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VIA E-MAIL: STATEPARTYFR@FEC.GOV

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2005 MAR 29 P 3 14
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Re: Comments to Notice 2005-6 Candidate Solicitation at State, District, and Local Party Fundraising Events

Dear Ms. Dinh:

On behalf of Congressman Eric Cantor, we submit the following comments in connection with the above-captioned Notice of Proposed Rulemaking ("NPRM"). See 70 Fed. Reg. 9013 (Feb. 24, 2005). The comments address the portion of the NPRM that discusses the Commission's practice of permitting Federal candidates and officeholders to attend and participate in functions other than those for state, district and local parties, where non-Federal funds are raised. See 70 Fed. Reg. at 9015 (citing Advisory Opinions 2003-36 and 2003-3). The comments conclude that this practice, as provided for in Advisory Opinion 2003-3, should be codified in the Code of Federal Regulations as part of this Rulemaking.

BACKGROUND

The Bipartisan Campaign Reform Act of 2002 ("BCRA") and its implementing regulations state that Federal candidates and officeholders may not solicit, receive, direct, transfer, spend, or disburse funds in connection with a non-Federal election that do not comply with Federal amount and source limitations. 2 U.S.C. § 441i(e)(1)(B); 11 C.F.R. § 300.62. In 2003, this office requested an advisory opinion interpreting that restriction on behalf of Congressman Cantor and various Virginia state candidates and officeholders. The request resulted in Advisory Opinion 2003-3 ("Opinion").

The Opinion began by stating that the BCRA "does not forbid a covered person from making any solicitation of funds in connection with a non-Federal election." "[A] covered person may make solicitations, but may not solicit funds that are outside the amount limitations and source prohibitions of the Act." The Opinion relied on the FEC's regulatory definitions of "to solicit" and "to direct" at 11 C.F.R. § 300.2(m) and (n) to determine that a Federal candidate or officeholder is only

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subject to the BCRA's non-Federal fundraising limitations if he or she "asks" for funds in connection with a non-Federal election. The Opinion concluded:

Representative Cantor may ask for funds in connection with a State election or direct funds in connection with such an election as long as he does not ask for funds that are in excess of the amounts permitted with respect to candidates under [the Act], or that are from sources prohibited by the Act from making contributions in connection with an election for Federal office.

To properly limit a fundraising solicitation to federally permissible amounts and sources, the Opinion explained that Congressman Cantor could employ a written or spoken disclaimer and provided the following sample disclaimer language:

I am asking for a donation of up to \$2,000 per election from an individual's own funds [or up to \$5,000 per election from a multi-candidate political committee or a political party committee]. I am not asking for funds from corporations, labor organizations or minors.

Since the Opinion was issued, Congressmen Christopher Shays and Martin Meehan filed suit challenging various regulations promulgated by the FEC. See Shays v. Federal Election Comm'n, 337 F. Supp. 2d 28 (D.D.C. 2004). This NPRM was initiated to conform the Commission's regulations to the court's conclusion that 11 C.F.R. 300.64(b) – which allows Federal candidates and officeholders to speak at State, district, or local party committee events "without restriction or regulation" – was promulgated in an arbitrary and capricious manner. The regulation implementing BCRA's non-Federal fundraising limitation, 11 C.F.R. § 300.62, was neither challenged nor mentioned in the Shays decision. However, the regulatory definitions of "to solicit" and "to direct" found at 11 C.F.R. § 300.2(m) and (n) were challenged and struck down. See id. at 73-80. The Commission is currently appealing that portion of the court's ruling. See Court Cases: Shays and Meehan v. FEC, The Record (Federal Election Commission, Washington, D.C.), Dec. 2004, at 1.

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The NPRM seeks comments on whether the Opinion “struck the proper balance,” or is “inconsistent with BCRA’s language and intent” in light of the Shays decision. 70 Fed. Reg. at 9015.

DISCUSSION

The Shays decision does not require the Commission to abandon its analysis and conclusion in Advisory Opinion 2003-3. The Opinion’s guidance should nonetheless be codified so that it can be relied upon by all Federal candidates and officeholders, and to address questions that were not answered by the Opinion.

I. The Shays Decision Does Not Alter the Validity of the Opinion’s Analysis and Conclusion for Purposes of this Rulemaking.

A. The Opinion’s disclaimer provisions to limit non-Federal fundraising are consistent with the BCRA, Shays, and other Commission regulations.

The regulation underlying the Opinion that implements the BCRA’s non-Federal fundraising limitations, 11 C.F.R. § 300.62, was not challenged or otherwise addressed by the Shays decision.¹ In fact, the Shays decision recognized that Federal law permits limited non-Federal fundraising in a manner consistent with 11 C.F.R. § 300.62. As noted in the Federal Register announcement of the NPRM, the Shays decision states that “nonfederal money solicitation is almost completely barred.” See 337 F. Supp. 2d at 92; 70 Fed. Reg. at 9015. It did not say that non-Federal fundraising is absolutely barred because the plain meaning of the BCRA clearly contemplates solicitation of some funds for non-Federal elections. See 2 U.S.C. § 441i(e)(1)(B) (“A candidate [or] individual holding Federal office ... shall not ... solicit, receive, direct, transfer, or spend funds in connection with an election other than an election for Federal office ... unless the funds—(i) are not in excess of the amounts permitted with respect to contributions to candidates and political committees under [the Act]; and (ii) are not from sources prohibited by the Act from making contributions in connection with an election for Federal office.”)

¹ The Shays decision explains that the Complaint in the case was filed October 8, 2002, and that an Amended Complaint was filed on January 21, 2003. See 337 F. Supp. 2d at 35. The case was stayed pending the Supreme Court’s decision in McConnell v. Federal Election Commission until early 2004. Id. The Commission issued the Opinion on April 29, 2003. According to the Shays decision, Plaintiffs never sought to amend their Complaint in the intervening time to challenge 11 C.F.R. § 300.62 as interpreted by the Opinion. Id. at 35-36.

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In developing the disclaimer requirement, the Opinion merely provided a means by which Federal candidates and officeholders can comply with the BCRA's non-Federal fundraising restrictions. It did not weaken, alter, or otherwise change the substance of the BCRA's restrictions. Accordingly, the Opinion is not vulnerable to the same criticism leveled by the Shays decision at other regulations that "unduly compromise[] the Act's purposes and create the potential for gross abuse." 337 F. Supp. 2d at 79 (internal quotations omitted).

Furthermore, the Commission has utilized disclaimers in other contexts to limit fundraising solicitations that have never been deemed insufficient for that purpose. See, e.g., 11 C.F.R. § 114.5(a) (disclaimers required for separate segregated fund solicitations). Similarly, there is nothing in the Shays decision or the BCRA to suggest that the disclaimers utilized in the Opinion are insufficient to limit solicitations by Federal candidates and officeholders for non-Federal funds. Accordingly, and in response to the questions posed in the NPRM, the Opinion "struck the proper balance" and is not "inconsistent with the BCRA's language and intent," or for that matter, Commission practice. 70 Fed. Reg. at 9015.

B. The effect of the Shays decision on the definitions of "to solicit" and "to direct" as they apply to the Opinion should not be addressed in this Rulemaking.

Though the Opinion relies on the definitions of "to solicit" and "to direct" that were struck down by the Shays decision, this Rulemaking is not the appropriate time to address how the Opinion is affected in that regard. First, the Commission is appealing that portion of the Shays decision. The appeal could restore those terms to their original meaning which would leave the Opinion unaffected. Second, if the Commission's appeal is unsuccessful, the Commission will be required to engage in a separate rulemaking to redefine those terms. That rulemaking will provide the Commission with ample opportunity to address whether, or to what extent, the Opinion is affected by the new regulatory definitions.

II. This Rulemaking Should Codify the Guidance Contained in the Opinion and Address Outstanding Issues Left By the Opinion.

The Opinion has become a regulatory cornerstone upon which the Commission has been building. See, e.g., Advisory Opinions 2003-5, 2003-12, 2003-37. It has become an important component of the Commission's regulatory framework and has been relied on by Federal candidates and officeholders when they conduct non-

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Federal fundraising. The Opinion should be codified in the Commission's regulations. Furthermore, the Opinion did not answer all of the questions raised in the original request, and the Opinion itself has raised additional questions. The Commission could benefit from comments and deliberation conducted as part of this Rulemaking to answer those questions.

The Commission explained in the Opinion that it "could not agree on whether the use of a covered person's name in a position not specifically related to fund raising, such as 'honorary chairperson,' on a solicitation not signed by the covered person, is prohibited under the Act." This particular question can and should be revisited and answered in this Rulemaking. But this question raises a larger one that should also be addressed: In what circumstances does use of a candidate's name trigger the Opinion's disclaimer obligations? The Opinion outlined the following framework for analyzing this question in the context of publicity for a non-Federal fundraising event in which a Federal candidate or officeholder's name is used. It required the following two-part assessment:

First, whether the publicity for the event constitutes a solicitation for donations in amounts exceeding the Act's limitations or from sources prohibited from contributing under the Act; and, second, whether the covered person approved, authorized, or agreed or consented to be featured or named in, the publicity. If the covered person has approved, authorized, or agreed or consented to the use of his or her name or likeness in publicity, and that publicity contains a solicitation for donations, there must be an express statement in that publicity to limit the solicitation to funds that comply with the amount limitations and source prohibitions of the Act.

FEC Advisory 2003-36 repeated this two-part test, but included the caveat that the "mere mention of a covered individual in the text of a written solicitation does not, without more, constitute a solicitation or direction of non-Federal funds by that covered individual." (Emphasis added.) This Rulemaking should address and

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codify what "more" could convert the mention of a Federal candidate or officeholder's name into a regulated solicitation for non-Federal funds.²

CONCLUSION

For the foregoing reasons, the Commission should codify the guidance contained in the Opinion and address additional questions not otherwise answered by the Opinion in this Rulemaking.

Sincerely,



Jan Witold Baran
Caleb P. Burns

² The Rulemaking could also clarify that due to the McConnell decision, the Opinion's sample disclaimer language quoted on page 2 supra no longer requires a reference to minors. See also 70 Fed. Reg. 5565 (Feb. 3, 2005) (Notice 2005-4 Contributions and Donations by Minors).