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STATE OF MAINE
DEPARTMENT OF THE ATTORNEY GENERAL
STATE HOUSE STATION 6
AUGUSTA, MAINE 04333

November 12, 1987

Honorable John E. Baldacci
Senate Chair
Honorable Carol Allen
House Chair
Joint Standing Committee on Business Legislation
Maine Legislature
State House
Augusta, Maine 04333

Dear Senator Baldacci and Representative Allen:

You have inquired as to whether Legislative Document No. 356, "AN ACT to Prohibit Tobacco Companies from Sponsoring Community, Sporting, Recreational or Civic Events," currently pending before your Committee would, if enacted, be unconstitutional. For the reasons which follow, it is the Opinion of this Office that the bill does violate the Supremacy Clause of the United States Constitution by virtue of the operation of the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. § 1331 et seq.[1/]

The bill would enact a new section of the Maine statutes that would prohibit tobacco companies from "[s]ponsorship of or

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1/ Because the unconstitutionality of this bill is so clear under the Supremacy Clause, this Opinion does not address the more complex question of whether the bill is also unconstitutional under the First Amendment's guarantee of freedom of speech. See Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico, ____ U.S. ____, ____; 106 S.Ct. 2968, 2977 (1986) (government regulation of speech relating to activity judged by the legislature to be injurious to public health, safety and welfare (gambling) not violative of First Amendment).

association with any community, sporting, recreational or civic events under the registered brand names of a tobacco product." The unlawful activity would include "all consumer sales promotion of tobacco products by manufacturers, packers, distributors, importers or sellers of such products, associated with any community, sporting, recreational, or civic event." As set forth in its Statement of Fact, the purpose of the bill is to "prohibit tobacco companies from sponsoring community and recreational events which associate their products with a healthy and youthful life style."

The Supremacy Clause, found in Article VI, Clause 2 of the United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land. . . .

Thus, in passing legislation within the ambit of its constitutional authority, the Congress has the constitutional power to "preempt" state legislative action on the subject of the federal legislation. The most direct way for the Congress to exercise this power is simply by so stating in express terms. Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977). Even if not so stated, the Court may infer a Congressional intent to preempt because "the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room to supplement it," or "because the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose." Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982); Rice v. Santa Fe Elevator Corp., 31 U.S. 218, 230 (1947), quoted with approval in Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190 (1983). Finally, "[e]ven where Congress has not entirely displaced the state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law." Id.; Florida Lime & Avacado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Notwithstanding all of this, however, the Court "is generally reluctant to infer preemption, "especially when the basic purposes of the state statute and the [federal statute] are similar." Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978). Consequently, this Department has consistently been very reluctant to discourage the Legislature

from passing legislation on the ground that it might be preempted and has not done so unless the question is free from all doubt. See, for example, the State's experience with the Maine Severance Pay Law, 26 M.R.S.A. § 625-B, about which a substantial preemption question was raised, but which was ultimately sustained against preemption challenge by the United States Supreme Court by one vote. Fort Halifax Packing Co. v. Coyne, -- U.S. --, 55 U.S.L.W. 4699 (June 1, 1987).

Applying these principles to the bill at issue, the basic question presented is whether the Federal Cigarette Labeling and Advertising Act contains any expression of congressional intent with regard to the preemption of state regulation of cigarette industry sponsorship and association with community and recreational events.2/ The purpose behind the Act, set out in 15 U.S.C. § 1331, is to set up a comprehensive Federal plan to deal with cigarette labeling and advertising that shows a relation between smoking and health whereby:

> (1) the public may be adequately informed about any adverse health effects of cigarette smoking by inclusion of warning notices on each package of cigarettes and each advertisement of cigarettes; and
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> (2) commerce and the national economy may be (A) protected to the maximum extent consistent with this declared policy and (B) not impeded by diverse, nonuniform, and confusing cigarette labeling and advertising regulations with respect to the relationship between smoking and health.

Further, the Act expressly preempts state regulation or prohibitions on cigarette advertising or promotions based on smoking or health. 15 M.R.S.A. § 1334(b) reads:

> No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.

It is thus clear that the Congress expressly intended that, in order to prevent a multiplicity of legal requirements

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2/ An even more basic question is whether this federal Act's enactment is authorized by the Constitution. Clearly, however, Congress' power to regulate interstate commerce, found in Article I, section 8, clause 3, is sufficient authority in this regard.

concerning cigarette advertising or promotion, it would establish such requirements on a national basis and prohibit the states from adding additional ones.

Since the Congress has expressed itself so clearly, it appears that L.D. 356 would certainly run afoul of the first preemption test outlined above. The bill's intent, as set forth in its Statement of Fact, is to regulate the promotional activities of tobacco companies, a form of advertising which is clearly covered with regard to cigarettes, by the federal act.3/ Thus, this Department is reluctantly obliged to conclude that the bill, if passed, would be preempted.4/

I hope the foregoing answers your question. Please feel free to reinquire if further clarification is necessary.

Sincerely yours,

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3/ Further mention is made in the Statement of Fact of the belief that "[t]obacco product advertising deceptively portrays the use of tobacco as socially acceptable and healthful," and that "[s]uch promotions of tobacco products undermine the credibility of government and private health education campaigns against smoking."

4/ In view of this conclusion, this Opinion does not reach the more arguable question of whether the bill could be invalidated under one of the other tests outlined above which contemplate a declaration of implicit preemption. But see Capollone v. Liggett Group Inc., 789 F.2d 181 (3rd Cir. 1986) cert. denied, 55 U.S.L.W. 3474 (U.S. January 13, 1987; Roysdon v. R. J. Reynolds Tobacco Co., 623 F. Supp. 1189 (D.C. Tenn. 1985), appeal pending, No. 86-5972 (6th Cir.), holding that the federal act implicitly preempted the state common law tort liability of cigarette companies for suits for damages based on smoking and health which challenge the adequacy of the warnings on cigarette packages or the propriety of a company's action in promoting cigarettes.