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MEMORANDUM

March 27, 2010

SUBJECT: Requested amendments to CSSB 284(JUD)
(Work Order Nos. 26-LS1448\S.2 and S.3)

TO: Senator Charlie Huggins
Attn: Jody Simpson

FROM: Alpheus Bullard *AB*
Legislative Counsel

This memorandum accompanies the amendments to CSSB 284(JUD) that you requested. I have two comments.

Amendments

Jody Simpson, of your staff, requested an amendment to CSSB 284(JUD) that would provide that sec. 10 of the bill (expenditures and contributions by foreign nationals) should not be interpreted to establish a more stringent prohibition against contributions and expenditures by a foreign national in state elections than that which exists under federal law.

Amendment 26-LS1448\S.2 provides, in relevant part, that sec. 10 of the bill should be interpreted to "prohibit a foreign national from making a contribution or expenditure in connection with a state election only to the extent that federal law prohibits a foreign national from making a contribution or expenditure in connection with a state election . . ." If the intent of the amendment is to ensure that the state law does no more and no less than the applicable federal law and that the federal law applies to state elections,¹ the utility of continuing to include a prohibition against contributions and expenditures made, directly or indirectly, by foreign nationals is not clear to me. The

¹ See 2 U.S.C. § 441e(a)(1) and 11 C.F.R. § 110.20(i). 2 U.S.C. § 441e(a)(1) prohibits a foreign national, directly or indirectly, from making a contribution or donation of money in connection with a federal, state, or local election. 11 C.F.R. § 110.20(i) states that [a] foreign national shall not direct, dictate, control, or directly or indirectly participate in the decision-making process of any person, such as a corporation, labor organization, political committee, or political organization with regard to such person's [f]ederal or non-[f]ederal election related activities, such as decisions concerning the making of contributions, donations, expenditures, or disbursements in connection with elections for any [f]ederal, [s]tate, or local office"

same substantive effect can be achieved by deleting sec. 10 from the bill. Amendment 26-LS1448\S.3 removes sec. 10 from the bill.

Federal preemption

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

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

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"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 prohibit independent 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 expenditures in campaigns for state office. However, field preemption may apply here. To the extent a court finds 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.

Given that the two amendments achieve the same substantive result and the possible preemption risks inherent in the first approach, The second of the two amendments, amendment S.3, may better realize your intent.

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

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Enclosures

AMENDMENT

OFFERED IN THE SENATE
TO: CSSB 284(JUD)

BY SENATOR HUGGINS

1 Page 6, lines 3 - 4:

2 Delete "apply only to the extent permitted by federal law"

3 Insert "prohibit a foreign national from making a contribution or expenditure in
4 connection with a state election only to the extent

5 (1) that federal law prohibits a foreign national from making a
6 contribution or expenditure in connection with a state election; and

7 (2) permitted by federal law"

AMENDMENT

OFFERED IN THE SENATE
TO: CSSB 284(JUD)

BY SENATOR HUGGINS

- 1 Page 1, lines 4 - 5:
- 2 Delete "**prohibiting expenditures and contributions by foreign nationals in state**
- 3 **elections;**"
- 4
- 5 Page 5, line 9, through page 6, line 4:
- 6 Delete all material.
- 7
- 8 Renumber the following bill sections accordingly.