FEDERAL ELECTION COMMISSION
Washington, DC 20463

October 7, 1991

CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

ADVISORY OPINION 1991-22

Douglas A. Kelley
Attorney at Law
Suite 500
701 Fourth Avenue
South Minneapolis, MN 55415

Dear Mr. Kelley:

This responds to your letter dated July 3, 1991, requesting an advisory opinion concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act" or "FECA"), to a recently enacted Minnesota statute that provides State funding combined with voluntary expenditure limits for Federal candidates who seek election in Minnesota.

You represent three elected Federal officeholders, Senator David Durenberger and Representatives Jim Ramstad and Vin Weber, whose filings with the Commission indicate that they have already become candidates for re-election to the United States Senate in 1994 (Durenberger) and to the United States House of Representatives in 1992 (Ramstad and Weber). You have also submitted the advisory opinion request on behalf of the Chairman of the Minnesota Independent Republican ("IR") Party, as well as on behalf of three identified members of the Minnesota legislature who do not appear to have become Federal candidates at this time.

The subject matter presented is the Minnesota Congressional Campaign Reform Act, effective January 1, 1991. Minn. Stat. §§ 10A.40 through 10A.51 (hereinafter cited as 10A.xx). In brief, the statute authorizes the payment of general revenue funds to Congressional candidates seeking election in Minnesota provided those candidates agree to voluntary limits on their campaign expenditures. You state that the statute is in effect for the 1992 Federal elections to the United States Congress in Minnesota and further explain that it "will play a crucial role" in the "campaign plans" of the above identified Federal candidates. The Commission understands from your request that the Federal candidates you represent will soon need to decide whether or not

they should participate in the new Minnesota campaign finance system, and how they should conduct their campaigns if candidates who will challenge them in the 1992 general election make a different decision.

The candidates and the IR Party chairman request the Commission's advice whether the FECA preempts the Minnesota statute with respect to both its voluntary expenditure limits specified for Federal candidates and to the financing of those candidates' campaigns from the general revenues of the State of Minnesota. You state that, if the Commission agrees with your view that the statute is preempted by the FECA, your clients request such a ruling "as soon as possible."

You further explain that early guidance from the Commission will "save significant amounts of time and energy in Minnesota that will be expended needlessly should the Commission not act at this time."

The cited Minnesota statute has several significant features. It is voluntary in the respect that no expenditure limit applies to any Federal candidate who does not agree to the limit.[1] MN 10A.43. It provides for the payment of a financial "incentive" to those Federal candidates who sign and file written agreements no later than September 1 of the general election year and who qualify for the general election ballot. MN 10A.43. The relevant expenditure limits are $3,400,000 for United States Senate candidates and $425,000 for candidates seeking election to the U.S. House of Representatives. MN 10A.44. These limits apply to expenditures made during the calendar year of the relevant Federal election and are adjusted based on changes in the consumer price index. MN 10A.44.[2]

The amount necessary to pay the incentive is appropriated from the general fund to the State treasurer and is payable to major party candidates only after certification of the results of the primary election. MN 10A.49. The maximum amount payable to a Federal candidate who agrees to the expenditure limit is 25% of the limit applicable to that candidate. MN 10A.43.[3] In order to be entitled to receive State funds, the Federal candidate must also match the amount paid by the State with contributions received from other sources. MN 10A.48.[4] In addition, a Federal candidate who agrees to the expenditure limit becomes "subject to a civil fine of up to four times" the amount of any expenditures exceeding the limit, if that candidate "permits the candidate's authorized committees to make aggregate expenditures on the candidate's behalf in excess of" the applicable limit. MN 10A.47.

In some circumstances the State will not make payments to a Federal candidate who has agreed to the expenditure limit and in other situations the expenditure limit, even where agreed to, will not apply. Specifically, if all major party Federal candidates for a given office agree to the expenditure limit, no State funds will be paid to any such candidate although the limits remain applicable to them. MN 10A.44.[5] However, if a candidate agrees to the limit, but has a major party candidate opponent who declines to so agree, the limit will not apply to either. Moreover, the candidate who agreed to the limit will receive the State payments for which that candidate otherwise qualifies. MN 10A.44.

The statute also provides that contributions by or to Federal candidates, as well as loans to them, are governed by the FECA and subject to the penalties imposed therein. MN 10A.45 and 10A.47.

Furthermore, the statute provides that political party expenditures with respect to Federal candidates are governed by the FECA, and that all reporting and disclosure requirements for Federal candidates are likewise governed by the FECA. MN 10A.46 and 10A.42; also, see MN 10A.51.

As already indicated, you contend that the Minnesota statutory scheme is preempted and superseded by the Act and Commission regulations, and that your position is confirmed in a series of past advisory opinions issued by the Commission. The question presented to the Commission is: Does the FECA preempt and supersede a statute that permits payment of state funds to Federal candidates who enter voluntary, binding agreements to limit their campaign expenditures which are made enforceable via civil fines in amounts up to 400% of excessive expenditures.

The Act states that its provisions and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. The House committee that drafted this provisio intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 regarding the effect of the Act on state law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes state law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, p. 51. 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration, voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests of the states and are not covered in the act." House Document 95-44, p. 51.

The FECA in its 1974 amendments prescribed limits on expenditures by all Federal candidates whether presidential or congressional. See Public Law 93-443, §101(a), 88 Stat. 1264 (1974). As a direct result of the United States Supreme Court decision in Buckley v. Valeo, 424 U.S. 1 (1976), the Congress amended the FECA in 1976 to repeal the expenditure limits for congressional candidates and to retain them only for presidential candidates who qualified for

campaign funds paid from the United States Treasury pursuant to chapters 95 and 96 of Title 26, United States Code. See Public Law 94-283, §112, 90 Stat. 488 (1976).

In the context of this statutory background, the Commission submitted its regulations on preemption (and other topics) to Congress in early 1977 and then promulgated them on April 13, 1977.[6] The pertinent regulations then provided, as they do currently, that Federal law supersedes State law concerning any limitation on expenditures regarding Federal candidates and political committees. 11 CFR 108.7(b)(3); see 11 CFR 108.7 (1977)[7]. Subsequent to both the enactment of the 1974 FECA amendments and to the Buckley decision in 1976, Congress has considered the issue of expenditure limits and has, up to this point, chosen to enact such limits only for Federally funded presidential candidates.[8] In making this choice, Congress has also made another decision - to reject the extension of Federal funding and the concomitant expenditure limits to other Federal candidates.

This status of the Federal law does not suggest the presence of a regulatory vacuum into which the states may enter.[9] It is instead indicative that Federal law continues to occupy the field with respect to enforcement of expenditure limits and, further, that the will of Congress at this time is that there be no expenditure limits for Federal candidates, other than for presidential candidates who qualify for U.S. Treasury funding.

The sweeping terms of the Act's preemption provision and its legislative history, which is largely incorporated in the Commission regulations, make clear that the FECA is to occupy the field of campaign finance for Federal elections and is to be the sole authority under which those elections are regulated. 2 U.S.C. 453, 11 CFR 108.7. The Commission has issued a number of advisory opinions that have concluded or assumed, as a general rule, that funds from state revenues, including tax check-offs or fees paid for state services or filing fees, may be deposited in a state party's Federal account.[10] The Commission's determination that a state may deposit money in a party committee's Federal account is, however, a separate question from whether a state may regulate Federal campaign finance under the guise of a public funding mechanism conditioned on abiding by spending limits.

The Minnesota statute not only purports to provide funds directly to Federal candidates, but also purports to enforce a limit on expenditures made by Federal candidates. This statutory scheme to regulate Federal campaign finance activity is clearly preempted by the Act's express preemption provisions and the Commission's regulations at 108.7(b)(3) which specifically state that "Federal law supersedes State law concerning the ... limitation on contributions and expenditures regarding Federal candidates...". As stated in the Conference Report to the 1974 amendments:

> The provisions of the conference substitute make it clear that the Federal law occupies the field with respect to ... the sources of campaign funds used in Federal races, the conduct of Federal campaigns, ... but does not affect the States' rights to prohibit false registration, voting fraud, theft of ballots and similar offenses under State law. H.R. Conf. Rep. No. 1438, 93rd Cong., 2d Sess. 69 (1974) (relating to contribution and expenditure limitations).

Minnesota's statute is not within the type of state laws Congress stated were outside the realm of Federal preemption. In fact, Minnesota's statutory scheme is more analogous to the situation presented in Advisory Opinion 1989-25 in which the Commission preempted a New Hampshire state statute to the extent it restricted a political party's 2 U.S.C. 441a(d) spending authority on behalf of Federal candidates who receive ballot fee waivers.[11]

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

Sincerely,

(signed)

John Warren McGarry
Chairman for the Federal Election Commission

Enclosures (AOs 1991-14, 1989-25, 1988-33, 1983-15, 1982-17)

1/ The statute uses the term "Congressional candidate" in reference to those Federal candidates who are covered. It defines such candidates to mean individuals who seek nomination or election to the United States Senate or United States House of Representatives from Minnesota and who are candidates as defined under 2 U.S.C. 431(2). MN 10A.41.

2/ The expenditure limits are increased to 120% of the specified limit in cases where a Federal candidate won a contested primary election but received less than twice as many votes as any one of the candidate's opponents in that primary. A separate limit equal to 20% of the base limit applies to "the aggregate amount of expenditures on behalf of" a Federal candidate or elected Federal office holder in any year "following an election year for the office held or sought . . ." MN 10A.44

3/ A further incentive is available in that individuals making contributions to a Federal candidate who has agreed to the limits are entitled to have their contributions refunded by the State in amounts up to $50 for individuals and $100 for married couples. MN 10A.43 and 290.06.

4/ A candidate who receives State funding is also required to return up to the full amount of the State payments if the candidate's actual expenditures are less than such payments. The amount to be repaid or returned is the difference between the State funding and the aggregate campaign expenditures of the candidate. The FECA report that the candidate's principal campaign committee must file by January 31 of the year following the general election is used to determine the amount of any required repayment. MN 10A.50 and 10A.51.

5/ The same situation exists where all candidates, regardless of political party affiliation, agree to the limits. MN 10A.44.

6/ The Commission had earlier submitted the same regulations to Congress on August 3, 1976, but Congress adjourned on October 1, 1976, two days before expiration of the 30 day legislative

review period as then mandated by the Act. Accordingly, those regulations were never prescribed by the Commission as final rules.

7/ The fact that this regulation is based upon 1974 FECA legislative history, which pertains to criminal provisions of Title 18 that were repealed in 1976, is of no consequence. Violations of the expenditure limits that were retained in the 1976 amendments are still subject to criminal penalties in some circumstances, as are certain violations of the contribution limits and prohibitions. 2 U.S.C. 437g(d); 26 U.S.C. 9012, 9042. In addition, the deletion of the form Title 18 provisions from the criminal code is of only limited significance because, in virtually all respects, the substantive provisions were renumbered and relocated in Title 2 of the Code. For example, the contribution limits formerly in 18 U.S.C. 608 became 2 U.S.C. 441a(a), the corporate prohibition in 18 U.S.C. 610 became 2 U.S.C. 441b, etc.

8/ Federal funding is also available to qualified national committees of political party organizations to defray expenses for their presidential nominating conventions. 26 U.S.C. 9008.

9/ The Commission notes that the preemption provision of the original FECA in 1971 may have accorded considerably more latitude for the application of state law to Federal candidates. It provided, in part, that state law would not be invalid or inapplicable unless complying with state law would result in a violation of the FECA. It further provided, however, that no state law shall be construed as prohibiting any action or expenditure that could be lawfully made under the FECA. Public Law 92-225, §403, 86 Stat. 20 (1972). The current Federal preemption provision of 2 U.S.C. 453, along with implementing Commission regulations, represent a striking contrast to the 1971 language and thus further support the Commission's conclusion here.

10/ See, e.g., Advisory Opinions 1991-14, 1988-33, 1983-15, 1982-17, 1980-103 and 1978-9.

11/ The Commission did not, however, issue an opinion on whether Federal law preempts those portions of New Hampshire law that directly regulate a candidate's expenditures or the use of campaign funds. Advisory Opinion 1989-25.