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Submitted By Electronic Mail

To:
Mr. Brad C. Deutsch,
Assistant General Counsel
Federal Election Commission
999 E. Street NW.
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RE: Comments on Notice 2005-2: De Minimis Exemption for Disbursement of Levin Funds by State, District, and Local Party Committees

Dear Mr. Deutsch,

These comments are submitted by Bryan Rogowski in response to the Commission's Notice of Proposed Rulemaking 2005-2, published at 70 Fed. Reg. 5385 (February 2nd, 2005) requesting comments on "proposed revisions to the Commission's regulations that establish a *de minimis* exemption allowing State, district, and local committees of a political party to pay for certain Federal election activity aggregating $5,000 or less in a calendar year entirely with Levin funds."

More specifically, the Commission has invited comments on the proposed revision of 11 CFR § 300.32(c)(4) and the question of whether following the precise language of the Bipartisan Campaign Reform Act of 2002 (BCRA) would lead to "absurd or futile results" absent promulgation of a *de minimis* exemption for disbursement of Levin funds by State, district, and local political party committees. I write to urge the Commission to accept the district court's ruling that the $5,000 Exemption in 11 CFR § 300.32(c)(4) was "inconsistent with Congress' clear intent, as expressed in BCRA" and to *disregard* the notion that following the precise language of BCRA would lead to "absurd or futile results".

I. Introduction

The Bipartisan Campaign Reform Act of 2002 (BCRA), which amended the Communications Act of 1934, the Federal Election Campaign Act of 1971 (FECA) and other portions of the United States Code, is the most recent of federal action attempting to "purge national politics of what [is] conceived to be the pernicious influence of 'big money' campaign contributions." *United States v. Automobile Workers*, 352 U.S. 567. In

enacting BCRA, Congress sought to address three important developments in the years since the Court's landmark decision in Buckley v. Valeo, 424 U.S. 1, 1) the increased importance of "soft money," 2) the proliferation of "issue ads," and 3) the disturbing findings of a Senate investigation into campaign practices related to the 1996 federal elections.

The FECA, as amended by BCRA, prohibits any national, state, district or local political party committee from soliciting, directing or making donations to certain tax-exempt organizations. 2 U.S.C. § 441i(d). This prohibition was challenged on constitutional grounds in *McConnell v. FEC*, 124 S. Ct. 619 (2003). The Supreme Court upheld the provision on party committees soliciting donations for tax-exempt organizations, finding it to be "closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates." *Id.* At 679. The Court also upheld the provision on prohibition of party committees making or directing donations to tax-exempt organizations. However, the Court concluded that the prohibition does raise "overbreadth" concerns if read to restrict donations that have already been raised in compliance with FECA's source, amount, and disclosure limitations. *Id* at 681. The Court reasoned that "prohibiting parties from donating funds already raised in compliance with FECA does little to further Congress' goal of preventing corruption of federal candidates and officeholders." *Id.* The Court interpreted this provision of the statute to apply "only to donations of funds not raised in compliance with FECA." *Id.*

It is important to return to the statutory language and legislative history of the Levin Amendment. Levin funds are most accurately characterized as non-Federal funds, subject only to state regulation, but for two additional restrictions. First, no contributor can donate more than $10,000 per year to a single committee's Levin account. §441i(b)(2)(B)(iii). Second, both Levin funds and the allocated portion of hard money to pay for such activities must be raised by the state or local committee that spends them, though the committee can team up with other national, state, or local committees to solicit the hard-money portion. §§441i(b)(2)(B)(iv), 441i(b)(2)(C). Pp. 52—55. As such, when party committees donate Levin funds to tax exempt organization they circumvent important BCRA restrictions.

The Commission has now turned to allocation ratios of disbursement of Levin and Federal funds[1] to Types 1 and 2 Federal election activity ("FEA")[2]. The amendment to the Federal Election Campaign Act of 1971 by BCRA subsection 441i(b)(1) which allows for disbursements between Federal funds and Levin funds brought the Commission to create the *de minimis* exemption for any State, district, or local party committee whose disbursements for allocable Type 1 & 2 FEA aggregate $5,000 or less

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[1] Federal funds are only such funds that comply with the limitations, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g)

[2] The first two types of FEA are: Type 1—Voter registration activity during the period that begins on the date that is 120 days before a regularly scheduled Federal election is held and ends on the date of the election; Type 2—Voter identification get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot.

in a calendar year. The justifications for the *de minimis* exemption that the district court held were inconsistent with Congress's clear intent, as expressed in BCRA, assumes wrongly that 1) Congress did not take a rigid approach to low levels of FEA and 2) that only half of what any single donor may donate to each and every State, district, and local political party committee under BCRA would be particularly sensitive to the grassroots nature of allocable Type 1 & 2 FEA.

II. Conditions and Restrictions on Spending Levin Funds

A. Legislative History

Given that the Commission has persistently viewed the language of the BCRA Amendments with a wider lens than the court (in *McConnell v. FEC*, 124 S. Ct. 619 (2003) and *Shays v. FEC*, 337 F.Supp.2d 28, 114-117 (D.D.C. 2004)), it is important to turn to the legislative and historical intent of the legislation.

Recall from *United States v. Automobile Workers*, 352 U.S. 567, 571 (1957) that Justice Frankfurter explained, in his opinion for the Court, that it was important to "purge national politics of what was conceived to be the pernicious influence of 'big money' campaign contributions." In Theodore Roosevelt's annual message to Congress in December 1905, he called for legislation forbidding all contributions by corporations "to any political committee or for any political purpose" (quoting 40 Cong. Rec. 96). He exclaimed further that "directors should not be permitted to use stockholders money for political purposes, and he recommended that a prohibition on corporate political contributions would be...an effective method of stopping the evils aimed at corrupt practices...".

The harsh rhetoric towards corporate and wealthy individuals contributing to political campaigns died down but the intent to shelter campaigns from the influence of powerful interests did not. In early 1972 Congress continued its improvement of the national election laws by enacting FECA, 86 Stat. 3. The presidential elections of 1972 however, made clear that FECA's passage did not deter unseemly fundraising and campaign practices. Evidence of those practices persuaded Congress to enact the FECA Amendments of 1974, 88 Stat. 1263. This first round of amendments 1) closed a loophole that allowed circumvention of individual committees' receipts and disbursements, 2) limited individual political contributions to $1,000 per election, 3) required public disclosure of contributions and expenditures exceeding certain limits and 4) established the Federal Election Commission (FEC) as an administrator and enforcer of the legislation.

When the Court of Appeals upheld the 1974 amendments almost in their entirety it set the foundations for the district court's ruling in *Shays v. FEC* by concluding "the clear and compelling interest in preserving the integrity of the electoral process provided a sufficient basis for sustaining the substantive provisions of the Act." *Id* at 841.

The Court of Appeals also upheld the provisions establishing contribution and expenditure limitations on the theory that they should be viewed as regulations of conduct rather than speech. *Id.*, at 840-841.

The current Court (2005), looking back on the 1974 amendments, views the restrictions on contribution limits as "serious-though different" under the First Amendment. *Buckley v. Valeo,* 424 U.S. 1, 14-23 (1976). The Court observed that the contribution limitations imposed only a "marginal restriction upon the contributor's ability to engage in free communication." *Id.*, at 20-21.

The rise of "soft money" donations to political parties and campaigns brought forth recognition by Congress that the close ties between federal candidates and state party committees would soon render anticorruption measures, in the standing enactments, ineffective. Congress designed 11 CFR §300.10, "General prohibitions on raising and spending non-Federal funds", to help prevent donors from contributing nonfederal funds to help finance "Federal election activity" (the first two types of which are defined above). The Levin Amendment created an exception to the general rules governing so-called "soft money". The Levin Amendment allows state and local party committees to pay for Type 1 & 2 activities as long as the activity does not refer solely to a clearly identified candidate for State or local office.

Prior rulemaking by the FEC brought comments on the applicability of Levin funds to the restriction limitations of non-Federal funds. The Commission was required to conform to the ruling of the U.S. Supreme Court in *McConnell v. FEC*, which included a narrowing of section 101 of the BCRA.

Senator Levin repeatedly emphasized two aspects of his amendment: it dealt only with non-Federal funds and it restricted the use of those funds to Type 1 & 2 activities (voter registration and get-out-the-vote efforts).

B. Current Law

If the rulemaking under consideration by the FEC is promulgated as I encourage, State, local and district political party committees will be required to pay for *all* allocable FEA either entirely with Federal funds or with an allocation of Federal and Levin funds pursuant to 11 CFR §300.33.

Under the current law disbursements for allocable Federal election activity that exceed in the aggregate $5,000 in a calendar year may be paid for entirely with Federal funds or may be allocated between Federal funds and Levin funds according to 11 CFR §300.33. Disbursements of less than $5,000 may be paid for entirely with Federal funds, entirely with Levin funds, or may be allocated between Federal and Levin funds. The result of the current law, according to the court, is the surge of non-Federal funds being raised by state, local and district parties and campaigns for Type 1 & 2 federal election activity. The legislative intent of the BCRA and all the way back to the Commission's

enabling act, FECA, was to keep distinct separation of funding source and funding activity between federal and non-federal funds. Under the current law this is not the case.

C. The Court's Interpretation

The decision in *Shays v. FEC* was to rule on the Commission's attempt to create a *de minimis* exemption for the use of non-Federal funds for Type 1 & 2 federal election activity. The Court disagreed with the justifications presented by the Commission for promulgating the $5,000 Exemption at 11 CFR §300.32. The Commission argued that Congress would not take a rigid approach to low levels of FEA and the claim that Type 1 & 2 FEA are somehow largely grassroots FEA. I agree with the court and disagree plainly with the Commission on both claims. Congress clearly intended for the BCRA to dissuade this type of promulgation, which made exceptions for campaign contributions, especially for amounts as large as $5,000. Moreover, by claiming that Type 1 & 2 FEA is void of national Federal elections is to ignore the tremendous support the grassroots provide to these elections.

The court did not agree with the Commission that a *de minimis* exemption stands and the Commission was unable to show that the statute would lead to "absurd or futile results" or that the failure to create a *de minimis* exemption would be "contrary to the primary legislative goal." *Shays* at 117 (quoting *Environmental Defense Fund* v. *EPA*, 82 F.3d 451, 466 (D.C. Cir. 1996) quoting, in turn, *State of Ohio* v. *EPA*, 997 F.2d 1520, 1535 (D.C. Cir. 1993)).

III. Conclusion

The decision in *Shays* v. *FEC* should conclude the Commissions actions to liberalize the restraints on non-federal campaign donations towards federal election activities. The Commissions promulgation of the $5,000 Exemption is in opposition with the interpretation of the conditions for a *de minimis* exemption as well as the legislative intent of the BCRA. Furthermore, it should be the position of the Commission to adhere to stricter standards of interpretation of FECA, BCRA and BCRA Amendments. Many of the problems that drove federal election restrictions through Congress over one hundred years ago still exist today—there is still an appearance of influence of 'big money' campaign contributions in Federal elections. Accordingly, I urge the Commission to strike the $5,000 Exemption in accordance with the courts opinion.