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>

11/20/2009 06:40 PM

To <FEAShays3@fec.gov>

cc

bcc

Subject Democratic Legislative Campaign Committee

Attached please find comments and a request to testify on behalf of the Democratic Legislative Campaign Committee.

Very truly yours,

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November 20, 2009

BY EMAIL

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

Re: Definition of Federal Election Activity

Dear Ms. Rothstein:

On behalf of the Democratic Legislative Campaign Committee (“DLCC”), I write to comment on the above-referenced Notice of Proposed Rulemaking, and to request the opportunity to testify at the Commission’s hearing on this matter.

The DLCC is the association of the nation’s Democratic state legislators. Its efforts are entirely nonfederal. It only supports legislative candidates, state legislative caucuses, and other nonfederal organizations whose work creates a positive environment for state legislative candidates. It does not, and has not made contributions or expenditures for the purpose of influencing federal elections.

The Commission’s Notice of Proposed Rulemaking refers repeatedly to “state, district or local party committees.” It refers only incidentally to associations of state and local candidates and officeholders. Yet such associations are subject to the Federal Election Activity restrictions as well. This presents a dilemma that cannot be overlooked. Sweeping definitions of terms like “voter registration” and “get-out-the vote activity” might be offered to close so-called “loopholes” in the financing of federal elections. But those same sweeping definitions would also restrict bona fide nonfederal activity that has neither the purpose nor the effect of influencing federal elections.

There are two sensible ways to resolve this dilemma, which the NPRM considers but does not adequately execute. The first is to craft revised definitions of “voter registration” and “get-out-

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the-vote activity” that do not capture communications intended mainly to increase popular support for nonfederal candidates.

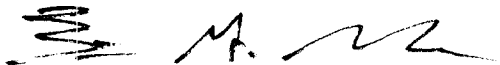
“Voter registration” and “GOTV” activities are terms with real meaning to political professionals, who distinguish them from so-called “persuasion” communications. The final rules should capture this essential difference. The *Shays III* decision held that the “individualized means” and “assist” requirements in the current rules did not do this; the court found that they excluded activities with the purpose and effect of increasing the numbers of voters on the rolls and at the polls on Election Day. *See Shays v. FEC*, 528 F.3d 914, 931-32 (D.C. Cir. 2008). But the court allowed for the possibility of other, more carefully drawn distinctions. *See id.* at 932.

The NPRM’s “encouraging or assisting” requirement provides no clear distinction. Nor do the lists of restricted activities help: they merely give examples of what is covered, leaving caucuses and nonfederal candidates to guess what else might be covered as well. A better approach would be to narrow the proposed definitions to activities *primarily aimed* toward registration and turnout. The Commission could then make clear – as now proposed – that a communication that simply refers to a nonfederal candidate and mentions the date of the election, without more, is not Federal Election Activity.

The NPRM sensibly proposes to distinguish and exclude voter identification and GOTV activities in elections not involving federal candidates. This is especially important to groups like state legislative caucus committees, which are often active in special state legislative elections. The Commission ought to restore and make permanent the 2006 Interim Final Rule. The DLCC is not aware of any data to suggest that nonfederal turnout programs, like those permitted by the 2006 Interim Final Rule, would have a significant effect on federal elections, even during an even-numbered year.

I appreciate the Commission’s attention to these matters, and the opportunity to testify.

Very truly yours,



Brian G. Svoboda