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May 10, 2010

VIA FACSIMILE

Thomasenia P. Duncan, Esquire
General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: AOR 2010-07 ("Yes on FAIR")

Dear Ms. Duncan:

This submission is in response to Advisory Opinion Request ("AOR") 2010-07, filed by Yes on FAIR, a coalition of working people, Karen Bass¹, and other community leaders ("Yes on FAIR"). Their AOR seeks Federal Election Commission approval for Members of Congress to solicit funds for Yes on FAIR, a California ballot initiative committee, outside the limits and source restrictions prescribed by the Federal Election Campaign Act ("FECA") (funds otherwise known as "soft money").

The Commission should reject this request because:

- The facts as presented in the AOR are not accurate since, under the Federal Election Campaign Act, Yes on FAIR, as shown below, has been "established, financed and maintained and controlled" by a federal candidate and officeholder.
- Yes on FAIR has misstated the law and FEC precedent to suit its own purposes of having federal candidates solicit soft money contributions illegal under federal law; and
- Yes on FAIR neglected to inform the Commission that the federal candidates who request this AOR to raise and spend soft money will be running in the same election for which the soft money committee will raise and spend funds.

¹ Karen Bass is also a candidate for the United States House of Representatives. <http://query.nictusa.com/cgi-bin/fecimg/?C00476523>. Candidate Bass has thus far failed to file the required Form 2 Statement of Candidacy but filed a Form 1 Statement of Organization on Feb. 19, 2010, an amended Statement of Organization on March 25, 2010, and a First Quarter 2010 Report of Receipts and Disbursements showing \$173,825.50 raised as of March 31, 2010.

LATE Comment
on AOR 2010-07

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If the Commission does approve this AOR, it will undermine the Bipartisan Campaign Reform Act's ban on soft money solicitations by members of Congress. That a number of the current Members of Congress either controlling or financing Yes on FAIR were sponsors of BCRA and previously argued against the position they are taking now only serves to emphasize that the Commission must reject this request.

Factual Errors in AOR

Despite twice stating in AOR 2010-07 that Yes on FAIR is not established, financed, maintained or controlled by a federal candidate or officeholder², the published statements of its officers contradict that statement.

UCLA Law School Professor Daniel Lowenstein, the only person listed as a principal officer on the Yes on FAIR Committee's California Statement of Organization besides the treasurer,³ acknowledged in published media reports that the "real sponsors [of Repeal Proposition 11] are Democratic congressmen, led by Howard Berman, and Berman's brother, Michael, the Democrats' top redistricting expert. 'It's Michael and Howard together,' Lowenstein said."⁴ Neither Representative Berman nor Prof. Lowenstein has denied these reports.

In addition, Congressman Berman acted as the person controlling the committee in conversations with groups and individuals, including in a conversation I had with Rep. Berman on March 5, 2010, —in the middle of the tense Congressional negotiations on national health care, no less—when I spoke on the telephone for 60-90 minutes with Congressman Berman. The agenda for this call was exploring a possible legislative solution pursuant to which I, as the proponent of the Voters First Act for Congress, would agree not to file the necessary signatures, then in hand, to qualify that measure concerning congressional districts, while the campaign to gather signatures for the Yes on FAIR measure (concerning state legislative districts) would cease, and all parties would undertake to support a potential compromise measure to be approved by the California Legislature.

²The factual representations in the AOR are:

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. [p.5]

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. [p.5]

³ Available at <http://cal-access.sos.ca.gov/PDFGen/pdfgen.prg?fileid=1468638&amendid=4>.

⁴ See Dan Walters, *Battle fights how on California redistricting* Sacramento Bee (Jan. 18, 2010), available at <http://www.sacbee.com/2010/01/18/2469326/dan-walters-ballot-fights-loom.html>; see also John Marcus, *Thousands apply for state redistricting panel*, SignOnSanDiego.com (Jan. 25, 2010), available at <http://www.signonsandiego.com/news/2010/jan/25/thousands-apply-redistricting-panel>.

The control of Yes on FAIR by persons who are also federal candidates violates the federal election laws because many of the contributions are from prohibited federal sources and far in excess of the limits a Member of Congress or a federal candidate may raise under the FECA. Representative Berman's committee lists among its contributions, as reported to the California Secretary of State:

CALIFORNIA STATE PIPE TRADES COUNCIL OF THE UNITED ASSOCIATION	\$50,000.00	4/27/2010
HAIM SABAN	\$2,000,000	4/9/2010
AFSCME	\$250,000.00	3/22/2010
CALIFORNIA 2010 SENATOR ALEX PADILLA'S BALLOT MEASURE COMMITTEE	\$10,000.00	3/29/2010
BOB BLUMENFIELD FOR ASSEMBLY 2010	\$10,000.00	3/8/2010
STRENGTHENING CALIFORNIA THROUGH LEADERSHIP	\$30,000.00	3/8/2010
I. B. E. W. EDUCATIONAL COMMITTEE	\$50,000.00	3/8/2010
FRIENDS OF LOIS CAPP	\$10,000.00	3/2/2010
PADILLA FOR SENATE	\$15,000.00	2/22/2010
FRIENDS OF FARR	\$10,000.00	2/11/2010
DIANE E. WATSON FOR CONGRESS	\$10,000.00	2/11/2010
MIKE HONDA FOR CONGRESS	\$10,000.00	2/11/2010
BERMAN FOR CONGRESS	\$10,000.00	2/11/2010
MATSUI FOR CONGRESS	\$10,000.00	2/11/2010
LOFGREN FOR CONGRESS	\$10,000.00	2/11/2010
KAREN BASS FOR ASSEMBLY 2008	\$20,000.00	2/11/2010
COMMITTEE TO RE-ELECT LINDA SANCHEZ	\$25,000.00	2/11/2010
IGOR PASTERNAK	\$10,000.00	2/11/2010
ANNA ESHOO FOR CONGRESS	\$10,000.00	2/11/2010
NANCY PELOSI FOR CONGRESS	\$10,000.00	2/11/2010
SOLIDARITY PAC	\$10,000.00	2/11/2010
ADAM SCHIFF FOR CONGRESS	\$10,000.00	2/11/2010
JUDY CHU FOR CONGRESS	\$10,000.00	2/11/2010

Rep. Berman and candidate Bass are running to be candidates on the same November 2010 California general election ballot as the initiative that Yes on FAIR seeks to qualify and influence.

Ironically, the FEC's public records show that in 2005, Congressman Berman argued against the position he is asking the Commission to take in this AOR. Noting at the time that he was a co-sponsor and supporter of the Bipartisan Campaign Reform Act amendments barring the soft money activity in which he now seeks to engage, Representative Berman's contradictions occurred in an *ex parte* conversation he had with Commissioner Weintraub regarding AOR 2005-10, an AOR he and Representative Doolittle submitted asking that candidates for federal office be able to raise soft money for ballot initiatives only when federal candidates will not be on the same ballot. In the conversation, according to Commissioner Weintraub's report, he indicated that he agreed with AO 2003-12 (Flake) except insofar that this opinion did not distinguish between ballot initiatives that appeared on the ballot during an election when federal candidates would not appear.

[Representatives Berman, Pelosi and Lofgren] then expressed their concern that the draft did not reflect their understanding or intent as supporters of BCRA. They pointed out that the request affects their advocacy on important issues (such as redistricting, parental notification, and an anti-union measure) that [sic] will be decided by a ballot initiative in a year when there are no Federal candidates on the ballot. Thus, they do not believe that their efforts on this ballot initiative would have any impact on their or any other Federal election and would not allow the introduction of soft money into any Federal election. They explained that the Governor was free to raise unlimited amounts of money to advocate for his positions on the ballot initiative and it would be unfair to limit their efforts in opposition. Representative Berman stated that he did not see the need for the Commission to abandon the entire rationale of the Advisory Opinion previously issued to Representative Flake, but that he saw the facts underlying his request as distinct.⁵

Representative Berman was right the first time and appears willing to expediently take the opposite position now to further his political goals.

Legal Analysis Correction

Federal candidates and entities established, financed, maintained or controlled by a federal candidate or officeholder may not solicit, receive, direct, transfer or spend funds in connection with any election other than an election for federal office unless the funds are not in excess of the FECA's contribution limits and not from prohibited sources such as labor organizations.⁶ "[A]ll 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.' This includes activity in the signature-gathering and ballot qualification stage, as well as activity to win passage of the measure after it qualifies for the ballot."⁷ A federal candidate who establishes, finances, maintains or controls a ballot measure committee may solicit only up to \$5,000 per calendar year from permissible sources.⁸

Given that Yes on FAIR is controlled by Representative Berman, that congressional candidate Bass is listed as its proponent, and that Yes on Fair receives and spends contributions in excess of the FECA's contribution limits and in violation of its source prohibitions, Congressman Berman, candidate Bass and Yes on FAIR are in violation of BCRA's ban on federal candidates controlling organizations that receive and spend soft, non-federal money. Even apart from control by federal candidates of Yes on FAIR, which taints this AOR, Requestors have taken some descriptive liberties with past advisory opinions, attempting to persuade the Commission that three opinions relating to fundraising for ballot initiatives "each yield[ed] a different outcome" with the result being "confusion in the law". There is no inconsistency or confusion in the past AORs; only a clear conclusion inconvenient for the Requestors.

⁵ Available at <http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=188>.

⁶ 2 U.S.C. § 441i(e)(1), 11 C.F.R. § 300.62.

⁷ Advisory Op. 2003-12 (Flake).

⁸ *Id.*

The seminal opinion, 2003-12 (Flake), which was predicated on a ballot measure's presence on the ballot at the same time as federal candidates, yielded the straightforward conclusion that "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, but 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." Thus, federal candidates (even if they did not establish, finance, maintain or control a ballot initiative committee) could not raise soft money after the initiative qualified for the ballot. Of course, to abandon this principle is precisely what the Requestors ask the Commission to do here.

Then in Advisory Opinion 2005-10 (Berman and Doolittle), the Commission concluded that federal candidates could raise soft money for ballot initiatives committees (if they did not establish, finance, maintain or control them) during odd-year elections when the candidates would not appear on the ballot. This limited exception simply cannot be applied in the present case of an even-year election when those who established, financed, maintain and control the Committee do appear on the ballot as federal candidates. Now, the Commission having given the inch, Congressman Berman and his colleagues want to take the mile.

Finally, in Advisory Opinion 2007-28 (McCarthy and Nunes), the Commission applied BCRA consistently with both of the aforementioned opinions, and concluded that federal candidates could raise funds subject to BCRA's limits (\$20,000 from individuals) for a 501(c)(4) organization (the ballot measure committee) that they did not establish, finance, maintain or control. But the Commission was consistent and left no confusion: even if a federal candidate does not establish, finance, maintain or control a ballot initiative committee, he or she may not raise soft money for it if the initiative will appear on the ballot at the same election as he or she appears on the ballot.

Conclusion

The Commission should, therefore, conclude that candidates for federal office may not solicit funds for Yes on FAIR under any of the options described in the request, which would violate the limits and source restrictions of the FECA and open up a vast new loophole allowing federal candidates to raise federally illegal soft money for committees that will be active in elections in which the federal candidates themselves are on the same ballot.

Sincerely,

Charles T. Munger, Jr.

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