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Ms. Mai T. Dinh
Assistant General Counsel
999 E. Street, N.W.
Washington, D.C. 20463

Re: Comments on Notice 2005-12 (State, District, and Local Party Committees Payment of Certain Salaries and Wages) and on Notice 2005-13 (Definition of Federal Election Activity)

Dear Ms. Dinh:

I am General Counsel for the California Democratic Party ("CDP"). On behalf of CDP, I submit these comments in response to the Federal Election Commission's Notice of Proposed Rulemaking 2005-12 and 2005-13 published at 70 Fed.Reg. 23,072 (May 4, 2005). The Federal Election Commission ("Commission" or "FEC") is seeking comments on proposed changes to the regulations regarding payments by State, district and local party committees for salaries and wages of employees who spend 25 percent or less of their compensated time in a month on Federal-related activities.[1] In addition, the Commission is seeking comments on various sections of the definition of "Federal Election Activity."

CDP is an unincorporated association of approximately seven million members who have joined together to advance common political beliefs. It is the duly authorized and officially recognized Democratic Party of the State of California. Its organization, operations and functions are set out in the California Elections Code Section 7050 *et seq.* CDP is a "party committee" under Federal law pursuant to 11 C.F.R. §100.5(e)(4). CDP maintains a core staff of employees during non-election years and increases its staffing during election years.

1. Payments of Certain Salaries and Wages

As an initial matter, CDP urges the Commission to postpone this rulemaking. The Commission is undertaking this rulemaking as a response to the ruling of the United States District Court for the District of Columbia in *Shays v. Federal Election Commission*, 337 F.Supp.2d 28 (D.D.C. 2004). The Commission has appealed the portion of that decision relevant to the payment of party employees' wages or salaries to the D.C. Circuit. CDP requests the Commission delay decision on amending these provisions until the appeal process and any other judicial proceedings are completed.

[1] For convenience, CDP uses "Federal-related activities" in its comments as the Commission has defined it in the NPRM to include both "Federal Election Activity" and "activities in connection with a Federal election." However, as noted in herein, CDP would encourage the Commission to narrow its regulatory language to more accurately track the statutory language and include only "activities in connection with a Federal election."

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The Bipartisan Campaign Reform Act of 2002 and the regulations issued subsequently by the FEC significantly altered the expenditure scheme for political party committees. BCRA added a definition of "Federal Election Activity" to FECA and defined "Federal Election Activity" to include the "services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election." 2 U.S.C. § 431(20)(A)(iv). Under BCRA state party committees, including CDP, must pay the salaries and wages of employees who spend more than 25 percent of their compensated time per month on Federal-related activities with entirely Federal funds. *See,* 2 U.S.C. § 441i(b)(1). Subsequent to the passage of BCRA, the Commission issued Regulation 106.7(d) which requires party employees to keep a monthly log of their time spent in connection with Federal elections and mandated that the salaries and wages of an employee who spends 25 percent or less of his or her compensated time in connection with Federal-related activities be paid for using entirely non-Federal funds. *See,* 11 C.F.R. §106.7(d)(1)(i) and 11 C.F.R. § 300.33(c)(2).

CDP believes the Commission's original interpretation of the 25 percent rule as articulated in 11 C.F.R. § 106.7(d)(1)(i) was correct and will ultimately be confirmed as such by the Court of Appeal. Revising the regulation now pending the appeal may undermine the Commission's legal position and seems premature.

If the Commission does proceed with rulemaking, CDP believes the Commission's proposed regulatory amendment does not provide a proportionate allocation ratio for many of its employees. CDP's employees work on a variety of projects and assignments. Many of CDP's employees are engaged in non-election activity (whether Federal or non-Federal) including conducting conferences and meetings, responding to member inquiries and researching public policy issues. Other employees spend no time "on activities in connection with a Federal Election" and instead spend 100 percent of their time on activities in connection with non-Federal elections.

Under the Commission's proposed regulation, an employee of CDP engaged in non-federal election activity 100 percent of his or her time in a calendar month would have to be compensated using at least 25 percent Federal funds. This is an unfair result which sweeps much too broadly and unjustifiably interferes with the type of money CDP may use to fund its employees working substantially on non-Federal activities.

Therefore, CDP supports the Commission's optional proposal of establishing an allocation ratio that is directly proportional to the amount of compensated time each employee spends on Federal-related activities in a given month. CDP believes that this option would satisfy the District Court's concern that the bright-line rule allows for circumvention of the soft money ban. In addition, this option would allow flexibility for party committees to pay for the exact proportion of the employee's time spent on Federal election-related activities.

Because, this option may be difficult due to record keeping and reporting for some party committees, CDP believes such an allocation method should be an alternative to the proposed 25 percent rule and not mandatory.

CDP opposes a regulation that would *require* a party committee to treat salaries and wages for employees spending less than 25 percent in a month on Federal election-related activities as an administrative expense subject to the allocation rules in 11 C.F.R. §106.7(d)(2). Such a regulation would exaggerate the amount employees spend on Federal-related activities. For example, the Governor of California may call a special election in 2005 on which only ballot measures would be voted upon. If such an election is called, CDP employees will be active in promoting the party's positions and activating the party's members regarding the ballot measures. An employee spending 99 percent of his or her time in a calendar month on state ballot measure issues and 1 percent of his or her time on Federal-related activities would have to be paid for using 15 percent Federal funds (the ratio for administrative expenses in a non-Presidential and non-Senate year.) There is no rational relationship between the time actually spent by the employee on Federal-election activities and the amount of Federal money required to be used to fund that employee.

In addition, CDP strongly encourages the FEC to formalize in its regulatory language that party employees who spend no time in a particular month on Federal-related activities may be compensated using entirely non-Federal funds. In its NPRM, the Commission noted that the proposed rules would allow those employees spending no time on Federal-related activities to be paid for using entirely non-Federal funds consistent with the current rule. *See,* 70 Fed. Reg. 23,073, FN 4. However, the proposed rules do not make it clear that such employees could be compensated using entirely non-Federal funds.

The NPRM also requests comments on the appropriate allocation ratio for the fringe benefits for party employees. CDP supports the concept of amending the rules to permit, but not require, party committees to use the same allocation for fringe benefits as are used for salaries and wages. However, CDP believes that the regulation should also allow party committees to use the administrative allocation scheme for such expenses. Under the current regulations, CDP can make an advance determination based on an employee's expected time spent on Federal-related activities as to whether the employee's fringe benefits must be paid for with entirely Federal or entirely non-Federal funds. However, if the regulation is changed to correspond directly in proportion with the employee's time spent on Federal-related activities, it will be difficult to determine in advance how much non-Federal money is needed for these costs. For administrative convenience reasons, party committees should have the option of paying employee fringe benefits under either the "direct proportion" allocation or under the administrative allocation ratio.

Finally, CDP requests that the Commission use this rulemaking process as an avenue for amending the regulatory language that includes an employee's time spent on Federal Election Activity for determining when an employee has reached the 25 percent threshold. The regulatory language is broader than the statutory language. The statutory language only includes "activities in connection with a Federal election" and does not include time spent on Federal Election Activity. 2 U.S.C. § 431(20)(A)(iv). However, the Commission regulations include both "activities in connection with a Federal election" and "Federal Election Activity." 11 C.F.R. §§ 106.7(c)(1) and 300.33(c)(2). Those two categories of activities are separate and distinct. "In connection with a Federal election" is a specific term which includes only activities that directly influence a Federal

election. Under the statutory definition of Federal Election Activity, it is a much broader term encompassing more generalized activities. The Commission should change its regulatory language to better track the language adopted by Congress.

2. Definition of Federal Election Activity

In response to the District Court's opinion, the Commission is also seeking comments on certain provisions in the definition of Federal Election Activity in 11 C.F.R. § 100.24(a). Generally, CDP believes that the definitions in the regulation provided adequate guidance during the past election cycle and that the definitions should remain unchanged. CDP supports the Commission's conclusion to leave the definitions of "voter registration activity" and "get-out-the-vote activity" unchanged. In addition, CDP believes that the Commission's proposed regulation defining "voter identification" is reasonable after the District Court's decision in *Shays v. FEC* and is understandable by the regulated community.

CDP supports the Commission's proposed changes to the definition of "in connection with an election in which a candidate for Federal office appears on the ballot." 11 C.F.R. §100.24(a)(1). This definition is relevant for determining when voter identification, GOTV and generic campaign activity constitute "Federal Election Activity." Proposed new section 100.24(a)(1)(iii) would create an exception whereby these activities would not be "Federal Election Activity" during specified time periods connected to municipal elections.

CDP's past experience provides a good example of why this exception is appropriate and necessary for party committees. The San Francisco mayoral run-off election in 2003 fell within the "Federal Election Activity" window for the March 2004 California primary election. The San Francisco December 9, 2003 election included only candidates for Mayor and City Attorney; no Federal candidates were on the ballot. However, under the current definition of "in connection with an election in which a candidate for Federal office appears on the ballot," the "Federal Election Activity" window in California began on December 5, 2003. Therefore, CDP was required to use entirely Federal funds or an allocation of Federal and Levin money to fund voter identification, GOTV and generic campaign activity purely in connection with an election for non-Federal candidates.

Thank you in advance for your consideration of these comments.

Very truly yours,

OLSON HAGEL & FISHBURN LLP

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