June 3, 2005

By Electronic Mail – FEAdef@fec.gov

Ms. Mai T. Dinh
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2005-13: Definition of Federal Election Activity

Dear Ms. Dinh:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking 2005-13, published at 70 Fed. Reg. 23068 (May 4, 2005). The NPRM seeks comment on proposed changes to the definition of Federal election activity ("FEA") in its rules. As the principal authors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement that law.

BCRA made extensive and detailed amendments to the Federal Election Campaign Act of 1971 ("FECA"), as amended. In the years since FECA's enactment, the FEC had interpreted it in enforcement matters, rulemakings, and advisory opinions to allow the use of political party committee accounts to raise and spend non-federal funds, commonly known as "soft money," to influence federal elections. BCRA terminated this practice by prohibiting the national parties from raising or spending soft money and prohibiting state and local parties from spending soft money to influence federal elections. These provisions withstood constitutional scrutiny in *McConnell v. FEC*, 540 U.S. 93 (2003).

The Supreme Court recognized in *McConnell* that the primary goal of BCRA could not be achieved without addressing soft money spending by state parties as well as national parties. *See* 540 U.S. at 164-68. It specifically upheld the prohibition on state party spending of soft money to influence Federal elections. *Id.* at 167.

The language and legislative history of BCRA make it clear that Congress intended to regulate state and local party spending when it affects Federal elections. And the primary way that BCRA does this is to prohibit the spending of soft money on "Federal election activities." BCRA contains a detailed definition of Federal election activities. In promulgating rules to further flesh out that definition and in answering questions that may arise as to the application of the law to specific fact situations, the Commission's duty is to implement the primary goal of the statute.

Unfortunately, in the original soft money rulemaking, the Commission consistently acted to allow, if not flat out encourage, the raising and use of soft money in ways not contemplated or permitted by BCRA. Time after time, the Commission adopted interpretations of statutory terms that were at odds with the structure and language of the statute and that undermined the clear purpose of the new law. Indeed, five of the 15 regulations overturned by the District Court in *Shays and Meehan v. FEC,* 337 F. Supp. 2d 28 (D.D.C 2004), *appeal pending* No. 04-5352 (D.C. Cir.), have to do with the definition of Federal election activities.

In this rulemaking, the Commission has the opportunity to correct its errors. But it can do so only if it adopts a different approach to its rulemaking function. The Commission's job is to implement the law, not to act as a super-legislature and second guess the judgments that Congress made.

In this connection, it should be noted that a number of the regulations overturned in *Shays and Meehan,* including two at issue in this proposed rule, were overturned in part because the Commission failed to give notice in the NPRM that it was contemplating a narrowing interpretation of the term to be defined. *See, e.g., Shays and Meehan,* 337 F. Supp. 2d at 100 (regarding voter registration), 106 (regarding GOTV). The reason that notice was not given was that the particular interpretation that the Commission adopted originated with a "floor amendment" offered by a single Commissioner or a group of Commissioners in proceedings held after comments had been received. These proceedings resembled a committee markup session with Commissioners playing the roles of legislators offering amendments and advancing policy arguments for why their proposals should be adopted. Almost completely gone from the discussion was any consideration of what Congress intended in BCRA.

The failure of so many of these "floor amendments" to pass muster in court should act as a strong caution against this kind of practice in the future. If the Commission keeps the purposes of BCRA as its touchstone in resolving questions about how statutory terms should be interpreted, perhaps it can avoid the temptation to legislate anew, rather than implement the law that Congress passed.

Our comments on the specific provisions of the proposed rule follow:

Voter Registration Activity (11 C.F.R. § 100.24(a)(2))

The proposed rule keeps the current rule in effect, noting that the District Court in *Shays and Meehan* overturned the rule on the narrow ground that proper notice was not given. We disagree with this approach. We believe the Commission should revisit the decision to limit "voter registration activities" to those activities that involve individual contact to assist people in registering them to vote. That narrowing construction of the term is at odds with the Commission's current discussion of voter registration activities as part of the definition of expenditure, *see* 11 C.F.R. § 100.133, and with a common sense understanding of the term. Voter registration is not just assisting people to register, it is encouraging them to register.

We reject the proposed rule's suggestion that the Commission should narrow the statutory definition in order to "balance the need to cover the core voter registration activity targeted by the statute with the public policy interest of encouraging the civic act of voting." 70 Fed. Reg. at 23069. Nothing in BCRA is inconsistent with the policy interest of encouraging people to register and vote. BCRA is about how such activities are to be financed. If nothing else, the 2004 elections demonstrated that banning soft money did not prevent political parties from having ample funds to carry out their important role in our political system. The Commission is not entitled to second guess Congress's judgment about the influence of voter registration activities on Federal elections by narrowing the statutory term to incorporate its own notion of "core" voter registration activities that has no basis in the statute or its legislative history.

Furthermore, whatever balancing needed to be done to recognize that some voter registration activity is purely civic in nature or is not done with a specific election in mind was done by the 120 day limitation in the statute itself. Congress made the judgment that within four months of a Federal election all voter registration activity will influence that election and state parties should have to use hard money (or a combination of hard money and Levin money) to pay for it. There is no justification for the Commission undertaking a further narrowing of the state party activities that should be paid for with hard money based on nothing more than the policy preferences of a majority of its members.

The concern expressed in the proposed rule about sweeping too broadly and covering "thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty" is perplexing. The regulation at issue here governs state party spending on these activities, not grassroots organizations or even other political committees. Surely the Commission would not modify its interpretation of the term voter registration activity in other rules without providing notice to the public that it was doing so.

Get-Out-The-Vote Activity (11 C.F.R. § 100.24(a)(3))

The current rule's limitation on what constitutes GOTV activity is even more damaging to the goals of the statute than its interpretation of voter registration. By defining GOTV as "contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting" the Commission effectively allows state parties to use soft money for a wide variety of activities commonly understood as being part of a GOTV campaign. And by indicating, albeit in a non-exclusive list, that providing information about polling place locations and times within 72 hours of an election is a GOTV activity, the rule strongly suggests that providing such information any earlier is not.

The 72-hour rule is particularly inappropriate given the prominence and success of the Republican Party's "72-hour plan" for mobilizing voters in the 2002 and 2004 elections. While the plan was put into action in the last 72 hours of the campaign,

preparation and development of the strategy, and spending for it, obviously took place many weeks and even months in advance of the election. Indeed, 130,000 volunteers worked *for the last week of the campaign* to carry out the plan. *See* Daron R. Shaw, "Going Door to Door with the GOP," Hoover Institution Digest (vol. 4, 2004), available at http://www.hooverdigest.org/044/shaw.html (last visited 6/2/2005). While some of the activities included in the 72-hour plan might be considered voter identification or voter registration activities, many probably would not. We think it is essential that the full range of GOTV activities be included in the definition. To allow state parties to spend soft money developing a GOTV plan aimed at influencing a Federal election would not effectuate the intent of Congress. Indeed, it would undermine it.

As we argued in our comments filed in the first soft money rulemaking: "[N]othing in BCRA provides any basis for the proposition that an activity must occur relatively proximate to elections to constitute 'get-out-the-vote activity.'" Comments of Sen. McCain, Sen. Feingold, Rep. Shays, and Rep. Meehan on Notice 2002-7, at 3 (May 29, 2002). Indeed, we strongly disagreed with the Commission's decision to limit coverage for such activities to, at most, the year of the Federal election. But that decision at least was tied to the statutory language that the activities must be "in connection with an election in which a Federal candidate is on the ballot." The 72-hour rule has no statutory basis whatsoever, and it is in conflict with all of our experience in how campaigns are run and GOTV operations are organized and carried out.

We also believe that the Commission's narrowing construction of the term GOTV to include only activities that "assist" people in the act of voting was wrong. A recorded call that says "please remember to get out to vote tomorrow" is just as much of a GOTV activity as a call where a volunteer informs the voter of the location of the polls or the hours during which the polls are open. Using the term "encourage" rather than "assist," as the Commission does in 11 C.F.R. § 100.133, is far more consistent with legislative intent.

Finally, we agree with the proposed rule that the statute requires associations of state and local candidates to use hard money for all of their GOTV activities when a Federal candidate is on the ballot.

Voter Identification (11 C.F.R. § 100.24(a)(4)

The definition of voter identification promulgated in 2002 inexplicably did not cover the acquisition of voter lists. This was a glaring omission, and the *Shays and Meehan* court found it to be contrary to congressional intent. *See Shays and Meehan,* 337 F. Supp. at 108. The proposed rule remedies this situation, but recognizes that the election year only "FEA window" may provide state parties with the ability to "game the system" by purchasing voter lists in an off year. We agree this is a problem and such a result would be inconsistent with the intent of BCRA.

One remedy to the problem would be to recognize that the FEA window is itself a flawed concept. Congress limited voter registration to the 120-day period before an

election but provided no time limit for other types of Federal election activity. At least in those states where both Federal and state elections occur in even years, it makes no sense to have an FEA window. At the very least, voter identification, which is the Federal election activity most likely to take place well in advance of the election, should not be limited to the year when the Federal election is taking place.

We strongly oppose any exception for a state party acquiring a voter list that it supposedly uses only for state elections. Congress directly addressed this situation in the Levin amendment. 2 U.S.C. §441i(b)(2). The Commission has no power to create an additional exception.

On the other hand, we agree again that the statute requires associations of state and local candidates to use hard money for voter identification activities when a Federal candidate is on the ballot.

Definition of "In Connection With an Election in Which a Candidate for Federal Office Appears on the Ballot" (11 C.F.R. § 100.24(a)(1))

We oppose any further time limitations on when Federal activity will be considered to have taken place. As discussed above, the "FEA window" that the Commission created in its initial soft money rulemaking already undercuts to some extent BCRA's effort to end state party spending of soft money to influence Federal elections. But within the Federal election year, or if a state schedules a special Federal election in an off year, voter registration, GOTV, and voter identification should be paid for with hard money (or hard money and Levin funds). Carving out time periods from even numbered years where state and local parties can spend soft money on these activities just because a municipal election has been scheduled would clearly be contrary to Congress's intent in BCRA.

Conclusion

This rulemaking presents an important test for the Commission, and an opportunity. With respect to the voter registration and GOTV issues, the District Court in the *Shays and Meehan* case does not specifically direct the Commission to change the rule. But the court did make clear that the interpretations advanced by the Commission were not the most logical or the most supportive of BCRA's purposes. We strongly urge the Commission to use this rulemaking to demonstrate that it understands the message the court sent and that we have been trying to deliver since the statute passed. The Commission's goal should be to interpret and apply BCRA in the manner most likely to fulfill Congress's intent.

Thank you for your consideration.

Sincerely,

Senator John McCain

Senator Russell D. Feingold
Representative Christopher Shays
Representative Marty Meehan