March 28, 2005

By Electronic Mail

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

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

Dear Ms. Dinh:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking 2005-6, published at 70 Fed. Reg. 9013 (Feb. 24, 2005). The NPRM seeks comment on whether to revise the Commission's rule at 11 C.F.R. § 300.64, which addresses solicitations by Federal officeholders and candidates at State, district, and local party fundraising events.

As the principal authors of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), we have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement that law, particularly as they relate to soft money. "BCRA's central provisions are designed to address Congress' concerns about the increasing use of soft money . . . to influence federal elections." 147 *Cong. Rec.* S2696 (daily ed. March 22, 2001) (statement of Sen. Feingold). "The soft money ban is the centerpiece of [BCRA]. Our legislation shuts down the soft money system[.]" 148 *Cong. Rec.* S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

In the original soft money rulemaking, the Commission consistently acted to allow, if not flat out encourage, the raising and use of soft money in ways not contemplated or permitted by BCRA. The current rule, which allows virtually unlimited solicitation by Federal officeholders and candidates at State, district, and local party fundraising events, is an excellent example. We strongly urge the Commission to respect the language of the statute and congressional intent by adopting the alternative proposed in the NPRM, which would bar Federal officeholders and candidates from soliciting any non-Federal funds, including Levin funds, when speaking at party fundraising events.

Statutory Framework

BCRA made extensive and detailed amendments to the Federal Election Campaign Act of 1971 ("FECA"), as amended. Its central purpose was to end the

influence of non-Federal funds (funds not subject to FECA's limits, prohibitions, and reporting requirements, commonly known as "soft money") in Federal elections. It did this by prohibiting national party committees from raising or spending soft money and prohibiting State and local party committees from spending soft money to influence Federal elections. *See* 2 U.S.C. § 441i(a) and (b). These provisions were upheld in *McConnell v. FEC*, 540 U.S. 93 (2003). The Supreme Court ruled that the soft money ban furthered the legitimate congressional interest in preventing both actual corruption and the appearance of corruption in Federal campaigns.

As part of the soft money prohibition, BCRA prohibits any Federal candidate or officeholder from raising non-Federal funds in connection with any election for Federal, State, or local office. 2 U.S.C. § 441i(e)(1)(A) and (B). The Supreme Court upheld these provisions as well, ruling that they are valid anti-circumvention measures. *Id.* at 182.

There are two specific exceptions to the prohibition on Federal candidates or officeholders raising non-Federal money. First, a Federal candidate or officeholder who is also a candidate for State or local office may raise non-Federal funds for use in that State or local election. 2 U.S.C. § 441i(e)(2). Second, a Federal candidate or officeholder may, with certain limitations, solicit non-Federal funds on behalf of tax exempt organizations. 2 U.S.C. § 441i(e)(4).

Congress also recognized that Federal candidates and officeholders are often important political figures in their states. It did not wish to prohibit state political parties from including Federal candidates or officeholders in their fundraising events. It is entirely appropriate for a State party to honor such individuals, or ask them to appear or speak, at fundraising events. Congress wanted to ensure that mere attendance at such events would not constitute prohibited fundraising under BCRA. Therefore, BCRA provides that notwithstanding the general solicitation prohibition, a Federal "candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district or local committee of a political party." 2 U.S.C. § 441i(e)(3).

It is important to note that the word "solicit" or "solicitation" does not appear in 2 U.S.C. § 441i(e)(3), in contrast to the exceptions from the solicitation prohibition contained in 2 U.S.C. § 441i(e)(2) and (4) that specifically permit solicitation.

The Current Rule

The 2002 NPRM on Title I of BCRA properly implemented the statutory language in proposed 11 C.F.R. § 300.64. *See NPRM on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money*, 67 Fed. Reg. 35654, 35672 (May 20, 2002). To support this approach, the NPRM cited Sen. McCain's statement in the Senate debate that "[t]he rule here is simple: Federal candidates and officeholders cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local." *Id.* (citing 448 *Cong. Rec.* S2139 (daily ed. March 20, 2002) (statement of Sen. McCain)). It further explained

that, "under the proposed rules, while such individuals may attend, speak, or be a featured guest at a State or local party fundraising event, they cannot solicit funds at any such event." 67 Fed. Reg. at 35672.

Commenting on and endorsing this proposal, we explained, "BCRA clearly prohibits Federal candidates and officeholders from soliciting funds for Federal election activities and activities in connection with a Federal election that are not subject to the limitations, prohibitions, and reporting requirements of the Act . . . Clearly stated, the exemption that allows a Federal candidate to attend, speak at, or be a featured guest at such a fundraising event is not an exemption from the general solicitation ban in the law." Comments of Sen. McCain, Sen. Feingold, Rep. Shays, and Rep. Meehan on Notice 2002-7, at 38 (May 29, 2002).

The Commission, however, adopted an alternative version of the regulation that does the exact opposite of what we recommended in our comments. 11 C.F.R. § 300.64 currently authorizes Federal candidates and officeholders to attend, speak, and appear as a featured guest at State, district or local party committee fundraising events "without regulation or restriction." In the accompanying Explanation and Justification ("E&J"), the Commission gave two reasons for its decision to ignore the recommendation in the NPRM and our comments. First, it made the amazing assertion that this interpretation "is compelled by the plain language of the section." Second, it argued that to prohibit solicitation "would require the Commission to regulate and potentially restrict what candidates and officeholders say at political events, which . . . would raise serious constitutional concerns." Final Rules, 67 Fed. Reg. 49064, 49108 (July 29, 2002).

This section of the rules, along with a number of other provisions of the Commission's soft money rules, was challenged by Representatives Shays and Meehan in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal docketed*, No. 04-5352 (D.C. Cir. Sept. 28, 2004). The court ruled that 11 C.F.R. § 300.64 passed muster under the *Chevron* test, under which if Congress does not directly speak to a question, an agency may adopt any permissible construction of the statutory language. *Shays and Meehan*, 337 F. Supp. 2d at 92.

The court nevertheless struck down the regulation, finding that, contrary to the claim made in the E&J, permitting Federal officeholders and candidates to speak at State, district and local fundraisers "without restriction or restriction" is not compelled by the statutory language. Nor did the Commission explain in the E&J "how examining speech at fundraising events implicates constitutional concerns that are not present when examining comments made at other venues." *Id.* at 93. Because the Commission failed to present a reasoned analysis for its decision, the court found that the regulation was arbitrary and capricious. *Id.*

The Revised Explanation and Justification Should Not Be Adopted

The Commission's preferred approach in this new rulemaking required by the *Shays and Meehan* decision is to retain the incorrect language at 11 C.F.R. § 300.64 and

attempt to revise the accompanying E&J to address the court's concerns. The revised E&J thus notes that the *Shays and Meehan* court found the statutory language to be ambiguous, correcting the unsupportable statement in the 2002 E&J that the Commission's preferred result was compelled by the statutory language. 70 Fed. Reg. at 9015.

The revised E&J, however, fails to deal with the court's second concern. In fact, it flatly ignores the court's directive that the Commission explain "how examining speech at fundraising events implicates constitutional concerns that are not present when examining comments made at other venues." *Shays and Meehan*, 337 F. Supp. 2d at 93. Instead, the revised E&J argues that the current rule "strikes the proper balance" by allowing unlimited speech at State, district, and local party committee fundraising events at which non-Federal funds are raised, but prohibiting covered individuals from soliciting non-Federal funds in pre-event publicity or through other mechanisms. 70 Fed. Reg. at 9015. But this is not the proper balance at all. Rather, the rule continues to carve a major loophole into what was intended to be a near total prohibition.

To the extent there is a balance to be struck, it is not the Commission's job to strike it. Congress struck the balance it considered to be proper by permitting Federal candidates and officeholders to attend, be honored at, or speak at a state party fundraiser, but not solicit funds. In light of the Supreme Court's decision upholding in their entirety the provisions of BCRA that prohibit Federal candidates and officeholders from raising soft money, *see McConnell*, 540 U.S. at 181-84, the Commission cannot seriously argue that prohibiting candidates from soliciting soft money at state party fundraisers would violate the First Amendment any more than prohibiting them from soliciting soft money for the state party in mailings or phone calls would. Indeed, the Supreme Court addressed and dismissed almost the exact argument put forward in the NPRM, and the very case the NPRM cites:

> Section 323 thus shows "due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620, 632, 63 L. Ed. 2d 73, 100 S. Ct. 826 (1980). The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts or request that a corporation or union contribute money through its PAC in no way alters or impairs the political message "intertwined" with the solicitation.

McConnell, 540 U.S. at 139-40.

The Commission also asserts that "[a] regulation that permitted speaking at a party event, the central purpose of which is fundraising, but prohibited soliciting would require candidates to tease out words of general support for the political party and its causes from words of solicitation for non-Federal funds for that political party." 70 Fed. Reg. at 9015. Suggesting that Federal candidates or officeholders are incapable of doing this, or even would find it difficult, borders on the ridiculous. Candidates and

officeholders routinely tailor their speeches to particular audiences, retaining the same core message but changing various details to reflect the age, geographic location, occupation, issue interest, political persuasion, or other distinguishing characteristics of the group. Editing out solicitations will pose no significant problem to those involved in this business, as long as the rule is clear.

Political actors know how to ask for money and they know how to avoid asking for money. Indeed, the Senate Ethics Rules require members of the Senate to avoid soliciting funds when appearing at a fundraising event for a charitable organization where fewer than 50 people are in attendance or if registered lobbyists or foreign agents are targeted by the event. *See* Senate Ethics Manual at 75-76 (2003).

The Proposed Alternative Should be Adopted

As explained above, the convoluted reasoning in the current rule and the proposed revised E&J are not consistent with the statutory language and congressional intent. In contrast, the proposed revisions to 11 C.F.R. § 300.64 (the alternative to the revised E&J) reflect both the letter and spirit of BCRA.

While the *Shays and Meehan* decision did find that the current regulation passes the *Chevron* test, the court also specifically found that the "Commission's interpretation likely contravenes what Congress intended when it enacted [2 U.S.C. § 441i(e)(3)], as well as what the Court views to be the more natural reading of the statute." 337 F. Supp. 2d at 92. The court also said: "[T]he fact that the Commission originally read 2 U.S.C. § 441i(e)(3) to mandate a contrary result to its ultimate conclusion undermines the clarity of its statutory analysis." *Id.* at 92-93 and n. 62. The Commission should heed this part of the court's decision and adopt the "more natural" reading of the statute, supported by the law's primary congressional sponsors, rather than stubbornly insisting on an unnatural reading of the statute and trying to create a justification that will squeeze by subsequent judicial review.

The NPRM also notes that the *Shays and Meehan* court voiced concern that the current rule "creates the potential for abuse." *Id.* at 92. It therefore "seeks public comment as to any potential for abuse under the current rule." 70 Fed. Reg. at 9015. In fact, the *Shays and Meehan* court found potential for significant abuse, although it could not, from the record, determine if this reached the "potential for *gross* abuse" required under *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986) (emphasis added) to invalidate the regulation. 337 F. Supp. 2d at 91. The court cited the *McConnell* Court's concern that such abuse would occur if 2 U.S.C. § 441i(e)'s restrictions on solicitations are not strictly enforced:

> [R]estrictions on solicitations are justified as valid anticircumvention measures. . . .Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. As the record demonstrates, even before the passage of

> BCRA, federal candidates and officeholders had already begun soliciting donations to state and local parties, as well as tax-exempt organizations, in order to help their own, as well as their party's, electoral cause.

337 F. Supp. 2d at 90 (citing *McConnell*, 540 U.S. at 182-83). Moreover, in the memorandum filed in connection with their challenge to 11 C.F.R. § 300.64, Representatives Shays and Meehan noted that the potential for abuse is:

> exacerbated by the lack of any definition of what constitutes a "fundraising event for a State, district, or local committee of a political party." Thus, nothing prevents a federal candidate or officeholder from calling together a group of wealthy donors, labeling the gathering a "fundraising event for a State, district, or a local committee of a political party," and conducting unrestricted solicitation of soft money at such an event.

Shays and Meehan, 337 F. Supp. 2d at 91 (citing Plaintiff's Memorandum at 51 n. 84).

The Commission has provided no explanation for why the concerns expressed in the litigation are not justified. Certainly, prohibiting solicitations in pre-event publicity does not address the problem. What is to prevent Federal candidates from not only soliciting soft money as part of their speeches at state party fundraisers, but from making phone calls to soft money donors from their tables during the event? Given the long history of party and candidate efforts to raise and spend soft money in connection with Federal elections and the Commission's general hostility to strictly implementing and enforcing the soft money ban, we believe the concern over potential abuse is more than justified. Adopting the alternative proposed in the NPRM to prohibit solicitation is the only way to close this major loophole.

Advisory Opinions 2003-3 and 2003-36 Were Incorrect

Following the promulgation of 11 C.F.R. § 300.64, the Commission issued two advisory opinions ("AOs") that broadened even further the right of Federal candidates and officeholders to solicit non-Federal funds, including activities at events that do not constitute State, local, or district party committee events. See AOs 2003-3 and 2003-36. The NPRM raises several questions as to how these should be treated in view of possible revisions to the current rule.

Among the questions asked, the only one that need be answered is, "Does the permission granted in 2 U.S.C. [§] 441i(e)(3) to attend, speak, or be a featured guest at State, district, or local party events, by implication, prohibit Federal officeholders and candidates from doing so at other fundraising events unless such events are solely and exclusively raising Federal funds?" 70 Fed. Reg. at 9015. The answer is "yes," unless BCRA specifically authorizes candidates or Federal officeholders to solicit non-Federal funds at such events, for example under 2 U.S.C. § 441i(e)(2) or (4). The statute provides no other permission to attend fundraisers where soft money is raised. Absent a

specific provision such as § 441i(e)(3), participation in such an event would violate the general prohibition in § 441i(e).

The Commission seems to read the *Shays and Meehan* court's observation that under BCRA, leaving aside the issue of State, district and local party fundraisers, "nonfederal money solicitation is almost completely barred" as almost a surprise, leading to the question of how best to treat these AOs. *Id.* (citing *Shays and Meehan*, 337 F. Supp. 2d at 92). In fact, it is a statement of the obvious. The Commission should revise 11 C.F.R. § 300.64 as proposed in the alternative. It should include a statement in the accompanying E&J that AOs 2003-3 and 2003-36 are superseded, to the extent they conflict with the revised rule.

The AOs also endorse the use of written or oral disclaimers in connection with a fundraising event, which state that the featured Federal candidate(s) or officeholder(s) will not solicit any non-Federal funds. While we agree that the use of such disclaimers should be encouraged, we also note that they should not provide a "safe harbor" to protect candidates or officeholders if it is later alleged that they solicited soft money at the event.

Federal Candidates and Officeholders May Not Raise Levin Funds. Period.

Levin funds are a type of non-Federal funds raised only by State, district, and local political party committees. They are limited to donations of $10,000 per source per calendar year and generally may be solicited from sources otherwise prohibited by the FECA from contributing in connection with Federal elections, except for foreign nationals. Levin fund donations, however, must be lawful under the laws of the State in which the committee is organized. 2 U.S.C. § 441i(b)(2)(B). Most importantly, BCRA clearly and specifically prohibits Federal officeholders and candidates, among others, from raising Levin funds. 2 U.S.C. § 441i(b)(2)(C).

The *Shays and Meehan* court, addressing another issue, stated that "the plain meaning of [BCRA] makes clear that Levin funds are funds 'subject to [FECA's] limitations, prohibitions, and reporting requirements.'" 337 F. Supp. 2d at 118. The Commission now seeks comment on whether Federal candidates and officeholders may raise Levin funds, since 2 U.S.C. § 441i(e)(1) authorizes them to raise funds "subject to the limitations, prohibitions and reporting requirements of the Act." 70 Fed. Reg. at 9016.

This convoluted reading is yet another misguided effort by the Commission to create exceptions to the soft money prohibition that is BCRA's core feature. With only the two exceptions discussed above (a Federal officer or candidate who is running for State or local office, or limited fundraising for tax exempt organizations), a Federal officeholder or candidate can raise only hard money. Had Congress intended that they be allowed to also raise Levin funds, it would have so provided in 2 U.S.C. § 441i(b). Instead, Congress specifically *prohibited* Federal candidates and officeholders from raising Levin funds. The prohibition on such fundraising starts with the clause

"Notwithstanding subsection (e)," *precisely to head off* any interpretation that since Levin funds are limited and regulated under BCRA they are not subject to the soft money fundraising prohibition of § 441i(e).

The cross reference to § 441i(e)(3) in § 441i(b)(2)(C) serves only to make clear that the statute's specific prohibition on raising Levin funds does not prevent a Federal candidate or officeholder from appearing or being honored at a state or local party fundraiser where Levin funds are raised. It does not, as explained above, allow Federal candidates or officeholders to solicit such funds. Indeed, the specific prohibition in § 441i(b)(2)(C) is yet another reason that reading § 441i(e)(3) to permit solicitation at state and local party fundraisers would be improper.

Conclusion

This rulemaking presents an important test for the Commission. Given the chance to reconsider the issue of Federal candidates and officeholders attending state party soft money fundraisers, will it implement what the District Court found is the "more natural reading" of the statutory provision, which is also the reading favored by the law's chief congressional sponsors? Or will it continue down the path of torturing the language of BCRA to create loopholes that could very well undermine the purpose of the law that Congress worked so hard to pass? The American people waited many years for Congress to break the link between enormous contributions and Federal elected officials. Not even a year after the bill was signed, the Commission undermined that law by making state party fundraisers a "rules-free zone." It is time for the Commission to abandon its effort to undo what the elected legislative bodies of this country and the American people achieved in BCRA.

Thank you for your consideration.

Sincerely,

Senator John McCain
Senator Russell D. Feingold
Representative Christopher Shays
Representative Marty Meehan