.S.C. 453; 11 CFR 108.7(b)(3).

10 The Act and Commission regulations establish that limitations and restrictions on
11 Federal candidate expenditures is an area to be regulated solely by Federal law. The Act
12 prescribes permissible and prohibited expenditures by Federal candidates. *See, e.g.*, 2
13 U.S.C. 431(9), 439a, 441a(j). Commission regulations implement these statutory
14 provisions governing expenditures by Federal candidates, including expenditures for
15 polling expenses. *See, e.g.*, 11 CFR 100.131-155, 106.2, 106.4, 113.2, 116.2, 116.11,
16 116.12. Specifically, with respect to this request, the West Virginia statute, if applied to
17 Federal candidates, would impede those candidates' ability to make payment of polling
18 expenses that are governed by the Act and Commission regulations. Under the Act's
19 preemption clause, only Federal law could limit the ability of a Federal candidate to make
20 expenditures for polling. 2 U.S.C. 453.

21 Similarly, in Advisory Opinion 2000-23 (New York State Democratic
22 Committee), the Commission examined a state law that restricted the ability of a state
23 party committee to make certain expenditures in support of candidates. The Commission

1 concluded that because the statute limited expenditures regarding Federal candidates
2 (rather than regulating “those areas defined as interests of the State”), the New York law
3 was preempted by the Act and Commission regulations.

4 The Commission concludes, therefore, that because W.Va. Code § 3-8-9 limits
5 expenditures by candidates and their principal campaign that are otherwise lawful under
6 the Act and Commission regulations, the West Virginia statute is preempted as to Federal
7 candidates and their principal campaign committees, such as Ms. Barth and the Barth
8 Committee, by the Act and Commission regulations. *See* 2 U.S.C. 453, 431(9), 439a.
9 *See also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) (“Preemption of
10 state law by Federal statute or regulation is not favored ‘in the absence of persuasive
11 reasons - either that the nature of the regulated subject matter permits no other
12 conclusions, or that the Congress has unmistakably so ordained.’” (citing Chicago &
13 N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Florida
14 Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963))). *Cf.* Advisory Opinion
15 2001-19 (Oakland County Democratic Party) (concluding that the Act does not preempt a
16 generally applicable state law governing bingo licenses with respect to a Federal political
17 committee that proposed organizing bingo fundraisers).

18 This response constitutes an advisory opinion concerning the application of the
19 Act and Commission regulations to the specific transaction or activity set forth in your
20 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
21 of the facts or assumptions presented and such facts or assumptions are material to a
22 conclusion presented in this advisory opinion, then the requester may not rely on that
23 conclusion as support for its proposed activity. Any person involved in any specific

1 transaction or activity which is indistinguishable in all its material aspects from the
2 transaction or activity with respect to which this advisory opinion is rendered may rely on
3 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
4 conclusions in this advisory opinion may be affected by subsequent developments in the
5 law including, but not limited to, statutes, regulations, advisory opinions and case law.
6 The cited advisory opinions are available on the Commission's website at
7 <http://saos.nictusa.com/saos/searchao>.

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On behalf of the Commission,

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Steven T. Walther

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Chairman