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Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: **Notice of Proposed Rulemaking: Definitions of "Solicit" and "Direct"**

Dear Mr. Deutsch:

These comments are submitted on behalf of our client, the Democratic National Committee ("DNC"), in response to the Commission's Notice of Proposed Rulemaking: Definitions of "Solicit" and "Direct", 70 *Fed. Reg.* 56599 (Sept. 28, 2005).

In summary, the DNC supports the Commission's proposed definitions of "solicit" and "direct," provided that examples are provided to indicate, or that the Explanation and Justification indicates, that merely expressing support or praise for an organization or entity does not, without more, constitute "soliciting" or "directing" funds to that organization. We believe that, in all other respects, the new proposed definition strikes the proper balance between meeting the requirements of the court decisions in the *Shays* litigation and providing workable guidance to party committees.

We request an opportunity to testify on behalf of the DNC, at the hearing on the proposed regulations scheduled to be held on November 14 and/or 15, 2005.

I. DNC's Interest in this Rulemaking

Under BCRA, "any officer or agent acting on behalf of" a national party committee "may not solicit, receive or direct to another person a contribution, donation or transfer of funds" unless those funds are subject to the limitations, prohibitions and reporting requirements of the Federal Election Campaign Act of 1971 as amended ("FECA"). 2 U.S.C. §414i(a)(1) & (2). Thus, a national party officer or employee, "acting on behalf of" the national party, may not "solicit" or "direct" any funds from any

source in any amount, unless the funds are going to a national party committee, a federal candidate, the federal account of a state party or a federal PAC.

In the course of their activities on behalf of the DNC, DNC Chair Governor Howard Dean, and other DNC officers and employees, frequently speak before state and local party committees and other organizations. In particular, they are often speakers at state and local party events, including fundraising events, and at non-fundraising events, such as conventions, seminars and trainings, for non-profit organizations and advocacy groups, including 501(c)(4) organizations, state-registered political committees and non-federal political organizations.

At all of these events, DNC officers and staff are careful to avoid any solicitation whatsoever of any funds. However, it is common for national party officials to refer to and express support for the programs and work of state and local party committees, and of the nonprofit advocacy organizations before which such officials appear. It is not possible for national party officials to script every word they speak, or for them to have to be concerned about every word they say in making such remarks.

It is important, therefore, that the Commission develop definitions for the terms “solicit” and “direct” that comply with the court decisions in *Shays v. FEC*, 337 F. Supp.2d 28 (D.D.C. 2004)(*Shays District*) and *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (*Shays Appeal*), and that, at the same time, are sufficiently clear and objective to provide adequate guidance to national party committees, their officers and their employees.

II. Definition of “Solicit”

A. Proposed Revised Definition

The Commission’s existing definition of “solicit” is “to ask that another person make a contribution, donation, transfer of funds...” 11 C.F.R. §300.2(m). In the *Shays Appeal* litigation, the plaintiffs argued, and the Court of Appeals agreed, that this definition “requires ‘an outright explicit request—‘please give’—that is contained in a single communication.’” *Shays Appeal*, 414 F.3d at 103, *quoting* Appellee’s Br. at 28. The Court of Appeals agreed with the plaintiffs that the Commission definition would permit a federal officeholder, for example, to say that “‘it’s important for our state party to receive at least \$100,000 from each of you in this election....’” *Id.* at 103, *quoting* Appellee’s Br. at 30. The Court of Appeals concluded that the “FEC definitions require an explicit direct request for money,” *id.* at 105; and that the definition leaves covered officials free to cause non-federal money to be contributed if they “only avoid explicit direct requests,” contrary to the intent of Congress. *Id.* at 106. The Court ruled that

Congress intended the term “solicit” to “cover indirect requests” and that, because the Commission’s definition “does not, we shall affirm its invalidation.” *Id.* at 107.

In the NPRM, the Commission proposes to revise its regulation to define “solicit” to mean “to ask, suggest or recommend that another person make a contribution....” The new definition would make clear that the term includes “a written or oral communication, whether explicit or implicit, construed as a reasonable person would understand it in context.”

The Commission’s new proposed definition fully complies with the requirement of the Court of Appeals decision that the definition include indirect and implicit requests, as well as explicit and direct requests. At the same time, the new definition, by incorporating a “reasonable person” test, provides an objective standard for determining when a communication constitutes a “solicitation.” In our view, therefore, the new proposed definition strikes the proper balance between the need to cover indirect and implicit solicitations and the need to afford workable guidance to the regulated community.

B. Alternatives

The first proposed alternative, to eliminate the “reasonable person” standard, would make the new definition significantly worse from the standpoint of national party officials and employees, because it would permit subjective judgments to govern whether a particular communication should be interpreted as asking, suggesting or recommending a contribution.

In the second alternative, elimination of the terms “suggest” and “recommend” from the new definition would likely not comply with the requirements of the Court of Appeals decision in *Shays*. It would be useful, however, as proposed in the second alternative, to make clear that solicitation “requires an actual request for funds and does not in any way apply to other types of political speech, such as statements of political support for an organization.” NPRM, 70 *Fed. Reg.* at 56601. As noted, DNC officers and employees frequently speak at state and local party fundraising events, and at non-fundraising events of non-profit organizations, before audiences that may include donors or prospective donors. It is normal and appropriate, in such appearances, for the national party officer or employee to praise or express support or appreciation for the work of that party committee or non-profit organization. Nothing in the language or history of BCRA suggests any legislative intent to prohibit such expressions of support.

Indeed, to the extent that the Court of Appeals believed that the definition of “solicit” for purposes of BCRA should be congruent with the Commission’s construction of that term in the context of solicitation for separate segregated funds, *Shays Appeal*, 414 F.3d at 106-07, it is clear that such expressions would not constitute “solicitation.” The

Commission has consistently ruled that discussion of the activities of a PAC does not constitute "solicitation", "where the information provided would neither encourage readers to support the SSF activities nor facilitate contributions to the SSF." A.O. 2003-14, *citing* A.O.'s 2000-7, 1991-3, 1988-2, 1983-38, 1982-65, 1980-65, and 1979-66; *see also* NPRM, 70 *Fed. Reg.* at 56603.

The third alternative, to maintain the current definition and simply revise the Explanation and justification, would appear not to comply with the court rulings in the Shays litigation.

The fourth alternative is no longer viable in any event given the denial by the Court of Appeals of the Commission's petition for rehearing en banc.

The fifth alternative, to provide no definition at all for the term "to solicit," would simply not provide adequate guidance to the regulated community.

C. Conduct

The plaintiffs in the *Shays* litigation, and BCRA's other sponsors, have never suggested that non-verbal conduct be included in any definition of "solicit." Conduct was not included in the list of examples of "solicitation" set forth in Plaintiffs' Memorandum in Support of Motion for Summary Judgment in *Shays* District, p. 38; see also, letter to the Commission from Senators McCain and Feingold and Representatives Shays and Meehan, April 10, 2002 (Comments in Title I Rulemaking), p. 19. Inclusion of non-verbal conduct in the definition would make it impossible for party officers and staff to understand what is permitted and what is prohibited. Expanding the definition of "solicit" in this way, therefore, would effectively make it impossible for officers and staff to appear at any event for a state or local party committee, or non-profit or state or local political organization. There is no good reason for the Commission to make any attempt to include anything other than written and verbal communications in the definition of "solicit."

D. Examples of Solicitation

The NPRM asks whether the Commission should incorporate, into the regulation or into the E&J, a set of examples of communications that would constitute "solicitations," and a set of examples of communications that would not constitute "solicitations."

We believe the Commission should incorporate such examples into the regulation or into the E&J. Inclusion of examples will provide practical, useful guidance to the party officers and staff who must understand clearly what types of expressions they must

avoid in addressing audiences, at state and local party events and events sponsored by non-profit and political organizations.

Further, we believe that the actual examples provided in the NPRM properly distinguish between language that should be deemed a solicitation, and general expressions of support that should not be so construed.

Some of the examples of communications that do not constitute solicitations refer to federal candidates—President, Senator, Representative. This is confusing because party officials and federal officeholders can solicit for federal candidates in any event. The examples would be more useful if they referred to state or local party committees or state or local candidates.

III. Definition of “To Direct”

The Commission’s current definition of “direct” is “to ask a person who has expressed an intent to make a contribution...to make that contribution...” 11 C.F.R. §300.2(n). In the *Shays District* case, the plaintiffs argued that the common meaning of the term “direct” is broader than to “ask,” and includes to “show or point out the way for” or “to assist by giving advice, instruction or supervision.” *Shays District*, 337 F. Supp. at 75, quoting Plaintiffs’ Memorandum in Support of Motion for Summary Judgment at 33-34. The District Court agreed, and also held that limiting the meaning of “direct” to “ask” would render the term “direct” superfluous, since it would then be defined in the same way as “solicit.” 337 F. Supp. at 76-77.

It is clear enough that the term “direct” was included in BCRA to cover situations in which a donor who already wants to make a contribution at the behest of a federal officeholder or party official is told where to send that contribution—the donor does not have to be “asked” to contribute, but merely told where to contribute. See *McConnell v. FEC*, 540 U.S. 93, 125 (2003)(“Candidates often *directed* potential donors to party committees and tax-exempt organizations that could legally accept soft money”(emphasis added)). An example given by the plaintiffs in the *Shays District* case is telling a donor, “X is a fine organization; you should consider giving it \$10,000.” *Shays District*, Plaintiffs’ Memorandum in Support of Motion for Summary Judgment at 34.

The Commission’s proposed new definition of “direct” is “to guide a person who has expressed an intent to make a contribution...by identifying a candidate, political committee or organization, for the receipt of a contribution...” 70 *Fed. Reg.* at 56606. That new definition clearly captures the situations that were intended to be addressed by the inclusion of the term “direct” in the law. The new definition is also directly responsive to the concerns of the District Court that the term “direct” be defined more broadly than merely to “ask,” so as to capture the ideas of advising, instructing or

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showing the way. At the same time, the new definition is sufficiently clear and objective to afford workable guidance for party committees and their officers and employees.

For these reasons, the Commission's proposed new definition of "to direct" should be adopted.

Respectfully submitted,

/s/

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Committee