

June 3, 2005

**By Electronic Mail**

Ms. Mai T. Dinh  
Assistant General Counsel  
Federal Election Commission  
999 E Street NW  
Washington, DC 20463

**Re: Comments on Notice 2005-13: Definition of "Federal Election Activity"**

Dear Ms. Dinh:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking 2005-13, published at 70 Fed. Reg. 23068 (May 4, 2005), seeking comment on proposed changes to its rules defining various components of the term "Federal election activity" under 11 C.F.R. § 100.24. Specifically, the Commission seeks comment on changes to its rules defining "voter registration activity," "get-out-the-vote (GOTV) activity," "voter identification," and the phrase "in connection with an election in which a candidate for Federal office appears on the ballot."

For the reasons set forth below, we urge the Commission:

- with regard to the definition of "voter registration," to amend the proposed rule to include efforts to *encourage* individuals to register to vote;
- with regard to the definition of "get out the vote activity," to adopt the proposed rule to eliminate the "association" exception, to amend the proposed rule to include efforts to *encourage* individuals to vote, and to amend the proposed rule to eliminate the 72-hour time period limitation on the definition;
- with regard to the definition of "voter identification," to adopt the proposed rule to eliminate the "association" exception, and to include voter list acquisition; and
- with regard to the definition of the term "in connection with" a Federal election, to reject the adoption of any exceptions to the existing Federal election time periods.

If the Commission decides to hold a hearing on this matter, all three commenters request the opportunity to testify.

**I. BCRA's Legislative History, Purpose and Structure Make Clear That the Definition of "Federal Election Activity" is Critical to Preventing Circumvention of the Soft Money Ban and Should Not Be Restrictively Interpreted to Open New Loopholes.**

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits national party committees from soliciting, receiving, or directing soft money. 2 U.S.C. § 441i(a). Similarly, FECA provides: "[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act." 2 U.S.C. § 441i(b)(1). The Act contains a limited exception for certain "Federal election activity" that a state party committee may finance with an allocated mixture of hard money and so-called Levin funds. 2 U.S.C. § 441i(b)(2).

The Act defines "Federal election activity" to include, *inter alia*: "voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election;" and "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 2 U.S.C. §§ 431(20)(A)(i) and (ii).

In crafting BCRA's definition of "Federal election activity," Congress took pains to be detailed and comprehensive. Not only is the statutory definition unusually precise, but Congress went a step further and specified what activity was "excluded" from the definition.<sup>1</sup> In short, Congress did not leave any room for this important term to be restricted in its scope by administrative interpretation. See *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (statute's "mention of one thing implies the exclusion of another thing") (internal quotation marks and citations omitted).

Congress's overriding purpose in enacting the state party soft money restrictions was to avoid further circumvention of the Federal campaign finance laws. One of BCRA's principal sponsors said that in closing the soft money loophole, Congress took "a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties," while "not attempt[ing] to regulate State and local party spending where this danger is not present, and where State and local parties engage in *purely non-Federal activities*." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of "Federal election activity" to cover only those activities that "in the judgment of Congress . . . clearly affect Federal elections" and left unregulated "activities that affect purely non-Federal elections." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

<sup>1</sup> The activities Congress exempted from the definition of "Federal election activity" are: (1) public communications that do not constitute voter registration, voter identification, GOTV, or generic campaign activity and refer solely to nonfederal candidates; (2) contributions to nonfederal candidates that are not earmarked for Federal election activity; (3) state and local political conventions; and (4) the cost of grassroots campaign materials, such as bumper stickers, that refer only to nonfederal candidates. 2 U.S.C. § 431(20)(B).

The legislative history, unmistakable purpose and statutory structure of BCRA make clear that the definition of “Federal election activity” is critical to preventing circumvention of the soft money ban and should not be narrowed.

## II. The Supreme Court in *McConnell* Upheld BCRA’s Definition of “Federal Election Activity”

The BCRA prohibition on state and local party committee use of soft money to fund Federal election activity was challenged and upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). The Court upheld the prohibition as a permissible means of preventing “wholesale evasion” of the national party soft money ban “by sharply curbing state committees’ ability to use large soft-money contributions to influence federal elections.” *Id.* at 161. The Court noted:

[I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. *Rather, state committees function as an alternative avenue for precisely the same corrupting forces.*

*Id.* at 164 (emphasis added). The Court continued:

Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was “neither novel nor implausible” for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees . . . .

*Id.* at 166 (internal citation omitted) (quoting *Nixon v. Shrink*, 528 U.S. 377, 391 (2000)). The *McConnell* Court concluded that “[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest.” *McConnell*, 540 U.S. at 165-66.

The Court went on to explicitly discuss BCRA’s definition of “Federal election activity,” explaining that BCRA’s ban on state party use of soft money for “Federal election activity” “is narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties *that can be used to benefit federal candidates directly.*” *Id.* at 167 (emphasis added). The Court continued:

Common sense dictates, and it was “undisputed” below, that a party’s *efforts to register voters sympathetic to that party* directly assist the party’s candidates for federal office. It is equally clear that federal candidates reap

substantial rewards from *any efforts that increase the number of like minded registered voters who actually go to the polls.*

*Id.* at 167-68 (internal citations omitted) (emphasis added).

The Court concluded: “Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption.” *Id.* at 168. The Court found BCRA’s prohibition on state party soft money expenditures for “Federal election activity” to be “a reasonable response to that risk.” *Id.*

In short, the Supreme Court in *McConnell* recognized that soft money contributions to state political party committees pose a serious threat of real and apparent political corruption where that money is spent on activities that benefit Federal candidates, and that BCRA’s prohibition on state political party use of soft money to fund “Federal election activity,” as defined in BCRA, is a “closely-drawn means of countering both corruption and the appearance of corruption.” *Id.* at 167.

### III. Voter Registration Activity

BCRA defines the term “Federal election activity” to include “voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election.” 2 U.S.C. § 431(20)(A)(i).

In May 2002, the Commission published NPRM 2002-7, seeking comment on a proposed rule defining “Federal election activity” that essentially just repeated the statutory language, to include “[v]oter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election[,]” and indicating: “For the purposes of voter registration activity, the term ‘election’ does not include any special election.” 67 Fed. Reg. 35654, 35674 (May 20, 2002) (proposed 11 C.F.R. § 100.24(a)(1)) (emphasis added).

The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics each submitted written comments on NPRM 2002-7, addressing the proposed regulation defining “Federal election activity” generally, and “voter registration activity” in particular. *See* Comments of Campaign Legal Center on Notice 2002-7 (May 29, 2002) at 3-4; Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 8-12; Comments of the Center for Responsive Politics on Notice 2002-7 (May 29, 2002) at 3-4.

The Commission gave no indication in NPRM 2002-7 that it might dramatically limit the scope of “voter registration activity” from the statutory provision. On the contrary, the proposed rule was nearly identical to the statutory description of “voter registration activity” at 2 U.S.C. § 431(20)(A)(i). Consequently, our comments submitted in the rulemaking made no references to limitations ultimately imposed on this term in the final rule adopted by the Commission.

In July 2002, the Commission published a final rule at section 100.24(a)(2) defining “voter registration activity” to mean “contacting individuals by telephone, in person, or by other individualized means to *assist* them in registering to vote.” 67 Fed. Reg. 49064, 49110-11 (July 29, 2002) (emphasis added).

Thus, by final rule, the Commission modified the proposed definition of “voter registration activity” to include only “individualized” efforts to “assist” voters to register, and thereby excluding any activity to *encourage* voters to register as well.

This provision was challenged in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) *appeal pending on other grounds* No. 04-5352 (D.C. Cir), where plaintiffs argued that the “assist” limitation on the term impermissibly narrows the definition of “voter registration activity,” because it “excludes from its reach encouragement that does not constitute actual assistance.” *Id.* at 98. The Commission acknowledged that the regulation requires “something more than merely encouraging registering to vote.” *Id.*

Examining the regulation under *Chevron* step one analysis, the court found the statutory phrase “voter registration activity” to be subject to various potential interpretations, noting “that it is possible to read the term ‘voter registration activity’ to encompass those activities that actually register persons to vote, as opposed to those that only encourage persons to do so without more.” *Id.* at 99. On this ground, the court determined that the regulation survived *Chevron* step one. *Id.* at 100.

The *Shays* court then turned to *Chevron* step two analysis, to determine whether the Commission’s construction of BCRA was a permissible one. The court began by noting that “the Commission’s construction may not functionally maximize Congress’s purposes.” *Id.* at 100. The court did not endorse the existing regulation, but instead found that its parameters “are subject to interpretation.” *Id.* Consequently, the court “cannot say *at this stage* that [the statutory purpose of preventing circumvention of the national party soft money ban] is ‘unduly compromised’ by the Commission’s regulation.” *Id.* (emphasis added) (quoting *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986)). The court explained:

While it is clear that mere encouragement does not fall within the scope of the regulation, it is possible that encouragement coupled with a direction of how one might register could constitute “assist[ance]” under the provision. Such an interpretation could remedy what might otherwise be a regulation that “unduly compromises the Act.” Without more guidance on the true scope of the regulation, the Court concludes that it cannot, without violating the ripeness doctrine, determine whether the regulation fails *Chevron* step two review.

*Shays*, 337 F. Supp. 2d at 100 (internal citations omitted) (quoting *Orloski*, 795 F.2d at 164).

Finally, the court turned to the plaintiffs’ claim that the Commission’s adoption of section 100.24(a)(2) violated the Administrative Procedures Act (APA) because the Commission “failed to provide notice in its NPRM that it was contemplating adopting rules that would limit ‘voter

registration” to encompass only “assisting” voters on an individualized basis to register. *Shays*, 337 F. Supp. 2d at 100.

The court agreed with the plaintiffs and concluded: “There is simply no indication provided [in the NPRM] that the Commission would seek to limit the term ‘voter registration.’ Accordingly, the Court finds that the Commission violated the APA’s notice requirements in promulgating 11 C.F.R. § 100.24(a)(2).” *Shays*, 337 F. Supp. 2d at 101 (internal citations and footnotes omitted).

The Commission initiated the present rulemaking “to cure what the court concluded was a notice problem and to consider the comments it receives on the current rule.” 70 Fed. Reg. at 23069. The Commission’s proposed regulation is identical to the current rule. Nevertheless, the Commission has invited comment on whether it “should address the concerns raised by the district court by amending the regulation.” 70 Fed. Reg. at 23069. Specifically, the Commission asks:

Should the Commission define “assist” to include encouragement coupled with direction as to how one might register? Does the “assist” limitation or the “individualized means” requirement exclude any activities that should be included in the definition of “voter registration activity?” Are there other specific activities that the Commission should include or exclude from the definition of “voter registration activity?”

70 Fed. Reg. at 23069.

We urge the Commission to “functionally maximize Congress’s purposes,” *Shays*, 337 F. Supp. 2d at 100, by including in the definition of “voter registration activity” efforts to *encourage* individuals to register to vote. Under the existing regulation, calling potential voters and encouraging – or imploring, or persuading – them to register to vote is *not* covered unless some sort of “assistance” is additionally provided – no matter how effective or common such activity is in influencing federal elections.

There is an obvious flaw in the Commission’s restricted reading of the term. The importance of the definition of “Federal election activity,” including its sub-category of “voter registration activity,” is that it draws the boundary between which activities a state party must fund with hard money (or with an allocated mixture of hard money and Levin funds) and which activities may permissibly be funded with soft money.

Thus, by excluding activities to “encourage” voters from the definition of “voter registration,” the Commission is authorizing state parties to spend *soft money* on partisan activities to “encourage” voters to register – a common and obvious and important part of voter registration drives.

As a functional matter, this makes no sense. When a state party encourages voters “sympathetic to that party” to register, just as much as when it actually and individually provides assistance to such voters in registering, its activities “directly assist the party’s candidates for

federal office.” *McConnell*, 540 U.S. at 167-68. And in both cases “federal candidates reap substantial rewards” from these voter registration efforts by state parties. *Id.* For this reason, activities by a state party to encourage the registration of voters for that party fall squarely within the reasoning of the Court in upholding section 441i(b) – that such activities will benefit federal candidates and thus “the funding of such activities creates a significant risk of actual and apparent corruption.” *Id.* at 168.

Indeed, the Commission’s proposed rule encourages state parties to bifurcate voter registration efforts, so that the first stage – contacting and encouraging voters to register – will be funded with exclusively soft money, and only the party’s subsequent follow-up effort to provide individualized assistance in actually registering those voters will need to be funded under BCRA’s rules.

This bifurcation of voter registration activity makes little sense, and is not consistent with the Commission’s own prior treatment of voter registration activity.

The Commission itself has recognized that “registration” is a “term[] of art used in campaign or election parlance . . . [to] connote efforts to increase the number of persons who register to vote.” Ad. Op. 1980-64. Likewise, one FEC regulation serving as part of the regulatory backdrop against which Congress enacted BCRA describes “voter registration and get-out-the-vote activities” as actions “designed to *encourage* individuals to register to vote or to vote.” 11 C.F.R. § 100.133 (emphasis added).

Not only is this regulation still in effect, but in August 2002, *after* the Commission had promulgated its final “Federal election activity” regulations, the Commission reorganized certain existing regulations including 11 C.F.R. § 100.133. *See* 67 Fed. Reg. at 50592. In doing so, the Commission made no effort to amend this provision to reflect the new, restricted definition of voter registration activity that governs in the Federal election activity context. To the contrary, the Commission promulgated a telling new title for Section 100.133: “Voter registration and get-out-the-vote activities.” *See* 67 Fed. Reg. at 50592. This title reflects the common-sense understanding that any “activity designed to encourage individuals to register to vote” constitutes “voter registration” activity.

The regulation at section 100.133 implements an exemption from the definition of the term “expenditure” for “nonpartisan activity designed to encourage individuals to vote or to register to vote.” 2 U.S.C. § 431(9)(B)(ii). This exemption would allow, for instance, a corporation or labor union to spend treasury funds on such nonpartisan voter registration activities. Because the Commission here has broadly defined voter registration to include activities to “encourage” voters to register, it is correctly giving broad scope to a statutory exemption.

By implementing two very different regulatory definitions of voter registration activity – a broad definition (in the context of exempting corporations and unions from hard money requirements) that includes “encouraging” registration, but a restricted definition (in the context of imposing hard money requirements on state parties) that excludes the same activities to “encourage” registration – the Commission’s patent inconsistency not only creates confusion

about two very different interpretations of the same activity in the same statute, but also *minimizes and thus undermines* the statutory requirement that voter registration activities by state parties be funded with hard money.

Another regulation, which sunsetted in December 2002 as mooted by BCRA, also treated “[g]eneric voter drives, including voter identification, voter registration, and get-out-the-vote drives” as “activities that *urge* the general public to register, vote or support candidates.” 11 C.F.R. § 106.5(a)(2)(iv) (emphasis added). *See also* 11 C.F.R. § 106.5(h) (sunset clause). Again, the Commission here properly treated activity to “urge” – or encourage – registration as within the meaning of voter registration activity. This longstanding definition for former allocation purposes – like the definition in section 100.133 – is inconsistent with the far more restricted definition now used in the context of “Federal election activity.”

Instead of re-promulgating a flawed regulation that contradicts its own administrative interpretation of parallel provisions, as well as common sense, the Commission should conform section 100.24(a)(2) with the companion definitions of the same activity in sections 100.133 and former section 106.5, and thus harmonize its regulations, by including activities that “encourage” or “urge” voters to register as within the definition of “voter registration activity.”<sup>2</sup>

So doing would also honor Congress’ intent to prevent the circumvention of BCRA’s national party soft money ban. Because Congress intended BCRA’s hard money requirement of section 441i(b) to reach *all* state party activities that affect Federal elections and benefit Federal candidates, the regulatory definition of “voter registration activity” must include all efforts to *encourage*, and not just assist, individuals to register to vote.<sup>3</sup>

#### IV. Get-Out-the-Vote Activity

Federal law defines the term “Federal election activity” to include “get-out-the-vote activity . . . conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]” 2 U.S.C. § 431(20)(A)(ii).

In NPRM 2002-7, the Commission sought comment on a proposed rule that largely tracked the statutory language. It defined “Federal election activity” to include “Get-out-the-

<sup>2</sup> If the Commission is not prepared to take this step and include “encouragement” in the definition of “voter registration activity,” it should at least move forward along the lines suggested by the court in *Shays* to interpret “assistance” to include “encouragement coupled with a direction of how one might register....” 337 F. Supp. 2d at 100.

<sup>3</sup> We note that, because of the scope of the district court’s remand in *Shays* for further proceedings on this regulation, the court’s rulings on *Chevron* issues that were favorable to the Commission were not ripe for appeal to the D.C. Circuit by the plaintiffs. *See* Motion of Cross-Appellants Christopher Shays and Martin Meehan for Voluntary Dismissal of Their Cross-Appeal (No. 04-5373), D.C. Circuit Nos. 04-5352 and 04-5373, pp. 3-4 (Nov. 23, 2004) (granted Dec. 2, 2004). We urge the Commission to reconsider its *Chevron* analysis of the voter registration regulation for all the reasons set forth in the plaintiffs’ district court briefs in *Shays*, recognizing that the *Chevron* issues remain open for further consideration and appeal.



vote activity” that is “conducted in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot)[.]” The proposed regulation further provided:

Examples of get-out-the-vote activity include transporting voters to the polls, contacting voters on election day or shortly before to encourage voting but without referring to a clearly identified candidate for Federal office, and distributing printed slate cards, sample ballots, palm cards, or other printed listing(s) of three or more candidates for any public office[.]

67 Fed. Reg. at 35674 (proposed 11 C.F.R. § 100.24(a)(2)(iii)).

The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics each submitted written comments addressing the proposed regulation. Although the Commission did ask in NPRM 2002-7 whether regulation of GOTV activity should be bound by a time frame, the Commission gave no other indication that it might again dramatically limit the scope of “get-out-the-vote activity.” 67 Fed. Reg. at 35655-56.

Democracy 21 noted that the GOTV example provided in the proposed rule implied that GOTV activity was time-limited. Democracy 21 commented:

[T]he definition of GOTV activity is not time-limited under the BCRA (nor is it under current FEC regulations), and the Commission should not read any time limitation into the statute (such as “activity on election day or shortly before”). Indeed, GOTV activity can occur weeks or months prior to an election.

Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 8-9.

In July 2002, the Commission published a final rule at section 100.24(a)(3) defining “get-out-the-vote activity” to mean:

[C]ontacting registered voters by telephone, in person, or by other individualized means to *assist* them in engaging in the act of voting. Get-out-the-vote activity *shall not include* any communication by an association or similar group of candidates for State or local office of individuals holding State or local office if such communication refers only to one or more State or local candidates. Get-out-the-vote activity includes, but is not limited to:

(i) Providing to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

(ii) Offering to transport or actually transporting voters to the polls.

67 Fed. Reg. at 49111 (emphasis added). The final regulation thus excluded GOTV efforts by associations of state and local candidates, excluded efforts to encourage voters to vote, and limited GOTV efforts to those within 72 hours of the election.

This regulatory definition of “get-out-the-vote activity” was challenged in *Shays* on three grounds. First, plaintiffs argued that the GOTV definition is impermissibly limited to activities that “assist” would-be voters, whereas efforts that encourage would-be voters to get out to vote should also be covered by the definition. *Shays*, 337 F. Supp. 2d at 102.

Second, plaintiffs objected to the Commission’s effort to engraft a 72-hour rule onto the definition of GOTV, on the ground that such a requirement presumptively and impermissibly limits the reach of the GOTV provision to conduct occurring within the *last three days* of the election campaign. *Id.*

Third, plaintiffs objected to the regulation’s exclusion of GOTV activities by “an association or similar group of candidates for State or local office or of individuals holding State or local office.” *Id.* Plaintiffs argued that “Congress provided the Commission with no authority to adopt such an exemption – and the exemption is, in fact, in direct contravention of legislative intent.” *Id.*

The *Shays* court began its consideration of the regulation defining GOTV activity with *Chevron* step one analysis, requiring that the court determine whether Congress has spoken on the question at issue. With regard to both the “assist” requirement and the 72-hour provision, the court determined that the statute was ambiguous enough to accommodate the Commission’s interpretation. *Id.* at 103. The court then applied *Chevron* step one analysis to the regulatory exemption for “associations” of state candidates and officeholders, and found that the statutory language regarding GOTV activity allows for no such exemption. The court concluded that “Congress has spoken directly on this question, and that the Commission’s exemption for ‘association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office’ runs contrary to Congress’s clearly expressed intent and cannot stand.” *Id.* at 104.

The court then subjected the “assist” requirement of section 100.24(a)(3) to *Chevron* step two analysis. As the court found with regard to “voter registration activity,” “the term GOTV can be read in different ways, and based on that analysis the Court finds that although the Commission’s construction *may not functionally maximize Congress’s purposes*, it is not a facially impermissible construction of the statute.” *Id.* at 105 (emphasis added).

Just as the court found ambiguity in the “voter registration activity” regulation, the court likewise found ambiguity as to what acts are encompassed by the GOTV regulation. The court reasoned that the degree to which the GOTV regulation might compromise BCRA’s purposes will depend on how the Commission enforces the regulation, and concluded: “At this juncture . . . the Court cannot make this determination.” *Id.*

Finally, the court analyzed the GOTV regulation for compliance with the APA. The court reviewed the May 2002 draft rule and the Commission’s solicitation of comments that

accompanied the draft, and concluded that interested parties could not have anticipated the final rulemaking from the draft rule. *Id.* at 106. Consequently, the court ruled that the Commission's regulation defining GOTV activity to be limited to "assist" activities, and to be restricted to the 72-hour pre-election period, violates the APA's notice requirement.

In short, the *Shays* court found section 100.24(a)(3), defining GOTV activity, to be invalid on *Chevron* step one grounds with respect to the exception for associations of state and local candidates and officeholders. Under *Chevron* step two analysis, the court determined that it is too early to tell whether the regulation's "assist" requirement and 72-hour timeframe will "unduly compromise" the Act, but that those restrictions were promulgated in violation of the APA.<sup>4</sup>

#### A. Eliminate "Association" Exception From Definition of GOTV Activity

In order to conform with the *Shays* court's opinion, the Commission proposes in the present NPRM to remove from the current rule the exception for certain communications by associations of state and local candidates and officeholders. 70 Fed. Reg. at 23072 (proposed 11 C.F.R. § 100.24(a)(3)). We support this modification of the current rule as the only acceptable means of complying with the court's decision in *Shays*.

The Commission seeks comment on whether groups of non-Federal candidates are required to pay for the full amount of Federal election activity with Federal funds. In asking this question, the Commission points, for comparative purposes, to 2 U.S.C. §§ 441i(b)(1) and (b)(2). The Commission also notes the allocation regulation applicable to separate segregated funds and nonconnected committees in 11 C.F.R. § 106.6.

Subsection (b)(1) of Section 441i establishes the ban on use of soft money for Federal election activity by "a State, district or local committee of a political party . . . or by an association or similar group of candidates for State or local office or of individuals holding State or local office." Subsection (b)(2), the so-called Levin amendment, establishes a limited exception to the soft money ban in subsection (b)(1) – applicable *only* to "a State, district, or local committee of a political party." In drafting subsection (b)(2), Congress made no reference to "an association or similar group of candidates for State or local office or of individuals holding State or local office."

The statutory language of BCRA makes clear that "an association or similar group of candidates for State or local office or of individuals holding State or local office" must use Federal funds to pay for *all* Federal election activity. Such associations are prohibited by statute from allocating expenditures for Federal election activity among Federal and non-Federal funds, or to raise and spend Levin funds. The allocation provisions of 11 C.F.R. § 106.6, applicable to

<sup>4</sup> As with the voter registration regulation, those aspects of the GOTV regulations on which the Commission prevailed in *Shays* could not be appealed by the plaintiffs to the D.C. Circuit; given the scope of the remand to the Commission for further proceedings, such an appeal would have been unripe. See n. 3, *supra*. We urge the Commission to reconsider its analysis with respect to these aspects of the GOTV regulations for the reasons set forth in the plaintiffs' district court briefs in *Shays*, recognizing that the *Chevron* issues remain open for further consideration and appeal.

separate segregated funds and nonconnected committees, are *inapplicable* to associations of state and local candidates and officeholders.

Allowing allocation for Federal election activity by associations of state and local candidates and officeholders would constitute an impermissible rewriting of the statute.

B. Eliminate “Assist” Requirement From Definition of GOTV Activity

Although the *Shays* court did not invalidate section 100.24(a)(3) based on the regulation’s inclusion of an “assist” requirement, the court did indicate that the current regulation “may not functionally maximize Congress’s purposes” and held the *Chevron* step two issue open for further consideration. *Shays*, 337 F. Supp. 2d at 105.

The NPRM notes that “the proposed rules do not include any amendments to the ‘assist’ requirement in section 100.24(a)(3).” 70 Fed. Reg. at 23070. For the reasons stated in the preceding section in our discussion of “voter registration activity,” we urge the Commission to amend the proposed definition of GOTV activity to include all efforts that *encourage* voters to vote.

C. Eliminate 72-Hour Time Period Reference From Definition of GOTV Activity

The Commission seeks comment on the examples of GOTV activity identified in section 100.24(a)(3). The Commission asks whether the non-inclusive list of examples should be changed in any way. The Commission explicitly asks whether the specific reference to activity within 72 hours of an election should be changed in any way.

While the final hours of an election are undoubtedly important, there is no reason to assume that a state or local party would not spend massive sums mobilizing its voting base prior to these last 72 hours. The Commission’s general counsel observed that “proximity in time to the election is not necessarily dispositive with regard to whether an activity is a GOTV activity.” Agenda Doc. No. 02-44, “Final Rules for Excessive and Prohibited Contributions (June 17, 2002) at 16.

Indeed, it is utterly implausible to suggest that state parties do not expend funds on GOTV efforts outside the 72-hour window, or throughout the year. Such GOTV activity includes, for example, training party volunteers in the most effective techniques to get their supporters to the polls,<sup>5</sup> conducting door-to-door GOTV activities, and holding GOTV rallies—

<sup>5</sup> In June 2004, for example, state Republican parties around the nation coordinated a massive GOTV training exercise known as “Test Drive 4W.” The *Associated Press* reported: “President Bush’s massive grass-roots organization is testing its plan to get out the vote in November, with thousands of volunteers nationwide making phone calls and walking door-to-door to contact voters.” The article went on to note, according to former chairman of the Republican Party of Florida, Al Cardenas, that Republican GOTV volunteer training began in October 2003—more than one year before the 2004 presidential election. See Brendan Farrington, *Bush Campaign Testing Its Massive Grass-Roots Organization*, ASSOCIATED PRESS NEWS WIRE, June 9, 2004.

particularly in states that allow early voting.<sup>6</sup>

GOTV activity can and does occur weeks and months prior to an election. Particularly given early voting, which is allowed in many states, the 72 hour limitation makes no sense at all.<sup>7</sup> The imposition of this type of temporal restriction only provides an incentive for parties to frontload as much of their GOTV activity as possible, thereby circumventing BCRA's soft money requirements.

We urge the Commission to modify the proposed definition of GOTV activity to eliminate the 72-hour time period reference in section 100.24(a)(3)(i). The definition of GOTV activity is not time-limited under FECA, and the Commission should not read any time limitation into the statute. BCRA covers *all* GOTV activity "in connection with" a Federal election; this term is otherwise defined in the Commission's regulations, 11 C.F.R. § 100.24(a)(1), and the Commission should not further constrict it.

## V. Voter Identification

Federal law defines the term "Federal election activity" to include "voter identification . . . conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 2 U.S.C. § 431(20)(A)(ii).

In NPRM 2002-7, the Commission sought comment on a proposed rule defining "Federal election activity" to include "[v]oter identification, including canvassing, and other activities designed to determine registered voters, likely voters, or voters indicating a preference for a specific candidate or political party[.]" that is "conducted in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot)[.]" 67 Fed. Reg. at 35674 (proposed 11 C.F.R. § 100.24(a)(2)(i)).

The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics each submitted written comments addressing the proposed regulation. *See* Comments of Campaign

<sup>6</sup> State party GOTV activities were in full-swing more than two weeks before the 2004 presidential election. State Republican parties around the nation held a "Walk the Vote" event on the weekend of October 16-17, to get out the vote for George Bush. "Democrats kicked their get-out-the-vote effort into high gear Friday," October 15, with a rally in Las Vegas. *See* Erin Neff, *GET-OUT-THE-VOTE*, LAS VEGAS REVIEW-JOURNAL, October 16, 2004.

<sup>7</sup> According to a survey by Electionline.org, 27 states permit early voting (with no excuse required to be eligible). *See* "Early and Absentee Voting Laws" at <http://www.electionline.org/index.jsp?page=Early.absentee.voting>. Virginia, for instance, begins general election balloting 45 days prior to Election Day. Va.Code 24.2-707. Arizona begins 33 days before Election Day, Ariz.Rev.Stat. 16-541(A), and California begins 29 days before Election Day. Cal.Elec.Code 3018. Concerted GOTV efforts in all of these states could yield important benefits to state parties, well before the 72 hour pre-Election Day window. In addition, every state allows some type of pre-Election Day absentee voting by mail. *See* "Absentee Voting Laws," *supra*.

Legal Center on Notice 2002-7 (May 29, 2002) at 3-4; Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 8-12; Comments of the Center for Responsive Politics on Notice 2002-7 (May 29, 2002) at 3-4.

The Commission gave no indication in NPRM 2002-7 that it might dramatically limit the scope of “voter identification.” Consequently, we made no references in our 2002 comments to the issues discussed below.

In July 2002, the Commission published a final rule at section 100.24(a)(4) defining “voter identification” to mean:

[C]reating or enhancing voter lists by verifying or adding information about the voters’ likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. This paragraph shall not apply to an association or similar group of candidates for State or local office or of individuals holding State or local office if the association or group engages in voter identification that refers only to one or more State or local candidates.

67 Fed. Reg. at 49111. The final rule thus excluded voter identification efforts by associations of state and local candidates, and excluded the purchase or acquisition of voter lists.

This “voter identification” provision was challenged in *Shays*, where plaintiffs argued that the regulatory definition excludes core voter identification activity – the purchase of voter lists. *Shays*, 337 F. Supp. 2d at 107. Plaintiffs also argued that the regulation’s exclusion of voter identification activities by associations of state and local candidates and officeholders was in direct contravention of Congress’ intent. *Id.* at n.83.

The court began its analysis by explaining in a footnote that the Commission’s exemption of associations of state and local candidates and officeholders violates *Chevron* step one, for the same reasons articulated by the court in the context of GOTV activity, as explained above. *Id.*

The court then applied *Chevron* step one analysis to the Commission’s exclusion of the *purchase* of voter lists from the definition of “voter identification.” The court found it “readily apparent” that “voter identification” means “acts taken to identify potential voters.” The court reasoned that “Acquiring a list of voters would appear to be the basic form of this activity.” *Id.* at 107. The court concluded:

The Court agrees that one may obtain a voter list and not be engaged in an activity aimed at identifying voters. But whatever the intent, inherent in the acquisition of such a list is the identification of voters. While a literal reading of the term “voter identification” may or may not have unintended consequences, the Court has been provided no evidence that *Congress intended* to exclude certain forms of activities that identify voters when it used the term “voter identification.” Given this state of affairs, the Court finds that this aspect of the Commission’s regulation fails *Chevron* step one review.

Accordingly, the Court finds that the Commission's definition of "voter identification" fails *Chevron* step one.

*Id.* at 108 (footnotes omitted) (emphasis in original).

A. Include Voter List Acquisition in Definition of "Voter Identification"

The Commission proposes to comply with the *Shays* court decision, in part, by including the acquisition of voter lists in the definition of "voter identification." 70 Fed. Reg. at 23070. Specifically, the proposed rule states: "Voter identification means acquiring information about potential voters, including, but not limited to, obtaining voter lists and creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates." 70 Fed. Reg. at 23072 (proposed 11 C.F.R. § 100.24(a)(4)).

The Commission explains in the NPRM that "the acquisition of voter lists would be considered Federal election activity if it occurs after the earliest filing deadline for the ballot in an even-numbered year and after the date is set for a special election in which a candidate for Federal office appears on the ballot," 70 Fed. Reg. at 23070, pursuant to the Federal election activity time periods established by section 100.24(a)(1).

The Commission seeks comment on whether the proposed "voter identification" rule, when combined with current section 100.24(a)(1) time periods, "would encourage State party committees to purchase voter lists outside the FEA window so that they would be able to allocate their purchases under 11 C.F.R. 106.7(d)(3) (using a mix of Federal and non-Federal funds) rather than being required to allocate under 11 C.F.R. 300.33 (using a mix of Federal and Levin funds)." 70 Fed. Reg. at 23070.

We urge the Commission to amend the definition of "voter identification" to mean "acquiring *or using* information about potential voters . . ." Under such a regulation, state and local party committees would be required to use Federal funds to pay for any voter list *acquired or used* within the time period defining what constitutes activity "in connection with" a Federal election. This regulatory language would prevent a state and local party committee from "gaming" the system by acquiring a voter list outside of the designated Federal election activity time period, but using the list within the time period.

Finally, with regard to voter list acquisition, the Commission seeks comment on whether the regulation should include a limited exception to the definition of "voter identification" for acquisition of voter lists "if the State, or local party committee does not actually use the voter list in connection with any election where a Federal candidate appears on the ballot." 70 Fed. Reg. at 23070.

We oppose the creation of any exception for state party acquisition of voter lists. In the words of the district court in *Shays*:

*[I]nherent in the acquisition of such a list is the identification of voters. While a literal reading of the term “voter identification” may or may not have unintended consequences, the Court has been provided no evidence that Congress intended to exclude certain forms of activities that identify voters when it used the term “voter identification.”*

*Shays*, 337 F. Supp. 2d at 108 (footnote omitted) (first emphasis added) (second emphasis in original).

B. Eliminate “Association” Exception From Definition of “Voter Identification”

In order to comply with the district court ruling in *Shays*, proposed section 100.24(a)(4) would remove the exception for associations of state and local candidates and officeholders. We support this modification of the current rule as the only acceptable means of complying with the court’s decision in *Shays*.

The Commission seeks comment regarding the ability of such associations of state and local candidates and officeholders to pay for Federal election activity by allocating between Federal and non-Federal funds under 11 C.F.R. § 106.6.

As explained above in the context of GOTV activity, the statutory language of BCRA makes clear that “an association or similar group of candidates for State or local office or of individuals holding State or local office” must use Federal funds to pay for all Federal election activity. Such associations are prohibited by statute from allocating expenditures for Federal election activity between Federal and non-Federal funds. The allocation provisions of 11 C.F.R. § 106.6, applicable to separate segregated funds and nonconnected committees, are *inapplicable* to associations of state and local candidates and officeholders.

**VI. Definition of “In Connection With an Election in Which a Candidate for Federal Office Appears on the Ballot”**

Federal law defines the term “Federal election activity” to include “voter identification, get-out-the-vote activity, or generic campaign activity conducted *in connection with an election in which a candidate for Federal office appears on the ballot* (regardless of whether a candidate for State or local office also appears on the ballot)[.]” 2 U.S.C. § 431(20)(A)(ii) (emphasis added).

Commission regulations define the phrase “in connection with an election in which a candidate for federal office appears on the ballot” to mean:

- (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) In an odd-numbered year, 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).

This regulation was not challenged in the *Shays* litigation. Nevertheless, the Commission is taking this opportunity to propose “some limited exceptions and one change to the operation of” section 100.24(a)(1). 70 Fed. Reg. at 23071.

The Commission’s proposed revision of section 100.24(a)(1)(ii) would change the operation of Federal election activity time periods related to special elections for Federal office. The current regulation is limited so as only to apply in odd numbered years. The proposed regulation eliminates the odd-year limitation. The removal of this limitation could extend the Federal election activity time period when a state schedules a special election for a Federal office before the time period under subsection (i) has begun. 70 Fed. Reg. at 23071-72.

We support this revision to extend the coverage of section 100.24(a)(1)(ii) to even-year special elections.

In addition, the Commission proposes creating numerous exceptions to the generally-applicable time periods established by sections 100.24(a)(1)(i) and (ii). Specifically, in municipalities that elect local officials in elections that do not coincide with primary or general elections for Federal office, the Commission proposes to exclude the following periods of time from the time periods of subsections (i) and (ii):

- For municipalities that hold local elections before Federal primary elections, the period from the beginning of the period specified in subsection (i) until the date of the municipal election; and
- For municipalities that hold Federal primary elections before local elections, the period from the day after the Federal primary election up to and including the date of the municipal election.

70 Fed. Reg. at 23072 (proposed 11 C.F.R. § 100.24(a)(1)(iii)).

We oppose the creation of any such exceptions to existing Federal election activity time periods established by 11 C.F.R. §§ 100.24(a)(1)(i) and (ii). These exceptions would create potentially large periods of time in which state and local party committees would be authorized to operate free from BCRA rules on “Federal election activity.” During such periods, they would be able to fund voter mobilization activities with soft money, even during periods in relative proximity to federal elections. Thus, for instance, if a municipality held a local election two weeks prior to a federal primary, the state party could use soft money for voter mobilization activities for the entire time period from the earliest federal filing date, up to the date of the local election two weeks before the federal primary. Depending on the frequency and dates of local elections, this could substantially undercut the purposes of BCRA.

The clear language of BCRA prohibits state, district and local party committees from using soft money to fund Federal election activity. The proposed exceptions to the existing Federal election activity time periods would unduly compromise BCRA's state party soft money ban established by 2 U.S.C. §§ 431(20) and 441i(b)(1), and would undermine Congress' intent to prevent the circumvention of the national party soft money ban.

As the Supreme Court noted in *McConnell* with regard to the state party soft money ban: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *Id.* at 168. The Court found BCRA's prohibition on state party soft money expenditures for "Federal election activity" to be "a reasonable response to that risk." *Id.*

The proposed exceptions could potentially carve several months out of every Federal election year, in which state and local party committees would be permitted by the Commission to freely spend soft money in a manner that undeniably influences Federal elections. Such exceptions would constitute an impermissible construction of the statute. Having already had the district court reject as contrary to law several loopholes drafted by the Commission in its original post-BCRA regulations, and having instituted this rulemaking to fix those problems, the Commission should not use this rulemaking to issue regulations that create entirely new circumventions and loopholes in violation of the statute, thus only prolonging the cycle of litigation.

## VII. Conclusion

For the reasons set forth above, we urge the Commission to adopt, with the recommended amendments and omissions set forth above, the proposed regulations defining "Federal election activity," in order to comply with the district court decision in *Shays* and to preserve the integrity of BCRA's ban on state and local party use of soft money to influence Federal elections.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

Fred Wertheimer  
Democracy 21

/s/ J. Gerald Hebert

J. Gerald Hebert  
Paul S. Ryan  
Campaign Legal Center

/s/ Lawrence M. Noble

Lawrence M. Noble  
Center for Responsive Politics

Donald J. Simon  
Sonosky, Chambers, Sachse  
Endreson & Perry LLP  
1425 K Street NW – Suite 600  
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan  
The Campaign Legal Center  
1640 Rhode Island Avenue NW – Suite 650  
Washington, DC 20036

Counsel to the Campaign Legal Center