AGENDA DOCUMENT NO. 09-59

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2009 AUG 20 P 3:13

FEDERAL ELECTION COMMISSION
Washington, DC 20463

August 20, 2009

AGENDA ITEM
For Meeting of: 8-27-2009

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan pch
General Counsel

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

ADVISORY OPINION 2009-21

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

DRAFT

Dear Mr. Leach:

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

Background

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

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

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

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

The West Virginia Secretary of State received a complaint from a citizen alleging that Ms. Anne Barth, a candidate for the U.S. House of Representatives for the 2nd Congressional District of West Virginia, and Anne Barth for Congress ("the Barth Committee"), her principal campaign committee, conducted a poll on or about September 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.

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

Question Presented

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

Legal Analysis and Conclusions

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

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; *see also* 11 CFR 108.7(a). The legislative history indicates that Congress 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 Committee 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.

In promulgating 11 CFR 108.7, the Commission stated specifically that 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. *Explanation and Justification of the Disclosure Regulations*, House Document No. 95-44, at 51 (1977). Section 108.7 also specifies that the Act does not supersede State laws relating to the manner of qualifying as a candidate or political party organization, dates and places of elections, voter registration, voting fraud, ballot theft, candidates' personal financial disclosures, or funds used for the purchase or construction of State or local party office building. 11 CFR 108.7(c). The Commission has previously stated that 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 Opinion 1988-21 (Wieder).

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

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

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

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

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

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

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. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific

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

On behalf of the Commission,

Steven T. Walther
Chairman