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AGENDA ITEM
For Meeting of: 11-02-00

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MEMORANDUM

TO: The Commission

FROM: Commissioner Karl Sandstrom KS

DATE: November 1, 2000

SUBJECT: AO 2000-24

I write this memorandum to explain why I conclude that federal law does not preempt the State of Alaska from regulating the portion of administrative expenses and generic voter drive expenses that are deemed non-federal under the allocation scheme of section 106.5 of the Commission's regulations. I also write to address some aspects of section 106.5 that are not discussed in the No Preemption Draft.

Section 106.5(a)(1) states: "Party committees that make disbursements in connection with federal and non-federal elections shall make those disbursements entirely from federal funds subject to the prohibitions and limitations of the Act, or from accounts established under 11 CFR 102.5." [1] This gives a party committee two options. It can either (1) make disbursements in connection with federal and non-federal elections entirely from federal funds ("Option 1"), or (2) make disbursements in connection with federal and non-federal elections from federal and non-federal accounts in accordance with 11 CFR 102.5 and 11 CFR 106.5 ("Option 2"). Since the requester has chosen Option 2, the question before the Commission is whether federal law preempts the State of Alaska from regulating the funding of activity that is deemed non-federal under Option 2.

"Preemption may be either express or implied, and 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'"[2] Absent explicit pre-emptive language, Congress' intent to supersede state law altogether may be inferred because "'[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it,'

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[1] 11 CFR 106.5(a)(1).

[2] *Fidelity Federal Savings & Loan Assoc. v. Cuesta*, 458 U.S. 141, 152-53 (1982) (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)).

because 'the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject,' or because 'the object sought to be obtained by federal law and the character of obligations imposed by it may reveal the same purpose.'"[3] "Even where Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent that it actually conflicts with federal law. Such a conflict arises when 'compliance with both federal and state regulations is a physical impossibility,' [citation omitted] or when state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'"[4] Moreover, regulations intended to pre-empt state law that are promulgated by an agency acting non-arbitrarily and within the congressionally delegated authority may also have pre-emptive force.[5]

If one considers Option 1 alone, it would appear that "[t]he scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" and "the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."[6] If section 106.5 were limited to Option 1, I would conclude that state law is preempted.

However, Option 2 prevents me from concluding that section 106.5 preempts state law entirely. I fail to see how the State of Alaska's regulation of activity that is deemed non-federal under Option 2 runs afoul of any of the standards for preemption stated above. Even if committees with federal and non-federal accounts have the flexibility under section 106.5 to pay a higher percentage of allocable expenses with federal funds than the ballot access method requires,[7] so long as the committee has the option under section 106.5 of paying a portion of those expenses with non-federal funds, there is no basis for preempting a state from regulating the portion of the administrative expenses and generic vote drive costs that are deemed non-federal and therefore not required to be subject to the prohibitions and limitations of the Act. To conclude otherwise would yield a system where party committees would have a choice between paying for administrative expenses and generic voter drive costs entirely from federal funds, on the one hand, or paying for such expenses with a portion of federal funds and a portion of entirely unregulated funds, on the other. If the federal interest in regulating administrative expenses and generic voter drive costs in connection with federal and non-federal elections is sufficient to justify Option 1, then it hardly makes sense to set up a system under Option 2 where a portion of expenses for federal and non-federal elections is regulated by neither federal law nor state law, and could be paid for by corporations, labor organizations, and foreign nationals.

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[3] *Cuesta,* 458 U.S. at 153 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). *See also Crosby v. National Foreign Trade Council,* 120 S.Ct. 2288, 2294, n.6 (2000) ("We recognize, of course, that the categories of preemption are not 'rigidly distinct' . . . [and] field pre-emption may be understood as a species of conflict preemption." (quoting *English v. General Elec. Co.*, 496 U.S. 72, 79, n.5 (1990))).

[4] *Cuesta,* 458 U.S. at 153 (citations omitted).

[5] *See Cuesta,* 458 U.S. at 153.

[6] *Cuesta,* 458 U.S. at 153

[7] The Explanation and Justification states, "the amounts that would be calculated under the rules for a committee's federal share of allocable expenses represent the minimum amounts to be paid from the committee's federal account, without precluding the committee from paying a higher percentage with federal funds." *Methods of Allocation Between Federal and Non-Federal Accounts; Payments; Reporting,* 55 Fed. Reg. 26058, 26063 (June 26, 1990).

For these reasons, I conclude that federal law does not preempt the State of Alaska from regulating the portion of administrative expenses and generic voter drive costs that are deemed non-federal under the allocation method set forth in section 106.5 of the regulations. If a state committee wishes to pay for those expenses entirely with federal funds, then I suggest they switch to Option 1.

Finally, I would reiterate what the Commission stated in a recent advisory opinion regarding preemption:

> The Commission recognizes that the Act and the Commission regulations do not compel deference or adherence by [state] officials to the Commission's conclusions with respect to the Act's preemption of [state] statutes. It is also clear that the judicial review process is the appropriate means for a final and binding determination of Federal preemption questions such as those addressed in this advisory opinion.[8]

[8] Advisory Opinion 2000-23, at 6.