Michael E. Toner
202.719.7545
mtoner@wileyrein.com

VIA E-MAIL

December 17, 2018

Jeff S. Jordan, Esq.
Assistant General Counsel
Complaints Examination & Legal Administration
Federal Election Commission
1050 First Street NE
Washington, DC 20463

Re: MUR 7523 - Sandfire Resources NL and Sandfire Resources America, Inc.

Dear Mr. Jordan:

We represent Sandfire Resources NL ("Sandfire") and Sandfire Resources America, Inc. ("Sandfire America") in the above-captioned matter. We have reviewed Yes for Responsible Mining's complaint filed on October 22, 2018 (the "Complaint") alleging that Sandfire and Sandfire America violated the Federal Election Campaign Act of 1971, as amended (the "Act" or "FECA"), and Federal Election Commission (the "Commission" or "FEC") regulations in connection with Sandfire America's donations to the Montana Mining Association, a trade association, and Stop I-186 to Protect Miners and Jobs, a Montana state ballot measure committee. Specifically, the Complaint alleges that these donations violated the Act's foreign national prohibition.

The Complaint's allegations rest entirely on an erroneous legal theory. Sandfire America's donations to the Montana Mining Association and Stop I-186 to Protect Miners and Jobs complied not only with Montana law and the state's extensive disclosure requirements, but also with the foreign national prohibition under federal law. Ballot measures—which are also referred to as ballot initiatives, ballot issues, or ballot referenda—constitute legislative activity and are not "elections" within the meaning of FECA as a matter of law. Thus, the Act's foreign national prohibition encompasses only federal, state, and local candidate elections and does not apply to pure state and local ballot measure activity. Accordingly, the Commission should find no reason to believe that Sandfire and Sandfire America violated the Act or Commission regulations and should promptly dismiss this matter.

I. The Act's foreign national prohibition does not apply to state and local ballot measure activities as a matter of law.

"The law has long distinguished between efforts related to ballot measures and those intended to influence candidate elections."[1] Both the Act and Commission regulations define "election" in terms of candidates seeking public office.[2] Ballot measures, by contrast, allow voters to directly enact a statute or ordinance, approve or reject an act of the legislature by referendum, or amend a constitution or charter.[3] "This is a straightforward distinction: a candidate is elected into representative office—not passed into law—by voters, whereas the opposite is true for ballot initiatives; they are passed into law—not elected—by voters."[4] Congress crafted FECA with this framework in mind.[5] The Supreme Court has interpreted the Act not to regulate state and local ballot measure activity.[6] And for decades the Commission has consistently applied the Act in this manner.[7]

As explained below, FECA's foreign national prohibition does not apply to state and local ballot measure activity as a matter of law. Although the Bipartisan Campaign Reform Act of 2002 ("BCRA") amended the foreign national prohibition, this amendment did not expand the prohibition's scope to encompass state and local ballot measure activity—nor did Congress intend for BCRA to do so. The Commission over the years has grappled with how to construe the statutory phrase "in connection with" an election, but in 2011 a three-judge panel of the U.S. District Court for the District of Columbia squarely resolved this issue for purposes of the foreign national prohibition. The *Bluman* court expressly concluded that FECA's foreign

---

1 FEC Adv. Op. 2005-10 (Berman/Doolittle), Concurring Opinion of Commissioners Ellen L. Weintraub and Danny L. McDonald at 1 (Sept. 2, 2005).

2 *See infra* nn.10-11 and accompanying text.

3 *See* Mont. Const. art. III, §§ 4-5 & art. XIV, §§ 8-9.

4 FEC Adv. Op. 2010-07 (Yes on FAIR), Concurring Opinion of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, at 4 (June 30, 2010).

5 *See infra* Part I.A.

6 *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 356 (1995) ("The Federal Election Campaign Act of 1971, at issue in *Buckley*, regulates only candidate elections, not referenda or other issue-based ballot measures."); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 789 n.26 (The Act, "by [its] terms, do[es] not apply to referendum votes.").

7 *See infra* n.12 and accompanying text.

national prohibition does not apply as a matter of law to issue advocacy such as state and local ballot measure activity and, on appeal, the Supreme Court summarily affirmed this decision.[8] Some Commissioners nevertheless have continued to contend that ballot measures are "elections" or, alternatively, that ballot measure activity is "in connection with" an election when ballot measures appear on the same ballots as federal candidates. But such theories are untenable in the aftermath of *Bluman* and are inconsistent with longstanding Commission regulations and precedents.

A. Congress did not intend for the foreign national prohibition to apply to state and local ballot measure activity.

Under the Act, foreign nationals are prohibited from directly or indirectly making "a contribution or donation of money or other thing of value . . . in connection with a Federal, State, or local election."[9] Both the statutory and regulatory definitions of "election" are limited to voting for candidates. The Act defines "election" to mean:

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

---

8 *Bluman v. FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011), *aff'd*, 132 S. Ct. 1087 (2012).

9 52 U.S.C. § 30121(a)(1).

10 *Id.* § 30101(1).

Commission regulations, in turn, define an "election" as "the process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office."[11]

Prior to BCRA—which revised the text of the foreign national prohibition from "any *contribution* of money or other thing of value . . . in connection with *an election to any political office*" to "a *contribution or donation* of money or other thing of value . . . in connection with *a Federal, State, or local election*"—it was undisputed that the foreign national prohibition did not apply to state or local ballot measure activity unless it was "inextricably linked" to a candidate appearing on the same ballot.[12] As BCRA's legislative history indicates, Congress did not intend for BCRA to expand the scope of the foreign national prohibition to encompass state and local ballot measure activity. Instead, Congress revised the wording of the foreign national prohibition for a very specific reason. In the wake of an investigation of alleged foreign national contributions in connection with the 1996 presidential election, a federal district court held that the foreign national prohibition did not apply to soft money donations because "contribution" was defined elsewhere in the Act as hard money funds for federal elections.[13] Although the D.C. Circuit quickly rejected this decision, concurring with the FEC's longstanding interpretation that the foreign national prohibition applied to federal, state, and local candidate elections,[14] Congress clarified the scope of the foreign national prohibition in BCRA to resolve any lingering

---

[11] 11 C.F.R. § 100.2(a); *see also id.* § 100.2(b)-(f) (defining "general election," "primary election," "runoff election," "caucus or convention," and "special election" in the context of voting for candidates).

[12] *See* FEC Adv. Op. 1989-32 (McCarthy), at 3, 6 (July 2, 1990) (acknowledging that "contributions or expenditures relating only or exclusively to ballot referenda issues, and not to elections to any political office, do not fall within the purview of the Act," but holding that foreign nationals are prohibited from donating to a state ballot measure committee "controlled" by a state candidate where the candidate organized the ballot measure committee "with the knowledge that his name will be inextricably linked with the committee before the same electorate voting on his reelection and at the same time as the campaign and voting for such reelection take place"); FEC Adv. Op. 1984-62 (B.A.D. Campaigns, Inc.), at 1 n.1 (Mar. 21, 1985) ("The Commission has previously held that contributions or expenditures exclusively to influence ballot referenda issues are not subject to the Act."); FEC Adv. Op. 1980-95 (First Nat'l Bank of Fla.), at 2 (Sept. 19, 1980) (A contribution to a state referenda committee "does not fall within the purview of the Act as it relates only to ballot referenda issues and not to elections to any political office.").

[13] *United States v. Trie*, 23 F. Supp. 2d 55, 60 (D.D.C. 1998).

[14] *United States v. Kanchanalak*, 192 F.3d 1037, 1047-50 (D.C. Cir. 1999).

ambiguity.[15] As Senator Specter explained during the U.S. Senate's floor debate of BCRA, Congress "need[ed] to make it 100 percent clear that foreign nationals cannot contribute to *U.S. political parties or candidates* under any circumstances."[16]

Congress's specific revisions to the text of the foreign national prohibition likewise reveal the legislature's intent. In response to the *Trie* court's reading of the statute, Congress inserted the word "donation" to clarify that the foreign national prohibition also applied to soft money funds that were not "contributions" as defined in the Act.[17] Congress also struck the statutory phrase "an election to any political office," which the D.C. Circuit had found ambiguous, and replaced it with the phrase "a Federal, State, or local election."[18] It is very telling that Congress in BCRA not only continued to limit the foreign national prohibition to "elections," but also retained the Act's candidate-focused definition of "election." If Congress had intended to expand the scope of the foreign national prohibition beyond candidate elections, it would have amended the definition of "election" in BCRA.

B. A three-judge federal district court panel has ruled that FECA's foreign national prohibition does not apply to state and local ballot measure activity as a matter of law.

In *Bluman v. FEC*, a decision summarily affirmed by the Supreme Court, a three-judge district court panel explained that the foreign national prohibition, "as [the court] interpret[s] it, does not bar foreign nationals from issue advocacy—that is, speech that does not expressly advocate the election or defeat of a specific candidate."[19] Instead, the foreign national prohibition "restrains [foreign nationals] only from a certain form of expressive activity closely tied to the voting process—providing money for a candidate or political party or spending

---

15 *See* Explanation and Justification for Regulations on Contribution Limitations and Prohibitions, 67 Fed. Reg. 69928, 69944 (Nov. 19, 2002) (noting that "[i]n 1999, 2000, and 2001 the Commission included in its legislative recommendations to Congress a proposal that [the Act] be amended to clarify that the statutory prohibition on foreign national contributions extends to State and local elections").

16 147 Cong. Rec. S2423 (daily ed. Mar. 19, 2001) (statement of Sen. Arlen Specter) (emphasis added).

17 *Trie*, 23 F. Supp. 2d at 60.

18 *Kanchanalak*, 192 F.3d at 1049.

19 *Bluman*, 800 F. Supp. 2d at 284.

money in order to expressly advocate for or against the election of a candidate."[20] The *Bluman* court specifically addressed state and local ballot measures,[21] echoing the Commission's position that the Act's "exemption of ballot measures, like all other issue speech, further demonstrates that [the foreign national prohibition] is narrowly tailored to address Congress's concern regarding proven attempts to exert foreign influence over American *candidate* elections."[22] The *Bluman* court emphasized that "Congress could reasonably conclude that the risk of undue influence is greater in the context of candidate elections than it is in the case of ballot initiatives."[23]

Notwithstanding the foregoing conclusions of the three-judge panel, some current and former members of the Commission have sought to rely on *Bluman* to support their position that the Act's foreign national prohibition applies to state and local ballot measure activity.[24] The *Bluman* court stated categorically, however, that the foreign national prohibition does not extend to state and local ballot measure activity. And the court noted that it was "not decid[ing] whether Congress *could* prohibit foreign nationals from engaging in speech other than contributions to candidates and parties, express-advocacy expenditures, and donations to outside groups to be used for contributions to candidates and parties and express-advocacy expenditures" and warned that "[its] holding should not be read to support such bans."[25] Regardless of whether "there are strong policy reasons why the Act should be read to prohibit foreign funding of ballot measure committees,"[26] the *Bluman* court has expressly foreclosed the Commission from doing so unless and until Congress amends the Act.

---

20 *Id.* at 290.

21 *Id.* at 291-92.

22 FEC Opp'n to Pls.' Mot. for Summ. J. and Reply in Supp. of FEC Mot. to Dismiss at 39, *Bluman*, 80 F. Supp. 2d 281 (D.D.C. 2011) (No. 10-1766) (emphasis added).

23 *Bluman*, 800 F. Supp. 2d at 291.

24 *See, e.g.*, MUR 6678 (Mindgeek USA, Inc., *et al.*), Statement of Reasons of Commissioner Ellen L. Weintraub (Apr. 23, 2015); MUR 6678 (Mindgeek USA, Inc., *et al.*), Statement of Reasons of Chair Ann M. Ravel (Apr. 22, 2015); FEC Agenda Doc. No. 15-49-A, Memorandum from Chair Ann M. Ravel Regarding State and Local Ballot Measures and the Ban on Foreign National Contributions (Sept. 22, 2015).

25 *Bluman*, 800 F. Supp. 2d at 292 (emphasis added).

26 MUR 6678 (Mindgeek USA, Inc., *et al.*), Statement of Reasons of Commissioner Ellen L. Weintraub 1.

C. The Commission has likewise never held that pure state and local ballot measure activity is "in connection with" an election.

Over the past 15 years, the Commission has had several opportunities to analyze whether state and local ballot measure activity—under a variety of different factual circumstances—are "in connection with an election for Federal office" or "in connection with any election other than an election for Federal office" for purposes of BCRA's federal candidate and officeholder soft money ban. Although it is tempting to look to the Commission's precedents in this area for guidance on whether state and local ballot measures are "in connection with a Federal, State, or local election" under the foreign national prohibition, the scope of these prohibitions are not necessarily coterminous. The soft money ban, after all, is an anti-circumvention measure designed to prevent actual or apparent corruption of federal candidates and officeholders *through their participation* in corporate and high-dollar fundraising.[27] Although this implicit concern about federal candidate or officeholder involvement and anti-circumvention has led to disparate FEC decisions, the Commission has never held that state or local ballot measure activity—absent direct candidate involvement—is "in connection with" an election.

In AO 2003-12 (Flake), the Commission found that "all activities of a ballot measure committee 'established, financed, maintained or controlled' by a Federal candidate . . . are 'in connection with any election other than an election for Federal office,'" noting in dicta that "the activities of a ballot measure committee that is not 'established, financed, maintained, or controlled' by a Federal candidate . . . are 'in connection with any election other than an election for Federal office' after the committee qualifies an initiative or ballot measure for the ballot."[28] However, some Commissioners later expressed regret over this opinion, explaining it was "a compromise ruling with which perhaps no Commissioner was completely satisfied."[29] The Commission abandoned this analysis in AO 2005-10 (Berman/Doolittle), concluding it was

---

[27] *See McConnell v. FEC*, 540 U.S. 93, 100 (2003) (BCRA's "restriction on solicitations is a valid anti-circumvention measure.").

[28] FEC Adv. Op. 2003-12 (Flake), at 6 (July 29, 2003).

[29] FEC Adv. Op. 2005-10 (Berman/Doolittle), Concurring Opinion of Commissioners Ellen L. Weintraub and Danny L. McDonald, at 2 (Sept. 2, 2005); *see also* FEC Adv. Op. 2010-07 (Yes on FAIR), Concurring Opinion of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, at 2 n.4 (June 30, 2010) ("In our view, AO 2003-12 (Flake) was wrongly decided and . . . effectively superseded by a subsequent advisory opinion.").

permissible under the soft money ban for two officeholders to solicit soft money for state ballot measure committees that (1) were not established, financed, maintained, or controlled by a federal candidate or officeholder and (2) supported or opposed ballot measures appearing on a ballot that did not include federal races.[30] The Commissioners could not agree on a legal rationale to support this outcome, but the Commissioners could not have reached this conclusion if they believed that ballot measures are "elections."

In subsequent advisory opinions, some Commissioners have continued to take the position that state and local ballot measure activity is not in connection with an election.[31] Other Commissioners, however, have expressed circumvention concerns about allowing federal candidates to solicit soft money to support or oppose ballot measures appearing on the same ballot as the soliciting federal candidate.[32] These concerns, however, are not present here where there are no allegations that a federal candidate or officeholder solicited the contribution nor that the ballot measure committee was established, financed, maintained, or controlled by a federal candidate or officeholder.

---

30 FEC Adv. Op. 2005-10 (Berman/Doolittle) (Aug. 22, 2005).

31 *See* FEC Adv. Op. 2010-07 (Yes on FAIR), Concurring Opinion of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn, at 4-5 (June 30, 2010) ("[B]ecause the Act does not regulate State ballot measures and referenda, ballot measures and referenda are not 'elections' within the meaning of the Act. Thus, activities supporting or opposing ballot measures and referenda are not 'in connection with' an election."); FEC Adv. Op. 2007-28 (McCarthy/Nunes), Concurring Opinion of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky, at 1 (Dec. 18, 2007) (explaining that ballot measure activity "is not 'in connection with an election' for purposes of" the soft money ban).

32 *See* FEC Adv. Op. 2010-07 (Yes on FAIR), Concurring Opinion of Vice Chair Cynthia L. Bauerly and Commissioners Steven T. Walther and Ellen L. Weintraub, at 3 (July 8, 2010) ("Absent the restrictions imposed by [the soft money ban], 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 . . . ."); FEC Adv. Op. 2007-28 (McCarthy/Nunes), Concurring Opinion of Chairman Robert Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub, at 1-2 (Dec. 31, 2007) ("It would make little sense to bar a candidate from raising non-Federal funds for GOTV activity in support of his or her own election but permit the candidate to raise non-Federal funds for GOTV activity in support of an initiative that appears on the same ballot. Either way, the funds raised by the candidate will be used in connection with an election in which that candidate appears on the ballot.").

Regardless of the Commission's inconsistent decisions in the context of the soft money ban, the Commission has *never* found the activities of a ballot measure committee not established, financed, maintained, or controlled by a federal candidate or officeholder or "inextricably linked" to a state or local candidate to be "in connection with" an election for purposes of the soft money ban or the foreign national prohibition. Because pure state and local ballot measure activities are not subject to regulation under the Act, the foreign national prohibition does not apply to such activities as a matter of law.

CONCLUSION

For all the foregoing reasons, the Commission should find no reason to believe that Sandfire and Sandfire America violated the Act's foreign national prohibition and should promptly dismiss the Complaint.

Respectfully Submitted,

Michael E. Toner
Brandis L. Zehr
A. Louisa Brooks