June 24, 2010 Advisory Letter---Gift Act and Campaign Reporting Act II (Advisory Letter)

Paula Tackett, Director
Legislative Council Service
411 State Capitol Building
Santa Fe, NM 87501

Re: Opinion Request—Gift Act and Campaign Reporting Act II

Dear Ms. Tackett:

Our office is in receipt of your August 4, 2009 letter requesting reconsideration of a specific sentence in our July 23, 2009 Advisory Letter to Speaker Ben Lujan regarding the New Mexico Campaign Reporting Act ("Act"), NMSA 1978, Sections 1-19-25 to –37. The sentence in question asserted that the Act "does not make a distinction between a federal, state or local candidate and a common sense reading of the law is that a donation to a candidate for any public office—federal, state or local is permissible." Your letter explained that this sentence is inconsistent with the Legislative Council Service's long-standing interpretation of the Act, which focuses on the definition of "candidate" as "an individual who seeks or considers an office in an election covered by the Campaign Reporting Act…." NMSA 1978, § 1-19-26(E) (2003). According to your letter, since "elections to federal office are not covered by the Campaign Reporting Act, it has been our understanding that donations to federal candidates from campaign funds that are covered by the act would not be permitted."

Based on our examination of the relevant New Mexico constitutional, statutory and case law authorities, and on the information available to us, we conclude that this long-standing interpretation may be vulnerable to challenge under the doctrine of federal preemption.

The Federal Election Commission ("Commission") has issued several campaign advisory letters that have examined local and state statutory language and preemption issues regarding campaign limitations on federal campaign activity. See Federal Election Commission Advisory Opinion 2000-23 (2000); Federal Election Commission Advisory Opinion 1988-21 (1988). In 1988, Orange County Commissioner Harriett Wieder decided to run for Congress and asked the Federal Election Commission to review the validity of a county ordinance that stated that citizens could contribute $868.00 per year to the commissioners.

The FEC's opinion identified the issue as: "The cited ordinance would appear to prohibit …[those who have] contributed $868 to one …County Board member[s] from contributing further…even if the contribution is for a Federal …campaign." AO 1988-21. The opinion examined the congressional conference report regarding the enactment of the Federal Election Campaign Act ("FECA"). The report language reads: "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). Based on this language, the opinion asserted that the Orange County ordinance "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.'" AO 1988-21. The opinion concluded that FECA preempted the ordinance since it "encroaches upon and … (FECA)'s and the regulations' treatment of contributions to Federal office candidates…." Id.

The opinion noted that: "the central aim … is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing—including contribution limits—for election to Federal office." Id. As is, FECA "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." Id.

In 2000, the New York Democratic Party Committee asked the Federal Election Commission to review the validity of a state law that prohibited political party funds from being used "for any person to be voted for at a primary election." AO 2000-23 (2000). The FEC's opinion, much like the 1988 opinion, focused on language in the congressional conference report. The opinion also added a discussion on the FEC's regulations, especially 11 CFR 108.7, and explained the regulation's intent was to ensure "Federal law supersedes State law with respect to …limitations on contributions and expenditures regarding Federal candidates…." Id. In addition, "In Teper v. Miller, 82 F.3d 989 (11th Cir. 1996), the 11th Circuit Court of Appeals noted its agreement with several of the past advisory opinions cited in this opinion (Advisory Opinions 1995-48, 1994-2, 1993-25 and 1992-43) preempting State laws concerning restrictions on … contributors." Id.

The opinion stated that all of these factors confirm "that the … permissibility of contribution to Federal candidates is an area to be regulated solely by Federal law." Id. Therefore, the opinion concluded that FECA preempted the above-mentioned New York law and that political parties should be allowed to use campaign funds to make donations to federal candidates.

New Mexico law, in comparison, provides that a candidate may use his campaign funds to make "donations to … another candidate seeking election to public office…." NMSA 1978, § 1-19-29.1(A)(6) (1995). The Legislative Council Service's long-standing interpretation means that this statute affirmatively provides what a candidate's campaign funds can be used for during the campaign process. As such, the statute provides the universe of authorized uses for these funds.

The Federal Election Commission, based on the above-cited advisory opinions, may view the Legislative Council Service's long-standing interpretation as a de facto campaign limitation on a federal campaign activity. While New Mexico law provides the universe of authorized uses; it also suggests that uses beyond the universe must be

prohibited. Our concern is that the Commission may point to FECA, Commission regulations and the congressional conference report and assert that federal law already controls the “sources” of federal campaign funds (i.e. federal law sets the universe). For instance, federal law already provides who can and who cannot donate funds for federal candidates.[1] It also provides what kind of funds can and cannot be used to donate to federal candidates. Therefore, the FEC may conclude that if a local ordinance cannot restrict a citizen in California from using funds to make a donation to a federal candidate, then a New Mexico law cannot restrict a candidate in New Mexico from using funds to make a donation to a federal candidate. Similarly, the FEC may conclude that if a state law cannot restrict a political party in New York from using its campaign funds to make a donation to federal candidates, then a New Mexico law cannot restrict a candidate in New Mexico from using his campaign funds to make a donation to a federal candidate.

Therefore, we conclude that the sentence in the July 23, 2009 Advisory Letter to Speaker Ben Lujan is consistent with precedent and should remain unchanged at this time. [2] However, we are mindful that FEC Advisory Opinion 2000-23 closed with the following statement:

> The Commission recognizes that the [federal] Act and Commission regulations do not compel deference or adherence by New York State officials to the Commission’s conclusions with respect to the Act’s preemption of New York 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.

You have requested a formal opinion on the matters discussed above. Please note that such an opinion is a public document available to the general public. Although we are providing you with our legal advice in the form of a letter instead of an Attorney General’s Opinion, we believe this letter is also a public document, not subject to the attorney-client privilege. Therefore, we may provide copies of this letter to the general public. If we may be of further assistance, or if you have any questions regarding this opinion, please let us know.

Sincerely,

ZACHARY SHANDLER
Assistant Attorney General

cc: Albert J. Lama, Chief Deputy Attorney General

[1] “The FECA places prohibitions on contributions and expenditures by certain individuals and organizations. The following are prohibited from making contributions or expenditures to influence federal elections: Corporations; Labor organizations; Federal government contractors; and Foreign nationals. Furthermore, with respect to federal elections: No one may make a contribution in another person's name. No one may

make a contribution in cash of more than $100. In addition to the above prohibitions on contributions and expenditures in federal election campaigns, the FECA also prohibits foreign nationals, national banks and other federally chartered corporations from making contributions or expenditures in connection with state and local elections." http://www.fec.gov/pages/brochures/fecfeca.shtml#anchor257909.

[2] In addition to the FEC advisory opinions, the Tenth Circuit Court has previously invalidated a section of the Act on similar grounds. See New Mexicans for Bill Richardson v. Gonzales, 64 F.3d 1495 (10th Cir. 1995) (invalidating Section 1-19-29.1(C), which banned the use of federal funds for state campaigns).