



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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MEMORANDUM

AGENDA ITEM
For Meeting of: 10-08-09

SUBMITTED LATE

TO: The Commission

FROM: Thomasenia P. Duncan *JPD*
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SUBJECT: Draft Notice of Proposed Rulemaking on Federal Election Activity

Attached is a draft Notice of Proposed Rulemaking ("NPRM") to implement the Federal election activity aspects of Shays v. Federal Election Commission, 528 F.3d 914 (D.C. Cir. 2008).

We request that this draft be placed on the agenda for October 8, 2009.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[Notice 2009 - __]**

4 **Definition of Federal Election Activity**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Notice of Proposed Rulemaking.

7 **SUMMARY:** The Federal Election Commission seeks comments on
8 proposed changes to its rules regarding the definitions of
9 “voter registration activity” and “get-out-the-vote activity”
10 under the Federal Election Campaign Act of 1971, as
11 amended. These proposed changes are in response to the
12 decision of the U.S. Court of Appeals for the District of
13 Columbia Circuit in Shays v. FEC. The Commission has
14 made no final decision on the issues presented in this
15 rulemaking. Further information is provided in the
16 supplementary information that follows.

17 **DATES:** Comments must be received on or before [INSERT DATE
18 30 DAYS AFTER DATE OF PUBLICATION IN THE
19 FEDERAL REGISTER]. The Commission will hold a
20 hearing on these proposed rules on Wednesday, December
21 16, 2009 at 9:30 a.m. Anyone wishing to testify at the
22 hearing must file written comments by the due date and
23 must include a request to testify in the written comments.

1 **ADDRESSES:** All comments must be in writing, addressed to Ms. Amy L.
2 Rothstein, Assistant General Counsel, and submitted in
3 either electronic, facsimile or hard copy form. Commenters
4 are strongly encouraged to submit comments electronically
5 to ensure timely receipt and consideration. Electronic
6 comments should be sent to FEAShays3@fec.gov. If the
7 electronic comments include an attachment, the attachment
8 must be in Adobe Acrobat (.pdf) or Microsoft Word (.doc)
9 format. Faxed comments should be sent to (202) 219-3923,
10 with hard copy follow-up. Hard copy comments and hard
11 copy follow-up of faxed comments should be sent to the
12 Federal Election Commission, 999 E Street, NW.,
13 Washington, D.C. 20463. All comments must include the
14 full name and postal service address of the commenter or
15 they will not be considered. The Commission will post
16 comments on its website after the comment period ends.
17 The hearing will be held in the Commission’s ninth floor
18 meeting room, 999 E Street, NW., Washington, D.C.

19 **FOR FURTHER**
20 **INFORMATION**
21 **CONTACT:** Ms. Amy L. Rothstein, Assistant General Counsel, or
22 Attorneys Mr. David C. Adkins or Mr. Neven F.
23 Stipanovic, 999 E Street, NW., Washington, D.C. 20463,
24 (202) 694-1650 or (800) 424-9530.

1 **SUPPLEMENTARY**

2 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”)

3 contained extensive and detailed amendments to the Federal Election Campaign Act of

4 1971, as amended, 2 U.S.C. 431 et seq. (“the Act”). The Commission promulgated a

5 number of rules to implement BCRA, including rules defining the terms “voter

6 registration activity” and “get-out-the-vote activity” (“GOTV activity”) at 11 CFR

7 100.24(a). The Court of Appeals for the District of Columbia Circuit found aspects of

8 these rules invalid in Shays v. Federal Election Commission, 528 F.3d 914 (D.C. Cir.

9 2008) (“Shays III”). The Commission seeks comment on proposed changes to the rules

10 at 11 CFR 100.24 to implement the Shays III decision.

11 **I. Background**

12 **A. BCRA**

13 The Act, as amended by BCRA, and Commission regulations provide that a State,

14 district or local committee of a political party must pay for certain “Federal election

15 activities” with either entirely Federal funds² or, in other instances, a mix of Federal

16 funds and “Levin funds.”³ See 2 U.S.C. 441i(b); 11 CFR 300.32. The Act identifies four

17 types of activity that are subject to these funding restrictions, including “voter registration

18 activity” – Type I Federal election activity – and GOTV activity – Type II Federal

¹ Pub. L. No. 107-155, 116 Stat. 81 (2002).

² “Federal funds” are funds subject to the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g).

³ “Levin funds” are funds raised and disbursed by State, district, or local party committees pursuant to certain restrictions. See 2 U.S.C. 441i(b); see also 11 CFR 300.2(i).

1 election activity. See 2 U.S.C. 431(20)(A)(i) and (ii), 441i(b); 11 CFR 100.24(a)(2) and
2 (3).⁴

3 Application of BCRA’s Federal election activity funding restrictions for Types I
4 and II Federal election activity is conditioned upon the timing of the activity. Voter
5 registration activity (Type I), for example, constitutes Federal election activity, and
6 therefore is subject to BCRA’s funding restrictions, only if it is conducted “120 days
7 before the date a regularly scheduled Federal election is held.” 2 U.S.C. 431(20)(A)(i).
8 Similarly, voter identification, GOTV activity, and generic campaign activity are Federal
9 election activity only if they are conducted “in connection with an election in which a
10 candidate for Federal office appears on the ballot.” 2 U.S.C. 431(20)(A)(ii).

11 In BCRA, Congress chose to restrict the funds which State, district, and local
12 party committees could use for Federal election activity because it determined that these
13 activities influence Federal elections. See 148 Cong. Rec. S2139 (daily ed. Mar. 20,
14 2002) (statement of Sen. McCain) (noting, for example, that “get-out-the-vote and voter
15 registration drives . . . are designed to, and do have an unmistakable impact on both
16 Federal and non-Federal elections”).

17 Restrictions on the funding of Federal election activity by State, district, and local
18 party committees are critical because they prevent evasion of BCRA’s restrictions on the
19 raising and spending of non-Federal funds by national party committees and Federal

⁴ In addition to GOTV activity, Type II Federal election activity also includes “voter identification” and “generic campaign activity.” See 2 U.S.C. 431(20)(A)(ii); 11 CFR 100.24 and 100.25. Types III and IV Federal election activity are outside the scope of this rulemaking and are not discussed. They pertain to public communications that refer to a clearly identified Federal candidate and promote, support, attack or oppose a candidate for Federal office (Type III) and services provided by an employee of a State, district or local committee of a political party who spends more than 25 percent of his or her compensated time on activities in connection with a Federal election, (Type IV). Types I and II Federal election activity may be funded with a combination of Federal and Levin funds; Types III and IV Federal election activity must be funded entirely with Federal funds.

1 candidates and officeholders. See Final Rules on Prohibited and Excessive
2 Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 65 (July 29, 2002)
3 (“2002 Final Rule”). Indeed, in passing BCRA’s Federal election activity provisions,
4 Congress had in mind “the very real danger that Federal contribution limits could be
5 evaded by diverting funds to State and local parties, which then use those funds for
6 Federal election activity.” See 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002)
7 (statement of Sen. McCain).

8 The Supreme Court upheld BCRA’s Federal election activity provisions in
9 McConnell v. FEC, 124 S. Ct. 619, 670-77 (2003). The Court found that non-Federal
10 funds given to State, district, and local party committees could have the same corrupting
11 influence as non-Federal funds given to the national parties and therefore held that
12 BCRA’s Federal election activity restrictions were justified by an important government
13 interest. Id. at 672-73. Indeed, the Court held that BCRA’s Federal election activity
14 provisions were likely necessary to prevent “corrupting activity from shifting wholesale
15 to state committees and thereby eviscerating [the Act].” Id. at 673.

16 In reaching its decision, the Court noted that BCRA regulated only “those
17 contributions to State and local parties that can be used to benefit federal candidates
18 directly” and therefore posed the greatest threat of corruption. Id. at 673-74. As such,
19 the Court found BCRA’s regulation of voter registration activities, which “directly assist
20 the party’s candidates for federal office,” and GOTV activities, from which Federal
21 candidates “reap substantial rewards,” to be permissible methods of countering both
22 corruption and the appearance of corruption. Id. at 674; see also id. at 675 (finding that
23 voter registration activities and GOTV activities “confer substantial benefits on federal

1 candidates” and “the funding of such activities creates a significant risk of actual and
2 apparent corruption,” which BCRA aims to minimize).

3 B. Rulemakings

4 Although BCRA defines Federal election activity to include “voter registration
5 activity” and “GOTV activity,” it did not specifically define those underlying terms.
6 See 2 U.S.C. 431(20)(A)(ii)-(iii). Accordingly, the Commission promulgated definitions
7 of these terms.

8 1. 2002 Rulemaking

9 The Commission first promulgated definitions of “voter registration activity” and
10 “GOTV activity” on July 29, 2002. See 2002 Final Rule, 67 FR at 49067. The 2002
11 Final Rule defined “voter registration activity” as “contacting individuals by telephone, in
12 person, or by other individualized means to assist them in registering to vote.” The
13 Explanation and Justification (“E&J”) accompanying the rule noted that the definition
14 was limited to “individualized contact for the specific purpose of assisting individuals
15 with the process of registering to vote.” See 2002 Final Rule, 67 FR at 49067. The
16 Commission expressly rejected an approach whereby mere encouragement to register to
17 vote would have constituted voter registration activity. The Commission was concerned
18 that taking such an approach would result in “thousands of political committees and
19 grassroots organizations that merely encouraged voting as a civic duty, who have never
20 been subject to Federal regulation for such conduct, [being] swept into the extensive
21 reporting and filing requirements mandated under Federal law.” Id.

22 The Commission similarly defined “GOTV activity” in 2002 as “contacting
23 registered voters by telephone, in person, or by other individualized means to assist them

1 in engaging in the act of voting.” See 11 CFR 100.24(a)(3). In adopting this
2 construction, the Commission sought to distinguish GOTV activity from “ordinary or
3 usual campaigning,” to avoid “federaliz[ing] a vast percentage” of the campaign activity
4 that a State, district, or local party committee may conduct on behalf of its candidates.
5 See 2002 Final Rule, 67 FR at 49067. The Commission’s definition focused on actions
6 directed toward registered voters that had the particular purpose of “assisting registered
7 voters to take any and all steps to get to the polls and cast their ballots, or to vote by
8 absentee ballot or other means provided by law.” Id. The definition was not intended to
9 cover activity aimed at “generally increasing public support for a candidate or decreasing
10 public support for an opposing candidate.” Id.

11 The Commission’s 2002 definition of GOTV activity also expressly excluded
12 “any communication by an association or similar group of candidates for State and local
13 office or of individuals holding State or local office if such communication refers only to
14 one or more [S]tate or local candidates,” in order to keep “State and local candidates’
15 grassroots and local political activity a question of State, not Federal, law.” Id. The
16 Commission declined to read BCRA as extending “to purely State and local activity by
17 State and local candidates” and concluded that such “a vast federalization of State and
18 local activity” required “greater direction from Congress.” Id.

19 The Commission’s 2002 definitions of voter registration activity and GOTV
20 activity were challenged in Shays v. FEC, 337 F. Supp.2d 28 (D.D.C. 2004) (“Shays I”).
21 The district court held that the definition of “voter registration activity” as requiring
22 actual assistance was neither inconsistent with congressional intent nor an impermissible
23 construction of BCRA. See Shays I, 337 F. Supp. 2d at 100 (applying Chevron U.S.A.,

1 Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837 (1984)). The court further held that
2 the “exact parameters” of the regulatory definition were unclear and, therefore, it was
3 unable to determine if the definition “unduly compromised” BCRA’s purpose. Id.
4 Nevertheless, the court found that the Commission’s definition was promulgated without
5 adequate notice and opportunity for comment, contrary to the Administrative Procedure
6 Act, see 5 U.S.C. 553, and remanded the regulation to the Commission. See Shays I,
7 337 F. Supp. 2d at 100.

8 The court reached similar conclusions as to the definition of “GOTV activity,”
9 holding that the definition of “voter registration activity” as requiring actual assistance
10 was neither inconsistent with congressional intent nor an impermissible construction of
11 BCRA. Id. at 103, 05 (applying Chevron). The court also concluded that there was
12 “ambiguity as to what acts are encompassed by the regulation,” which rendered the court
13 unable to determine whether the definition of “GOTV activity” unduly compromised
14 BCRA. Id. at 105. As it had with the definition of “voter registration activity,” however,
15 the court found that the Commission’s definition was promulgated without adequate
16 notice and opportunity for comment and remanded the regulation to the Commission.
17 See id. at 106.

18 The court also found that the exemption from the GOTV activity definition for
19 communications made by associations or groups of State or local candidates or
20 officeholders ran contrary to Congress’s clearly expressed intent. See Shays I, 337 F.
21 Supp. 2d at 104. However, the court found that BCRA provided no support for such an
22 exemption, and it rejected all federalism concerns raised by the Commission in defense of
23 the exemption, holding that “Congress was sensitive to federalism concerns in drafting

1 BCRA” and that the Supreme Court in McConnell had rejected the general federalism
2 challenge brought against BCRA’s Federal election activity provisions. Id.

3 2. 2005 Rulemaking

4 The Commission commenced a rulemaking in 2005 to address the court’s
5 concerns, rather than appeal these aspects of Shays I. Following another notice and
6 period for comment, the Commission promulgated definitions of “voter registration
7 activity” and “GOTV activity” that were substantially similar to those promulgated in
8 2002. The final rules were accompanied by an E&J that sought to address many of the
9 Shays I court’s concerns. See Final Rules on Definition of Federal Election Activity, 71
10 FR 8926, 28 (Feb. 22, 2006) (“2006 Final Rule”).

11 The Commission’s decision to leave unchanged the core aspects of the definitions
12 of “voter registration activity” and “GOTV activity” was based on its continued concern
13 that definitions which captured “mere encouragement[s]” would be “overly broad,” were
14 unnecessary “to effectively implement BCRA,” and “could have an adverse impact on
15 grassroots political activity.”⁵ Accordingly, the 2006 definitions were designed to
16 encompass activities that actually registered persons to vote and resulted in voters going
17 to the polls. Id. at 8928-29. Thus, the Commission sought to “regulate the funds used to
18 influence Federal elections” and not “incidental speech.” Id.

19 The Commission noted in its 2006 E&J that its regulations would not lead to the
20 circumvention of the Act precisely because they captured “the use of non-Federal funds

⁵ The Commission did change other aspects of the GOTV activity definition in response to the Shays I court decision. The Commission removed from the definition of “GOTV activity” the exemption for communications by associations and groups of State or local candidates or officeholders. See 2006 Final Rule, 71 FR 8931. The Commission also removed from the examples of GOTV activity the phrase “within 72-hours of an election,” to clarify that the definition covered activity conducted more than 72-hours before an election. See id. at 8930-8931.

1 for disbursements that State, district, and local parties make for those activities that
2 actually register individuals to vote.” Id. Moreover, “many programs for widespread
3 encouragement of voter registration to influence Federal elections would be captured as
4 public communications under Type III [Federal election activity].” Id. The 2006 E&J
5 also provided a nonexclusive list of examples of activity that would – and would not –
6 constitute voter registration activity. Id.

7 C. Shays III

8 The revised definitions of voter registration activity and GOTV activity were
9 challenged again in Shays v. FEC, 508 F.Supp.2d. 10, 63-70 (D.D.C. 2007). Analyzing
10 the definitions of “voter registration activity” and “GOTV activity,” the district court
11 noted that the Commission’s 2006 E&J addressed only the most obvious instances of
12 what was – and was not – covered activity and not the “vast gray area” of activities that
13 State and local parties may conduct and that may benefit Federal candidates. Shays v.
14 FEC, 508 F. Supp. 2d at 65, 69-70.

15 Regarding GOTV activities, in particular, the court focused on Advisory Opinion
16 2006-19, issued to the Los Angeles County Democratic Party Central Committee, in
17 which the Commission concluded that a local party committee’s mass mailing and pre-
18 recorded, electronically dialed telephone calls (“robocalls”) to the party’s registered
19 voters would not constitute get-out-the-vote activity.⁶ The district court stated that
20 Advisory Opinion 2006-19 had announced a much narrower interpretation of the scope of

⁶ The proposed communications would have been made four or more days before the election, would have informed recipients of the date of the election, would have urged them to vote for local, but not Federal, candidates, and would not have included additional information such as the hours and location of the individual voter’s polling place. The Commission concluded that the communications would provide neither actual assistance nor sufficiently individualized assistance to constitute GOTV activity and that, as a result, the communications could be funded exclusively with non-Federal funds.

1 GOTV activity than “might otherwise [have been] presumed on the face of the
2 definition.” Id. at 69.

3 The court held that the Commission’s failure to address these vast gray areas, and
4 to explain whether activities falling within them would affect Federal elections, unduly
5 compromised BCRA’s purposes. Id. at 65-66, 69-70. Accordingly, the court remanded
6 the definitions to the Commission. Id. at 70-71.

7 The court of appeals upheld the lower court’s decision invalidating the
8 Commission’s definitions of “voter registration activity” and “GOTV activity,” although
9 on slightly different grounds. See Shays v. FEC, 528 F.3d 914, 931 (D.C. Cir. 2008)
10 (“Shays III”). The court of appeals recognized that the Commission had discretion to
11 promulgate definitions that left unaddressed large gray areas of activity and to fill them in
12 later through enforcement actions and the advisory opinion process. See Shays III, 528
13 F.3d at 931.

14 Nevertheless, the court of appeals held that the Commission’s definitions of
15 “voter registration activity” and “GOTV activity” were deficient because they served to
16 “create ‘two distinct loopholes.’” Id. The flaws in both definitions were: (1) the “assist”
17 requirements, which excluded efforts that “actively encourage people to vote or register
18 to vote;” and (2) the “individualized means” requirements, which excluded “mass
19 communications targeted to many people,” and had the effect of “dramatically narrowing
20 which activities [were] covered” by the rules. Id. Accordingly, the court of appeals
21 concluded that the definitions would “allow the use of soft money for many efforts that
22 influence federal elections,” which is directly counter to BCRA’s purpose. Id.

1 The court rejected the Commission’s justifications for the definitions – to exclude
2 mere exhortations from coverage and to give clear guidance as to the scope of the rules –
3 because the Commission could craft definitions that exclude “routine or speech-ending
4 exhortations” and that provided clear guidance to State, district, and local party
5 committees in a way that is more consistent with BCRA. Id. at 932. Accordingly, the
6 court of appeals remanded the regulations to the Commission.

7 **II. Proposed Revisions to 11 CFR 100.24(a)(2) and 100.24(a)(3)**

8 To comply with the court’s decision in Shays III, the Commission proposes
9 revising the definitions of voter registration activity and GOTV activity at 11 CFR
10 100.24(a)(2)-(3). The Commission seeks comment on the proposal and is particularly
11 interested in whether the proposed definitions would satisfy the court’s decision in Shays
12 III. The Commission has not made any final determinations regarding which aspects of
13 the following proposal it will adopt in the final rule.

14 A. General Definitions

15 To comply with the Shays III decision, the Commission proposes revising the
16 definitions of voter registration activity and GOTV activity at 11 CFR 100.24(a)(2) and
17 (a)(3). Specifically, the Commission’s proposal would define voter registration activity
18 as “encouraging or assisting potential voters in registering to vote” and would define
19 GOTV activity as “encouraging or assisting potential voters to vote.” The Commission
20 has not made a final determination to adopt these general definitions and seeks comment
21 on them.

22 These proposals are intended to close the “two distinct loopholes” in the current
23 definitions that were identified by the Shays III court as allowing the use of non-Federal

1 funds in connection with Federal elections. See Shays III at 931-32. The proposed
2 definitions would eliminate the requirement that voter registration activity and GOTV
3 activity must actually assist persons in registering to vote or in the act of voting. Instead,
4 the proposed definitions cover both activities that encourage voting or voter registration,
5 as well as activities that actually assist potential voters in voting or registering to vote.

6 Similarly, the proposed definitions would eliminate the requirement that voter
7 registration activity and GOTV activity be conducted by “individualized means.” The
8 proposed definitions cover both activities targeted towards individual persons and
9 activities directed at groups of persons – for example, mass mailings, all electronically
10 dialed telephone calls (or, as they are commonly known, “robocalls”), or radio
11 advertisements – so long as they encourage or assist voting or voter registration.

12 The Commission seeks comment on whether the proposed definitions adequately
13 address the concerns articulated by the court in the Shays III decision. Do they provide
14 sufficient guidance as to which activities are covered and which are not? Do the
15 proposed definitions, in fact, close the “two distinct loopholes” identified by the Shays III
16 court? Alternatively, do the proposed definitions cover activity that Congress did not
17 intend to regulate in BCRA? If so, what specific activities would be covered by the
18 proposed rules that would not have any effect on Federal elections?

19 More specifically, the proposed definition of “voter registration activity” is
20 intended to cover, *inter alia*, the following activities: (1) providing an individual with a
21 flier that reads “Register to Vote” and that includes the URL and address of the
22 appropriate State or local office handling voter registration; (2) providing an individual
23 with a voter registration form and verbally encouraging the recipient to fill out the form

1 and submit it to the appropriate State or local office handling voter registration; or (3)
2 mailing voter registration forms to individuals and encouraging them, in a cover letter, to
3 fill out and submit the forms in advance of the registration deadline. Should the
4 definition cover such activities? What if any additional activities should it cover?

5 Similarly, the proposed definition of “GOTV activity” is intended to cover, *inter*
6 *alia*, these activities: (1) driving a sound truck through a neighborhood that plays a
7 message urging listeners to “Vote next Tuesday at the Main Street community center”;
8 (2) mailing a flier to registered voters with the date of the election but not the location of
9 polling places or their hours of operation; and (3) making telephone calls (including
10 robocalls) reminding the recipient of the times during which the polls are open on
11 election day. Should the proposed definition of GOTV activity cover such activities?
12 What if any additional activities should it cover?

13 What, if any, enforcement difficulties might the proposed definitions present?

14 B. Examples

15 Each proposed definition includes a non-exhaustive list of examples. Several
16 activities that would either encourage or assist voter registration are provided at proposed
17 paragraphs (a)(2)(i)(A-E). Some of the examples involve actual assistance (“assisting
18 individuals in completing or filing [voter registration] forms” and “submitting on behalf
19 of a potential voter a completed voter registration form”), while others involve
20 encouragement of persons to register to vote (“urging individuals to register to vote . . .
21 by any . . . means”).

22 Similarly, several activities that would either encourage or assist persons in voting
23 are provided at proposed paragraph (a)(3)(i)(A)-(B). Some examples from the existing

1 rule would be retained (such as “offering to transport, or actually transporting, voters to
2 the polls”) and new examples would be added to illustrate the new “encourage”
3 component of the proposed definition. Informing voters of the date of an election or the
4 times or locations of polling locations, for example, would constitute GOTV activity
5 under the proposed definition.

6 The Commission has not settled on the proposed examples of voter registration
7 activity and GOTV activity and seeks comments on them. By providing these examples,
8 does the proposal make clear that the definitions of voter registration activity and GOTV
9 activity would not require actual assistance? Would the examples help State, district, and
10 local party committees distinguish activities that are covered under the proposed
11 definitions from activities that are not covered? Do the examples clarify any potential
12 ambiguities in the general definition? Are there other examples that should be added?
13 Should any of the proposed examples be revised or deleted? Finally, is it clear that the
14 lists of examples provided in the proposal are not exhaustive and that each example
15 would, by itself, constitute voter registration activity or GOTV activity?

16 C. Exemption for “Mere Exhortations”

17 Although the Shays III court required the Commission to promulgate definitions
18 of voter registration activity and GOTV activity that included encouragements to vote
19 and to register to vote, the court of appeals acknowledged that it would be permissible to
20 exclude from the definitions “routine or spontaneous speech-ending exhortations” and
21 “mere exhortations . . . made at the end of a political event or speech.” Shays III at 932.
22 Accordingly, proposed 11 CFR 100.24(a)(2)(ii) and (a)(3)(ii) recognize that “speeches”
23 or “events” that include exhortations to vote or to register to vote that are incidental to the

1 speech or event are exempt from the regulatory definitions of GOTV activity and voter
2 registration activity. The proposals provide examples of the types of incidental
3 exhortations that would qualify under the exemption.

4 The exemption would be limited to exhortations made during a speech or at an
5 event, such as a rally. It would not apply to exhortations made by any other means or in
6 any other forum, such as robocalls, mailers, or television and radio advertisements.
7 Further, the proposed exemption would apply only if an exhortation to vote or to register
8 to vote is incidental to the speech or event.

9 The Commission has not made a final determination to adopt this exemption and
10 seeks comment on it. Does it provide clear guidance as to the activities exempted from
11 the definitions of voter registration activity and GOTV activity? Do the examples make
12 clear what types of statements qualify as “mere exhortations”?

13 Has the Commission properly established the scope of the proposed exemption?
14 Is it appropriate to limit the exemption to cover only those exhortations that are incidental
15 to a speech or event? Does this requirement capture the type of “speech-ending”
16 exhortations discussed by the court in the Shays III decision? Does the requirement that
17 an exhortation be incidental to a speech or event create a workable and enforceable
18 standard? How should the Commission determine whether an exhortation is incidental to
19 a speech or event? Should the Commission consider the frequency with which a “mere
20 exhortation” is offered? Is there a material difference between stating “Vote next
21 Tuesday” once and stating it multiple times over the course of a speech or event?

22 Are there other factors that the Commission should consider in determining
23 whether the exemption applies? For example, should the spontaneity of an exhortation

1 play a role in making this determination, and how would the Commission determine the
2 spontaneity of an exhortation? Does it matter at what point in a speech an exhortation is
3 offered? Is an exhortation offered at the end of a speech different from one offered at the
4 beginning or middle of a speech?

5 Further, is it proper to limit application of the exemption to incidental
6 exhortations made at speeches and events, or should other communications be included
7 as well? If so, what other types of activities and communications should be covered by
8 the exemption? Should it cover direct mailings, robocalls, radio and television
9 advertisements, and all other “communications” that contain incidental exhortations to
10 vote or to register to vote? Should the exemption cover, for example, robocalls made a
11 few days before a Federal election that detail Mayor Smith’s record and exhorts listeners
12 to “Vote for Mayor Smith on Election Day”?⁷ Would an exemption that included these
13 types of communications be consistent with the court’s opinion in Shays III?

14 Does the medium in which a statement is made affect whether it is a “mere
15 exhortation” at all? Are scripted communications incapable of containing incidental
16 exhortations? In other words, are scripted exhortations to vote or to register to vote the
17 types of communications which the Shays III court was referring to in its opinion? If the
18 exemption is expanded to cover exhortations made in other media, how could the
19 Commission determine if they were incidental? Would such a determination be made by
20 examining the proportion of space or time devoted to the exhortation in relation to the
21 rest of the communication? See, e.g., 11 CFR 106.1 (requiring that payments for

⁷ A similar communication that urged a vote for a Federal candidate would be Type III Federal election activity, see 11 CFR 100.24(b)(3), and would be subject to BCRA’s funding restrictions for that reason, regardless of whether the activity was also deemed to be GOTV activity.

1 communications discussing multiple Federal or non-Federal candidates be attributed to
2 each candidate based on the time or space devoted to each one). Would the Commission
3 have to establish threshold percentages that defined whether an exhortation was, in fact,
4 incidental to a communication?

5 How would the proposed general definitions of “voter registration activity” and
6 “GOTV activity” be affected by altering the scope of the exemption? Would the
7 examples in proposed paragraphs (a)(2)(i)(A)-(E) and (a)(3)(i)(A)-(B) need to be revised
8 if the Commission adopted a broader exemption? Would allowing a broader exemption
9 potentially allow communications that affect Federal elections to be funded with non-
10 Federal funds, contrary to BCRA’s purpose?

11 This exemption is not intended to inoculate speeches or events that otherwise
12 would meet the proposed definitions of “voter registration activity” or “GOTV activity.”
13 For example, a speech given 60 days before an election that provides listeners with
14 information on how to register to vote would constitute Federal election activity even if it
15 also contains an exhortation to register to vote (such as “Register and make your voice
16 heard!”). Should the Commission make this limitation explicit in the rule itself? Without
17 an explicit limitation, could the general exemption be interpreted as applying to voter
18 registration activity or GOTV activity for reasons other than their inclusion of an
19 exhortation? Would adding an explicit limitation be helpful or would it be redundant and
20 therefore unnecessary?

21 D. Exclusion of Public Communications Relating to State and Local Elections

22 Finally, proposed 11 CFR 100.24(a)(3)(iii) excludes from the definition of
23 “GOTV activity” a “public communication that refers solely to one or more clearly

1 identified candidates for State or local office and notes the date of the election.” The
2 proposal under consideration, if adopted, would ensure that the expansion of the GOTV
3 activity definition, which is required by the Shays III court, does not, in effect, render
4 meaningless the statutory definition of “Federal election activity,” which specifically
5 does not include amounts disbursed or expended for “a public communication that refers
6 solely to a clearly identified candidate for State or local office, if the communication is
7 not a Federal election activity described in subparagraph (A)(i) or (ii).” 2 U.S.C.
8 431(20)(B)(i); 11 CFR 100.24(c)(1).

9 The Commission has not made a final determination to adopt the proposed
10 exclusion and seeks comment on it. Does the proposed exclusion correctly implement
11 the statutory definition? Is the proposed exclusion necessary to ensure that the expansion
12 of the definition of “GOTV activity” does not render meaningless the exclusion for
13 communications that refer solely to non-Federal candidates? Is it necessary to ensure that
14 the Commission does not federalize purely State and local campaign activity?

15 Conversely, would the proposed provision exclude from regulation the types of
16 activities from which “federal candidates reap substantial rewards”? See McConnell,
17 124 S. Ct. at 168. Similarly, is the proposed exclusion materially different from the
18 exception for associations of State and local candidates that was included in the
19 Commission’s first definition of GOTV activities and that was invalidated by the district
20 court in the Shays I decision? See Shays I, 337 F. Supp. 2d at 102-03; see also discussion
21 above in part I.B-C.

1 E. Other Issues

2 In Shays III, the court of appeals cited Advisory Opinion 2006-19 (Los Angeles
3 County Democratic Party Central Committee), in which the Commission concluded that
4 letters and pre-recorded telephone calls encouraging certain Democrats to vote in an
5 upcoming local election did not count as GOTV activity, in part, because the
6 communications did not provide individualized assistance to voters. See Shays III, 528
7 F.3d 932. The court held that this overly restrictive definition of GOTV activity was
8 contrary to the statute. Id. The court did not address, however, whether communications
9 made solely in connection with a non-Federal election may be excluded from the
10 definition of GOTV activity or Federal election activity.

11 In light of the Shays III decision and the definitions proposed above, must the
12 Commission explicitly supersede, in whole or in part, Advisory Opinion 2006-19? If so,
13 should the Commission, either in its E&J or in the regulation explicitly address the
14 circumstances involved with that advisory opinion? For example, should the E&J or final
15 regulation acknowledge explicitly that communications made four or more days before
16 an election are “GOTV activity” if they encourage or assist individuals in voting,
17 provided that neither of the proposed exclusions at 11 CFR 100.24(a)(3)(iii) (State and
18 local elections) or 11 CFR 100.24(c)(5) (voter identification or GOTV activity solely in
19 connection with a non-Federal election; *see infra*) – if adopted – is met? What other
20 aspects of that advisory opinion should be addressed in a similarly explicit manner?

1 **III. Voter Identification and GOTV Activity In Connection with a Non-Federal**
2 **Election**

3 **A. Background**

4 BCRA limits regulation of Type II FEA to activities that are conducted “in
5 connection with an election in which a candidate for Federal office appears on the
6 ballot.” See 2 USC 441i(b)(1); 431(20)(A)(ii). In 2002, the Commission defined “in
7 connection with an election in which a candidate for Federal office appears on the ballot”
8 generally to mean the period of time beginning on the earliest filing deadline for access to
9 the primary election ballot for Federal candidates in each particular State, and ending on
10 the date of the general election, up to and including any runoff date. See 11 CFR
11 100.24(a)(1)(i). For States not holding a primary election, the covered period began on
12 January 1 of each even-numbered year. Id. For special elections in which Federal
13 candidates were on the ballot, the period was deemed to begin when the date of the
14 special election was set and to end on the date of the special election. See 11 CFR
15 100.24(a)(1)(ii).

16 This definition did not, however, account for municipalities, counties, and States
17 that conducted separate, non-Federal elections within the “in connection with an election”
18 time windows. As such, Type II Federal election activities conducted in connection with
19 these non-Federal elections were subject to BCRA’s restrictions. Therefore, in 2006, the
20 Commission adopted an Interim Final Rule that revised the definition of “in connection
21 with an election in which a candidate for Federal office appears on the ballot” to exclude
22 purely non-Federal voter identification and GOTV activity. See Interim Final Rule on

1 Definition of Federal Election Activity, 71 FR 14357 (Mar. 22, 2006) (“Interim Final
2 Rule”).

3 The Interim Final Rule added new paragraph (a)(1)(iii) to 11 CFR 100.24 to
4 exclude voter identification or GOTV activities that were “in connection with a non-
5 Federal election that is held on a date separate from a date of any Federal election” and
6 that refers exclusively to: (1) non-Federal candidates participating in the non-Federal
7 election, provided the non-Federal candidates are not also Federal candidates; (2) ballot
8 referenda or initiatives scheduled for the date of the non-Federal election; or (3) the date,
9 polling hours and locations of the non-Federal election. See 11 CFR
10 100.24(a)(1)(iii)(A)(1)–(3); Interim Final Rule, 71 FR at 14359–60. By its own terms,
11 the provision expired on September 1, 2007. See 11 CFR 100.24(a)(1)(iii)(B); Interim
12 Final Rule at 14358.

13 B. Proposal

14 The Commission is considering adding 11 CFR 100.24(c)(5), which would
15 exclude from the definition of “Federal election activity” any voter identification
16 activities or GOTV activities that are “solely in connection with a non-Federal election
17 held on a date separate from any Federal election.” For example, a GOTV program
18 offering to transport voters to the polls on the day of an exclusively non-Federal election
19 would be eligible for the proposed exclusion. However, a voter identification program
20 collecting information about voters’ preferences in both a non-Federal election in March
21 and a Federal primary in April would not qualify, since such a program would not be
22 “solely in connection with a non-Federal election.” This proposal largely tracks the

1 Interim Final Rule, although, as proposed here, it would be located in a different
2 paragraph within 11 CFR 100.24.

3 The proposed rule under consideration is based on the premise that voter
4 identification and GOTV activity for non-Federal elections held on a different date from
5 any Federal election will have no effect on subsequent Federal elections. The
6 Commission seeks comments, especially in the form of empirical data, on whether voter
7 identification and GOTV efforts in connection with a non-Federal election have any
8 meaningful effect on voter turnout in a subsequent Federal election, or otherwise confer
9 benefits on Federal candidates. For example, if a GOTV communication provides the
10 date of a non-Federal election and offers transportation to voters for such a non-Federal
11 election, what effect, if any, would such activity have on a Federal election held on a
12 separate date, that is weeks or months later?

13 The proposed exclusion would be narrowly drawn and not apply to activities that
14 are also in connection with a Federal election. To that end, the Commission seeks
15 comment on whether the exclusion should take into account the proximity of the next
16 Federal election. For example, should the rule distinguish between situations where the
17 next Federal election is only six days later, as opposed to six months? How much time
18 should pass between a Federal and State or local election to ensure activities associated
19 with the State or local election have no affect on the Federal one? Should the time
20 required to pass be different for voter identification activity than it is for GOTV activity?

21 Additionally, many states currently allow voters to cast a ballot, either in person
22 or by mail, prior to Election Day – a process known generally as “early voting.” See U.S.
23 Election Assistance Commission, A Voter’s Guide to Federal Elections 5 (2008),

1 available at <http://www.eac.gov/voter/voter/a-voters-guide-to-federal->
2 [elections/attachment_download/file](http://www.eac.gov/voter/voter/a-voters-guide-to-federal-elections/attachment_download/file). However, the exclusion in proposed section
3 100.24(c)(5) distinguishes excluded local activity, in part, based on whether the dates of
4 Federal and non-Federal elections coincide. The Commission seeks comment on whether
5 early voting affects the relevance of the dates on which elections are held. Do the early
6 voting periods for Federal elections overlap with the dates of State and local elections or
7 State and local early voting periods? Can early voters cast ballots at the same time for
8 both Federal and State or local elections when the actual date of those elections do not
9 coincide? How does GOTV activity for early voting in non-Federal elections affect
10 turnout and voting patterns for early voting in Federal elections? The Commission
11 particularly welcomes comments in the form of empirical data.

12 The proposed exclusion further requires that voter identification or GOTV activity
13 refer exclusively to non-Federal candidates participating in the non-Federal election
14 (provided that the non-Federal candidates are not also Federal candidates); ballot
15 referenda or initiatives scheduled for the date of the non-Federal election; or the date,
16 polling hours, and locations of the non-Federal election. These limitations are intended
17 to ensure that the only activity excluded from the definition of “Federal election activity”
18 is solely in connection with a non-Federal election.

19 To effectuate this intention better, the Commission invites comments on any
20 changes that it should make to proposed 11 CFR 100.24(c)(5). Do the proposal’s
21 limitations ensure that the exclusion covers only non-Federal activity? The Commission
22 seeks comment on whether proposed 11 CFR 100.24(c)(5) excludes “purely non-Federal”
23 activities. Is the proposed exclusion consistent with congressional intent?

1 Finally, the current proposal is different from previous Commission approaches to
2 this issue. In the Interim Final Rule, and subsequently in a Notice of Proposed
3 Rulemaking,⁸ the Commission had proposed excluding non-Federal voter identification
4 and GOTV activity from regulation by amending the definition of “in connection with an
5 election in which a candidate for Federal office appears on the ballot.” The current
6 proposal would instead address non-Federal elections by adding a new exclusion to the
7 definition of “Federal election activity” at 11 CFR 100.24(c)(5). Would this approach
8 have a different effect from the approach in the Interim Final Rule and the NPRM, and if
9 so, should the Commission adopt the prior approach or the proposed approach? Does the
10 Commission have the authority to add this provision, even though it is not expressly
11 provided for in the statutory text? Alternatively, does the statute’s definition of Federal
12 election activity at 2 U.S.C. 431(20)(A), which does not include the type of activities
13 described under proposed 11 CFR 100.24(c)(5), permit this provision?

14 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

15 The Commission certifies that the attached proposed rule, if promulgated, would
16 not have a significant economic impact on a substantial number of small entities. The
17 basis for this certification is that this proposed rule would affect State, district, and local
18 party committees, which are not “small entities” as defined in 5 U.S.C. 601. The term
19 “small entities” includes not-for-profit enterprises that are “small organizations” under
20 5 U.S.C. 601(4) and 601(6). State, district and local party committees are not-for-profit
21 enterprises, but they are not “small organizations” under 5 U.S.C. 601(4) because they

⁸ See Notice of Proposed Rulemaking on Federal Election Activity and Non-Federal Elections, 72 FR 31473 (June 7, 2007).

1 are not independently owned and operated and are not dominant in their field. 5 U.S.C.
2 601(4). State political party committees are not independently owned and operated
3 because they are not financed and controlled by a small identifiable group of individuals,
4 and they are affiliated with the larger national political party organizations. In addition,
5 the State political party committees representing the Democratic and Republican parties
6 have a major controlling influence within the political arena of their States and are thus
7 dominant in their field. District and local party committees are generally considered
8 affiliated with the State committees and need not be considered separately. To the extent
9 that any State party committees representing minor political parties might be considered
10 “small organizations,” the number affected by this proposed rule is not substantial.

11

- 1 **List of Subjects**
- 2 11 CFR Part 100
- 3 Elections
- 4

1 For the reasons set out in the preamble, subchapter A of chapter 1 of title 11 of the
2 Code of Federal Regulations would be amended as follows:

3 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

4 1. The authority citation for 11 CFR part 100 would continue to read as follows:

5 **Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

6 2. Section 100.24 would be amended by deleting paragraph (a)(1)(iii), by revising
7 paragraphs (a)(2) and (a)(3), and by adding (c)(5) to read as follows:

8 **§ 100.24 Federal election activity (2 U.S.C. 431(20)).**

9 (a) * * *

10 (1) * * *

11 (iii) ~~—Voter identification and Get Out the Vote Activities Limited to~~
12 ~~Non-Federal Elections.~~

13 (A) ~~—Notwithstanding paragraphs (a)(1)(i) and (ii) of this~~
14 ~~section, in connection with an election in which a candidate~~
15 ~~for Federal office appears on the ballot does not include~~
16 ~~any activity or communication that is in connection with a~~
17 ~~non-Federal election that is held on a date separate from a~~
18 ~~date of any Federal election and that refers exclusively to:~~

19 (1) ~~—Non-Federal candidates participating in the non-~~
20 ~~Federal election, provided the non-Federal~~
21 ~~candidates are not also Federal candidates;~~

22 (2) ~~—Ballot referenda or initiatives scheduled for the date~~
23 ~~of the non-Federal election; or~~

1 (E) Submitting a completed voter registration form on behalf of
2 a potential voter.

3 **[Exemption for “Mere Exhortations”]**

4 (ii) A speech or event is not voter registration activity solely because it
5 includes an exhortation to register to vote that is incidental to the
6 speech or event, such as:

7 (A) “Register and make your voice heard”;

8 (B) “Don’t forget to register to vote”;

9 (C) “Register by September 5th”; or

10 (D) “Don’t forget to register to vote by next Wednesday.”

11 (3) Get-out-the-vote activity means contacting registered voters by telephone,
12 in person, or by other individualized means, to assist them in engaging in
13 the act of voting. Get out the vote activity includes, but is not limited to:
14 encouraging or assisting potential voters to vote.

15 (i) Providing individual voters information such as the date of the
16 election, the times when polling places are open, and the location
17 of the particular polling places. Except as provided in paragraph
18 (a)(3)(ii) below, get-out-the-vote activity includes, but is not
19 limited to, any of the following:

20 (A) Informing potential voters, whether by mail (including
21 direct mail), in person, by telephone (including robocalls),
22 or by any other means, about:

23 (1) The date of an election;

1 [Exclusion for Voter Identification and GOTV Activity Solely In Connection with a
2 Non-Federal Election]

3 * * * * *

4 (c) * * *

5 * * * * *

6 (5) Voter identification or get-out-the-vote activity that is solely in connection
7 with a non-Federal election that is held on a date on which no Federal
8 election is held and that refers exclusively to:

9 (i) Non-Federal candidates participating in the non-Federal election,
10 provided the non-Federal candidates are not also Federal
11 candidates;

12 (ii) Ballot referenda or initiatives scheduled for the date of the non-
13 Federal election; or

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(iii) The date, polling hours and locations of the non-Federal election.

On behalf of the Commission,

Steven T. Walther
Chairman
Federal Election Commission

DATED _____
BILLING CODE: 6715-01-P