



"Gordon, Rebecca (Perkins
Coie)"
<RGordon@perkinscoie.com>

To <FEAShays3@fec.gov>

cc

bcc

11/20/2009 06:52 PM

Subject Comments to rulemaking on "Federal election activity"
definition

Attached please find comments submitted on behalf of the Democratic National Committee in the Commission's rulemaking on the definition of "Federal election activity."

<<Document.pdf>>

Yours,

Rebecca Gordon

Rebecca Gordon
Perkins Coie LLP
ph. 202.434.1676
f. 202.654.9666
rgordon@perkinscoie.com

IMPORTANT TAX INFORMATION: This communication is not intended or written by Perkins Coie LLP to be used, and cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer under the Internal Revenue Code of 1986, as amended.

* * * * *

IRS CIRCULAR 230 DISCLOSURE: To ensure compliance with Treasury Department and IRS regulations, we you that, unless expressly indicated otherwise, any federal tax advice contained in this communication (including attachments) is not intended or written by Perkins Coie LLP to be used, and cannot be used by the taxpayer, for purpose of (i) avoiding penalties that may be imposed on the taxpayer under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein (or any attachments).

* * * * *

NOTICE: This communication may contain privileged or other confidential information. If you have received it please advise the sender by reply email and immediately delete the message and any attachments without copying or disclosing the contents. Thank you.



Document.pdf



607 Fourteenth Street N.W.
Washington, D.C. 20005-2011

PHONE: 202.628.6600

FAX: 202.434.1690

www.perkinscoie.com

Rebecca H. Gordon
PHONE: (202) 434-1676
FAX: (202) 654-9666
EMAIL: RGordon@perkinscoie.com

November 20, 2009

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

Re: Definition of Federal Election Activity

Dear Ms. Rothstein:

On behalf of the Democratic National Committee, we write in response to the Commission's October 20, 2009 notice of proposed rulemaking on proposed changes to the definition of "Federal election activity."

As the governing body of the national Democratic Party, the DNC works hand in hand with state party committees every election cycle to support candidates at the local, state, and national level. Much of the Democratic Party's most important work – organizing volunteers, educating citizens, and registering voters – is undertaken at the grassroots level by state parties.

The DNC understands the importance of ensuring that the new rules address the concerns the Court of Appeals raised in *Shays*. However, it is not inconsistent with this objective to exempt exclusively state-based activity. And, at a time when new technologies are changing and expanding the ways that the parties can engage with their members and encourage new participation, at low- to no-cost, it is not necessary to the core BCRA enforcement function (prohibiting the use of soft money in federal elections) for the Commission to regulate all of these new ways to communicate without regard to whether doing so actually advances the purpose of BCRA. See *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 132 (2003) ("BCRA's central provisions are designed to address Congress' concerns about the increasing use of soft money and issue advertising to influence federal elections.").

24216-0001/LEGAL17326640.1

ANCHORAGE · BEIJING · BELLEVUE · BOISE · CHICAGO · DENVER · LOS ANGELES · MENLO PARK
OLYMPIA · PHOENIX · PORTLAND · SAN FRANCISCO · SEATTLE · SHANGHAI · WASHINGTON, D.C.

Perkins Coie LLP and Affiliates

In light of these concerns, the DNC shares the views the Association of State Democratic Chairs has expressed in its comments on these proposed changes. In addition, it respectfully suggests that the Commission could help mitigate these effects with three particular actions:

1. Adopt the exclusion to the definition of "GOTV activity" for public communications that refer solely to state or local candidates.

The Commission's proposed rule excludes from the definition of "GOTV activity" public communications that refer only to state or local candidates, and include the date of the election. *See* Definition of Federal Election Activity, 74 Fed. Reg. 53,674, 53,680 (Oct. 20, 2009). It explains that its purpose here is to avoid "render[ing] meaningless" the statutory definition of "Federal election activity" which does not include amounts expended for public communications referring solely to state or local candidates. *See id.* at 53,678.

The DNC encourages the Commission to adopt this exemption. Without it, as the Commission notes, solely state-specific activity – which Congress did not intend to regulate when it passed BCRA – would fall within the zone of federally-regulated conduct.

Consider, for example, an email communication sent in October 2010 from a state party devoted exclusively to biographies of candidates in a state's gubernatorial election, ending with the line "Be sure to vote on November 2!" and a link to the website of the state's Department of Elections. In the absence of the exception, as it is sent in the 120 days before a November federal election – when it would be most effective – it would constitute federally-regulated GOTV under the new rules. This would be true even if there is no mention at all of a federal candidate.

2. Include a similar exclusion in the definition of "voter registration activity."

The DNC respectfully urges the Commission to add a similar exemption from the definition of "voter registration activity."

As the Commission notes, part of its task after *Shays* is to craft a definition of "Federal election activity" that includes mass communications. *See* 74 Fed. Reg. at 53,676. The proposed new rule thus significantly expands the definition of "voter registration activity" to include several new categories of communications aimed at the general public. It does not, however, limit these activities with respect to the election (federal, state, or local) that provides the impetus for the communication. Accordingly, it risks the unnecessary intrusion into purely state and local activity that the Commission has identified with respect to "GOTV activity."

A modification of the example given above illustrates this. Take an email communication sent in October 2010 from a state party devoted exclusively to biographies of candidates in a state's gubernatorial election, including the line "Be sure to register today!" and a link to the Department of Elections' website. This would constitute federally-regulated voter registration under the new rule. And the same result would be reached with respect to a Twitter tweet sent out from a state party that says simply "Register to vote for [Gov.] Candidate Jones by Sept. 7."

Hence, the exemption that the Commission proposes for "GOTV activity," for purely state and local activity, is properly and logically included as an exclusion from the definition of "voter registration activity."

3. Limit mass communications covered to those that qualify as "public communications."

In its 2006 rulemaking on Internet Communications, the Commission explicitly acknowledged that the unique features of the internet -- in particular its accessibility, low cost, low barrier to entry, and interactive features -- merited regulatory restraint. *See* Internet Communications, 71 Fed. Reg. 18,589, 18,589 (Nov. 18, 2009) ("[T]he Commission recognizes the Internet as a unique and evolving mode of mass communication and political speech that is distinct from other media in a manner that warrants a restrained regulatory approach."). This position of restraint led the Commission to opt to exclude from the disclaimer requirements, the coordination rules, and other regulatory provisions most communications made over the internet.

The DNC observed firsthand the ways in which this decision has encouraged and grown political speech. The levels of political engagement encouraged and cultivated on the internet and through other electronic means during the 2008 election cycle, particularly among young voters, far surpassed anything seen in prior elections. *See* Pew Internet and American Life Project, *The Internet and the 2008 Election* (June 15, 2008), available at www.pewinternet.org/Reports/2008/The-Internet-and-the-2008-Election.aspx. And in the short time since the 2008 election, advances in technology have borne even more advanced methods of communication that would enable political committees to reach an even broader audience.

The Commission proposes in this rulemaking to include in the "Federal election activity" definition various kinds of communications without including any kind of exception for internet or electronic activity. The DNC respectfully submits that this exacts too high a cost on political speech. It both contravenes the Commission's stated views about internet communications, and fails to advance Congress's stated purpose in passing BCRA: to reduce the flow of so-called "soft money" into federal elections.

November 20, 2009
Ms. Amy Rothstein, Esq.
Page 4

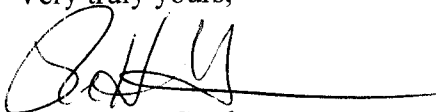
Communications over the internet provide a virtually no-cost way for state parties to communicate with potential voters. Yet, as shown in the examples above, the proposed rules would treat these low- or no-cost communications the same as they would a high-cost television ad, radio ad, billboard, or robocall. Given the cost involved, treating these communications as "Federal election activity" does nothing to help effect the purpose of BCRA, and would certainly chill state party political activity using these modes of communication.

The DNC therefore respectfully suggests that the Commission create an exception in its proposed definition for voter registration and GOTV messages that are conveyed through the internet. The Commission could accomplish this very simply by limiting the covered communications to those that qualify as "public communications" under current regulations.

This would be entirely consistent with Congress's stated purpose in passing BCRA. It would also be consistent with the court's opinion in *Shays*.

We appreciate the opportunity to comment on this matter.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Rebecca H. Gordon', with a long horizontal line extending to the right.

Rebecca H. Gordon
Counsel to the Democratic National Committee