March 4, 2005

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: Notice 2005-2: De Minimis Exemption for Disbursement of Levin Funds by State, District, and Local Party Committees

Dear Mr. Deutsch:

We appreciate the opportunity to comment on the Commission's Notice of Proposed Rulemaking (NPRM) 2005-2, published at 70 Fed. Reg. 5385 (February 2, 2005). As the principal sponsors of BCRA, we have a particular interest in ensuring that regulations adopted by the Commission accurately construe and implement that law.

The NPRM proposes repeal of the Commission's rule at 11 C.F.R. § 300.32(c)(4) that establishes a $5,000 per year *de minimis* threshold for the requirement contained in the Bipartisan Campaign Reform Act (BCRA) that State, district and local party committees pay for certain Federal Election Activity at least partly with hard money. A primary purpose of BCRA was to limit the use of "soft money" in Federal campaigns. Because the proposed change helps effectuate that result, we urge the Commission to adopt it as set forth in the NPRM.

Title I of BCRA generally requires that Federal Election Activity (FEA) be paid for with Federal funds, that is, funds subject to the prohibitions, limitations and reporting requirements of the Federal Election Campaign Act of 1971 (FECA), 2 U.S.C. §§ 431 *et seq*. However, BCRA provides an exception for certain activities, for which State, district and local party committees may allocate disbursements between Federal and so-called "Levin funds" in accordance with allocation ratios determined by the Commission. 2 U.S.C. § 441i(b)(2).

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, except from 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. § 441(b)(2)(B).

The Commission issued final regulations implementing Title I of BCRA on July 29, 2002. Final Rules, 67 Fed. Reg. 49064. The regulations at 11 C.F.R. § 300.32(c)(4) require any State, district, or local political party committee *that disburses more than $5,000 on allocable FEA in a calendar year* either to pay for such allocable FEA entirely with Federal funds or to allocate disbursements between Federal funds and Levin funds (emphasis added). In other words, the Commission created a *de minimis* exemption for any State, district, or local party committee whose allocable disbursements aggregate $5,000 or less in a calendar year. This rule permits such committees to pay for these types of FEA entirely with Levin funds.

This *de minimis* exception, along with a number of other provisions of the Commission's Title I BCRA rules, was challenged by two of us in *Shays and Meehan v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), *appeal pending* No. 04-5352 (D.C. Cir. Sept. 28, 2004). The *Shays and Meehan* court held that the $5,000 exemption was inconsistent with Congress' clear intent to require State, district, and local party committees to pay for all allocable FEA either solely with Federal funds or with funds allocated between Federal and Levin funds. 337 F. Supp. 2d at 117. As such, it violated the standard established in *Chevron, U.S.A. v. Natural Resource Defense Council*, 467 U.S. 837, 842-43 (1984) (if the intent of Congress is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

Consistent with the *Shays and Meehan* decision, the Commission is proposing to delete the $5,000 *de minimis* exception from 11 C.F.R. § 300.32(c)(4). We support this proposed revision. There is simply nothing in the statute that permits a *de minimis* exception. The Levin amendment was an important compromise reached during congressional consideration of BCRA. Such funds, which are in essence a form of soft money, were always contemplated to be used in conjunction with Federal funds to pay for certain allocable FEA, in recognition of a central principle of the statute – that FEA have an influence on Federal elections. Congress also imposed specific requirements on how funds could be raised for both the Federal and Levin portions of the allocated spending. It was never contemplated that any FEA could be engaged in without a State, district, or local party committee spending at least some Federal funds.

The Commission also seeks comments on an alternative version, under which covered committees with combined receipts and disbursements for FEA of less than $5,000 in a calendar year would be allowed to make covered FEA expenditures entirely with Levin funds. Such committees are exempt from FEA reporting requirements under 2 U.S.C. § 434(e)(2)(A).

We oppose this alternative on two grounds. First, as discussed in *Shays and Meehan* and elaborated upon above, there is again no statutory basis for this exemption. Second, it is impossible to tell in advance how much a given committee will receive or disburse for FEA. Committees should therefore use Federal funds or comply with the FEA allocation ratios starting with their earliest disbursements. Otherwise, they would immediately be in violation of the law if they reach the $5,000 threshold at some point in during the calendar year.

Thank you for your consideration.

Sincerely,

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