

AGENDA DOCUMENT NO. 10-71



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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2010 NOV 10 P 4: 58

November 10, 2010

AGENDA ITEM
For Meeting of 11-18-10

MEMORANDUM

TO: The Commission

FROM: Christopher Hughey *pch*
Acting General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Amy L. Rothstein *ALR (RCS)*
Assistant General Counsel

Joshua S. Blume *JSB*
Attorney

Subject: Drafts A, B, C, and D of AO 2010-24 (Republican Party of San Diego County)

Attached are proposed drafts of the subject advisory opinion. We have been asked to place these drafts on the agenda for November 18, 2010.

Attachments

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Attached are proposed drafts of the subject advisory opinion. We have been asked to place these drafts on the agenda for November 18, 2010.

Attachments

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFTS A, B, C, and D of ADVISORY OPINION 2010-24 are now available for comment. It was requested by C. April Boling, CPA, on behalf of the Republican Party of San Diego County. The four drafts are scheduled to be considered by the Commission at its public meeting on Thursday, November 18, 2010.

If you wish to comment on DRAFTS A, B, C, and D of ADVISORY OPINION 2010-24, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on November 17, 2010.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fec.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Rosemary C. Smith
Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2010-24, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Rosemary C. Smith, Esq.
Federal Election Commission
999 E Street, NW
Washington, DC 20463

1 ADVISORY OPINION 2010-24

2 Ms. C. April Boling, CPA
3 Treasurer, Republican Party of San Diego County
4 7185 Navajo Road, Suite P
5 San Diego, CA 92119

DRAFT A

6 Dear Ms. Boling:

7 We are responding to your advisory opinion request on behalf of the Republican
8 Party of San Diego County (the “Committee”), concerning the application of the Federal
9 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
10 the activities of the Committee’s Voter Registration Coordinator (the “Employee”) and
11 Executive Director.

12 The Commission concludes that some of the Employee’s activities recruiting,
13 training, and supervising contractors hired by the Committee during the applicable
14 Federal election activity (“FEA”) time periods are voter registration activity and therefore
15 FEA under the Act and Commission regulations. The Commission further concludes that
16 the Executive Director’s supervision of the Employee does not constitute voter
17 registration activity.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 September 15, 2010.

21 The Committee is a local committee of the Republican Party. The Committee
22 hired the Employee in May 2010. The Employee’s sole function is to recruit, train, and
23 supervise contractors hired by the Committee exclusively to perform voter registration
24 activities. The Employee spends 100 percent of her time engaged in this activity.

1 The Employee spends approximately twenty percent of her time on each of the
2 following four categories of activities, for a total of eighty percent of her time:

3 (1) Recruitment, (2) Orientations, (3) Contractor management, and (4) Validation of
4 completed registrations.

- 5 • Recruitment – includes posting positions on job boards, meeting with clubs to
6 encourage members to participate in the electoral process by registering voters,
7 interviewing potential contractors, and scheduling orientations for contractors.
- 8 • Orientations – includes both one-on-one and group meetings with potential
9 contractors to communicate the Committee’s voter registration program’s
10 requirements relating to the contractors’ responsibilities, protocol, and payment
11 structure. This category also includes training contractors on voter eligibility
12 requirements, legal rights to solicit, and table set-up instructions.
- 13 • Contractor management – includes providing additional training upon request,
14 responding to requests from business owners for verification of contractor status
15 and program details, and completing vendor applications on request.
- 16 • Validation of completed registrations – includes scheduling the turning in of
17 voter registration cards, reviewing the voter registration cards for missing
18 information or errors made by the voters, photocopying voter registration cards,
19 calling newly registered voters to welcome them to the Republican Party,
20 reviewing and verifying information submitted by registrants, reporting any
21 suspicious information revealed on such review to the Registrar of Voters, and
22 personally submitting the voter registration cards to the Registrar of Voters.

1 The remaining twenty percent of the Employee’s activity is divided between three
2 additional categories of work. These categories and the percentage of time spent on them
3 are as follows: (1) Material preparation – 10 percent, (2) Events – 5 percent, and
4 (3) Calculation of contractor payments – 5 percent.

- 5 • Material preparation – includes designing and preparing signs and other voter
6 registration materials for the contractors.
- 7 • Events – includes researching potential events at which voter registration may
8 take place and alerting contractors to them, as well as determining the number of
9 contractors to attend such events. It also includes setting up and tearing down
10 voter registration booths, but it does not include the Employee’s actual
11 registration of any voters, herself.
- 12 • Calculation of contractor payments – includes all activities related to calculating
13 the payments to be received from the California Republican Party, and the
14 payments to be distributed to each contractor depending on the number of voter
15 registrations in targeted State Assembly and State Senate districts.

16 The Committee anticipates that it will also employ a Voter Registration Coordinator with
17 these duties in future election cycles.

18 The Committee is currently reporting the activities of the Employee during the
19 applicable FEA time periods as FEA to the Commission. If the Employee’s activities are
20 not FEA, however, the Committee would like to amend its reports and to transfer the
21 appropriate amount of non-Federal funds¹ to cover the non-Federal share of those costs.

22

¹ Non-Federal funds are funds that do not comply with the amount limitations, source prohibitions, and reporting requirements of the Act. See footnote 6, below.

1

2 ***Questions Presented***

3 *(1) Are the Employee's activities voter registration activity and therefore FEA*
4 *during the 120 days prior to an election?*²

5 *(2) If the answer to Question 1 is "yes," do the activities of the Executive Director*
6 *in supervising the Employee also constitute voter registration activity?*

7 *(3) If the answer to Question 1 is "no," may the Committee amend its reports*
8 *previously filed with the Commission characterizing the Employee's activities as FEA,*
9 *and transfer the appropriate amount of non-Federal funds to cover the non-Federal*
10 *share of the cost for these activities?*

11 *(4) Will the answer to Question 1 differ under the new FEA regulations that are*
12 *scheduled to take effect on December 1, 2010?*

13 ***Legal Analysis and Conclusions***

14 *(1) Are the Employee's activities voter registration activity and therefore FEA*
15 *during the 120 days prior to an election?*

16 Yes, some of the Employee's activities within California's FEA voter registration
17 periods for 2010 are FEA because they constitute voter registration activity.

18 The Bipartisan Campaign Reform Act of 2002³ ("BCRA") amended the Act, in
19 pertinent part, by introducing and defining a new term – FEA – and by requiring State,

² Voter registration activity is FEA "during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election." 2 U.S.C. §431(20)(A)(i). For California for 2010, these periods are February 8 through June 8 and July 5 through November 2. See "Federal Election Activity Dates for 2010," Federal Election Commission, at http://www.fec.gov/pages/bcra/rulemakings/charts_fea_dates_2010.shtml. The Committee has not asked, and the Commission does not address in this advisory opinion, whether any of the Employee's activities constitute FEA outside of the 120-day voter registration activity FEA time periods.

³ Pub. L. No. 107-155, 116 Stat. 81 (2002).

1 district, and local party committees to pay for FEA with either Federal funds or a
2 combination of Federal and Levin funds.⁴ 2 U.S.C. 441i(b). The Act’s definition of FEA
3 includes *voter registration activity* during the period beginning 120 days before the date
4 of a regularly scheduled Federal election, and ending on the date of the election. 2
5 U.S.C. 431(20)(a)(i) (also known as Type I FEA). Commission regulations define *voter*
6 *registration activity* as “contacting individuals by telephone, in person, or by other
7 individualized means to assist them in registering to vote.” 11 CFR 100.24(a)(2).⁵ It
8 includes, but is not limited to, “printing and distributing registration and voting
9 information, providing individuals with voter registration forms, and assisting individuals
10 in the completion and filing of such forms.” *Id.*⁶

⁴ “Federal funds” are funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g). “Levin funds” are funds raised by State, district, and local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. *See* 11 CFR 300.2(i).

⁵ In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (“*Shays III*”), the appellate court upheld the district court’s decision holding that the Commission’s regulatory definition of, *inter alia*, voter registration was overly permissive and thus contrary to the statute. The court remanded the regulation to the Commission, which promulgated revised regulations on September 10, 2010, as discussed more fully below in Question 4. Since the revised regulations do not take effect until December 1, 2010, the Commission analyzes Questions 1 through 3 under the old regulations, which remain in effect until December 1, 2010.

⁶ *Cf.* Explanation and Justification of Federal Election Activity, 71 FR 8926, 8930 (Feb. 22, 2006) (“2006 E&J”) (noting, in the context of get-out-the-vote activity (“GOTV”), which is also known as Type II FEA, that if “a State party committee . . . hir[es] a consultant *a month prior to the election* to design a [72-hour] GOTV program for the State party committee and recruit volunteers to drive voters to the polls on election day[, t]he consultant’s work performed *well before the 72-hour time period* would be considered Type II FEA”) (emphasis added). There, the Commission was concerned not so much with the fact that the consultant would recruit volunteers engaging in Type II FEA, but rather with the timing of the consultant’s activities. Here, the question is not about the timing of the Employee’s activities, but rather with whether those activities meet the definition of Type I FEA.

The Act and Commission regulations also provide different definitions for voter registration activity (Type I FEA) and GOTV activity (Type II FEA), and thus are not necessarily analogous. Moreover, where the Commission was aware of the practice of hiring consultants to design 72-hour campaign programs in advance of the election and associated time periods, but chose to include that example only in the GOTV context, it can be presumed that the Commission meant to exclude this type of relationship in the voter registration context. *See, e.g., Bates v. United States*, 522 U.S. 23, 29 (1997); *Lindh v. Murphy*, 521 U.S.

1 The Committee’s description of the Employee’s tasks indicates that the Employee
2 spends 20 percent of her time validating complete registrations, which includes assisting
3 individuals in registering to vote by reviewing their voter registration cards for missing
4 information or errors, and taking the voter registration cards and turning them in to the
5 Registrar of Voters. The Employee spends an additional ten to fifteen percent of her time
6 preparing materials for use in registering voters, such as signage, in-field voter
7 registration materials, and setting up and tearing down voter registration booths. These
8 activities fall within the definition of voter registration activity. *See* 11 CFR 100.24(a)(2)
9 (defining voter registration activity to include “printing and distributing registration and
10 voting information, providing individuals with voter registration forms, and assisting
11 individuals in the completion and filing of such forms”).

12 The Commission’s regulations require State party committees to use a Federal
13 account to pay for salaries, wages, and fringe benefits of any employees who spend more
14 than 25% of their compensated time in a given month on FEA. *See* 11 CFR
15 106.7(d)(1)(ii); 300.33(d)(2). Accordingly, because the Employee spends at least 30 to
16 35 percent of her time on Type I FEA within California’s FEA voter registration periods,
17 she must be paid exclusively from the Committee’s Federal account within those
18 periods.⁷

19 (2) *If the answer to Question 1 is “yes,” do the activities of the Executive Director*
20 *in supervising the Employee also constitute voter registration activity?*

320, 330 (1997); *Bailey v. United States*, 516 U.S. 137, 146 (1995); *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993).

⁷ Although the request does not ask specifically about the 25 percent FEA payment threshold under 11 CFR 300.33(d)(2) with respect to the Employee, the request asks generally about “the proper reporting and payment related to” the Employee’s activities.

1 No, the activities of the Executive Director in supervising the Employee do not
2 constitute voter registration activity.

3 Unlike the Employee in the answer to Question 1, above, whose job consists of
4 assisting individuals in registering to vote, the Executive Director does not engage in
5 these activities. The Executive Director's supervision of the Employee does not fit
6 within the definition of voter registration activity under the Act or Commission
7 regulations.

8 *(3) If the answer to Question 1 is "no," may the Committee amend its reports*
9 *previously filed with the Commission describing the Employee's work as FEA, and*
10 *transfer the appropriate amount of non-Federal funds to cover the non-Federal share of*
11 *the cost for these services?*

12 This question is moot, because the answer to Question 1 is "yes."

13 *(4) Will the answer to Question 1 differ under the new FEA regulations that are*
14 *scheduled to take effect on December 1, 2010?*

15 No, the answer to Question 1 will not differ under the new FEA regulations that
16 take effect on December 1, 2010.

17 In September 2010, the Commission adopted new definitions of GOTV activity
18 and voter registration activity in response to the decision by the United States Court of
19 Appeals for the District of Columbia Circuit in *Shays III*.⁸ See Explanation and

⁸ The Court of Appeals for the D.C. Circuit in *Shays III* found two flaws in the definitions. First, by requiring efforts to "assist" people to vote or to register to vote, the definitions improperly excluded efforts that "actively encourage people to vote or to register to vote." *Id.* Second, by limiting the scope of the definitions to contacting voters by "individualized means," the definitions improperly excluded "mass communications targeted to many people," and otherwise had the effect of narrowing the activities covered by the rules. *Shays III*, 528 F.3d 914.

1 Justification of Final Rules Regarding the Definition of Federal Election Activity, 75 FR
2 55257 (Sept. 10, 2010) (“2010 E&J”).

3 As revised, the definition of voter registration activity has been expanded to
4 include activities that encourage or urge people to register to vote, as well as those that
5 assist them in registering to vote. 2010 E&J at 55260, 55267. In addition, the current
6 regulatory language about contacting potential voters by “individualized means” has been
7 eliminated. Accordingly, the Employee’s activities also constitute *voter registration*
8 *activity* under the revised definition.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requester may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the

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1 law including, but not limited to, statutes, regulations, advisory opinions and case law.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman

8

1 ADVISORY OPINION 2010-24

2 Ms. C. April Boling, CPA
3 Treasurer, Republican Party of San Diego County
4 7185 Navajo Road, Suite P
5 San Diego, CA 92119

DRAFT B

6 Dear Ms. Boling:

7 We are responding to your advisory opinion request on behalf of the Republican
8 Party of San Diego County (the “Committee”), concerning the application of the Federal
9 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
10 the activities of the Committee’s Voter Registration Coordinator (the “Employee”) and
11 Executive Director.

12 The Commission concludes that the Employee’s activities recruiting, training, and
13 supervising contractors hired by the Committee during the applicable Federal election
14 activity (“FEA”) time periods are *voter registration activity* and therefore FEA under the
15 Act and Commission regulations. The Commission further concludes that the Executive
16 Director’s supervision of the Employee also constitutes *voter registration activity*.

17 ***Background***

18 The facts presented in this advisory opinion are based on your letter received on
19 September 15, 2010.

20 The Committee is a local committee of the Republican Party. The Committee
21 hired the Employee in May 2010. The Employee’s sole function is to recruit, train, and
22 supervise contractors hired by the Committee exclusively to perform voter registration
23 services. The Employee spends 100 percent of her time engaged in this activity.

24 The Employee spends approximately twenty percent of her time on each of the
25 following four categories of activities, for a total of eighty percent of her time:

1 (1) Recruitment, (2) Orientations, (3) Contractor management, and (4) Validation of
2 completed registrations.

- 3 • Recruitment – includes posting positions on job boards, meeting with clubs to
4 encourage members to participate in the electoral process by registering voters,
5 interviewing potential contractors, and scheduling orientations for contractors.
- 6 • Orientations – includes both one-on-one and group meetings with potential
7 contractors to communicate the Committee’s voter registration program’s
8 requirements relating to the contractors’ responsibilities, protocol, and payment
9 structure. This category also includes training contractors on voter eligibility
10 requirements, legal rights to solicit, and table set-up instructions.
- 11 • Contractor management – includes providing additional training upon request,
12 responding to requests from business owners for verification of contractor status
13 and program details, and completing vendor applications on request.
- 14 • Validation of completed registrations – includes scheduling the turning in of
15 voter registration cards, reviewing the voter registration cards for missing
16 information or errors made by the voters, photocopying voter registration cards,
17 calling newly registered voters to welcome them to the Republican Party,
18 reviewing and verifying information submitted by registrants, reporting any
19 suspicious information revealed on such review to the Registrar of Voters, and
20 personally submitting the voter registration cards to the Registrar of Voters.

21 The remaining twenty percent of the Employee’s activity is divided between three
22 additional categories of work. These categories and the percentage of time spent on them
23 are as follows: (1) Material preparation – 10 percent, (2) Events – 5 percent, and

1 (3) Calculation of contractor payments – 5 percent.

- 2 • Material preparation – includes designing and preparing signs and other voter
3 registration materials for the contractors.
- 4 • Events – includes researching potential events at which voter registration may
5 take place and alerting contractors to them, as well as determining the number of
6 contractors to attend such events. It also includes setting up and tearing down
7 voter registration booths, but it does not include the Employee’s actual
8 registration of any voters, herself.
- 9 • Calculation of contractor payments – includes all activities related to calculating
10 the payments to be received from the California Republican Party, and the
11 payments to be distributed to each contractor depending on the number of voter
12 registrations in targeted State Assembly and State Senate districts.

13 The Committee anticipates that it will also employ a Voter Registration Coordinator with
14 these duties in future election cycles.

15 The Committee is currently reporting the activities of the Employee during the
16 applicable FEA time periods as FEA to the Commission. If the Employee’s activities are
17 not FEA, however, the Committee would like to amend its reports and to transfer the
18 appropriate amount of non-Federal funds¹ to cover the non-Federal share of those costs.

19

¹ Non-Federal funds are funds that do not comply with the amount limitations, source prohibitions, and reporting requirements of the Act. See footnote 6, below.

1

2 ***Questions Presented***

3 (1) *Are the services provided by the Employee voter registration activity and*
4 *therefore FEA during the 120 days prior to an election?*²

5 (2) *If the answer to Question 1 is “yes,” do the activities of the Executive Director*
6 *in supervising the Employee also constitute voter registration activity?*

7 (3) *If the answer to Question 1 is “no,” may the Committee amend its reports*
8 *previously filed with the Commission characterizing the services provided by the*
9 *Employee as FEA, and transfer the appropriate amount of non-Federal funds to cover the*
10 *non-Federal share of the cost for these services?*

11 (4) *Will the answer to Question 1 differ under the new FEA regulations that are*
12 *scheduled to take effect on December 1, 2010?*

13 ***Legal Analysis and Conclusions***

14 (1) *Are the services provided by the Employee voter registration activity and*
15 *therefore FEA during the 120 days prior to an election?*

16 Yes, the services provided by the Employee within California’s FEA voter
17 registration periods for 2010 are FEA because they constitute *voter registration activity*.

18 The Bipartisan Campaign Reform Act of 2002³ (“BCRA”) amended the Act, in
19 pertinent part, by introducing and defining a new term – FEA – and by requiring State,

² Voter registration activity is FEA “during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election.” 2 U.S.C. 431(20)(A)(i). For California for 2010, these periods are February 8 through June 8 and July 5 through November 2. See “Federal Election Activity Dates for 2010,” Federal Election Commission, at http://www.fec.gov/pages/bcra/rulemakings/charts_fea_dates_2010.shtml. The Committee has not asked, and the Commission does not address in this advisory opinion, whether any of the Employee’s activities constitute FEA outside of the 120-day voter registration activity FEA time periods.

³ Pub. L. No. 107-155, 116 Stat. 81 (2002).

1 district, and local party committees to pay for FEA with either Federal funds or a
2 combination of Federal and Levin funds.⁴ 2 U.S.C. 441i(b). The Act’s definition of FEA
3 includes *voter registration activity* during the period beginning 120 days before the date
4 of a regularly scheduled Federal election, and ending on the date of the election. 2
5 U.S.C. 431(20)(a)(i) (also known as Type I FEA). Commission regulations define *voter*
6 *registration activity* as “contacting individuals by telephone, in person, or by other
7 individualized means to assist them in registering to vote.” 11 CFR 100.24(a)(2).⁵ It
8 includes, but is not limited to, “printing and distributing registration and voting
9 information, providing individuals with voter registration forms, and assisting individuals
10 in the completion and filing of such forms.” *Id.* It also includes the establishment and
11 implementation of a voter registration program, including the recruitment and training of
12 volunteers. See Explanation and Justification of Final Rules Regarding Definition of
13 Federal Election Activity, 71 FR 8926, 8930 (Feb. 22, 2006) (“2006 E&J”) (noting, in the
14 analogous context of *get-out-the-vote activity* (“GOTV”), which is also known as Type II
15 FEA, that if “a State party committee . . . hir[es] a consultant a month prior to the election
16 to design a GOTV program for the State party committee and recruit volunteers to drive
17 voters to the polls on election day[, t]he consultant’s work . . . would be considered Type
18 II FEA”)

⁴ “Federal funds” are funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g). “Levin funds” are funds raised by State, district, and local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. See 11 CFR 300.2(i).

⁵ In *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) (“*Shays III*”), the appellate court upheld the district court’s decision holding that the Commission’s regulatory definition of, *inter alia*, voter registration was overly permissive and thus contrary to the statute. The court remanded the regulation to the Commission, which promulgated revised regulations on September 10, 2010, as discussed more fully below in Question 4. Since the revised regulations do not take effect until December 1, 2010, the Commission analyzes Questions 1 through 3 under the old regulations, which remain in effect until December 1, 2010.

1 The Commission concludes that the activities performed by the Employee within
2 California’s FEA voter registration periods are Type I FEA because the Employee’s sole
3 duties are to recruit, train, and supervise the contractors hired by the Committee for its
4 voter registration program. The Committee’s description of the Employee’s tasks
5 indicates that the Employee spends 20 percent of her time validating complete
6 registrations, which includes assisting individuals in registering to vote by reviewing their
7 voter registration cards for missing information or errors, and taking the voter registration
8 cards and turning them in to the Registrar of Voters. The Employee spends an additional
9 ten to fifteen percent of her time preparing materials for use in registering voters, such as
10 signage, in-field voter registration materials, and setting up and tearing down voter
11 registration booths. These activities fall within the definition of *voter registration*
12 *activity*. See 11 CFR 100.24(a)(2) (defining *voter registration activity* to include
13 “printing and distributing registration and voting information, providing individuals with
14 voter registration forms, and assisting individuals in the completion and filing of such
15 forms”).

16 Additionally, the Employee spends approximately 65 percent of her time
17 recruiting, training, and managing contractors hired by the Committee to perform *voter*
18 *registration activity*.⁶ The Commission concludes that the Employee’s activities
19 recruiting, training, and supervising contractors hired by the Committee also constitute
20 *voter registration activity* under the Act and Commission regulations because her

⁶ The advisory opinion request indicates that “there is no question that payment to the contractors hired by the committee to perform voter registration activities are FEA during the 120 days prior to the election.” Advisory Opinion Request at page 2.

1 activities are necessary to establish or implement the Committee's voter registration
2 program. Indeed, her duties are an integral and inseverable component of the program.

3 *(2) If the answer to Question 1 is "yes," do the activities of the Executive Director*
4 *in supervising the Employee also constitute voter registration activity?*

5 Yes, the services provided by the Executive Director in supervising the Employee
6 – and, by extension, the voter registration program – constitute *voter registration activity*.
7 Just as with the Employee in the answer to Question 1, above, the Executive Director's
8 supervision of the Employee is necessary to establish or implement the Committee's
9 voter registration program. Because the Committee's voter registration program
10 constitutes *voter registration activity*, the time spent supervising, managing, or directing
11 any aspect of the program is *voter registration activity* under 11 CFR 100.24(a)(2).
12 Accordingly, the time that the Executive Director spends supervising the Employee
13 constitutes *voter registration activity*.

14 *(3) If the answer to Question 1 is "no," may the Committee amend its reports*
15 *previously filed with the Commission describing the Employee's work as FEA, and*
16 *transfer the appropriate amount of non-Federal funds to cover the non-Federal share of*
17 *the cost for these services?*

18 This question is moot, because the answer to Question 1 is "yes."

19 *(4) Will the answer to Question 1 differ under the new FEA regulations that are*
20 *scheduled to take effect on December 1, 2010?*

21 No, the answer to Question 1 will not differ under the new FEA regulations that
22 take effect on December 1, 2010.

1 In September 2010, the Commission adopted new definitions of *GOTV activity*
2 and *voter registration activity* in response to the decision by the United States Court of
3 Appeals for the District of Columbia Circuit in *Shays III*.⁷ See Explanation and
4 Justification of Final Rules Regarding the Definition of Federal Election Activity, 75 FR
5 55257 (Sept. 10, 2010) (“2010 E&J”).

6 As revised, the definition of *voter registration activity* has been expanded to
7 include activities that encourage or urge people to register to vote, as well as those that
8 assist them in registering to vote. 2010 E&J at 55260, 55267. In addition, the current
9 regulatory language about contacting potential voters by “individualized means” has been
10 eliminated. As a result of these changes, the scope of what is *voter registration activity*
11 for purposes of FEA will be broader under the new rules than it is under the current rules.
12 Accordingly, the Employee’s activities and the Executive Director’s activities also
13 constitute *voter registration activity* under the revised definition.

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. See 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requester may not rely on that
19 conclusion as support for its proposed activity. Any person involved in any specific
20 transaction or activity which is indistinguishable in all its material aspects from the

⁷ The Court of Appeals for the D.C. Circuit in *Shays III* found two flaws in the definitions. First, by requiring efforts to “assist” people to vote or to register to vote, the definitions improperly excluded efforts that “actively encourage people to vote or to register to vote.” *Id.* Second, by limiting the scope of the definitions to contacting voters by “individualized means,” the definitions improperly excluded “mass communications targeted to many people,” and otherwise had the effect of narrowing the activities covered by the rules. *Shays III*, 528 F.3d 914.

1 transaction or activity with respect to which this advisory opinion is rendered may rely on
2 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
3 conclusions in this advisory opinion may be affected by subsequent developments in the
4 law including, but not limited to, statutes, regulations, advisory opinions and case law.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman

1 ADVISORY OPINION 2010-24

2 Ms. C. April Boling, CPA
3 Treasurer, Republican Party of San Diego County
4 7185 Navajo Road, Suite P
5 San Diego, CA 92119

DRAFT C

6 Dear Ms. Boling:

7 We are responding to your advisory opinion request on behalf of the Republican
8 Party of San Diego County (the “Committee”), concerning the application of the Federal
9 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
10 the activities of the Committee’s Voter Registration Coordinator (the “Employee”).

11 The Commission concludes that the services provided by the Employee for the
12 Committee are Federal election activity (“FEA”) under the Act and Commission
13 regulations. Accordingly, the Committee must pay the Employee’s salary, wages, and
14 fringe benefits with funds that comply with the amount limitations, source prohibitions,
15 and reporting requirements of the Act (“Federal funds”).

16 ***Background***

17 The facts presented in this advisory opinion are based on your letter received on
18 September 15, 2010.

19 The Committee is a local committee of the Republican Party. The Committee
20 hired the Employee in May 2010. The Employee’s sole function is to recruit, train, and
21 supervise contractors hired by the Committee to register voters. The Employee spends
22 100 percent of her time engaged in this activity.

23 The Employee spends approximately twenty percent of her time on each of the
24 following four categories of activities, for a total of eighty percent of her time:

1 (1) Recruitment, (2) Orientations, (3) Contractor management, and (4) Validation of
2 completed registrations.

- 3 • Recruitment – includes posting positions on job boards, meeting with clubs to
4 encourage members to participate in the electoral process by registering voters,
5 interviewing potential contractors, and scheduling orientations for contractors.
- 6 • Orientations – includes both one-on-one and group meetings with potential
7 contractors to communicate the Committee’s voter registration program’s
8 requirements relating to the contractors’ responsibilities, protocol, and payment
9 structure. This category also includes training contractors on voter eligibility
10 requirements, legal rights to solicit, and table set-up instructions.
- 11 • Contractor management – includes providing additional training upon request,
12 responding to requests from business owners for verification of contractor status
13 and program details, and completing vendor applications on request.
- 14 • Validation of completed registrations – includes scheduling the turning in of
15 voter registration cards, reviewing the voter registration cards for missing
16 information or errors made by the voters, photocopying voter registration cards,
17 calling newly registered voters to welcome them to the Republican Party,
18 reviewing and verifying information submitted by registrants, reporting any
19 suspicious information revealed on such review to the Registrar of Voters, and
20 personally submitting the voter registration cards to the Registrar of Voters.

21 The remaining twenty percent of the Employee’s activity is divided between
22 three additional categories of work. These categories and the percentage of time spent on
23 them are as follows: (1) Material preparation – 10 percent, (2) Events – 5 percent, and

1 (3) Calculation of contractor payments – 5 percent.

- 2 • Material preparation – includes designing and preparing signs and other voter
3 registration materials for the contractors.
- 4 • Events – includes researching potential events at which voter registration may
5 take place and alerting contractors to them, as well as determining the number of
6 contractors to attend such events. It also includes setting up and tearing down
7 voter registration booths, but it does not include the Employee’s actual
8 registration of any voters, herself.
- 9 • Calculation of contractor payments – includes all activities related to calculating
10 the payments to be received from the California Republican Party, and the
11 payments to be distributed to each contractor depending on the number of voter
12 registrations in targeted State Assembly and State Senate districts.

13 The Committee anticipates that it will also employ a Voter Registration Coordinator with
14 these duties in future election cycles.

15 Since June 2010, the Committee has been reporting the services provided by the
16 Employee as FEA to the Commission (and has paid her salary with Federal funds during
17 the applicable voter registration activity time period). If the services provided by the
18 Employee are not FEA, the Committee would like to amend its monthly reports filed in
19 June, July, August, September, and October accordingly and to transfer the appropriate
20 amount of non-Federal funds to cover the non-Federal share of the Employee’s salary,
21 wages and fringe benefits.

22 ***Questions Presented***

23 (1) *Are the services provided by the Employee FEA?*

1 (2) *If the answer to Question 1 is “yes,” are the activities of the Executive*
2 *Director in supervising the Employee also FEA?*

3 (3) *If the answer to Question 1 is “no,” may the Committee amend its reports*
4 *previously filed with the Commission characterizing the services provided by the*
5 *Employee as FEA, and transfer the appropriate amount of non-Federal funds to cover the*
6 *non-Federal share of the Employee’s salary, wages and fringe benefits?*

7 (4) *Will the answer to Question 1 differ under the new regulations pertaining to*
8 *FEA that are scheduled to take effect on December 1, 2010?*

9 ***Legal Analysis and Conclusions***

10 (1) *Are the services provided by the Employee FEA?*

11 Yes, the services provided by the Employee are FEA because the Employee
12 spends at least 25 percent of her monthly compensated time on FEA or on activity in
13 connection with a Federal election.

14 The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”) amended the Act by,
15 in pertinent part, requiring State, district, and local party committees to pay for FEA with
16 either Federal funds or a combination of Federal and Levin funds.² 2 U.S.C. 441i(b).
17 The Act and Commission regulations describe four different types of FEA, two of which
18 (Types I and IV) are particularly relevant here. Type IV FEA covers “services provided
19 during any month by an employee of a State, district, or local committee of a political

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

² “Federal funds” are funds subject to the amount limitations, source prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g). “Levin funds” are funds raised by State, district, and local party committees pursuant to the restrictions in 11 CFR 300.31 and disbursed subject to the restrictions in 11 CFR 300.32. *See* 11 CFR 300.2(i).

1 party who spends more than 25 percent of that individual's compensated time during that
2 month on activities in connection with a Federal election."³ 2 U.S.C. 431(20)(A)(iv); 11
3 CFR 100.24(b)(4). "Activities in connection with a Federal election" include, but are not
4 limited to, the specific types of FEA enumerated in the Act and Commission regulations,
5 including Type I FEA. *See* 11 CFR 300.33(d)(2); *see also* 2 U.S.C. 441i(e)(1)(A)
6 (prohibiting Federal candidates and officeholders from soliciting, receiving, directing, or
7 transferring funds "in connection with an election for Federal office, *including* funds for
8 any Federal election activity") (emphasis added).

9 Voter registration activity (also known as Type I FEA) is defined as "contacting
10 individuals by telephone, in person, or by other individualized means to assist them in
11 registering to vote." 11 CFR 100.24(a)(2). It includes, but is not limited to, "printing and
12 distributing registration and voting information, providing individuals with voter
13 registration forms, and assisting individuals in the completion and filing of such forms."
14 *Id.* It also includes the establishment and implementation of a voter registration program,
15 including the recruitment and training of volunteers. *See* Explanation and Justification of
16 Final Rules Regarding Definition of Federal Election Activity, 71 FR 8926, 8930 (Feb.
17 22, 2006) ("2006 E&J") (noting, in the analogous context of get-out-the-vote ("GOTV")
18 activity,⁴ that if "a State party committee . . . hir[es] a consultant a month prior to the
19 election to design a GOTV program for the State party committee and recruit volunteers

³ The salaries, wages, and fringe benefits of employees spending 25 percent or less of their time on such activities may be paid either from the Federal account or may be allocated as administrative costs pursuant to 11 CFR 106.7(d)(2), unless none of the employees' time is spent on such activity, in which case they may be paid with funds that comply with State law. 11 CFR 300.33(d)(1), (d)(3).

⁴ The definition of GOTV activity is similar to that of voter registration activity. It means, in pertinent part, "contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting." 11 CFR 100.24(a)(3).

1 to drive voters to the polls on election day[, t]he consultant’s work . . . would be
2 considered Type II FEA”).⁵

3 State, district, and local party committees must use only Federal funds to pay the
4 salary, wages, and fringe benefits of any employee who spends more than 25 percent of
5 his or her compensated time in a given month on FEA or on activities in connection with
6 a Federal election (Type IV FEA). 11 CFR 300.33(d)(2); *see also* 2 U.S.C. 441i(b)(1).

7 The Commission concludes that the services provided by the Employee are Type
8 IV FEA, because she spends more than 25 percent of her compensated time for the party
9 committee during the month on activities in connection with a Federal election –
10 specifically, voter registration activity (Type I FEA). The Employee’s sole duties are to
11 establish, implement, recruit for, manage, and supervise the Committee’s voter
12 registration program.

13 Indeed, the Employee engages in voter registration activity not only through her
14 supervision of the Committee’s voter registration program, but also through her direct
15 participation in assisting individuals in registering to vote. The Committee’s description
16 of the Employee’s tasks indicates that the Employee spends approximately twenty
17 percent of her time validating complete registrations, which includes assisting individuals
18 in registering to vote by reviewing their voter registration cards for missing information
19 or errors, and taking the voter registration cards and turning them in to the Registrar of
20 Voters. The Employee spends an additional ten to fifteen percent of her time preparing

⁵The example in the 2006 E&J refers to a “consultant” as opposed to an employee. *See* 2006 E&J at 8930. Because payments to consultants are not covered under Type IV FEA, they would be covered under Type II FEA. *See also* 11 CFR 300.33(a)(2) (State, district and local party committees “may allocate disbursements or expenditures, *except salaries and wages for employees*, between Federal funds and Levin funds” for GOTV activity) (emphasis added).

1 materials for use in registering voters, such as signage, in-field voter registration
2 materials, and setting up and tearing down voter registration booths. These activities fall
3 within the definition of voter registration activity. *See* 11 CFR 100.24(a)(2) (defining
4 voter registration activity to include “printing and distributing registration and voting
5 information, providing individuals with voter registration forms, and assisting individuals
6 in the completion and filing of such forms”).

7 Moreover, those activities performed by the Employee that are not “voter
8 registration activity” under 11 CFR 100.24(a)(2), are, nonetheless, activities “in
9 connection with a Federal election” under 11 CFR 100.24(b)(4). The Employee spends
10 100 percent of her compensated time recruiting, training, and supervising contractors
11 whose sole function is to register voters for the California primary and general elections –
12 elections in which Federal candidates appear on the ballot. “Common sense dictates, and
13 it was ‘undisputed’ below, that a party’s efforts to register voters sympathetic to that
14 party directly assist the party’s candidates for Federal office.” *McConnell v. FEC*, 540
15 U.S. 93, 167 (2003) (citation omitted).

16 Accordingly, because at least 25 percent of the services provided by the
17 Employee are FEA (and fully 100 percent of her activities are in connection with a
18 Federal election), those services are Type IV FEA. Therefore, the Committee must use
19 only Federal funds to pay her salary, wages, and fringe benefits. *See* 11 CFR
20 300.33(d)(2).

1 (2) *If the answer to Question 1 is “yes,” do the activities of the Executive Director*
2 *in supervising the Employee count toward the 25 percent threshold for Type IV FEA?*

3 Yes, the services provided by the Executive Director in supervising the Employee
4 – and, by extension, the voter registration program – count toward the 25 percent
5 threshold for Type IV FEA.

6 As explained in the answer to Question 1, above, time spent by an employee in
7 supervising a voter registration program is both voter registration activity under 11 CFR
8 100.24(a)(2) and activity in connection with a Federal election under 11 CFR
9 100.24(b)(4). Accordingly, the time that the Executive Director spends supervising the
10 Employee counts toward the 25 percent threshold for Type IV FEA.

11 (3) *If the answer to Question 1 is “no,” may the Committee amend its reports*
12 *previously filed with the Commission describing the Employee’s work as FEA, and*
13 *transfer the appropriate amount of non-Federal funds to cover the non-Federal share of*
14 *the Employee’s salary, wages and fringe benefits?*

15 This question is moot, because the answer to Question 1 is “yes.”

16 (4) *Will the answer to Question 1 differ under the new FEA regulations that are*
17 *scheduled to take effect on December 1, 2010?*

18 No, the answer to Question 1 will not differ under the new FEA regulations that
19 take effect on December 1, 2010.

20 In September 2010, the Commission adopted new definitions of GOTV activity
21 and “voter registration activity” in response to the decision by the United States Court of
22 Appeals for the District of Columbia Circuit in *Shays v. Federal Election Commission*,

1 528 F.3d 914 (D.C. Cir. 2008).⁶ *See* Explanation and Justification of Final Rules
2 Regarding the Definition of Federal Election Activity, 75 FR 55257 (Sept. 10, 2010)
3 (“2010 E&J”).

4 As revised, the definition of “voter registration activity” has been expanded to
5 include activities that encourage or urge people to register to vote, as well as those that
6 assist them in registering to vote. 2010 E&J at 55260, 55267. In addition, the current
7 regulatory language about contacting potential voters by “individualized means” has been
8 eliminated. As a result of these changes, the scope of what is “voter registration activity”
9 for purposes of FEA will be broader under the new rules than it is under the current rules.
10 Accordingly, if an activity is voter registration activity under the current definition in
11 11 CFR 100.24(a)(2), then it will also be voter registration activity under the revised
12 definition.

13 This response constitutes an advisory opinion concerning the application of the
14 Act and Commission regulations to the specific transaction or activity set forth in your
15 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
16 of the facts or assumptions presented and such facts or assumptions are material to a
17 conclusion presented in this advisory opinion, then the requester may not rely on that
18 conclusion as support for its proposed activity. Any person involved in any specific
19 transaction or activity which is indistinguishable in all its material aspects from the
20 transaction or activity with respect to which this advisory opinion is rendered may rely on

⁶ The Court of Appeals for the D.C. Circuit found two flaws in the definitions. First, by requiring efforts to “assist” people to vote or to register to vote, the definitions improperly excluded efforts that “actively encourage people to vote or to register to vote.” *Id.* Second, by limiting the scope of the definitions to contacting voters by “individualized means,” the definitions improperly excluded “mass communications targeted to many people,” and otherwise had the effect of narrowing the activities covered by the rules. *Id.*

1 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
2 conclusions in this advisory opinion may be affected by subsequent developments in the
3 law including, but not limited to, statutes, regulations, advisory opinions and case law.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman

1 ADVISORY OPINION 2010-24

2 Ms. C. April Boling, CPA
3 Treasurer, Republican Party of San Diego County
4 7185 Navajo Road, Suite P
5 San Diego, CA 92119

DRAFT D

6 Dear Ms. Boling:

7 We are responding to your advisory opinion request on behalf of the Republican
8 Party of San Diego County (the “Committee”), concerning the application of the Federal
9 Election Campaign Act of 1971, as amended (the “Act”), and Commission regulations to
10 the activities of an employee of the Committee (the “Employee”).

11 The Commission concludes that some of the services provided by the Employee
12 for the Committee are voter registration activity, and that the Committee may amend its
13 reports previously filed with the Commission describing the Employee’s work as FEA,
14 and transfer the appropriate amount of non-Federal funds to cover the non-Federal share
15 of the Employee’s salary, wages and fringe benefits. The Commission further concludes
16 that the services provided by the Executive Director in supervising the Employee are not
17 voter registration activity.

18 ***Background***

19 The facts presented in this advisory opinion are based on your letter received on
20 September 15, 2010.

21 The Committee is a local committee of the Republican Party. The Committee
22 hired the Employee in May 2010. The Employee’s sole function is to recruit, train, and
23 supervise contractors hired by the Committee to register voters. The Employee spends
24 100 percent of her time engaged in this activity. The Committee states that the Employee

1 performs no activities that either encourage or assist potential voters in registering to
2 vote.

3 The Employee spends approximately twenty percent of her time on each of the
4 following four categories of activities, for a total of eighty percent of her time:

5 (1) Recruitment, (2) Orientations, (3) Contractor management, and (4) Validation of
6 completed registrations.

- 7 • Recruitment – includes posting positions on job boards, meeting with clubs to
8 encourage members to participate in the electoral process by registering voters,
9 interviewing potential contractors, and scheduling orientations for contractors.
- 10 • Orientations – includes both one-on-one and group meetings with potential
11 contractors to communicate the voter registration program’s requirements relating
12 to the contractors’ responsibilities, protocol, and payment structure. This
13 category also includes training contractors on voter eligibility requirements, legal
14 rights to solicit, and table set-up instructions.
- 15 • Contractor management – includes providing additional training upon request,
16 responding to requests from business owners for verification of contractor status
17 and program details, and completing vendor applications on request.
- 18 • Validation of completed registrations – includes scheduling the turning in of
19 voter registration cards, reviewing the voter registration cards for missing
20 information or errors made by the voters, photocopying voter registration cards,
21 calling newly registered voters to welcome them to the Republican Party,
22 reviewing and verifying information submitted by registrants, reporting any

1 suspicious information revealed on such review to the Registrar of Voters, and
2 personally submitting the voter registration cards to the Registrar of Voters.

3 The remaining twenty percent of the Employee's activity is divided between three
4 additional categories of work. These categories and the percentage of time spent on them
5 are as follows: (1) Material preparation – 10 percent, (2) Events – 5 percent, and
6 (3) Calculation of contractor payments – 5 percent.

7 • Material preparation – includes designing and preparing signs and other voter
8 registration materials for the contractors.

9 • Events – includes researching potential events at which voter registration may
10 take place and alerting contractors to them, as well as determining the number of
11 contractors to attend such events. It also includes setting up and tearing down
12 voter registration booths, but it does not include the Employee's actual
13 registration of any voters, herself.

14 • Calculation of contractor payments – includes all activities related to calculating
15 the payments to be received from the California Republican Party, and the
16 payments to be distributed to each contractor depending on the number of voter
17 registrations in targeted State Assembly and State Senate districts.

18 The Committee anticipates that it will also employ an employee with these duties in
19 future election cycles.

20 Since June 2010, the Committee has been reporting the services provided by the
21 Employee as federal election activity ("FEA") to the Commission (and, accordingly, have
22 paid her salary with Federal funds). If the services provided by the Employee are not
23 FEA, however, the Committee would like to amend the monthly reports filed for June,

1 July, August, September, and October accordingly and to transfer the appropriate amount
2 of non-Federal funds to cover the non-Federal share of the Employee's salary, wages and
3 fringe benefits.

4 ***Questions Presented***

5 *(1) Are the services provided by the Employee FEA?*

6 *(2) If the Employee's activities are "voter registration," are the activities of the*
7 *Executive Director also considered voter registration during the time he is supervising*
8 *the Employee?*

9 *(3) If the answer to Question 1 is "no," may the Committee amend its reports*
10 *previously filed with the Commission characterizing the services provided by the*
11 *Employee as FEA, and transfer the appropriate amount of non-Federal funds to cover the*
12 *non-Federal share of the Employee's salary, wages and fringe benefits?*

13 *(4) Will the answer to Question 1 differ under the new regulations pertaining to*
14 *FEA that are scheduled to take effect on December 1, 2010?*

15 ***Legal Analysis and Conclusions***

16 *(1) Are the services provided by the Employee FEA?*

17 Some of the services provided by the Employee are Type I FEA (voter
18 registration activity within 120 days of a Federal election).

19 Type I FEA covers "voter registration activity during the period that begins on the
20 date that is 120 calendar days before a regularly scheduled Federal election is held and
21 ends on the date of the election." 2 U.S.C. 431(2); 11 CFR 100.24 (b)(1). Voter
22 registration is defined as "contacting individuals by telephone, in person, or by other
23 individualized means to assist them in registering to vote." 11 CFR 100.24(a)(2). It

1 includes, but is not limited to, “printing and distributing registration and voting
2 information, providing individuals with voter registration forms, and assisting individuals
3 in the completion and filing of such forms.” *Id.*

4 Based on your description of the Employee’s activities, the Commission reaches
5 the following conclusions about which of these activities constitute voter registration
6 activity:

7 1. Recruitment – Posting of positions on job boards, interviewing potential
8 contractors, and scheduling orientations for contractors are not voter
9 registration activity because these activities do not include contacting
10 individuals to assist them in registering to vote, printing or distributing
11 registration and voting information, providing individuals with voter
12 registration forms, or assisting individuals in the completion and filing of such
13 forms. Meeting with various clubs to encourage members to participate in the
14 electoral process by registering voters may constitute voter registration
15 activity if the Employee distributes registration or voting information, or
16 assists individuals in completion and filing of such forms. *See* 11 CFR
17 100.24(a).

18 2. Orientations – These activities do not constitute voter registration activities
19 because these activities do not include contacting individuals to assist them in
20 registering to vote, printing or distributing registration and voting information,
21 providing individuals with voter registration forms, or assisting individuals in
22 the completion and filing of such forms. *See* 11 CFR 100.24(a).

23 3. Material Preparation – These activities constitute voter registration activity

- 1 because they include printing registration and voting information.¹ *See* 11
2 CFR 100.24(a).
- 3 4. Contractor Management – Training of contractors, including “additional
4 training,” does not constitute voter registration activity because the activity
5 does not include any contact with individuals to assist them with registering to
6 vote or other voter registration activity. *See* 11 CFR 100.24(a).
- 7 5. Events – These activities constitute voter registration activity because they
8 involve providing individuals with voter registration forms. *See* 11 CFR
9 100.24(a).
- 10 6. Validation of Completed Registrations – This activity is federal election
11 activity because it involves assisting individuals in the completion and filing
12 of voter registration forms. *See* 11 CFR 100.24(a).
- 13 7. Calculation of Contractor Payments – This activity is not federal election
14 activity because these activities do not include contacting individuals to assist
15 them in registering to vote, printing or distributing registration and voting
16 information, providing individuals with voter registration forms, or assisting
17 individuals in the completion and filing of such forms. *See* 11 CFR 100.24(a).
- 18 Thus, some but not all of these activities fall within the definition of voter
19 registration activity. *See* 11 CFR 100.24(a)(2) (defining voter registration activity).²

¹ The Commission assumes for the purpose of this answer that the materials printed by the Employee are subsequently distributed. *See* 11 CFR 100.24(a)(2) (“Voter registration activity... includes but is not limited to printing and distributing registration and voting information”) (emphasis added).

² The Act and Commission regulations provide different definitions for voter registration activity (Type I FEA) and GOTV activity (Type II FEA), and thus are not necessarily analogous. *Cf.* Explanation and Justification of Federal Election Activity, 71 FR 8926, 8930 (Feb. 22, 2006) (“2006 E&J”) (in the context of GOTV activity, if a State party committee hires a consultant a month prior to the election to design a

1 (2) *If the Employee's activities are "voter registration," are the activities of the*
2 *Executive Director also considered voter registration during the time he is supervising*
3 *the Employee?*

4 Although some of the Employee's activities are voter registration activities, the
5 services provided by the Executive Director in supervising the Employee are not voter
6 registration activities.

7 General supervision of an employee, without more, does not fit within the
8 definition of Type I FEA. Specifically, it is not "voter registration activity" because it
9 does not involve any contact with individuals by telephone, in person, or by other
10 individualized means to assist them in registering to vote, or the printing or distributing
11 of voting information, or providing individuals with voter registration forms or assisting
12 individuals in the completion and filing of such forms. *See* 11 CFR 100.24(a)(2).

13 (3) *May the Committee transfer the appropriate amount of non-Federal funds to*
14 *cover the non-Federal share of the allocable voter registration costs of the Employee?*

15 Yes, the Committee may transfer the appropriate amount of non-Federal funds to
16 cover the non-Federal share of the allocable voter registration costs of the Employee.

17 Under the Act, "an amount that is expended or disbursed for Federal election
18 activity by a State, district, or local committee of a political party . . . shall be made from
19 funds subject to the limitations, prohibitions, and reporting requirements of [the] Act." 2
20 U.S.C. 441i(b)(1). The Act provides for an exception to this general requirement for

GOTV program for the State party committee and recruit volunteers to drive voters to the polls on election day, the consultant's work would be considered Type II FEA; no similar language was included regarding Type I FEA). Thus, although the Commission specifically included in the 2006 E&J the example of the GOTV consultant hired prior to the 72-hour GOTV time window, that example was not included in the voter registration context.

1 certain Federal election activity (including the voter registration activity here), and allows
2 for payment for such activity to be allocated among amounts “which consist solely of
3 contributions subject to the limitations, prohibitions, and reporting requirements of this
4 Act . . .” and “other amounts which are not subject to the limitations, prohibitions, and
5 reporting requirements of [the] Act . . .” (commonly called “Levin funds”). 2 U.S.C.
6 441i(b)(2).³ Under the Act, the allocation ratio is set by Commission regulation.

7 Thus, the Committee may pay for its voter registration activity in one of two
8 ways: (1) with funds subject to the limitations, prohibitions, and reporting requirements
9 of the Act, or (2) allocated among funds subject to the limitations, prohibitions, and
10 reporting requirements of the Act and Levin funds, as specified by 11 CFR 300.33(b). As
11 for the remainder of the Employee’s activities that do not constitute voter registration
12 activity, the Committee may allocate the cost among its Federal and non-Federal
13 accounts in accordance with 11 CFR 106.7(d)(2)-(3).

³ The Act conditions the use of “Levin funds” upon the following:

- (i) the activity does not refer to a clearly identified candidate for Federal office;
- (ii) the amounts expended or disbursed are not for the costs of any broadcasting, cable, or satellite communication, other than a communication which refers solely to a clearly identified candidate for State or local office;
- (iii) the amounts expended or disbursed which are described in subparagraph (A)(ii) are paid from amounts which are donated in accordance with State law and which meet the requirements of subparagraph (C), except that no person (including any person established, financed, maintained, or controlled by such person) may donate more than \$10,000 to a State, district, or local committee of a political party in a calendar year for such expenditures or disbursements; and
- (iv) the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from—
 - (I) any other State, local, or district committee of any State party,
 - (II) the national committee of a political party (including a national congressional campaign committee of a political party),
 - (III) any officer or agent acting on behalf of any committee described in subclause (I) or (II); or
 - (IV) any entity directly or indirectly established, financed, maintained, or controlled by any committee described in subclause (I) or (II). 2 U.S.C. 441i(b)(2)(B).

1 11 CFR 300.33(d)(2) (purporting to define Type IV FEA, regarding certain
2 employee staff time dedicated to activity “in connection with a federal election”) cannot
3 be read to change the answer to this request. That section purports to define Type IV
4 FEA, which the Act defines as “services provided during any month by an employee of a
5 State, district, or local committee of a political party who spends more than 25 percent of
6 that individual’s compensated time during that month on activities in connection with a
7 Federal election.” 2 U.S.C. 431(20)(A)(iv). 11 CFR 300.33(d)(2) could be read as
8 adding an additional, non-statutory requirement *via* regulation, to include “[s]alaries,
9 wages, and fringe benefits paid for employees who spend more than 25 percent of their
10 compensated time in a given month on *federal election activities* or on activities in
11 connection with a federal election must be paid only from a Federal account.” 11 CFR
12 300.33(d)(2) (emphasis added).

13 In addition to the obvious problems (adding an additional restriction not found in
14 the statute, and creating a circular regulatory framework that defines FEA by reference to
15 FEA), applying the regulation here is at odds with other provisions of the statute,
16 specifically 2 U.S.C. 441i(b)(2) (regarding Levin funds). The Commission cannot
17 rewrite that statutory choice (where Congress specifically allowed a local party to pay for
18 its voter registration activity with a mixture of federally-permissible funds and Levin
19 funds) *via* regulation, and thus section 300.33(d)(2) cannot be read to impose a
20 requirement that such activity be paid for only with federally-permissible funds.⁴

⁴ Of course, the opposite is equally true -- merely because a party committee employee spends less than 25% of his time on voter registration activity, section 300.33 cannot eliminate that activity from the reach of the FEA restrictions. The Commission has not fared well when it chooses to ignore the statute to either impose a so-called “hard money” requirement where none exists in the Act, or when it eliminates such a requirement where one is imposed by the Act. *See EMILY’s List v. FEC*, 581 F.3d 1 (D.C. Cir. 2009)

1 Should the Committee choose to allocate these costs accordingly, it should be
2 done within 10 days after receiving this opinion, and the Committee should file the
3 appropriate amendments.

4 (4) Will the answer to Question 1 differ under the new FEA regulations that are
5 scheduled to take effect on December 1, 2010?

6 No, the answer to Question 1 will not differ under the new FEA regulations that
7 take effect on December 1, 2010.

8 In September 2010, in response to the decision by the United States Court of
9 Appeals for the District of Columbia Circuit in *Shays v. Federal Election Commission*,
10 528 F.3d 914 (D.C. Cir. 2008), the Commission adopted a new definition of “voter
11 registration activity.” *See Explanation and Justification of Final Rules Regarding the*
12 *Definition of Federal Election Activity*, 75 FR 55257 (Sept. 10, 2010) (“2010 E&J”). The
13 analysis set forth above is unaffected by the new regulation.

14 This response constitutes an advisory opinion concerning the application of the
15 Act and Commission regulations to the specific transaction or activity set forth in your
16 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
17 of the facts or assumptions presented and such facts or assumptions are material to a
18 conclusion presented in this advisory opinion, then the requester may not rely on that

(striking down a regulation requiring an organization’s administrative costs to be paid for with at least 50 percent Federal funds regardless of whether the organization’s activity was in connection with a Federal election); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir.2005) (“*Shays I*”) (striking down a regulation providing that state and local party committees may pay the salaries of employees who spend less than 25% of their time on federal activities with entirely non-federal funds. Moreover, although 11 CFR 300.33 was promulgated before *Shays I*, the Commission did not seek public comment on whether the changes mandated by that case also required or allowed the Commission to expand the reach of section 300.33(d)(2). *See* Definition of Federal Election Activity (Notice of Proposed Rulemaking), 70 Fed. Reg. 23068 (May 4, 2005) (proposing to redefine “voter registration activity” (Type I FEA), “get out the vote activity” and “voter identification” (Type II FEA), and the Type II FEA periods, but not seeking comment on the impact of these proposed changes on the definition of Type IV FEA).

1 conclusion as support for its proposed activity. Any person involved in any specific
2 transaction or activity which is indistinguishable in all its material aspects from the
3 transaction or activity with respect to which this advisory opinion is rendered may rely on
4 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
5 conclusions in this advisory opinion may be affected by subsequent developments in the
6 law including, but not limited to, statutes, regulations, advisory opinions and case law.

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On behalf of the Commission,

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Matthew S. Petersen
Chairman