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Via Email

Mai T. Dinh, Esq.
Acting Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: "Federal election activity"

Dear Ms. Dinh:

These comments are submitted in response to the Commission's above-referenced Notice of Proposed Rulemaking, 70 *Fed. Reg*. 23068 (May 4, 2005), proposing amendments to the Commission's regulations relating to the definition of "Federal election activity". These comments are being provided in our personal capacity as attorneys who represent more than thirty state and local party committees and do not necessarily represent the views of any particular client.

In the event the Commission determines that a hearing will be held on these proposed rules, the undersigned request an opportunity to testify at that hearing.

This rulemaking is being undertaken in response to the decision in *Shays v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004). In that case, the District Court, *inter alia*, set aside certain portions of the Commission's current regulations regarding the definition of "Federal election activity". We provide the following comments in response to the Commission's proposals:

1) Voter Registration Activity

As a general matter we support the Commission s conclusion to retain the current definition of voter registration activity. We believe that the regulated community has found the Commission s definition relatively easy to understand and apply. In response to the Commission s question, we agree with the view taken in the NPRM that mere encouragement to register to vote should not be considered voter registration activity. Thus, we do not believe that mere encouragement should be included in Commission s definition. If it were so included, a vast array of campaign activity could be considered Federal election activity. We believe the Commission s regulation strikes the proper balance between Congressional intent to regulate actual voter registration activity and the need for the regulated community to understand and apply a fair and workable definition.

Our only specific recommendation with respect to the modification of the definition would be to exclude the term voting information from the definition. As a general matter, voting information is not generally provided at the same time as voter registration activities but is usually set forth in communications made immediately prior to the election. Ultimately, we believe the concept of voting information should be clarified and narrowed as discussed below in our comments regarding the Commission s proposed definition of get out the vote.

2) Get-out-the-Vote Activity

Generally, we believe that the current definition of get-out-the-vote (GOTV) activity is a reasonable and understandable definition. However, state party committees have experienced two problems with the definition:

(a) GOTV Example

We have found that the first example of GOTV in the Commission s definition, 11 CFR §100.24(a)(3)(i), has been difficult to interpret and apply. That example appears to create a three part, conjunctive test for such an activity to constitute GOTV. First, the communication must be one where the voter is contacted through phones, in person or through other individualized means. Second, the communication, in the example, occurs within 72 hours of the election. Third, the communication referenced in the example provides information such as the date of the election, times when polling places are open and the location of particular polling places. *Id.*

During the 2004 election cycle, there was considerable confusion as to what types of communications would be covered by this example. This confusion related to the timing, method, and content of communications. First, the reference to 72 hours in the example led many committees to believe that the Commission was creating a bright line rule that any GOTV communication outside that window was not a GOTV communication regardless of content. Second, the content portion of the example led to uncertainly as to what types of content would cause a communication to be treated as GOTV activity. For example, does the mere inclusion of the date of the election in a communication cause it to be treated as GOTV activity? Would the inclusion of the voter's polling place, but without the time polling places are open, constitute GOTV?

In addition to being difficult to interpret and apply, the example set forth in §100.24(a)(3)(i) sweeps too broadly in terms of the activity brought within the scope of the GOTV activity definition. Information about the date of the election, polling places and hours have been standard information to be included in persuasion communications on behalf of candidates for years, and does not necessarily "assist" someone in engaging in the act of voting. Further, now that the Commission will be required by the *Shays* decision to include individualized communications by association of state and local candidates—including, in particular, state legislative caucuses--in the definition of GOTV activity, the definition will result in requiring such legislative caucuses to pay for a broad range of activities with federally-regulated funds. Thus, applying the example of §100.24(a)(3)(i), it would appear that, under the new regulation, state legislative caucuses may have to use federal funds to pay for state-candidate specific communications if those communications merely included information about the day of the election: "Vote for Jones for State Senate on November 3." Obviously, many state legislative caucuses do not have federally permissible funds because they are, by definition, state political committees and therefore raise funds not subject to the prohibitions and limitations of the Federal Election Campaign Act. Thus state legislative caucuses may be barred altogether from referencing Election Day even in state candidate specific communications. This could not be what Congress had intended in enacting BCRA.

Ultimately, we believe that GOTV activity should be limited to those activities that are designed to provide actual, physical assistance to a voter that facilitates the ability of a person to vote. Examples of individualized GOTV activity that would facilitate the vote would be the receipt and collection of absentee ballots or vote-by-mail ballots (including any materials that were delivered in an individualized manner that would provide any tear-off return slip or other information to assist a registered voter in obtaining a ballot), phone calls on Election Day that remind persons to vote and/or offers of rides to the polls, as well as the actual transport of voters to the polls.

Therefore, the Commission should eliminate the example set forth in section 100.24(a)(3)(i) and should amend the regulation to make clear that GOTV activity includes only those activities that actually facilitate or physically assist voters in the act of voting.

(b) "Individualized Means"

The current definition of GOTV activity includes contacting voters by telephone, in person, "or by other individualized means." State and local party committees have experienced considerable difficulty in understanding the scope of the term "other individualized means." In particular, it was our understanding, based on informal communications with the Commission that the Commission views direct mail delivered to voters as "individualized means." In the *McConnell v. FEC* litigation, however, the United States and the Commission represented to the three-judge US District Court that mail would *not* be considered an individualize means of contacting voters:

> The FEC's regulations, however, define GOTV to mean "contacting registered voters by telephone, in person, or by other *individualized means*".... This excludes from regulation as GOTV all of a party committee's television or radio advertising for state candidates or ballot initiatives and, apparently, even *mass mailings* and Internet appeals. Only "individualized" assistance must be paid with federal funds (or Levin funds).

McConnell v. FEC, No. 02-0582 (D.D.C (CKK, KLH, RJL)), Redacted Opposition Brief of Defendants at 29 (emphasis added and in original).

With the exclusion of direct mail and the Internet from the definition of "individualized means," the only remaining means of communication that appear to be included in the definition of GOTV activity would be telephone and in-person contacts, which are already specifically referenced in the language of the regulation. Therefore, the regulation should be amended to delete or further clarify the reference to "other individualized means."[1]

[1] If the Commission adopts this suggestion, a conforming amendment should be made to the definition of voter registration activity.

3) Voter Identification

In light of the guidance provided to the Commission by the district court in *Shays v. FEC,* we believe that the new regulation proposed by the Commission is reasonable and appropriate under the circumstances. The bright line test provided by the Commission is easy to understand, and we believe, will not be subject to abuse.

In response to the Commission s question, the inclusion of costs as voter identification activity should turn on a purchase test rather than a use test. It would be nearly impossible for the Commission to craft, and for the regulated community to understand or apply, a rule that attempts to track the uses of voter file information. Therefore, we would urge that the Commission not create a rule that requires a committee to track such uses of the list since the allocation and valuation issues would likely be inconsistently applied and be very burdensome for committees.

We do not believe that a payment rule (as opposed to a usage rule) will unfairly burden committees that undertake non-federal elections in odd-years since such committees will likely engage in voter identification activities during the odd year outside of the Federal election activity windows. Of course, by eliminating former 11 C.F.R. § 106.5(d)(2), party committees that hold non-federal elections in odd-years are no longer permitted to pay for voter drive expenses solely with non-federal funds and such expenditures are now subject to the Commission s minimum ratios found in the current 11 C.F.R. § 106.7(d)(2). However, we believe the Commission should reinstate in its allocation regulations, in whole or in part, the former exemption that permitted the use of 100% non-federal funds for voter drive activities for non-federal, odd-year elections. Naturally, as noted above, a specific exemption of voter file acquisition in the odd-year from the definition of Federal election activity regulation would, as a general matter, be superfluous because, under a purchase test, the activity would likely fall outside of any Federal election activity time window.

While the Commission s proposed regulation covers the actual acquisition or creation of voter lists, the proposed regulation does *not* appear to cover the administrative costs of the maintenance of a voter list. We would note that there are other costs associated with the maintenance of a voter file other than the actual acquisition of the voter list itself or specifically identifying whether a particular voter will vote in an upcoming election. These costs include the housing of the file on a computer or Internet server, staff resources to maintain the file, as well as updating the file with new information regarding existing voters on the file that are not related to the likelihood of voting or constitute the acquisition of a new voter list, such as changes of addresses, phone numbers, party affiliation and voter registration status. During the 2004 election

cycle, state party committees received inquiries from the Commission s Reports Analysis Division that suggested, mistakenly, that expenditures for such activities as Voter File or Voter File Maintenance should be treated as voter identification even under the narrower definition of the current rule. The new regulation should make clear that such expenditures do *not* constitute voter identification activity.

4) Federal election activity Windows

While we generally support the Commission s attempt to alleviate the burdens of the Federal election activity windows for municipal elections, the Commission should clarify who is entitled to utilize the proposed exclusions. Is the exemption a bright line test for all state, district and local party committees in the state? For example, if only one city in a state is holding a separate municipal election, does the exemption apply to all activities of a state party committee during that period regardless of whether they are related to the city elections? Are local committees that are not located within that jurisdiction entitled to the exception? The Commission should clarify this to avoid confusion in connection with the exception.

We appreciate the opportunity to submit these comments on the Commisson s proposed regulations.

Respectfully submitted,

Joseph E. Sandler
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