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Commissioner Michael E. Toner, Vice-Chairman
Commissioner David M. Mason
Commissioner Danny L. McDonald
Commissioner Ellen L. Weintraub
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5367 (U.S. Rep. Darrell Issa)

Dear Commissioners:

On behalf our client, Respondent U.S. Rep. Darrell Issa, we write to bring to your attention that the legal underpinning of the Commission's Factual and Legal Analysis in the above referenced enforcement matter has been reversed by the recently issued Advisory Opinion 2005-10 (Reps. Berman and Doolittle). MUR 5367 should, therefore, be promptly dismissed.

The finding against Respondent Rep. Darrell Issa was premised on a "ballot measure" being "in connection with any election other than an election for Federal office" for purposes of the Bipartisan Campaign Reform Act's (BCRA) prohibition on Federal candidates and officeholders raising and spending funds not subject to the prohibitions and limitations of Federal law. F&LA at 2-3. MUR 5367 turns entirely on whether Rep. Issa violated BCRA's ban on soliciting soft money, and spending corporate (a Subchapter S corporation of which he and his wife were the sole shareholder)¹ and personal² funds for a California ballot measure committee, *Rescue California*.

However, the Commission's ruling in AO 2005-10 that a California ballot measure is not an "election" for purposes of BCRA's ban on soft money fundraising under certain circumstances is applicable as well to MUR 5367. In particular, the "certain circumstances" include that:

¹ It is more accurate to say that Rep. Issa, for administrative convenience, made several same-day transfers from a personal account through his Subchapter S Corporation to *Rescue California*. See July 20, 2004 letter from counsel

² AO 2004-25 (Corzine) negates the Commission's prior conclusion in the F&LA that there was reason to believe that Rep. Issa, by spending his personal funds, spent soft money in violation of BCRA

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- Neither requestor nor any other Federal candidate will be on the November 8, 2005 ballot (There was no Federal candidate on the October 7, 2003 ballot.);
- The 2005 ballot measures represent major issues facing the constituents of Reps. Berman and Doolittle, and touch on matter frequently before Congress. While the AO does not mention these issues, there are eight on the ballot, http://www.ss.ca.gov/elections/elections_j.htm#2005Special, and one of these measures touches upon the lifeblood of California congressional officeholder's re-election prospects – how congressional district boundaries are drawn. (The 2003 ballot focused on who would be governor of the State, which impacts all Californians.);
- The ballot measure committees, according to the AO, are not and would not be directly or indirectly established, financed, maintained or controlled by either Reps. Berman or Doolittle, or anyone acting on their behalf, or on behalf of any political party committee. (However, the FEC cannot know this until the end of the campaign when total receipts for these ballot measure committees have been tabulated. There is nothing in the AO preventing Reps. Berman and Doolittle from financing the ballot measure committees to exactly the same degree as Rep. Issa. The only difference is that the totals for the recall effort are known, and the totals for the 2005 cannot be.);
- Reps. Berman and Doolittle would undertake fundraising in their individual capacities and not on behalf of any political party committee. (The same was true for Rep. Issa.);
- Reps. Berman and Doolittle would not raise funds for public communications that would refer to either of them and be distributed in their respective congressional districts (The same was true for Rep. Issa.);

Whether one of these circumstances, some in combination, or all is dispositive is not stated. However, based upon the *BNA, Money & Politics* Report of the Commission's August 18th meeting, the single dispositive factor behind the Commission's ruling would appear to have been the fact that there were no Federal races on the November 8, 2005 ballot, as a motion to allow soft money fundraising under this circumstance initially garnered five votes.

In any event, the circumstances in MUR 5367 correspond to those in AO 2005-10:

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- Rep. Issa was not on the October 7, 2003 ballot;
- The ballot measure represented a major issue facing Rep. Issa's constituents, namely whether Governor Davis should continue to govern the State of California;
- Rep. Issa undertook fundraising in his individual capacity and not on behalf of any political party committee;
- Rep. Issa did not raise funds for public communications that would refer to him and be distributed in his congressional district.

In his response to the F&LA, Rep. Issa went along with the fiction that he "established", "financed" and "maintained" *Rescue California* merely because he had given a substantial amount of funds to it. He did this for BCRA purposes because *Issa for Governor*, his gubernatorial candidate committee, would be considered, under Commission regulations, affiliated with *Rescue California* and, thus, Rep. Issa would be exempt from the fundraising ban under 2 U.S.C. § 441i(e)(2)).

There is, however, not a scintilla of evidence that Rep. Issa established or controlled *Rescue California* in the traditionally understood sense that he had something to do with its organizational genesis or exercised decision-making authority. The FEC has never authoritatively provided precise content to the terms "financed" or "maintained" for purposes of affiliation, which naturally leads to abuses such as in this matter where the F&LA concludes:

- Rep. Issa provided "seed money" (\$100,000) to *Rescue California* (that is, he had an "active and significant role in the formation" of the committee, 11 C.F.R. 300(c)(2)(ix)), and thereby "established" it; and
- Rep. Issa provided funds in a "significant amount" and on an "ongoing basis" (60% of total reported receipts³) to *Rescue California* (that is, he "financed" and "maintained" the committee, 11 C.F.R. § 300.2(c)(2)(vii) and (viii)).

If Rep. Issa is found to have "established" "financed" or "maintained" a ballot measure committee merely by having raised or spent an undefined amount of funds that is labeled "seed money", or in "significant" amounts, it puts the AO 2005-10 requestors and all other Federal candidates relying on it in the precarious position (not addressed in AO 2005-10) of becoming establishers, financers or maintainers of the very ballot measure committees for which the

³ Now that the *Rescue California* has terminated and its total receipts over the term of its existence are quantified, on-line reports indicate that Rep. Issa personally or through Green Properties, Inc. contributed 56% of its total receipts. See <http://dbsearch.ss.ca.gov/ContributorSearch.aspx>

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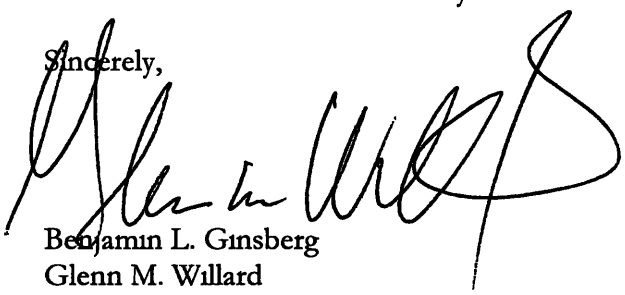
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Commission gave them permission to raise significant amounts of funds from any source. The FEC, by granting Reps. Berman and Doolittle a license to raise soft money (without any noted restriction), have invited them to break the law, not unlike a police officer who invites a tavern patron to step outside and then arrests him for public drunkenness.

On the other hand, if the Commission concludes that raising or spending unlimited soft money for these ballot measure committees is permissible for requestors and other similarly situated candidates, or if the question of "affiliation" with a ballot measure committee was not dispositive in AO 2005-10 in light of the other circumstances present (such as the requestors not being on the ballot), then Rep. Issa should either be considered as not having established, financed or maintained *Rescue California* or that his donations to it were outweighed by the other circumstances that render his activity lawful.

Because the circumstances in MUR 5367 are on all fours with those in AO 2005-10, this MUR should be dismissed without delay and not allowed to hang over the head of Rep. Issa.

Sincerely,



Benjamin L. Ginsberg
Glenn M. Willard

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