IOWA DEMOCRATIC PARTY

Mike Peterson, State Chair

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April 7, 1998

AOR 1998-08

Lawrence Noble, Esq.
General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20003

Dear Mr. Noble:

I am writing on behalf of the Iowa Democratic Party ("IDP") to request an advisory opinion relating to the operation of Iowa campaign finance laws and their interaction with the preemption clause of the Federal Election Campaign Act ("FECA"). 2. U.S.C. § 453, and regulations promulgated thereunder, 11 C.F.R. § 108.7.

Beginning in September of 1997, the IDP has received contributions, which were solicited specifically for purchasing a party office building in accordance with 2 U.S.C. § 431(8)(B)(viii). On January 12, 1998, the IDP purchased an office building with such funds. The IDP paid a portion of the cost of the building and has obtained a 20-year mortgage to defray the balance of the purchase costs. The IDP intends to solicit and receive contributions pursuant to § 431(8)(B)(viii) for the purpose of paying the balance of the mortgage. The FEC has ruled that contributions to a building fund are not subject to the prohibitions and limitations of 2 U.S.C. §§ 441a and 441b so long as a building is not acquired for the purpose of influencing a specific federal election. See FEC Advisory Opinion 1986-40.

Thus far, all funds received for the purpose of defraying the costs of the purchase of the office building have been in compliance with the prohibitions of Iowa election law. Specifically, Iowa election laws prohibit contributions from corporations. Iowa Code § 56.15. Iowa election law does not limit the amount of contributions that may be contributed by any permissible source. The IDP wishes to establish a separate building fund account into which it intends to receive contributions to defray the cost of purchasing the party office building. It is the intention of the IDP to solicit

funds for this purpose from sources that do not comply with the prohibitions of Iowa election law.

On July 15, 1997, the Iowa Ethics and Campaign Disclosure Board ("Board") issued the enclosed Declaratory Ruling to the Republican Party of Iowa. In its ruling, the Board has concluded that the Republican Party of Iowa had failed to sufficiently demonstrate that the FECA preempts the prohibitions of Iowa election law as it pertains to solicitations of contributions for the purposes enumerated in § 431(8)(B)(viii). However, a review of FEC Advisory Opinions, as well as settled case law, demonstrates that the FEC has preempted state regulation of building funds. (The IDP acknowledges that the FECA does not preempt the state's ability to regulate the disclosure of building fund contributions. Therefore, the IDP does not seek any opinion regarding disclosure requirements.) See Weber v. Henry. 995 F.2d 872 (8th Cir.1993)

FEC regulations squarely address this issue at 11 C.F.R. § 108.7:

(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 –

(1) Organization and registration of political committees supporting Federal candidates:
(2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
(3) Limitation on contributions and expenditures regarding Federal candidates and political committees....

As you know, the FEC has determined on several occasions that the FECA preempts state law when it purports to regulate the federal activities of state party committees that are governed by the FECA. See e.g. AO 1978-50 (allocation of get-out-the-vote drives preempted a Michigan statute prohibiting expenditures from more than account); AO 1978-54 (state reporting requirements for federal candidates are superseded by the FECA); AO 1989-25 (a state statute that restricts a state prty from making coordinated expenditures is preempted); AO 1993017 (requirement that state

party pay administrative costs with a portion of non-federal funds was preempted).

Also, on several occasions, the Commission has had the opportunity to directly address the issue of state regulation of contributions received pursuant to § 431(8)(B)(viii). The Commission has consistently ruled that the FECA preempts state law with regards to such contributions. FEC AO's 1997-14; 1996-8; 1993-9; 1991-5; 1986-40.

The FEC has consistently provided a clear and compelling explanation for Congress's intent to preempt state laws with respect to building fund contributions. In Advisory Opinion 1991-5, the FEC explained:

> Congress explicitly decided not to place restrictions upon a subject, the cost of construction and purchase of an office facility by a national or state political party committee, which it might otherwise have chosen to treat as election influencing activity. Because such a facility would be used, at least in part, for Federal election activity, Congress could have decided that the purchase or contribution of such facility was for the purpose of influencing a Federal election. Instead, it took the affirmative step of deleting the receipt and disbursement of funds for such activity from the specific proscriptions of the Act. In addition, there is no indication that Congress envisioned any sort of limitation on its preemption to some allocable portion of the costs of purchasing or constructing a building. (citation omitted) The Commission concludes, therefore, that the Act and Commission regulations preempt the application of Tennessee State or local law with respect to the prohibitions on corporate donations to the TDP building fund. FEC Advisory Opinion 1991-5, Fed. Elect. Camp. Financing Guide, CCh, ¶ 6015 at 11, 697-11,698.

Thus, if the FECA did not preempt Iowa law with respect to such contributions, state party committees in Iowa would be subject to disparate application of a federal statute in comparison to other state party committees whose state laws permit corporate contributions. In such a situation, 2 U.S.C. § 453 and 11 C.F.R. § 108.7(b)(3) mandate preemption.

Based on the foregoing discussion, the IDP respectfully request that the FEC issue an Advisory Opinion confirming that the FECA preempts

Iowa election law prohibitions with regard to solicitation of corporate funds into a depository which is constituted for the purpose set forth in 2 U.S.C. § 431(8)(B)(viii). Your prompt response to this inquiry is greatly appreciated. Thank you for your assistance in this matter.

Sincerely yours,

Michael Peterson
Chairman

Enclosure

BEFORE THE IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD

IN THE MATTER OF:	
PETITION FOR DECLARATORY, RULING BY THE REPUBLICAN PARTY OF IOWA	**DECLARATORY RULING**
on certain aspects of Iowa Code § 56.15	

APR 17 [illegible] '98

APR 21 [illegible]

Re: AOR 1998-08

(Better copy of enclosure to letter of 4-7-98)

Pursuant to Iowa Code § 17A.9 and Iowa Admin. Code § 351-9.1, the Republican Party of Iowa (RPI) has petitioned this Board for a declaratory ruling asking whether Iowa Code § 56.15, which prohibits Iowa committees which support candidates (including RPI) from receiving corporate contributions, is preempted by Federal law insofar as its application to state party central committees (including RPI).

The Board acknowledges the Statement of the Facts set out by RPI in its Petition. As further background, the Board notes that RPI previously petitioned the Campaign Finance Disclosure Commission, the Board's predecessor, for a declaratory ruling on this question in 1983. That Ruling, issued in 1984, declined to opine on the issue of preemption, but rather concluded that the Iowa statute prohibiting corporate contributions applied to prohibit the planned activity, which was the use of corporate contributions to construct a facility for RPI.

The current Petition notes two advisory opinions issued by the Federal Election Commission (the F.E.C.) since 1984 in which a majority of the F.E.C. concluded that the Federal law did supersede state prohibitions similar to that in Iowa Code § 56.15.

THE STATE STATUTE

Iowa Code § 56.15, subsections 1 and 2, provide, in pertinent part:

1. [I]t is unlawful for ... [a] corporation ...to contribute any money, property, labor, or thing of value, directly or indirectly, to a committee, or for the purpose of influencing the vote of an elector ...

2. [I]t is unlawful for a member of a committee, or its employee or representative, ... or for a candidate for office or the representative of the candidate, to solicit, request, or knowingly receive from ... [a] corporation ... any money, property, or thing of value belonging to the ... corporation for campaign expenses, or for the purpose of influencing the vote of an elector ...

THE FEDERAL STATUTE

The Federal Election Campaign Act (F.E.C.A.), 2 U.S.C. 431 (8)(B)(viii) provides, in pertinent part:

(B) The term "contribution" does not include --

(viii) any gift, subscription, loan, advance, or deposit of money or anything of value to a national or a State committee of a political party specifically designated to defray any cost for construction or purchase of any office facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office.

ISSUES AND DISCUSSION

I. WHEN DOES FEDERAL LAW SUPERSEDE STATE LAW?

In the Federal system of government enjoyed in these United States, the guiding rule is that an exercise of Federal power generally prevails over state law, and if the laws of a state come into conflict with a Federal statute, the state law must yield.[1] However, there must be an actual conflict between the Federal and state laws which goes to the purpose and intent of the Federal law. The "entire scheme of the federal statute must be considered; and whether Congress and the agencies acting under it have excluded state action depends on the facts in the particular case and the congressional intent ... Thus, the nature of the power exerted by Congress, the object sought to be attained, and the character of the obligation imposed by the law are important in determining whether supreme federal enactments preclude the enforcement of state laws on the same subject."[2] To effectively preempt state law, Congress must usually be express in its intention; preemption by implied intent is the exception, not the rule.[3]

A federal law is usually limited in its effect to activities under the jurisdiction of a federal agency, and a state law affecting state level action will not usually be preempted by implication "unless, when fairly construed, the federal [law] on the subject is clearly in conflict with the state [law] on the same subject[4] ... the repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together."[5] A state law is deemed to be preempted by implication if under the particular circumstances enforcement of the state law would be an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.[6]

"[I]n determining whether state law has been superseded by federal law, the test is not whether a state law happens to block action which a federal agency may chance to approve, but

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[1] See *Chicago and N.W. Transp. Co. V. Kalo Brick & Tile Co.*, 450 U.S. 311, 101 S. Ct. 1124, 67 L.Ed. 2d 258 (1981)(Interstate Commerce Act precludes operation of Iowa law regarding failure to operate adequate service as against a rail carrier which had received permission under the I.C.A. (which determination includes considerations as to adequate service) to abandon a rail line); 81A C.J.S States § 24, p. 324.

[2] 81A C.J.S. States § 24, p. 329.

[3] See *Cosmetic, Toiletry and Fragrance Ass'n., Inc. v. State of Minn.*, 440 F.Supp. 1216, (D.C. Minn. 1977) aff'd., 575 F.2d 1256 (8th Cir. 1978)(state law requiring certain labeling was impliedly preempted by similar federal law on labeling, considering the aim and intent of Congress, the pervasiveness of the Federal regulatory scheme, the nature of the subject matter regulated, and whether under the circumstances, the state law stood as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress).

[4] *Holiday Acres No. 3 v. Midwest Federal Sav. and Loan Ass'n of Minneapolis*, 308 N.W.2d 471 (Minn. 1981) (state law concerning exercise of mortgage contract due-on-sale clause which allows acceleration upon transfer by mortgagor at option of lender is not preempted by congressional legislation or Federal Home Loan Bank Board regulation).

[5] 81 C.J.S. States § 24, p. 331; *Powers v. McCullough*, 140 N.W.2d 378 (Iowa 1966) (as applied to interstate railroads operating in Iowa there was no direct conflict between Iowa statue requiring employer to report specified accidents to the State Commisioner of Labor and Federal statute requiring the monthly reporting of railroad accidents to the Interstate Commerce Commission and an interstate carrier was able to comply with both).

[6] *Chicago and N.W. Transp. Co. v. Kalo Brick & Tile Co. (See note 1).*

whether the state law frustrates the operation of the federal law and prevents accomplishment of its purpose, and, if it does, only then must the state law yield."[7]

II. DOES THE F.E.C.A. (IN 2 U.S.C. Sec. 431(8)(B)(viii)) PREEMPT IOWA CODE SECTION 56.15 INSOFAR AS IT PROHIBITS CORPORATE CONTRIBUTIONS TO A STATE PARTY CENTRAL COMMITTEE FOR THE PURPOSES OF A BUILDING FUND?

Given the above discussion on the guiding principles of Federal preemption, a number of preliminary issues must be reviewed and answers determined. While the Board notes that the two F.E.C. opinions cited by IRP[8] do make rudimentary reference to the factors to be considered in determining preemption, the Board also notes that in the case of both opinions there was a two-member dissent which contended that the majority's analysis of the preemption issue was incomplete and incorrect.[9] While the Board may choose to defer to the F.E.C.'s interpretation of the interaction between the F.E.C.A. and the Iowa law, the Board is not jurisdictionally subordinate to the FEC so as to preclude the Board from independently considering the question of preemption.

A. WAS THERE EXPRESS INTENT TO SUPERSEDE CONTRARY STATE LAW WITH REGARD TO PROHIBITING CORPORATE CONTRIBUTIONS FOR STATE PARTY BUILDING FUNDS?

Congress can preempt a field either by express statutory command or by implicit legislative design.[10] When a state law is challenged under the supremacy clause, the courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[11] The F.E.C. opinions note that the F.E.C.A. expressly "supersede[s] and preempt[s] any provision of State law with respect to election to Federal office." AO 1991-5, 11,696, 11,697; AO 1993-9, 11,892, 11,893. [Emphasis added.] The Board does not question or contest that insofar as a state party central committee's activities to support or oppose candidates for Federal office, the provisions of Iowa Code § 56.15 would not apply to prohibit corporate donations for building purposes. For that matter, the Board has never and would not contend that Iowa Code § 56.15 or any other provision of Chapter 56 would apply to any activity involving any Federal candidate which did not also directly involve a state or local candidate.

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[7] 81A C.J.S. States § 24, p. 332, footnoting to *First Iowa Hydro-Elec. Co-op. v. Federal Power Comm'n*, 151 F.2d 20 (D.C. Cir. 1945) (Iowa law prohibiting construction of dams in any navigable stream for industrial purposes without a permit was not preempted by the terms of the Federal Power Act which required compliance with state law) reversed on other grounds, 328 U.S. 152, 66 S.Ct. 906, 90 L.Ed. 1143.

[8] AO 1991-5, *Fed. Elec. Camp. Financing Guide*, CCH, ¶6015 at p. 11,696; AO 1993-9, *Fed. Elec. Camp. Financing Guide*, CCH, ¶6091 at p. 11,892.

[9] *Id.*, P.6015 at p. 11,698, P. 6091 at p. 11,894.

[10] *Malone v. White Motor Corp.*, 435 U.S. 497, 504, 98 S. Ct. 1185,1189, 55 L.Ed.2d 443 (1978).

[11] *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed 1447 (1947). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 179 (1978).

The principle issue then becomes whether the provisions of the F.E.C.A. effectively supersede Iowa Code § 56.15 insofar as the state political party's activities relate to state or local candidates. There is no similarly clear language in the F.E.C.A. which expressly states that it was Congress' intent that this permitted activity with relation to Federal candidates was also specifically intended to apply to state party central committees activity with regard to state and local candidates.

B. WAS THERE IMPLIED INTENT THAT THE EXEMPTION FROM THE CORPORATE PROHIBITION APPLY TO STATE PARTY CENTRAL COMMITTEES ACTIVITES WITH REGARD TO STATE OR LOCAL CANDIDATES?

The courts have applied a test involving four key factors which must be considered in determining that implied preemption has occurred:

> (1) the aim and intent of Congress as revealed by the statute itself and its legislative history ... (2) the pervasiveness of the federal regulatory scheme as authorized and directed by the legislation and as carried into effect by the federal administrative agency ... (3) the nature of the subject matter regulated and whether it is one which demands "exclusive federal regulation in order to achieve uniformity vital to national interest." ...; and (4) "whether under the circumstances of [a] particular case [state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[12]

1. WHAT WAS THE CONGRESSIONAL PURPOSE (AIM AND INTENT) FOR THE FEDERAL EXEMPTION OF CORPORATE CONTRIBUTIONS GIVEN TO A POLITICAL PARTY CENTRAL COMMITTEE FOR BUILDING FUNDS?

The F.E.C. opinions do discuss somewhat the Congressional history of the F.E.C.A.:

> The Act and Commission regulations specifically address building fund donations and clearly permit them. ...Congress explicitly decided not to place restrictions upon a subject, the cost of construction and purchase of an office facility by a national or state political party committee, which it might otherwise have chosen to treat as election influencing activity. Because such a facility would be used, at least in part, for Federal election activity, Congress could have decided that the purchase or construction of such facility was for the purpose of influencing a Federal election.

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[12] *Cosmetic, Toiletry & Frag. Ass'n, Inc. v. State of Minn.* 440 F.Supp. 1216, 1220 (Dist. Minn.), *aff'd.* 575 F.2d 1256 (8th Cir. 1978); quoting *Northern States Power Co. v. State of Minn.*, 447 F.2d 1143, 1146-47 (8th Cir. 1971), *aff'd.* 405 U.S. 1035, 92 S.Ct. 1307, 31 L.Ed.2d 576 (1972).

> Instead, it took the affirmative step of deleting the receipt and disbursement of funds for such activity from the specific proscriptions of the Act. In addition, there is no indication the Congress envisioned any sort of limitation on its preemption to some allocable portion of the costs of purchasing or construing a building. ([In contrast, there are areas of election activity which] specifically sanction[] allocation of expenses for certain exempt party activities).[13]

This analysis, however, does not clearly indicate Congress' aim and intent in specifically allowing corporation donations for a building fund for a committee which is involved in elections for Federal office. Further, the justification for opining that there need not be any allocation between a state party's Federal activity and state activity because "there is no indication that Congress envisioned any sort of limitation on its preemption to some allocable portion ..." reverses the principles of preemption set out above -- rather than implying preemption because of the presence of a Federal directive regarding the subject, the opinion implies preemption of an allocation because of Congressional silence.

The Board could speculate as to what Congress' aim and intent was in enacting the exception for corporate donations for a building fund; however, the Board believes that it is the burden of the Petitioner, IRP, to identify the Congressional aim and intent, and to further show how, given the remaining factors which consider that aim and intent, Federal preemption should be implied insofar as a state party central committee's state and local political activity.

2. HOW PERVASIVE IS THE FEDERAL REGULATORY SCHEME AS AUTHORIZED AND DIRECTED BY THE LEGISLATION AND AS CARRIED INTO EFFECT BY THE FEDERAL ADMINISTRATIVE AGENCY?

The Board concedes that the F.E.C.A. regulatory scheme is completely pervasive as to the financial activities of committees which are involved in elections for Federal office. However, with the possible exclusion of the issue at hand, the Board is aware of only one campaign finance-related provision of the F.E.C.A which clearly applies to candidates at all levels, which is the prohibition against contributions by foreign nationals.[14] The Petitioner has made no showing that the Federal scheme, either overall or with regard to the specific aim and intent underlying the corporate exemption for building funds, is so pervasive as to require preemption of state law even as to committees involved in state and local elections. To this end, there should be a showing that there be no reconciliation between the federal law which allows

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[13] AO 1991-5, 11,696, 11,697; AO 1993-9, 11,892, 11,893-11,894.

[14] 2 U.S.C. § 441e(a): "It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national." [Emphasis added.]

corporate contributions to a political party central committee for building funds and the state law which prohibits both direct and indirect corporate contributions to committees which support candidates for state, county or local office.

The Board is not convinced that the fact that the Federal government may have preempted state law by occupying the field on the question as to of whether committees which support Federal candidates can receive corporate donations for a building fund certainly means that there is preemption in the field on the question as to whether corporate donations for building funds for committees involved in state or local elections is allowed.[15] The Board observes that while a state party central committee clearly can and is involved in both Federal and state/local elections, the financial activities for each level of involvement are already conducted under the auspices of separately formed and reporting committees (one with the F.E.C., one with the Board). No argument has been advanced by RPI which would exclude an interpretation which would allow a corporately-funded building to be constructed solely for Federal activity. The Petitioners have not addressed the possibility that the state/local activity be conducted in a separate building, or the possibility that the state/local committee account reimburse the Federal account for a pro-rated fair market rental value of building usage. These are issues which the Board believes appropriate for the Petitioner to respond to in order for the Board to opine in favor of preemption.

3. WHAT IS THE NATURE OF THE SUBJECT MATTER REGULATED AND IS IT ONE WHICH DEMANDS "EXCLUSIVE FEDERAL REGULATION IN ORDER TO ACHIEVE UNIFORMITY VITAL TO NATIONAL INTEREST?"

Similar to the preceding section, the Board believes that the Petitioner has not at this point demonstrated that the provisions of the F.E.C.A. in general or the Federal corporate building exemption in particular are of such a nature as to exclude the possibility of allowing the exemption with respect to the state party central committee's Federal activities, but to defer to the state law prohibition with regard to the party's state and local activity. The Board is not persuaded that the state law prohibition against corporate contributions to a committee [supporting or opposing a state or local candidate] in any way touches upon the regulation or operation of the Federal activities of a state party committee.[16] The Board is not cognizant of any national interest in uniformity on allowing corporate donations to be used for buildings to support the state and local activities of state party committees. "Mere federal permission [for an activity to occur] does not necessarily preclude state prohibition."[17]

4. UNDER THE CIRCUMSTANCES OF THIS CASE DOES THE STATE LAW STAND AS AN OBSTACLE TO THE ACCOMPLISHMENT AND EXECUTION OF THE FULL PURPOSES AND OBJECTIVES OF CONGRESS?

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[15] *Holiday Acres No. 3*, 308 N.W. 471, 478.
[16] *Id.*
[17] *Id.* at 479.

Again, without a better determination of the aim and intent of Congress in allowing corporate donations for building funds for state party committees, it is difficult for the Board to find that enforcement of Iowa Code § 56.15 poses an obstacle to the accomplishment of those purposes and objectives. It appears conceivable that the immediate goal of allowing such committees to use such funds for a building in which to conduct their Federal election activities can be accomplished and is not impaired by continued enforcement of the Iowa prohibition. The Petitioner has not demonstrated how federal law would be impaired by operation of Iowa Code § 56.15.

Given that the Federal financial activities of the state party central committee are conducted separately from the state and local financial activities of the committee, it is difficult for the Board to conclude that the Federal law is in "direct conflict" with the state statute. Without additional information, the Board must conclude that the laws can be reconciled, and that therefore Federal preemption does not apply.[18]

CONCLUSION

The Board finds that the Petitioner, the Republican Party of Iowa, has not provided sufficient authority or information upon which the Board can conclude that the provisions of Iowa Code § 56.15 are preempted insofar as the state and local election activities of the state party central committee.

Approved this 15th day of July, 1997.

IOWA ETHICS AND CAMPAIGN DISCLOSURE BOARD

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James Albert, Board Member
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By Kay Williams
KAY WILLIAMS, Executive Director

[18] *Powers v. McCullough*, 140 N.W.2d 378, 382 ("The term 'direct' conflict means hostile encounter, contradictory, repugnant, so irreconcilably inconsistent, each with the other, as to make one actually inoperable in the face of the other.")