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April 7, 2010

Thomasenia Duncan, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

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COMMISSION
2010 APR -7 PM 3:11
OFFICE OF GENERAL
COUNSEL

Re: Yes on FAIR Advisory Opinion Request

Dear Ms. Duncan:

Pursuant to 2 U.S.C. § 437f, we seek an advisory opinion on behalf of Yes on FAIR, a coalition of working people, Karen Bass, and other community leaders devoted to eliminating bureaucratic waste of taxpayer dollars on the political game of redistricting ("Yes on FAIR"). Yes on FAIR seeks to confirm that Members of Congress may solicit funds for Yes on FAIR outside the limits and source restrictions prescribed by the Federal Election Campaign Act ("FECA").

FACTUAL DISCUSSION

Yes on FAIR is a registered nonfederal political committee in the state of California. Its sole purpose is to support the qualification and passage of the FAIR Act, a proposed ballot measure for the November 2010 California statewide general election ballot. "FAIR" stands for "Financial Accountability In Redistricting"; the Act's purpose is to rescind Proposition 11, which passed in November 2008 by a bare majority of the California electorate and had the effect of assigning redistricting responsibilities for State Assembly, State Senate and Board of Equalization districts to a commission of 14 randomly selected volunteers. The FAIR Act voids Proposition 11's unelected commission and, unlike Proposition 11, mandates a fiscally responsible redistricting process that demands precise population equality for districts of the same type, stiffens the prohibition against the splitting of cities and counties in redistricting proposals,

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requires that all redistricting proposals are subject to the California voters' right of referendum, and ensures that the redistricting process is overseen by individuals who are directly accountable to California voters.

Yes on FAIR has applied to the Internal Revenue Service for recognition as a section 501(c)(4) organization. Its officers and directors are Daniel Lowenstein and Fredric D. Woocher. Yes on FAIR is not directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, any federal candidate or officeholder.¹

Pursuant to state law, Yes on FAIR is currently seeking signatures to qualify for the November 2010 general election ballot. To allow sufficient time for signatures to be verified using random sampling, the California Secretary of State recommends submitting qualifying signatures by April 16, 2010. If the Secretary of State concludes that Yes on FAIR has obtained the requisite number of valid signatures, she will certify the FAIR Act to appear on the ballot at the next general election held at least 131 days after the measure is deemed qualified. *See* Cal. Const. art. II, § 8(c); Cal. Elec. Code § 9030 *et seq.* To appear on the November 2010 general election ballot, the FAIR Act must be certified no later than June 24, 2010.

Once the measure has qualified for the general election ballot, Yes on FAIR will engage in an extensive campaign to promote the FAIR Act's passage as well as get-out-the-vote programs specifically designed to get the measure's supporters to the polls in November. None of Yes on FAIR's campaign advertisements will promote, support, attack or oppose any federal candidate, or result in a coordinated communication under Commission rules.

Yes on FAIR seeks confirmation that Members of Congress may solicit funds on behalf of Yes on FAIR outside federal limits and source restrictions both during the period before the FAIR Act qualifies for the general election ballot, and during the post-qualification period leading up to the date of the general election. If permitted, such

¹ 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 identified in Yes on FAIR's official name only because California state law requires the official name of certain ballot measure committees to identify state officeholders who have contributed \$50,000 or more to the committee. While Bass has not personally contributed to Yes on FAIR, state political committees associated with her have made two contributions totaling \$50,000: Karen Bass for Assembly 2008 contributed \$20,000 and Strengthening California Through Leadership, a state ballot measure committee controlled by Bass, contributed \$30,000. After Rep. Dianne Watson announced her retirement from Congress, 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.

solicitations would be in support of a ballot measure committee completely independent of any federal candidate or officeholder.

If the Commission cannot conclude that Members may solicit unlimited funds on behalf of the ballot measure committee at any time, Yes on FAIR seeks confirmation that Members may solicit contributions to Yes on FAIR outside federal limits and source restrictions during the pre-qualification period, and then federally permissible funds in amounts not to exceed \$20,000 per contributor during the post-qualification period.

LEGAL DISCUSSION

FECA does not expressly limit the amounts or sources that federal candidates or officeholders may solicit for ballot initiative committees. As amended by the Bipartisan Campaign Reform Act of 2002 (“BCRA”), FECA restricts federal candidate and officeholder fundraising only “in connection with an election for Federal office” or “in connection with an election other than an election for Federal office.” *See* 2 U.S.C. § 441i(e)(1)(A) and (B); 11 C.F.R. §§ 300.61, 300.62. Members may freely raise funds outside FECA’s source restrictions for legal defense funds, for example, because such fundraising is not “in connection with” an election, even when the litigation results from an election in which the Member ran. *See* FEC Adv. Op. 2003-15.

Since BCRA’s passage, the full Commission has never, with one voice, definitively applied BCRA’s restrictions to independent ballot initiative committee fundraising. The question has arisen in three main advisory opinions, each yielding a different outcome. *See* FEC Adv. Op. 2003-12 (issued to Rep. Flake); FEC Adv. Op. 2005-10 (issued to Reps. Berman and Doolittle); FEC Adv. Op. 2007-28 (issued to Reps. McCarthy and Nunes). The result has been confusion in the law that has chilled Member involvement in significant public policy issues, while others pursue their opposing objectives without restraint. The time has long since passed for the Commission to say definitively – and affirmatively – that Members and federal candidates may raise funds freely for independent initiative committees.

Under 2 U.S.C. § 441i(e), “the threshold question is whether the funds involved are in connection with a Federal or non-Federal election under subsection (e)(1).” *See* FEC Adv. Op. 2003-20. If the funds are not raised or spent in connection with an election, then they do not fall within the scope of section 441i(e), and therefore are not subject to the Act’s limits and source restrictions.

On one occasion, the full Commission permitted Members to solicit funds outside federal limits and source restrictions on behalf of a ballot measure committee, albeit when the Members themselves were not also on the ballot. *See* FEC Adv. Op. 2005-10. And in several concurring opinions, various Commissioners have said that the prohibitions are “expressly limited to elections for office.” Concurring Opinion of Vice Chairman Mason and Commissioner von Spakovsky, FEC Adv. Op. 2007-28 (quoting Concurring Opinion of Vice Chairman Toner and Commissioner Mason, FEC Adv. Op. 2005-10).

The distinction between elections for office and non-candidate elections is appropriate because “[a]dvocacy related to ballot measures is generally seen as issue- rather than candidate-driven, and the funding for such efforts has been acknowledged to present less potential for corruption.” Concurring Opinion of Commissioners Weintraub and McDonald, FEC Adv. Op. 2005-10. Accordingly, as long as the federal candidate or officeholder is not soliciting contributions for a committee that it has “established, financed, maintained, or controlled,” the section 441i(e) prohibitions should not be applicable “to non-candidate political activity, such as ballot initiatives or referenda.” Concurring Opinion of Vice Chairman Mason and Commissioner von Spakovsky, FEC Adv. Op. 2007-28 (quoting Concurring Opinion of Vice Chairman Toner and Commissioner Mason, FEC Adv. Op. 2005-10).

Here, no federal candidate or officeholder will direct or control Yes on FAIR’s activities, nor will they have established, financed, maintained, or controlled Yes on FAIR. And Yes on FAIR itself will not promote, support, attack or oppose any federal candidate, or sponsor any coordinated communications. With no explicit statutory or Congressional command, no evidence of corruption or its appearance from the initiative fundraising that has been allowed to date, and no clear, enduring statement of the law from a full Commission on the subject, Members of Congress ought finally to be able to solicit contributions for state ballot measure committees like Yes on FAIR outside federal limits and source restrictions.

Even if the Commission does not allow Members of Congress to solicit freely for Yes on FAIR throughout the entire initiative process, prior Commission action indicates clearly that they may solicit unlimited contributions during the pre-qualification period. The Commission has concluded that “the activities of a ballot measure committee that is not ‘established, financed, maintained or controlled’ by a Federal candidate, officeholder, or agent of either, are not ‘in connection with any election other than an election for Federal office’ prior to the committee qualifying an initiative or ballot measure for the ballot.” *See* FEC Adv. Op. 2003-12. In reaching this conclusion, the Commission noted “a clear

delineation between pre-ballot qualification activities, such as petition and signature gathering, which do not occur within close proximity to an election, and post-ballot qualification activities, that occur in closer proximity to elections.” *Id.*

The Commission has also clearly stated that the post-qualification period begins only “once a ballot measure committee qualifies an initiative . . . for the ballot.” *Id.* In California, a measure is not deemed qualified for the ballot until the Secretary of State certifies that the proponents of the measure have collected the requisite number of valid signatures. In this case, certification of the FAIR Act is likely to occur sometime between April 16, the Secretary of State’s suggested date for submitting qualifying signatures, and June 24, the last date by which the California Secretary of State may certify a measure for inclusion on the November 2010 general election ballot. Thus, because Yes on FAIR is not established, financed, maintained or controlled by a federal candidate or officeholder, Members of Congress should, in any event, be able to solicit contributions outside federal limits and source restrictions on behalf of Yes on Fair until the FAIR Act is certified to appear on the ballot.

And even if the Commission were to find that solicitations on behalf of Yes on FAIR during the post-qualification period were “in connection with an election”, Members of Congress should be allowed to solicit funds on behalf of Yes on FAIR in amounts not to exceed \$20,000. *See* 2 U.S.C. § 441i(e)(4); 11 C.F.R. § 300.65; *see also* FEC Adv. Op. 2007-28. Such solicitations would be permissible under 2 U.S.C. § 441i(e)(4) because Yes on FAIR has submitted its application for determination of tax-exempt status under 26 U.S.C. § 501(c), and because Yes on FAIR is not established, financed, maintained or controlled by a federal candidate or officeholder.

Furthermore, Members should be able to solicit funds from any federally permissible source, including partnerships and federal political committees. The purpose of section 441i(e)’s soft money restrictions is to restrict the solicitation by federal candidates of funds that they would not be permitted to solicit in connection with their own federal election campaigns. For example, when federal candidates solicit funds for another entity in connection with a nonfederal election for office, such candidates may not solicit funds from corporations or labor organizations. But federal candidates *may* solicit funds in such instances from partnerships and federal political committees. By extension, the Commission should interpret section 441i(e)(4)(B) to permit federal candidates to solicit funds for certain tax-exempt organizations in amounts not to exceed \$20,000 from federally permissible sources.

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Entities such as partnerships and federal political committees are, at bottom, funded by individuals. Unlike corporations and labor organizations, they may freely give to federal candidates and committees. Under a statute devised to prevent corruption or its appearance, there is no rational basis for allowing federal candidates to solicit contributions from these sources for their own campaigns, but not for qualified nonprofit organizations that engage in more limited activity. *See* 2 U.S.C. § 441i(e)(4); 11 C.F.R. § 300.65. Thus, even if the Commission were to find that solicitations on behalf of Yes on FAIR were in connection with an election for purposes of section 441i(e), Members of Congress should be permitted to solicit funds on behalf of Yes on FAIR in amounts not to exceed \$20,000 from *all* federally permissible sources.

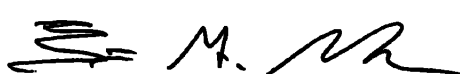
In the event that the Commission determines that Members may not solicit funds for Yes on FAIR under any of the options described above, we request the Commission's guidance as to which of the Act's limitations and prohibitions apply to a Member's solicitation of funds on Yes on FAIR's behalf.

Because Yes on FAIR's inquiry relates specifically to funds raised during the pre-qualification period and qualifying signatures for the ballot measure are due imminently, we ask that the Commission issue a written advisory opinion within 10 days after receiving this request. The timeliness of the Commission's response will affect the ability of all concerned to advocate their interests in connection with the qualification of this ballot measure.

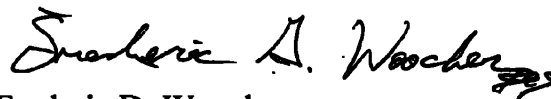
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Thank you for your prompt attention to this matter. Please do not hesitate to call us should you have any questions.

Very truly yours,



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04/15/2010 05:06 PM

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Subject Yes on FAIR AOR

Amy,

Yes on FAIR filed its initial statement of organization with the California Fair Political Practices Commission on January 14, 2010. It qualified as a California nonfederal committee on February 2, 2010, having raised or spent in excess of \$1,000.

Please let us know if you have any further questions.

Thanks!

-Kate

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