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FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION COMMISSION
SECRETARIAT

2010 MAY 21 P 4: 10

May 21. 2010

AGENDA ITEM

For Meeting of 05-27-10

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Thomasenia P. Duncan JPD
General Counsel

Rosemary C. Smith RCS
Associate General Counsel

Amy L. Rothstein ALR (by RCS)
Assistant General Counsel

Cheryl A.F. Hemsley
Attorney

Subject: Draft AO 2010-07(Yes on FAIR)

Attached are two proposed drafts of the subject advisory opinion. We request that these drafts be placed on the agenda for May 27, 2010.

Attachment

ADVISORY OPINION 2010-07

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DRAFT A

Dear Messrs. Svoboda and Woocher and Mss. Keane and Dudovitz:

We are responding to your advisory opinion request on behalf of Yes on FAIR,[1] concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of funds by Members of Congress on behalf of Yes on FAIR.

The Commission concludes that Yes on FAIR may have Members of Congress solicit funds on its behalf outside the amount limitations and source prohibitions of the Act and Commission regulations both before and after the initiative qualifies for the ballot.

Background

The facts presented in this advisory opinion are based on your letter dated April 7, 2010, and your email dated April 15, 2010.

Yes on FAIR is a ballot initiative committee in California. Yes on FAIR has applied to the Internal Revenue Service for recognition as a section 501(c)(4) organization under Title 26 of the Internal Revenue Code. Counsel for Yes on FAIR

[1] The requestor's full name is Yes on FAIR, a coalition of entrepreneurs, working people, Karen Bass, and other community leaders devoted to eliminating bureaucratic waste of taxpayer dollars on the political game of redistricting committee ("Yes on FAIR").

represents that Yes on FAIR was not directly or indirectly established by, and is not financed, maintained, or controlled by, any Federal candidate or officeholder.[2]

Yes on FAIR's sole purpose is to support the qualification and passage of the Financial Accountability In Redistricting Act ("FAIR Act"), a proposed ballot initiative, for the statewide November 2, 2010 general election ballot. At the time of the request, Yes on FAIR was seeking signatures to qualify the FAIR Act for the November ballot. The last date on which the California Secretary of State may qualify a measure for the November ballot is June 24, 2010.

Once the ballot initiative has qualified for the general election ballot, Yes on FAIR intends to engage in an extensive campaign to promote the FAIR Act's passage. Yes on FAIR intends to undertake voter identification, voter registration, and get-out-the-vote activities. However, Yes on FAIR was unable to provide information regarding the extent to which these activities will be undertaken. Yes on FAIR's campaign advertisements reportedly will not promote, support, attack or oppose any federal candidate "or result in coordinated communications under Commission rules."

[2] The request notes that California state law requires the official name of certain ballot initiative committees to identify state officeholders who have contributed $50,000 or more to the committee. The request states that Karen Bass "is identified in Yes on FAIR's official name only because of" this state law requirement. Ms. Bass is a California State legislator; she was speaker of the California State Assembly until March 1, 2010 and remains a member of the State Assembly. The request states that "[w]hile Bass has not personally contributed to Yes on FAIR, state political committees associated with her have made two contributions totaling $50,000" and that "Bass decided to run for election to the U.S. House of Representatives in the 33rd Congressional District of California. Bass has not and will not establish, finance maintain or control Yes on FAIR, which has raised and will continue to raise the bulk of its funds from other, unconnected sources. And neither Bass nor her agents have, or will have, any ongoing involvement with Yes on FAIR."

Question Presented

May Yes on FAIR have Members of Congress solicit funds on its behalf that are outside of the amount limitations and source prohibitions of the Act before and after the FAIR Act qualifies for the general election ballot?

Legal Analysis and Conclusions

Yes, Yes on FAIR may have Members of Congress solicit funds on its behalf that are outside the amount limitations and source prohibitions of the Act before and after the initiative qualifies for the November ballot.

Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by them or acting on their behalf (collectively, "covered persons") are limited in how much and from whom they may solicit funds in connection with an election. Specifically, covered persons may not solicit, receive, direct, transfer, or spend any "funds in connection with any election for Federal office" unless the funds are "subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.61. Further, covered persons may not solicit, receive, direct, transfer, or spend any "funds in connection with any election other than an election for Federal office" unless the funds are consistent with the Act's amount limitations and source prohibitions. 2 U.S.C. 441i(e)(1)(B); *see also* 11 CFR 300.62.

In analyzing the application of 2 U.S.C. 441i(e), the threshold question is whether the funds involved are in connection with a Federal or non-Federal election under subsection (e)(1). In Advisory Opinion 2003-12 (Flake), the Commission concluded that, under 2 U.S.C. 441i(e)(1)(B), the activities of a ballot measure committee that is not

directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder, or agent of either, are not in connection with a non-Federal election before the committee has qualified an initiative or ballot measure for the ballot, but are in connection with a non-Federal election after the committee has qualified an initiative or ballot measure for the ballot. The rationale for this determination was that pre-qualification activities, such as petition and signature gathering, do not occur within close proximity to an election, while post-qualification activities in support of or in opposition to an initiative occur closer to the election.

However, in Advisory Opinion 2005-10 (Berman-Doolittle), the Commission concluded that section 441i(e) does not prohibit Federal candidates and officeholders from raising funds for committees that have been formed solely to support or oppose ballot measures, notwithstanding that the measures in question had already qualified for the ballot.[3] Moreover, neither of the concurring opinions of the commissioners who voted for the result in AO 2005-10 drew any distinction between the pre- and post-ballot qualification periods. In fact, the statement by Commissioners Weintraub and McDonald stated the "reasoning was faulty" in AO 2003-12 regarding the "in connection with" analysis, and that the distinction between pre- and post-ballot qualification was drawn "[f]or the sake of compromise." (AO 2005-10, Concurring Statement of Commissioners Ellen L. Weintraub and Danny Lee McDonald at 2).[4] Thus, AO 2005-10 effectively

[3] The ballot qualification deadline for the ballot measures at issue in AO 2005-10 was June 30, 2005. The AO request raising the question of whether the ballot measures at issue was "in connection with" an election was submitted on July 15, 2005, and the advisory opinion was issued on August 22, 2005. Had the ballot measures not qualified, the advisory opinion would have been moot.

[4] Although Commissioners Weintraub and McDonald also stated that they "would have preferred to have regulated the pre-qualification activities as well" in AO 2003-12, it was because they believed the ballot measure committee at issue in AO 2003-12 was established, financed, maintained, or controlled by a Federal candidate. *See id.*

superseded AO 2003-12 and its distinction between the pre- and post-ballot qualification periods.[5]

Because the distinction drawn in AO 2003-12 between the pre- and post-ballot qualification periods no longer is applicable, the focus must turn to whether activities related to ballot measures generally are "in connection with" an "election" as contemplated by the Act.

The specific sections of 441i(e) at issue discuss "an election for Federal office" and "any election other than an election for Federal office." The Act defines an "election" as follows:

> (A) A general, special, primary, or runoff election;
>
> (B) A convention or caucus of a political party which has authority to nominate a candidate;
>
> (C) A primary election held for the selection of delegates to a national nominating convention of a political party; and
>
> (D) A primary election held for the expression of a preference for the nomination of individuals for election to the office of President.

2 U.S.C. § 431(1).

[5] This request involves a ballot measure that will appear on the same ballot as Federal candidates, which was not the case in AO 2005-10. This distinction is immaterial, however, as the prohibition on soliciting so-called "soft-money" in section 441i(e) applies equally to funds that are "in connection with an election for Federal office" as well as "funds in connection with any election other than an election for Federal office." *Compare* 2 U.S.C. 441i(e)(1)(A) and 2 U.S.C. 441i(e)(1)(B). Thus, the operative question in AO 2005-10 was whether the ballot measures were in connection with *any* election, whether Federal or non-Federal. The Commission concluded the restrictions in section 441i(e)(1) did not apply to the fundraising activities for the ballot measures. If the ballot measures were "in connection with" any election, then the Commission could not have reached this conclusion without contravening 441i(e)(1)(B). The fact that there are now Federal candidates on the ballot in this instance does not make the ballot measure at issue any more "in connection with" the election than the ballot measures at issue in AO 2005-10. Voting for or against the ballot measure is not tied in any way to voting for or against any Federal candidates.

Moreover, under Commission regulations, an election is defined as "the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office." 11 C.F.R. 100.2(a). Thus, both the statutory and the regulatory definitions of "election" discuss the term in the context of voting for candidates, rather than ballot measures.

Furthermore, the Act's legislative history (and the views of the Members of Congress who voted for the Act) confirms the understanding that ballot measures are not "elections." As Vice Chairman Toner and Commissioner Mason explained in AO 2005-10, "In debating the Bipartisan Campaign Reform Act of 2002 ('BCRA') [which introduced section 441i(e)'s so-called 'soft-money' ban], not a single Member of Congress, including the legislation's sponsors, indicated that the soft money ban would apply to initiatives and referenda. Moreover, Members of Congress who voted for BCRA, including House Minority Leader Nancy Pelosi (D-CA), filed comments in this proceeding indicating that it was not their understanding that 441i(e)'s soft money restrictions would apply beyond candidate elections to ballot measure." (AO 2005-10, Concurring Statement of Vice Chairman Michael E. Toner and Commissioner David M. Mason at 1); *see also* Memorandum from Commissioner Ellen L. Weintraub to Commission Secretary, August 17, 2005, *available at* http://saos.nictusa.com/aodocs/413239.pdf.)

The Commission agrees with these earlier statements. The Act and Commission regulations define "election" in terms of individual candidates seeking representative office. The ballot initiative process, on the other hand, allows voters to directly enact a proposed statute, constitutional amendment, or ordinance. (*See, e.g.*, Cal. Election Law

Code, Div. 9, Art. 1 §9000 *et seq.*) This is a straightforward distinction: a candidate is elected into representative office – not passed into law – by voters, whereas the opposite is true for ballot initiatives; they are passed into law – not elected – by voters. Under the Act, the Commission's jurisdiction is circumscribed accordingly; it reaches the process by which voters select their representatives, but not how those representatives, or the people themselves, enact legislation.

Accordingly, the Commission concludes that Yes on FAIR's activities are not "in connection with" an election under 2 U.S.C. 441i(e)(1)(A) or (B) both before and after ballot qualification. Thus, Yes on FAIR may have Members of Congress solicit funds on its behalf outside the amount limitations and source prohibitions of the Act.[6]

The Commission expresses no opinion regarding the possible application of the Internal Revenue Code or State tax laws to the proposed activities, as those questions are outside its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the

[6] Because the Commission reaches its conclusion based on section 441i(e)(1), it need not reach the issue of whether the exemption for 501(c) organizations under section 441i(e)(4) applies. *Cf.* AO 2007-28 (McCarthy/Nunes).

transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Matthew S. Petersen

Chairman

ADVISORY OPINION 2010-07

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Dear Messrs. Svoboda and Woocher and Mss. Keane and Dudovitz:

We are responding to your advisory opinion request on behalf of Yes on FAIR,[1] concerning the application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to the solicitation of funds by Members of Congress on behalf of Yes on FAIR.

The Commission concludes that Members of Congress may solicit funds on behalf of Yes on FAIR outside the amount limitations and source prohibitions of the Act and Commission regulations during the period before the initiative qualifies for the ballot. Members of Congress may also solicit funds for Yes on FAIR after the initiative qualifies for the ballot, subject to the conditions discussed below.

Background

The facts presented in this advisory opinion are based on your letter dated April 7, 2010, and your email dated April 15, 2010.

Yes on FAIR is a ballot initiative committee in California. Yes on FAIR has applied to the Internal Revenue Service for recognition as a section 501(c)(4)

[1] The requestor's full name is Yes on FAIR, a coalition of entrepreneurs, working people, Karen Bass, and other community leaders devoted to eliminating bureaucratic waste of taxpayer dollars on the political game of redistricting committee ("Yes on FAIR").

organization under Title 26 of the Internal Revenue Code. Counsel for Yes on FAIR represents that Yes on FAIR was not directly or indirectly established by, and is not financed, maintained, or controlled by, any Federal candidate or officeholder.[2]

Yes on FAIR's sole purpose is to support the qualification and passage of the Financial Accountability In Redistricting Act ("FAIR Act"), a proposed ballot initiative, for the statewide November 2, 2010 general election ballot. At the time of the request, Yes on FAIR was seeking signatures to qualify the FAIR Act for the November ballot. The last date on which the California Secretary of State may qualify a measure for the November ballot is June 24, 2010.

Once the ballot initiative has qualified for the general election ballot, Yes on FAIR intends to engage in "an extensive campaign to promote the FAIR Act's passage." Among other things, this campaign will involve voter identification, voter registration, and "get-out-the-vote programs specifically designed to get the measure's supporters to the polls" on election day. You represent that Yes on FAIR's campaign advertisements will not promote, support, attack or oppose any federal candidate "or result in coordinated communications under Commission rules."

[2] The request notes that California state law requires the official name of certain ballot initiative committees to identify state officeholders who have contributed $50,000 or more to the committee. The request states that Karen Bass "is identified in Yes on FAIR's official name only because of" this state law requirement. Ms. Bass is a California State legislator; she was speaker of the California State Assembly until March 1, 2010 and remains a member of the State Assembly. The request states that "[w]hile Bass has not personally contributed to Yes on FAIR, state political committees associated with her have made two contributions totaling $50,000" and that "Bass decided to run for election to the U.S. House of Representatives in the 33rd Congressional District of California. Bass has not and will not establish, finance maintain or control Yes on FAIR, which has raised and will continue to raise the bulk of its funds from other, unconnected sources. And neither Bass nor her agents have, or will have, any ongoing involvement with Yes on FAIR."

Questions Presented

1. May Members of Congress solicit funds on behalf of Yes on FAIR?

2. May Members of Congress solicit funds on behalf of Yes on FAIR from persons other than individuals during the post-qualification period?

Legal Analysis and Conclusions

1. May Members of Congress solicit funds on behalf of Yes on FAIR?

Yes, Members of Congress may solicit funds on behalf of Yes on FAIR. Specifically, Members of Congress may solicit funds outside the amount limitations and source prohibitions of the Act and Commission regulations on behalf of Yes on FAIR during the period before the initiative qualifies for the November ballot. Members of Congress may also solicit funds for Yes on FAIR after the initiative qualifies for the November ballot, subject to the conditions discussed below.

In the Bipartisan Campaign Reform Act ("BCRA"), Congress amended the Act to prohibit Federal candidates and officeholders, their agents, and entities directly or indirectly established, financed, maintained or controlled by them or acting on their behalf (collectively, "covered persons") from raising and spending funds in connection with an election unless the funds are consistent with the limits and prohibitions contained in the Act. 2 U.S.C. 441i(e)(1)(A), (B); *see also* 11 CFR 300.61, 300.62. This prohibition was animated by the concern that, without such limits, Federal candidates could circumvent the contribution limits and prohibitions of the Act by raising non-federal funds for activities that "give rise to all the same corruption concerns posed by contributions made directly to the candidate or officeholder." *McConnell v. FEC*, 540 U.S. 93, 182 (2003). In McConnell v. FEC, the Supreme Court explained that Congress

enacted BCRA, in part, to close a "soft-money loophole" that had "enabled parties and candidates to circumvent . . . limitations on the source and amount of contributions [made] in connection with federal elections" and concluded that these "restrictions on solicitations are justified as valid anticircumvention measures." *Id.* at 133, 126, 182.

In analyzing the application of this prohibition, the threshold question is whether the funds involved are in connection with an election under section 441i(e)(1). In Advisory Opinion 2003-12 (Flake), the Commission concluded that under section 441i(e)(1)(B), the activities of a ballot measure committee that is not directly or indirectly established, financed, maintained or controlled by a Federal candidate or officeholder, or agent of either, are not in connection with an election before the committee has qualified an initiative or ballot measure for the ballot, but are in connection with an election after the committee has qualified an initiative or ballot measure for the ballot.[3]

Pre-Ballot Qualification

The line drawn by Advisory Opinion 2003-12 (Flake) and maintained in subsequent Advisory Opinions reflects fundamental differences in the nature and timing of activities undertaken by ballot measure committees before and after a measure qualifies for the ballot. Before qualification, a committee is principally concerned with

[3] Specifically, the Commission concluded that the activities proposed in Advisory Opinion 2003-12 (Flake) were "in connection with an election other than an election for Federal office." Advisory Opinion 2003-12 at 6. As discussed below, in a subsequent Advisory Opinion the Commission concluded that the restrictions of section 441i(e)(1) did not apply to a ballot measure committee that was formed to support or oppose initiatives on the November 8, 2005 ballot, on which no Federal candidates appeared. *See* Advisory Opinion 2005-10 (Berman-Doolittle) at 2. In a Concurring Statement, Commissioners Weintraub and McDonald reaffirmed their support for the result in Advisory Opinion 2003-12 (Flake), but explained their view that "the better analysis, and one more reflective of the real issues proposed by Rep. Flake, would have rested on a conclusion that where a federal candidate establishes, maintains, finances or controls a ballot measure committee, on an issue with which that candidate is closely identified, and the committee raises and spends soft money to influence voting on a day on which that candidate is himself on the ballot, then the candidate and the committee's activities are 'in connection with an election for *Federal* office,' that is, the candidate's own election." Concurring Statement of Commissioner Ellen L. Weintraub and Commissioner Danny Lee McDonald at 2 (emphasis in original).

ensuring compliance with the technical requirements of ballot access. The activities undertaken in support of this goal, such as petition and signature gathering, do not occur within close proximity to an election. While pre-qualification activity may have some limited political consequences, "such activity is sufficiently removed that it is not 'in connection with'" an election within the meaning of section 441i(e). Advisory Opinion 2010-03 (National Democratic Redistricting Trust).

Accordingly, given that Yes on FAIR indicates it was not directly or indirectly established by, and is not directly or indirectly financed, maintained or controlled by, a covered person, the Commission concludes that Yes on FAIR's activities are not "in connection with" an election under 2 U.S.C. 441i(e)(1)(A) or (B) during the pre-qualification period.[4] Thus, Members of Congress may solicit funds on behalf of Yes on FAIR outside the amount limitations and source prohibitions of the Act during the pre-qualification period.

Post-Ballot Qualification

After qualification, by contrast, ballot measure committees engage in generalized campaigning with the goal of persuading potential voters to support the measure and encouraging supporters to vote. Indeed, this generalized campaigning often takes the form of federal election activity ("FEA"), as defined by BCRA, such as voter registration,

[4] The Commission notes the comment submitted by Mr. Munger on behalf of Voters FIRST Act for Congress alleges that Yes on FAIR "has been 'established, financed and maintained and controlled' by a federal candidate and officeholder." When considering an Advisory Opinion Request, the Commission must render an opinion, if possible, based on the facts presented by the requestor. For purposes of this Advisory Opinion, the Commission relies on the requestor's representation that Yes on FAIR has not been established, and will not be maintained, financed or controlled by a covered Person. If that representation turns out to be factually inaccurate, then this Advisory Opinion will provide the requestor with no protection.

voter identification and get-out-the-vote programs.[5] Because FEA affects federal elections, even where federal candidates are not explicitly referenced, Congress has determined that such activities are "in connection with an election for Federal office" and subject to the solicitation restrictions at issue here.[6]

Absent the restrictions imposed by section 441(e), Federal candidates and officeholders would be able to solicit non-federal funds in the post-qualification period for those ballot measures that are expected to appeal to that person's likely supporters. Funds raised by covered persons, in turn, could be used to support voter registration, voter identification and get-out-the-vote activities to benefit both the ballot measure and the Federal candidate or officeholder who solicited the funds, as well as other members of that person's political party. In Advisory Opinion 2003-12, for example, Representative Flake proposed to solicit funds for a ballot measure that would have repealed a statute that was closely identified with his opponent, Senator John McCain. Representative Flake proposed to appear in advertisements promoting the ballot measure, and would have appeared to benefit from the voter registration and identification programs undertaken in support of the measure.

The distinction between pre- and post-qualification activities is bolstered by the fact that the latter often take place in close proximity to an election. While signature gathering efforts nine months before a federal election are unlikely to have any influence on voter turnout in that election, get-out-the-vote programs that occur in the days immediately preceding an election are likely to have a significant and predictable effect. Thus, solicitations for the post-qualification activities of ballot measure committees could

[5] *See* 2 U.S.C. 441i(b), 431(20); *see also* 11 CFR 100.24.
[6] 2 U.S.C. 441i(e)(1)(A).

provide an opportunity for circumvention of the law. This distinction is consistent with the Commission's definition of FEA, which imposes a similar temporal limitation to distinguish between non-federal and federal activity.[7]

In keeping with this framework, the Commission concluded in Advisory Opinion 2005-10 (Berman-Doolittle) that section 441i(e) does not prohibit Federal candidates and officeholders from raising funds for committees that have been formed solely to support or oppose ballot measures that were designated for an off-year election, in which no federal candidates were on the ballot. Such an election was simply too far removed from a federal election to give rise to the potential for circumvention addressed by section 441i(e).

Here, once the ballot measure has qualified for the ballot, Yes on FAIR plans to "engage in an extensive campaign" including get-out-the-vote programs to get the measure's supporters to the polls, all aimed at passing the FAIR Act on the November 2010 general election ballot. The Commission concludes that during the post-qualification period, Yes on FAIR's activities are in connection with an election in accordance with 2 U.S.C. 441i(e). Thus, any funds raised by Members of Congress on behalf of Yes on FAIR during the post-qualification period are subject to the amount limitations and source prohibitions of the Act.

However, the Act contains two specific exemptions from the limits of section 441i(e)(1), applicable to solicitations on behalf of certain tax exempt organizations. Because Yes on FAIR has submitted an application to the Internal Revenue Service for

[7] *See* 2 U.S.C. 441i(b), 431(20); *see also* 11 CFR 100.24.

determination of tax-exempt status under 26 U.S.C. 501(c), the Commission considers these exemptions below. *See* 2 U.S.C. 441i(e)(4);[8] 11 CFR 300.65.

If conducting activities in connection with an election (including voter identification, voter registration, get-out-the-vote activity or generic campaign activity) is not the principal purpose of an organization described in 26 U.S.C. 501(c), then Members of Congress, Federal candidates, and their agents may make general solicitations of funds on behalf of the organization during the post-qualification period. General solicitations may be made without regard to the Act's source prohibitions or amount limitations. However, if an organization engages in any activities in connection with an election as described above (although such activities are not that organization's principal purpose), then solicitations by covered persons must not be for funds for such activities. 2 U.S.C.441i(e)(4)(A); 11 CFR 300.65(a)(2). If Yes on FAIR's principal purpose is something other than conducting such election activities, then the committee may opt to issue certifications to Federal officeholders stating that conducting election activities is not its principal purpose, and that it does not intend to pay debts incurred in making expenditures or disbursements in connection with an election for Federal office in a prior election cycle. Members of Congress may rely on these certifications in making general solicitations of funds on behalf of Yes on FAIR. *See* 11 CFR 300.65(e).

Members of Congress, Federal candidates, and their agents may also make "specific solicitations" to obtain funds for voter identification, voter registration, get-out-the-vote activity or generic campaign activity, or for an organization described in 26

[8] The Commission has concluded that the provisions of 2 U.S.C. 441i(e)(4) apply only to those organizations described in 26 U.S.C. 501(c) that are not directly or indirectly "established, financed, maintained or controlled" by a covered person. *See* Advisory Opinion 2003-12 (Flake).

U.S.C. 501(c) whose principal purpose is to conduct such activity, provided that the solicitations are made only to individuals, and the amount solicited from any individual does not exceed $20,000 during any calendar year. 2 U.S.C. 441i(e)(4)(B); 11 CFR 300.65(b). However, Members of Congress, Federal candidates, and their agents may not solicit funds on behalf of an organization described in 26 U.S.C. 501(c) for any other election activities.

The Advisory Opinion Request did not clearly indicate whether or not Yes on FAIR's principal purpose is to conduct activities in connection with an election. Accordingly, if Yes on FAIR's principal purpose is something other than conducting activities in connection with an election, and the solicitations are not to obtain funds for activities in connection with an election, then Members of Congress may make general solicitations on behalf of Yes on FAIR without regard to the Act's amount limitations and source prohibitions.

By contrast, if Yes on FAIR's principal purpose is to conduct activities described above in connection with an election or if solicitations are made to obtain funds to conduct such activity, then Members of Congress may make specific solicitations on Yes on FAIR's behalf so long as the solicitations are made only to individuals and the amount solicited does not exceed $20,000 during any calendar year. *See* 2 U.S.C. 441i(e)(4)(B); 11 CFR 300.65(b). Members of Congress may not solicit funds on behalf of Yes on FAIR for any election activity other than those described in 2 U.S.C. 44i(e)(4)(B) and 11 CFR 300.65(c), except that Members of Congress may solicit funds on behalf of Yes on FAIR from other non-prohibited sources up to the contribution limits in 2 U.S.C. 441a. *See* 2 U.S.C.441i(e)(1).

2. May Yes on FAIR have Members of Congress solicit funds of up to $20,000 on its behalf from persons other than individuals during the post-qualification period?

No, Yes on FAIR may not have Members of Congress solicit funds of up to $20,000 on its behalf from persons other than individuals, except as described in the answer to Question 1, above.

The Act and Commission regulations are clear that the "specific solicitation" exception applies if "[t]he solicitation is made *only* to individuals". 2 U.S.C. 441i(e)(4)(B)(i); 11 CFR 300.65(b)(1) (emphasis added). Had Congress intended to allow these solicitations to be made to persons other than individuals, it could have used any of the other terms included in the definition of "person", such as "partnership" or "committee." 2 U.S.C. 431(11). Instead, Congress limited the specific solicitation provision in the Act "only to individuals." 2 U.S.C. 441i(e)(4)(B)(i). Accordingly, the Commission's regulation is limited "only to individuals." 11 CFR 300.65(b)(1). The Commission hence concludes that Members of Congress may not make specific solicitations on Yes on FAIR's behalf in the post-qualification period to anyone other than individuals.

The Commission expresses no opinion regarding the possible application of the Internal Revenue Code or State tax laws to the proposed activities, as those questions are outside its jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a

conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law. The cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Matthew S. Petersen

Chairman