

May 21, 2010

AO DRAFT COMMENT PROCEDURES

The Commission permits the submission of written public comments on draft advisory opinions when on the agenda for a Commission meeting.

Two Alternative DRAFTS of ADVISORY OPINION 2010-07 are available for public comments under this procedure. It was requested by Brian G. Svoboda, Esq., Kate S. Keane, Esq., Frederic D. Woocher, Esq., and Aimee Dudovitz., on behalf of Yes on FAIR.

Two alternative Drafts of Advisory Opinion 2010-07 are scheduled to be on the Commission's agenda for its public meeting of Thursday, May 27, 2010.

Please note the following requirements for submitting comments:

1) Comments must be submitted in writing to the Commission Secretary with a duplicate copy to the Office of General Counsel. Comments in legible and complete form may be submitted by fax machine to the Secretary at (202) 208-3333 and to OGC at (202) 219-3923.

2) The deadline for the submission of comments is 12:00pm noon (Eastern Time) on May 26, 2010.

3) No comments will be accepted or considered if received after the deadline. Late comments will be rejected and returned to the commenter. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.

4) All timely received comments will be distributed to the Commission and the Office of General Counsel. They will also be made available to the public at the Commission's Public Records Office.

CONTACTS

Press inquiries: Judith Ingram (202) 694-1220

Deputy Commission Secretary: Darlene Harris (202) 694-1038

Other inquiries:

To obtain copies of documents related to AO 2010-07, contact the Public Records Office at (202) 694-1120 or (800) 424-9530 or visit the Commission's website at www.fec.gov.

For questions about comment submission procedures, contact Rosemary C. Smith, Associate General Counsel, at (202) 694-1650.

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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 *AKR (by RCS)*
Assistant General Counsel

Cheryl A.F. Hemsley *CAH*
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

2010 MAY 21 P 4: 10

1 ADVISORY OPINION 2010-07

2
3 Brian G. Svoboda, Esq.
4 Kate S. Keane, Esq.
5 Perkins Coie LLP
6 607 Fourteenth Street, N.W.
7 Washington, D.C. 20005-2003

DRAFT A

8
9 Frederic D. Woocher, Esq.
10 Aimee Dudovitz, Esq.
11 Strumwasser & Woocher LLP
12 10940 Wilshire Boulevard, Suite 2000
13 Los Angeles, CA 90024

14
15 Dear Messrs. Svoboda and Woocher and Mss. Keane and Dudovitz:

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

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

24 ***Background***

25 The facts presented in this advisory opinion are based on your letter dated April 7,
26 2010, and your email dated April 15, 2010.

27 Yes on FAIR is a ballot initiative committee in California. Yes on FAIR has
28 applied to the Internal Revenue Service for recognition as a section 501(c)(4)
29 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”).

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

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

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

16

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."

1 ***Question Presented***

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

5 ***Legal Analysis and Conclusions***

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

9 **Federal candidates and officeholders, their agents, and entities directly or**
10 **indirectly established, financed, maintained or controlled by them or acting on their**
11 **behalf (collectively, “covered persons”) are limited in how much and from whom they**
12 **may solicit funds in connection with an election. Specifically, covered persons may not**
13 **solicit, receive, direct, transfer, or spend any “funds in connection with any election for**
14 **Federal office” unless the funds are “subject to the limitations, prohibitions, and reporting**
15 **requirements of this Act.” 2 U.S.C. 441i(e)(1)(A); *see also* 11 CFR 300.61. Further,**
16 **covered persons may not solicit, receive, direct, transfer, or spend any “funds in**
17 **connection with any election other than an election for Federal office” unless the funds**
18 **are consistent with the Act’s amount limitations and source prohibitions.**
19 **2 U.S.C. 441i(e)(1)(B); *see also* 11 CFR 300.62.**

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

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

9 However, in Advisory Opinion 2005-10 (Berman-Doolittle), the Commission
10 concluded that section 441i(e) does not prohibit Federal candidates and officeholders
11 from raising funds for committees that have been formed solely to support or oppose
12 ballot measures, notwithstanding that the measures in question had already qualified for
13 the ballot.³ Moreover, neither of the concurring opinions of the commissioners who
14 voted for the result in AO 2005-10 drew any distinction between the pre- and post-ballot
15 qualification periods. In fact, the statement by Commissioners Weintraub and McDonald
16 stated the “reasoning was faulty” in AO 2003-12 regarding the “in connection with”
17 analysis, and that the distinction between pre- and post-ballot qualification was drawn
18 “[f]or the sake of compromise.” (AO 2005-10, Concurring Statement of Commissioners
19 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.*

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

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

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

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

17 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.

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

6 Furthermore, the Act’s legislative history (and the views of the Members of
7 Congress who voted for the Act) confirms the understanding that ballot measures are not
8 “elections.” As Vice Chairman Toner and Commissioner Mason explained in AO 2005-
9 10, “In debating the Bipartisan Campaign Reform Act of 2002 (‘BCRA’) [which
10 introduced section 441i(e)’s so-called ‘soft-money’ ban], not a single Member of
11 Congress, including the legislation’s sponsors, indicated that the soft money ban would
12 apply to initiatives and referenda. Moreover, Members of Congress who voted for
13 BCRA, including House Minority Leader Nancy Pelosi (D-CA), filed comments in this
14 proceeding indicating that it was not their understanding that 441i(e)’s soft money
15 restrictions would apply beyond candidate elections to ballot measure.” (AO 2005-10,
16 Concurring Statement of Vice Chairman Michael E. Toner and Commissioner David M.
17 Mason at 1); *see also* Memorandum from Commissioner Ellen L. Weintraub to
18 Commission Secretary, August 17, 2005, *available at*
19 <http://saos.nictusa.com/aodocs/413239.pdf>.)

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

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

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

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

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requester may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 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).

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

7 On behalf of the Commission,

8

9 Matthew S. Petersen

10 Chairman

11

12

1 ADVISORY OPINION 2010-07

2
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DRAFT B

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13 Los Angeles, CA 90024

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

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

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

25 ***Background***

26 The facts presented in this advisory opinion are based on your letter dated April 7,
27 2010, and your email dated April 15, 2010.

28 Yes on FAIR is a ballot initiative committee in California. Yes on FAIR has
29 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”).

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

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

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

17

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."

1 ***Questions Presented***

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

5 ***Legal Analysis and Conclusions***

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

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

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

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

5 In analyzing the application of this prohibition, the threshold question is whether
6 the funds involved are in connection with an election under section 441i(e)(1). In
7 Advisory Opinion 2003-12 (Flake), the Commission concluded that under section
8 441i(e)(1)(B), the activities of a ballot measure committee that is not directly or indirectly
9 established, financed, maintained or controlled by a Federal candidate or officeholder, or
10 agent of either, are not in connection with an election before the committee has qualified
11 an initiative or ballot measure for the ballot, but are in connection with an election after
12 the committee has qualified an initiative or ballot measure for the ballot.³

13 *Pre-Ballot Qualification*

14 The line drawn by Advisory Opinion 2003-12 (Flake) and maintained in
15 subsequent Advisory Opinions reflects fundamental differences in the nature and timing
16 of activities undertaken by ballot measure committees before and after a measure
17 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).

1 ensuring compliance with the technical requirements of ballot access. The activities
2 undertaken in support of this goal, such as petition and signature gathering, do not occur
3 within close proximity to an election. While pre-qualification activity may have some
4 limited political consequences, “such activity is sufficiently removed that it is not ‘in
5 connection with’” an election within the meaning of section 441i(e). Advisory Opinion
6 2010-03 (National Democratic Redistricting Trust).

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

14 *Post-Ballot Qualification*

15 After qualification, by contrast, ballot measure committees engage in generalized
16 campaigning with the goal of persuading potential voters to support the measure and
17 encouraging supporters to vote. Indeed, this generalized campaigning often takes the
18 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.

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

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

17 The distinction between pre- and post-qualification activities is bolstered by the
18 fact that the latter often take place in close proximity to an election. While signature
19 gathering efforts nine months before a federal election are unlikely to have any influence
20 on voter turnout in that election, get-out-the-vote programs that occur in the days
21 immediately preceding an election are likely to have a significant and predictable effect.
22 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).

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

4 In keeping with this framework, the Commission concluded in Advisory Opinion
5 2005-10 (Berman-Doolittle) that section 441i(e) does not prohibit Federal candidates and
6 officeholders from raising funds for committees that have been formed solely to support
7 or oppose ballot measures that were designated for an off-year election, in which no
8 federal candidates were on the ballot. Such an election was simply too far removed from
9 a federal election to give rise to the potential for circumvention addressed by section
10 441i(e).

11 Here, once the ballot measure has qualified for the ballot, Yes on FAIR plans to
12 "engage in an extensive campaign" including get-out-the-vote programs to get the
13 measure's supporters to the polls, all aimed at passing the FAIR Act on the November
14 2010 general election ballot. The Commission concludes that during the post-
15 qualification period, Yes on FAIR's activities are in connection with an election in
16 accordance with 2 U.S.C. 441i(e). Thus, any funds raised by Members of Congress on
17 behalf of Yes on FAIR during the post-qualification period are subject to the amount
18 limitations and source prohibitions of the Act.

19 However, the Act contains two specific exemptions from the limits of section
20 441i(e)(1), applicable to solicitations on behalf of certain tax exempt organizations.
21 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.

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

3 If conducting activities in connection with an election (including voter
4 identification, voter registration, get-out-the-vote activity or generic campaign activity) is
5 not the principal purpose of an organization described in 26 U.S.C. 501(c), then Members
6 of Congress, Federal candidates, and their agents may make general solicitations of funds
7 on behalf of the organization during the post-qualification period. General solicitations
8 may be made without regard to the Act's source prohibitions or amount limitations.
9 However, if an organization engages in any activities in connection with an election as
10 described above (although such activities are not that organization's principal purpose),
11 then solicitations by covered persons must not be for funds for such activities.

12 2 U.S.C.441i(e)(4)(A); 11 CFR 300.65(a)(2). If Yes on FAIR's principal purpose is
13 something other than conducting such election activities, then the committee may opt to
14 issue certifications to Federal officeholders stating that conducting election activities is
15 not its principal purpose, and that it does not intend to pay debts incurred in making
16 expenditures or disbursements in connection with an election for Federal office in a prior
17 election cycle. Members of Congress may rely on these certifications in making general
18 solicitations of funds on behalf of Yes on FAIR. *See* 11 CFR 300.65(e).

19 Members of Congress, Federal candidates, and their agents may also make
20 "specific solicitations" to obtain funds for voter identification, voter registration, get-out-
21 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).

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

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

14 By contrast, if Yes on FAIR's principal purpose is to conduct activities described
15 above in connection with an election or if solicitations are made to obtain funds to
16 conduct such activity, then Members of Congress may make specific solicitations on Yes
17 on FAIR's behalf so long as the solicitations are made only to individuals and the amount
18 solicited does not exceed \$20,000 during any calendar year. See 2 U.S.C. 441i(e)(4)(B);
19 11 CFR 300.65(b). Members of Congress may not solicit funds on behalf of Yes on
20 FAIR for any election activity other than those described in 2 U.S.C. 441i(e)(4)(B) and 11
21 CFR 300.65(c), except that Members of Congress may solicit funds on behalf of Yes on
22 FAIR from other non-prohibited sources up to the contribution limits in 2 U.S.C. 441a.
23 See 2 U.S.C.441i(e)(1).

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

3 **No, Yes on FAIR may not have Members of Congress solicit funds of up to**
4 **\$20,000 on its behalf from persons other than individuals, except as described in the**
5 **answer to Question 1, above.**

6 **The Act and Commission regulations are clear that the “specific solicitation”**
7 **exception applies if “[t]he solicitation is made *only* to individuals”. 2 U.S.C.**
8 **441i(e)(4)(B)(i); 11 CFR 300.65(b)(1) (emphasis added). Had Congress intended to**
9 **allow these solicitations to be made to persons other than individuals, it could have used**
10 **any of the other terms included in the definition of “person”, such as “partnership” or**
11 **“committee.” 2 U.S.C. 431(11). Instead, Congress limited the specific solicitation**
12 **provision in the Act “only to individuals.” 2 U.S.C. 441i(e)(4)(B)(i). Accordingly, the**
13 **Commission’s regulation is limited “only to individuals.” 11 CFR 300.65(b)(1). The**
14 **Commission hence concludes that Members of Congress may not make specific**
15 **solicitations on Yes on FAIR’s behalf in the post-qualification period to anyone other**
16 **than individuals.**

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

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

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

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On behalf of the Commission,

Matthew S. Petersen

Chairman