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To "FEAShays3@fec.gov" <FEAShays3@fec.gov>
cc
bcc
Subject Rulemaking Comments

Attached are the comments of Joseph Sandler and Neil Reiff regarding the FEA rulemaking. The original copy will be sent via first class mail.

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FEA Final Comments 11-20-09.pdf

SANDLER, REIFF & YOUNG, P.C.

November 20, 2009

Via Email

Amy Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: "Definition of Federal election activity"

Dear Ms. Rothstein:

These comments are submitted in response to the Commission's above-referenced Notice of Proposed Rulemaking, 74 *Fed. Reg.* 53674 (October 20, 2009), proposing amendments to the Commission's regulations relating to the definition of "Federal election activity." These comments are being submitted by our law firm and reflect our views as practitioners representing more than thirty-five state and local Democratic Party committees, as well as several associations of state and local candidates. These comments do not necessarily represent the views of any particular client of our firm.

The undersigned request an opportunity to testify at the Commission hearing of December 16, 2009 regarding the proposed changes to the Commission's regulations in the above referenced notice.

I. Introduction

This rulemaking is being undertaken in response to the decision in *Shays v. Federal Election Commission*, 528 F.3d 914 (D.C. Cir 2008)("*Shays III Appeal*"). In that case, the Court of Appeals, *inter alia*, set aside the Commission's current regulations regarding the definition of "voter registration" and "get-out-the-vote." While the Commission's decisions in this rulemaking obviously must conform to the opinion in *Shays III Appeal*, we respectfully suggest that the Commission can achieve such conformity yet still heed its own caution as set out in its E&J in the original BCRA soft money rulemaking:

> ...the Commission has concluded that it must define GOTV in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV

> is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity.

Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 *Fed. Reg.* 49064, 49067 (July 29, 2002).

To be sure, it is difficult to fathom from the Court's opinion in *Shays Appeal III* precisely what the Commission is supposed to do about the FEA regulations. The Court's discussion of the FEA regulations is covered in a mere four pages of a thirty-seven page opinion. In that brief discussion, the Court, without the aid of any empirical evidence of actual abuse of the regulations, relied upon hypothetical situations described by the plaintiffs to find that the Commission's revised definitions of "voter registration" and "GOTV activity" created two "loopholes," specifically, that the requirement that activity "assist" voters in registering or voting, and the requirement that communications be by "individualized means," excluded activity that the Court believed Congress intended to cover. The Court did not provide any real guidance to the Commission on what would be acceptable in an amended regulation. Nevertheless, we believe that the Commission can comply with the Court's vague directives and also provide guidance to the regulated community, without a vast overreaching into non-federal campaign activity. We respectfully suggest that the Commission can successfully navigate this path by recognizing several basic points.

First, although the Court failed to recognize this, BCRA *already* treats as "Federal election activity" ("FEA") all mass and public communications that mention either a federal candidate or political party. Attached to these Comments as Exhibit A is a chart that demonstrates that most campaign activities that would directly or indirectly benefit federal candidates are already covered by the existing Commission regulations and compares the treatment of those campaign activities under both the Commission's proposed regulations and our understanding of the current regulations. Therefore, as a general matter, the only activities that will be affected by the revised final rules resulting from this rulemaking are activities that exclusively mention non-federal candidates, especially those that are limited purely to advocacy for those candidates.

Second, the assumption that state and local parties are waiting with bated breath to pounce on the supposed "loopholes" and exploit them to expend vast sums of soft money, simply defies reality. It has been our experience that most state and local party committees, when faced with the close calls of trying to interpret scope of the Commission's BCRA regulations will err on the side of caution and treat campaign activity as "federal election activity" and pay for those activities exclusively with federal

dollars, or in some cases allocate those activities between federal and Levin funds. It has also been our experience that many state parties are operating with significantly *less* non-federal funds than they did prior to the enactment of the BCRA due to its severe solicitation restrictions on candidates, officeholders and party officers. Therefore, state party organizations generally do not have large reserves of non-federal funds to undertake end-runs around the FECA through the "loopholes" identified by the Court of Appeals.

Third, the Court's opinion does not and cannot change the fact that Congress clearly intended to exclude from the scope of FEA activities and communications that have no other practical purpose than to advocate for the election or defeat of a non-federal candidate. The terms "voter registration" and "get-out-the-vote," were not intended to encompass all types of non-federal campaign activity by state and local party committees. That much is evident from Congress' enactment, as part of BCRA, of 2 U.S.C. § 431(20)(B)(i) which specifically excludes from the definition of "federal election activity" any public communication that refers solely to a clearly identified non-federal candidate unless the activity itself is a "federal election activity."[1] Therefore, to the extent the Commission does have any clear directive under the statute in this rulemaking, it is to ensure that this provision is not rendered superfluous. In this regard, the organizations that will be most affected by the change in regulation are associations of state and local candidates, whose sole purpose is to elect non-federal candidates. To the extent that the Commission broadens the scope of these regulations, the regulations could ultimately encompass any and all activities undertaken by these organizations.

Fourth, as a threshold matter, the Commission should not adopt any regulation that brings into the scope of voter registration or GOTV the mere encouragement of a person to register to vote or vote. The *Shays III Appeal* Court itself specifically recognized that mere exhortations to register or vote should *not* be covered:

> As Shays points out, "a definition could surely be crafted that would exempt such routine or spontaneous speech-ending exhortations without opening a gaping loophole permitting state parties to use soft money to saturate voters with unlimited direct mail and robocalls that unquestionably benefit federal candidates."

Shays III Appeal, 528 F.3d at 932. Although the plaintiffs, in the suggestion quoted by the Court, were referring specifically to speeches and rallies, nothing in the Court's decision can reasonably be read to mean that exhortations are to be excluded only if made in a speech or at a rally but not if made by other means of communications. Such a

[1] In addition, 2 U.S.C. § 431(20)(B)(iv) exempt all grassroots materials from the definition of "federal election activity" without qualification.

reading of the Court's ruling would not make sense. In the NPRM, the Commission specifically asks whether "an exemption that included these [other] types of communications be consistent with the court's opinion in Shays III Appeal?" 74 *Fed. Reg.* at 53678. The answer is yes.

Fifth, finally, in its effort to close the "individualized means" loophole identified by the *Shays Appeal III* Court, the Commission should resist the temptation to expand the definitions of voter registration and get-out-the-vote activities to other means of mass communications such as television, radio, newspapers or other general forms of public political advertising. [2] It is true that the concept of "individualized contact" has been the source of confusion. But much of that confusion is needless. In large part, the Court's concern was the Commission's approach to this issue in Advisory Opinion 2006-19. *Shays III Appeal*, 528 F.3d at 931. That concern, however, can easily be addressed by abandoning the line drawing undertaken in that AO with regard to "targeting" and by taking the position, instead, that certain inherently individualized means of communications—certainly including, for example, phone banks and direct mail-- are covered by the regulation without regard to any other variable.

In our proposal set forth below, we have tried to set forth a functional definition of "voter registration" and "get-out-the-vote" that, we believe, properly addresses the Court's concerns without being over-inclusive. By contrast, the Commission's proposed definitions would encompass virtually all campaign activity and then carve out specific narrow exemptions, but without actually providing the necessary clarification. This approach would inevitably lead to much confusion in the regulated community and likely require the Commission to constantly revise the definitions in advisory opinions and additional rulemakings. We believe our proposal provides a better approach.

With these principles in mind, we provide the following specific comments in response to the Commission's proposals:

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[2] We would also point out that the Commission's draft regulation is so broadly written that it could be literally interpreted to apply to items like yard signs, bumper stickers and other campaign paraphernalia. We assume that was not the Commission's intent. Therefore, if the Commission does not limit, by its terms, the types of communications that are covered by the rules, we would recommend that the proposed definition of voter registration and get-out-the-vote activity include a cross reference to 11 C.F.R. § 100.24(c)(4). In addition, this provision exempts handbills and brochures (which are presumably not public communications covered under section § 100.24(c)(1)) from the definition of federal election activity if those materials exclusively feature non-federal candidates. The Commission should clarify that such materials would also not be covered under the revised regulations.

II. Voter Registration Activity

The Commission should retain the concepts provided in the original definition of "voter registration" and should not include the all-encompassing "encourage." Rather, we believe the term "assist" can be replaced by an easier understood and perhaps somewhat broader term such as "facilitate."[3] The term "facilitate" could be used to cover any activities that would otherwise help a potential registrant to register, including, *inter alia,* providing individuals with voter registration forms, assisting individuals in the completion of the form, collecting such forms for submission with the appropriate state agency, as well as providing information to individuals on how to turn in voter registration materials.

The inclusion of "encouragement" in the definition runs the risk of affecting electoral advocacy that includes a mere exhortation to register or vote especially when such advocacy occurs within 120 days of a federal primary. Such a broad definition could have many unintended consequences. For example, the Republican Governor's Association ("RGA") could send out a fundraising mailing within 120 days of a federal primary election that purports to raise funds for and build support for a candidate for Governor who is also on the ballot in that same primary. In many cases, the Type I voter registration periods begin one year before the federal general election. In that mailing, the RGA implores its supporters to engage in civic activities including registering to vote, as well as volunteering and contributing to the gubernatorial candidate. Because that mailing was undertaken within 120 days of a federal election, the RGA (whose apparent sole interest is to elect candidates for Governor) would be forced to pay for this mailing exclusively with funds that are subject to the prohibitions and limitations of federal law. This certainly cannot be what Congress intended.

As a general matter, it should be noted that it has been our experience that party organizations do not undertake activities that generally merely urge individuals to register to vote. To do so would be a waste of scarce party resources. Ordinarily, such efforts would include actions that would facilitate the actual registration of the potential voter and most, if not all party efforts to register voters would be covered by our proposed definition. Thus, we do not believe that there would be any "loophole" created by utilizing the term "facilitation" in the regulation.

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[3] According to Webster's Dictionary, the definition of facilitate is "to make easier; help bring about." The definition of assist is to "to give support or aid. " Merriam-Webster Dictionary Online, accessed November 9, 2009.

In addition, our proposed definitions include both email and SMS messaging since both types of activities have increasingly been used as methods of targeted direct contact with potential voters to both register and vote.

Finally, it should be noted that our proposed regulation deletes section 100.24(a)(2)(ii) since our addition of the "facilitation" element makes the subsection unnecessary.

Based upon the above, we suggest the proposed definition be modified as follows:

(a)(2) *Voter Registration activity* means the facilitation of registering persons to vote.

(i) Voter Registration includes, but is not limited to, any of the following:

(A) Urging, whether by mail (including direct mail), in person, by telephone (including robocalls or phone banks or SMS messaging), email or at public events (including speeches and rallies) potential voters to register to vote and providing that potential voter with information about registration and voting or otherwise facilitating the potential voter's efforts to register to vote.

(B) Distributing voter registration forms or instructions to potential voters;

(C) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms;

(D) Submitting a completed voter registration form on behalf of a potential voter.

III. Get-out-the-Vote Activity

We believe that the Commission's get-out-the-vote definition should also comport with the principles set forth above. The Commission's proposed definition is overly broad, and appears to be internally contradictory. On the one hand, the regulation appears to sweep virtually all campaign activity into the definition of GOTV through inclusion of the term "encourage." On the other hand, the proposed definition purports to exclude "mere exhortation" but appears to do so only in the context of speeches or rallies, but not when such exhortation takes place through other forms of communication. In addition, the proposed regulation includes two additional examples of activities that would not be considered GOTV. This is a confusing and unworkable approach.

We believe the Commission should use a definition that (1) specifies that certain types of communications are covered and (2) limits, in certain circumstances, the definition of get-out-the vote to those efforts that attempt to or actually "facilitate" a person's effort to vote. This approach would leave mere electoral advocacy outside of the GOTV definition while capturing those activities that "facilitate" the effort to vote.

In addition, in order to address the Court's apparent concerns, the Commission should take into consideration the types of communications that are actually designed to work in conjunction with Election Day get-out-the vote drives. For example, party committees use both live and automated phone calls, as well as email and SMS messaging within the last two or three days of an election to remind individuals to get out and vote. Therefore, an appropriate response to the *Shays III Appeal* decision would be for the Commission to explicitly include in the definition within the last 72 hours of an election, actvities that merely remind individuals to vote or are designed to work in conjunction with physical get-out-the-vote efforts. Outside of that window, the definition should not cover activities/communications that merely encourage individuals to vote on Election Day or merely provide the date of the election to the potential voter, where the mode of communication is not designed to work in concert with a get-out-the-vote effort. If the Commission traps itself in its current interpretation of the Court's logic, there will be little, if any political speech left that is not swept into the BCRA.

It is our strong belief that the mere inclusion of the date of an election in an election communication should not convert that communication into a get-out-the-vote activity. The inclusion of the date of the election has become a common feature of electoral advocacy—"Vote for Smith for Governor next Tuesday November 3"-- and does little, if anything, to facilitate or assist the voter in voting. It has been our experience that most mailings on behalf of candidates include, as a matter of course, the date of the election or perhaps a reference to the day of the week that the election is being held, even if the mailing does not include any other information regarding voting. The absurd result of this approach would require a footnote to each non-federal mailing stating, "We would like to tell you the date of the election that we are advocating for this candidate, but federal law prohibits its inclusion." Similarly, merely encouraging a voter to "vote by mail" should not be covered. For example, in the state of Oregon, mail voting is the exclusive method of casting ballots. Therefore, merely stating "vote by mail" is the equivalent of saying "Vote on November 4th."

Based upon the above, we suggest the proposed regulation be modified as follows:

(a)(3) *Get-out-the-vote activity* means facilitation of the act of voting by registered voters.

(i) Get-out-the-vote activity includes, but is not limited to, any of the following:

(A) Providing potential voters, whether by mail (including direct mail), in person, by telephone (including robocalls, telephone banks or SMS messaging), email or at public events (including speeches and rallies) with information about:
  (1) Times when polling places are open;
  (2) The location of a particular polling place;
  (3) Early voting, voting by absentee or voting by mail.

(B) Offering to transport, or actually transporting, potential voters to the polls.

(C) Providing, offering to collect, or actually collecting absentee ballots or vote by mail ballots.

(D) Contacting potential voters, within 72 hours of the date of an election, in person, sound truck, by phone (including robocalls, telephone banks or SMS messaging) or email to remind them to vote on Election Day.

(E) Contacting potential voters whether by mail (including direct mail), in person, by telephone (including robocalls, telephone banks or SMS messaging), or email to remind them to turn in an absentee ballot, vote by mail application, or mail-in ballot.

It should be noted that our proposed definition excludes the Commission's proposed section 100.24(a)(3)(iii). Although we would support the inclusion of this example depending on the ultimate outcome of the rulemaking, the scope of our proposal makes this subsection unnecessary since it is clear that both examples would be excluded under its provisions.

We also support the Commission's proposed exemption for Voter Identification and Get-out-the Vote for non-federal elections that are held within the Type II FEA Window but not on the same day as a federal election. The language of the exemption strikes the proper balance between exempting the activity and any effect the activities may have on an impending federal election. We are not aware of any situations where such elections are held in such close proximity to a federal election that there will be any

residual effect on the federal election. However, it would be difficult for the Commission to craft a regulation that takes different scenarios into account. Therefore, the current language in the proposed regulation is necessary and appropriate.

In summary, we believe our proposed alternative approach to the definitions of voter registration and GOTV complies with the Court's directive by (1) abandoning the concept of "individualized contact" with the inclusion of specific types of communications to be included in the regulation; (2) addresses communications right before in the election that are actually intended to get-out-the-vote but may not actually "assist" the voter; (3) covers all scenarios where campaign activities actually provide assistance to the voter and (4) strikes the proper balance between regulating federal elections and leaving outside the scope of FEA most non-federal campaign activity that does not influence federal elections or otherwise benefit federal candidates.

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

Respectfully submitted,

Joseph E. Sandler
Neil P. Reiff

SUMMARY CHART FEA RULEMAKING

	Mentions only Fed. Candidate including PSAO **Current Rule**	**Mentions only Non-Fed Candidate (Non-FEA)** **Current Rule**	**Mentions Both Fed & Non-Fed Candidate (Express Advocacy) (Not meeting Levin Definitions)** **Current Rule**	**Meets Levin Definitions/No fed. candidate mention (Generic, GOTV, Voter Reg, Voter ID) (including non-federal candidate mention)** **Current Rule**	**Effect of FEC proposal on current rules**
TV/Radio	Must be paid for 100% federal. Unchanged by both FEC and SRY Proposal.	May be paid for 100% non-federal.	Must be paid for 100% federal.	Must be paid for 100% federal.	All TV and Radio ads that PASO federal candidates and party committees are covered by Type III FEA. FEC proposal appears to regulate all other TV and radio ads, especially if they encourage voting or otherwise mention the date of the election or other voting information.
Newspaper Ads	Same as TV/Radio.	Same as TV/Radio.	Same as TV Radio.	May be paid for on a split with federal and Levin (Generic Only). Unlimited.	Same as TV/Radio
Direct Mail	Must be paid for 100% federal.	May be paid for 100% non-federal. Would be considered Levin activity if information was provided regarding voter registration, provided information regarding date of the election plus the times polling places were open or where to vote. Presumably includes absentee ballot and early vote activities too and vote by mail.	Must be paid for 100% federal.	May be paid for on split with Levin Funds.	FEC proposal appears to expand the content rules for mail contacts if it merely included the date of the election or encourages persons to vote. Rule would no longer require an "individualized" contact.

SUMMARY CHART FEA RULEMAKING

Phones	Must be paid for 100% federal.	May be paid for 100% non-federal. Would be considered Levin activity if voting or voter registration information was provided or if caller was offered a ride to the polls.	Must be paid for 100% federal.	May be paid for on split with Levin Funds.	Same as direct mail above.
Canvassing (Distribution of handbills, brochures and slate cards)	Must be paid 100% federal.	May be paid for 100% non-federal. Presumably exempted from FEA Definitions by 11 C.F.R. § 100.24(c)(4).	May be paid for on state split with regular non-federal. Must be paid 100% federal if meets Levin definition (GOTV).	May be paid for on split with Levin Funds.	FEC proposal would appear to cover any canvassing activity that included reference to election date or otherwise encouraged voting. No longer requires an "individualized contact." Not clear if FEC proposal acknowledges exemption at 11 C.F.R. § 100.24(c)(4).
Internet Activity	Must be paid 100% federal.	May be paid for100% non-federal.	May be aid on split.	Does not appear to be covered by current FEC regulations.	Not clear if and how the FEC proposal affects Internet activity.