



William W. Mercer
 Phone (406) 896-4607
 Fax (406) 252-1669
 WWMercer@hollandhart.com

Digitally signed by
 Christal Dennis
 Date: 2018.12.19
 11:29:32 -05'00'

December 18, 2018

SENT VIA E-MAIL CELA@fec.gov AND FIRST CLASS U.S. MAIL

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

Re: MUR 7523 - Montana Mining Association and Stop I-186 to Protect Miners and Jobs

Dear Mr. Jordan:

We represent the Montana Mining Association (“MMA”) and Stop I-186 to Protect Miners and Jobs (“Stop I-186”) in the above-captioned matter. We are in receipt of and have reviewed Yes for Responsible Mining’s Complaint filed on October 22, 2018 (the “Complaint”) alleging that Sandfire Resources NL (“Sandfire”) and Sandfire Resources America, Inc. (“Sandfire America”) made unlawful contributions to MMA and Stop I-186 and that the MMA and Stop I-186 knowingly accepted those contributions. We also have reviewed the response filed by Sandfire and Sandfire America on December 17, 2018 and agree with and adopt the arguments advanced in that response on behalf of MMA and Stop I-186.

In its Complaint, Yes for Responsible Mining alleges that the payment and acceptance of funds contributed by Sandfire or Sandfire America violate the Federal Election Campaign Act of 1971, as amended (the “Act” or “FECA”) and the Federal Election Commission (the “FEC”) regulations. Specifically, the Complaint alleges that donations from Sandfire and Sandfire America violated the Act’s foreign national prohibition. For the reasons set forth in this response, the foreign national prohibition does not apply to Sandfire or Sandfire America’s contributions to MMA or Stop I-186. As such, the Complaint should be dismissed.

The allegations relate to a Montana state ballot initiative¹, Initiative 186 (“the Ballot Initiative”) advanced by Yes for Responsible Mining and rejected by voters this November. If it had been enacted into law, the Ballot Initiative would have required mines, which were not permitted on or before November 6, 2018, to have a reclamation plan containing measures

¹ Ballot initiatives are sometimes referred to as ballot measures, ballot issues or ballot referenda.



sufficient to prevent the pollution of water without the need for “perpetual treatment.” The Ballot Initiative had the potential to significantly impact the mining industry in Montana.

Stop I-186, a state ballot issue committee, was organized to oppose the Ballot Initiative. *See* ARM 44.11.201–204. A state ballot issue committee is defined by Montana law to mean a political committee specifically organized to support or oppose a ballot issue. § 13-1-101(7), MCA. Stop I-186 received and reported contributions from incidental committees and individuals which it spent to educate and inform Montanans about the potential impacts of the initiative on mining in the state. Stop I-186 reported its expenditures and contributions in accordance with the state administrative rules set forth at Title 44, Chapter 11 of the Administrative Rules of Montana.

MMA is a voluntary trade association comprised of members of every sector of the mining industry. Founded in 1919, MMA serves all parties involved in mining endeavors in Montana, from large companies to small and independent miners and service providers. MMA’s purpose is to protect and promote the mining industry in the state. In furtherance of its purpose, MMA and some of its members made financial and in-kind contributions to Stop I-186. MMA also received contributions from incidental committees to benefit the campaign. Although not organized for the purpose of opposing the Ballot Initiative, MMA registered as an “incidental committee” which is a political committee not specifically organized or operating for the primary purpose of supporting or opposing candidates or ballot issues but that may incidentally become a political committee by receiving a contribution or making an expenditure that supports or opposes a political candidate or ballot issue. § 13-1-101(23)(a), MCA. As an incidental committee, MMA filed the necessary reports to make its contributions and expenditures public.

While this background is helpful for context, the issue before the FEC is purely legal. Yes for Responsible Mining’s allegations are meritless because FECA’s foreign national prohibition applies only to federal, state and local candidate *elections*. Purely state ballot measures are not considered “elections” under the Act. Therefore, the Act’s limitations and restrictions – including the foreign national prohibition – do not apply to funds received or expended in support of a state or local ballot initiative, like the one at issue here.

The Act prohibits foreign nationals 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.” 52 U.S.C. § 30121(a)(1). The term election is defined, by statute and regulation, to apply only to the act of voting for candidates, not ballot initiatives. 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 elections to the office of the President.

2 U.S.C. § 431(1). Consistent with the statute’s definition, the Commission regulations define “election” as “the process by which *individuals*, whether opposed or unopposed, seek nomination for election, or election, to Federal office”. 11 C.F.R. § 100.2(a) (emphasis added). “Thus, both the statutory and regulatory definition of ‘election’ discuss the term in the context of voting for *candidates*, rather than *ballot measures*.” 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 3 (emphasis added).

The Supreme Court has recognized FECA’s distinction between efforts related to ballot measures and those related to candidate elections and has made clear that FECA regulates only federal elections. *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 356 (1995) (FECA “regulates only candidate elections, not referenda or other issue-based ballot measures.”). Accordingly, because the Act does not regulate State ballot initiatives, ballot initiatives are not “elections” within the meaning of the Act. It follows that activities supporting or opposing ballot measures, including the contribution of funds, are not “in connection with an election.”

A three-judge panel of the United States District Court of the District of Columbia also interpreted FECA as not applicable to state ballot initiatives or measures. *Bluman v. FEC*, 800 F. Supp. 2d 281, 284 (D.D.C.) *aff’d*, 565 U.S. 1104 (2012). The Court explained in that case that the foreign national prohibition only precludes foreign nationals from “making expenditures to expressly advocate the election or defeat of a political candidate.” *Id.* According to the Court in *Bluman*, the statute does not “bar foreign nationals from issue advocacy.” *Id.* Campaigns for ballot initiatives are exactly that – advocacy for or against an issue that has been proposed as legislation. In rejecting the argument that the statute was “underinclusive and not narrowly tailored because it permits foreign nationals to make contributions and expenditures related to ballot initiatives” the *Bluman* court explained that “Congress could reasonably conclude that the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives.” *Id.* at 291.

Although a look into the legislative history is unnecessary because the plain language of the statute and rules are unambiguous, it also confirms the understanding that ballot measures are not “elections.” *Id.* Prior to the enactment of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which amended the foreign national prohibition, it was clear that FECA did not apply to state or local ballot measures unless it was “inextricably linked” to a candidate appearing on the same ballot. *See* FEC Adv. Op. 1989-32 (McCarthy) at 3, 6 (July 2, 1990). Congress did not intend, by enacting the BCRA, to broaden the scope of FECA to apply to state and local ballot measures. Rather, BCRA was enacted to introduce a so called “soft-money ban” in the wake of a holding that the foreign national prohibition did not apply to soft money donations. *See* 67



Federal Election Commission
 December 18, 2018
 Page 4

Fed. Reg. 69928, 69944 (Nov. 19, 2002); *United State v. Trie*, 23 F. Supp. 2d 55, 60 (D.D.C. 1998). The amendments purpose was to address what constituted a contribution and to make clear that “foreign nationals cannot contribute to U.S. *political parties or candidates* under any circumstances.” 147 Cong. Rec. S2423 (daily ed. Mar. 19, 2001) (statement of Sen. Arlen Specter) (emphasis added).

The BCRA did nothing to expand the Act to address state ballot measures. In fact, when debating the BCRA not a single Member of Congress indicated that the soft money ban included in the amendment would apply to initiatives and referenda. 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 (citing A0 2005-10, Concurring Statement of Vice Chairman Michael E. Toner and Commissioner David M. Mason at 1). The legal distinction between an election for an individual candidate and a ballot issue is logical. “[A] candidate is elected into a representative office – not passed into law – by voters, whereas the oppose is true for ballot initiatives; they are passed into law – not elected – by voters.” 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.

As explained above, state ballot measures and initiatives are not “elections” under the Act and therefore the Act does not apply to activities supporting or opposing ballot measures. Yes for Responsible Mining’s Complaint is based upon an erroneous construction of the applicable law and therefore invites the FEC to reach an incorrect legal conclusion. The FEC should find no reason to believe that MMA or Stop I-186 violated the Act’s foreign national prohibition by receiving payment from Sandfire or Sandfire America and should dismiss the Complaint.

Sincerely,

A handwritten signature in blue ink that reads "Branne McCafferty".

for

William W. Mercer
 of Holland & Hart LLP

WWM

11769170_2