FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

ADVISORY OPINION 2010-07

CONCURRING STATEMENT OF
VICE CHAIR CYNTHIA L. BAUERLY
COMMISSIONER STEVEN T. WALTHER
COMMISSIONER ELLEN L. WEINTRAUB

Yes on FAIR, a ballot initiative committee located in California, submitted an Advisory Opinion Request asking for the Commission's guidance on what rules apply, under the Federal Election Campaign Act ("the Act"), as amended by the Bipartisan Campaign Finance Reform Act ("BCRA"), to solicitations by Members of Congress on behalf of Yes on FAIR. Specifically, Yes on FAIR asked whether Members of Congress may solicit unlimited funds on behalf of Yes on FAIR at any time. Alternatively, if the Commission were to conclude that Members of Congress may not solicit unlimited funds on behalf of Yes on FAIR after the committee's initiative qualifies for the ballot, Yes on FAIR asked whether Members of Congress may solicit funds of up to $20,000 from persons other than individuals during the post-qualification period.

The Commission agreed unanimously that Members of Congress may solicit unlimited funds on behalf of Yes on FAIR during the period before the committee's initiative qualifies for the ballot, but was divided in its analysis of the other questions presented in the Advisory Opinion Request. As explained in further detail in this Statement, we differed from our colleagues in our conclusions with respect to the post-qualification period. Specifically, the three of us concluded that after the initiative qualifies for the ballot, solicitations by Members of Congress on behalf of Yes on FAIR must comply with the amount limitations and source prohibitions of the Act. We also concluded that, under the exemption for specific solicitations at 2 U.S.C. 441i(e)(4), Members of Congress could solicit up to $20,000 from individuals only. We write separately to explain our rationale for these two conclusions.

In 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 stated 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. However, the activities of the committee are "in connection with" an election *after* the committee has qualified an initiative or ballot measure for the ballot.[1]

A. Pre-Ballot Qualification

The line drawn by Advisory Opinion 2003-12 (Flake) and maintained in subsequent Advisory Opinions reflects important 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 (1) obtaining the signatures required to gain ballot access and (2) ensuring compliance with other technical requirements of ballot access. The activities undertaken in support of these goals do not occur within close temporal proximity to the election. Although 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, we conclude 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.[2] Thus, Members of Congress

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[1] 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).

[2] We note that on May 10, 2010 Mr. Charles T. Munger submitted a comment on the Advisory Opinion Request on behalf of Voters FIRST Act for Congress, another California ballot initiative committee, alleging that Yes on FAIR "has been 'established, financed and maintained and controlled' by a federal candidate and officeholder." Available at http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=3052&START=1137807.pdf. 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 the Advisory Opinion, the Commission relied 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.

may solicit funds on behalf of Yes on FAIR outside the amount limitations and source prohibitions of the Act during the pre-qualification period.

B. Post-Ballot Qualification

1. Applicability of 2 U.S.C. 441i(e)(1)

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 type of campaigning often takes the form of Federal election activity ("FEA"), as defined by BCRA, such as voter registration, voter identification and get-out-the-vote programs. *See* 2 U.S.C. 441i(b), 431(20); *see also* 11 CFR 100.24. 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. 2 U.S.C. 441i(e)(1)(A).

Absent the restrictions imposed by section 441i(e), a covered person would be able to solicit non-Federal funds in the post-qualification period for those ballot measures that are expected to appeal to that Federal candidate or officeholder'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 (Flake), 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 temporal proximity to the election date when the initiative is on the ballot along with Federal candidates. While signature gathering efforts nine months before a Federal election are unlikely to have any measurable 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 provide an opportunity for significant circumvention of the Act. 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. *See* 2 U.S.C. 441i(b), 431(20); *see also* 11 CFR 100.24.

In keeping with this framework, the Commission concluded, by a vote of 5-1, in Advisory Opinion 2005-10 (Berman-Doolittle) that section 441i(e) does not prohibit covered persons 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. In Advisory Opinion 2005-10, the Commission concluded that such an election was simply too remote both in time and circumstance from a Federal election to give rise to the potential for circumvention addressed by section 441i(e). To the extent that our

colleagues have suggested that the Concurring Statement of Commissioners Weintraub and McDonald in Advisory Opinion 2005-10 "effectively superseded [Advisory Opinion 2003-12 (Flake)] and its distinction between pre- and post-qualification periods,"[3] the Concurring Statement expressed the views of only two Commissioners and therefore could not have served to supersede any legal opinions adopted by a bipartisan majority (by a vote of 5-1) of the Commission, particularly since the Weintraub-McDonald Concurring Statement reaffirmed the result of Advisory Opinion 2003-12. Moreover, the conclusions reached in Advisory Opinion 2005-10 were "fairly narrow in scope" since they related only to an off-year election in which no Federal candidate appeared on the ballot. Because the subject Advisory Opinion Request involves a ballot initiative in which Federal candidates will also appear on the ballot, the conclusions reached in Advisory Opinion 2005-10 are not applicable here and therefore are not inconsistent with our views expressed herein.[4]

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. After an initiative has qualified for a ballot on which Federal candidates will also appear, the activities of a ballot initiative committee are, "in connection with" an election within the meaning of 2 U.S.C. 441i(e). Accordingly, any funds raised by Members of Congress on behalf of Yes on FAIR during the post-qualification period will be subject to the amount limitations and source prohibitions of the Act.

2. Applicability of Nonprofit Exemptions at 2 U.S.C. 441i(e)(4)

While post-qualification solicitations are subject to the amount limitations and source prohibitions of the Act, they may qualify for two specific exemptions from the limits of 441i(e)(1) that are applicable to solicitations on behalf of certain tax exempt organizations under 26 U.S.C. 501(c) (including organizations that have submitted an application for determination of tax exempt status). Because Yes on FAIR has submitted an application to the Internal Revenue Service for determination of tax-exempt status under 26 U.S.C. 501(c), we consider these exemptions in turn. *See* 2 U.S.C. 441i(e)(4);[5] 11 CFR 300.65.

The Act distinguishes between solicitations for 501(c) organizations that conduct certain categories of defined Federal election activities (including voter identification, voter registration, get-out-the-vote activity and generic campaign activity) and solicitations for other 501(c)

[3] Advisory Opinion 2010-07, Concurring Statement of Chairman Matthew S. Petersen, Commissioner Caroline C. Hunter and Commissioner Donald F. McGahn II at 3.
[4] Concurring Statement of Commissioner Ellen L. Weintraub and Commissioner Danny Lee McDonald at 5. As Commissioners Weintraub and McDonald wrote, "[i]ts import is limited to those circumstances where a federal candidate seeks to raise funds for a ballot measure committee that he or she does not establish, maintain or control; [and] where no federal candidate appears on the same ballot." *Id.* This narrow interpretation was supported by commenters from the House of Representatives. Indeed, Representative Berman expressly argued that the Commission could grant his request without superseding AO 2003-12, on the grounds that the facts presented in his request were distinct from those at issue in that Opinion. *See* Ex-Parte Memorandum from Commissioner Ellen L. Weintraub to Commission Secretary, August 17, 2005, available at http://saos.nictusa.com/aodocs/413239.pdf.
[5] 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).

organizations. If conducting such activities is not the principal purpose of an organization described in 26 U.S.C. 501(c), then covered persons may make unlimited general solicitations of funds on behalf of the organization at any time, including during the post-qualification period. In such an instance, general solicitations may be made without regard to the Act's source prohibitions or amount limitations. However, if an organization engages in any of the defined Federal election activities described above (although such activities are not that organization's principal purpose), then covered persons may not solicit funds for such activities. 2 U.S.C.441i(e)(4)(A); 11 CFR 300.65(a)(2).

Covered persons 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 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, covered persons may not solicit funds on behalf of an organization described in 26 U.S.C. 501(c) for any other election activities. 11 CFR 300.65(d).

The Advisory Opinion Request did not indicate whether or not Yes on FAIR's principal purpose is to conduct voter identification, voter registration, get-out-the-vote activity or generic campaign activity. Accordingly, if Yes on FAIR's principal purpose is something other than conducting these activities, and the solicitations are not to raise funds for these activities, then Members of Congress, as well as other covered persons, may make general solicitations on behalf of Yes on FAIR without regard to the Act's amount limitations and source prohibitions.[6] By contrast, if Yes on FAIR's principal purpose is to conduct the type of Federal election activity described in clauses (i) and (ii) of 2 U.S.C. 421(20)(A), then Members of Congress, as well as other covered persons, may make 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). Similarly, even if Yes on FAIR's principal purpose is not to conduct these types of Federal election activity, Members of Congress, as well as other covered persons, "may make a solicitation explicitly to obtain funds for carrying out" such activities under the same conditions. *Id.* Any "specific solicitation" made pursuant to 2 U.S.C. 441i(e)(4)(B) may only be made to natural persons because 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).[7]

We conclude that during the post-qualification period, solicitations by Members of Congress on behalf of Yes on FAIR are governed by the provisions of 2 U.S.C. 441i(e). Thus,

[6] 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).

[7] 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).

funds solicited and 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, unless they qualify for one of the two nonprofit exemptions set forth in 2 U.S.C. 441i(e)(4).

Cynthia Bauerly by KB — 7/8/10
Cynthia L. Bauerly, Vice Chair — Date

Steven T. Walther — 7/8/10
Steven T. Walther, Commissioner — Date

Ellen L. Weintraub — 7/8/10
Ellen L. Weintraub, Commissioner — Date