FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO:	**THE COMMISSION** **STAFF DIRECTOR** **GENERAL COUNSEL** **CHIEF COMMUNICATIONS OFFICER** **FEC PRESS OFFICE** **FEC PUBLIC DISCLOSURE**
FROM:	**ACTING COMMISSION SECRETARY** D. H.
DATE:	**May 25, 2010**
SUBJECT:	**COMMENT ON DRAFT AO 2010-07** **Yes on FAIR**

Transmitted herewith is a timely submitted comment from Brian G. Svoboda and Kate Sawyer Keane of Perkins Coie LLP, counsel; and Frederic D. Woocher and Aimee Dudovitz of Strumwasser & Woocher LLP, counsel, regarding the above-captioned matter.

Proposed Advisory Opinion 2010-07 is on the agenda for Thursday, May 27, 2010.

Attachment

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May 25, 2010

VIA FACSIMILE

Ms. Darlene Harris
Acting Commission Secretary
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Comments on Drafts of Advisory Opinion 2010-07

Dear Ms. Harris:

We are writing on behalf of Yes on FAIR in response to the two alternative drafts of Advisory Opinion 2010-07 circulated on May 21, 2010. We appreciate the Commission's consideration of our request. The Commission should adopt Draft A of Advisory Opinion 2010-07, which is consistent with the statute and Commission regulations. Draft B fails to provide definitive guidance for Members who seek to solicit funds to support Yes on FAIR, and is based on suppositions that find no support in any record before the Commission.

A clear response to Yes on FAIR's request is necessary so that Members understand the full extent to which they may support and solicit funds for Yes on FAIR. The House Committee on Standards of Official Conduct and Senate Ethics Committee allow Members and Senators, respectively, to solicit funds on behalf of ballot initiative committees. But the Commission lacks any express rule on the subject. It has issued three inconsistent Advisory Opinions — Advisory Opinion 2003-12 (Flake), Advisory Opinion 2005-10 (Berman-Doolittle), and Advisory Opinion 2007-28 (McCarthy-Nunes) — which have resulted in at least six separate concurring and dissenting opinions. The result has been confusion for the regulated community, and a chill on permitted conduct.

Draft A resolves this confusion and provides a clear answer. It correctly recognizes that the ballot initiative process is a legislative process, allowing "voters to directly enact a proposed statute, constitutional amendment, or ordinance." Draft A at 6. It is no accident that three of the four advisory opinion requests on ballot initiative fundraising have originated from California, where the initiative process is a common way to make law. Members have a clear reason — apart from their own federal campaigns — to participate in these legislative debates and to solicit support. Whatever their personal electoral circumstances, Members will want to influence the policy debate, and groups such as Yes on FAIR will need their help. Recognizing the cogent distinction between candidate elections and ballot initiatives, Draft A correctly concludes that Members should be permitted to solicit unlimited funds in connection with Yes on FAIR and other ballot initiatives.

Yes on FAIR's request presents no facts to indicate that its activities are in connection with an election. It presents none of the facts that concerned the Commission in Advisory Opinion 2003-12 (Flake), where the requestor controlled the initiative committee, sought to "repeal[] a statute that was closely identified with his opponent, ... proposed to appear in advertisements promoting the ballot measure, and would have appeared to benefit from the voter registration and identification programs undertaken in support of the measure."[1] Draft B at 6.

Nor is there any actual evidence, whether in the request or in the comments, that support for the initiative will correlate with support for any federal candidate. Finally, although Yes on FAIR, if it qualifies, would share a ballot with federal candidates, Yes on FAIR proposes to take additional steps beyond those required by law to avoid any risk that its activities will affect a candidate's campaign for election. None of its communications will promote, support, attack or oppose a federal candidate, or result in a coordinated communication under Commission rules.

Draft B would correctly permit Members to solicit unlimited funds on behalf of Yes on FAIR during the pre-qualification period. But it fails to provide definitive guidance as to the limits and restrictions that would apply during the post-qualification period. This is

[1] Notwithstanding the untimely comments of Charles T. Munger, Jr., Yes on FAIR is not directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, any federal candidate or officeholder. Munger publicly opposes the Yes on FAIR initiative, is the author and principal sponsor of a competing redistricting initiative, and actively seeks to curtail any support for Yes on FAIR. Munger's comments here lack merit and do not deserve the special notice that Draft B would give. *See* Draft B at 5 n. 4.

not because of any failure on Yes on FAIR's part to "clearly indicate ... [its] principal purpose," Draft B at 9, but rather because of Draft B's unwillingness squarely to apply the law to the facts presented. The very question before the Commission is *whether* Yes on FAIR's post-qualification activities are "in connection with an election."

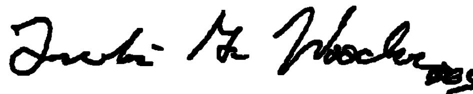
The Commission is entirely capable of answering this question with no further factual development. To dodge this question, as Draft B does, would simply add to the present confusion over what Members can and cannot do with respect to ballot initiative committees.

Nothing in the record supports the conclusion that Yes on FAIR's post-qualification activities "are likely to have a significant and predictable effect" on any soliciting Member's electoral fortunes. *Cf.* Request at 2 (warranting that none of the communications will promote, support, attack, or oppose any federal candidate, or result in a coordinated communication).

If the Commission believes that the potential for such effects may be inherent in the ballot initiative process, then the proper course is a rulemaking, in which the Commission can seek public comment and develop a record to support or debunk Draft B's assumptions. But no such record exists here. To adopt Draft B would be to prohibit Members from soliciting funds on Yes on FAIR's behalf — as permitted by both the House and the Senate — without any express basis in the law, and based on unsupported and indeed disproven assumptions.

Draft A reaches a logical result that is consistent with the statute and resolves the inconsistencies apparent in the Commission's former opinions. Draft B reaches a contrary and unsupported conclusion, while withholding any definitive guidance as to the limits applicable to Member solicitations on behalf of ballot initiative committees. The Commission should adopt Draft A.

Very truly yours,



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cc: Chairman Petersen
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