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AGENDA ITEM
For Meeting of: 2-28-02

SUBMITTED LATE

MEMORANDUM

DATE: February 27, 2002

TO: Commissioners

FROM: Commissioner Darryl R. Wold

RE: AOR 2002-02 (Maryland Lobbyist)

After giving the preemption issue in this AOR further thought, I more firmly reach the conclusion that we should not conclude that the Act preempts the provision of state law in question here.

The preemption provision in § 453 of the Act, on its face, is worded in broad terms, and is unequivocal in expressing Congress' intent that the Act preempt state law:

> "The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."

In light of this, there is no doubt about the intent to preempt. The question, however, is what provisions of state law are preempted. *Cipollone v. Liggett Group, Inc.* (1992) 505 U.S. 504, at 517 (Where Congress has included an express preemption clause in a legislative scheme, "we need only identify the domain expressly pre-empted" by the provision.")

Unfortunately, the scope of that "domain" is not apparent from the language of § 453, notwithstanding its broad wording. In a sense, the broad wording preempting "any provision of State law with respect to election to Federal office" is the reason the scope of § 453 is uncertain.

To begin with, it is obvious that the Act has nothing to do with "election" to any office, as that word is commonly understood to refer to the process of voting -- registration, casting a ballot, counting the votes -- notwithstanding the use of that term in § 453. The legislative debates during passage of the 1974 amendments make it clear that state law concerning registration, voting, and counting votes is not preempted. Section 108.7(c) of our regulations reflects that limited construction of § 453.

The Act does concern campaign *finance*, but the legislative history, again, indicates that not even all provisions in state law concerning financing of campaigns for Federal office were intended to be preempted. Senate Conference Report No. 93-1237, 93d Congress, 2d Session, reprinted in 1974 U.S.Code Cong. & Ad.News 5587, 5618, 5669, agreed to by the Senate in connection with the 1974 amendments to the Act, stated:

> "It is the intent of the conferees that any State law regulating the political activities of State and local officers and employees is not preempted or superseded by the amendments . . .."

A colloquy between Senators emphasized that point: "It [would be] . . . up to the State to determine the extent to which [state or local officers or employees] may participate in Federal elections." (120 Cong.Rec. 34386 (Oct. 8, 1974), remarks of Sen. Stevens.) The activity and participation referred to in this legislative history includes making contributions to candidates for Federal office. *Reeder v. Kansas City Board of Police Examiners* 733 F.2d 543, 546 (8th Cir. 1984).

The limited scope of § 453 is further reflected in our regulations. Section 108.7, in subdivision (a), repeats the broad preemptive language of § 453, but then describes the actual scope of preemption in a much more limited fashion, in subsection (b):

> "Federal law supersedes State law concerning the --
>
> (1) Organization and registration of political committees supporting Federal candidates;
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> (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
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> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees."

The limited scope of preemption even in the area of campaign finance is emphasized not only by the approach of our regulation in describing only specific areas of preemption, but also by the approach this regulation did not take -- it did not describe the scope of preemption even of campaign finances in broad terms -- it did not say, for instance, that "Federal law supersedes State law concerning all matters of financing of campaigns for Federal office".

Likewise, courts that have considered the preemptive effect of the Act have repeatedly taken the approach that § 453 expresses Congress' intent to preempt, but that the key issue is to "identify the domain expressly pre-empted", following *Cipollone, supra* 505 U.S. at 517 in that regard. (See, e.g., *Teper v. Miller* 82 F.3d 989, 994, n. 5 (11th Cir. 1996) "The FECA preemption clause means that the FECA occupies the field "'with respect to election to federal office.' [Cite] The only real issue is the effective reach of this phrase"; *Bunning v. Kentucky*, 42 F.3d 1008, 1011 (6th Cir. 1994) citing *Cipollone; Weber v. Heaney*, 995 F2d 872, 875 (8th Cir. 1993) citing *Cipollone*.)

In determining what is preempted by § 453, the courts have also been guided by the principle that there is a strong presumption against preemption, and that preemption provisions therefore must be narrowly construed. See, for examples, *Karl Rove & Company v. Thornburgh*, 39 F.3d 1273, 1280 (5th Cir. 1994) ("a 'strong presumption' exists against preemption, and 'courts have given section 453 a narrow preemptive effect in light of its legislative history'"); *Weber, supra*, at 875 ("We also recognize the strong presumption against preemption, and narrowly construe the language of § 453 to identify whether the [state statute] is preempted", citing *Cipollone* at 523); *Stern v. General Electric Company*, 924 F.2d 472, 475, n. 3 (2d Cir. 1991) ("even with respect to election-related activities, courts have given section 453 a narrow preemptive effect in light of its legislative history").

Thus, courts have found that there is no preemption of state law concerning the liability of a federal candidate for debts of his committee, *Karl Rove & Company, supra*; governing whether corporate political contributions were actionable as corporate waste, notwithstanding the provisions of § 441b concerning various categories of corporate spending, *Stern, supra*; or prohibiting police employees from making political contributions, including to federal candidates, *Reeder, supra*.

In deciding issues of preemption ourselves, we likewise should be guided by the principles stated by the Supreme Court in *Cipollone*, that because of the strong presumption against preemption, a preemption provision must be narrowly construed. Thus, I cannot agree with the apparent approach of the advisory opinion draft in this matter to the contrary -- it relies too heavily on the broad language of preemption in § 453, and stretches too much to find an intent to preempt all regulation of solicitations in the scattered provisions of the Act that concern solicitation of prohibited contributions.

It strikes me that the preemption issue presented to us in this advisory opinion is most closely analogous to that presented in Advisory Opinion 2001-19, in which we concluded that the Act did not preempt provisions of a state law that precluded a political committee, including a federal political committee, from

operating a bingo game, even though that bingo game was operated to raise contributions to the federal committee.

We reached that conclusion notwithstanding the facts that the Act extensively regulates the subject of contributions to federal political committees, and that the Commission has repeatedly (and in my view substantially correctly) held that state laws imposing restrictions on contributions to federal political committees are preempted.

That conclusion, however, reflects an appropriately narrow reading of the preemption provision of the Act. We noted, among other factors, that there was no bar under the state law against prospective donors making any contribution. The only bar was against a specific means of raising contributions -- by a bingo game. We did not stretch to inextricably connect that means of raising contributions to the Act's regulation of contributions *per se*.

We also noted the factor that control of gaming activity "is a central feature of a State's regulatory authority", which we had noted in a different context in our regulations, in § 114.5(b)(2). This factor gives recognition to a state's interest in the regulation in question -- recognition that is called for in our federal system of government.

Both of those factors are present in this pending advisory opinion. First, the Maryland statute does not bar any contributor -- even the lobbyists that are subject to it -- from making any contribution. It only restricts a specific category of individuals -- registered lobbyists -- from raising contributions.

Second, the Maryland statute operates in an area in which the State has a compelling interest in exercising its regulatory authority -- the prevention of the possibility of corruption in its legislative process. Indeed, it appears that the Maryland statute has been upheld in federal court against a challenge to its constitutionality brought on the grounds that it impermissibly infringed on the First Amendment rights of lobbyists, in *Maryland Right to Life PAC v. Weathersbee*, 975 F.Supp. 791 (D.Md. 1997). (The *Weathersbee* opinion refers to section 15-707 of the Maryland State Government Code. The statute before us in this advisory opinion is cited as section 15-714. The Maryland State Ethics Commission, however, which provided us with a copy of the *Weathersbee* opinion, said it concerned the section that is before us in this advisory opinion, and from the description in the opinion, it appears that is the case.) The court found that the specific limitations on the political activity of lobbyists served a compelling state interest in avoiding corruption of the legislative process, and that the statute was narrowly tailored to achieve that interest. (975 F.Supp. at 797-798.)

It is true that the court did not consider the particular application of the code section to lobbyists' activity on behalf of the candidacy of members of the state legislature for federal office, and it is also true that the existence of a compelling state interest supporting the provision does not mean that it cannot be preempted by federal law. The point, however, is that the statute regulates a subject of important state interest. For that reason also we should be cautious in finding that it is preempted, and that the state cannot enforce its interests, no matter how substantial.

I discussed other reasons why I did not find the analysis in the draft advisory opinion persuasive, in my previous memorandum of February 20.

I would like to see us strictly construe the areas of preemption set out in § 108.7(b) of our regulations, and give as much deference as we can to the substantial interests of the state that are reflected in the statute before us -- deference that is appropriate in our federal system of government.