FEDERAL ELECTION COMMISSION
Washington, DC 20463

May 16, 1988

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1988-21

Dana W. Reed
Reed & Jones
3151 Airway Avenue, Suite M-1
Costa Mesa, California 92626

Dear Mr. Reed:

This responds to your letter of April 25, 1988, requesting an advisory opinion on behalf of Friends of Harriett Wieder, concerning preemption by the Federal Election Campaign Act of (1971, as amended ("the Act"), and Commission regulations of an Orange County, California, ordinance that limits political contributions.

Your letter states that the Friends of Harriett Wieder ("Friends") is the authorized campaign committee of Harriett Wieder, a candidate for Congress in the 42nd District of California. The primary election will be held in California on June 7, 1988. Mrs. Wieder is also a member of the Orange County Board of Supervisors. You explain that at least one potential contributor to Mrs. Wieder's Federal campaign is hesitant to contribute the $1,000 maximum permitted by the Act[1/] because his contribution and the receipt of that contribution by the Friends may be considered violations of the Orange County Campaign Reform Ordinance of 1978, as amended. Violations are misdemeanors under the ordinance.[2/]

Section 1-6-13 of the Orange County ordinance prohibits a certain class of persons, "County Influence Brokers," from contributing more than $868 in any 12-month period in the aggregate to all members of the Board of Supervisors, candidates for Board office, and their controlled committees. The ordinance in pertinent part defines a "County Influence Broker" as any person who (1) has contributed more than $350 over the past 12 months to any or all members of the Board of Supervisors or their controlled committees and (2) is employed or contracts for consideration to communicate with Board members or their staff assistants for the purpose of influencing any action of the Board of Supervisors.[3/]

The cited ordinance would appear to prohibit a County Influence Broker who has contributed $868 to one or more Orange County Board members from contributing further to those persons or to a Board member to whom he has not previously made a contribution even if the contribution is for a Federal and not for a county campaign. In a letter you enclosed with your request, the Orange County District Attorney's office concluded that the ordinance limiting contributions by County Influence Brokers applies to contributions made to the Friends of Harriett Wieder. Another official, the Orange County Counsel, had earlier advised Mrs. Wieder that the Act would preempt the ordinance.

As revised by the 1974 Amendments to the Act, section 453 states:

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

The language of this broad, explicit preemption clause is plain. The report of the House committee that drafted the clause explains its intent in sweeping terms: Federal law is to be "construed to occupy the field with respect to elections to Federal office" and is to be "the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). The conference committee report on the 1974 Amendments states that "Federal law occupies the field with respect to ... the source of campaign funds in Federal races [and to] the conduct of Federal campaigns ...." H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974).

The Commission has issued regulations that embody the explicit congressional intent to preempt. The regulations provide, inter alia, that "Federal law supersedes State law concerning the ... [l]imitations on contributions ... regarding Federal candidates and political committees." 11 CFR 108.7(b)(3). The regulations also list the types of State election laws that the Act does not preempt or supersede, e.g., State laws governing the manner of qualifying as a candidate, dates and places of elections, voter registration, vote fraud. 11 CFR 108.7(c). The Orange County ordinance in question does not fall within this restricted category. Instead, it regulates the contributions that may be made to Harriett Wieder's Federal campaign; in the words of the conference report quoted earlier, it concerns "the source of campaign funds in Federal races."

As the legislative history of section 453 shows, the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing--including contribution limitations--for election to Federal office. The Act prescribes limitations on contributions by any person, including individuals, and prohibits contributions completely by certain specified persons (national banks, corporations, and labor organizations using their treasury funds, and foreign nationals and government contractors). The Act does not include influence brokers or lobbyists among those who may not contribute to Federal candidates or political committees. To fail to preempt the regulation by Orange County of contributions to Federal candidates would be to undermine the congressional aim of national uniformity and to nullify Congress's considered decision to allow Federal campaign contributions of up to $1,000.[4/]

The Commission has consistently relied upon the Act's broad preemption provision, 2 U.S.C. 453. The Act occupies the field with respect to Federal election campaign contributions. The

most relevant precedent is Advisory Opinion 1978-66, in which a congressional candidate who was also an elected state officer in California asked the Commission whether the Act preempted California provisions that prohibited his receiving contributions from lobbyists registered under California law. Citing 2 U.S.C. 453 and its legislative history, the Commission concluded that, "since the provisions of the California Government Code . . . are, in effect, limitations on contributions, . . . these provisions are preempted by the Act insofar as they might apply to a candidate for Federal office." See also Advisory Opinion 1986-27 (Act preempts contribution reporting duties demanded by State regulatory body; "[s]uch a requirement would impose reporting and itemization requirements on . . . a Federal political committee . . . that would exceed those required by the Act and Commission regulations"); Advisory Opinion 1982-29 (corporate separate segregated fund may collect voluntary contributions by means of payroll deductions regardless of any State laws to the contrary). Cf. Advisory Opinion 1986-11 and the opinions it cites.[5/]

The Commission concludes that the Act and Commission regulations preempt the Orange County ordinance insofar as it applies to the Federal election campaign of Harriett Wieder. Congress has not only expressly preempted the field of Federal election regulation, it has, assisted by the Commission, created a uniform Federal regulatory scheme for the financing of Federal elections. The Orange County ordinance encroaches upon the Act's and the regulations' treatment of contributions to Federal office candidates and to their committees.[6/]

Two court decisions that appear to support nonpreemption are factually distinguishable and inconsistent with the prevailing case law. Reeder v. Kansas City Board of Police Comm'rs, 733 F.2d 543 (8th Cir. 1984), cert. denied, ____ U.S. ____, 107 S. Ct. 951 (1987), and Pollard v. Board of Police Comm'rs, 665 S.W.2d 333 (Mo. 1984) (en banc), cert. denied, 473 U.S. 907-08 (1985), involved challenges by Kansas City, Missouri, policemen to a state statute that forbids officers and employees of the Kansas City Police Department to make any political contributions. The provision in question, unlike the Orange County ordinance, is directed to governmental employees. Further, in explaining their decisions, the courts gave little weight to the Act's express preemption clause, its legislative history, and the Commission's administrative rulings.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

(signed)

Thomas J. Josefiak
Chairman of the Federal Election Commission

Enclosures (AOs 1986-27, 1986-11, 1984-26, 1982-29, 1979-28, and 1978-66)

1/ 2 U.S.C. 441a(a)(1)(A): "No person shall make contributions . . . to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000."

2/ Orange County Codified Ordinances §1-6-16.

3/ Orange County Codified Ordinances §1-6-9. Each County Influence Broker must register with the County Clerk. §1-6-10.

4/ The Commission has indicated that the Act permits any person who is not otherwise prohibited by Federal law from doing so to make a contribution up to the statutory maximum in a Federal election and that a Federal office candidate may accept such a contribution. See, e.g., Advisory Opinions 1984-26 and 1979-28.

5/ Compare the advisory opinions listed in the text with Advisory Opinion 1980-47, which did not involve contribution limitations (Act did not preempt State law prohibiting payments by candidates and political committees to "walk-around" workers on election day).

6/ Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 698-99 (1984), summarizes the familiar principles applicable to preemption questions. See also Aloha Airlines, Inc. v. Director of Taxation of Hawaii, 464 U.S. 7, 12 n.5 (1983) (rules developed in cases involving the implicit preemption of State statutes apply when a court must decide whether a State law should be preempted even though Congress has not expressly legislated preemption; "[t]hese rules . . . have little application when a court confronts a federal statute . . . that explicitly pre-empts state laws"). Cf. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 236 (1947) ("Congress can act so unequivocally as to make clear that it intends no regulation except its own. . . . The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State"); KVUE, Inc. v. Moore, 709 F.2d 922, 931-32 (5th Cir. 1983), aff'd mem., 465 U.S. 1092(1984) ("If preempted, a complementary or supplementary state regulation is as invalid as one directly conflicting with the federal scheme, for preemption forbids state regulations to advance or to retard the federal purpose") (footnote omitted).