FEDERAL ELECTION COMMISSION
Washington, DC 20463

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

ADVISORY OPINION 2001-19

Gary Kohut, Chair
Oakland County Democratic Party
P.O. Box 423
Troy, MI 48099-0423

Dear Mr. Kohut:

This refers to your letter dated November 1, 2001, as supplemented by letters of December 10 and 20, on behalf of the Oakland Democratic Campaign Committee ("the Committee") concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the pre-emption of Michigan State law regarding the Committee's use of State bingo licenses to raise funds for Federal election campaigns.

You state that, as chair of the Committee, you seek advice to determine whether the Committee is prohibited by law from qualifying for a State bingo license. You indicate that the Committee is the Federal committee established by the Oakland County (MI) Democratic Party to receive and spend funds to influence Federal elections. You explain that, as part of its ongoing fundraising efforts, the Committee operates two bingos that were designated, as of October 17, 1995, as Federal bingos by the Michigan Bureau of State Lottery, which licenses bingos in Michigan.

A Michigan statute, passed in 1995, defines the qualifications an organization must satisfy to obtain a bingo license. 1995 PA 275, MCL 432.103 et seq. You explain that subsection 3(6) provides that:

> Qualified organization does not include a candidate committee, political committee, political party committee, ballot question committee, independent

> committee, or any other committee as defined by, and organized pursuant to, the Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, being sections 169.201 to 169.282 of the Michigan Compiled Laws.

You further state that the 1995 Michigan bingo statute was challenged in State court on constitutional and other grounds. The Michigan Court of Appeals upheld the statute and, on March 27, 2001, the Michigan Supreme Court denied an application for leave to appeal the Court of Appeals decision. *See, Reynolds v. Bureau of State Lottery*, 240 Mich. App. 84, 610 N.W.2d 597 (2000), *leave to appeal denied*, 624 N.W.2d 195 (2001). You note that on August 28, 2001 a motion for reconsideration was denied.

As a result of these events, the Michigan Bureau of State Lottery in a letter to you dated September 24, 2001, declared its intention to revoke the Committee's two bingo licenses, stating, in part:

> According to records of the Bureau, the current and/or previous bingo license applications submitted by your organization indicate that it falls within the definition of a committee under the Michigan [statutes]. As a result of Act 275 of the Public Acts of 1995, such committees are no longer eligible for licensure under the Bingo Act.

The Bureau scheduled an informal hearing for the Committee to demonstrate compliance. At the hearing, held October 19, the Committee argued that the Michigan statute did not apply because the Committee is organized under Federal, rather than State law. You explain that the Bureau has taken the matter under advisement and will probably issue a ruling by January 2002.[1]

In light of the above, you request that the Commission provide the Committee an opinion on the following questions:

(1) As a committee that does not allocate receipts and expenditures between Federal and non-Federal activity, but rather has separate Federal and non-Federal committees, is the Committee, registered with the Federal Election Commission, "a 'committee' as defined by, and organized pursuant to, the Michigan campaign finance act, Act No. 388 of the Public Acts of 1976, being sections 169.201 to 169.282 of the Michigan Compiled Laws?"

(2) If so, does Federal law bar the application of the State bingo license prohibition to our Federal committee?

---

[1] You state that the Committee continues to rely heavily on bingo income to support its Federal election activities. You further explain that State officials informally advised you that the Bureau would permit the Committee to continue using bingos for its fundraising and would issue annual licenses permitting this activity until all appeals from adverse rulings are exhausted.

ACT AND COMMISSION REGULATIONS

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; 11 CFR 108.7(a). The House committee that approved this provision explained its meaning in sweeping terms, stating that it is intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the 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 election related conduct 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, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections. *Id*. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 to clarify and explain the scope of the Act's preemption of 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, at 51*; 11 CFR 108.7(b). In past opinions, the Commission has summarized the legislative history of 2 U.S.C. §453 as showing that "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinions 2001-12, 2000-23 and 1999-12.

APPLICATION TO PARTY PROPOSAL

In response to the first question posed in your inquiry, the determination as to whether the Committee falls under the definition of "committee," as set forth in the cited Michigan statute, is a matter to be decided by officials (including State courts) pursuant to the laws of Michigan, rather than by this Commission in exercising its powers pursuant to the Act or Commission regulations. Therefore, the Commission states no opinion with regard to your first question.

The Commission notes that the Act authorizes the Commission to issue an advisory opinion in response to a "complete written request" from any person with respect to a specific transaction or activity by the requesting person. 2 U.S.C. §437f(a).

The request must concern a specific transaction or activity that "the requesting person plans to undertake or is presently undertaking and intends to undertake in the future." 11 CFR 112.1(b). Inquiries presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties do not qualify as advisory opinion requests.

In the situation presented here, it is significant that State officials already have taken the position that, because the bingo statute "specifically prohibits the licensure of committees, your organization [Democratic Executive Committee, Oakland County] is no longer eligible to hold a bingo license." Letter to Gary L. Kohut, dated September 24, 2001, from State Licensing Director, Bureau of State Lottery. While this position remains on appeal and under review by higher level State officials, it does present a specific transaction or activity and one that is not hypothetical. The Committee continues to use bingo as a means of raising funds to influence Federal elections; however, there is a substantial risk that such activity may be held as prohibited by State authorities when final review and appeals are concluded. Thus, it is appropriate for the Commission to consider this inquiry as an advisory opinion request.

In response to your second question, the Commission concludes that the Act and Commission regulations do not bar the application of Michigan bingo license statutes to the activity and operations of the Committee.

The Commission has not previously considered the interaction of a State's gaming laws with the Act's preemption provisions. It notes, however, that the control of gaming activity is a central feature of a State's regulatory authority, one that has been accorded explicit recognition elsewhere in the Commission's regulations. In particular, the separate segregated fund of a corporation or labor organization is permitted to use various fundraising and gaming devices such as raffles and others that involve a prize, but only "so long as State law permits" such use. 11 CFR 114.5(b)(2). The regulation does not exempt these fundraising events from the requirements of State law. This policy along with certain other differences in your circumstances, distinguishes the Committee's situation from several past opinions where the Commission concluded that the Act and Commission regulations would preempt and supersede State regulation of a Federal committee.

For example, the Commission has preempted State laws that purported to disqualify an entire class of potential contributors to Federal campaigns. *See* Advisory Opinion 2000-23 (prohibitions on contributions by party committees to Federal candidates prior to party nominations); *see also* Advisory Opinions 1995-48, 1993-25 and 1989-12 (prohibitions on contributions by State lobbyists during a State legislative session to Federal candidates and prohibitions on contributions made by State lottery contractors to a U.S. Senate candidate). In the situation here, there is not total or absolute disqualification of a committee's fundraising ability. Nor is any specific group of prospective donors barred from making contributions. Instead, the statute reaches only one particular method of fundraising, bingo. Moreover, where a State law purported to

bar a committee from using a fundraising method specifically sanctioned by Commission regulations, the Commission has preempted. *See* Advisory Opinion 1982-29 (prohibitions on payroll deduction programs used by a corporation to facilitate voluntary contributions by its restricted personnel to the corporation's separate segregated fund). The Commission notes that neither the Act nor Commission regulations specifically create a right to use bingo as a fundraising device. In Advisory Opinion 1990-6, the Commission preempted a State regulation prohibiting a corporation that sponsored a separate segregated fund (PAC) from making matching corporate donations to charities linked to an employee's contribution to the corporation's Federal PAC. However, the FECA-preempted State regulation addressed a very limited zone of activity that entailed only indirect and intangible inducements to persons who were solicited to make voluntary political contributions; it was not part of a State regulatory regime to license or control gaming ventures within the State.

Therefore, in light of the above and recognizing that final administrative and judicial review under State law is not yet completed, the Commission holds that pertinent sections of the Michigan Compiled Laws, to the extent they are construed to prohibit the Committee's use of bingo to raise funds for the purpose of influencing Federal elections, are not preempted or superseded by the Act or Commission regulations.

This response constitutes an advisory opinion concerning the 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)

David M. Mason
Chairman

Enclosures: (AOs 2001-12, 2000-23, 1999-12, 1995-48, 1993-25, 1990-6, 1989-12, and 1982-29)