86202

State of California
Fair Political Practices Commission
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September 13, 1978

A-78-243

N. Bradley Litchfield
Assistant General Counsel
Federal Election Commission
1325 K Street, N.W.
Washington, D.C. 20463

Dear Mr. Litchfield:

The Fair Political Practices Commission appreciates your advising us of California Assemblyman William Dannemeyer's request for an advisory opinion on the question of whether he can accept campaign contributions from California lobbyists. Assemblyman Dannemeyer is currently a candidate for the U.S. House of Representatives as well as a member of the California Legislature.

Under California's Political Reform Act, it is unlawful for a lobbyist[1] to make a campaign contribution to members of the Legislature as well as political committees supporting members of the Legislature. Government Code Section 86202.[2] Likewise, members of the Legislature are prohibited from accepting campaign contributions from registered lobbyists. Section 86204.

You have advised our staff that the draft opinion prepared for the Federal Elections Commission's ("FEC") consideration concludes that the Federal Election Campaign Act's ("FECA") provisions preempt California law with respect to contributions

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1/ As defined in Government Code Section 82039 and regulation 2 Cal. Adm. Code §18239. Lobbyists include only those persons who attempt to influence the Legislature and state agencies on a substantial or regular basis. At the present time there are approximately 700 registered lobbyists.

2/ All further statutory references are to the Government Code unless otherwise noted.

from lobbyists to legislators. It is our understanding that your opinion relies upon 2 U.S.C. Section 453 and the Federal Elections Commission's regulation, 11 C.F.R. 108.7.

This is to inform you that the Fair Political Practices Commission respectfully disagrees with your application of the preemption clause to the specific question posed by Assemblyman Dannemeyer. The Fair Political Practices Commission respectfully submits that Congress could not have intended to vitiate a law that regulates an area properly reserved to state regulation. Assemblyman Dannemeyer holds a dual role - he is state legislator and a candidate for federal office. He does not relinquish his capacity as an elected state officer just because he chooses to run for federal office.[3/] He still participates in the governmental processes as a state legislator. If lobbyists are able to contribute to his federal campaign, Assemblyman Dannemeyer will be subject to the corruptive influences which the Act attempted to eliminate by prohibiting gifts of more than $10 a month and contributions to elected state officers. Sections 86201-04. Those sections are applied nondiscriminately to all elected state officers in a proper exercise of the state's police powers.

The standard for determining whether state law is preempted by federal law was stated in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963). The court stated:

> [F]ederal regulation ... should not be deemed preemptive of state regulatory power in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained....
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> 373 U.S. at 142.

3/ Of course, Assemblyman Dannemeyer could have resigned his state office and accepted lobbyists' contributions to his federal campaign. See, Morial v. Judicial Commission of Los Angeles, 565 F. 2d 295 (5th Cir. 1977).

This is not a case where Congress has "unmistakably ordained" that statutes such as Section 86202 should be pre-empted nor is the subject of the regulation such that one must conclude that preemption is necessary.

While the FECA clearly was intended to preempt some aspects of state regulation of federal elections, such as the filing of campaign spending reports, there is no indication that Congress intended to preempt every aspect of state law regulating legitimate state subjects which may incidentally impact in any way upon a federal election.

The language of 2 U.S.C. Section 453 makes clear that the provisions of the FECA only preempt provisions of state law "with respect to election to federal office," (emphasis added) not every state regulation somehow affecting federal elections. The FEC's own preemption regulations recognize that there are some aspects of elections that are properly regulated by the various states' laws. 11 C.F.R. 108.7(b). Congress, in enacting the FECA, expressed its intention to occupy the field of federal elections. To that end, the preemption language was inserted. But there is no evidence to suggest that Congress, by enacting the FECA, intended to vitiate other state laws that may tangentially touch on the federal election process but are intended to regulate in areas of legitimate state concern unrelated to federal elections.

That the FECA was not intended to preempt a state law such as Sections 86202[4/] and 86204 can be seen by examining the history and purpose of those sections. Those sections do not deal with election to federal office but rather with state legislators and lobbyists. They are part of the Political Reform Act which is aimed at ridding the state political system of the appearance and actuality of corruption and improper influence. The findings of the Political Reform

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4/ The constitutionality of this section and Section 86201 which prohibits a lobbyist from making a gift of $10 or more are presently under consideration by the California Supreme Court in Fair Political Practices Commission v. Superior Court. The case, which involves the constitutionality of the entire Act and the possible denial of due process and equal protection to lobbyists by Sections 86201 and 86202, was argued before the California Supreme Court on June 5, 1978.

Act state:

> Public officials, whether elected or appointed, should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them;
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> Costs of conducting election campaigns have increased greatly in recent years, and candidates have been forced to finance their campaigns by seeking large contributions from lobbyists and organizations who thereby gain disproportionate influence over governmental decisions;
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> Section 81001(b) and (c).

Lobbyists, in the public mind and as a matter of statutory definition, are persons who have day-to-day contact with legislators. They are paid for the specific pragmatic purpose of exercising influence over legislative decisions so that those decisions will be beneficial to the interests of their employers. The intimacy and access of lobbyists to legislators creates an opportunity for corruption and certainly creates an appearance of improper influence when coupled with contributions and gifts given by lobbyists to the officials they lobby.

Prior to the adoption of the Political Reform Act, many lobbyists gave both contributions and gifts to public officials they lobbied or acted as conduits for their employers' contributions. The role of the lobbyist in the campaign contribution process encouraged a system in which the very persons whose task is self-described as advocacy were able to gain influence and access not on the basis of the merits of the arguments they espoused or the quality of their advocacy, but rather on the basis of the financial benefits they could bestow upon public officials. Where the possibility of improper influence and corruption created by the use of financial resources is so great, the state has a significant interest in eliminating that possibility and encouraging a system of government in which the merits of arguments and not money are the decisive factors.

There is nothing in the FECA or its history which suggests that Congress intended to preempt state laws aimed at preventing corruption in the relationship between state legislators and lobbyists. Under the rationale of the proposed opinion the states could never enforce any law which is aimed at preventing corruptive influences and operates to prohibit or limit contributions to state legislators who are also candidates for federal office. For example, under the rationale

you have proposed a state could not prosecute a state legislator-federal candidate for bribery when the bribe was for the purpose of buying the legislator's vote in the state legislature but was made in the form of a contribution to the legislator's federal campaign. There is no reason to believe Congress intended to handicap the states' ability to act to prevent corruption in state politics.

This also is not a case where the subject matter of the regulation demands preemption. Unlike some regulations of commerce where state regulation interferes with the purposes and operation of the federal law (See Jones v. Rath Packing Co., _____ U.S. _____, 97 S. Ct. 1305, 1318 (1977)), the Political Reform Act's regulation of lobbyist contributions to state legislators does not frustrate the policies or objectives of the FECA. The federal law does not purport to regulate lobbyist-to-legislator contributions, just as it does not purport to regulate the dates and places of election. See 11 C.F.R. Section 108.7(c). Therefore, there is no federal policy which can be frustrated by California's regulation of lobbyist contributions. Indeed, it can hardly be argued that FECA intrinsically preempts even substantially overlapping state regulation, since prior to the 1974 amendments state regulation was expressly permitted.

The ramifications of a broader reading of FECA's preemptive clause would be devastating. To avoid the prohibitions of Sections 86202 and 86204 an elected state officer would just have to declare for federal office.[5/]

Even assuming that Congress had intended in the FECA to interfere with the reasonable and legitimate exercise of a state's police powers, the Fair Political Practices Commission asserts Congress would have acted impermissibly. Congress cannot interfere with the states' powers to make essential

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5/ Although in this particular case, the state legislator had to forego seeking reelection in order to seek federal office, some California elected state officials can and have sought federal office without sacrificing their state positions. For example, in 1976, Governor Edmund G. Brown, Jr., was a candidate for president, but his term as governor was not up until 1978. In 1974, state Senator H. L. Richardson was a candidate for United States Senator, but his term as state senator did not end until 1976.

decisions concerning the conduct of integral government functions. National League of Cities v. Usery, 426 U.S. 833, 845, 855 (1976). There can be no question that regulation of elected state government officials and state lobbyists is part of California's integral functions as a state. The FECA should be interpreted to avoid conflicts between the powers of the states and Congress.

We therefore respectfully request that the FEC decline to adopt the broad preemptive scope urged in your staff's draft.

I hope this information has been helpful. If you have any further questions, please contact me.

Sincerely,

Lee C. Rosenthal
Chief
Legal Division

LCR:kp