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To <SolicitationShays3@fec.gov>
cc
bcc
Subject RNC Reply Comments

Attached please find reply comments submitted by the Republican National Committee on the proposed rule changes in NPRM 2009-26.

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RNC Reply Comments on Non-Fed Fundraising Events.pdf

Republican National Committee

Counsel's Office

February 22, 2010

VIA ELECTRONIC MAIL

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Reply Comments on NPRM Regarding Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events, Fed. Reg. No. 233, 64016 (Dec. 7, 2009)

Dear Ms. Rothstein:

The Republican National Committee ("RNC") submits the following reply comments on the Notice of Proposed Rulemaking referenced above ("NPRM"). We look forward to the opportunity to expand on these comments at the March 10 hearing if the Commission wishes, and we write today only to highlight a few key points in response to other submitted comments.

First, as a general matter, we note that the commenters unanimously agree that Alternative 2 in either its proposed or a slightly modified form is acceptable under *Shays v. FEC, 528 F.3d 914 (D.C. Cir. 2008) ("Shays III")*, and several of us have opined that it is the best alternative. We hope the Commission will regard this bipartisan consensus, among parties with very different viewpoints regarding the proper extent of campaign finance restrictions and prohibitions generally, as a helpful indicator of what the final rule should look like.

Second, we would like to echo the opinion expressed by Sandler, Reiff & Young, P.C. that with respect to oral remarks made by a covered person at a fundraising event, the Commission can meet the *Shays III* requirement simply by prohibiting solicitations specifically for non-Federal funds. There is no need to prohibit general solicitations or to require a disclaimer when general solicitations are made. And it indeed is awkward to have to place a sign or include an oral disclaimer for general solicitations. It is unsurprising that Sandler, Reiff and the RNC agree on this point as well as several other points relevant to this rulemaking given that both of us work intimately with state parties nationwide and are attuned to the practical and legal obstacles with which they contend on a daily basis. While the rules at issue relate to

the conduct of officeholders, these rules have real implications for state and local parties, and we urge the Commission to comply with *Shays III* in a way that minimizes the burden on the parties.

Third, the National Republican Senatorial Committee's request for affirmative safe harbors has much to commend. Safe harbors for communications could easily be included in the list of communications that do not constitute solicitations at 11 C.F.R. § 300.2(m)(3) or in the new rule. Of course, we do not believe safe harbors are necessary for titles or roles listed on pre-event publicity because we assert that these mentions do not constitute solicitations. If the Commission rejects our contention on this score, then safe harbors for specific roles or titles associated with fundraising events would be helpful as state and local party committees benefit greatly from clear guidance.

Fourth, we strongly urge the Commission to reject the suggestion made by Democracy 21 and the Campaign Legal Center that Advisory Opinion 2005-10 (Berman/Doolitte) be superseded. We agree with the reasoning of Vice Chairman Toner and Commissioner Mason articulated in their concurring opinion. In the wake of the Supreme Court's limited view of what constitutes a cognizable corruption interest, as expressed in *Citizens United v. FEC*, 558 U.S. __, slip op. at 43 (2010), prohibiting the solicitation of non-Federal funds for ballot measure campaigns would be even more constitutionally suspect now than it was when the Commission issued the Advisory Opinion. Moreover, not only would such a prohibition contravene the statute and the Commission's definition of "election" at 11 C.F.R. § 300.2(a), but it would fly in the face of common sense and the ordinary meaning of the term. The RNC actively participates in both elections and ballot initiatives, and we simply do not consider them to be the same thing.

Finally, we share the concern expressed by the National Republican Congressional Committee ("NRCC") with respect to the language in the NPRM concerning non-Federal funds that "are raised" at fundraising events. We agree with the NRCC's recommendation that the new version of 11 C.F.R. § 300.64 should apply only to events for which non-Federal funds are solicited. It is not uncommon for state and local parties to hold events for which only Federal funds are solicited but to which a donor brings a check for an amount outside the Federal limits. It would be nonsensical to force a party committee to decline the check (presumably only to follow up the next day with a solicitation phone call) in order to avoid triggering the constraints of the regulation. Moreover, we recommend that the Commission clarify that the solicitation of non-Federal funds only triggers the regulation if the solicitation is part of the official program or pre-event publicity. Such a clarification would thus enable the conduct of Federal candidates and officeholders to properly avoid being implicated when off-the-cuff, individual solicitations are made to prospective donors during the course of an event.

The RNC appreciates the opportunity to submit these reply comments, and we look forward to the hearing on March 10.

Sincerely,

John R. Phillippe Jr.
Chief Counsel