

For Tues., March 9, 2010

CSHB 409 Version E, amendments, opinions ... Checklist:

New CS Version E bill

New CS Version E memo (see Tabled Amendment R.3B)

Amendment E.1 for CSHB 409 Version E

Memo for E.1 on independent expenditures and effect of E.1 amendment on CSHB 409 (STA)

Amendment E.2 prohibiting foreign contributions and expenditures

Memo for E.2 prohibiting foreign nationals from making state contributions and expenditures

Amendment E.3 for both audio and video components for identification of communications

Amendment R. 3B *tabled* at March 2, 2010 meeting

Amendment E.5 (formerly R.5) *not offered yet*

Amendment E.6 (formerly R.6) *not offered yet*

Memo for Rep. Petersen Amendments R.5 and R.6

Tues, March 2, 2010 State Affairs Meeting

Amendment R.1 *passed*

Amendment R.2 *withdrawn*

Amendment R.3A *passed*

Amendment R.3B *tabled*

Amendment R.7 *passed*

Verbal requests of John Ptacin, Dept. of Law

Opinion on nationality

Opinion on true source of funds, certification of by CEO and others, conspiracy

CS FOR HOUSE BILL NO. 409(STA)
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-SIXTH LEGISLATURE - SECOND SESSION

BY THE HOUSE STATE AFFAIRS COMMITTEE

Offered:
Referred:

Sponsor(s): HOUSE STATE AFFAIRS COMMITTEE

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to state election campaigns, the duties of the Alaska Public Offices**
2 **Commission, the reporting and disclosure of expenditures and independent**
3 **expenditures, the filing of reports, and the identification of certain communications in**
4 **state election campaigns; and providing for an effective date."**

5 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

6 *** Section 1.** AS 15.13.010(b) is amended to read:

7 (b) Except as otherwise provided, this chapter applies to contributions,
8 expenditures, and communications made [BY A CANDIDATE, GROUP,
9 NONGROUP ENTITY, MUNICIPALITY OR INDIVIDUAL] for the purpose of
10 influencing the outcome of a ballot proposition or question as well as those made to
11 influence the nomination or election of a candidate.

12 *** Sec. 2.** AS 15.13.030 is amended to read:

13 **Sec. 15.13.030. Duties of the commission.** The commission shall

14 (1) develop and provide all forms for the reports and statements

1 required to be made under this chapter, AS 24.45, and AS 39.50;

2 (2) prepare and publish a manual setting out uniform methods of
3 bookkeeping and reporting for use by persons required to make reports and statements
4 under this chapter and otherwise assist **all persons** [CANDIDATES, GROUPS, AND
5 INDIVIDUALS] in complying with the requirements of this chapter;

6 (3) receive and hold open for public inspection reports and statements
7 required to be made under this chapter and, upon request, furnish copies at cost to
8 interested persons;

9 (4) compile and maintain a current list of all filed reports and
10 statements;

11 (5) prepare a summary of each report filed under AS 15.13.110 and
12 make copies of this summary available to interested persons at their actual cost;

13 (6) notify, by registered or certified mail, all persons who are
14 delinquent in filing reports and statements required to be made under this chapter;

15 (7) examine, investigate, and compare all reports, statements, and
16 actions required by this chapter, AS 24.45, and AS 39.50;

17 (8) prepare and publish a biennial report concerning the activities of
18 the commission, the effectiveness of this chapter, its enforcement by the attorney
19 general's office, and recommendations and proposals for change; the commission shall
20 notify the legislature that the report is available;

21 (9) adopt regulations necessary to implement and clarify the provisions
22 of AS 24.45, AS 39.50, and this chapter, subject to the provisions of AS 44.62
23 (Administrative Procedure Act); [AND]

24 (10) consider a written request for an advisory opinion concerning the
25 application of this chapter, AS 24.45, AS 24.60.200 - 24.60.260, or AS 39.50; **and**

26 **(11) make available to the public information contained in a report**
27 **filed under AS 15.13.040(e) within 24 hours after the filing of the report with the**
28 **commission.**

29 * Sec. 3. AS 15.13.040(d) is amended to read:

30 (d) Every [INDIVIDUAL,] person [, NONGROUP ENTITY, OR GROUP]
31 making an **independent** expenditure shall make a full report of expenditures, upon a

form prescribed by the commission, unless exempt from reporting.

* Sec. 4. AS 15.13.040(e) is amended to read:

(e) Each person [THE REPORT] required to report under (d) of this section shall file a full report in accordance with AS 15.13.110(g) on a form prescribed by the commission. If the report is filed by a person that is not an individual, the report must be certified as correct by the treasurer or fiscal officer of the person.

The report must contain

(1) the name, address, principal occupation, and employer of the individual filing the report;

(2) [, AND] an itemized list of all expenditures made, incurred, or authorized by the person;

(3) the name of the candidate or the title of the ballot proposition or question supported or opposed by each expenditure and whether the expenditure is made to support or oppose the candidate or ballot proposition or question;

(4) the name, address, and nationality of each officer and director of the person, when applicable;

(5) the aggregate amount of all contributions made to the person, if any, for the purpose of influencing the outcome of an election; for all contributions to the person that exceed \$100 in the aggregate in a year, the date of the contribution and amount contributed by each contributor; and for a contributor

(A) who is an individual, the name, address, principal occupation, and employer of the contributor; or

(B) that is not an individual, the name and address of the contributor and the name, address, and nationality of each officer and director of the contributor [EXPENDITURES. THE REPORT SHALL BE

FILED WITH THE COMMISSION NO LATER THAN 10 DAYS AFTER THE EXPENDITURE IS MADE].

* Sec. 5. AS 15.13.040(h) is amended to read:

(h) The provisions of (d) of this section do not apply to one or more

1 expenditures made by an individual acting independently of any other person
2 [GROUP OR NONGROUP ENTITY AND INDEPENDENTLY OF ANY OTHER
3 INDIVIDUAL] if the expenditures

4 (1) cumulatively do not exceed \$500 during a calendar year; and

5 (2) are made only for billboards, signs, or printed material concerning
6 a ballot proposition as that term is defined by AS 15.13.065(c).

7 * Sec. 6. AS 15.13.040(p) is amended to read:

8 (p) For purposes of (b), (e), and (j) of this section, "contributor" means the
9 true source of the funds, property, or services being contributed.

10 * Sec. 7. AS 15.13.082(b) is amended to read:

11 (b) A person, other than an individual exempt from reporting under
12 AS 15.13.040(h), [CANDIDATE, GROUP, OR NONGROUP ENTITY] may not
13 make an expenditure unless the source of the expenditure has been disclosed as
14 required by this chapter.

15 * Sec. 8. AS 15.13.084 is amended to read:

16 **Sec. 15.13.084. Prohibited expenditures.** A person may not make an
17 expenditure

18 (1) anonymously, unless the expenditure is

19 (A) paid for by an individual acting independently of any
20 person [GROUP OR NONGROUP ENTITY AND INDEPENDENTLY OF
21 ANY OTHER INDIVIDUAL];

22 (B) made to influence the outcome of a ballot proposition as
23 that term is defined by AS 15.13.065(c); and

24 (C) made for

25 (i) a billboard or sign; or

26 (ii) printed material, other than an advertisement made
27 in a newspaper or other periodical;

28 (2) using a fictitious name or using the name of another.

29 * Sec. 9. AS 15.13.086 is amended to read:

30 **Sec. 15.13.086. Authorized makers of expenditures.** An expenditure

31 (1) authorized by or on [IN] behalf of a candidate may be made only

1 by

2 (A) the candidate; or

3 (B) the candidate's campaign treasurer or a deputy campaign
4 treasurer;

5 (2) authorized [BY AS 15.13.067(3)] by or on [IN] behalf of a group
6 may be made only by the group's campaign treasurer.

7 * Sec. 10. AS 15.13.090 is amended to read:

8 **Sec. 15.13.090. Identification of communication.** (a) All communications
9 shall be clearly identified by the words "paid for by" followed by the name and
10 address of the person [CANDIDATE, GROUP, NONGROUP ENTITY, OR
11 INDIVIDUAL] paying for the communication. In addition,

12 (1) candidates and groups may identify the name of their campaign
13 chairperson; and

14 (2) a person other than a candidate, an individual, or a political
15 party shall clearly

16 (A) identify the person's principal officer and the officer's
17 title;

18 (B) include a statement from the principal officer
19 approving the communication;

20 (C) provide the address of the person's principal place of
21 business; and

22 (D) identify the person's five largest contributors under
23 AS 15.13.040(e)(5), if any, during the 12-month period before the date of
24 the communication, with the words "top five contributors." [.]

25 (b) The provisions of (a) of this section do not apply when the communication

26 (1) is paid for by an individual acting independently of any other
27 person [GROUP OR NONGROUP ENTITY AND INDEPENDENTLY OF ANY
28 OTHER INDIVIDUAL];

29 (2) is made to influence the outcome of a ballot proposition as that
30 term is defined by AS 15.13.065(c); and

31 (3) is made for

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(A) a billboard or sign; or

(B) printed material other than an advertisement made in a newspaper or other periodical.

* **Sec. 11.** AS 15.13.090 is amended by adding a new subsection to read:

(c) A person other than a candidate, individual, or political party may not make a communication under (a) of this section unless the person's principal officer has certified to the commission in writing that the officer has reviewed the communication, and, based on the officer's knowledge, the communication is not defamatory and does not contain any defamatory statements.

* **Sec. 12.** AS 15.13.110 is amended by adding a new subsection to read:

(g) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 24 hours after an expenditure has been made. An independent expenditure report filed under this subsection must include any expenditure not yet reported that was made before the filing of the report. However, an independent expenditure that exceeds \$250 and that is made within nine days of an election shall be reported to the commission not later than 24 hours after the expenditure is made.

* **Sec. 13.** AS 15.13.111(a) is amended to read:

(a) Each [CANDIDATE, GROUP, NONGROUP ENTITY, OR] person required to report under this chapter shall preserve all records necessary to substantiate information required to be reported under this chapter for a period of six years from the date of the election for which the information was required to be reported, unless the records have been submitted to the commission under (c) of this section.

* **Sec. 14.** AS 15.13.135 is amended to read:

Sec. 15.13.135. Independent expenditures for or against candidates. (a) [ONLY AN INDIVIDUAL, GROUP, OR NONGROUP ENTITY MAY MAKE AN INDEPENDENT EXPENDITURE SUPPORTING OR OPPOSING A CANDIDATE FOR ELECTION TO PUBLIC OFFICE.] An independent expenditure supporting or opposing a candidate for election to public office, except an independent expenditure made by a nongroup entity with an annual operating budget of \$250 or less, shall be reported in accordance with AS 15.13.040 and 15.13.100 - 15.13.110 and other

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requirements of this chapter.

(b) A person [AN INDIVIDUAL, GROUP, OR NONGROUP ENTITY] who makes independent expenditures for a mass mailing, for distribution of campaign literature of any sort, for a television, radio, newspaper, or magazine advertisement, or any other communication that supports or opposes a candidate for election to public office

(1) shall comply with AS 15.13.090; and

(2) shall place the following statement in the mailing, literature, advertisement, or other communication so that it is readily and easily discernible:

This NOTICE TO VOTERS is required by Alaska law. (I/we) certify that this (mailing/literature/advertisement) is not authorized, paid for, or approved by the candidate.

* Sec. 15. AS 15.13.067 and 15.13.140(a) are repealed.

* Sec. 16. This Act takes effect immediately under AS 01.10.070(c).

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MEMORANDUM

March 3, 2010

SUBJECT: Committee Substitute for House Bill 409 (STA)
(Work Order No. 26-LS1495\E)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *TLB*
Legislative Counsel

This memorandum accompanies the above-described Committee Substitute that is amended by amendments 26-LS1495\R.1, 26-LS1495\R.7, and half of 26-LS1495\R.3. I have one comment.

The committee tabled a portion of amendment 26-LS1495\R.3. As a result, sec. 12 of CSHB 409(STA) now reads:

(g) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 24 hours after an expenditure has been made. *An independent expenditure report filed under this subsection must include any expenditure not yet reported that was made before the filing of the report. However, an independent expenditure that exceeds \$250 and that is made within nine days of an election shall be reported to the commission not later than 24 hours after the expenditure is made (emphasis added).*

The provision would have the same substantive effect if the tabled portion of the amendment were included, resulting in a subsection that would read:

(g) An independent expenditure report required under AS 15.13.040(e) shall be filed with the commission not later than 24 hours after an expenditure has been made.

The language in sec. 12 of CSHB 409(STA) italicized above, requires independent expenditures of over \$250 made within nine days of an election to be reported to the Alaska Public Offices Commission within 24 hours. The first sentence of the subsection now requires that all independent expenditures be reported within 24 hours. The first sentence of the subsection makes the final sentence of CSHB 409(STA) unnecessary.

Representative Bob Lynn

March 3, 2010

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Similarly, if all independent expenditures must be reported to the Alaska Public Offices Commission within 24 hours of being made, there is no need to require an independent expenditure report to include expenditures "not yet reported that [were] made before the filing of the report." This sentence was included in HB 409 (26-LS1495\R) to ensure against the possibility that, in the sentence's absence, the statute could be interpreted to permit expenditures that are made 10 days before an election to not be reported until the day following the election, where an expenditure made within nine days of an election would have to be reported within 24 hours of the expenditure being made. If all independent expenditures must be disclosed within 24 hours, this sentence is no longer necessary for the purposes for which it was originally included, is redundant, and should be removed from the bill.

If you have any questions, please do not hesitate to contact me.

TLAB:plm

10-124.plm

Enclosure

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE LYNN

TO: CSHB 409(STA), Draft Version "E"

1 Page 4, following line 9:

2 Insert a new bill section to read:

3 "* Sec. 7. AS 15.13.067 is amended to read:

4 **Sec. 15.13.067. Who may make expenditures.** Only the following may make
5 an expenditure **that is not an independent expenditure** in an election for candidates
6 for elective office:

7 (1) the candidate;

8 (2) an individual;

9 (3) a group that has registered under AS 15.13.050; and

10 (4) a nongroup entity that has registered under AS 15.13.050."
11

12 Renumber the following bill sections accordingly.

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14 Page 4, line 29, through page 5, line 6:

15 Delete all material.

16

17 Renumber the following bill sections accordingly.

18

19 Page 7, line 13:

20 Delete "AS 15.13.067 and 15.13.140(a) are"

21 Insert "AS 15.13.140(a) is"

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MEMORANDUM

March 5, 2010

SUBJECT: Expenditures, independent expenditures, and the effect of amendment 26-LS1495\E.1 to CSHB 409(STA)

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *AKS*
Legislative Counsel

This memorandum accompanies the amendment described above.

If the purpose of the draft House Committee Substitute is to conform Alaska statutes with the decision of the United States Supreme Court in Citizens United v. Federal Election Commission, No. 08-205, 558 U.S. ____ (January 21, 2010) (a case about independent election campaign expenditures made by corporations),¹ this amendment would make explicit that the only expenditures that CSHB 409(STA) permits, beyond those that are currently allowed, are the independent expenditures that the Court held could not be prohibited under the First Amendment.

The United States Supreme Court's Citizens United decision spoke in terms of permissive "independent expenditures" in the course of an election campaign. Since the legal distinction between an "expenditure" on behalf of a candidate made by a corporation or labor union and a "contribution" from that corporation or labor union to the candidate is not entirely clear,² it seems best to follow the court's lead and to make explicit in the bill

¹ Because one of the statutes involved in this case and considered by the Court concerned labor unions, it also, arguably, is a case about independent election campaign expenditures made by labor unions, though that is not made explicit in the U. S. Supreme Court opinion.

² See definitions for "contribution" and "expenditure" at AS 15.13.400:

(4) "contribution"

(A) means a purchase, payment, promise or obligation to pay, loan or loan guarantee, deposit or gift of money, goods, or services for which charge is ordinarily made and that is made for the purpose of influencing the nomination or election of a candidate, and in AS 15.13.010(b) for the purpose of influencing a

that the only expenditures that may be made under AS 15.13 by a person that is not a candidate, individual, group, or nongroup entity, are independent expenditures.

ballot proposition or question, including the payment by a person other than a candidate or political party, or compensation for the personal services of another person, that are rendered to the candidate or political party; . . .

(B) does not include

(i) services provided without compensation by individuals volunteering a portion or all of their time on behalf of a political party, candidate, or ballot proposition or question;

(ii) ordinary hospitality in a home;

(iii) two or fewer mass mailings before each election by each political party describing the party's slate of candidates for election, which may include photographs, biographies, and information about the party's candidates;

(iv) the results of a poll limited to issues and not mentioning any candidate, unless the poll was requested by or designed primarily to benefit the candidate;

(v) any communication in the form of a newsletter from a legislator to the legislator's constituents, except a communication expressly advocating the election or defeat of a candidate or a newsletter or material in a newsletter that is clearly only for the private benefit of a legislator or a legislative employee; or

(vi) a fundraising list provided without compensation by one candidate or political party to a candidate or political party;

(6) "expenditure"

(A) means a purchase or a transfer of money or anything of value, or promise or agreement to purchase or transfer money or anything of value, incurred or made for the purpose of

(i) influencing the nomination or election of a candidate or of any individual who files for nomination at a later date and becomes a candidate;

(ii) use by a political party;

(iii) the payment by a person other than a candidate or political party of compensation for the personal services of another person that are rendered to a candidate or political party; or

(iv) influencing the outcome of a ballot proposition or question;

(B) does not include a candidate's filing fee or the cost of preparing reports and statements required by this chapter;

(C) includes an express communication and an electioneering communication, but does not include an issues communication;

Representative Bob Lynn

March 5, 2010

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As a drafting mater, bill section 7, to be added as part of amendment E.1, proposes to modify existing AS 15.13.067 to clarify that the only persons permitted to make an expenditure that is not an independent expenditure in a state election are those persons who are currently permitted to do so under state law. Because, as a drafting choice, I have opted to retain (and modify) AS 15.13.067, the last entry in amendment E.1 deletes "AS 15.13.067" from the list of sections proposed to be repealed. And, because AS 15.13.067 is to be retained (and modified), I saw no need to repeal the reference to that section that appears in bill section 9; since the remainder of the amendment proposed in bill section 9 constitutes technical changes, the second entry in amendment E.1 eliminates bill section 9 in its entirety.

If you have any questions, please do not hesitate to contact me.

TLAB:plm
10-125.plm

Enclosure

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE LYNN

TO: CSHB 409(STA), Draft Version "E"

1 Page 4, following line 9:

2 Insert a new bill section to read:

3 **"* Sec. 7.** AS 15.13 is amended by adding a new section to read:

4 **Sec. 15.13.068. Expenditures and contributions by foreign nationals.** (a) A
5 foreign national may not, directly or indirectly, in connection with an election under
6 this chapter, make a contribution or expenditure or make an express or implied
7 promise to make a contribution or expenditure.

8 (b) In this section, "foreign national" includes

9 (1) a foreign government, every political subdivision of a foreign
10 government, every official, agent, or representative of a foreign government, and
11 every agency, corporation, or instrumentality of the foreign government or of a
12 political subdivision of a foreign government;

13 (2) a person outside of the United States, unless it is established that
14 the person is an individual and a citizen of and domiciled in the United States, or that
15 the person is not an individual and is organized under or created by the laws of the
16 United States or of any state or other place subject to the jurisdiction of the United
17 States and has its principal place of business in the United States;

18 (3) a partnership, association, corporation, organization, or other
19 combination of persons organized under the laws of or having its principal place of
20 business in a foreign country; or

21 (4) a domestic subsidiary of an entity described in (1) - (3) of this
22 subsection or a domestic corporation controlled by an entity described in (1) - (3) of
23 this subsection, if that entity finances, participates in, or selects a person who

1 participates in the making of a contribution or an expenditure of the domestic
2 subsidiary or domestic corporation.

3 (c) The provisions of this section apply only to the extent permitted by federal
4 law."

5
6 Renumber the following bill sections accordingly.

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MEMORANDUM

March 8, 2010

SUBJECT: Prohibiting foreign nationals from making contributions or expenditures in connection with a state election
(Work Order No. 26-LS1495\E.2, amendment to CSHB 409(STA))

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard *AB*
Legislative Counsel

You requested a legal opinion as to whether, under federal law, the state could regulate contributions and expenditures by foreign nationals made in connection with a state election, and if it were permissible under federal law, an amendment prohibiting all contributions and expenditures by foreign nationals.

A foreign national is not permitted under federal law to directly or indirectly, make a contribution or expenditure in connection with a federal, state, or local election. 2 U.S.C. § 441e. The Federal Election Commission (FEC) has interpreted this prohibition broadly. See 11 C.F.R. 110.4(a)(3) (clarifying that a foreign national cannot participate, even indirectly, in election related decisions).

Federal Preemption

Because 2 U.S.C. 441e already clearly prohibits foreign nationals from making campaign contributions, expenditures, and independent expenditures in federal, state, and local elections, a state effort to legislate in this area may face a preemption challenge.

The Supremacy Clause, Art. VI, cl. 2 of the Constitution of the United States, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Alaska Supreme Court has noted that "[u]nder the Supremacy Clause of the federal constitution, state laws that interfere with federal laws are invalid." Allen v. State,

203 P.3d 1155, 1161, n. 12 (Alaska 2009), quoting State v. Dupier, 118 P.3d 1039, 1049 (Alaska 2005). The court recently summarized federal preemption law as follows:

There is a presumption against federal preemption of state law, and preemption doctrine "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." Additionally, "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes," . . . "the case for federal pre-emption becomes a less persuasive one." But where state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.

There are three major types of federal preemption of state law: "express," "field," and "conflict" preemption. Express preemption occurs when Congress explicitly declares an intent to preempt state law in a particular area. . . .

Field preemption is the term used when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law. We "will not infer an intent to occupy the field where Congress has left some room for state involvement." . . .

Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law "stands as an obstacle to accomplishment and execution of the full purposes and objectives of Congress." . . .

Allen v. State, 203 P.3d 1155, 1160 - 1161 (Alaska 2009) (citations and footnotes omitted).

The state clearly does not have authority to regulate contributions and expenditures in campaigns for federal office; that has been expressly preempted by federal law. 2 U.S.C. 453 (specifying that the provisions of the federal election campaigns act "supersede and preempt any provision of state law with respect to election to federal office."); 11 C.F.R. 108.7(b)(3) (federal law "supersedes state law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.")

Whether the state may regulate contributions and expenditures in campaigns for state office is less clear. I am not aware of any federal statute or regulation which expressly preempts state regulation of foreign contributions and expenditures in campaigns for state office. However, field preemption may come into play here. To the extent a court found that the federal law governing contributions and expenditures by foreign nationals is so

Representative Bob Lynn

March 8, 2010

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comprehensive and complete as to "occupy the field", it could invalidate state law attempting to cover the same ground. To the extent that the state and federal laws conflict, conflict preemption is also a possibility.

Drafting Approach

The accompanying amendment, in a manner consistent with federal law,¹ prohibits foreign nationals from making contributions and expenditures in state elections. The amendment is drafted to avoid the issue of whether federal law could be interpreted to preempt all state laws relating to campaign contributions and expenditures by foreign nationals, by providing that the state's prohibition applies "only to the extent permitted by federal law."

I hope that the amendment is consistent with your intent. I will look forward to your further direction in this matter.

TLAB:med:ljw

10-033.med

Enclosure

¹ See 2 U.S.C 411e, 22 U.S.C. 611(b), and 11 C.F.R. 110.4.

AMENDMENT

OFFERED IN THE HOUSE

TO: CSHB 409(STA), Draft Version "E"

1 Page 5, line 22, following "the":

2 Insert "name and city and state of residence or principal place of business, as
3 applicable, of each of the"

4
5 Page 5, line 24:

6 Delete "with the words "top five contributors."[.]"

7 Insert "."

8
9 Page 6, following line 9:

10 Insert a new subsection to read:

11 "(d) To satisfy the requirements of (a)(2)(C) of this section and, if applicable,
12 (a)(2)(D) of this section, the following statement or statements must be read, in a
13 manner that is easily heard, or placed in the communication so as to be easily
14 discernable, or, in a communication that is transmitted by a method that includes both
15 audio and video components, be read in a manner that is easily heard and placed in the
16 communication so as to be easily discernable:

17 This communication was paid for by (person's name and city
18 and state of principal place of business).

19 The top contributors of (person's name) are (the name and city
20 and state of residence or principal place of business, as applicable, of
21 the largest contributors to the person under AS 15.13.090(a)(2)(D))."

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: CSHB 409(STA), Draft Version "E"

1 Page 6, line 4:

2 Delete "a new subsection"

3 Insert "new subsections"

4

5 Page 6, following line 9:

6 Insert a new subsection to read:

7 "(d) If a foreign government holds more than a 10 percent ownership interest
8 in a person paying for a communication under (a) of this section, the foreign
9 government must be clearly identified in the communication as a partial owner of the
10 person. If a foreign government holds more than 50 percent of the ownership interest
11 in a person paying for a communication under (a) of this section, the foreign
12 government must be clearly identified in the communication as the majority owner
13 and controlling interest holder of the person. A foreign government identified in a
14 communication under this subsection must be identified by the foreign government's
15 common or usual name. In this subsection, "foreign government" includes every
16 political subdivision of the foreign government, every official, agent, or representative
17 of the foreign government, and every agency, corporation, or instrumentality of the
18 foreign government or of a political subdivision of the foreign government."

AMENDMENT

OFFERED IN THE HOUSE

BY REPRESENTATIVE PETERSEN

TO: CSHB 409(STA), Draft Version "E"

1 Page 3, line 27, following "contributor":

2 Insert ";

3 (6) for a person that is a for-profit entity, the address used by the
4 person for federal income tax purposes, if different than the address provided
5 under (1) of this subsection"

6

7 Page 5, line 21, following "business":

8 Insert "if the person is a nonprofit entity, or the address used by the person for
9 federal income tax purposes if the person is a for-profit entity"

LEGAL SERVICES

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MEMORANDUM

March 8, 2010

SUBJECT: Questions relating to proposed amendments 26-LS1295\R.5 and R.6 to HB 409

TO: Representative Bob Lynn
Chair of the House State Affairs Committee
Attn: Mike Sica

FROM: Alpheus Bullard
Legislative Counsel

You asked that I review amendments 26-LS1495\R.5 and R.6, which were drafted to amend House Bill 409 (HB 409).

26-LS1495\R.5

This amendment amends sec. 11 of HB 409 by adding a new subsection to AS 15.13.090 that requires a corporation or other person in which a foreign government¹ holds a 10 percent ownership interest or more to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 paid for by that person. The amendment additionally requires that if a foreign government holds more than a 50 percent ownership interest in the person, the person must identify that a foreign government is "the majority owner and controlling interest holder of the person" in a communication under AS 15.13.090.

This amendment could be interpreted to raise constitutional and legal issues. The regulation of foreign governments' involvement in state elections may be preempted by federal law. Requiring identification of a foreign government's ownership interest of 10 percent or more in a person paying for a communication under AS 15.13.090 may also raise constitutional issues of equal protection and First Amendment associational rights.

1. Preemption. The Federal Election Campaign Act (FECA) prohibits any foreign national from contributing, donating, or spending funds in connection with any federal,

¹ The amendment defined "foreign government" to include every political subdivision of the foreign government, every official, agent, or representative of the foreign government, and every, agency, corporation, or instrumentality of the foreign government or of a political subdivision of the foreign government.

state, or local election in the United States, either directly or indirectly.² Because 2 U.S.C. 441e already clearly prohibits foreign nationals from making campaign contributions, expenditures, and independent expenditures in federal, state, and local elections, a state effort to legislate in this area may face a preemption challenge.

The Supremacy Clause, Art. VI, cl. 2 of the Constitution of the United States, provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Alaska Supreme Court has noted that "[u]nder the Supremacy Clause of the federal constitution, state laws that interfere with federal laws are invalid." Allen v. State, 203 P.3d 1155, 1161, n. 12 (Alaska 2009), quoting State v. Dupier, 118 P.3d 1039, 1049 (Alaska 2005). The court recently summarized federal preemption law as follows:

There is a presumption against federal preemption of state law, and preemption doctrine "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." Additionally, "[w]here coordinate state and federal efforts exist within a complementary administrative framework, and in the pursuit of common purposes," . . . "the case for federal pre-emption becomes a less persuasive one." But where state law comes into conflict with federal law, the Supremacy Clause of the United States Constitution dictates that state law must always yield.

There are three major types of federal preemption of state law: "express," "field," and "conflict" preemption. Express preemption occurs when Congress explicitly declares an intent to preempt state law in a particular area. . . .

Field preemption is the term used when the federal law governing a particular area is so comprehensive and so complete that Congress is said to have completely occupied a field, leaving no room for state law. We "will not infer an intent to occupy the field where Congress has left some room for state involvement." . . .

Conflict preemption occurs when a state law and a federal law are in conflict, either because compliance with both state and federal law is impossible or because the state law "stands as an obstacle to

² See 2 U.S.C. § 441e, 22 U.S.C. § 611(b), and 11 C.F.R. 110.4.

accomplishment and execution of the full purposes and objectives of Congress." . . .

Allen v. State, 203 P.3d 1155, 1160 - 1161 (Alaska 2009) (citations and footnotes omitted).

The state clearly does not have authority to regulate contributions and expenditures in campaigns for federal office; that has been expressly preempted by federal law. 2 U.S.C. 453 (specifying that the provisions of the federal election campaigns act "supersede and preempt any provision of state law with respect to election to federal office."); 11 C.F.R. 108.7(b)(3) (federal law "supersedes state law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees.").

Whether the state may regulate contributions and expenditures from foreign nationals in campaigns for state office is less clear. I am not aware of any federal statute or regulation which expressly preempts state regulation of foreign contributions and expenditures in campaigns for state office. However, field preemption may come into play here. To the extent a court found that the federal law governing contributions and expenditures by foreign nationals is so comprehensive and complete as to "occupy the field," it could invalidate state law attempting to cover the same ground. To the extent that the state and federal laws conflict, conflict preemption is also a possibility.

2. Equal protection. Because the amendment's additional identification requirements apply only to persons that have a 10 percent or greater foreign government ownership interest, and not to other persons, the amendment could prompt an equal protection challenge. Alaska evaluates equal protection claims using a sliding scale.³ There are several steps involved. First, the court determines the importance of the interest impaired by the challenged statute. Then the court looks at the purposes served by the statute. Finally, the court looks at how well the statutory means fits the purpose. "The common question in addressing equal protection cases is whether two groups of people who are treated differently are similarly situated and thus entitled to equal treatment."⁴ In order for a classification to be valid under the state's equal protection test, it must be reasonable, not arbitrary, and must bear a fair and substantial relation to a legitimate governmental objective. Wilson v. Municipality of Anchorage, 669 P.2d 569, 572 (Alaska 1983).

Because federal law prohibits foreign nations from making contributions or expenditures, directly or indirectly, in connection with a state election, it is not clear to me what state purpose the amendment serves. Consequently, I do not know how a court would evaluate the state's interest in requiring persons, of which a foreign government owns 10 percent

³ Matanuska-Susitna Borough School v. State, 931 P.2d 391, 396 (Alaska 1997).

⁴ Anderson v. State, 78 P.3d 710, 718 (Alaska 2003).

or more or, of which a foreign government owns 50 percent or more, to identify the foreign government's ownership interest in any communication made by the person under AS 15.13.090.

3. Freedom of speech and association. The amendment requires a person, in which a foreign government owns a 10 percent or greater interest to identify the foreign government's ownership interest (in the person) in any communication under AS 15.13.090 funded by that person. In deciding whether a state election law violates a person's rights under the Federal Constitution's First and Fourteenth Amendments and the state constitution's art I, secs. 5 and 6, a court will (1) weigh the character and magnitude of the burden that the state's rule imposes on the person's rights against the interests that are contended by the state to justify that burden, and (2) consider the extent to which the state's concerns make the burden necessary.

Election related laws and regulations that impose a severe burden on associational rights must be narrowly tailored and advance a compelling state interest. A statute or regulation that imposes a lesser burdens triggers less exacting review, and a state's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. However, no bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.⁵

In the recent Citizens United v. Federal Election Commission case, the court wrote:

Disclaimer and disclosure requirements may burden the ability to speak, but they "impose no ceiling on campaign-related activities," *Buckley*, 424 U.S., at 64, 96 S. Ct. 612, 46 L. Ed. 2d 659, and "do not prevent

⁵ In Timmons v. Twin Cities Area New Party, 520 U.S. 351 (1997), the Supreme Court established the relevant framework for a court to employ in resolving these competing interests:

When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the character and magnitude of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. No bright line separates permissible election-related regulation from unconstitutional infringements on First Amendment freedoms.

Id. at 358 - 359 (internal quotation marks and citations omitted).

anyone from speaking," *McConnell, supra*, at 201, 124 S. Ct. 619, 157 L. Ed. 2d 491 (internal quotation marks and brackets omitted). The Court has subjected these requirements to "exacting scrutiny," which requires a "substantial relation" between the disclosure requirement and a "sufficiently important" governmental interest. *Buckley, supra*, at 64, 66, 96 S. Ct. 612, 46 L. Ed. 2d 659 (internal quotation marks omitted); see *McConnell, supra*, at 231-232, 124 S. Ct. 619, 157 L. Ed. 2d 491.

Citizens United v. Federal Election Commission, 558 U.S. ____ (2010), slip. op at 51; 175 L. Ed. 2d 753, 799; 130 S. Ct. 876, 914. At a minimum, the state would have to demonstrate an important regulatory interest in requiring persons that have a foreign government ownership interest of 10 percent or more to identify the foreign government's ownership interest.

26-LS1495\R.6

This amendment modifies secs. 4 and 10 of HB 409. a provision amending AS 15.13.040(e) (expenditure reports). It requires for-profit entities to disclose the address used by the entity for federal income tax purposes in an expenditure report, if that address was different from the address provided for the individual filing the report under the bill's sec. 15.13.040(e)(1). The amendment also requires a for-profit entity to identify the address used by the entity for federal-tax purposes (instead of the entity's principal place of business) in a communication made under AS 15.13.090(a).

It was my understanding that this amendment was requested in order that for-profit entities that take advantage of foreign jurisdictions for tax purposes be identified. However, under federal law,⁶ a for-profit entity that is located outside the United States may not legally make direct or indirect contributions or expenditures in a federal, state, or local election.

TLAB:ljw
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⁶ See *id.*