SANDLER, REIFF & YOUNG, P.C.

February 9, 2010

Via Email

Amy Rothstein, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Notice of Proposed Rulemaking: ñParticipation by Federal Candidates and Officeholders at Non-Federal Fundraising Eventsò

Dear Ms. Rothstein:

These comments are submitted in response to the Commissionôs above-referenced Notice of Proposed Rulemaking, 74 *Fed. Reg*. 64016 (December 7, 2009), proposing amendments to the Commissionôs regulations relating to the solicitation of non-federal funds by federal candidates and officeholders on behalf of state and local party committees. These comments are being submitted by our law firm and reflect our views as practitioners representing more than thirty-five state and local Democratic Party committees. These comments do not, however, necessarily represent the views of any particular client of our firm.

This rulemaking is being undertaken in response to the decision in *Shays v. Federal Election Commission*, 528 F.3d 914 (D.C. Cir 2008)(ñ*Shays III Appeal*ò). In that case, the Court of Appeals, *inter alia*, set aside the Commissionôs current regulations regarding the ability of federal candidates and officeholders to appear and speak at events sponsored by state and local party committees, events at which non-federal funds may be raised.

1. Alternative Proposals in the NPRM

The Commission has offered three alternative proposals in response to the *Shays III Appeal*. Of the three alternatives proposed by the Commission, the Commission should adopt either Alternative 1 or 2. In these two alternatives, we believe the

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Commission has properly balanced the concerns of the Court in *Shays III* with the clear congressional intent, underlying the language of the Bipartisan Campaign Reform Act of 2002 (ñBCRAò) to permit federal candidates and officeholders to continue to appear and speak and state and local party fundraising events.

With respect to the specific language of Alternative 2, it makes sense to require the disclaimer set out in Alternative 2 in any written solicitation signed by a federal candidate. However, the mere listing of a federal candidate on an invitation as a ñfeatured guestò or ñhonored guestò does not, logically, in itself constitute a ñsolicitation.ò Therefore, no disclaimer should be required in that situationð that is, if the federal candidate or officeholder is merely listed in an invitation or other pre-event publicity as a featured or honored guest at the event.

With respect to regulating oral remarks made by federal candidates and officeholders at a state or local party fundraising event, the Commission can satisfy the *Shays III* Court simply by prohibiting federal candidates or officeholders from making any specific solicitation for non-federal funds at such an event. Specifically, it would make sense for the Commission to prohibit any specific request for corporate or union treasury contributions, or for contributions from individuals in excess of the permitted amount, but the Commission should not prohibit general requests for support or contributions. If the prohibition is tailored in this way, it would be unnecessary to impose any requirement that the party committee post a sign, statement or other placard that would disclaim that a covered person is not soliciting prohibited funds. The posting of such a sign would be awkward and confusing in any event.

Finally, we believe that the Commission should reject Alternative 3. This alternative appears to prohibit the solicitation by a party committee of non-federal funds at a state or local party event, even if the federal candidate or officeholder is merely appearing as a speaker or a featured guest. Such an approach is clearly in contravention of the intent of 2 U.S.C. § 441i(e)(3). Further, it would represent a reversal of the positions taken in several prior Commission rulings and opinions. The Commission hasð with one exception, discussed below in detail-- approached solicitation issues in a reasonable and balanced way and there would appear to be no reason for the Commission suddenly to reverse its positions in this rulemaking when such reversal is not required by anything in the *Shays III Appeal* decision.

II. Advisory Opinion 2007-11

We believe that the Commission should use this NPRM to clarify several issues left unaddressed in Advisory Opinion 2007-11. In its disposition of that Advisory Opinion Request, the Commission resolved only one of the questions presented by the requestors. Specifically, the Commission ruled that a state or local party committee could include the name of a federal candidate on a ñsave the dateò invitation and later

solicit non-federal funds through a communication that did not include the name of the federal candidate. The Commission could not, however, resolve two other questions presented by the requestor: (1) whether an invitation that included the name of a federal candidate could include information about non-federal funds and (2) whether an enclosed reply card could include a request for non-federal funds.

The OGC Draft opinion concluded that neither option was permissible since both options were deemed to be ñsolicitationsò by the federal candidate. That position is manifestly incorrect. The Commissionôs rule, 11 CFR § 300.64(a), necessarily assumes that a federal candidate who is listed in pre-event publicity that otherwise complies with the requirements of the rule, would not be making a ñsolicitation.ò Characterizing a candidate or officeholderôs appearance in an invitation or other pre-event communication, in accordance with current section 300.64(a), as a ñsolicitationò would lead to a conclusion that any non-federal funds raised at the event could not be used for Levin activity. That conclusion would contravene both 2 U.S.C. § 441i(e)(3) and 11 C.F.R. § 300.31(e)(2), which clearly contemplate that such non-federal funds *will* be eligible for designation as Levin Funds.

Therefore, first, no disclaimer should be required for the appearance of federal candidates and officeholders in invitations for state and local party committee fundraising events. (*See, e.g,.* FEC Advisory Opinion 2003-3). Second, that factual information regarding state laws is included in an invitation should not lead to the conclusion that a federal officeholder or candidate is making an illegal solicitation. As explained above, the inclusion of these requirements would render 2 U.S.C. § 441i(e)(3) superfluous.[1]

In order to effectuate the clear intent of section 441i(e)(3), the Commission had set forth reasonable safeguards for the appearance of federal candidates at state party events in rules promulgated shortly after the passage of the BCRA. The Commission should incorporate clarifying language into 11 C.F.R. § 300.64(a) that factual information regarding state laws would not be deemed to be a solicitation of non-federal funds by a federal candidate or officeholder. Furthermore, the Commission should clarify that no special disclaimers similar to those approved in Advisory Opinion 2003-3 are necessary in such pre-event publicity. Any Commission guidance to this effect on this issue would not be contrary to any portion of the *Shays III Appeal* decision.

[1] This concern was echoed in a Concurring Opinion to Advisory Opinion 2007-11 by Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky.

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

Respectfully submitted,

Joseph E. Sandler
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