March 4, 2005

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

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 jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2005-2 published at 70 Fed. Reg. 5385 (February 2, 2005), seeking comment on whether the Commission should delete the $5,000 exemption from 11 C.F.R. § 300.32(c)(4). The Commission also seeks comment on whether, as an alternative to the outright elimination of the $5,000 *de minimis* exemption, the *de minimis* exemption should be revised so as to apply only to state, district, and local party committees with *combined receipts and disbursements* for federal election activity that together aggregate less than $5,000 in a calendar year. For the reasons set forth below, we support the deletion of the $5,000 exemption and oppose the alternative proposal to reformulate the exemption. If the Commission decides to hold a hearing on this matter, all three commenters request the opportunity to testify.

I. Introduction

The Federal Election Campaign Act ("FECA"), as amended by BCRA, requires that any expenditure for federal election activity by a state, district or local political party committee be made using funds subject to the limitations, prohibitions, and reporting requirements of the Act (*i.e.*, "hard money"). 2 U.S.C. § 441i(b)(1). The Supreme Court upheld this provision against constitutional challenge in *McConnell v. FEC*, 540 U.S. 93 (2003), and referred to the provision as "a straightforward contribution regulation . . . prevent[ing] donors from contributing nonfederal funds to state and local party committees to help finance 'Federal election activity.'" 540 U.S. at 161-62. The Court acknowledged that BCRA's national party soft money ban "would rapidly become ineffective if state and local committees remained available as a conduit for soft money donations." *Id.* at 161.

Congress carved out a narrow exception to the requirement that hard money be used to pay for federal election activities. The so-called Levin Amendment provides that a state,

district, or local party committee may use an allocated *mixture* of federal hard money and Levin funds[1] to pay for certain federal election activities. 2 U.S.C. § 441i(b)(2).

In May 2002, the Commission published NPRM 2002-7, seeking comment on proposed rules implementing the soft money provisions of BCRA, including the Levin Amendment provisions described above. 67 Fed. Reg. 35654 (May 20, 2002). The rule proposed in that NPRM, 11 C.F.R. § 300.32(c)(4), *did not contain* the $5,000 *de minimis* exemption eventually approved by the Commission. The Campaign Legal Center, Democracy 21, and the Center for Responsive Politics submitted written comments in response to NPRM 2002-7, but had no notice that the Commission would consider the creation of a *de minimis* exemption and, consequently, did not comment on the legality of such an exemption.

In July 2002, the Commission published 11 C.F.R. § 300.32(c)(4), along with its Explanation and Justification for the rule. 67 Fed. Reg. 49096, 49126 (July 29, 2002). Unlike the rule proposed by the FEC's General Counsel and published in NPRM 2002-7, the rule adopted by the Commission permits state, district, and local party committees to pay for certain federal election activity aggregating $5,000 or less *entirely* with Levin Funds, disregarding the statutory requirement that federal election activity be paid for either entirely with hard money or with a mixture of hard money and Levin funds.

This rule, among many others, was challenged in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) *appeal pending* No. 04-5352 (D.C. Cir). The district court invalidated 11 C.F.R. § 300.32(c)(4), concluding that the Commission's creation of a $5,000 *de minimis* exemption from required allocation "runs contrary to Congress' intent . . . ." *Id.* at 117. The court found that "a *de minimis* exemption cannot stand if it is contrary to that statute." *Id.* at 116 (quoting *Environmental Defense Fund, Inc. v. E.P.A.*, 83 F. 3d 451, 466 (D.C. Cir. 1996)). According to the district court, "Congress clearly expressed its intent in BCRA's statutory language that all 'Federal election activity' pursued by state, local and district political party committees is to be paid for using federal funds, except for certain circumstances where such committees may use an 'allocated' ratio of federal and Levin funds." *Shays*, 337 F. Supp. 2d at 116-17.

This rulemaking follows the district court's invalidation, on so-called "*Chevron*" grounds, of the $5,000 *de minimis* exemption in 11 C.F.R. § 300.32(c)(4), and the court's remand to the Commission for further action consistent with the court's opinion. The NPRM for this rulemaking proposes a simple and correct response to the court's remand, which is to delete the $5,000 *de minimis* exemption from 11 C.F.R. § 300.32(c)(4). The NPRM also suggests an alternative proposal for amending the regulation in a manner that would simply

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[1] Levin funds are not subject to FECA hard money limitations, prohibitions, and reporting requirements but, instead, are subject to looser contribution and expenditure restrictions established by the Levin Amendment. Levin funds must be raised in accordance with state contribution limits; however, no person may donate more than $10,000 in Levin funds to a state, district, or local party committee. Levin funds may not be used to fund an activity that refers to a clearly identified candidate for federal office, nor to fund any broadcasting, cable, or satellite communication, unless the communication refers solely to a candidate for state or local office. *See* 2 U.S.C. § 441i(b)(2).

reformulate the invalidated *de minimis* exemption. As noted above, undersigned commentators strongly support the proposal to delete the invalidated $5,000 *de minimis* exemption, and oppose the alternative proposal to simply reformulate an invalid exemption.

II. Proposed Deletion of $5,000 *De Minimis* Exemption

The NPRM proposes the replacement of the invalidated *de minimis* exemption with a clear and simple rule: "The disbursements for allocable Federal election activity may be paid for entirely with Federal funds or may be allocated between Federal funds and Levin funds according to 11 C.F.R. 300.33." 70 Fed. Reg. 5387.

This proposed regulatory language comports with the statutory intent of 2 U.S.C. § 441i(b) and makes clear to state, district, and local party committees the requirements of federal law. For this reason, we urge the Commission to adopt this proposed regulation 11 C.F.R. § 300.32(c)(4).

III. Alternative Proposal for Reformulation of the *De Minimis* Exemption

The Commission seeks comment regarding whether, as an alternative to the deletion of the $5,000 *de minimis* exemption, 11 C.F.R. § 300.32(c)(4) should instead be revised to retain a *de minimis* exemption for certain state, district, and local political party committees. This alternative proposal differs from the invalidated $5,000 exemption in only one respect. Whereas the invalidated exemption was available to committees with *disbursements* for federal election activities of $5,000 or less, the proposed alternative exemption would be available to committees with *combined receipts and disbursements* for federal election activities of less than $5,000.

The proposed alternative *de minimis* exemption merely reformulates the monetary threshold triggering the exemption. The district court in *Shays* took issue not with the monetary threshold triggering the invalidated *de minimis* exemption but, rather, with the inconsistency between a *de minimis* exemption and congressional intent. The monetary trigger for the exemption was irrelevant to the court's analysis.

The district court in *Shays* noted that a *de minimis* exemption "cannot stand if it is contrary to the express terms of the statute." *Shays*, 337 F. Supp. 2d at 116. The court found the $5,000 *de minimis* exemption to be contrary to Congress' clearly expressed intent to require *all* federal election activity to be paid for using hard money or an allocated ratio of hard money and Levin funds. *Id.* at 116-17. Just as the *de minimis* exemption analyzed in *Shays* violates congressional intent, so to would the proposed alternative *de minimis* exemption.

The court in *Shays* acknowledged that a *de minimis* exemption may be permissible in rare instances, where failure to allow a *de minimis* exemption is "contrary to the primary legislative goal," or will "lead to absurd or futile results." *Id.* at 117. The court found, however, that the Commission "failed to demonstrate that such effects would result in the absence of its *de minimis* exemption." *Id.* A faithful interpretation of 2 U.S.C. 441i(b) does

not permit a *de minimis* exemption. Not only would a regulation without any such exemption not undermine Congress' legislative goal, it is the only interpretation that will further it: to keep state parties from spending soft money on activities that influence federal elections. Nor will it produce absurd or futile results. For this reason, a *de minimis* exemption should not be adopted.

The Commission suggests in NPRM 2005-2 that the alternative proposed *de minimis* exemption is warranted by the fact that FECA reporting requirements apply only to committees with aggregate receipts and disbursements in a calendar year aggregating $5,000 or more. *See* 70 Fed. Reg. 5387. *See also* 2 U.S.C. § 434(e)(2)(A). Suggesting that federal reporting requirements necessitate or justify the alternative proposed *de minimis* exemption is akin to suggesting that the federal law requirement for itemization of contributions in excess of $200 in campaign finance reports, *see* 2 U.S.C. § 434(b)(3)(A), warrants an exemption for contributions of $200 or less from otherwise prohibited sources (*e.g.*, corporations, labor unions, foreign nationals).

Just as federal law prohibits a committee from receiving corporate contributions in connection with a federal election, *irrespective of the committee's reporting requirements*, *see* 2 U.S.C. § 441b(a), federal law likewise prohibits a state, district or local party committee from making disbursements for federal election activities without using only hard money, or a mixture of hard money and Levin funds, *irrespective of the committee's reporting requirements*. The adoption of a regulation incorporating a *de minimis* exemption in either context would constitute an illegal rewriting of the statute. And adoption of the reformulated *de minimis* exemption proposed in the NPRM would, we firmly believe, be contrary to law as the district court found in *Shays*.

IV. Conclusion

For the reasons set forth above, we urge the Commission to adopt proposed rule 11 C.F.R. § 300.32(c)(4) with no *de minimis* exemption, and to reject the alternative proposal, which would merely reformulate the invalidated exemption and violate the statutory intent of 2 U.S.C. § 441i(b).

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
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