SANDLER, REIFF & YOUNG, P.C.

50 E STREET, S.E., SUITE 300
WASHINGTON, DC 20003

JOSEPH E. SANDLER
sandler@sandlerreiff.com
NEIL P. REIFF
reiff@sandlerreiff.com

COUNSEL:
JOHN HARDIN YOUNG
young@sandlerreiff.com

TELEPHONE: (202) 479-1111
FACSIMILE: (202) 479-1115

August 17, 2005

Mary Dove, Secretary
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: DRAFT ADVISORY OPINION 2005-10
COMMENTS OF BALLOT INITIATIVE STRATEGY CENTER, INC.

Dear Madame Secretary:

These comments are submitted on behalf of our client, Ballot Initiative Strategy Center, Inc. ("BISC"), with respect to the above-referenced draft Advisory Opinion. BISC is a nonpartisan, nonprofit organization exempt from taxation under section 501(c)(4) of the Internal Revenue Code. BISC's mission is to provide technical assistance and other forms of support to organizations and citizens in their efforts to qualify progressive initiatives and referenda for the ballot and to advocate for the election or defeat of particular initiatives and referenda.

The question posed by the subject advisory opinion request is whether and under what circumstances a federal candidate or officeholder may solicit contributions to a ballot initiative committee. The approach taken by the Draft Advisory Opinion is unnecessarily complicated and confusing, given the plain language of the Federal Election Campaign Act of 1971 ("FECA"), as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA") and prior Commission Advisory Opinions.

In essence, under the plain language of BCRA, 2 U.S.C. §441i(e)(4), and the Commission's previous rulings, in the case where a federal candidate or officeholder has not established, financed, maintained or controlled a ballot initiative committee, if the ballot initiative committee is a section 501(c)(4) non-profit organization, the federal

candidate or officeholder *can make an unlimited general solicitation of funds* as long as the ballot initiative committee's principal purpose is not to engage in the specific Federal election activities described in 2 U.S.C. §431(20)(A)(i) & (ii).

Most ballot initiative committees are, or should be, organized as nonprofit organizations exempt from federal taxation under section 501(c)(4) of the Code, even when those committees are required to register as political committees under state campaign finance laws. The reason is that the IRS's regulations do *not* treat the influencing of initiative and referenda as political-organization (527-exempt) expenses, but rather as direct or grassroots lobbying expenses. 26 C.F.R. §§56.4911-2(b)(1)(iii), 56-4911-2(d)(1)(ii). Thus, the correct tax-exempt status for an organization devoted to influencing a ballot initiative is normally section 501(c)(4).

Such a tax status determines whether and under what circumstances a federal candidate or officeholder can solicit funds for the ballot initiative committee. The language of BCRA is clear that, if an organization is a nonprofit organization under section 501(c) of the Code, then—assuming that the organization is *not* established, financed, etc., by a federal candidate or officeholder—that federal candidate or officeholder can make a general solicitation, *without limitation*, of funds in any amount, from any source, provided that the principal purpose of the organization is not to engage to engage in Federal election activities described in 2 U.S.C. §431(20)(A)(i)-(ii). The Commission made this clear in Advisory Opinion 2003-12. There, in addressing the situation where a ballot initiative committee becomes a tax-exempt organization, and is not established, financed, etc. by a federal candidate or officeholder, the Commission ruled that:

> 2 U.S.C. 441i(e)(4)(A) & (B) provide that, if a 501(c) organization satisfies certain conditions, a candidate for Federal office, an individual holding Federal office, or an agent of either (a "covered individual') may make "general solicitations" or "specific solicitations" for the 501(c) organization. When the conditions for its exercise are met, 2 U.S.C. 441i(e)(4)(A)'s "general solicitation" provisions *operate as a total exclusion from the solicitation restrictions on Federal candidates and officeholders* contained in 2 U.S.C. 441(e)(1).

AO 2003-12 (emphasis added).

Thus, as the Commission itself has recognized, the "general solicitation" exemption of section 441i(e)(4) preempts and excludes the operation of section 441i(e)(2)(B) with respect to ballot initiative committees.

Although the Draft AO acknowledges the section 441i(e)(4) exclusion, the Draft merely suggests that these provision "may apply." Draft AO 2005-10 at 7 line 5. To the contrary, assuming the ballot initiative committee is, as the requestors indicate, not

established, financed, etc. by any federal candidate or committee, there is no question that the section 441i(e)(4) exclusion *does* apply, and is absolutely conclusive as to the ability of federal candidates and officeholders to solicit funds for such a ballot initiative committee.

Accordingly, BISC believes the Advisory Opinion issued in response to this request should simply confirm that, in the event that the subject ballot initiative committee is not established, financed, etc. by a federal officeholder or candidate, and is a nonprofit organization exempt from tax under section 501(c)(4) of the Code, the federal candidate or officeholder clearly *can* make a general solicitation, without limitation on source or amount, for the ballot initiative committee, as long as the ballot initiative committee's principal purpose is not to engage in voter registration, voter id, get out the vote or generic campaign activity as described in 2 U.S.C. §431(20)(A)(i) & (ii).

Further, even if a ballot initiative committee claimed exemption from federal taxation as a political organization under section 527 of the Code, it makes no sense to interpret an initiative or referendum as an "election," contrary to the regulations of the IRS, which operate on the principle that initiatives and referenda are legislative in nature and are not political, i.e., not 527-exempt.

We thank the Commission for the consideration of these comments.

Sincerely yours,

Joseph E. Sandler
Neil P. Reiff

Attorneys for Ballot Initiative Strategy Center, Inc.

cc: Rosemary C. Smith, Esq., Associate General Counsel
Office of General Counsel