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Federal Election Commission
Office of General Counsel
999 E Street N.W.
Washington, DC 20463

Dear Commissioners:

AOR 1991-22

As authorized agent for a United States Senator facing election in 1994, two United States Representatives facing election in 1992, three members of the Minnesota Legislature considering a campaign for federal office, and the Chairman of the Independent Republican Party of Minnesota, I request this advisory opinion pursuant to 2 U.S.C. § 437(f).

The subject of this request is the Minnesota Congressional Campaign Reform Act which became effective January 1, 1991. Minn. Stat. §§ 10A.40-.51 (1990). This statute provides general revenue funds for federal candidates in exchange for agreeing to spending limits. A copy of the statute is attached. The statute is effective for elections in November 1992 and will play a crucial role in my clients' campaign plans. The statute may also limit expenditures and contributions by the IR party as they pertain to a particular candidate.

I seek this advisory opinion because it is my view that the Federal Election Commission ("Commission") will find that federal law preempts the Minnesota statute with respect to federal campaign expenditure limitations and public funding of federal campaigns. If the Commission believes the Federal Election Campaign Act ("FECA" or "Act") preempts the Minnesota statute, my clients request such a ruling as soon as possible. Guidance from the Commission now will save significant amounts of time and energy in Minnesota that will be expended needlessly should the Commission not act at this time.

The Statute

The Minnesota statute limits basic election-year expenditures to $3,400,000 for United States Senate candidates and $425,000 for United States House of Representatives candidates. Candidates who agree to be bound by the above limits can receive up to 25 percent

of the expenditure limit as an "incentive" from the state. If, however, all candidates for a particular office agree to be bound by the limits, none may receive an incentive. Similarly, if all major political party candidates agree to be bound, no such candidate may receive an incentive. If, however, a candidate agrees to be bound by the limitations but has an opponent from a major political party who refuses to be bound by the limitations, then the candidate agreeing to the limits is not bound by the limits yet is eligible to receive an "incentive" from the state.

Under certain conditions, the statute provides additional taxpayer funds for candidates who are opposed in a primary. Candidates who are bound by the expenditure limits are subject to civil fines of up to four times the amount of any expenditures exceeding the limit. The statute also limits post-election expenditures.

Discussion

Federal law is clear that "the provisions of [the] Act, and rules prescribed under [the] Act, supersede and preempt any provisions of State law with respect to election to Federal office." 2 U.S.C. § 453.

In a series of advisory opinions, the Commission has confirmed that statutory schemes such as the Minnesota statute are preempted by the FECA:

> The Act and commission regulations prescribed thereunder supersede and preempt any conflicting or overlapping provisions of State law with respect to election to Federal Office. 2 U.S.C. § 453. The constitutional underpinning of § 453 is apparent from the supremacy clause of the Constitution which requires that where there is a clear collision between State and Federal law, or a conflict between Federal law and the application of an otherwise valid State enactment, Federal law will prevail. It will not be presumed that a Federal statute was intended to supersede the exercise of a given power by a State unless there is a clear manifestation of intention to do so, since the exercise of Federal supremacy will not lightly be presumed.

AO 1978-54, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5345 (1978) (citations omitted)(emphasis added); AO 1978-66, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5355 (1978) (identical language used in this opinion).

The language of the federal regulations constitutes a "clear manifestation of intention" to supersede state power with respect to expenditure limitations for federal candidates:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the -
> . . . .
> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

11 C.F.R. § 108.7 (1991)(emphasis added).

Furthermore, the fact that the FECA is, as yet, silent on the question of expenditure limitations does not give the state the freedom to legislate in this area. The Commission has repeatedly found that federal law is "the sole authority" for federal election regulation.

> It is clear 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. . . .'
>
> Commission regulations follow these expressions of legislative intent by explaining that the Act and regulations thereunder supersede and preempt State law with respect to: the organization and registration of political committees supporting Federal candidates, the reporting and disclosure of political contributions and expenditures to and by candidates for Federal office and political committees supporting them, and limitations on contributions and expenditures regarding Federal candidates and political committees.

AO 1978-54, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5345 (1978) (citations omitted)(emphasis added).

The Commission has found preemption in virtually every case where the FECA somehow covers the area the state is attempting to regulate. AO 1978-24, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5314 (1978) (finding the FECA preempted a state statute requiring the names and addresses of officials of political organizations on all publications since "sponsorship statements and notices of the availability of campaign finance reports, which are required by 2 U.S.C. 435(b) and 441(d) to be included on the political advertising of candidates for Federal office, are an integral part of a scheme prescribed by the Act for effecting full disclosure"); AO 1978-54, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5345 (1978) (state broadcast disclaimer statute was preempted because

the Commission believes that "any construction of these State statutes which would make them applicable to candidates for Federal office would be without effect since Congress intended for Federal law to supersede State law with respect to the registration of political committees supporting Federal candidates").

In the specific area of contributions and expenditures, the commission has repeatedly ruled that federal law preempts state law. In a 1976 advisory opinion the Commission found that "Federal law clearly occupies the field with respect to permissible and prohibited contributions to Federal candidates and committees, the disclosures of receipts and expenditures of Federal candidates and committees, and the conduct of Federal campaigns." 1 Fed. Election Camp. Fin. Guide (CCH) para. 6953 (1976).

More recently the Commission found that a New Hampshire statute which imposed filing fees on candidates who did not agree to abide by state-imposed expenditure limitations was preempted to the extent that it attributed state party expenditures to the candidate since the effect could be a restriction on federally authorized expenditures. AO 1989-25 1 Fed. Election Camp. Fin. Guide (CCH) para. 5973 (1989). (The Commission reserved the right to rule on whether the limitations themselves were preempted.)

Furthermore, in several modified opinions, the Commission expressly found that there are not "any limits on expenditures by a candidate except for presidential candidates accepting public financing." Transfer Binder Fed. Election Camp. Fin. Guide (CCH) para. 9020 at 50,397, modifying, AO 1975-105 (40 FR 60164, December 31, 1975). Accord Transfer Binder Fed. Election Camp. Fin. Guide (CCH) para. 9020 at 50,396, modifying, AO 1975-44 (41 FR 3832, January 26, 1976).

Thus, it appears that the FECA preempts the Minnesota statute in several ways:

> Spending Limits and Public Financing: The Minnesota statute imposes spending limitations and, in some cases, provides public financing to federal candidates. Several Commission advisory opinions have stated that the Act intends campaigns to have wide discretion on how they spend campaign funds. E.g., AO 1980-29, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5485 (1980); AO 1978-2, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5237 (1978). The federal government has yet to adopt spending limitations or provide public funds for federal (non-presidential) elections. The President has threatened to veto the bills currently before Congress. The Department of Justice testified that S.3, passed by the Senate on May 23, 1991, has serious constitutional problems. The fact that

Congress has not imposed spending limitations does not give the state the freedom to legislate in a field "occupied" by the federal government.

Contribution Sources and Limits: The FECA has also set forth a complete statutory scheme for permissible sources and amounts of contributions. Nowhere in this integral federal statutory scheme are there provisions allowing: (a) a state to contribute to a federal candidate or (b) a state to contribute to a federal candidate in amounts in excess of the limits imposed by the FECA. Thus, the FECA preempts the Minnesota statute to the extent it would make the state a source of contributions to a federal candidate and in the way it would increase the limit on the amount any source may contribute to a federal candidate. cf. AO 1980-103, 1 Fed. Election Camp. Fin. Guide (CCH) para. 5557 (1980).

Limitations on Party Expenditures: The current scheme is preempted by 2 U.S.C §441a(d) to the extent that it limits expenditures made by the party on behalf of a particular candidate.

On behalf of United States Senator David Durenberger, United States Representative Jim Ramstad, United States Representative Vin Weber, Minnesota Senator Duane Benson, Minnesota Senator Gary Laidig (who is in the process of registering as a federal candidate), Minnesota Representative Gil Gutknecht and the Chairman of the Minnesota Independent Republican Party, Robert Weinholzer, I request that the Commission answer whether the Minnesota statute is preempted by federal law since the Minnesota law regulates contributions to and expenditures by federal candidates.

Sincerely,

Douglas A. Kelley

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enc.

DAK/jll

Attachment