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October 4, 2012

BY HAND

Ms. Shawn Woodhead Werth
Secretary and Clerk
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: Democratic Party of Illinois
Request for Consideration of Legal Question

Dear Ms. Werth:

I write on behalf of my client, the Democratic Party of Illinois ("the DPI"), pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45,798 (2011). The Commission should reject the Audit Division's contention that, under the allocation rules, a state party, when paying employees entirely with federal funds, must still keep logs showing the percentage of time they spent in connection with a federal election. Neither the Act nor Commission rules support this position.

The Commission selected the DPI for audit under 2 U.S.C. § 438(b) for its 2010 election cycle activities. The DPI cooperated with the auditors throughout, providing the requested records and responding to the auditors' inquiries. The auditors began field work on April 30, 2012, and held the exit conference on May 18, 2012. On September 12, 2012, the auditors formally informed the DPI of a finding that it failed to keep monthly logs for its employees in violation of 11 C.F.R. § 106.7(d)(1), even though the DPI did not allocate the costs of these employees' salaries and benefits, but rather paid them entirely with federal funds.

It is not the Commission's recordkeeping rules at part 104 that are at issue here, but rather its *allocation* rules at part 106. The particular rule involved, 11 C.F.R. § 106.7(d)(1), implements the restrictions on financing Federal election activity under the Bipartisan Campaign Reform Act of 2002, which generally prohibit state political parties from paying for FEA with nonfederal funds. The stated purpose of section 106.7(d)(1) was to "provide documentation ***for allocation***

purposes." Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 49,064, 49,078 (2002) (emphasis added). The reason was clear. If BCRA allows state parties to pay employees with nonfederal funds only when they devote no more than 25 percent of their time to federal elections, then there must be a way to determine how they spent their time. But when the state party pays its employees 100% federally, then there is no need to verify its decision not to allocate. In that case, there is no allocation, and the employees by definition have been properly paid.

The Commission wrote section 106.7(d)(1) with some sensitivity for the burdens that it would place on state parties. It rolled back an initial proposal to have the employees keep "time records," realizing after notice and comment that this proposal would be "burdensome" and "impractical." *Id.* The auditors' novel interpretation would have the Commission lurch in the opposite direction. It would create a whole new category of burden, while serving no evident or stated purpose.

If adopted and enforced, the auditors' interpretation would violate the Administrative Procedure Act, which bars "agency actions, findings, and conclusions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." 5 U.S.C. § 706(2)(A). The agency must examine the relevant data and articulate a satisfactory explanation for its action, demonstrating a "rational connection between the facts found and the choice made." *Burlington Truck Lines v. United States,* 371 U.S. 156, 168 (1962). Here, there is no such connection. There is no rational connection between 106.7(d)'s recordkeeping requirement, and the need to ensure compliance with the soft money spending limitations, when the employees are paid 100% federally in the first place.

Courts have already corrected the Commission over its rules on paying state party employees, and their logic is instructive here. In *Shays v. FEC,* 414 F.3d 76 (D.C. Cir. 2005) ("Shays I"), the United States Court of Appeals for the District of Columbia Circuit held that the Commission acted arbitrarily and capriciously when it failed to explain the state party employee allocation rules. *See id.* at 110–12. The court looked to the "statutory context" behind the rules, and asked how the FEC could justify allowing employees who spent up to 25 percent of their time on federal election activities to be paid entirely nonfederally. *Id.* at 111. The Commission replied that its policy was a necessary "implication" of the requirement that parties pay more federally active employees entirely with federal funds. *Id.* at 110. The court found that this implication "makes no sense," that "the Commission gave no other justification for" its rule, and that the rule was arbitrary and capricious as a result. *Id.* at 112.

By the court's logic, the auditors' position suffers from the same defect. Here, the "statutory context" is allocation. The law is intended to ensure that state parties do not impermissibly subsidize their Federal election activity with soft money. *Id.* at 111. Because section 106.7(d)(1) says simply that state parties "must keep a monthly log of the percentage of time

each employee spends in connection with a Federal election", the auditors draw the "implication" that the recordkeeping requirement extends to federally paid employees, as well. 414 F.3d at 110. Yet there is no logical connection between the statutory objective of avoiding circumvention of the soft money restrictions, and the auditors' position. Requiring state parties to keep time logs to support paying their employees 100% federally "makes no sense." *Id.* at 112.

Finally, the auditors' position adds insult to injury. In a world where corporations and unions may make independent expenditures, *see Citizens United v. FEC*, 558 U.S. 310 (2010); where nonconnected PACs may raise unlimited, unrestricted contributions to make independent expenditures, *see SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc); and where national parties may raise federal funds in larger amounts indexed to inflation, *see* 2 U.S.C. § 441a(a), state parties are among the most disfavored actors. The auditors' position would compound the heavy compliance burdens that are already laid upon the state parties' shoulders, adding an arbitrary, unsupported recordkeeping requirement. The Commission can fully enforce BCRA, and avoid worsening the gaping imbalance between state parties and other actors, by rejecting the auditors' position.

We appreciate the Commission's consideration of this matter.

Very truly yours,

Brian G. Svoboda
Counsel to the Democratic Party of Illinois

cc (by electronic mail): Chair Hunter
Vice Chair Weintraub
Commissioner Bauerly
Commissioner McGahn
Commissioner Petersen
Commissioner Walther
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Thomas Hintermister, Assistant Staff Director, Audit Division
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