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2010 AUG 26 P 1:52

AGENDA ITEM
For Meeting of 8/26/10

MEMORANDUM

SUBMITTED LATE

TO: The Commission

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SUBJECT: Draft Final Rules and Explanation and Justification for Definition of Federal Election Activity

Attached are draft Final Rules and Explanation and Justification to implement the decision of the Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008).

We request that this draft be placed on the agenda for August 26, 2010.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 100**

3 **[Notice 2010 - __]**

4 **Definition of Federal Election Activity**

5 **AGENCY:** Federal Election Commission.

6 **ACTION:** Final Rules.

7 **SUMMARY:** The Federal Election Commission (“Commission”) is revising its
8 rules as to the activities that constitute “Federal election activity”
9 under the Federal Election Campaign Act of 1971, as amended.
10 Specifically, these final rules modify the definitions of “voter
11 registration activity” and “get-out-the-vote activity,” in response to
12 the decision of the U.S. Court of Appeals for the District of
13 Columbia Circuit in Shays v. FEC.

14 **DATES:** These rules are effective on December 1, 2010.

15 **FOR FURTHER
16 INFORMATION
17 CONTACT:**

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18 David C. Adkins or Attorney Mr. Neven F. Stipanovic, 999 E
19 Street, NW., Washington, D.C. 20463, (202) 694-1650 or (800)
20 424-9530.

21 **SUPPLEMENTARY
22 INFORMATION:**

The Bipartisan Campaign Reform Act of 2002¹ (“BCRA”) contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 et seq. (“the Act”). The Commission is revising its regulations at 11

¹ Pub. L. No. 107-155, 116 Stat. 81 (2002).

1 CFR 100.24 regarding “Federal election activity,” including the definitions of the terms “voter
2 registration activity” and “get-out-the-vote activity” (“GOTV activity”). The Court of Appeals
3 for the District of Columbia Circuit found aspects of these rules invalid in Shays v. Federal
4 Election Commission, 528 F.3d 914 (D.C. Cir. 2008) (“Shays III”). Accordingly, the
5 Commission is revising its rules at 11 CFR 100.24 to comply with the Shays III decision.

6 **Transmission of Final Rules to Congress**

7 Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review
8 of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker
9 of the House of Representatives and the President of the Senate and publish them in the Federal
10 Register at least thirty calendar days before they take effect. The final rules that follow were
11 transmitted to Congress on [_____, 2010].

12 **Explanation and Justification**

13 **I. Background Information**

14 A. BCRA

15 The Act, as amended by BCRA, and Commission regulations provide that a State,
16 district, or local committee of a political party must pay for certain “Federal election activities”
17 with either entirely Federal funds² or, in other instances, a mix of Federal funds and “Levin
18 funds.”³ See 2 U.S.C. 441i(b); 11 CFR 300.32. The Act identifies four types of activity that are
19 subject to these funding restrictions, including “voter registration activity” – Type I Federal

² “Federal funds” are funds subject to the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g).

³ “Levin funds” are funds raised and disbursed by State, district, or local party committees pursuant to certain restrictions. See 2 U.S.C. 441i(b); see also 11 CFR 300.2(i).

1 election activity – and GOTV activity – Type II Federal election activity. See 2 U.S.C.
2 431(20)(A)(i) and (ii), 441i(b); 11 CFR 100.24(a)(2) and (3).⁴

3 Application of BCRA’s Federal election activity funding restrictions for Types I and II
4 Federal election activity is conditioned upon the timing of the activity. Voter registration
5 activity (Type I), for example, constitutes Federal election activity, and therefore is subject to
6 BCRA’s funding restrictions, only if it is conducted “120 days before the date a regularly
7 scheduled Federal election is held.” 2 U.S.C. 431(20)(A)(i). Similarly, voter identification,
8 GOTV activity, and generic campaign activity are Federal election activity only if they are
9 conducted “in connection with an election in which a candidate for Federal office appears on the
10 ballot,” a phrase that is defined in terms of a specific time window.⁵ 2 U.S.C. 431(20)(A)(ii) and
11 11 C.F.R. 100.24(a)(1).

12 In BCRA, Congress chose to restrict the funds which State, district, and local party
13 committees could use for Federal election activity because it determined that these activities
14 affect Federal elections. See 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen.

⁴ In addition to GOTV activity, Type II Federal election activity also includes “voter identification” and “generic campaign activity.” See 2 U.S.C. 431(20)(A)(ii); 11 CFR 100.24 and 100.25. Types III and IV Federal election activity are outside the scope of this rulemaking and are not discussed. They pertain to public communications that refer to a clearly identified Federal candidate and promote, support, attack or oppose a candidate for Federal office (Type III) and services provided by an employee of a State, district, or local committee of a political party who spends more than 25 percent of his or her compensated time on activities in connection with a Federal election, (Type IV). Types I and II Federal election activity may be funded with a combination of Federal and Levin funds; Types III and IV Federal election activity must be funded entirely with Federal funds.

⁵ Commission regulations define “in connection with an election in which a candidate for Federal office appears on the ballot” as:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) The period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

11 C.F.R. 100.24(a)(1).

1 McCain) (noting, for example, that “get-out-the-vote and voter registration drives . . . are
2 designed to, and do have an unmistakable impact on both Federal and non-Federal elections”).

3 Restrictions on the funding of Federal election activity by State, district, and local party
4 committees are critical because they prevent evasion of BCRA’s restrictions on the raising and
5 spending of non-Federal funds by national party committees and Federal candidates and
6 officeholders. See Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds
7 or Soft Money, 67 FR 49064, 65 (July 29, 2002) (“2002 Final Rule”). Indeed, in passing
8 BCRA’s Federal election activity provisions, Congress had in mind “the very real danger that
9 Federal contribution limits could be evaded by diverting funds to State and local parties, which
10 then use those funds for Federal election activity.” See 148 Cong. Rec. S2138 (daily ed. Mar.
11 20, 2002) (statement of Sen. McCain).

12 The Supreme Court upheld BCRA’s Federal election activity provisions in McConnell v.
13 FEC, 124 S. Ct. 619, 670-77 (2003). The Court found that non-Federal funds given to State,
14 district, and local party committees could have the same corrupting influence as non-Federal
15 funds given to the national parties and therefore held that BCRA’s Federal election activity
16 restrictions were justified by an important government interest. Id. at 672-73. The Court held
17 that BCRA’s Federal election activity provisions were likely necessary to prevent “corrupting
18 activity from shifting wholesale to state committees and thereby eviscerating [the Act].” Id. at
19 673.

20 In reaching its decision, the Court noted that BCRA regulated only “those contributions
21 to State and local parties that can be used to benefit federal candidates directly” and therefore
22 posed the greatest threat of corruption. Id. at 673-74. As such, the Court found BCRA’s
23 regulation of voter registration activities, which “directly assist the party’s candidates for federal

1 office,” and GOTV activities, from which Federal candidates “reap substantial rewards,” to be
2 permissible methods of countering both corruption and the appearance of corruption. Id. at 674;
3 see also id. at 675 (finding that voter registration activities and GOTV activities “confer
4 substantial benefits on federal candidates” and “the funding of such activities creates a
5 significant risk of actual and apparent corruption,” which BCRA aims to minimize).

6 B. Rulemakings

7 Although BCRA defines Federal election activity to include “voter registration activity”
8 and “GOTV activity,” it does not specifically define those underlying terms. See 2 U.S.C.
9 431(20)(A)(ii)-(iii). Accordingly, the Commission promulgated definitions of these terms.

10 1. 2002 Rulemaking

11 The Commission first promulgated definitions of “voter registration activity” and
12 “GOTV activity” on July 29, 2002. See 2002 Final Rule, 67 FR at 49067. The 2002 Final Rule
13 defined “voter registration activity” as “contacting individuals by telephone, in person, or by
14 other individualized means to assist them in registering to vote.” Id. at 49110. The Explanation
15 and Justification (“E&J”) accompanying the rule noted that the definition was limited to
16 “individualized contact for the specific purpose of assisting individuals with the process of
17 registering to vote.” Id. at 49067. The Commission expressly rejected an approach whereby
18 mere encouragement to register to vote would have constituted voter registration activity. The
19 Commission was concerned that taking such an approach would result in “thousands of political
20 committees and grassroots organizations that merely encouraged voting as a civic duty, who
21 have never been subject to Federal regulation for such conduct, [being] swept into the extensive
22 reporting and filing requirements mandated under Federal law.” Id.

1 The Commission similarly defined “GOTV activity” in 2002 as “contacting registered
2 voters by telephone, in person, or by other individualized means to assist them in engaging in the
3 act of voting.” Id. at 49111. In adopting this construction, the Commission sought to distinguish
4 GOTV activity from “ordinary or usual campaigning,” to avoid “federaliz[ing] a vast
5 percentage” of the campaign activity that a State, district, or local party committee may conduct
6 on behalf of its candidates. Id. at 49067. The Commission’s definition focused on actions
7 directed toward registered voters that had the particular purpose of “assisting registered voters to
8 take any and all steps to get to the polls and cast their ballots, or to vote by absentee ballot or
9 other means provided by law.” Id. The definition was not intended to cover activity aimed at
10 “generally increasing public support for a candidate or decreasing public support for an opposing
11 candidate.” Id.

12 The Commission’s 2002 definition of GOTV activity also expressly excluded “any
13 communication by an association or similar group of candidates for State and local office or of
14 individuals holding State or local office if such communication refers only to one or more [S]tate
15 or local candidates,” in order to keep “State and local candidates’ grassroots and local political
16 activity a question of State, not Federal, law.” Id. The Commission declined to read BCRA as
17 extending “to purely State and local activity by State and local candidates” and concluded that
18 such “a vast federalization of State and local activity” required “greater direction from
19 Congress.” Id.

20 The Commission’s 2002 definitions of voter registration activity and GOTV activity were
21 challenged in Shays v. FEC, 337 F. Supp.2d 28 (D.D.C. 2004) (“Shays I”). The district court
22 held that the definition of “voter registration activity,” which required actual assistance, was
23 neither inconsistent with congressional intent nor an impermissible construction of BCRA. See

1 Shays I, 337 F. Supp. 2d at 100 (applying Chevron U.S.A., Inc. v. Natural Res. Def. Council,
2 Inc., 467 U.S. 837 (1984)). The court further held that the “exact parameters” of the regulatory
3 definition were unclear and, therefore, it was unable to determine if the definition “unduly
4 compromised” BCRA’s purpose. Id. Nevertheless, the court found that the Commission’s
5 definition was promulgated without adequate notice and opportunity for comment, contrary to
6 the Administrative Procedure Act, see 5 U.S.C. 553, and remanded the regulation to the
7 Commission. See Shays I, 337 F. Supp. 2d at 100.

8 The court reached similar conclusions as to the definition of “GOTV activity,” holding
9 that the definition of “voter registration activity,” which required actual assistance, was neither
10 inconsistent with congressional intent nor an impermissible construction of BCRA. Id. at 103,
11 05 (applying Chevron). The court also concluded that there was “ambiguity as to what acts are
12 encompassed by the regulation,” which rendered the court unable to determine whether the
13 definition of “GOTV activity” unduly compromised BCRA. Id. at 105. As it had with the
14 definition of “voter registration activity,” however, the court found that the Commission’s
15 definition was promulgated without adequate notice and opportunity for comment and remanded
16 the regulation to the Commission. See id. at 106.

17 The court also found that the exemption from the GOTV activity definition for
18 communications made by associations or groups of State or local candidates or officeholders ran
19 contrary to Congress’s clearly expressed intent. See id. at 104. The court found that BCRA
20 provided no support for such an exemption, and it rejected all federalism concerns raised by the
21 Commission in defense of the exemption, holding that “Congress was sensitive to federalism
22 concerns in drafting BCRA” and that the Supreme Court in McConnell had rejected the general
23 federalism challenge brought against BCRA’s Federal election activity provisions. Id.

1 2. 2005 Rulemaking

2 The Commission commenced a rulemaking in 2005 to address the court’s concerns,
3 rather than appeal these aspects of Shays I. Following another notice and period for comment,
4 the Commission promulgated definitions of “voter registration activity” and “GOTV activity”
5 that were substantially similar to those promulgated in 2002. The final rules were accompanied
6 by an E&J that sought to address many of the Shays I court’s concerns. See Final Rules on
7 Definition of Federal Election Activity, 71 FR 8926, 28 (Feb. 22, 2006) (“2006 Final Rule”).

8 The Commission’s decision to leave unchanged the core aspects of the definitions of
9 “voter registration activity” and “GOTV activity” was based on its continued concern that
10 definitions which captured “mere encouragement[s]” would be “overly broad,” were unnecessary
11 “to effectively implement BCRA,” and “could have an adverse impact on grassroots political
12 activity.”⁶ Accordingly, the 2006 definitions were designed to encompass activities that actually
13 registered persons to vote and resulted in voters going to the polls. Id. at 8928-29. Thus, the
14 Commission sought to “regulate the funds used to influence Federal elections” and not
15 “incidental speech.” Id.

16 The Commission noted in its 2006 E&J that its regulations would not lead to the
17 circumvention of the Act precisely because they captured “the use of non-Federal funds for
18 disbursements that State, district, and local parties make for those activities that actually register
19 individuals to vote.” Id. Moreover, “many programs for widespread encouragement of voter
20 registration to influence Federal elections would be captured as public communications under

⁶ The Commission did change other aspects of the GOTV activity definition in response to the Shays I court decision. The Commission removed from the definition of “GOTV activity” the exemption for communications by associations and groups of State or local candidates or officeholders. See 2006 Final Rule, 71 FR 8931. The Commission also removed from the examples of GOTV activity the phrase “within 72-hours of an election,” to clarify that the definition covered activity conducted more than 72-hours before an election. See id. at 8930-8931.

1 Type III [Federal election activity].” Id. The 2006 E&J also provided a nonexclusive list of
2 examples of activity that would – and would not – constitute voter registration activity. Id.

3 C. Shays III

4 The revised definitions of voter registration activity and GOTV activity were challenged
5 again in Shays v. FEC, 508 F.Supp.2d. 10, 63-70 (D.D.C. 2007). Analyzing the definitions of
6 “voter registration activity” and “GOTV activity,” the district court noted that the Commission’s
7 2006 E&J addressed only the most obvious instances of what was – and was not – covered
8 activity but not the “vast gray area” of activities that State and local parties may conduct and that
9 may benefit Federal candidates. Shays v. FEC, 508 F. Supp. 2d at 65, 69-70.

10 Regarding GOTV activities, in particular, the district court focused on Advisory Opinion
11 2006-19, issued to the Los Angeles County Democratic Party Central Committee, in which the
12 Commission concluded that a local party committee’s mass mailing and pre-recorded,
13 electronically dialed telephone calls (“robocalls”) to the party’s registered voters would not
14 constitute get-out-the-vote activity.⁷ The district court stated that Advisory Opinion 2006-19 had
15 announced a much narrower interpretation of the scope of GOTV activity than “might otherwise
16 [have been] presumed on the face of the definition.” Id. at 69.

17 The district court held that the Commission’s failure to address these vast gray areas, and
18 to explain whether activities falling within them would affect Federal elections, unduly
19 compromised BCRA’s purposes. Id. at 65-66, 69-70. Accordingly, the court remanded the
20 definitions to the Commission. Id. at 70-71.

⁷ The proposed communications would have been made four or more days before the election, would have informed recipients of the date of the election, would have urged them to vote for local, but not Federal, candidates, and would not have included additional information such as the hours and location of the individual voter’s polling place. The Commission concluded that the communications would provide neither actual assistance nor sufficiently individualized assistance to constitute GOTV activity and that, as a result, the communications could be funded exclusively with non-Federal funds.

1 The court of appeals upheld the lower court’s decision invalidating the Commission’s
2 definitions of “voter registration activity” and “GOTV activity,” although on slightly different
3 grounds. See Shays v. FEC, 528 F.3d 914, 931 (D.C. Cir. 2008) (“Shays III”). The court of
4 appeals recognized that the Commission had discretion to promulgate definitions that left
5 unaddressed large gray areas of activity and to fill them in later through enforcement actions and
6 the advisory opinion process. See Shays III, 528 F.3d at 931.

7 Nevertheless, the court of appeals held that the Commission’s definitions of “voter
8 registration activity” and “GOTV activity” were deficient because they served to “create ‘two
9 distinct loopholes.’” Id. The flaws in both definitions were: (1) the “assist” requirements, which
10 excluded efforts that “actively encourage people to vote or register to vote;” and (2) the
11 “individualized means” requirements, which excluded “mass communications targeted to many
12 people,” and had the effect of “dramatically narrowing which activities [were] covered” by the
13 rules. Id. Accordingly, the court of appeals concluded that the definitions would “allow the use
14 of soft money for many efforts that influence federal elections,” which is directly counter to
15 BCRA’s purpose. Id.

16 The court rejected the Commission’s justifications for the definitions – to exclude mere
17 exhortations from coverage and to give clear guidance as to the scope of the rules – because the
18 Commission could craft definitions that exclude routine exhortations and that provided clear
19 guidance to State, district, and local party committees in a way that is more consistent with
20 BCRA. Id. at 932. Accordingly, the court of appeals remanded the regulations to the
21 Commission.

22 In response to the court of appeal’s decision, the Commission published a Notice of
23 Proposed Rulemaking on October 20, 2009. See Notice of Proposed Rulemaking on the

1 Definition of Federal Election Activity, 74 FR 53674 (Oct. 20, 2009) (“2009 NPRM” or
2 “NPRM”). The NPRM proposed possible modifications to the definitions of “voter registration
3 activity” and “GOTV activity,” as well as a modification to the “exceptions” paragraph of the
4 definition of “Federal election activity.” The public comment period for the NPRM closed on
5 November 20, 2009. The Commission received written comments from 13 commenters,
6 including a comment from the Internal Revenue Service indicating that the proposed rules did
7 not appear to present a conflict with the Internal Revenue Code or the regulations thereunder.
8 The Commission held a public hearing on December 16, 2009, at which seven witnesses
9 testified. After the hearing, the Commission accepted four supplemental comments expanding
10 on issues raised during the hearing. All comments and a public transcript of the hearing are
11 available at http://www.fec.gov/law/law_rulemakings.shtml#FEAShays3. For purposes of this
12 document, the terms “comment” and “commenter” apply to both written comments and oral
13 testimony at the public hearing.

14 These final rules define “voter registration activity” and “GOTV activity” for purposes of
15 the Commission’s Federal election activity regulations. These new definitions cover activities
16 that urge, encourage, or assist potential voters to register to vote or to vote, regardless of whether
17 the message is delivered individually or to a group of people via mass communication. Brief,
18 incidental exhortations to register to vote or to vote are, however, exempt from the new
19 definitions. Activities meeting these definitions must be paid for with Federal funds or with a
20 mix of Federal and Levin funds. In addition, these final rules clarify that GOTV activity and
21 voter identification conducted solely in connection with a non-Federal election are not subject to
22 the Commission’s Federal election activity regulations and provide that certain de minimis
23 activities are not subject to the Federal election activity funding restrictions.

1 **II. Final Rules**

2 **A. 11 CFR 100.24(a)(2) – Definition of “Voter Registration Activity”**

3 To comply with the Court of Appeals’ decision in Shays III, the Commission is revising
4 the definition of “voter registration activity” at 11 CFR 100.24(a)(2). The Commission’s new
5 definition covers activities that assist, encourage, or urge potential voters to register to vote. The
6 definition continues to cover contacting potential voters by individualized means but, as revised,
7 it now also covers contacts directed to potential voters by any means to urge or encourage them
8 to register to vote. As explained further below, the new definition excludes brief, incidental
9 exhortations to register to vote, consistent with the court’s decision.

10 **1. 11 CFR 100.24(a)(2)(i) – Covered Activities**

11 New paragraph (a)(2)(i) of 11 CFR 100.24 lists the activities that constitute voter
12 registration activity. The new definition identifies the following activities as voter registration
13 activity:

- 14 • encouraging or urging potential voters to register to vote: by mail (including direct mail),
15 email, in person, by telephone (including pre-recorded telephone calls, phone banks, and
16 messaging such as SMS and MMS), or by any other means (11 CFR 100.24(a)(2)(i)(A));
- 17 • preparing and distributing information about registration and voting (11 CFR
18 100.24(a)(2)(i)(B));
- 19 • distributing voter registration forms or instructions to potential voters (11 CFR
20 100.24(a)(2)(i)(C));
- 21 • answering questions about how to complete or file a voter registration form (11 CFR
22 100.24(a)(2)(i)(D));

- 1 • assisting potential voters in completing voter registration forms (11 CFR
2 100.24(a)(2)(i)(D));
- 3 • submitting or delivering completed voter registration forms (11 CFR 100.24(a)(2)(i)(E));
- 4 • offering or arranging to transport, or actually transporting, potential voters to a board of
5 elections or county clerk’s office for them to fill out voter registration forms (11 CFR
6 100.24(a)(2)(i)(F)); and
- 7 • any other activity that assists potential voters to register to vote (11 CFR
8 100.24(a)(2)(i)(G)).

9 Accordingly, the revised definition of “voter registration activity” covers the following
10 examples:(1) sending a mass mailing of voter registration forms; and (2) submitting completed
11 voter registration forms to the appropriate State or local office handling voter registration.

12 The Commission received multiple comments on its proposal to expand the definition of
13 voter registration activity to include encouraging potential voters to register to vote. Almost all
14 the commenters agreed that expanding the definition in this manner would be responsive to the
15 Shays III court. Commenters offered a range of opinions, though, on whether this expansion was
16 required by the court’s decision or if there was a narrower approach that might satisfy the court.

17 Two commenters stated that the Commission could not do “anything short of including
18 encourage[ment]” in the definition and “still satisfy the concerns of the circuit court.” In
19 contrast, others that commented on this issue argued that a definition of voter registration activity
20 that included activities that only encourage people to register to vote (regardless of the means)
21 was unnecessary. Some commenters asserted that such a definition would subject to regulation
22 all of the activities of State and local party committees, contrary to the intent of Congress.

1 Instead, the majority of commenters advocated for a narrower definition that would not
2 apply to activities that, in their opinion, are not appropriately characterized as voter registration
3 activity. Commenters suggested definitions covering only activities that actively encourage
4 voter registration (which would be informed by a time/space analysis); that were primarily aimed
5 at increasing voter registration; or that facilitate voter registration. Another commenter proposed
6 a definition that would cover only activities understood by a “reasonable person engaged in
7 political campaign management” to be voter registration activity. Multiple commenters wanted
8 the Commission to adopt a definition of voter registration activity that would exclude
9 “persuasion communications,” which commenters characterized as communications that are
10 intended to secure a vote for a specific candidate but that are not effective at mobilizing potential
11 voters to register to vote.

12 If any of these narrower approaches proved under-inclusive, one commenter suggested
13 that the Commission could subsequently amend its regulations. This approach, according to the
14 commenter, was preferable to adopting a broad definition at the outset covering all activities that
15 encourage potential voters to register to vote.

16 The Commission also received comments addressing its proposal to expand the definition
17 of voter registration activity to include communications made by “any other means” that urge
18 potential voters to register to vote. Two commenters thought that the court’s decision did not
19 require the Commission to adopt a definition covering all mass communications, and that the
20 definition could simply be amended to cover certain specific activities, including phone banks
21 and direct mail. Another commenter argued that the Commission should exempt from the
22 definition of voter registration activity all Internet communications, stating that such
23 communications are made at “virtually no cost.” By contrast, one commenter asserted that the

1 definition’s “any other means” standard was not “inclusive enough” and that the definition
2 should list “the multiple methods of electronic communication used today.”

3 As discussed above, the Shays III court identified “two distinct loopholes” in the
4 Commission’s prior definitions of voter registration activity. See Shays III, 528 F.3d at 931-32.
5 The court determined that these “two distinct loopholes” – which required that voter registration
6 activity “assist” voters in registering to vote and that contacts with potential voters be
7 “individualized” – conflicted with BCRA’s purpose. Id. at 932. Moreover, the Shays III court
8 suggested that the Commission’s regulations should reach both efforts that “encourage people to
9 vote or to register to vote” as well as “mass communications” that are directed to a significant
10 number of people. Id. at 931. The Commission concludes that the definitions of voter
11 registration adopted in this rulemaking best address the court’s concerns.

12 For these reasons, the Commission has decided not to adopt any of the other proposals
13 suggested by the commenters. Whatever the individual merits of these proposals, in the current
14 rulemaking the Commission is charged with adopting a definition of voter registration activity
15 that addresses the “two distinct loopholes” identified by the Shays III court. Furthermore, many
16 of the alternative proposals suggested by the commenters will not provide clear guidance to State
17 and local party committees and could prove difficult for the Commission to administer and
18 enforce.

19 The Commission has reorganized the definition of voter registration activity in section
20 100.24 in light of comments received. Whereas the proposed rule would have set forth a general
21 definition of “voter registration activity” with a non-exhaustive list of examples, the new rule
22 defines “voter registration activity” by providing a comprehensive list of covered activities.

1 Notwithstanding this change in form, the new definition covers the same universe of activities as
2 the definition proposed in the NPRM.

3 This change is responsive to commenters who indicated that the structure of the proposed
4 definition was “confusing” and unhelpful. The Commission has concluded that the new
5 definition, which lists both specific and general activities, provides clear and effective guidance
6 while capturing those activities that Congress and the courts identified as being “voter
7 registration activity.”

8 2. 11 CFR 100.24(a)(2)(ii) – Brief, Incidental Exhortations

9 New paragraph (a)(2)(ii) of 11 CFR 100.24 states that an activity is not “voter
10 registration activity” solely because it includes a brief exhortation to register to vote, so long as
11 the exhortation is incidental to a communication, activity, or event. This exception from the
12 definition of “voter registration activity” ensures that activities that are not otherwise voter
13 registration activity do not become voter registration activity simply because they include a brief,
14 incidental reminder to register to vote.

15 To qualify for the exception, the exhortation to register to vote must be both brief and
16 incidental. Exhortations to register to vote that go on for many minutes of a speech, for example,
17 or that occupy a large amount of space in a mailer are not brief and will not qualify for the
18 exception. Similarly, exhortations, however brief, must also be incidental to the communication,
19 activity or event. For example, a one-line exhortation to “Register to vote!” appearing at the end
20 of a campaign flier would be incidental to the larger communication, whereas a communication
21 that stated only “Register to Vote by October 1st!” and contained no other text would not be
22 incidental and, thus, would not come within the exception from the definition of “voter
23 registration activity.”

1 The exception applies to brief, incidental exhortations regardless of the forum or medium
2 in which they are made. The exception covers an exhortation offered in a speech at a rally, for
3 example, as well as one appearing in an email.

4 Two examples of activities that would be covered under the exception appear at new
5 paragraphs (a)(2)(ii)(A) and (a)(2)(ii)(B) of 11 CFR 100.24. The first example is a mailer
6 praising the public service record of a mayoral candidate and/or discussing the candidate's
7 campaign platform. The mailer concludes by reminding recipients: "Don't forget to register to
8 vote for [the mayoral candidate] by October 1st." The second example involves a phone call for
9 a State party committee fundraising event. The call provides recipients with information about
10 the event, solicits donations, and concludes by reminding the listener: "Don't forget to register to
11 vote."

12 The new exception at 11 CFR 100.24(a)(2)(ii) differs in certain respects from the one
13 proposed in the NPRM. The proposed exception would have applied only to incidental
14 exhortations made during speeches or events, whereas the exception in the final rule applies to
15 brief, incidental exhortations made in any communication, activity, or event. Moreover, the
16 proposed exception did not explicitly require that the exhortation be brief, although a brevity
17 requirement was implicit in the proposal. Finally, the proposed exception included four
18 examples of exhortations that would have qualified for the exception. The new exception
19 includes only two examples, but they are more detailed than in the NPRM and, thus, provide
20 better guidance regarding the intended application of the exception.

21 Several of the comments received on the exhortation exception were simply an extension
22 of the comments on the scope and organization of the proposed definition of "voter registration
23 activity" itself. One commenter, for example, indicated that the exception did not sufficiently

1 narrow the definition of “voter registration activity” and would not appropriately protect
2 “persuasion communications.” Another commenter urged the Commission not to adopt the
3 exhortation exception and, instead, simply to define voter registration activity as covering only
4 activities that facilitate voter registration.

5 Other comments focused on the scope of the proposed exception. Specifically,
6 commenters addressed whether the exception should be limited, as it was in the NPRM, to
7 exhortations made during speeches and events, or whether it should also cover exhortations made
8 in other contexts. Two commenters supported adopting the proposed exception, pointing out that
9 the court’s opinion specifically referenced only “routine or spontaneous speech-ending
10 exhortations.” Several commenters, though, believed that there was no reason to limit the
11 exception by the medium in which the communication was delivered or the forum in which it
12 was made. One of these commenters stated that “[n]othing in the court’s decisions [could]
13 reasonably be read to mean that exhortations are to be excluded only if made in a speech or at a
14 rally but not if made by other means of communications.” Another commenter pointed out that
15 limiting the exception in this way would render it functionally meaningless, because parties
16 rarely rely on speakers at rallies to encourage people to register to vote.

17 Two commenters discussed the proposed requirement in the NPRM that, to qualify for
18 the exception, an exhortation be incidental to a speech or event. One commenter suggested that
19 the Commission determine whether an exhortation is, in fact, incidental by engaging in a
20 time/space analysis. Another commenter urged that the exhortation exception be further limited
21 to only spontaneous communications and not cover communications that are scripted.

22 The Commission has considered the comments and has decided to adopt a somewhat
23 broader exception than initially proposed. While the Shays III court required the Commission to

1 adopt a more expansive definition of “voter registration activity,” the court acknowledged that
2 the Commission could exclude from the definition “routine or spontaneous speech-ending
3 exhortations” and “mere exhortations . . . made at the end of a political event or speech.” Shays
4 III, 528 F.3d at 932.

5 The Commission agrees with those commenters who indicated that the exception should
6 not be limited by medium or forum. To limit the exemption to exhortations made only at
7 speeches or rallies would elevate form over substance and is not necessary to give effect to the
8 court’s opinion. The court did not require the Commission to create artificial distinctions
9 between an incidental exhortation during a speech or rally and an incidental exhortation made in
10 a written communication or telephone call conveying the same message.

11 This exception will not inoculate speeches or events that otherwise would meet the new
12 definition of “voter registration activity.” For example, a speech given sixty days before an
13 election that devotes several minutes to providing listeners with information on how to register to
14 vote would not qualify under the exception at new 11 CFR 100.24(a)(2)(ii). Instead, the
15 exception is intended to ensure that communications that would not otherwise be voter
16 registration activity do not become voter registration activity merely because they include a brief,
17 incidental exhortation encouraging listeners to register to vote.

18 B. 11 CFR 100.24(a)(3) – Definition of “GOTV Activity”

19 To comply with the Court of Appeals’ decision in Shays III, the Commission is revising
20 the definition of “GOTV activity” at 11 CFR 100.24(a)(3). The Commission’s revised definition
21 covers activities that assist, encourage, or urge potential voters to vote. The definition continues
22 to cover contacting potential voters by individualized means but, as revised, it now also covers
23 contacting potential voters by any means to urge or encourage them to vote. As explained

1 further below, the new definition excludes brief, incidental exhortations to vote, consistent with
2 the court's decision.

3 1. 11 CFR 100.24(a)(3)(i) – Covered Activities

4 Revised paragraph (a)(3)(i) of 11 CFR 100.24 lists the activities that are GOTV activity.

5 The revised definition identifies the following activities as GOTV activity:

- 6 • encouraging or urging potential voters to vote (11 CFR 100.24(a)(3)(i)(A));
- 7 • informing potential voters about times when polling places are open (11 CFR
8 100.24(a)(3)(i)(B)(1)), the location of polling places (11 CFR 100.24(a)(3)(i)(B)(2)), or
9 early voting or voting by absentee ballot (11 CFR 100.24(a)(3)(i)(B)(3));
- 10 • offering or arranging to transport voters to the polls, as well as actually transporting
11 voters to the polls, is also GOTV activity (11 CFR 100.24(a)(3)(i)(C)); and
- 12 • all activities that assist potential voters to vote are GOTV activity (11 CFR
13 100.24(a)(3)(i)(D)).

14 These activities fall within the definition regardless of the means by which information is
15 conveyed.

16 Accordingly, the revised definition of “GOTV activity” would cover the following
17 examples: (1) driving a sound truck through a neighborhood that plays a message urging listeners
18 to “Vote next Tuesday at the Main Street community center”; and (2) making telephone calls
19 (including robocalls) reminding the recipient of the times during which the polls are open on
20 election day.

21 The Commission received multiple comments on its proposal to expand the definition of
22 GOTV activity to include encouraging potential voters to vote. Many of those comments
23 addressed together the proposed expansions of the definitions of “voter registration activity” and

1 “GOTV activity.” Those comments were discussed and addressed in the preceding section and
2 are only briefly mentioned here. Other comments, though, focused on the proposed expansion of
3 the definition of “GOTV activity,” and are discussed below.

4 Almost all the commenters agreed that revising the definition of “GOTV activity” to
5 include encouraging and urging potential voters to vote would be responsive to the Shays III
6 court. Commenters offered a range of opinions, though, on whether this expansion was required
7 by the court’s decision or if there was a narrower approach that might satisfy the court.

8 Two commenters asserted that the Commission could not do “anything short of including
9 encourage[ment]” in the definition and “still satisfy the concerns of the circuit court.” Others
10 that commented on this issue, by contrast, believed that a definition of “GOTV activity” that
11 included activities that only encouraged people to vote (regardless of the means) is unnecessary.
12 Some commenters were concerned that such a definition would subject to regulation all of the
13 activities of State and local party committees, contrary to the intent of Congress.

14 Several commenters were particularly concerned that the proposed definition of “GOTV
15 activity” would cover all candidate advocacy conducted by State, district, and local party
16 committees, including advocacy focused solely on State and local candidates that makes no
17 mention of a Federal candidate. As with the definition of “voter registration activity,”
18 commenters proposed narrowing the definition of “GOTV activity” to cover only activities that
19 actively encourage or facilitate voting or that are primarily aimed at increasing voter turnout.
20 Another commenter proposed a definition that would cover only activities understood by a
21 “reasonable person engaged in political campaign management” to be GOTV activity.

22 Some commenters also offered more specific suggestions regarding the definition of
23 “GOTV activity.” One commenter proposed defining “GOTV activity” as “activities directed

1 toward encouraging voters who are identified as likely to support specific candidates to cast
2 votes in an election in which federal candidates are on the ballot.” Several commenters stressed
3 the need to adopt a definition of GOTV activity that would exclude “persuasion
4 communications,” which the commenters characterized as communications that are intended to
5 secure a vote for a specific candidate but that are not effective at mobilizing potential voters to
6 vote.

7 In the event that any of these narrower approaches proved under-inclusive, one
8 commenter suggested that the Commission could subsequently amend its regulations. This
9 approach, according to the commenter, was preferable to adopting a broad definition at the outset
10 covering all activities that encourage potential voters to vote.

11 The Commission also received comments addressing its proposal to revise the definition
12 of “GOTV activity” to include communications urging potential voters to vote made by “any
13 other means.” Two commenters thought that the court’s decision did not require the
14 Commission to adopt a definition covering all mass communications, and that the definition
15 could simply be amended to cover certain specific activities, including phone banks and direct
16 mail.

17 Another commenter thought that the Commission should exempt from the definition of
18 “GOTV activity” all Internet communications, because such communications are made at
19 “virtually no cost.” In contrast, another commenter thought that the definition’s “any other
20 means” standard was not “inclusive enough” and that the definition should list “the multiple
21 methods of electronic communication used today.”

22 As discussed above, the Shays III court identified “two distinct loopholes” in the
23 Commission’s prior definitions of GOTV activity. See Shays III, 528 F.3d at 931-32. The court

1 determined that these “loopholes” – which required that GOTV activity “assist” voters in voting
2 and that contacts with potential voters be “individualized” – conflicted with BCRA’s purpose.
3 Id. at 932. Moreover, the Shays III court suggested that the Commission’s regulations should
4 reach both efforts that “*encourage* people to vote or to register to vote” as well as “mass
5 communications” that are directed to a significant number of people. Id. at 931. The
6 Commission concludes that the definition of GOTV activity adopted in this rulemaking best
7 addresses the court’s concerns.

8 For these reasons, the Commission has decided not to adopt any of the other proposals
9 suggested by the commenters. Whatever the individual merits of these proposals, in the current
10 rulemaking the Commission is charged with adopting a definition of GOTV activity that
11 addresses the “two distinct loopholes” identified by the Shays III court. Furthermore, many of
12 the alternative proposals suggested by the commenters would prove difficult for the Commission
13 to administer and enforce. Introducing qualifiers into the definition of GOTV activity – like
14 “targeting,” “active encouragement,” or “primarily aimed” – may theoretically narrow the
15 definition, but would require the Commission to make searching (and potentially burdensome)
16 inquiries into the mechanics, decision-making, and intentions of State, district, and local party
17 committees and associations of State or local candidates in order to enforce the law. In addition,
18 such a vague definition would not provide clear guidance to State, district, and local party
19 committees and associations of State or local candidates.

20 The Commission has reorganized the definition of “GOTV activity” in section 100.24 in
21 light of comments received. Whereas the proposed rule would have set forth a general definition
22 of “GOTV activity” with a non-exhaustive list of examples, the new rule defines “GOTV
23 activity” by providing a comprehensive list of covered activities. Notwithstanding this change in

1 form, the new definition covers the same universe of activities as the definition proposed in the
2 NPRM.

3 This organizational change is responsive to commenters who indicated that the structure
4 of the proposed definition was “confusing” and unhelpful. The Commission has decided that the
5 revised definition, which lists both specific and general activities, provides clear and effective
6 guidance while capturing those activities that Congress and the courts identified as being GOTV
7 activity.

8 2. 11 CFR 100.24(a)(3)(ii) – Brief, Incidental Exhortations

9 New paragraph (a)(3)(ii) of 11 CFR 100.24 states that an activity is not GOTV activity
10 solely because it includes a brief exhortation to register to vote, so long as the exhortation is
11 incidental to a communication, activity, or event. Like the exception to the definition of “voter
12 registration activity,” this exception to the definition of “GOTV activity” ensures that activities
13 that are not otherwise GOTV activity do not become GOTV activity simply because they include
14 a brief, incidental reminder to vote.

15 The exception operates identically to the exhortation exception to the definition of “voter
16 registration activity.” To qualify for the exception, the exhortation to vote must be both brief and
17 incidental. Exhortations to vote that consume many minutes of a speech, for example, or that
18 occupy a large amount of space in a mailer are not brief and will not qualify for the exception.
19 Similarly, exhortations, however brief, must also be incidental to a communication, activity, or
20 event. For example, a one-word reminder to “Vote!” appearing at the end of a mailer would be
21 incidental to the larger communication, whereas a message in a mailer that stated only “Vote on
22 Election Day!” or “Vote for Smith next Tuesday!” and contained no other text would not be
23 incidental and, thus, would not be exempted from the definition of GOTV activity.

1 The exception applies to brief, incidental exhortations regardless of the forum or medium
2 in which they are made. The exception covers an exhortation made at the end of a speech at a
3 rally, for example, as well as one appearing at the end of an email.

4 Two examples of activities that would be covered under the exception appear at new
5 paragraphs (a)(3)(ii)(A) and (a)(3)(ii)(B) of 11 CFR 100.24. The first example is a mailer
6 praising the public service record of a mayoral candidate and/or discussing the candidate's
7 campaign platform. The mailer concludes by reminding recipients: "Vote [for the mayoral
8 candidate] on November 4th." The second example involves a phone call for a State party
9 committee fundraising event. The call provides recipients with information about the event,
10 solicits donations, and concludes by reminding the listener: "Don't forget to vote on November
11 4th."

12 The new exception at 11 CFR 100.24(a)(3)(ii) differs in certain respects from the one
13 proposed in the NPRM. The proposed exception would have applied only to incidental
14 exhortations made during speeches or events, whereas the exception in the final rule applies to
15 brief, incidental exhortations made in any communication, activity, or event. Moreover, the
16 proposed exception did not explicitly require that the exhortation be brief, although a brevity
17 requirement was implicit in the proposal. Finally, the proposed exception included four
18 examples of exhortations that would have qualified for the exception. The new exception
19 includes only two examples, but they are more detailed than in the NPRM and, thus, provide
20 better guidance regarding the intended application of the exception.

21 Several of the comments received on the exhortation exception were simply an extension
22 of the comments on the scope and organization of the proposed definition of GOTV activity
23 itself. One commenter, for example, indicated that the exception did not sufficiently narrow the

1 definition of “GOTV activity” and would not appropriately protect “persuasion communications”
2 that are “devoted to convincing a voter to vote for a particular candidate or party.” Another
3 commenter urged the Commission not to adopt the exhortation exception and, instead, simply
4 define GOTV activity as covering only activities that facilitate voting. A different commenter
5 suggested that the line between exhortation and encouragement existed where the
6 communication or activity specifically urged a potential voter to vote. In the opinion of this
7 commenter, a sign saying “Vote for Smith” would be an exhortation to vote, while a sign saying
8 “Go Vote for Smith” would encourage voting and thus constitute GOTV activity.

9 Other comments focused on the scope of the proposed exception. Specifically,
10 commenters addressed whether the exception should be limited, as it was in the NPRM, to
11 exhortations made during speeches and events, or whether it should also cover exhortations made
12 in other contexts. Two commenters supported adopting the proposed exception, pointing out that
13 the court’s opinion specifically referenced only “routine or spontaneous speech-ending
14 exhortations.” Several commenters, though, believed that there was no reason to limit the
15 exception by the medium in which the communication was delivered or the forum in which it
16 was made. One of these commenters stated that “[n]othing in the court’s decisions [could]
17 reasonably be read to mean that exhortations are to be excluded only if made in a speech or at a
18 rally but not if made by other means of communications.”

19 Two commenters addressed the proposed requirement in the NPRM that, to qualify for
20 the exception, an exhortation be incidental to a speech or event. One commenter suggested that
21 the Commission determine whether an exhortation is, in fact, incidental by engaging in a
22 time/space analysis. Another commenter suggested that the exhortation exception be further
23 limited to only spontaneous communications and not cover communications that are scripted.

1 The Commission has considered the comments and has decided to adopt a somewhat
2 more expansive exception than initially proposed. While the Shays III court required the
3 Commission to adopt a more expansive definition of GOTV, the court acknowledged that the
4 Commission could exclude from the definition “routine or spontaneous speech-ending
5 exhortations” and “mere exhortations . . . made at the end of a political event or speech.” Shays
6 III, 528 F.3d at 932.

7 The Commission agrees with those commenters who indicated that the exception should
8 not be limited by medium or forum. To limit the exception to exhortations made only at
9 speeches or rallies would elevate form over substance and is not necessary to give effect to the
10 court’s opinion. The court did not require the Commission to create artificial distinctions
11 between an incidental exhortation during a speech or rally and an incidental exhortation made in
12 a written communication or telephone call conveying the same message.

13 This exemption will not inoculate speeches or events that otherwise would meet the
14 definition of “GOTV activity.” For example, a speech given within the covered Federal election
15 activity period that devotes several minutes to providing listeners with information on how and
16 where to vote would not qualify under the exception at new 11 CFR 100.24(a)(3)(ii). Instead,
17 the exception is intended to ensure that communications that would not otherwise be GOTV
18 activity do not become GOTV activity merely because they include a brief, incidental
19 exhortation to vote.

20 C. 11 CFR 100.24(c)(5) and (c)(6) – Voter Identification and GOTV Activity Solely In
21 Connection with a Non-Federal Election

22 The new provisions at 11 CFR 100.24(c)(5) and (c)(6) restructure the combined provision
23 proposed in the NPRM by addressing voter identification and GOTV activity in two separate

1 provisions. New paragraph (c)(5) of 11 CFR 100.24 provides that certain voter identification
2 that is conducted solely in connection with a non-Federal election that is held on a date within
3 the Type II Federal election activity time periods, but on which no Federal election is held, and
4 which is not used in a subsequent election in which a Federal candidate is on the ballot, is not
5 subject to BCRA’s Federal election activity funding restrictions.

6 New paragraph (c)(6) of 11 CFR 100.24 provides that certain GOTV activity that is
7 conducted solely in connection with a non-Federal election that is held on a date within the Type
8 II Federal election activity time periods, but on which no Federal election is held, is not subject
9 to BCRA’s Federal election activity funding restrictions, provided that any communications
10 made as part of such activity refer exclusively to: (1) non-Federal candidates participating in the
11 non-Federal election, if the non-Federal candidates are not also Federal candidates, (2) ballot
12 referenda or initiatives scheduled for the date of the non-Federal election, or (3) the date, polling
13 hours, and locations of the non-Federal election.

14 The Commission received several comments on the provision as proposed in the NPRM.
15 Five commenters supported the provision, saying that it struck the proper balance and
16 characterized it as “sensible.” One commenter believed it was proper to exclude such activities
17 from the Federal election activity funding restrictions because they do not directly benefit
18 Federal candidates, which was the focus of the McConnell court in analyzing BCRA.

19 Many of these commenters also indicated that the proximity of an exclusively non-
20 Federal election to a subsequent Federal election should have no bearing on the application of
21 the provision. One commenter said that the proximity of the two types of elections was
22 irrelevant because they involve different variables; the issues that inform voter identification and
23 motivate voters in non-Federal elections are very different than those that inform and motivate in

1 a Federal election. Accordingly, according to these commenters, voter identification and GOTV
2 activity conducted for a non-Federal election is of little use in a subsequent Federal election.

3 In contrast, two commenters objected to the provision on the basis that it would allow
4 activity that affected Federal elections to be funded with non-Federal funds contrary to BCRA's
5 intent. According to these commenters, all voter identification and GOTV activity confer
6 benefits on Federal candidates and, as such, these activities must be regulated to avoid the risk of
7 actual or apparent corruption.

8 BCRA requires State, district, and local political party committees and organizations to
9 finance Federal election activity with Federal funds, or, in some instances, with an allocated mix
10 of Federal funds and Levin funds. 2 U.S.C. 441i(b); 11 CFR 300.33. One of the principal
11 sponsors of BCRA described its Federal election activity provisions as a "balanced approach
12 which addresses the very real danger that Federal contribution limits could be evaded by
13 diverting funds to State and local parties," while "not attempt[ing] to regulate State and local
14 party spending where this danger is not present, and where State and local parties engage in
15 purely non-Federal activities." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (Statement of
16 Sen. McCain).

17 BCRA does not require the Commission to regulate voter identification or GOTV
18 activities by State, district, and local political party groups that are exclusively in connection
19 with non-Federal elections. Many communities hold entirely non-Federal elections on dates that
20 are separate from any election in which a Federal candidate appears on the ballot, but that
21 nevertheless fall within the Type II Federal election activity time periods. See, e.g.
22 <http://www.usmayors.org/elections/electioncitiesfall2010.pdf> (listing mayoral elections held in
23 2010) (last visited July 28, 2010). The Commission, therefore, is adopting exceptions in the final

1 rule to better distinguish between voter identification and GOTV activities that are Federal
2 election activity, and those activities that are not Federal election activity because they do not
3 affect elections in a which Federal candidate appears on the ballot.

4 D. 11 CFR 100.24(c)(7) – Activities Involving De Minimis Costs

5 New paragraph (c)(7) of 11 CFR 100.24 provides that de minimis costs associated with
6 the following enumerated activities are not subject to the Federal election activity funding
7 restrictions: (1) on the website of a party committee or association of State or local candidates,
8 posting a hyperlink to a State or local election board’s web page containing information on
9 voting or registering to vote; (2) on the website of a party committee or association of State or
10 local candidates, enabling visitors to download a voter registration form or absentee ballot
11 application; (3) on the website of a party committee or association of State or local candidates,
12 providing information about voting dates and/or polling locations and hours of operation; and (4)
13 placing voter registration forms or absentee ballot applications obtained from the board of
14 elections at the office of a party committee or association of State or local candidates.

15 In the NPRM the Commission asked generally whether the proposed definitions of “voter
16 registration activity” and “GOTV activity” covered activity that Congress did not intend to
17 regulate in BCRA and, if so, what those activities were.

18 In response, one commenter pointed out that under the expanded definitions of “voter
19 registration activity” and “GOTV activity,” “all the organizational activity of every county, every
20 city, and every state committee is going to be brought into these regulations,” since – on some
21 level – organizing people to register to vote, and to vote, informs everything that party
22 committees do. This commenter noted, for example, that State and local parties commonly post
23 on their websites information on voter registration and voting but that the costs of doing so is

1 “typically minimal and is folded into the general administrative costs of operating the
2 committee.” To the extent this activity was covered as “voter registration activity” or “GOTV
3 activity,” all the operational costs would potentially need to be funded with Federal funds or a
4 mix of Federal and Levin funds, as appropriate.

5 The Commission is mindful of the administrative complexities that State, district and
6 local party committees, as well as associations of State and local candidates, would face in
7 tracking the nominal, incidental costs of these activities. As recognized by the courts, agencies
8 may promulgate de minimis exemptions to the statutes they administer on the basis that
9 “Congress is always presumed to intend that pointless expenditures of effort be avoided.”
10 Association of Administrative Law Judges v. FLRA, 397 F.3d 957, 961-62 (D.C. Cir. 2005).
11 Although there are limits to this authority – de minimis exceptions are inappropriate for
12 extraordinarily rigid statutes or when the regulatory costs of the exemption exceed its benefits –
13 it is inherent in most statutory schemes. Id. at 962; see Environmental Defense Fund v. EPA, 82
14 F.3d 451, 466 (D.C. Cir. 1996).

15 Accordingly, the Commission has decided to adopt new paragraph (c)(6) at 11 CFR
16 100.24 to make clear that certain activities are not subject to BCRA’s Federal election activity
17 funding restrictions. Such a de minimis exception is entirely appropriate in this context because
18 many of the activities listed will involve no costs and, thus, already effectively fall outside the
19 Federal election activity funding regulations. To the extent the listed activities do involve de
20 minimis costs, they are so small that – even in aggregate over a long period of time – they would
21 not result in any meaningful evasion of BCRA’s soft money restrictions.

22 The Commission notes that this provision only covers de minimis costs associated with
23 the enumerated activities; amounts that are not de minimis, which are incurred in connection

1 with the enumerated activities, must still be paid for with Federal funds or a mix of Federal and
2 Levin funds, as appropriate. In addition, the provision in paragraph (c)(6) does not cover de
3 minimis costs associated with other activities. The costs associated with activities not
4 enumerated, regardless of how small, must also be paid for with Federal funds or a mix of
5 Federal and Levin funds, as appropriate. Thus, the list of activities enumerated in the provision
6 is exhaustive. Activities not listed are not covered, regardless of how closely related they are to
7 the activities listed.

8 E. Additional Issues

9 1. Advisory Opinion 2006-19 (Los Angeles County Democratic Party Central Committee)

10 In Shays III, the court of appeals criticized Advisory Opinion 2006-19 (Los Angeles
11 County Democratic Party Central Committee), in which the Commission concluded that letters
12 and pre-recorded telephone calls encouraging certain Democrats to vote in an upcoming local
13 election did not count as GOTV activity because the communications did not provide
14 individualized assistance to voters. See Shays III, 528 F.3d at 932. The court held that this
15 overly restrictive construction of the definition of “GOTV activity” was contrary to the statute.
16 See id. The Commission is superseding Advisory Opinion 2006-19 because the conclusion of
17 that advisory opinion, along with its reasoning, cannot be reconciled with the Commission’s new
18 definition of “GOTV activity.”

19 2. Associations of State and Local Candidates and Officeholders

20 One commenter pointed out that the NPRM “refer[red] repeatedly to ‘state, district or
21 local party committees’” and referred “only incidentally to associations of state and local
22 candidates and officeholders.” The commenter noted that such associations are subject to the

1 Federal election activity funding restrictions to the same extent as State, district, and local party
2 committees.

3 The Commission agrees with the commenter that the new definitions of “voter
4 registration activity” and “GOTV activity” apply equally to party committees and associations of
5 State and local candidates, alike. Any disproportionate references to party committees in the
6 NPRM – and in this E&J – do not reflect a determination by the Commission that the activities
7 of associations of State and local candidates are less important or less likely to fall under the
8 umbrella of Federal election activity established by Congress. Previous attempts to exempt the
9 activities of associations of State and local candidates from the definition of “GOTV activity”
10 were found to be contrary to BCRA, See Shays I, 337 F. Supp. 2d at 104, and the Commission is
11 not revisiting that decision.

12 3. Communications Referencing Only State and Local Candidates

13 In the NPRM, the Commission proposed adding an exception to the definition of “GOTV
14 activity” at 11 CFR 100.24(a)(3)(iii) for public communications that refer solely to one or more
15 clearly identified candidates for State or local office and note the date of the election. The
16 proposal was designed to ensure that the expansion of the GOTV activity definition required by
17 the Shays III court would not, in effect, render meaningless the statutory definition of “Federal
18 election activity,” which specifically does not include amounts disbursed or expended for “a
19 public communication that refers solely to a clearly identified candidate for State or local office,
20 if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii).”
21 2 U.S.C. 431(20)(B)(i); 11 CFR 100.24(c)(1).

22 Several commenters addressed the proposed “State and local communication” exception.
23 Five commenters supported it. One stated that the exception would ensure that State and local

1 parties are not deterred from supporting State and local candidates and that the benefits of the
2 proposed exception “far outweigh the incidental effect [that the covered] activities may have on
3 Federal elections.” The same commenter thought that the exception should be expanded to cover
4 State ballot initiatives, as well. Another commenter thought the exception properly excluded
5 from the definition of “GOTV activity” those activities that are not “primarily aimed at
6 facilitating the act of voting.” A third commenter characterized the exception as a “common-
7 sense implementation” of the statute that was particularly necessary in States in which local
8 elections are frequently held.

9 In contrast, two other commenters urged the Commission to reject the proposed
10 exception on the basis that it would “render meaningless” the definition of “GOTV activity” and
11 would “swallow the rule.” In particular, these commenters noted that the proposed exception left
12 out a critical component of the statutory exception on which it was based: that the
13 communications not otherwise meet the definition of “GOTV activity.” As pointed out by the
14 commenter:

15 [T]he fact that a communication refers solely to a State or local candidate is not
16 sufficient to satisfy the exemption, if the communication otherwise constitutes
17 GOTV or voter registration activity. In other words, the key issue is not whether
18 the communication refers solely to a non-federal candidate, but rather whether the
19 communication is GOTV or voter registration activity. If it is GOTV or voter
20 registration activity, it is not eligible for the exemption, even if it refers only a
21 state or local candidate.

22
23 The Commission is not adopting the “State and local communication” exception. The
24 provisions at 2 U.S.C. 431(20)(B)(i) and 11 CFR 100.24(c)(1) remain and continue to exempt
25 from the definition of Federal election activity public communications that refer solely to a
26 clearly identified candidate for State or local office, which do not otherwise constitute voter

1 registration activity, GOTV activity, generic campaign activity or voter identification within the
2 applicable time periods.

3 Furthermore, the Commission notes that grassroots campaign materials, including
4 buttons, bumper stickers, handbills, brochures, posters, and yard signs, which name or depict
5 only State or local candidates, continue to be exempt from the definition of Federal election
6 activity, provided that this grassroots materials exception shall not include materials that are
7 distributed by mail. 2 U.S.C. 431(20)(B)(iv); 11 CFR 100.24(c)(4). As such, a yard sign
8 exhorting readers to “Vote Smith for Mayor on September 15th!” or a handbill that encourages a
9 reader to “Support your County Commissioner! Register by next Tuesday!” could be paid for
10 entirely with non-Federal funds.

11 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

12 The Commission certifies that the attached final rule will not have a significant economic
13 impact on a substantial number of small entities. The basis for this certification is that the
14 organizations affected by this rule are State, district, and local party committees, which are not
15 “small entities” under 5 U.S.C. 601. These not-for-profit committees do not meet the definition
16 of “small organization,” which requires that the enterprise be independently owned and
17 operated and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not
18 independently owned and operated because they are not financed and controlled by a small
19 identifiable group of individuals, and they are affiliated with the larger national political party
20 organizations. In addition, the State political party committees representing the Democratic and
21 Republican parties have a major controlling influence within the political arena of their State and
22 are thus dominant in their field. District and local party committees are generally considered
23 affiliated with the State committees and need not be considered separately. To the extent that any

1 State party committees representing minor political parties might be considered “small
2 organizations,” the number affected by this rule is not substantial.

3 **List of Subjects**

4 11 CFR Part 100

5 Elections

6

1 For the reasons set out in the preamble, subchapter A of chapter 1 of title 11 of the Code
2 of Federal Regulations is amended as follows:

3 **PART 100 – SCOPE AND DEFINITIONS (2 U.S.C. 431)**

4 1. The authority citation for 11 CFR part 100 continues to read as follows:

5 **Authority:** 2 U.S.C. 431, 434, and 438(a)(8).

6 2. Section 100.24 is amended by removing paragraph (a)(1)(iii), by revising paragraphs (a)(2)
7 and (a)(3), and by adding (c)(5) and (c)(6) to read as follows:

8 **§ 100.24 Federal election activity (2 U.S.C. 431(20)).**

9 (a) * * *

10 (1) * * *

11 (iii) ~~—Voter identification and Get Out the Vote Activities Limited to Non-~~
12 ~~Federal Elections.~~

13 (A) ~~—Notwithstanding paragraphs (a)(1)(i) and (ii) of this section, in~~
14 ~~connection with an election in which a candidate for Federal office~~
15 ~~appears on the ballot does not include any activity or~~
16 ~~communication that is in connection with a non-Federal election~~
17 ~~that is held on a date separate from a date of any Federal election~~
18 ~~and that refers exclusively to:~~

19 (1) ~~—Non-Federal candidates participating in the non-Federal~~
20 ~~election, provided the non-Federal candidates are not also~~
21 ~~Federal candidates;~~

22 (2) ~~—Ballot referenda or initiatives scheduled for the date of the~~
23 ~~non-Federal election; or~~

1 (3) ~~—The date, polling hours and locations of the non-Federal~~
2 ~~election.~~

3 (B) ~~—Paragraph (a)(1)(iii) of this section shall not apply to any activities~~
4 ~~or communications after September 1, 2007.~~

5 (2) Voter registration activity ~~means contacting individuals by telephone, in person,~~
6 ~~or by other individualized means to assist them in registering to vote. Voter~~
7 ~~registration activity includes, but is not limited to, printing and distributing~~
8 ~~registration and voting information, providing individuals with voter registration~~
9 ~~forms, and assisting individuals in the completion and filing of such forms.~~

10 (i) Voter registration activity means:

11 (A) Encouraging or urging potential voters to register to vote, whether
12 by mail (including direct mail), e-mail, in person, by telephone
13 (including pre-recorded telephone calls, phone banks and
14 messaging such as SMS and MMS), or by any other means;

15 (B) Preparing and distributing information about registration and
16 voting;

17 (C) Distributing voter registration forms or instructions to potential
18 voters;

19 (D) Answering questions about how to complete or file a voter
20 registration form, or assisting potential voters in completing or
21 filing such forms;

22 (E) Submitting or delivering a completed voter registration form on
23 behalf of a potential voter;

1 (F) Offering or arranging to transport, or actually transporting
2 potential voters to a board of elections or county clerk’s office for
3 them to fill out voter registration forms; or

4 (G) Any other activity that assists potential voters to register to vote.

5 (ii) Activity is not voter registration activity solely because it includes a brief
6 exhortation to register to vote, so long as the exhortation is incidental to a
7 communication, activity, or event. Examples of brief exhortations
8 incidental to a communication, activity, or event include:

9 (A) A mailer praises the public service record of mayoral candidate X
10 and/or discusses his campaign platform. The mailer concludes by
11 reminding recipients, “Don’t forget to register to vote for X by
12 October 1st.”

13 (B) A phone call for a state party fundraiser gives listeners information
14 about the event, solicits donations, and concludes by reminding
15 listeners, “Don’t forget to register to vote.”

16 (3) Get-out-the-vote activity means contacting registered voters by telephone, in
17 person, or by other individualized means, to assist them in engaging in the act of
18 voting. Get-out-the-vote activity includes, but is not limited to:

19 (i) Providing to individual voters information such as the date of the election,
20 the times when polling places are open, and the location of particular
21 polling places; and Get-out-the-vote activity means:

22 (A) Encouraging or urging potential voters to vote, whether by mail
23 (including direct mail), e-mail, in person, by telephone (including

1 pre-recorded telephone calls, phone banks and messaging such as
2 SMS and MMS), or by any other means;

3 (B) Informing potential voters, whether by mail (including direct mail),
4 e-mail, in person, by telephone (including pre-recorded telephone
5 calls, phone banks and messaging such as SMS and MMS), or by
6 any other means, about:

7 (1) Times when polling places are open;

8 (2) The location of particular polling places; or

9 (3) Early voting or voting by absentee ballot;

10 (C) Offering or arranging to transport, or actually transporting,
11 potential voters to the polls; or

12 (D) Any other activity that assists potential voters to vote.

13 (ii) Offering to transport or actually transporting voters to the polls. Activity is
14 not get-out-the-vote activity solely because it includes a brief exhortation
15 to vote, so long as the exhortation is incidental to a communication,
16 activity, or event. Examples of brief exhortations incidental to a
17 communication, activity, or event include:

18 (A) A mailer praises the public service record of mayoral candidate X
19 and/or discusses his campaign platform. The mailer concludes by
20 reminding recipients, “Vote for X on November 4th.”

21 (B) A phone call for a state party fundraiser gives listeners information
22 about the event, solicits donations, and concludes by reminding
23 listeners, “Don’t forget to vote on November 4th.”

1 * * * * *

2 (c) * * *

3 * * * * *

4 (5) Voter identification activity that is conducted solely in connection with a non-
5 Federal election held on a date on which no Federal election is held, and which is
6 not used in a subsequent election in which a Federal candidate appears on the
7 ballot.

8 (6) Get-out-the-vote activity that is conducted solely in connection with a non-
9 Federal election held on a date on which no Federal election is held, provided that
10 any communications made as part of such activity refer exclusively to:

11 (i) Non-Federal candidates participating in the non-Federal election, if the
12 non-Federal candidates are not also Federal candidates;

13 (ii) Ballot referenda or initiatives scheduled for the date of the non-Federal
14 election; or

15 (iii) The date, polling hours, and locations of the non-Federal election.

16 (7) De minimis costs associated with the following:

17 (i) On the website of a party committee or an association of State or local
18 candidates, posting a hyperlink to a state or local election board's web
19 page containing information on voting or registering to vote;

20 (ii) On the website of a party committee or an association of State or local
21 candidates, enabling visitors to download a voter registration form or
22 absentee ballot application;

- 1 (iii) On the website of a party committee or an association of State or local
2 candidates, posting information about voting dates and/or polling locations
3 and hours of operation; or
4 (iv) Placing voter registration forms or absentee ballot applications obtained
5 from the board of elections at the office of a party committee or an
6 association of State or local candidates.

7
8 On behalf of the Commission,
9

10
11
12 _____
13 Matthew S. Petersen
14 Chairman
15 Federal Election Commission

16
17 DATED _____
18 BILLING CODE: 6715-01-P