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Subject Comment -- NPRM re FEA - Shays 3

Please find attached a PDF copy of Comments submitted today – and also sent by FAX to the FEC General Counsel's Office.

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Amy L. Rothstein, Assistant General Counsel
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20453

Re: **Comments of the California Republican Party -- Notice of Proposed Rulemaking re: Federal Election Activity (74 Fed. Reg. 53674)**

Dear Ms. Duncan and Ms. Rothstein:

The undersigned on behalf of the California Republican Party submits these comments with respect to the Notice of Proposed Rulemaking ("NPRM") (74 Fed. Reg. 53674) to implement the Federal election activity aspects of *Shays v. Federal Election Commission*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). Proposed Regs. 11 CFR §100.24(a)(2) and (3).

Summary of Comments

The *Shays III* circuit panel decision, from which this Commission did not appeal, requires the Commission to revisit its BCRA regulations concerning "Federal Election Activity," and in particular the regulatory definitions of "voter registration activity" and "get-out-the-vote activity." *Shays III* is just one of several cases, the most recent of which is *Republican National Committee, et al. v. Federal Election Commission*, Case No. 1:08-cv-01953-RJL, U.S. District Court for the District of Columbia, ("*RNC v. FEC*") argued and pending decision, that concern the application or interpretation of Part I of BCRA.

With a decision pending in *RNC v. FEC, supra,* the Commission should defer acting on the instant NPRM to await the guidance of the district court, and ultimately the decision of the

United States Supreme Court, as to the constitutional boundaries of its regulatory authority with respect to "Federal Election Activity."[1]

Were the Commission to adopt broad regulations to fill in the "vast gray area" of "voter registration activity" and "get-out-the-vote activity" as recommended by the *Shays III* circuit panel, such regulation may run afoul of the proper constitutional bounds of BCRA, where such the regulations concern "speech that does not unambiguously relate to the election of a federal candidate.

Any foray into regulation of non-public communications, as suggested by the *Shays III* circuit panel, likewise faces both constitutional and statutory problems. BCRA, 2 USC § 431(20)(A)(iii) is the only provision for regulation of communications concerning "Federal Election Activity," and that subdivision relates solely to, and permits regulation of only "public communications" that identify and promote, attack, support or oppose a federal candidate. The Commission is without authority to regulate non-public communications more extensively than public communications, either constitutionally or statutorily.

Comments

Comment 1 – The Commission Should Await Guidance of the U.S. District Court and/or the United States Supreme Court On the Permissible Scope of Regulation of Voter Registration Activity and Get-Out-The-Vote Activity.

The Commission should not take further action to adopt amendments to its regulations concerning the definitions of "voter registration activity" and "get-out-the-vote" activity until it receives the clear guidance in *RNC v. FEC*, from either the three judge panel of the U. S. District Court for the District of Columbia, before which the case is now pending, or the United States Supreme Court. This case directly raises the question of whether "voter registration activity" and "get-out-the-vote activity" are subject to very broad regulation as "Federal Election Activity." While the decision will be on the "as applied" challenge, the Commission is likely to follow its experience in *Wisconsin Right to Life v. Federal Election Commission* 551 U.S. 449 (2007) ("*WRTL II*"), in treating the ruling more broadly: requiring a fundamental review of the parameters and scope of section 431(20)(A)(i) and (ii), in its application to state and local political parties whose speech is not "unambiguously related to the campaign of a federal candidate." *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

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[1] References herein to "voter registration activity" and "get-out-the-vote activity," and communications related to such activity, are commonly described as "speech."

The Commission, in its 2002 and 2006 rulemakings, properly eschewed detailed provisions covering all types of possible voter registration and GOTV activities, particularly those involving communications in speeches and through non-public communications. However, the Commission's regulations (11 CFR §100.24(a)(2) & (3)) broadly covered those activities that "assisted" individual voters to register to vote and to vote.

While the district court in *Shays I* upheld the Commission's exercise of discretion in adopting the FEA regulations, it ordered the Commission to explain in greater detail the reasons for the regulations. The district court's 2007 decision particularized the court's inchoate concerns in *Shays I* about the scope of the Commission's regulations. As the NPRM notes, in *Shays III*, the district court complained that the Commission's 2005 E&J failed to address the "vast gray area" of activities that local and state parties may conduct that may benefit federal candidates. 74 Fed.Reg., at 53676; *Shays III*, 508 F. Supp. 2d at 65, 69-70. The *Shays III* circuit panel upheld the district court's invalidation of the voter registration and GOTV rules "on slightly different grounds." *Shays III*, 528 F.3d 914, 931 (D.C. Cir. 2008). While holding that the Commission had discretion to utilize various regulatory tools including advisory opinions and enforcement to fill in gaps (528 F.3d at 931), the appellate panel found that the regulatory definitions of "voter registration activity" and "get-out-the-vote activity" were flawed because the "assist" components excluded efforts that "actively encourage people to vote or register to vote" and the "individualized means" provisions excluded "mass communications targeted to many people." *Id.*

In the intervening period, this Commenter along with the Republican National Committee brought their "as applied" challenge to Part I of BCRA. *RNC v. FEC, supra.* This challenge included, *inter alia*, challenges to the limitations of 2 USC § 431(20)(A), insofar as those statutes required, and have been interpreted by the Commission to require, state and local political parties to use federally-permissible funds for "voter registration activity" and "get-out-the-vote activity" that did not unambiguously relate to the election of a federal candidate.

Also, in the intervening period, the Court of Appeals for the District of Columbia Circuit, in *Emily's List v. Federal Election Commission*, No. 08-5422, 2009 WL 2972412 (D.C. Cir. Sept. 18, 2009). The *Emily's List* circuit panel invalidated three FEC regulations applicable to Internal Revenue Code section 527 non-profit organizations (11 CFR 106.6(c) & (f); 11 CFR 100.57.)

While the *Emily's List* majority determined that the challenged regulations violated the First Amendment, all three judges agreed that the challenged regulations were not authorized by law. Judge Janice Rogers Brown put it this way in describing how the challenged regulations' premise did not fit the Congressional purpose of FECA:

> "This blindingly-bright line [of the *Solicitation Regulation*] suffers from the same flaw as the *Multiple Candidate Allocation Regulation*: it assumes merely referencing a federal candidate always unmasks a purpose of influencing a federal election and assumes those who give money in response to such a solicitation also unfailingly do so for the same purpose. That's just not true. Instead, a federal politician's name can be used for reasons tied solely to state electioneering. Again, consider an out-of-state and out-of-cycle Senator Stabenow. If she were to say "*Emily's List* supported a Democrat like me when I was running for state office, and I'm asking you to support *Emily's List* now so it can continue to work on behalf of women who are seeking state office," then under the *Solicitation Regulation*, the entire amount of any donations is subject to the FEC. [fn omitted.] That result conflicts with Congress's "purpose" requirement. Brown, J., concurring. Slip. Op. 7.
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> "Contrary to [the *Administrative Costs Allocation*] regulation's premise, moreover, certain "administrative expenses" do not always reflect a federal purpose, mixed or otherwise. A committee, for example, that opposes human cloning (and thus supports many different state and federal candidates and laws throughout the nation) may launch an outpost in a state that is considering an anti-cloning measure and organize a voter drive there, even though the group has no intention of participating in any federal election. By this regulation, a full half of the costs must be expensed to the committee's federal account. In fact, the FEC would require the committee to use hard money for a leaflet that says "both Democrats and Republicans" endorse the initiative. Such a leaflet is not "generic party advertising," (*McConnell*, 540 U.S. at 123); it is an ad for a state ballot initiative, not a political party, and it defies reason to say otherwise. [fn omitted] FECA does not require this absurdity." *Id.*, Slip. Op. 9.

Judge Kavanaugh expressed the same concerns. For example, with respect to challenged regulation 11 CFR 100.57, he opined:

> "Finally, *Emily's List* argues that the solicitation rule set forth in § 100.57 also exceeds the FEC's statutory power. We agree. To reiterate, § 100.57 requires covered non-profits to treat as hard-money "contributions" *all* funds given in response to solicitations indicating that "*any* portion" of the funds received will be used to support or oppose the election of a federal candidate. 11 C.F.R. §§ 100.57(a)-(b)(1) (emphasis added). If the communication indicates that the funds will support or oppose both a federal and non-federal candidate, then at least 50% of those funds must be treated as hard money. *See id.* § 100.57(b)(2). The statutory defect in the rule is that, depending on the particular

> solicitation at issue, it requires covered non-profits to treat as hard money certain donations that are not actually made "for the purpose of influencing" federal elections." Kavanaugh, J., Slip Op. 36.

Thus, although the two cases (*Shays III* and *Emily's List*) specifically concern different regulations (the former regulations addressing voter registration activity and get-out-the-vote activity under BCRA, the latter regulations concerning the proper allocation of costs under pre-BCRA FECA), the two panels' views of what Judge Kollar-Kotelly and the *Shays III* panel described as the "vast gray area" of potentially-regulable conduct by state and local political parties, reflect vastly disparate perspectives of the scope of permissible federal regulation of activity, such as "voter registration activity" and "get-out-the-vote activity." In contrast with the *Shays III* district court and circuit panel, the *Emily's List* panel describes as "absurd" the regulations' overreach (Judges Kavanaugh and Henderson) and the "blindingly bright line" that ignores the bona fide non-federal component of mixed activity by non-profit organizations (Judge Brown), in particular with respect to the lack of statutory authority for such expansive regulations. In *RNC v. FEC*, the plaintiffs contend that the statute does not stand on firm constitutional footing of *Buckley*; i.e., in reaching only that activity that unambiguously relates to the campaign of a federal candidate.

Comment 2 – The Commission May Constitutionally Regulate Only "Voter Registration Activity" And "Get-Out-The-Vote Activity" ("Speech") That Is "Unambiguously Related To The Campaign Of A Federal Candidate.

RNC. v. FEC, a three-judge district court case brought under section 403 of BCRA, may resolve the tension between the two D.C. Circuit panels' views, and shed new light on whether the "vast gray area" that includes mixed federal and non-federal "voter registration activity" and "get-out-the-vote activity," is subject to expansive federal regulation by BCRA.

If the Commission elects to proceed with this rulemaking at this time, its amended regulations should reflect a regulatory position that only "speech that is unambiguously related to the campaign of a candidate for federal office may constitutionally be regulated by the Commission."

We contend the *Shays III* courts drew the line in the wrong place, based upon a reading of *McConnell* that is untenable constitutionally. As we have argued in *RNC v. FEC*, the appropriate constitutional line demarking the bounds of permissible regulation of federal activity is between speech that unambiguously relates to the election of a federal candidate. *Shays III's* direction to the Commission to wade into the "vast gray areas" of potential regulation should be resisted,

because it is precisely in those areas that the Commission cannot find such unambiguous regulatory guideposts.

Comment 3 – Regulation of Communications related to "Voter Registration Activity" and "Get-Out-The-Vote Activity" is Beyond the Commission's Statutory Authority, 5 USC §706(a).

Communications (or "exhortations") concerning "voter registration activity" and "get-out-the-vote activity," unless they mention and promote, attack, support or oppose a federal candidate, are beyond the authority of the Commission to regulate with respect to "Federal Election Activity." *See Emily's List v. Federal Election Commission,* Case No. 08-5422, decided September 18, 2009 [5 U.S.C. § 706(2)(C) (agency may not act "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."] Specifically, the only authority for the regulation of public communications with respect to "Federal Election Activity" is found in 2 USC § 431(20)(A)(iii), not § 431(20)(A)(i) [concerning "voter registration activity"] or 431(20)(A)(ii) [concerning, *inter alia*, "get-out-the-vote activity"].

The attempt to capture "speech" or "exhortations" to register to vote or vote goes way too far, beyond the scope of section 431(20)(a)(iii), which is the only reference to communications activity in the definition of "Federal Election Activity" in BCRA. *Definition of Federal Election Activity E& J* (71 Fed. Reg. 8926, 8929).

Moreover, it is neither as simple nor as reflective of reality to suggest, as the *Shays III* circuit panel did, that "exhortations" to register and vote at the end of speeches be captured by the regulation. Rarely do federal candidates act as messengers to the general public in such contexts, or deliver such messages. More likely such exhortations would occur, as the FEC's 2006 E&J suggests, at a voter registration table at a county fair booth or in connection with a telephone bank, or similar event. In CRP's case as reflected in the record evidence in *RNC v. FEC, supra*, rarely if ever would CRP utilize any federal candidate to make such communications or exhortations to vote. *Id.*

Nothing in the BCRA definitions of "voter registration activity" or "get-out-the-vote activity" (or for that matter "voter identification activity") encompasses or addresses types of non-public communications whatsoever, and there is no evidence of Congressional intent to do so. *Id.* Such regulations would not satisfy the requirements of *Chevron USA, Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-43 (1984), as explicated by the circuit panel in *Emily's List.*

To include "speech" or other "exhortations" to register and vote by means other than type III FEA communications would require regulation of conduct that is beyond the authority of the Commission to regulate (see, e.g., *Emily's List, supra*) and, which does not unambiguously relate to the election of a federal candidate. *Buckley v. Valeo, supra*, 424 U.S. at 80.

Comment 4 – The Commission Should Reject the *Shays III* Panel's Suggestion to Withdraw Advisory Opinion 2006-19.

The district court in *Shays III* expressed its unease with FEC Advisory Opinion 2006-19 (NPRM, 74 Fed. Reg. 53676 ["the Commission announced a much narrower scope of "get-out-the-vote activity" than might otherwise [have been] presumed on the face of the definition."]; 508 F. Supp. 2d at 69.) Likewise, the *Shays III* circuit panel expressed similar concerns about the narrow scope of the regulation, reading *McConnell* to reach much "get-out-the-vote activity" that will "directly assist a party's candidates for federal office." *McConnell, supra*, 540 U.S. at 167-168.

However, the facts of FEC Advisory Opinion 2006-19 demonstrate why the *Shays III* circuit panel properly concluded that the Commission should have sufficient deference to consider not only broad rulemakings, but to employ its advisory opinion process, if appropriate, to evaluate on a case-by-case approach in lieu of broad regulations with specific exceptions. The panel's reflections on AO 2006-19 as permitting the use of unregulated money for such activities is overstated.

In Advisory Opinion 2006-19, to the Los Angeles County Democratic Central Committee ("LACDP"), the Commission held that planned mailings and telephone communications LACDP submitted as part of its advisory opinion request did not constitute "Federal Election Activity" because (1) the communications in question promoted only non-Federal Candidates; (2) would not be made in close proximity to the date of the election at which both federal, state and local candidates would appear on the ballot; and (3) were "insufficiently targeted" and were not "individualized" so as to constitute "get-out-the-vote activity" under the Commission's then-current regulations. 11 CFR 100.24(a)(3). The Commission concluded therefore that the communications need not be paid for with a mix of Federal and Levin funds or entirely with Federal funds, but allowed LACDP to pay for the communications entirely with non-Federal funds.

LACDP proposed sending a "Local Voter Guide" to registered Democrats in the City of Long Beach endorsing candidates for local non-partisan offices in a city runoff election that was held concurrently with the June 6, 2006 statewide direct primary election at which federal, state and local candidates were to appear on the ballot. The proposed communication told the

recipients that "Election Day is June 6th" and urged the recipients to "Vote on June 6th" for identified local candidates. LACDP also proposed to communicate by pre-recorded electronic telephone messages to such persons endorsing Bob Foster for Mayor of Long Beach and stating "he is an exceptional candidate who shares our values and has great ideas for Long Beach, including plans to clean up the Port, attract new high wage jobs and add 100 new police officers." LACDP proposed to send the mailing and engage in the telephone appeal more than four days before the June 6, 2006 election. The mailings were addressed to individual recipients, all registered Democrats, and provided no information on polling place locations or poll hours.

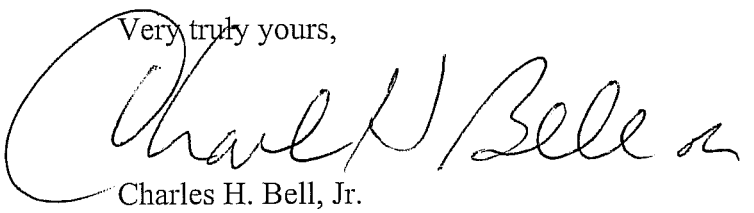
The Commission analyzed 11 CFR 100.24(a)(3)'s provisions concerning "get-out-the-vote activities," noting that in 2002, the Commission had stated that "GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or vote by *absentee ballot* or other means provided by law" and that in 2006, the Commission had reiterated this view that, "[I]n the Commission's extensive enforcement experience, general exhortations to register to vote and to vote are so common in political party communications that including encouragement to register to vote and to vote would be overly broad, is not necessary to effectively implement BCRA, and could have an adverse impact on grassroots political activities.' 71 Fed. Reg. at 8929. For this reason, the Commission explained that it 'declines to impose FEA funding requirements on State, district and local party committees' 'mere encouragement' of registering to vote or voting." The Commission then concluded by carefully applying the facts in light of regulation 11 CFR 100.24(a)(3): these demonstrated that the activity was not "get-out-the-vote activity" within the meaning of the regulation: (1) the fact the communications promoted only non-Federal candidates and were like "form letters" not individualized to the particular voter or targeted to a subset of Democratic registered voters; and (2) most importantly that the proposed communications were to be made four or more days prior to the election. The advisory opinion concluded: "the more removed from election day, the less effect the communications are likely to have on motivating recipients to go to the polls. A communication made several days prior to an election is more likely to be a 'general exhortation' to vote or 'mere encouragement' to vote, as opposed to a communication that assists a voter in engaging in the act of voting by individualized means"; (3) while the proposed LACDP communications "contain only the date of the election and do not include such additional information as the hours and location of the individual voter's polling place, merely including the date of the election in a communication that advocates the election or defeat of only State or local candidates does not turn the activity into GOTV activity."

The Commission should not abandon AO 2006-19, because, as we have argued in *RNC v. FEC*, the appropriate constitutional line demarking the bounds of permissible regulation of federal activity is between speech that unambiguously relates to the election of a federal

candidate. *Shays III's* direction to the Commission to enter the "vast gray areas" of potential regulation should be resisted, because it is precisely in those areas that the Commission cannot find such unambiguous regulatory guideposts.

Thank you for the opportunity to submit comments on this NPRM.

Very truly yours,



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