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11/20/2009 04:56 PM

To <feashays3@fec.gov>
cc
bcc
Subject Comments on Proposed FEA Regulations

Please find attached comments by Mr. Ron Nehring, Chairman of the California Republican Party and Chairman of the Republican State Chairmen for the RNC.

**Brandi Zehr**
Associate Counsel
Republican National Committee


Nehring FEA Comments.pdf

RON NEHRING

CHAIRMAN
California Republican Party

CHAIRMAN
RNC State Chairmen's Committee

November 20, 2009

**VIA EMAIL**

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

RE: Comments on Proposed Rulemaking on Federal Election Activity

Dear Ms. Rothstein:

As Chairman of the Republican State Chairmen's Committee of the Republican National Committee ("RNC") and Chairman of the California Republican Party ("CRP"), I write to comment on the Commission's Notice of Proposed Rulemaking: Definition of Federal election activity, 74 Fed. Reg. 53674 (Oct. 20, 2009), which proposes expanding the definitions of "voter registration activity" and "get-out-the-vote activity."[1] On behalf of the RNC and CRP, I submit these comments and also request an opportunity, along with counsel, to testify at the hearing.

## I. INTRODUCTION

The position of Chairman of the Republican State Chairmen's Committee is an appointed position traditionally selected by the RNC Chairman. The Chairman of the State Chairmen's Committee serves on the executive committee of the RNC and represents the interests of the leaders of the fifty state and six territorial Republican committees. Thus, the person holding this position is well-positioned to assess and represent the collective views and interests of Republican state party chairs nationwide.

[1] I would like to point out that the CRP and the RNC are parties to ongoing litigation challenging many points of law that are related to the issues at hand, as discussed more thoroughly in comments submitted by Chuck Bell on behalf of the CRP. The opinions expressed in this comment are based on the *current* state of the law and are not reflections of the assertions we are making in litigation.

Although Republican state parties are subject to the *Rules of the Republican Party*, they are organized and operate under state law. Every state of course has its own laws governing state and local elections, including source and amount restrictions, if any, on political contributions. Most state parties are concerned primarily with electing state and local officials. Moreover, each state party engages in its own form of grassroots activity. Thus, the effects of the proposed voter registration and get-out-the-vote ("GOTV") definitions would vary based on state law and state party practices, but in many, if not most, states, a substantial amount of grassroots volunteer activity in connection with nonfederal elections would vanish. This drastic reduction in civic involvement would damage our democracy dramatically while doing little to serve BCRA's purpose.

The CRP is the official state party organization for over five million registered Republicans in California. It operates through a state central committee with over 1,400 members. The CRP's primary goal is to elect Republicans at all levels of government. The CRP engages in the full range of grassroots activities, but because of California's large size and population, many activities are conducted primarily at the county rather than the state level. For example, in San Diego County (population: 3 million) Republican voter turnout activities are led by the Republican Party of San Diego County and the over 3,000 volunteers who serve as Precinct Representatives, turning out the Republican vote in their neighborhoods.

The CRP's expenditures for voter registration generally have been targeted to obtain Republican voter registrations in state legislative districts because there are very few competitive Congressional districts.[2] Generally, larger-scale voter registration projects have been sponsored by the local party committees in their own counties, if those counties contain targeted state legislative districts. Few of the targeted legislative districts in which party-organized or party-paid voter registrations is occurring overlap with the very few targeted Congressional districts. In the 2008 election cycle, only one targeted Congressional district, CD-11, overlapped with targeted legislative districts (Assembly Districts 10 & 15).

The CRP and local parties raise money to support these and other activities in accordance with both federal and California law, the latter of which allows the CRP and its local parties to accept contributions in amounts higher than federal limits and also from corporations and labor organizations. The proposed voter registration and GOTV regulations would have a substantial and negative impact on the CRP's and local parties'

[2] In fact, of all the Congressional races held since 2004 – regular and special – only fourteen were competitive, or won by less than 55% of the vote. The remaining 152 races were won by over 55%, making the vast majority – nearly 92% – of Congressional races in California truly uncompetitive. Source: RNC Strategy Division.

ability to engage in political speech and to conduct grassroots activities in connection with nonfederal elections.

As Chairman of the Republican State Chairmen's Committee and Chairman of the CRP, I am deeply concerned about the effect the proposed regulations will have on our grassroots nonfederal activity and political speech. Most state and local parties already have difficulty raising federal funds sufficient to fully fund routine campaign activities in registration and voter turnout programs in non-presidential election years (and many non-targeted states have similar difficulty in presidential years), making it difficult to support state races. They also have difficulty raising Levin funds because of the complex fundraising requirements.

The ability of state and local parties to register new voters has already been substantially curtailed by BCRA's existing restrictions. For example, the CRP, together with local party committees, registered on average over 300,000 new Republican voters each year in the 15 years leading up to the enactment of BCRA. After enactment of BCRA, the CRP, together with county party committees, registered fewer than 300,000 per year in most election years since 2003

I fear that if it becomes more difficult for the state and local parties to engage in voter registration and GOTV that grassroots activities and speech will slowly fade. It is also a possibility that those activities will move to the campaigns of state candidates, rendering the party system useless. Federalizing too much nonfederal activity may have harmful unintended consequences. Additionally, it is important to note that political parties in America are transparent, open, and democratically governed. Rules with the effect of shifting political activity away from open, transparent and democratically governed political parties to organizations that do not necessarily exhibit these traits is not healthy for our democracy.

In crafting new definitions of "voter registration activity" and "get-out-the-vote activity," the Commission faces the difficult task of following the D.C. Court of Appeals' opinion in *Shays v. Federal Election Commission*, 528 F.3d 914 (D.C. Cir. 2008) (hereinafter *Shays III Appeal*), while respecting the Bipartisan Campaign Reform Act's ("BCRA") intent to leave purely nonfederal activity unregulated at the federal level, *see, e.g.,* 2 U.S.C. § 431(20)(B) (2008). This challenge can be met by expanding the definitions only to the limited extent required under *Shays III Appeal*. We believe that the Commission's proposed regulations are broader than *Shays III Appeal* requires and that they dangerously encroach on nonfederal activity, and we respectfully suggest that

the Commission adopt narrower definitions that leave purely nonfederal activity to the regulatory purview of the states.

## II. THE PROPOSED DEFINITIONS ARE BROADER THAN *SHAYS III* REQUIRES

### A. The *Shays III Appeal* Court Presents the Commission with the Task of Addressing Two Specific Concerns

The Commission's proposed definitions of "voter registration activity" and "get-out-the-vote activity" are much broader than the *Shays III Appeal* court requires. In the scant five pages devoted to this issue, the *Shays III Appeal* court held that the 2006 definitions were contrary to BCRA's purpose of "prohibiting soft money from being used in connection with federal elections."[3] 528 F.3d at 932 (quoting McConnell v. FEC, 540 U.S. 93, 177 n. 69 (2003)). In the NPRM, the Commission asks whether the proposed definitions comply with *Shays III*. 74 Fed. Reg. 53674, 53677 (Oct. 20, 2009). Despite the lack of clear guidance by the *Shays III Appeal* court, we believe that the proposed definitions comply with the *Shays III Appeal* decision but go much further than what is required.

Although the court did not specifically state how to revise the definitions, it did identify two so-called "loopholes" in the definitions of "voter registration activity" and "get-out-the-vote activity." 528 F.3d at 931. Without directly saying so, the *Shays III Appeal* court implied that addressing these two specific concerns would be an appropriate way to amend the "restrictive definitions of GOTV activity and voter registration activity [that] run directly counter to BCRA's purpose." *Id.* at 931-32. The court's analysis of these concerns relied heavily on hypotheticals set forth in the appellee's brief and not actual evidence. *Id.* The hypotheticals relied upon were merely that – hypotheticals. The court even prefaced its discussion of the two specific concerns by emphasizing the Commission's ability to promulgate vague regulations to be later filled in. *Id.* at 931. Surely the court meant for the appellee's hypotheticals to provide guidance to a general rule, not to be the exact rule.

[3] The *Shays III Appeal* court also seemed to indicate that it might have found the 2006 regulations to be acceptable had the Commission provided "persuasive justification for them." 528 F.3d at 931.

### B. The Proposed Definitions Exceed the Boundaries of Congressional Intent by Federalizing Purely Nonfederal Activity

In passing BCRA, Congress clearly intended for the FEA definitions to exclude a substantial amount of nonfederal activity. *See, e.g.,* 2 U.S.C. § 431(20)(B) (2008). The *McConnell* Court pointed this out when deciding the constitutionality of BCRA's FEA provision, noting that it "explicitly excludes several categories of activity from this definition: public communications that refer solely to nonfederal candidates; contributions to nonfederal candidates; state and local political conventions; and the cost of grassroots campaign materials like bumper stickers that refer only to state candidates." 540 U.S. 93, 162 (2003); *see also* § 431(20)(B). In fact, the primary reason that BCRA's FEA provision survived *McConnell* is that it was "closely drawn" to only cover activity that "confer[red] substantial benefits on federal candidates." 540 U.S. at 167-68. The *Shays III Appeal* court even cited *McConnell* and an earlier Commission statement acknowledging that leaving purely nonfederal activity unregulated does not pose a risk to BCRA.[4] 528 F.3d at 932. If the Commission expands the scope of FEA to encompass nearly all nonfederal voter registration and GOTV activity, then it may open the door to further litigation on the grounds of, among other things, unconstitutional overbreadth. Some nonfederal activity must be left unregulated – this much is clear. We urge the Commission to strike a balance between expanding the scope of the definitions, as the *Shays III Appeal* court requires, and leaving some nonfederal campaign activity and speech unregulated, as Congress and the Supreme Court require.

While the Commission's proposed definitions certainly addressed the *Shays III Appeal* court's two specific concerns, they also unnecessarily federalize a substantial amount of state and local activity. For example, under the proposed rules it would be considered FEA for a state or local party to pay for an ad, airing during the FEA timeframe, which urged the public to vote for a state or local ballot measure in an upcoming election. This type of communication is not a rare exception, but rather is quite common. The CRP, for example, has spent $18,130,187 in support of or opposition to statewide ballot measures since 2002. Communications like this constitute a significant amount of purely nonfederal activity that will not meet the exception in proposed 11 C.F.R. 100.24(a)(3)(iii) because they do not mention a state or local candidate. This type of communication is also not generic campaign activity, another type of FEA not at issue here, because it is does not support or oppose a political party,

[4] *See, e.g.,* 67 Fed. Reg. 49106 (2002) ("As long as the section 527 organization for which funds are being raised exclusively supports non-Federal candidates and does not finance activities that could benefit Federal candidates, such as get-out-the-vote activities in connection with an election in which a Federal candidate appears on the ballot, BCRA's intent is preserved.") (cited by McConnell v. FEC, 540 U.S. 93, 177 n. 69 (2003), Shays v. FEC, 528 F.3d at 932.).

but instead focuses on a specific issue. Clearly this type of communication should not be considered FEA.

### C. A More Moderate Rule is Required

Rather than federalize most activity up front and slowly carve out exceptions to the rules, which would inevitably happen, the Commission instead should adopt a more moderate position. The *Shays III Appeal* court carved out the first of such exceptions for "routine or spontaneous speech-ending exhortations." *Id.* at 932. In the time since the Court of Appeals' decision was issued, scholars and practitioners have undoubtedly come up with several more situations that the Commission would most likely qualify as exemptions. Creating a regulatory scheme featuring a broad rule with a myriad of potential exceptions would result in a lack of clarity and lead to not only confusion in the regulated community but also an increase in compliance costs. It also would deter nonfederal activity and speech for state and local party committees because of uncertainty as to whether some activity might qualify as an exemption.

Instead, the Commission could create a more moderate rule – the least regulation that the *Shays III Appeal* court requires – and then add more regulated area to it if necessary. It *is* possible to address the court's concerns without crafting regulations that are overly broad and encroach on nonfederal activity and speech. *See* infra. Although the *Shays III Appeal* court is requiring the Commission to broaden its definitions, the Commission does not have to – and should not – draft a definition that goes beyond what the court requires.

## III. PRESERVING NONFEDERAL ACTIVITY THROUGH A SAFE HARBOR

Although the *Shays III Appeal* court provided very little corrective guidance after rejecting the Commission's regulations, it did raise two specific concerns for the Commission to address. The court's first concern was that the definitions of voter registration and GOTV activity required "that the party contacting potential voters actually 'assist' them in voter or registering to vote." *Id.* at 931. The second concern was that the definitions only covered contact "'by telephone, in person, or by other individualized means,' thus entirely excluding mass communications targeted to many people." *Id.* (quoting 11 C.F.R. § 100.24(a)(2)-(3)). While at first glance, addressing these concerns may seem to call for broad, sweeping definitions, it is possible to do so in a precise manner with a clear safe harbor – and without unnecessarily and improperly encroaching on nonfederal activity and speech.

### A. Expanding the Definitions Beyond "Assistance" and to Include All Communications

In an effort to address the *Shays III Appeal* court's first concern, the Commission proposes expanding the definition of both voter registration and GOTV to include activity that encourages or assists a person to register to vote or to vote. Proposed 11 C.F.R. § 100.24(a)(2)-(3). Under these proposed definitions, nearly all voter registration or GOTV-related activity within the FEA timeframes is included. But the Commission does not have to go nearly this far with the definitions. The *Shays III Appeal* court rejected the Commission's 2006 regulations because they were restricted to activity that included actual assistance. 528 F.3d at 931. The court, however, never said that the new definition must include mere encouragement or that mere encouragement was sufficient to make an activity qualify as voter registration or GOTV activity. Instead, the court stated that the definition should include *active* encouragement. *Id.* The Commission's proposed definitions include mere encouragement to register to vote and to vote when, in fact, they are not required to do so.

The Commission also proposes eliminating the "individualized means" limitation and including all forms of communication. Proposed 11 C.F.R. § 100.24(a)(2)-(3). Frustrated with the Commission's reasoning in an advisory opinion not to categorize robocalls and direct mail as individualized means, the court specifically pointed out that the individualized means limitation was too narrow. 528 F.3d at 931. We strongly believe that the Commission should refrain from sweeping all forms of communications into FEA. To the extent additional forms of communication are included in the definitions of voter registration and GOTV, however, then the Commission should ensure that there is another standard in place to ensure that purely nonfederal activity is being swept in. We suggest that the Commission expand its "mere exhortation" exemption to *all* communications as the best way to do this.

### B. Creating a Clear "Mere Exhortation" Safe Harbor

The *Shays III Appeal* court said it would be permissible for the Commission to exempt "mere exhortations"[5] from the definitions. *Id.* at 932. The court implied that it was acceptable to exclude from the definitions of voter registration and GOTV activities that were incidental or mere exhortations. The Commission has included an exemption for "mere exhortations" made at the end of a political speech or event in its proposed

[5] "Mere" means "no more than" and "exhortation" is a synonym for "encourage." Merriam-Webster Online Dictionary, Definitions of "Mere" and "Exhortation," http://www.merriam-webster.com (last visited Nov. 16, 2009).

regulations and has asked whether such an exemption should be expanded to other forms of communications. We urge the Commission to extend the proposed "mere exhortation" exemption to *all* communications. The exemption in its current form is so narrow as to be meaningless. Local parties, for example, rarely rely upon speakers, whether they are county party officials, state candidates, or federal candidates whose districts are in their counties, to make speeches or exhortations to the general public to register to vote. Extending the exemption to all forms of communication is crucial. Creating a safe harbor for all mere exhortations is an effective way to clearly differentiate purely nonfederal activity from that which has a substantial effect on federal elections.

For example, under the proposed regulations, airing a radio ad urging listeners to vote for a nonfederal ballot measure would be considered FEA because it would be "encouraging" listeners to vote for a nonfederal measure that happened to be on the same ballot as a federal race. Under the proposed regulations, a communication such as this would not be considered FEA if it were made at a political event or speech. The proposed "mere exhortation" exemption is a good model of how to preserve purely nonfederal activity and this example illustrates why it is important to extend it to other forms of communication. If the "mere exhortation" exemption extends to all communications, then the obviously nonfederal activity described in the above example would be correctly categorized as nonfederal and left unregulated at the federal level.

We believe the best way to define what constitutes a "mere" exhortation is through a content-based approach that both the Commission and regulated community are already familiar with – the time and space ratio. The Commission could decide, for example, that if encouragement to vote constitutes more than "X" percent of a radio ad, then it is considered to be encouraging the listeners to vote and should be classified as FEA. Providing a clear safe harbor, such as a percentage time and space ratio standard, would strengthen the rule and make it easier for the regulated community to follow.

### C. Applying a "Mere Exhortation" Safe Harbor to All Communications is Vital to Preserving Nonfederal Grassroots Activity

In California, the proposed regulations would negatively impact both our voter registration and GOTV programs. For example, the CRP's primary focus in 2010 will include our gubernatorial election. Under the proposed definition for voter registration, the CRP will have to pay for a radio ad urging Californians to support the Republican candidate for governor and reminding them to register to vote by the deadline with either one hundred percent federal or a combination of federal and Levin funds. The effect on our GOTV programs would be even more dramatic. The CRP relies heavily on our local

county parties to drive GOTV efforts. Nearly all CRP and local party communications leading up to the 2010 election will contain an exhortation to vote. The proposed regulations would suddenly "federalize" nearly all these communications. Many of these communications would appear to fall under the proposed nonfederal public communication exemption at Proposed 11 C.F.R. 100.24(a)(3)(iii), but realistically they may not because they might contain more information than just the date of the election.

The last example especially illustrates the need for a "mere exhortation" standard that creates a clear, bright line safe harbor. If a local party sends a direct mail piece that supports a slate of nonfederal candidates and also lists the election date and polling place for the recipients, it would not be considered FEA under our suggested standard if the space allotted to the GOTV references was less than "X" percent of the overall mail piece. Under a "mere exhortation" standard with a clear safe harbor such as this, the Commission would be able to ensure that activity that substantially affects federal candidates is still paid for with federal funds or a federal-Levin mix. At the same time, nonfederal activity and speech would still be left regulated at the state and local level.

## IV. VOTER ID AND GOTV IN CONNECTION WITH A NONFEDERAL ELECTION

In an effort to leave some nonfederal activity unregulated, the Commission proposed excluding from the definitions of voter identification ("voter ID") and GOTV any activity that is solely in connection with a nonfederal election being held on a separate date from a federal election. We fully support this position. Voter ID conducted in connection with a separate nonfederal election has either no effect or only a marginal effect on federal elections. Most GOTV activities obviously have no effect because their goal is to assist people in getting to the polls for the nonfederal election being held on a different day than the federal election. For example, many California cities and counties hold their municipal general elections in March and runoff election in May. The March elections are solely nonfederal, but the May runoff will usually be held on the same day as a federal primary. The GOTV activity that the CRP and its local party committees devote to the March election really have *no effect* on the later federal primary. Since each of these activities operate in connection with a specific election – specific candidates and specific issues – in mind, the proximity to a federal election should not matter. Additionally, timeframes for early voting should also not be taken into account.

In response to the Commission's query regarding the appropriate placement of this exception, we believe it would be more appropriate to incorporate the exception into the definition of "in connection with an election in which a candidate for Federal office appears on the ballot" as in the interim final rule, rather than separately list this as an

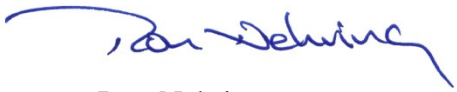
exclusion from the definition of FEA as in the proposed regulations. This organization is in keeping with our recommendation of incorporating such exceptions into the rule rather than separately listing carve-outs, as we believe such an approach will prove clearer and more workable for state and local parties.

## V. CONCLUSION

On behalf of the CRP and the RNC's Republican State Chairmen's Committee, I urge the Commission to reconsider and modify its proposed regulations before adopting final rules. In the current state, the proposed regulations federalize a vast amount of nonfederal activity and speech, contrary to Congressional intent, Supreme Court jurisprudence, and the health of democracy. The *Shays III Appeal* court is requiring the Commission to expand the scope of the voter registration and GOTV definitions, but the court is not requiring the Commission to expand the scope as much as the Commission has in the proposed regulations. The CRP and the Republican State Chairmen believe it would be prudent for the Commission to take a more moderate approach – to expand the definitions to include *active* encouragement, but to leave *mere* encouragement out of the definition by providing a clear, time and space ratio safe harbor. Doing so would address the two specific concerns raised in *the Shays III Appeal* decision without unnecessarily federalizing nonfederal grassroots activity and speech.

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

Respectfully submitted,



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