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cc "Lance Olson" <Lance@olsonhagel.com>
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Subject CA Democratic Party -- Comments on FEA Regulations
(89103.13)

Ms. Rothstein: Please find attached comments submitted by the California Democratic Party regarding the Commission's proposed regulations changing the definitions of "voter registration activity" and "get-out-the-vote activity" in response to the Shays III Appellate decision.

Thank you for the opportunity to submit the comments.

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CDP -- VR and GOTV NPRM Comments FINAL.pdf

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November 20, 2009

Ms. Amy L. Rothstein, Asst. General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

**RE: Comments of California Democratic Party on Federal Election
Activity Rulemaking**

Dear Ms. Rothstein:

These comments are submitted by the California Democratic Party in response to the proposed changes to the Commission's rules amending the definitions of "voter registration activity" and "get-out-the-vote activity." The proposed changes are in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in Shays v. FEC ("Shays III"), 528 F.3d 914 (2008).

The proposed regulations establish new definitions for voter registration and GOTV activities that eliminate the requirement that state and local political party committees provide either actual or individualized assistance to voters in order for the activity to qualify as Federal election activity. The proposed regulations also contain two narrow but important exceptions for State and local political party committees engaged in State and local election activities.

First, the proposed regulations make an exception to the definition of GOTV activity for a public communication that refers "solely to one or more clearly identified candidates for State or local office and notes the date of election." Second, the regulations contain an exemption for voter identification or GOTV activities that are solely in connection with a non-Federal election that is held on a date on which no Federal election is held and that refers exclusively to either (1) non-Federal candidates participating in a non-federal election, (2) ballot measure activities scheduled for the date of the non-Federal election, or (3) the date, polling hours and locations of a non-Federal election.

CDP supports the two exceptions to GOTV and voter identification activities because they allow State and local political party committees to conduct some types of GOTV and voter identification outreach related exclusively to State and local elections without imposing FEA funding requirements. Nevertheless, CDP believes that any regulation that brings into

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the scope of voter registration or GOTV activities the mere encouragement of a person to register to vote or vote – such as by merely mentioning the date of the election -- is overly restrictive.

If the Commission retains the framework contained in the current regulations, the exception for GOTV activities should be broadened to include public communications that refer to a state or local ballot measure being voted on the same date on which a Federal election is held and that also include a reference to the election date of the ballot measure.

DISCUSSION

BCRA's framers were focused on prohibiting State and local party committees from serving as conduits for the receipt of soft money contributions intended to have a direct impact on Federal elections. In passing BCRA, Congress illustrated the specific types of activities designed to be limited by the soft money restrictions imposed on Federal election activities:

In the 1996 Presidential election, for example, State parties spent many millions of dollars on television ads that promoted their Presidential candidates. The money for these ads, moreover, in many cases was either transferred from the national parties or contributed by donors directly to the State parties.

(Senator John McCain, Senate Floor Speech, 148 Cong.Rec. S2139
(March 20, 2002).)

Nothing in BCRA or its legislative history suggests that its purpose was to restrict State and local party committees from engaging in advocacy solely on behalf of state and local candidates. In fact, BCRA's Congressional architects were concerned about preserving or enhancing the traditional role that State and local political parties play in State and local elections. According to Senator McCain, "the bill does not attempt to regulate State and local party spending . . . where state and local parties engage in purely non-Federal activities." (148 Cong.Rec. S2138 (March 20, 2002).) Senator McCain continued: "If anything, the bill will return the State and local parties to the grassroots and encourage them to broaden their bases and reach out to average voters." (Id.)

Congress' concern with the preservation of the role of State and local political parties is also evident from the express language of BCRA. Under 2 U.S.C. section 431(20)(B)(i), the definition of "Federal election activity" specifically excludes any amount expended by a State or local political party for public communications that refer solely to a clearly identified candidate for State or local office as long as the communication does not otherwise qualify as FEA. Grassroots campaign materials such as buttons, bumper stickers, or yard signs that name or depict only a candidate for State or local office are also statutorily exempted. (2 U.S.C. § 431(20)(B)(iv).)

In Shays III, the Appeals Court invalidated the Commission's regulations defining GOTV and voter registration activities because, in the Court's view, these definitions left too much room for soft money to be used directly in connection with Federal elections. (528 F.3d at 932.) The Shays III Court was particularly concerned with closing the "two distinct loopholes" that exclude from the FEA funding requirements any GOTV or voter registration communications that did not provide actual or individualized assistance to voters. (Shays III, 528 F.3d at 931.)

The Commission's draft regulations attempt to strike a careful balance between the Court's mandate to narrow the definitions of GOTV and voter registration activities on the one hand and preserving a role for State and local political parties to engage in purely State and local election activities on the other. Although the proposed regulations resolve the Court's concern by broadening the definitions of GOTV and voter registration, the regulations reach too far when they capture activities that do not actually facilitate voting or voter registration -- including the mere mention of the date of election which is at the core of most meaningful political communications.

CDP suggests that the Commission adopt slightly narrower definitions of GOTV and voter registration activities to include activities that facilitate the act of registering to vote or voting, instead of encompassing the mere encouragement to vote.

CDP encourages the Commission to retain the exclusions for public communications relating to State and local elections. The benefit of allowing political parties to continue their grassroots election activities in support of State and local candidates by including the narrow exception far outweighs the incidental effect these activities may have on Federal elections. Even the most skeptical among us would have a difficult time drawing a connection between contributions received by State and local political parties used to pay for communications that feature only state or local candidates and any corrupting influence such contributions could have on Federal candidates.

Maintaining the exceptions is particularly important given the fact that CDP and other State and local political party committees will otherwise be subject to the FEA requirements in spite of the fact that their focus is overwhelmingly to engage in local, not Federal, grassroots activities. Most of these grassroots activities involve supporting or opposing State and local candidates, ballot measures, and other community causes. In our experience, many local committees avoid engaging in Federal election activities altogether because complying with the allocation rules is too complicated and burdensome for these mostly volunteer organizations. If Commission regulations reach too far, the practical effect would be to discourage local party committees from doing what they are primarily formed to do—support State and local candidates and ballot measures.

Also, because California ballot measure elections most often occur in conjunction with Congressional primary or general elections, CDP recommends that the exception for GOTV communications that refer to a State or local candidate and refer to the date of election be

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expanded to include communications that clearly identify a State or local ballot measure and include the date of the election. In California, State and local voters are frequently called on to pass or reject ballot measures which CDP supports or opposes. In the last two regular election cycles alone, California voters have decided on 29 different ballot measures concerning topics as varied as abortion rights, infrastructure bonds, and the ability of same sex couples to marry. This number does not include measures voted on at special elections.

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We appreciate the opportunity to submit these comments regarding the Commission's proposed regulations.

Sincerely,

OLSON HAGEL & FISHBURN LLP



RICHARD R. RIOS

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