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

Re: Comments of the Los Angeles County Democratic Central Committee in Response to the Request for Comments on the Notice of Proposed Rulemaking Regarding the Definition of Federal Election Activity

Dear Ms. Rothstein:

This law firm is counsel to the Los Angeles County Democratic Central Committee, also known as the Los Angeles County Democratic Party (LACDP). The LACDP is the official governing body of the Democratic Party in the County of Los Angeles. It is the largest local Democratic Party entity in the United States, representing over 2.2 million registered Democrats in the 88 cities and the unincorporated areas of Los Angeles County.

As a local political party committee, the LACDP focuses much, if not most, of its political efforts on the election of candidates to municipal, county and other state and local office. The LACDP is also the entity which sought guidance from the Federal Election Commission (Commission) in Advisory Opinion (AO) 2006-19, an AO which was extensively discussed by the Court in Shays v. Federal Election Commission, 528 F.3d 914 (D.C. Cir. 2008), the so-called "Shays III" case. AO 2006-19 dealt with communications (mail and automated calls) directed at registered Democrats solely in connection with a Long Beach municipal election being held simultaneously with a federal election. As such, the effects of the Commission's Shays III-inspired regulations on municipal and other nonfederal election activities when the nonfederal election in question is held near the time of a federal election is of particular importance to LACDP. Accordingly, this letter focuses on: (i) public communications referring solely to state and local candidates and ballot measures; and (ii) voter identification and get-out-the-vote (GOTV) activities in connection with a non-federal election.

I. Exclusion for Public Communications Relating to State and Local Elections.

2 U.S.C. § 431(20)(b)(i) provides that the term "[f]ederal election activity" does not include a "public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii)." In upholding the Bipartisan Campaign Reform Act (BCRA) against a facial challenge, the Supreme Court, in McConnell v. Federal Election Commission, 124 S.Ct. 619, 674 (2003), concluded that the BCRA was closely drawn to meet a sufficiently important government interest because it is "narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties that can be used to benefit federal candidates directly." In so concluding, the Court noted, with approval, that there was an exception for public communications which "refer solely to a clearly identified candidate" for non-federal office. Id. at 671 & 672.

Proposed 11 CFR § 100.24(a)(3)(iii) excludes from the definition of GOTV activity a "public communication that refers solely to one or more clearly identified candidates for State or local office, but does not refer to a clearly identified Federal candidate, and notes the date of the election." This is a common-sense implementation of the exception in § 431(20)(b)(i). At any one time, there may be numerous upcoming elections. For example, in Los Angeles County, during 2009, there have been or will be the following major elections (affecting either a larger city or multiple jurisdictions at one time): on March 24, 2009, there was a special primary election for state senate; on May 19, 2009, there were a statewide and consolidated local elections; on June 30, 2009, there were a number of school districts which had special parcel tax elections; on July 14, 2009, there was a special general election for the 32nd Congressional District; on September 1, 2009, there was a special state assembly race; on September 22, 2009, there was a special City of Los Angeles city council race; on November 3, 2009, there were consolidated elections in dozens of cities and school districts; on December 8, 2009, there will be a special runoff election in the City of Los Angeles city council race; and on December 29, 2009, there will be a Long Beach special school board election. Given the fact that Los Angeles County has eighty-eight municipalities and a multitude of school and other districts, this is not uncommon. Indeed, it is quite common in each calendar year for Los Angeles County to have not less than six regularly scheduled election dates, plus special elections. As a result, the absence of an election date in a communication would lead to voter confusion as to when the non-federal candidate's race is appearing on the ballot. Given the real world context in which non-federal elections take place, the absence of an election date on any communication would, as a practical matter, substantially vitiate, if not entirely eliminate, the usefulness of the communication. Thus, a rule precluding the listing of the bare election date in a communication focused "solely" on one or more clearly identified candidates for non-federal office would nullify the exception in § 431(20)(b)(i).

Moreover, it is clear that Congress thought of television, cable and radio advertisements as the paradigmatic "public communications." And in most of the country, the use of the election date in such mass broadcast/cablecast communications is common, while the use of

information such as how to find your polling place or how to get a ride to the polls is less common. An exception that disallowed the use of the date of the election in the communication, therefore, would effect a significant change in substantially every non-federal public communication in a way that an exception that disallowed only more specific efforts to get individual voters to the polls perhaps would not. We are aware of nothing in the Congressional record which would support the notion that Congress wished to effectuate such a wholesale change in state and local advertising. In these circumstances, it is fair to assume that Congress did not intend to disallow the use of the bare date of the election in public communication referring to one or more specific non-federal candidates.

II. Exclusion for Voter Identification and GOTV Activity Solely in Connection with Non-Federal Election.

Proposed 11 CFR § 100.24(c)(5) excludes from the definition of "Federal election activity" voter identification or GOTV activity that "is 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: (i) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates; (ii) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or (iii) The date, polling hours and locations of the non-Federal election." In its Notice of Proposed Rulemaking (NPRM), the Commission sought comments as to "whether the exclusion should take into account the proximity of the next Federal election." LACDP submits that the statute does not require that the exclusion be defined in terms of a fixed time period; and that the McConnell decision's focus on whether non-federal activity "benefit[s] federal candidates directly" provides a more constitutionally suitable test. See, also, McConnell, supra, 124 S.Ct. at 674 (BCRA is constitutional insofar as it relates to GOTV and voter identification because it regulates conduct from which "federal candidates reap substantial rewards.")

First, the only BCRA provision which mandates a time period or "window" within which all activity is "Federal election activity" is 2 U.S.C. § 431(20)(a)(i), which provides that "Federal election activity" includes "voter registration activity 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." In contrast, 2 U.S.C. § 431(20)(a)(ii) does not contain any reference to a specific time period. Rather, § 431(20)(a)(ii) requires that, to be "Federal election activity," the voter identification or GOTV activity be "conducted in connection with an election in which a candidate for Federal office appears on the ballot." Accordingly, nothing in the statute requires the Commission to base its exception on a time-period or time window.

And, second, whether the activity took place within a specific time window, while perhaps not impermissible,[1] is not the test used by the Supreme Court in evaluating the constitutionality of the voter identification and GOTV provisions of the BCRA. Rather, as noted

[1] See McConnell v. Federal Election Commission, 124 S.Ct. at 675 n. 63.

above, the test used was the nexus of the non-federal activity to a direct benefit to a federal candidate. Thus, the proviso that the non-federal candidate not also be a candidate for federal office, the (externally derived BCRA) requirement that if a federal candidate is somehow referenced (for example, as an endorser) nothing in the activity promote, oppose, support or attack that federal candidate, and the requirement that the election itself be held on a separate date are more appropriate methods to assure that the activity does not directly benefit a federal candidate and, thus, a more appropriate way than a time window to define what is—and is not—an activity governed by the restrictions on "Federal election activity" imposed by the BCRA.

The NPRM states that the proposed exception is "based on the premise that voter identification and GOTV activity for non-Federal elections held on a different date from any Federal election will have no effect on subsequent Federal elections." It then requests empirical evidence to support (or refute) that premise. However, it is difficult, if not impossible, to prove a negative—that is, that voter identification or GOTV activity has no effect whatsoever on a Federal election. Rather, as discussed above, a more suitable way of envisioning the test is whether voter identification or GOTV activity is sufficiently connected to a federal election or a candidate for federal office to warrant a determination that such activity is "in connection with a federal election." Using this test, the LACDP submits that the Commission's judgment about the likely effect of activity for a state or local candidate in a separate non-federal election is amply warranted.

Finally, whichever test the Commission may choose, LACDP submits that, as described in the attached statements of Steve Barkan, SG&A Campaigns, Bryan Choate, DMedia, Inc., Sue Burnside, Burnside and Associates, Maureen Erwin, Erwin and Muir Public Affairs and Political Consulting, Doug Herman, The Strategy Group, Larry Levine, Levine and Associates, and Ben Tulchin, Tulchin Research, each an expert campaign consultant doing business in California, voter identification and GOTV efforts in a non-federal election are of little or no utility for use in connection with a different candidate running for a different office on a different date.

The LACDP thanks the Commission for the opportunity to participate in the comment process.

If I may be of any additional assistance, please feel free to contact me at the address and telephone number on the letterhead of this correspondence.

Very truly yours,

Laurence S. Zakson,
of Reich, Adell & Cvitan

LSZ/ws:caw
Enclosures

cc: Eric Bauman (w/ encls.)
Hon. Martha Escutia (w/o encls.)
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