



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Aimee Dudovitz, Esq.
Strumwasser & Woocher, LLP
10940 Wilshire Blvd., Suite 2000
Los Angeles, CA 90024

NOV 18 2010

RE: MUR 6280
Michael Berman;
Yes on FAIR and Frederic D. Woocher, in
his official capacity as Treasurer;
Daniel Lowenstein

Dear Ms. Dudovitz:

On April 30, 2010, the Federal Election Commission notified your clients, Michael Berman, Yes on FAIR and Frederic D. Woocher, in his official capacity as Treasurer, and Daniel Lowenstein of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On November 15, 2010, the Commission found, on the basis of the information in the complaint, and information provided by your clients, that there is no reason to believe Michael Berman, Yes on FAIR and Frederic D. Woocher, in his official capacity as Treasurer, and Daniel Lowenstein violated 2 U.S.C. § 441i(e)(1)(A) and (B). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explain the Commission's finding, is enclosed for your information.

If you have any questions, please contact Peter Reynolds, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Mark D. Shonkwiler
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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1 **FEDERAL ELECTION COMMISSION**

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3 **FACTUAL AND LEGAL ANALYSIS**

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5 RESPONDENTS: Michael Berman MUR: 6280

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7 Yes on FAIR and Frederic D. Woocher,
8 in his official capacity as Treasurer

9
10 Daniel Lowenstein

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13 **I. INTRODUCTION**

14 This matter was generated by a complaint filed by Voters FIRST Act for
15 Congress. See 2 U.S.C. § 437(g)(a)(1). The available information indicates that
16 Representative Howard L. Berman ("Representative Berman"), Berman for Congress and
17 Bruce Corwin, in his official capacity as Treasurer ("Berman for Congress"), Michael
18 Berman, Yes on FAIR and Frederic D. Woocher, in his official capacity as Treasurer, and
19 Daniel Lowenstein did not solicit, receive, direct, transfer, or spend funds outside the
20 Act's source prohibitions and amount limitations in violation of 2 U.S.C. § 441i(e)(1)(A)
21 and (B).

22 **II. FACTUAL AND LEGAL ANALYSIS**

23 **A. Factual Background**

24 Representative Berman is a Federal officeholder, as well as a candidate for
25 reelection, in the November 2, 2010, general election. See 2 U.S.C. §§ 431(2), 431(3); 11
26 C.F.R. §§ 100.3, 100.4. Berman for Congress is his principal campaign committee.

27 Yes on FAIR¹ is a ballot initiative committee in California that has applied to the
28 Internal Revenue Service for recognition as a section 501(c) organization. Daniel

¹ The respondent's full name is "Yes on FAIR, a coalition of entrepreneurs, working people, community leaders such as Karen Bass, and other concerned citizens devoted to eliminating bureaucratic

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1 Lowenstein is listed as a principal officer of Yes on FAIR. Michael Berman,
2 Representative Berman's brother, is a consultant to Yes on FAIR. Yes on FAIR's sole
3 purpose is to support the qualification and passage of the Financial Accountability In
4 Redistricting Act (the "FAIR Act") in the November general election. The FAIR Act²
5 qualified for the general election ballot as of June 24, 2010. *See*
6 <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm#1451>
7 (last visited September 9, 2010). Both before and after the FAIR Act qualified for the
8 ballot, Yes on FAIR accepted contributions in excess of \$5,000. *See* [http://cal-](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1323672&view=late1)
9 [access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1323672&view=late1](http://cal-access.ss.ca.gov/Campaign/Committees/Detail.aspx?id=1323672&view=late1) (last
10 visited September 1, 2010).

11 Voters FIRST Act for Congress is the Complainant in this matter, as well as the
12 name of the ballot initiative championed by the Complainant. Like the FAIR Act, it
13 pertains to redistricting. It qualified for the November general election ballot as of May
14 5, 2010, and has been designated "Proposition 20." *See*
15 <http://www.sos.ca.gov/elections/ballot-measures/qualified-ballot-measures.htm> (last
16 visited September 9, 2010).

17 The Complaint alleges that Representative Berman took actions to "establish,
18 finance, maintain or control" Yes on FAIR, which resulted in a violation of 2 U.S.C. §
19 441i(e)(1)(A) and (B).³ The Complaint is based on two factual allegations. First, in a

waste of taxpayer dollars on the political game of redistricting." *See* Lowenstein, Woocher, and Michael Berman Response, 2. Karen 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. Bass is also the current Democratic nominee for election to the U.S. House of Representatives in the 33rd Congressional District of California. She is not a respondent in this matter.

² The FAIR Act has been designated "Proposition 27" on the general election ballot.

³ Though they were not specifically named as respondents in the Complaint, the Commission sent notifications to Berman for Congress, Michael Berman, Lowenstein, and Yes on FAIR.

1 report published on January 18, 2010, Lowenstein acknowledged that Representative
2 Berman and Michael Berman, a redistricting expert, are “the real sponsors” of the FAIR
3 Act. *See* Compl., Attachment C. Notably, the report discusses the ballot initiative but
4 does not mention Yes on FAIR or suggest that the Bermans are involved with that
5 entity—a distinction not recognized in the Complaint. Second, the Complaint alleges that
6 a conversation between Charles T. Munger, Jr. (an individual involved in some capacity
7 with the Complainant) and Representative Berman on March 5, 2010, indicated that
8 Representative Berman controlled Yes on FAIR. Specifically, the Complaint states that
9 Munger and Representative Berman discussed a potential compromise wherein Munger
10 would agree not to file the necessary signatures to qualify the Voters FIRST Act for
11 Congress for the November ballot, “while the campaign to gather signatures for the FAIR
12 measure would cease.” *Id.* at 2.

13 On April 7, 2010, Yes on FAIR sought an advisory opinion as to whether
14 Members of Congress may solicit funds on its behalf outside of the amount limitations
15 and source prohibitions of the Act both before and after the FAIR Act qualified for the
16 general election ballot. The advisory opinion request was complete on April 15, 2010.
17 As part of its request, Yes on FAIR represented to the Commission that it is not directly
18 or indirectly established, financed, maintained or controlled by, or acting on behalf of,
19 any Federal candidate or officeholder. Because the Commission relied on that
20 representation in Advisory Opinion 2010-07 (Yes on FAIR), issued on June 14, 2010,
21 there was no basis for it to address the question of whether Representative Berman
22 established, financed, maintained or controlled Yes on FAIR. Within a week after

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1 issuing Advisory Opinion 2010-07 (Yes on FAIR), the Commission received two
2 responses to the Complaint.

3 The first response, sent on behalf of Representative Berman and Berman for
4 Congress (the "Rep. Berman Response"), asserts that those respondents have not
5 "established, financed, maintained or controlled" Yes on FAIR. The Rep. Berman
6 Response asserts that though Representative Berman is "a private supporter" of the FAIR
7 Act, he does not "hold himself out as responsible for Yes on FAIR's activities, or as
8 specially involved in its decisionmaking." Rep. Berman Resp., 2. With respect to the
9 March 5, 2010, phone conversation between Representative Berman and Munger,
10 Representative Berman "does not share the Complainant's recollection of the
11 conversation" and asserts that even if Complainant's recollection were accurate, it is not
12 evidence of any special relationship between Representative Berman and Yes on FAIR.
13 *Id.* at 3. The Rep. Berman Response acknowledges that the Committee has made one
14 contribution of \$10,000 to Yes on FAIR, but it maintains that neither the Committee, nor
15 Representative Berman, has paid for Yes on FAIR's administrative costs or provided any
16 ongoing funding to Yes on FAIR. Additionally, the Rep. Berman Response maintains
17 that although Representative Berman is aware of Michael Berman's involvement with
18 Yes on FAIR, Michael Berman has no actual authority to act on Representative Berman's
19 behalf, and his actions in connection with Yes on FAIR have not been made under
20 Representative Berman's direction or control. *Id.* at 4.

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1 The second response was sent on behalf of Yes on FAIR officers and consultants
2 Lowenstein, Woocher⁴ and Michael Berman (the “LWB Response”). It contends as an
3 initial matter that the Complaint fails to allege a violation with respect to these
4 respondents. In any event, the LWB Response further asserts that Lowenstein “worked
5 with a team of experts to draft the FAIR Act” and is the official proponent of the
6 measure, and that he and Woocher are the only officers and directors of Yes on FAIR and
7 are responsible for all of its decisions. LWB Resp., 2-3. The LWB Response further
8 asserts that no Federal officeholder or candidate “has ever played any role in the
9 establishment, governance, or general operation of Yes on FAIR.” *Id.* at 3. Michael
10 Berman, according to the LWB Response, was hired as a consultant to Yes on FAIR but
11 does not have any control over the entity. *Id.* Moreover, the LWB Response asserts that
12 to the extent Michael Berman is involved with Yes on FAIR, his actions cannot be
13 imputed to Representative Berman, because a familial relationship, without more, is
14 insufficient to establish agency. *Id.* at 5.

15 **B. Analysis**

16 Under the Act, as amended by the Bipartisan Campaign Reform Act of 2002
17 (“BCRA”), Federal candidates, officeholders, their agents, and entities directly or
18 indirectly established, financed, maintained or controlled by, or acting on behalf of, a
19 candidate or officeholder, may not raise or spend funds in connection with an election⁵

⁴ Woocher was named in the Commission’s notification letter as a respondent in his official capacity as Treasurer of Yes on FAIR, though not as an individual. Neither of the responses was submitted on behalf of Yes on FAIR.

⁵ The Commission has addressed whether activities of a ballot measure committee established, financed, maintained or controlled by a Federal candidate, officeholder, or agent of either, are in connection with an election. See generally Advisory Opinions 2010-07 (Yes on FAIR); 2007-28 (McCarthy/Nunes); 2005-10 (Berman/Doolittle); 2003-12 (Flake).

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1 unless the funds are subject to the limitations, prohibitions, and reporting requirements of
2 the Act. *See* 2 U.S.C. § 441i(e)(1); *see also* 11 C.F.R. §§ 300.61, 300.62.

3 With respect to this matter, the Commission has already issued Advisory Opinion
4 2010-07 (Yes on FAIR), which determined that Members of Congress could solicit funds
5 outside the amount limitations and source prohibitions of the Act and Commission
6 regulations on behalf of Yes on FAIR during the period before the initiative qualified for
7 the November ballot and up to \$20,000 from individuals on behalf of Yes on FAIR after
8 the initiative qualified to be placed on the ballot. The Commission's conclusion,
9 however, relied on Yes on FAIR's assertion that it is not "established, financed,
10 maintained or controlled" by a Federal candidate, officeholder, or agent of either.
11 Therefore, if Yes on FAIR *is* "established, financed, maintained or controlled" by a
12 Federal candidate, officeholder, or agent of either, it cannot rely on Advisory Opinion
13 2010-07 (Yes on FAIR). Thus, the primary issue in this matter is whether Representative
14 Berman directly or indirectly "established, financed, maintained or controlled" Yes on
15 FAIR.

16 The ten non-exclusive factors set out at 11 C.F.R. § 300.2(c)(2) determine
17 whether a person or entity ("sponsor") "directly or indirectly established, financed,
18 maintained or controlled" another person or entity under 2 U.S.C. § 441i(e)(1). These
19 factors must be examined in the context of the overall relationship between the sponsor
20 and the entity to determine whether the presence of any factor or factors is evidence that
21 the sponsor "directly or indirectly established, financed, maintained or controlled" the
22 entity. 11 C.F.R. § 300.2(c)(2).

23 As applied to Yes on FAIR and Representative Berman, the relevant factors are:

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- 1 • Whether Representative Berman, directly or through his agent, has the
2 authority or ability to direct or participate in the governance of Yes on
3 FAIR through provisions of constitutions, bylaws, contracts, or other
4 rules, or through formal or informal practices or procedures, 11 C.F.R. §
5 300.2(c)(2)(ii);
6
- 7 • Whether Representative Berman, directly or through his agent, has the
8 authority or ability to hire, appoint, demote, or otherwise control the
9 officers, or other decision-making employees or members of Yes on
10 FAIR, 11 C.F.R. § 300.2(c)(2)(iii);
11
- 12 • Whether Representative Berman, directly or through his agent, provides
13 funds or goods in a significant amount or on an ongoing basis to Yes on
14 FAIR, such as through direct or indirect payments for administrative,
15 fundraising, or other costs, but not including the transfer to a committee of
16 its allocated share of proceeds jointly raised pursuant to 11 C.F.R. §
17 102.17, and otherwise lawfully, 11 C.F.R. § 300.2(c)(2)(vii); and
18
- 19 • Whether Representative Berman, directly or through his agent, had an
20 active or significant role in the formation of Yes on FAIR, 11 C.F.R. §
21 300.2(c)(2)(xi).
22

23 The Commission has concluded that a candidate “established” an entity for
24 purposes of 11 C.F.R. § 300.2(c)(2) on the basis that the candidate was among the
25 individuals who formed the committee and signed its organizational documents, he
26 served as its chairman, and his part-time campaign consultant aided the committee with
27 its state filings and bank accounts. *See* Advisory Opinion 2003-12 (Flake); *see also*
28 MUR 5367 (Isna) (wherein candidate who provided committee with more than 60% of
29 funding and all of seed money was determined to have “financed” the committee). In
30 contrast, Representative Berman is not listed as an officer on Yes on FAIR’s Statement of
31 Organization, and the available information does not indicate that he had any official role
32 in establishing Yes on FAIR. Further, while Berman for Congress acknowledges
33 donating \$10,000 to Yes on FAIR, that amount represents less than one half of one
34 percent of even those contributions that are listed in the Complaint (which total

1 \$2,385,000). No available information indicates that Representative Berman or Berman
2 for Congress provided financing for Yes on FAIR beyond the \$10,000 contribution.
3 Moreover, there is no information available that refutes the assertion in the Rep. Berman
4 Response that neither Berman for Congress nor Representative Berman paid for Yes on
5 FAIR's administrative costs or provided any funding in a significant amount or on an
6 ongoing basis. There is similarly no indication that Representative Berman had the
7 authority or ability to hire, appoint, demote, or otherwise control the officers, or other
8 decision-making employees or members of Yes on FAIR.

9 Additionally, the Commission concluded in MUR 5338 (The Leadership Forum)
10 that because no formal authority was granted in the organizational documents of a 527
11 political organization, there was no formal "control" of the organization by the alleged
12 sponsors. The Commission also found that "more than the mere fact of such informal,
13 ongoing relationships between the personnel of the potentially sponsoring and potentially
14 sponsored entity is necessary to support a conclusion of 'establishment, financing,
15 maintenance or control'" of the 527 organization. "[W]hile former employers and
16 colleagues may exercise influence, influence is not necessarily control." See MUR 5338
17 (The Leadership Forum), First General Counsel's Report (adopted by the Commission by
18 a vote of 4-2).

19 Here, the Complaint alleges that the phone conversation between Munger and
20 Representative Berman demonstrated Representative Berman's control of Yes on FAIR
21 (an account which the respondents dispute). However, Complainant again does not
22 distinguish between the FAIR Act and Yes on FAIR, alleging only that Representative
23 Berman discussed a "possible legislative solution" in which "the campaign to gather

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1 signatures for the FAIR measure would cease....” Compl., 2. Complainant’s
2 characterization of the phone conversation does not demonstrate that Representative
3 Berman controlled Yes on FAIR.

4 In this matter, the available information does not indicate that Representative
5 Berman or Berman for Congress has any formal authority over Yes on FAIR, nor does it
6 indicate a relationship of control, as opposed to one of mere influence. Rather, it
7 indicates only that Representative Berman is a proponent of the FAIR Act, was involved
8 in some fashion with Yes on FAIR’s campaign to gather signatures for its ballot
9 qualification, and is the brother of one of Yes on FAIR’s consultants. In light of the
10 available information and relevant precedent, the Commission lacks a sufficient basis to
11 find that Representative Berman “directly or indirectly established, financed, maintained
12 or controlled” Yes on FAIR.

13 Accordingly, the Commission finds no reason to believe Representative Howard
14 L. Berman, Berman for Congress and Bruce Corwin, in his official capacity as Treasurer,
15 Michael Berman, Yes on FAIR and Frederic D. Woocher, in his official capacity as
16 Treasurer, and Daniel Lowenstein violated 2 U.S.C. § 441i(e)(1)(A) and (B).

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