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September 30, 2024

Ms. Amy L. Rothstein
Assistant General Counsel for Policy
Federal Election Commission
1050 First Street, NE
Washington, D.C. 20463

Re: Notice of Availability: Petition for Rulemaking to Strengthen Political Parties

Dear Ms. Rothstein:

I am writing on behalf of my client Ken Martin, in his capacity as Chair of the Minnesota Democratic-Farmer-Labor Party ("Minnesota DFL Party"). Pursuant to 11 CFR § 200.2(a)(1) and 5 USC § 55(e), the Minnesota DFL Party files the following supplemental comments in connection with its Petition for Rulemaking. On June 25, 2024, the Minnesota DFL Party submitted a Petition for Rulemaking in connection with Commission regulations as they relate to state and local party committees. On August 1, 2024, the Commission published a Notice of Availability related to our petition.[1]

In June of 2016, Chairman Martin and the Minnesota DFL Party petitioned the Commission to initiate a rulemaking to provide state and local party committees with regulatory relief. On October 7, 2016, the Commission made the Minnesota DFL Party's petition available for public comment.[2] Based upon our letter of June 25, 2024, the Commission has disposed of the original 2016 petition and has published the new Notice of Availability.

On January 30, 2017, I filed comments on behalf of the Minnesota DFL Party and Chairman Martin in connection with its 2016 petition. For the sake of brevity, I attach a copy of those comments to this letter and incorporate its analysis herein by reference.

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[1] 89 Fed. Reg. 62671 (August 1, 2024),

[2] 81 Fed. Reg. 69721 (Oct. 7 2016).

The Minnesota DFL Party and Chairman Martin provide the following supplemental observations:

1. Party Payroll Regulation

As we discussed in our 2017 comment, in many cases, state and local party committees continue to limit staff activity to supervisory and volunteer recruitment activities due to the requirement that any employee that spends more than 25% of their time on federal elections or "federal election activities" must be paid for exclusively with federal funds. Even though staff may be hired to partake in voter engagement activities, state parties ordinarily cannot raise sufficient federal funds to pay for a large general election staff exclusively with federal funds. Since the current Commission regulations include "federal election activities" towards the calculation of the 25% threshold, in many instances, party staff are prohibited by party leadership from engaging with voters for fear that their activities may trigger the application of the 25% standard. It has been our experience that state and local candidates have eschewed working with state parties for this very reason. In addition, state parties who do engage in limited contact with voters ordinarily prohibit their staff from providing any voter information or asking any type of voter identification questions to voters. These limitations are implemented solely due to the unnecessary inclusion of "federal election activities" in the current regulation.

As a general matter, federal election activity windows begin several months before an election.[3] This means, that many state parties will stop engaging in staff centered organizing activities early in a federal election year in order to avoid the federalization of the staff salaries.

In the promulgation of the Bipartisan Campaign Reform Act ("BCRA"), Congress created and applied the definition of "federal election activities" in several contexts. As applied to staff salaries, the law defines "federal election activities" as services provided by staff who spend more than 25 percent of their time on "activities connected with a Federal election."[4] As a matter of statutory interpretation, it is clear that Congress only intended the subparagraph to reach services that were directly in connection with a federal election, such as expressly advocating the election or defeat of a federal candidate or otherwise providing services directly to a federal candidate. For these reasons, the Minnesota DFL Party is requesting that the Commission remove the term "federal election activities" from the relevant regulations on staff salary allocations by state parties.

[3] 11 C.F.R. § 100.24(a).

[4] 52 U.S.C. § 30101(20)(a)(iv).

2. Definition of Get-out-the-Vote

As we have previously commented, we believe that the Commission was not compelled to craft the broad definition of "get-out-the-vote" and "voter registration" adopted in response to the U.S. Court of Appeals decision in *Shays v. FEC*.[5] In 2009, our firm provided detailed comments in response to the Notice of Proposed Rulemaking that was required by the Court's decision. In our comments, we argued that the Commission was not compelled to promulgate a regulation that would essentially encompass almost all proposed non-federal communications by state and local party committees during a federal election year. Our 2009 comments are attached to this letter and incorporated herein by reference.

The current Commission regulations require state and local party committees to make bizarre communication choices, none of which alleviate the fear of corruption in American politics nor make it more or less likely that a voter will vote for a particular federal candidate.

The expansive "get-out-the-vote" and "voter registration" regulations are unnecessary to fulfill the valid governmental interests of regulating speech in connection with non-federal elections. Any communication that references a federal candidate or promotes the party in general are already regulated by other provisions of the BCRA.[6]

The practical problems of the Commission's current regulations become apparent when a state party committee distributes mail on behalf of its state and local candidates. Under federal law, state party committees are provided with a non-profit postal permit (candidate committees are not provided the same non-profit rate).[7] Non-profit mailing rates are significantly less than normal bulk mailing rates. Thus, state party committees engage in significant non-federal mail activity and non-federal candidates have a large incentive to work directly with state parties in mailings to support their candidacies. Unlike the unrealistic musings of the Appellee cited to in the *Shays* opinion,[8] these mailings are highly targeted communications to the identified supporters of those state and local candidates and are not "blanketed" statewide to potentially influence federal elections.

Under the current regulation, a state party must undertake two absurd calculations in order to disseminate mail in support of its state and local candidates:

First, the party must decide whether to use the word "vote" in a mailing or avoid any encouragement to vote altogether. This decision is driven by whether the party committee wishes to avoid scrutiny over how much content is required to avoid a determination that the inclusion of the word "vote" or any encouragement to "vote" is "incidental" to the entirety of the communication. Practically speaking every state party must either hire a federal campaign

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[5] *Shays v. Federal Election Commission*, 528 F.3d 914 (D.C. Cir. 2008).

[6] 52 U.S.C. §§ 30101(20)(A)(ii) (regulating generic communications) & (iii) (federalizing any public communication that promotes or supports or attacks or opposes a federal candidate).

[7] 39 U.S.C. § 3626(e).

[8] *Shays*, 528 F.3d at 932.

finance attorney to review each and every non-federal mailing to determine whether the inclusion of a vote message is "incidental" or remove any encouragement to vote in its non-federal mailings. Such determinations are exceedingly difficult due to the lack of any guidance provided by the Commission related to the revised definition of "get-out-the-vote." As a general matter, state candidate mailings take many different forms. Some are biographical and have several paragraphs of content describing the candidate. Others provide succinct points regarding a candidate's positions or the positions of their opponents.

A decision to make a piece long or short is a determination made by those who seek to elect the state or local candidate, not to influence the election of an unnamed, theoretical federal candidate. It is an absurd outcome to require that a state party refrain from encouraging the state or local candidate's supporters to vote or provide information about when and where to vote in these communications, or to require a legal determination of how large or prominent that messaging can be in order to avoid having to pay for the mailings with federal or Levin funds. Ultimately, this determination due to the Commission's regulations impairs state parties ability to advocate for their state and local candidates, unnecessarily restricts their First Amendment rights, and serves no legitimate public policy.

Similarly, what if a state party wants to run a television ad for a candidate for Governor? Most ads are 30 seconds long. If the party wishes to include an exhortation that encourages the listener to vote, is a 30-second communication sufficiently long to include an incidental "speech ending" exhortation? A state party must make the difficult choice of refraining from certain types of communications to support their state and local candidates or avoiding the use of the word "vote" in the advertisement. Once again, it is hard to understand how this reduces "corruption" in American politics or otherwise influences federal elections.

Second, the state party must be careful not to include the most basic information regarding voting on its non-federal communications due to the current definition of GOTV activity.[9] Communications are strictly limited to inclusion of the date of election and cannot include any information related to times when polling places are open, locations of polling places, or information related to early or absentee voting. The inclusion of this "assistance" provision in the Commission's original regulations in 2002 was based upon a simplistic understanding of voting and voting behavior.

In 2002, voting methods were more limited and most voters cast their ballots on election day using one voting method, in person voting. Since 2002, methods of voting and the time to vote have been expanded in many states around the country to include more access to vote-by-mail opportunities, extended early in-person voting, and use of drop boxes to return ballots. These voting methods have been unfairly attacked and significant misinformation regarding these voting methods has been disseminated in a a deliberate attempt to confuse voters and suppress turnout. It is a bizarre policy choice to federalize mailings supporting state and local candidates only because a state party and its state or local candidates wish to inform their

[9] 11 CFR 100.24(3)(i)(B).

supporters on how, when, and where they can vote .[10] In a time where many seek to attack voting and make it more difficult, state parties can be an important partner to ensure that elections are conducted in a fair manner. Muzzling that voice serves no valid governmental purpose.[11]

The negative consequences of the Commission's regulations on the relationships of state parties with its state and local candidates far outweigh any tangible benefit that may be derived by federal candidates through the use of non-federal funds for communications on behalf of state and local candidates.

3. Volunteer Exempt Mail

In our attached 2017 comments, we outline the Commission's missed opportunity to clarify and modernize its approach related to the regulation of volunteer exempt mail.[12] As we previously discussed, modern mailing techniques, union shop rules, as well as the restrictions on mail delivery to United States Postal Service Bulk Mail Centers have made compliance with the 1979 exemption quite difficult. This challenge was further exacerbated by the COVID 19 pandemic. Since 2020, public health requirements have made it even more difficult to recruit and convene volunteers in ways necessary to comply with the volunteer mailing exemptions. We appreciate previous efforts to address this issue and encourage the Commission to continue to search for a consensus that balances the statutory requirements and the realities of modern political technology.

4. Local Party Committees

A local party committee qualifies as a "political committee" under FECA if it makes expenditures aggerating in excess of $1,000 or engages in exempt activities aggregating in excess of $5,000 in a calendar year.[13] These registration thresholds, set in the 1970s were not indexed for inflation. Thus, due to these very low registration thresholds, local party organizations have been relegated to the sidelines lest they desire to be subject to the Act's registration and reporting requirements and the consequences of affiliation with a state party and other registered local party committees within their state. Ultimately, few local party organizations make this fateful choice and most choose to forego any meaningful participation in federal elections. One way in which the Commission can provide some relief to local party

[10] In the event the Commission decides not to substantively modify the "incidental" test, it should consider adding an "incidental" mention test to the provision of voting information in a party communication. See Federal Election Commission Advisory Opinion Request 2014-16.

[11] Ironically, such voting information can be included in a state party brochure for that same candidate since it would be exempted as a grassroots material 52 U.S.C. § 30101(20)(B)(iv); 11 C.F.R. § 100.24(c)(4). This distinction is just one of several factors that puts the Commission's regulation on unstable Constitutional grounds.

[12] Comments of Ken Martin and the Minnesota DFL party, RE: REG 2016-03: Political Party Rules, p.3-4 (and footnotes cited therein discussing the attempts in 2010 by the Commission to modernize its enforcement approach to volunteer exempt mail).

[13] 52 U.S.C. § 30101(4)(C).

committees is by clarifying that the political committee status of a local party organization is subject to the limitations of the "major purpose" test found in *Buckley v. Valeo*.[14] To our knowledge, the Commission never considered or applied the major purpose test to the application of whether a local party organization qualifies as a "political committee." Nevertheless, this test is constitutionally mandated and must be applied. We suggest that the Commission consider promulgating an Interpretive Rule or other guidance that clarifies that a local party committee would only qualify as a "political committee" if it met the statutory thresholds and had a major purpose of influencing a federal election.

The administrative record created by our original petition, supplemented by what we believe will be many more comments and other evidence provided by additional commenters, will demonstrate that relief for state and local party committees is overdue. Although the BCRA had noble goals, it's implementation substantially impaired the operations of state and local party committees and each election cycle brings new court rulings and other regulatory developments that further disadvantage state parties relative to other political actors. While state parties struggle to survive, unrestricted third parties thrive in a regulatory environment that allows them to operate in an almost unrestricted manner that provides for significant input from federal candidates despite their use of funds that do not comply with federal restrictions.

While we understand that the Commission may be constrained by both statutory and judicial mandates, we have identified several ways in which the Commission can permissibly provide relief. Of course, we are open to discussing other options that we have not identified. It should be noted that, significant changes to party regulation may be on the horizon. Specifically, it is anticipated that the United States Supreme Court will soon hear a case challenging the Act's coordinated expenditure limits as they relate to party committees.[15] Of course, this case will not directly affect provisions of the BCRA but may moot concerns related to volunteer exempt mail.

In addition, recent United State Supreme Court jurisprudence calls into question the constitutional viability of much, if not all, of the BCRA. Specifically, with respect to those provisions and regulations pertaining to state and local party committees, the Commission must address, and not further exacerbate concerns that those provisions constitute a "prophylaxis-upon-prophylaxis approach."[16] In our view, it is highly unlikely that the Commission's current regulations defining "get-out-the-vote" or "voter registration" would survive constitutional scrutiny and a review of the record in the *Shays* decision does not indicate that the Court or litigants gave any consideration to First Amendment concerns.

[14] *Buckley v. Valeo,* 424 U.S. 1, 79 (1976). See also, Federal Election Commission Advisory Opinion 2024-02 at p. 4, *fn.* 14 (Applying major purpose test to registration and reporting requirements of state and local candidates).

[15] *Nat'l Republican Senatorial Comm. V. FEC,* 2024 U.S. App. LEXIS 22607, 2024 FED App. 0212P (6th Cir. September 5, 2024).

[16] *McCutheon v. FEC,* 582 U.S. 185, 221 (2014).

Chairman Martin and the Minnesota DFL Party thank the Commission for reopening consideration of the issues raised above and look forward to working with the Commission in connection with this renewed call for action in connection our Petition. If you have any questions, feel free to contact me at reiff@sandlerreiff.com or at 202-479-1111.

Sincerely,

Neil Reiff

Counsel to the Ken Martin, Chair,
Minnesota Democratic Farmer Labor Party

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January 30, 2017

Mr. Neven F. Stipanovic
Acting Assistant General Counsel
Federal Election Commission
Office of General Counsel
999 E Street, NW
Washington, D.C. 20463

RE: REG 2016-03: Political Party Rules

Dear Mr. Stipanovic:

On behalf of our client, Ken Martin, in his capacity as Chair of the Minnesota Democratic Farmer-Labor Party, we write to comment on REG 2016-03, the Federal Election Commission's Rulemaking Petition for Political Party Rules. We would like to first thank the Commission for submitting our June 14, 2016 Petition for Rulemaking to the Federal Register, and for providing this opportunity to comment.

In the wake of the 2016 presidential race, we write to you with increased urgency to take advantage of this chance to create rules that will strengthen political parties. State parties have been struggling increasingly over the years, with both the media and public showing criticism and concern for the number of candidates at odds with the political parties they represent; while ***state parties have had their hands strapped due to burdensome federal regulations that limit their actions even in state and local elections, outside groups have been able to pour money into elections at all levels of government.***[1] One immediate and alarming consequence of this

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[1] This trend has been on the rise since 2010, notably the same year that the Commission revised its definition of federal election so broadly that it essentially reaches any state and local party activity, and the same year the Supreme Court struck down limits on independent expenditures by corporations in *Citizens United v. Federal Election Commission*. See Definition of Federal Election Activity, 75 Fed Reg., 55257 (Sep. 10, 2010); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359 (2010). For example, from 2006 to 2012, party committee independent expenditures have remained relatively stagnant, at nearly a quarter of a billion dollars per cycle. While in 2006 and 2008 parties spent *several times more than* outside groups on independent expenditures, outside group spending raised to $195 million in 2010, and by 2012, outside groups' spending on congressional elections was twice as high as party expenditures, and in 2014, *outside groups spent nearly four times what party committees spent in competitive Senate races*. Ian Vandewalker and Daniel I. Weiner, Stronger Parties: Reforming America's Engines

being that politicians are assuming office who may have little connection to their constituents through the traditional state party structure, and instead may be more beholden to outside groups whose interests may be narrow, self-serving, or even against candidates' parties' interests. For the sake of brevity, we hereby incorporate by reference the comments and discussion of our initial petition filed on June 14, 2016.

Included as an exhibit to our June 14, 2016 Petition for Rulemaking was Commissioner Lee E. Goodman's Memorandum on Regulatory Relief for Political Parties and attached Resolution of the Federal Election Commission Commencing Work on a Notice of Proposed Rulemaking Focused on Strengthening Political Parties, which contained proposed resolutions to state party challenges.[2] Since Commissioner Goodman has provided clear resolutions by drawing upon his expertise and position as a Commissioner, we would like to further describe and comment on some of the challenges he references drawn from Mr. Martin's and our own expertise and positions as the Chair and Counsel, collectively, of the Minnesota Democratic Farmer Labor Party ("DFL").

1. Restrictions on Party Coordinated Communications Should be Alleviated

Current regulations on party coordinated communications with candidates are incredibly restrictive and confusing for political parties and candidates. As Chair to the DFL, Mr. Martin can attest that like parties across the country, federal law has prevented the DFL from engaging in certain communications due to burdensome administrative and compliance requirements; one of the many effects has been the loss of opportunities to develop stronger relationships between the party and candidates.

For example, in that regard we support Commissioner Goodman's proposals to both narrow the scope of party coordinated communications to only include those communications that expressly advocate the election or defeat of federal candidates. In addition, we support Commissioner Goodman's proposals to allow more substantive interaction with candidates to ensure that candidates and their parties can more efficiently discuss candidate positions. To be sure, the Supreme Court has ruled that independent party communications may not be limited[3]

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of Participation BRENNAN CENTER FOR JUSTICE 6-7 (2015), https://www.brennancenter.org/sites/default/files/publications/Stronger_Parties_Stronger_Democracy.pdf (last accessed January 25, 2017).

[2] Memorandum from Commissioner Lee E. Goodman on Regulatory Relief for Political Parties (Oct. 20, 2015); Resolution of the Federal Election Commission Commencing Work on a Notice of Proposed Rulemaking Focused on Strengthening Political Parties, Nov. 15, 2015, http://www.fec.gov/agenda/2015/documents/mtgdoc_15-54-a-1.pdf (last accessed January 25, 2017).

[3] Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604, (1996).

but coordinated party committees can.[4] However, allowing the party to utilize private or public information in their possession to advocate for its candidates will not increase the likelihood of corruption in the political system and will allow parties to not have to duplicate research it may already have on hand in order to properly function.

In addition, we support Commissioner Goodman's proposal to codify and clarify that non-public communications, including grassroots campaign materials and canvasing are not covered by the Commission's rules. Any uncertainty on this issue would have a chilling effect on party committees. Additionally, as Commissioner Goodman and two of his colleagues recently reiterated, it is a longstanding Commission policy that such grassroots efforts remain outside of the Commission's rules.[5]

2. Rules Should be Simplified and Modernized for Volunteer Exempt Mail Activities[6]

We believe that the Commission must recognize that its previous approaches to regulating volunteer activities, especially with respect to volunteer exempt mail, does not comport with the modern realities of political campaigning.[7] In 2010, the Commission attempted to create an Interim Enforcement Policy to provide parties with guidance as to how much volunteer activity is necessary to be in compliance with the statute's requirements that unlimited

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[4] Colorado Republican Fed. Campaign Comm. v. Fed. Election Comm'n, 518 U.S. 604 (1996).

[5] Advisory Opinion 2016-21 (Great America PAC), Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen.

[6] Committee on Campaign Finance Reform, *Recommendations & Resolution in Support of Reasonable Campaign Finance Regulation of State and Local Party Committees*, ASSOCIATION OF STATE DEMOCRATIC CHAIRS.

[7] On March 11, the Commission opened discussion on four drafts of an interim enforcement policy on the "Volunteer Materials" Exemption as related to campaign mailings. Federal Election Commission, Weekly Digest, Issue 2010-10, March 12, 2010, available at http://fec.gov/press/press2010/20100312Digest.shtml. ***Each of the four drafts acknowledged the need to provide the public with clear guidance and notice on how the Commission interpreted the Act's volunteer materials exemption with respect to volunteer mail.*** See Federal Election Commission Proposed Interim Enforcement Policy, Draft A at 3 (March 10, 2010); Draft B at 3; Draft C at 3; Draft D at 3. See also Matters Under Review 5598 (Swallow for Congress), 5824 and 5825 (Pennsylvania Democratic State Committee), 5837 (Missouri Democratic State Committee), 4851 (Michigan Republican State Committee). 4754 (Republican Party of New Mexico), 4538 (Alabama Republican Party), 4471 (Montana State Democratic Committee), 3248 (New York Democratic Party), 3218 (Blackwell for Congress Committee), 2994 (Wyoming State Democratic Party), 2559 (Oregon Republican Party), 2337 (Texas Republican Congressional Committee), 2288 (Shimzu for Congress), available at http://eqs.fec.gov/eqs/searcheqs (search by MUR number) (last accessed January 26, 2017).

volunteer exempt mail be undertaken with the assistance of volunteers.[8] However, after seeking public comment on draft policies on the volunteer materials exemption, the Commission did not issue any guidance.[9] We implore the Commission to provide clear, commonsense guidance that takes modern campaigning and technology into account so that party committees can realistically utilize these exemptions with respect to volunteer mailings.

We additionally encourage the Commission to clarify 11 C.F.R. § 100.87(c) as Commissioner Goodman has proposed in order to ensure that authorized committees may transfer funds to state parties for volunteer activities without such transfers being deemed to be "earmarked" by the Commission.[10] In MUR 6691 (Lampson for Congress), the Commission's General Counsel ("OGC") interpreted the regulation to mean that a candidate's transfer of funds to a party committee engaged in volunteer mail activity benefitting that candidate met the test for earmarking found in the Commission's regulations.[11] Consequently, the OGC recommended that the Commission disallow the use of the volunteer materials exemption under the anti-earmarking provisions found in section 52 U.S.C. §§ 30101(8)(B)(ix)(3) & (9)(B)(viii)(3) & 11 C.F.R. §§ 100.87(c) & 100.147(c). This is a bizarre result and surely the statute and regulation were not written for this purpose, but rather to prevent ***donor earmarking***. To be sure, payments made by candidates to a party committee are legally defined as "transfers" and not "contributions." 52 U.S.C. § 30114(a)(4). Therefore, such transfers are not, by the plain language of the statute and Commission regulations, covered by the provision. Thus, we believe that incorporating Commissioner Goodman's proposed language to clarify that funds transferred by an authorized committee are not covered by this provision would provide the necessary clarity to prevent such a peculiar interpretation of this rule in the future.

3. The Definition of "Federal Election Activity" Should be Redefined so State and Local Activities Are Not Regulated by Federal Law

State and local parties have been severely limited in their ability to engage in state and local activities due to the overly-broad definition of "federal election activity." The Commission

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[8] 52 U.S.C. §§ 30101(8)(B)(ix), (9)(B)(viii); 11 CFR §§ 100.87, 100.147.

[9] After seeking public comment, the Commission placed the draft Interim Enforcement Policy on the April 29 agenda; however, it was not discussed. Open Meeting Agenda, Thursday April 29, 2010, Audio Recording at 0:50 (stating the Interim Enforcement Policy would be held over for the next open meeting), available at http://fec.gov/agenda/2010/agenda20100429.shtml (last accessed January 26, 2017); see Federal Election Commission, Open Meeting Agenda, Thursday, May 27, 2010, available at http://fec.gov/agenda/2010/agenda20100527.shtml (the Interim Enforcement Policy did not appear on the next open meeting agenda).

[10] Memorandum from Commissioner Lee E. Goodman on Regulatory Relief for Political Parties (Oct. 20, 2015); Resolution of the Federal Election Commission Commencing Work on a Notice of Proposed Rulemaking Focused on Strengthening Political Parties, Nov. 15, 2015 at 2.

[11] First General Counsel's Report, MUR 6691 (Lampson for Congress) at 11.

should reevaluate its revised rules promulgated in 2010 to determine whether these rules have unnecessarily covered too many types of communications and have otherwise stifled party activities at the state and local level. Although we acknowledge that the Commission promulgated these amendments in response to litigation that was brought against it,[12] the Commission should re-evaluate whether its regulations went too far and whether a re-examination of these definitions are in order in light of the deleterious effects it has had upon political party committee activity at the state and local level. Specifically, the Commission should determine whether its determination that a get-out-the-vote activity is not covered by the regulations only if an exhortation is not "incidental" to a communication and whether there is an alternative way to regulate state and local activities. To be sure, state party committees have struggled to determine when such communications are "incidental" and should not be required to ask for an advisory opinion for each communication it wishes to disseminate to determine whether it meet a standard that has yet to be defined or clarified by the Commission.[13]

4. The Commission Must Correct its Incorrect Application of the Regulation Relating to Party Payroll

The sweeping definition of "federal election activity" also impacts state party staffing decisions. Since federal law requires that employees who work more than twenty-five percent of their time in connection with federal elections **and federal election activities** be paid for with *federal funds*,[14] state party committees are required to pay for most, if not all of their staff

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[12] Shays v. Federal Election Commission, 528 F.3d 914 (DC Cir. 2008) ("Shays III").

[13] To the extent that the Commission may decide to keep the "incidental" test, we support Commissioner Goodman's proposal to add that the provision of additional voting information that is "incidental" to a communication, activity, or event would not constitute Federal Election Activity. Commissioner Goodman's proposed clarification of federal election activity appears to derive from proposals and comments related to Advisory Opinion Request 2014-16 (AOR 2014-16), where the Connecticut Democratic State Central Committee requested clarification on whether certain mailings were considered federal election activity. Commenters argued and some draft opinions concluded that certain communications that included information regarding the location of polling places and the time polling places were open were not federal election activity since they were "incidental" to the entire communication.

We believe that this proposed conclusion in AOR 2014-16 was not supported by existing regulations and must be done through an amendment to the regulations as opposed to the Advisory Opinion process. Consequently, if there is a consensus to expand the scope of the "incidental" exemption by amending the regulation, we support such a change. See Memorandum from Commissioner Lee E. Goodman on Regulatory Relief for Political Parties (Oct. 20, 2015); Resolution of the Federal Election Commission Commencing Work on a Notice of Proposed Rulemaking Focused on Strengthening Political Parties, Nov. 15, 2015 at 3 (proposing amendments to 11 C.F.R §§ 100.24(a)(2)(ii), 100.24(a)(3)(ii), and proposing adding in a new subsection (C)).

[14] 11 C.F.R. § 300.33(d)(3); see 11 C.F.R. § 100.24 (definition of "Federal election activity").

exclusively with federal funds, even if that employee does not spend any time on federal elections. For example, if an employee spends more than twenty-five percent of their time engaging in voter identification activity for a state or local candidate, they must be paid exclusively with federal funds. This is facially contrary to the statue which only requires such an allocation if an employee spends more than twenty-five percent of their time in connection with federal elections.[15] Despite this divergence, the Commission did not provide any principled explanation as to why it was required to, or expanded the regulation past the statutory requirement when it promulgated its regulations in 2002.[16]

Predictably, state and local candidates are hesitant to work with state party committees on such projects when payment is incompatible with the state or local campaign financing laws that should regulate such activities. Although the Commission may be limited on what it could do to correct systemic and structural problems created by statute, it can at least follow the statute when promulgating its own regulations. This is one clear case of that. Here, the Commission has failed to follow the statute and this failure has had profound effects on party committees' ability to fund and staff state and local grassroots efforts. The Commission must amend 11 C.F.R. § 100.24 to properly track the language of the statute so that only activities that are ***in connection with a federal election*** are counted towards the twenty-five percent threshold required to pay for an employee exclusively with federal funds.

Conclusion

To briefly summarize, the Commission is well positioned to take advantage of this opportunity to strengthen political parties and our country's democratic process. Current federal law creates complicated and overly burdensome requirements for state parties to adhere to, while outside groups face fewer restrictions and are able to funnel money into politics in favor of their narrowed interests. We hope the Commission will revisit the proposals that Commissioner Goodman offered in his October 2015 memorandum, and make the necessary changes to help our political system and strengthen our political parties.

Sincerely,

Neil Reiff
Rachel Provencher
Counsel to the Ken Martin, Chair,
Minnesota Democratic Farmer Labor Party

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[15] 52 U.S.C. §§ 30101(20)(A)(iv); 30125(b)(1).

[16] See Definition of Federal Election Activity, 75 Fed. Reg., 55257 (Sep. 10, 2010).

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

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> 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.

[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. <u>Get-out-the-Vote Activity</u>

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 <u>all</u> 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.