October 28, 2005

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on the Definition of "Solicit" and "Direct"

Dear Mr. Deutsch:

On behalf the Democratic Senatorial Campaign Committee ("DSCC"), the National Republican Senatorial Committee ("NRSC"), the Democratic Congressional Campaign Committee ("DCCC") and the National Republican Congressional Committee ("NRCC") (collectively "Committees"), we submit these comments on the Notice of Proposed Rulemaking identified above which contains proposed amendments to the current definitions of "solicit" and "direct" in Federal Election Commission ("Commission") regulations. 70 Fed. Reg. 56599 (Sept. 28, 2005). The Committees appreciate the opportunity to submit these written comments on the NPRM and each Committee hereby requests an opportunity testify if the Commission holds a hearing on this matter.

Background

The Commission is undertaking this revision under a mandate of the United States Court of Appeals which, in affirming a lower court decision, found that the definitions in question were not consistent with the purposes of the Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002 (the "Act"). *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005). Specifically, the Court held that the term "solicit" did not encompass indirect or implicit requests for contributions, while it found the term "direct" to be lacking in independent functional significance. The Court denied a petition for rehearing *en banc*. *Shays v. FEC*, D.C. Cir. No. 04-5352, *en banc petition denied* 10/21/05.

The Committees are registered with the Commission as national party committees, directed by Members of Congress (who are also typically candidates for Federal office), and file periodic reports of their receipts and disbursements. All monies raised and spent by the Committees are regulated by the amount limitations and source prohibitions under the Act. The amendments contained in the NPRM will directly impact the activities of the Committees, as members of the regulated community, and of Senators, Members of the House, and candidates for election to the House and Senate, of both political parties.

As explained more fully below, the Committees urge the Commission to approach this rulemaking with the goal of preserving stability in the regulatory regime. In complying with the Court's decision, the Commission may fairly consider the point that those seeking revisions in the rules have conceded: the existing rules have apparently worked well. The sponsors of the legislation in the Senate, Senators McCain and Feingold, have written:

> McCain-Feingold broke the link between big donors and legislative and executive branch policymaking. That alone was a very significant and far-reaching achievement that will pay dividends to the American people for years to come.

John McCain & Russ Feingold, C*ampaign Finance Law is Working*, CINCINNATI POST, June 2, 2004 at A9, *available at* http://www.cincypost.com/2004/06/02/guest060204.html; *see also* Anthony Corrado & Thomas E. Mann, *In the Wake of BCRA: An Early Report on Campaign Finance in the 2004 Elections*, THE FORUM, Vol. 2: No. 2, Article 3, available at http://www.bepress.com/forum/vol2/iss2/art3/.

In addition, the Committees oppose any changes to the rules that create new ambiguities or unnecessary restrictions that may chill the interaction between members of the regulated community and grassroots activists and organizations. Any change to the definitions of "solicit" and "direct" should give the regulated community clear notice as to what communications and/or activities constitute a solicitation. The Commission should reject any proposed revisions to the definitions of "solicit" and "direct" that create an opportunity for regulators and political opponents to second guess and misinterpret what a federal officeholder or candidate said at an event.

"To Solicit"

The primary proposed rule would define "solicit" to include "recommend" and "suggest," and it would make clear that the terms reached both implicit and explicit communications. It also supplies a standard of construction: "as a reasonable person would understand it in context." 11 C.F.R. § 300.2(m).

Most significant in the Commission's discussion of the proposed rule is its stated belief that the Court of Appeals misconstrued the scope of the current rule. The Commission did not read the rule as a kind of "magic words" test, and nor did the Committees. It was generally understood that language plainly operating as a solicitation, even if not in the most direct terms, would still fall within the prohibition of 441e. For example, the Court of Appeals was troubled, unnecessarily, that the Commission might not detect a solicitation in this statement:

"It's important for our State party to receive at least $100,000 from each of you in this election." 70 Fed. Reg. 56600 (Sept. 28, 2005).[1]

If this is so, and the rule so construed would meet the requirements of the Court's holding in *Shays*, then the FEC might take the simplest path to a resolution here by adopting Alternative Two. Under this Alternative, the Commission would retain the current wording of the rule, but would clarify in the Explanation and Justification that it will enforce the rule to apply to "indirect, implied requests." *Id.* at 56601.

This approach would introduce the least instability into the current rules, which, as noted, even the sponsors of the law have publicly found to have succeeded in severing the link between federal elected officials and candidates and "soft money." The regulated community would be put on notice that the rule will be interpreted in accordance with the *Shays* holding, but the rule, now familiar to those charged with complying with it for a full cycle and a half, would remain unchanged in structure and wording. And it would avoid the inevitable uncertainties associated with the introduction of new terms—terms that are themselves undefined.

This approach would obviate the need for a "reasonable person" standard of construction. It is not clear what this requirement would add. It is employed in other areas of the law, but it has always been the subject of lively scholarly debate and various interpretations. Far from clarifying the reach of the rule, which is one of the Commission's prime objectives, it simply adds language without improving overall the clarity of the requirement. The Court of Appeals did not ask for a longer, wordier rule, but a better one—that is, a rule better calculated to promote compliance with the Act. Less here would be more: namely, the current rule, which has the virtues being a *rule*—relatively clear in purpose and scope and well designed to provide notice to those subject to it. It is not likely that Congress enacted a law on the question of solicitation, one that directly affects all of its activities, without the expectation that the rule would be clear and comprehensible in wording and predictable in application.

There are two additional issues raised by the rulemaking: the treatment of "conduct" and the use of specific examples. In the first case, we do not see how the Commission can usefully speak, with anything approaching desirable clarity or even coherence, about the

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[1] Another example misconstrued by the Court as beyond the grasp of the current rule is: "X is an effective State party organization; it needs to get as many $100,000 contributions as possible." *Id.*

interpretation of behavior. Winks and nods never function alone; they embroider words. The Commission, as it interprets the current rules, has made clear that it can read them to reach "indirect, implied requests," and this should be sufficient to reach any words sufficient to make out a solicitation, regardless of whether they are accompanied for emphasis by this or that gesture. In those cases, the gestures may punctuate the case, leaving no doubt, but the words do the work. Where the words leave doubt, it is not clear how an enforceable rule, with adequate guidance to the community, could rest on behavior and the challenges of correctly interpreting it.

The Commission asks about the use of examples. These belong in the Explanation and Justification, but not in the text of the rules. They may help to illustrate how the Commission would interpret the rules, but it is far better to have the Commission supply a rule, illustrated by an example, than to confuse the two. With the use of examples presented as part of the rules, the Commission would invite arguments that modified versions of the examples, though fully consistent with the rules, have been purposefully excluded, with the implication that they are *per se* illegal. For purposes of the current rulemaking, it will facilitate community understanding and compliance if interpretative problems of this kind are avoided.

The Term "Direct"

The Commission's proposed definition of the term "direct," to mean "to guide" a potential contributor to identified candidates or parties, adequately addresses the *Shays* Court's expectation that it be clearly assigned a more independent, functional role in the rule. This supplements the prohibition without duplicating the substance of the term "solicit" and, by doing so, meets the requirements of the *Shays* decision.

Attendance at Events Sponsored by Organizations

The Commission seeks comment on the question of whether it should reconsider the opinions issued in Advisory Opinions 2003-3 and 2003-36, authorizing attendance and participation in fundraising events, other than state and local party fundraising events, at which soft money is raised.

The Commission should keep these rulings in place. They offer detailed guidance to the regulated community, without having caused any known abuse or confusion. Their retention avoids a narrow and inappropriate focus on parties to the exclusion of other political organizations that wish to have the involvement of officials and candidates on the same legal terms. The Commission has specified the safeguards required to assure compliance with the

core purposes of 441e. The regulated community now has a full cycle of working experience with these safeguards, and these seem to have served their intended purpose in maintaining the barrier between candidates and officials and the making of unlimited soft money donations.

Miscellaneous Issues

The Commission also requests comments on these issues:

(1) *The legal status of "attendance" at an event.* The Commissions has asked for comment on whether attendance alone should ever serve as the basis for a finding of solicitation. The Committees counsel against this sort of approach in the strongest terms. Nothing in the statute or regulations suggest, nor would any existing constitutional standard allow, a Congressional choice of prohibiting officeholders or candidates from even physically attending a political function—even one where funds are being raised.

(2) *The incorporation in the rules of the written and oral "disclaimers" by which officials and candidates limit their solicitations to federally restricted funds.* Since the Commission will revise its rules for other purposes, it would serve the purposes of clear, readily accessible guidance if the Commission did incorporate these requirements into the rules. These requirements need not specify the precise words to be used but would serve the purposes of the rule if they directed generally that candidates and officeholders clearly state their intention to raise only federally permissible funds. One rule reflecting all the settled requirements serves the interests of clarity and raises the likelihood of widespread compliance.

(3) *The use in these rules of the "solicitation" rulings and other guidance established for the specific context of corporate and trade association activity.* The Commission should take care not to confuse the policy issues presented for candidates and officials, on the one hand, and corporations and associations, on the other. Corporations and associations are subject to a stringent prohibition on federal election-related activity, and the "solicitation" rules in that context, fashioned in the shadow of that prohibition, should not influence regulatory judgments on rules intended for public elected officials and candidates

for federal office. In this latter case, the judgments must take more delicately into account the effects of any rules on the ability of elected officials and candidates to carry on their core, constitutionally protected activities.

Very truly yours,

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And the Democratic Congressional Campaign Committee

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