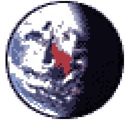

"Paul Ryan" <PRyan@campaignlegalcenter.org>

11/20/2009 05:22 PM

To <FEAShays3@fec.gov>

cc

bcc

Subject CLC & D21 Comments on NPRM 2009-22

Dear Ms. Rothstein,

Attached please find comments of the Campaign Legal Center and Democracy 21 for filing in response to NPRM 2009-22. Thank you.

Sincerely,

Paul S. Ryan

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CLC & D21 Comments on NPRM 2009-22 _FEA_ 11.20.09.pdf

November 20, 2009

By Electronic Mail (FEAShays3@fec.gov)

Ms. Amy L. Rothstein
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Notice 2009-22: Definition of "Federal Election Activity"

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Notice of Proposed Rulemaking (NPRM) 2009-22, published at 74 Fed. Reg. 53674 (Oct. 20, 2009), seeking comment on proposed changes to its rules defining various components of the term "Federal election activity" under 11 C.F.R. § 100.24. Specifically, the Commission seeks comment on changes to its rules defining "voter registration activity" and "get-out-the-vote activity" ("GOTV activity") in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*").

For the reasons set forth below, we urge the Commission to adopt its proposed rule defining "voter registration activity" to include "encouraging or assisting potential voters in registering to vote" and to adopt its proposed rule defining "GOTV activity" as "encouraging or assisting potential voters to vote," with the recommended amendments and omissions set forth below. Further, both the Campaign Legal Center and Democracy 21 request the opportunity to testify at the Commission's rulemaking hearing scheduled for December 16, 2009.

I. BCRA's Legislative History, Purpose and Structure Make Clear That the Definition of "Federal Election Activity" is Critical to Preventing Circumvention of the Soft Money Ban and Should Not Be Restrictively Interpreted to Open New Loopholes

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits national party committees from soliciting, receiving, or directing soft money. 2 U.S.C. § 441i(a). Similarly, FECA provides: "[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act." 2 U.S.C. § 441i(b)(1) (emphasis added). The Act contains a limited

exception for certain Federal election activity that a state party committee may finance with an allocated mixture of hard money and so-called "Levin funds." 2 U.S.C. § 441i(b)(2).

The Act defines "Federal election activity" to include, *inter alia*: "voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election"; and "voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 2 U.S.C. §§ 431(20)(A)(i) and (ii).

In crafting BCRA's definition of "Federal election activity," Congress took pains to be detailed and comprehensive. Not only is the statutory definition unusually precise, but Congress went a step further and specified precisely what activity was "excluded" from the definition.[1] In short, Congress did not leave any room for this important term to be restricted in its scope by administrative interpretation. *See Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (statute's "mention of one thing implies the exclusion of another thing") (internal quotation marks and citations omitted).

Congress's overriding purpose in enacting the state party soft money restrictions was to avoid further circumvention of the federal campaign finance laws. One of BCRA's principal sponsors said that in closing the soft money loophole, Congress took "a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties," while "not attempt[ing] to regulate State and local party spending where this danger is not present, and where State and local parties engage in <u>purely non-Federal activities</u>." 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of "Federal election activity" to cover only those activities that "in the judgment of Congress . . . clearly affect Federal elections" and left unregulated "activities that affect purely non-Federal elections." 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The legislative history, purpose and statutory structure of BCRA make clear that the definition of "Federal election activity" is critical to preventing circumvention of the soft money ban and should not be narrowed.

II. The Supreme Court in *McConnell* Upheld BCRA's Definition of "Federal Election Activity"

The BCRA prohibition on state and local party committee use of soft money to fund Federal election activity was challenged and upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). The Court upheld the prohibition as a permissible means of preventing

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[1] The activities Congress exempted from the definition of "Federal election activity" are: (1) public communications that do not constitute voter registration, voter identification, GOTV, or generic campaign activity and refer solely to nonfederal candidates; (2) contributions to nonfederal candidates that are not earmarked for Federal election activity; (3) state and local political conventions; and (4) the cost of grassroots campaign materials, such as bumper stickers, that refer only to nonfederal candidates. 2 U.S.C. § 431(20)(B).

"wholesale evasion" of the national party soft money ban "by sharply curbing state committees' ability to use large soft-money contributions to influence federal elections." *Id.* at 161. The Court noted:

> [I]n addressing the problem of soft-money contributions to state committees, Congress both drew a conclusion and made a prediction. Its conclusion, based on the evidence before it, was that the corrupting influence of soft money does not insinuate itself into the political process solely through national party committees. Rather, state committees function as an alternative avenue for precisely the same corrupting forces.

Id. at 164 (emphasis added). The Court continued:

> Congress also made a prediction. Having been taught the hard lesson of circumvention by the entire history of campaign finance regulation, Congress knew that soft-money donors would react to [the national party soft money ban] by scrambling to find another way to purchase influence. It was "neither novel nor implausible" for Congress to conclude that political parties would react to [the national party soft money ban] by directing soft-money contributors to the state committees . . . .

Id. at 166 (internal citation omitted) (quoting *Nixon v. Shrink*, 528 U.S. 377, 391 (2000)). The *McConnell* Court concluded that "[p]reventing corrupting activity from shifting wholesale to state committees and thereby eviscerating FECA clearly qualifies as an important governmental interest." *McConnell*, 540 U.S. at 165-66.

The Court went on to explicitly discuss BCRA's definition of "Federal election activity," explaining that BCRA's ban on state party use of soft money for Federal election activity "is narrowly focused on regulating contributions that pose the greatest risk of . . . corruption: those contributions to state and local parties that can be used to benefit federal candidates directly." *Id*. at 167 (emphasis added). The Court continued:

> Common sense dictates, and it was "undisputed" below, that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office. It is equally clear that federal candidates reap substantial rewards from any efforts that increase the number of like minded registered voters who actually go to the polls.

Id. at 167-68 (internal citations omitted) (emphasis added).

The Court concluded: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *Id*. at 168. The Court found BCRA's prohibition on state party soft money expenditures for Federal election activity to be "a reasonable response to that risk." *Id*.

In short, the Supreme Court in *McConnell* recognized that soft money contributions to state political party committees pose a serious threat of real and apparent political corruption where that money is spent on activities that benefit federal candidates, and that BCRA's prohibition on state political party use of soft money to fund Federal election activity, as defined in BCRA, is a "closely-drawn means of countering both corruption and the appearance of corruption." *Id.* at 167.

III. Post-BCRA History of "Voter Registration Activity" Regulation

BCRA defines the term "Federal election activity" to include "voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election." 2 U.S.C. § 431(20)(A)(i).

A. 2002 "Voter Registration Activity" Rulemaking and *Shays I* Litigation

In May 2002, the Commission published NPRM 2002-7, seeking comment on a proposed rule defining "Federal election activity" that essentially just repeated the statutory language, to include "[v]oter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election[,]" and indicating: "For the purposes of voter registration activity, the term 'election' does not include any special election." 67 Fed. Reg. 35654, 35674 (May 20, 2002) (proposed 11 C.F.R. § 100.24(a)(1)) (emphasis added).

The Campaign Legal Center and Democracy 21 each submitted written comments on NPRM 2002-7, addressing the proposed regulation defining "Federal election activity" generally, and "voter registration activity" in particular. *See* Comments of Campaign Legal Center on Notice 2002-7 (May 29, 2002) at 3-4;[2] Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 8-12.[3]

The Commission gave no indication in NPRM 2002-7 that it might dramatically limit the scope of "voter registration activity" from the statutory provision. On the contrary, the proposed rule was nearly identical to the statutory description of "voter registration activity" at 2 U.S.C. § 431(20)(A)(i). Consequently, our comments submitted in the rulemaking made no references to limitations ultimately imposed on this term in the final rule adopted by the Commission.

In July 2002, the Commission published a final rule at section 100.24(a)(2) defining "voter registration activity" to mean "contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote." 67 Fed. Reg. 49064, 49110-11 (July 29, 2002) (emphasis added).

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[2] *Available at* http://www.fec.gov/pdf/nprm/soft_money_nprm/campaign_and_media.pdf.

[3] *Available at* http://www.fec.gov/pdf/nprm/soft_money_nprm/common_cause_and_democracy_21.pdf.

Thus, by final rule, the Commission modified the proposed definition of "voter registration activity" to include only "individualized" efforts to "assist" voters to register, and thereby excluding any activity to encourage voters to register as well.

This provision was challenged in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"), where plaintiffs argued that the "assist" limitation on the term impermissibly narrows the definition of "voter registration activity," because it "excludes from its reach encouragement that does not constitute actual assistance." *Id.* at 98. The Commission acknowledged that the regulation requires "something more than merely encouraging registering to vote." *Id.*

Examining the regulation under *Chevron* step one analysis, the court found the statutory phrase "voter registration activity" to be subject to various potential interpretations, noting "that it is possible to read the term 'voter registration activity' to encompass those activities that actually register persons to vote, as opposed to those that only encourage persons to do so without more." *Shays I*, 337 F. Supp. 2d at 99. On this ground, the court determined that the regulation survived *Chevron* step one. *Id.* at 100.

The *Shays I* court then turned to *Chevron* step two analysis, to determine whether the Commission's construction of BCRA was a permissible one. The court began by noting that "the Commission's construction may not functionally maximize Congress's purposes." *Id.* at 100. The court did not endorse the existing regulation, but instead found that its parameters "are subject to interpretation." *Id.* Consequently, the court "cannot say at this stage that [the statutory purpose of preventing circumvention of the national party soft money ban] is 'unduly compromised' by the Commission's regulation." *Id.* (emphasis added) (quoting *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986)). The court explained:

> While it is clear that mere encouragement does not fall within the scope of the regulation, it is possible that encouragement coupled with a direction of how one might register could constitute "assist[ance]" under the provision. Such an interpretation could remedy what might otherwise be a regulation that "unduly compromises the Act." Without more guidance on the true scope of the regulation, the Court concludes that it cannot, without violating the ripeness doctrine, determine whether the regulation fails *Chevron* step two review.

Shays I, 337 F. Supp. 2d at 100 (internal citations omitted) (quoting *Orloski*, 795 F.2d at 164).

Finally, the court turned to the plaintiffs' claim that the Commission's adoption of section 100.24(a)(2) violated the Administrative Procedures Act (APA) because the Commission "failed to provide notice in its NPRM that it was contemplating adopting rules that would limit 'voter registration'" to encompass only "assisting" voters on an individualized basis to register. *Shays I*, 337 F. Supp. 2d at 100.

The court agreed with the plaintiffs and concluded: "There is simply no indication provided [in the NPRM] that the Commission would seek to limit the term 'voter registration.'

Accordingly, the Court finds that the Commission violated the APA's notice requirements in promulgating 11 C.F.R. § 100.24(a)(2)." *Shays I*, 337 F. Supp. 2d at 101 (internal citations and footnotes omitted).

B. 2005-06 "Voter Registration Activity" Rulemaking and *Shays III* Litigation

The Commission then commenced a rulemaking in 2005 "to cure what the court concluded was a notice problem and to consider the comments it receives on the current rule." NPRM 2005-13, 70 Fed. Reg. 23068, 23069 (May 4, 2005). The Commission's proposed regulation was identical to the rule at issue in the *Shays I* litigation. Nevertheless, the Commission invited comment on whether it "should address the concerns raised by the district court by amending the regulation." 70 Fed. Reg. at 23069. Specifically, the Commission asked:

> Should the Commission define "assist" to include encouragement coupled with direction as to how one might register? Does the "assist" limitation or the "individualized means" requirement exclude any activities that should be included in the definition of "voter registration activity?" Are there other specific activities that the Commission should include or exclude from the definition of "voter registration activity?"

70 Fed. Reg. at 23069.

The Campaign Legal Center and Democracy 21 jointly submitted comments on NPRM 2005-13, urging the Commission to "functionally maximize Congress's purposes," *Shays I*, 337 F. Supp. 2d at 100, by including in the definition of "voter registration activity" efforts to encourage individuals to register to vote. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2005-13 (June 3, 2005) at 6.[4] We explained in our 2005 comments that, under the Commission's regulation, calling potential voters and encouraging or imploring or persuading them to register to vote is not covered unless some sort of "assistance" is additionally provided—no matter how effective or common such activity is in influencing federal elections. *Id.*

The importance of the definition of "Federal election activity," including its sub-category of "voter registration activity," is that it draws the boundary between which activities a state party must fund with hard money (or with an allocated mixture of hard money and Levin funds) and which activities it may fund with soft money. Thus, by excluding activities to "encourage" voters from the definition of "voter registration," the Commission has authorized state parties to spend soft money on partisan activities to "encourage" voters to register—a common, obvious and important part of voter registration drives.

As a functional matter, the Commission's current rule makes no sense. When a state party encourages voters "sympathetic to that party" to register, just as much as when it actually and individually provides assistance to such voters in registering, its activities "directly assist the party's candidates for federal office." *McConnell,* 540 U.S. at 167-68. And in both cases

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[4] *Available at* http://www.fec.gov/pdf/nprm/fea_definition/comm_02.pdf.

"federal candidates reap substantial rewards" from these voter registration efforts by state parties. *Id.* For this reason, activities by a state party to encourage the registration of voters for that party fall squarely within the reasoning of the *McConnell* Court in upholding section 441i(b)—that such activities will benefit federal candidates and thus "the funding of such activities creates a significant risk of actual and apparent corruption." *Id.* at 168.

As we pointed out in our comments on NPRM 2005-13, the Commission itself has recognized that "registration" is a "term[] of art used in campaign or election parlance . . . [to] connote efforts to increase the number of persons who register to vote." Ad. Op. 1980-64. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2005-13 at 7. Likewise, one FEC regulation serving as part of the regulatory backdrop against which Congress enacted BCRA describes "voter registration and get-out-the-vote activities" as actions "designed to encourage individuals to register to vote or to vote." 11 C.F.R. § 100.133 (emphasis added).

Not only is this regulation still in effect, but in August 2002, after the Commission had promulgated its Federal election activity regulations eventually invalidated in *Shays I*, the Commission reorganized certain existing regulations, including 11 C.F.R. § 100.133. *See* 67 Fed. Reg. at 50592. In doing so, the Commission made no effort to amend this provision to reflect the Commission's newly restricted definition of voter registration activity that has now for years governed in the context of Federal election activity. To the contrary, the Commission promulgated a telling new title for Section 100.133: "Voter registration and get-out-the-vote activities." *See* 67 Fed. Reg. at 50592. This title reflects the common-sense understanding that any "activity designed to encourage individuals to register to vote" constitutes "voter registration" activity.

The regulation at section 100.133 implements an exemption from the definition of the term "expenditure" for "nonpartisan activity designed to encourage individuals to vote or to register to vote." 2 U.S.C. § 431(9)(B)(ii). This exemption would allow, for instance, a corporation or labor union to spend treasury funds on such nonpartisan voter registration activities. Because the Commission here has broadly defined voter registration to include activities to "encourage" voters to register, it is correctly giving broad scope to a statutory exemption.

We argued in our comments on NPRM 2005-13 that by implementing two very different regulatory definitions of voter registration activity—a broad definition (in the context of exempting corporations and unions from hard money requirements) that includes "encouraging" registration, but a restricted definition (in the context of imposing hard money requirements on state parties) that excludes "encouraging" registration—the Commission's patent inconsistency not only creates confusion about two very different interpretations of the same activity in the same statute, but also minimizes and thus undermines the statutory requirement that voter registration activities by state parties be funded with hard money. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2005-13 at 7-8

Another regulation, which sunsetted in December 2002 as mooted by BCRA, also treated "[g]eneric voter drives, including voter identification, voter registration, and get-out-the-vote drives" as "activities that urge the general public to register, vote or support candidates." 11

C.F.R. § 106.5(a)(2)(iv) (emphasis added). *See also* 11 C.F.R. § 106.5(h) (sunset clause). Again, the Commission here properly treated activity to "urge"—or encourage—registration as within the meaning of voter registration activity, not just activities that "assist" in registration. This longstanding definition of "voter registration" for former allocation purposes, like the definition in section 100.133, is inconsistent with the far more restricted definition now used in the context of Federal election activity.

Nevertheless, in its 2005-06 rulemaking, rather than harmonizing the definition of "voter registration activity" of section 100.24(a)(2) with the companion definitions of the same activity in section 100.133 and former section 106.5 by including activities that "encourage" voters to register as within the definition, the Commission instead re-promulgated its flawed regulation that contradicts its own administrative interpretation of parallel provisions, as well as common sense.

The Commission's regulation defining "voter registration activity" was again challenged in *Shays III*, 508 F. Supp. 2d 10 (D.D.C. 2007). The district court in *Shays III* again explained:

> As the Supreme Court recognized in *McConnell,* BCRA's restrictions on state, district, and local party committees use of nonfederal funds in connection with activities that influence federal elections was "designed to foreclose wholesale evasion" of BCRA's prohibition on national party committees using nonfederal funds for the same activities, and was "based on the evidence . . . that the corrupting influence of soft money does not insinuate itself into the political process solely through the national party committees. Rather, state committees function as an alternative avenue for precisely the same corrupting forces." 540 U.S. at 161, 164, 124 S.Ct. 619. Moreover, as the Supreme Court stated, "[c]ommon sense dictates . . . that a party's efforts to register voters sympathetic to that party directly assist the party's candidates for federal office," and that state and local party voter registration activities "have a significant effect on the election of federal candidates." *Id.* at 167-68, 124 S.Ct. 619 (citing *McConnell,* 251 F.Supp.2d at 459-61) (Kollar-Kotelly, J.).

Shays III, 508 F. Supp. 2d at 65.

The district court went on to explain that "[n]evertheless, the Expanded E&J does not address the vast gray area of activities that state and local parties may conduct and that may benefit federal candidates." *Id.* The court used as an example the fact that, "based on the regulation and the Expanded E&J it is impossible to determine whether it would constitute voter registration activity for local party staff, sitting under a banner reading "Don't forget to register to vote!" at a county fair, to hand out registration forms and answer questions on how to complete them, but not collect the forms and return them to the government agency." *Id.*

Further, the district court explained: "Nor does the Commission, in either its Expanded E&J or its briefs, attempt to demonstrate that activities falling within the gray area between the two extremes do not 'have a significant effect on the election of federal candidates,' or cannot 'be used to benefit federal candidates directly.'" *Id.* at 66.

For these reasons, the *Shays III* district court concluded that that the Commission's regulation defining "voter registration activity" "'unduly compromises the Act' and therefore violates *Chevron* step two." *Id.* (citing *Orloski,* 795 F.2d at 164). The court further concluded that, "[f]or the same basic reason, the Expanded E&J fails to provide a 'rational justification [for the Commission's definition], as required by the APA's arbitrary and capricious standard." *Id.* (citing *Shays I*, 414 F.3d at 97).

> The Commission's Expanded E&J focuses on straw men, citing only examples falling at the far ends of the spectrum of potential voter registration activity without explaining how its definition, which apparently excludes the significant amount of activity in between, either supports or does not undermine BCRA's purposes. As such, it fails to meet the APA's requirement of reasoned decisionmaking.

Id.

The Commission appealed the *Shays III* district court decision and the D.C. Circuit Court affirmed the district court's decision invalidating the Commission's regulation defining "voter registration activity," though it "reject[ed] the regulation for other reasons." *Shays III*, 528 F.3d 914, 931 (D.C. Cir. 2008). The Circuit Court agreed with plaintiff Shays that:

> [T]he FEC's definitions of GOTV activity and voter registration activity create "two distinct loopholes." Appellee's Opening Br. 41. First, both definitions require that the party contacting potential voters actually "assist" them in voting or registering to vote, 11 C.F.R. § 100.24(a)(2)-(3), thus excluding efforts that actively *encourage* people to vote or register to vote and dramatically narrowing which activities are covered. Second, both definitions require the contact to be "by telephone, in person, or by other *individualized* means," thus entirely excluding mass communications targeted to many people. *Id.* (emphasis added).

Shays III, 528 F.3d at 931.

The Circuit Court noted that, as plaintiff Shays pointed out:

> [U]under the Commission's construction, a state party within days of a federal election can send out multiple direct mailings to every potential voter sympathetic to its cause urging them to vote, and can blanket the state with automated telephone calls by celebrities identifying the date of the election and exhorting recipients to get out to vote, without being deemed to be engaged in GOTV activity. Likewise, large-scale efforts encouraging potential supporters to register to vote and directing them how they may do so are not "voter registration activities" under the Commission's definitions. Indeed, the more people that a communication is intended to reach, and the more money the party spends, the less likely it is that the communication will be an "individualized means" of "assistance" subject to BCRA's restrictions on [Federal election activity].

Id. at 932 (citing Appellee's Opening Br. 43).

On this basis, the *Shays III* Circuit Court concluded that "[t]he FEC's restrictive definitions of GOTV activity and voter registration activity run directly counter to BCRA's purpose, and the Commission has provided no persuasive justification for them." *Id.* The Circuit Court went further and questioned "whether these definitions could even survive at *Chevron* step one," expressing doubt about "whether the meaning of GOTV activity and voter registration activity can plausibly be limited to individualized assistance." *Id.* "In any event," the court held, "the definitions fail at *Chevron* step two because they conflict with BCRA's purpose of 'prohibiting soft money from being used in connection with federal elections.'" *Id.* (citing *McConnell,* 540 U.S. at 177 n. 69).

The *Shays III* Circuit Court concluded by explicitly rejecting the rationales given by the Commission for adopting its limited constructions of GOTV activity and voter registration activity—*i.e.*, (1) to ensure that mere exhortations to get out and vote or register to vote made at the end of a political event or speech would not count as Federal election activity; and (2) to give clear guidance to state and local party organizations so they know what activities they can engage in. *Id.* The court found the first rationale to be unpersuasive because "a definition could surely be crafted that would exempt such routine or spontaneous speech-ending exhortations without opening a gaping loophole permitting state parties to use soft money to saturate voters with unlimited direct mail and robocalls that unquestionably benefit federal candidates." *Id.* (citing Appellee's Opening Br. 45). "And the second rationale[,]" the court reasoned, "doesn't even amount to an argument for a limited definition of GOTV activity and voter registration activity." *Id.* Instead, *Shays III* Circuit Court concluded:

> [I]t's an argument for a clear and detailed definition. But because any clear definition would satisfy the FEC's goal of providing precise guidance—one that forbade any activity designed to get people to register or vote would be just as easy to follow as one that allowed unlimited GOTV and voter registration efforts—the desire for a clear rule, in and of itself, provides no justification for this limited definition.

Id. at 932-33.

IV. Post-BCRA History of GOTV Regulation

Federal law defines the term "Federal election activity" to include "get-out-the-vote activity . . . conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]" 2 U.S.C. § 431(20)(A)(ii).

A. 2002 GOTV Rulemaking and *Shays I* Litigation

In NPRM 2002-7, the Commission sought comment on a proposed rule that largely tracked the statutory language. It defined "Federal election activity" to include GOTV activity

that is "conducted in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot)[.]" The proposed regulation further provided:

> Examples of get-out-the-vote activity include transporting voters to the polls, contacting voters on election day or shortly before to encourage voting but without referring to a clearly identified candidate for Federal office, and distributing printed slate cards, sample ballots, palm cards, or other printed listing(s) of three or more candidates for any public office[.]

67 Fed. Reg. at 35674 (proposed 11 C.F.R. § 100.24(a)(2)(iii)).

The Campaign Legal Center and Democracy 21 each submitted written comments addressing the proposed regulation. *See* Comments of Campaign Legal Center on Notice 2002-7 at 3-4; Comments of Democracy 21 on Notice 2002-7 at 8-12. Although the Commission did ask in NPRM 2002-7 whether regulation of GOTV activity should be bound by a time frame, the Commission gave no other indication that it might dramatically limit the scope of GOTV activity. 67 Fed. Reg. at 35655-56.

Democracy 21 noted that the GOTV example provided in the proposed rule implied that GOTV activity was time-limited. Democracy 21 commented:

> [T]he definition of GOTV activity is not time-limited under the BCRA (nor is it under current FEC regulations), and the Commission should not read any time limitation into the statute (such as "activity on election day or shortly before"). Indeed, GOTV activity can occur weeks or months prior to an election.

Comments of Democracy 21 on Notice 2002-7 at 8-9.

In July 2002, the Commission published a final rule at section 100.24(a)(3) defining "GOTV activity" to mean:

> [C]ontacting registered voters by telephone, in person, or by other individualized means to <u>assist</u> them in engaging in the act of voting. Get-out-the-vote activity <u>shall not include</u> any communication by an association or similar group of candidates for State or local office of individuals holding State or local office if such communication refers only to one or more State or local candidates. Get-out-the-vote activity includes, but is not limited to:
>
> (i) Providing to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places; and
>
> (ii) Offering to transport or actually transporting voters to the polls.

67 Fed. Reg. at 49111 (emphasis added). The final regulation thus excluded (i) GOTV efforts by associations of state and local candidates, (ii) efforts to encourage voters to vote, and (iii) any GOTV efforts prior to 72 hours before the election.

This regulatory definition of "GOTV activity" was challenged in *Shays I* on three grounds. First, plaintiffs argued that the GOTV definition is impermissibly limited to activities that "assist" would-be voters, whereas efforts to encourage would-be voters to get out to vote should also be covered by the definition. *Shays I*, 337 F. Supp. 2d at 102.

Second, plaintiffs objected to the Commission's effort to engraft a 72-hour rule onto the definition of GOTV, on the ground that such a requirement presumptively and impermissibly limits the reach of the GOTV provision to conduct occurring within the <u>last three days</u> of the election campaign. *Id.*

Third, plaintiffs objected to the regulation's exclusion of GOTV activities by "an association or similar group of candidates for State or local office or of individuals holding State or local office." *Id.* Plaintiffs argued that "Congress provided the Commission with no authority to adopt such an exemption—and the exemption is, in fact, in direct contravention of legislative intent." *Id.*

The *Shays I* court began its consideration of the regulation defining "GOTV activity" with *Chevron* step one analysis, requiring that the court determine whether Congress has spoken on the question at issue. With regard to both the "assist" requirement and the 72-hour provision, the court determined that the statute was ambiguous enough to accommodate the Commission's interpretation. *Id*. at 103. The court then applied *Chevron* step one analysis to the regulatory exemption for "associations" of state candidates and officeholders, and found that the statutory language regarding GOTV activity allows for no such exemption. The court concluded that "Congress has spoken directly on this question, and that the Commission's exemption for 'association[s] or similar group[s] of candidates for State or local office or of individuals holding State or local office' runs contrary to Congress's clearly expressed intent and cannot stand." *Id.* at 104.

The court then subjected the "assist" requirement of section 100.24(a)(3) to *Chevron* step two analysis. As the court found with regard to "voter registration activity," "the term GOTV can be read in different ways, and based on that analysis the Court finds that although the Commission's construction <u>may not functionally maximize Congress's purposes</u>, it is not a facially impermissible construction of the statute." *Id*. at 105 (emphasis added).

Just as the court found ambiguity in the "voter registration activity" regulation, the court likewise found ambiguity as to what acts are encompassed by the GOTV regulation. The court reasoned that the degree to which the GOTV regulation might compromise BCRA's purposes will depend on how the Commission enforces the regulation, and concluded: "At this juncture . . . the Court cannot make this determination." *Id.*

Finally, the court analyzed the GOTV regulation for compliance with the APA. The court reviewed the May 2002 draft rule and the Commission's solicitation of comments that

accompanied the draft, and concluded that interested parties could not have anticipated the final rulemaking from the draft rule. *Id.* at 106. Consequently, the court ruled that the Commission's regulation defining "GOTV activity" to be limited to "assist" activities, and to be restricted to the 72-hour pre-election period, violated the APA's notice requirement.

In short, the *Shays I* court found section 100.24(a)(3), defining "GOTV activity," to be invalid on *Chevron* step one grounds with respect to the exception for associations of state and local candidates and officeholders. Under the *Chevron* step two analysis, the court determined that it was too early to tell whether the regulation's "assist" requirement and 72-hour timeframe would "unduly compromise" the Act, but that those restrictions were promulgated in violation of the APA.

B. 2005-06 GOTV Rulemaking and *Shays III* Litigation

The Commission then commenced a rulemaking in 2005 to conform its regulatory definition of GOTV to conform with the *Shays I* district court decision. *See* NPRM 2005-13, 70 Fed. Reg. at 23069.

Specifically, the Commission proposed in NPRM 2005-13 to remove from its rule the exception for certain communications by associations of state and local candidates and officeholders. 70 Fed. Reg. at 23072. The Campaign Legal Center and Democracy 21 jointly submitted written comments on NPRM 2005-13, supporting this modification of the rule as the only acceptable means of complying with the court's decision in *Shays I*. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2005-13 at 11.

Further, the Commission sought comment as to whether the specific reference to activity within 72 hours of an election should be changed in any way. The Campaign Legal Center and Democracy 21 noted in written comment to the Commission that GOTV activity can and does occur weeks and months prior to an election, particularly in states that permit early voting. Consequently, we urged the Commission to modify the proposed definition of "GOTV activity" to eliminate the 72-hour time period reference in section 100.24(a)(3)(i). *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2005-13 at 12-13.

Finally, the Campaign Legal Center and Democracy 21 noted in written comment that, although the *Shays I* court did not invalidate section 100.24(a)(3) based on the regulation's inclusion of an "assist" requirement, the court did indicate that the regulation "may not functionally maximize Congress's purposes" and held the *Chevron* step two issue open for further consideration. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2005-13 at 12 (citing *Shays I*, 337 F. Supp. 2d at 105). For the reasons stated in the preceding section in our discussion of "voter registration activity," we urged the Commission to amend the proposed definition of "GOTV activity" to include all efforts that encourage voters to vote. *Id.*

Nevertheless, in its 2005-06 rulemaking, although the Commission did remove the exception for certain communications by associations of state and local candidates and officeholders, as well as the 72-hour time period reference, the Commission retained an "assist"

requirement in the definition of "GOTV activity," rather than amending the definition to include all efforts that encourage voters to vote.

The Commission's regulation defining "GOTV activity" was again challenged in *Shays III*. The *Shays III* district court began its analysis by summarizing the procedural history and explaining that the court in *Shays I* had determined that plaintiffs' *Chevron* step two challenge to the "assist" limitation on the definition of GOTV "was not ripe" because, at the time, it was unclear how the Commission would treat particular activities under the regulation. *Shays III*, 508 F. Supp. 2d at 67.

The *Shays III* district court went on to explain, however, that:

> Subsequently, in June 2006, the Commission issued Advisory Opinion 2006-19, in which it reviewed a local party committee's proposal to "make pre-recorded, electronically dialed telephone calls and send direct mail to all voters registered as Democrats in Long Beach[, California] between four and fifteen days prior to" a non-partisan general election held on the same day as a federal primary election. *See* AO 2006-19 at 1-2 (PX 147). The telephone script and the direct-mail piece each informed registered Democrats of the date of the election, that certain municipal candidates were endorsed by the Democratic Party, and urged voters to vote for those candidates. *Id.* at 2. The Commission concluded that the planned communications did "not constitute 'Federal election activity' that must be paid for entirely with Federal funds or a mix of Federal funds and Levin funds. Accordingly [the local party committee] may pay for the planned communications entirely out of non-Federal funds." *Id.* The Commission's conclusion turned on its determination that the "proposed communications do not constitute assisting voters in engaging in the act of voting by individualized means . . . [.]"[5]

Id. at 67-68 (emphasis added).

[5] The *Shays III* district court further explained that the Commission's determination was based on four factors:

> First, the communications promote the election of only non-Federal candidates. Second [the local party committee] will conduct the proposed communications four or more days prior to the election; the more removed from election day, the less effect the communications are likely to have on motivating recipients to go to the polls.... Third, there is no indication that [the local party committee] has engaged in any activity to target these communications to any specific subset of Democratic voters ... the planned communications are generic in nature and do not provide any individualized assistance to the voters ... Fourth, the 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 an election in a communication that advocates the election or defeat of only State and local candidates does not turn that communication into GOTV activity.

Shays III, 508 F. Supp. 2d at 68.

The district court reasoned:

> Like the Commission's definition of voter registration activity, the Commission's definition of GOTV activity, on its face, offers the possibility of a broad interpretation. However, in AO 2006-19, the Commission concluded that the planned communications did not constitute GOTV activity in part because "the 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." AO 2006-19 at 4 (PX 147). AO 2006-19 thus suggests that the Commission has adopted an even more restrictive view of its regulation than this Court previously understood in *Shays I,* when it stated that the Commission had "made clear that providing a person with the date of the election constitutes GOTV activity if it occurs within 72 hours of an election."

Id. at 68-69 (citing *Shays I*, 337 F. Supp. 2d at 105).

The *Shays III* district court was troubled not only by the Commission's own interpretation of its GOTV regulation in AO 2006-19, but also noted that "the Expanded E&J does not explain how the Commission's definition of GOTV activity would apply to activities that fall in the gray area between a "general exhortation" or "mere encouragement" to vote and activities that clearly constitute GOTV activity." *Id.* at 69. The court explained:

> Neither the regulation itself nor the Expanded E&J addresses, for instance, Plaintiff's hypothetical that "within days of a federal election a state party can send out multiple direct mailings to every potential voter sympathetic to its cause urging them to . . . vote, and can blanket the state with automated telephone calls by celebrities identifying the date of an election and exhorting recipients to get out to vote, without being deemed to be engaged in . . . GOTV activity."

Id. at 69 (citing Pl.'s Br. at 55).

For these reasons, the *Shays III* district court concluded that the Commission's "Expanded E&J fails establish that the Commission's definition of GOTV activity will not 'unduly compromise[ ] the Act's purposes.'" *Id.* at 70 (citing *Orloski,* 795 F.2d at 164). "Furthermore, for the reasons discussed [by the court] in connection with the Commission's definition of voter registration activity, the Court conclude[d] that the Commission violated the APA's requirement of reasoned decisionmaking in promulgating the definition of GOTV activity." *Id.*

The Commission appealed the *Shays III* district court decision with respect to its regulation defining "GOTV activity" and the D.C. Circuit Court, in an opinion combining analysis of the regulatory definitions of "voter registration activity" and "GOTV activity" in a single section, affirmed the district court's invalidation of the Commission's regulation defining "GOTV activity," though it "reject[ed] the regulation for other reasons." *Shays III*, 528 F.3d 914, 931 (D.C. Cir. 2008).

As explained in the preceding section of these comments pertaining to "voter registration activity," the Circuit Court agreed with plaintiff Shays that:

> [T]he FEC's definitions of GOTV activity and voter registration activity create "two distinct loopholes." Appellee's Opening Br. 41. First, both definitions require that the party contacting potential voters actually "assist" them in voting or registering to vote, 11 C.F.R. § 100.24(a)(2)-(3), thus excluding efforts that actively encourage people to vote or register to vote and dramatically narrowing which activities are covered. Second, both definitions require the contact to be "by telephone, in person, or by other individualized means," thus entirely excluding mass communications targeted to many people. *Id.* (emphasis added).

Shays III, 528 F.3d at 931.

Also, as explained in the preceding section of these comments pertaining to "voter registration activity," the Circuit Court noted that, as plaintiff Shays pointed out:

> [U]nder the Commission's construction, a state party within days of a federal election can send out multiple direct mailings to every potential voter sympathetic to its cause urging them to vote, and can blanket the state with automated telephone calls by celebrities identifying the date of the election and exhorting recipients to get out to vote, without being deemed to be engaged in GOTV activity. . . . Indeed, the more people that a communication is intended to reach, and the more money the party spends, the less likely it is that the communication will be an "individualized means" of "assistance" subject to BCRA's restrictions on [Federal election activity].

Id. at 932 (citing Appellee's Opening Br. 43).

The Circuit Court explained that "these examples are not merely hypothetical" and went on to note the Commission's AO 2006-19, in which the Commission "decided that letters and pre-recorded telephone calls directed to registered Democrats in Long Beach, California, encouraging them to vote in an upcoming election, did not count as GOTV activity because they provided no individualized information to any particular recipient." *Id.* (citing Ad. Op. 2006-19 (June 5, 2006)).

On the same bases explained in the preceding section of these comments pertaining to "voter registration activity," the *Shays III* Circuit Court concluded that "[t]he FEC's restrictive definitions of GOTV activity and voter registration activity run directly counter to BCRA's purpose" and held that "the definitions fail at *Chevron* step two because they conflict with BCRA's purpose of 'prohibiting soft money from being used in connection with federal elections.'" *Id.* (citing *McConnell,* 540 U.S. at 177 n. 69).

V. Present Rulemaking Proposals

The Commission has commenced this rulemaking to comply with the *Shays III* Circuit Court decision invalidating the regulations defining "voter registration activity" and "GOTV activity." "[T]he Commission's proposal would define voter registration activity as 'encouraging or assisting potential voters in registering to vote'[6] and would define GOTV activity as 'encouraging or assisting potential voters to vote.'"[7] NPRM 2009-22, 74 Fed. Reg. at

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[6] Specifically, the Commission proposes defining "voter registration activity" as follows:

> (2) *Voter registration activity* means encouraging or assisting potential voters in registering to vote.
> (i) Except as provided in paragraph (a)(2)(ii) of this section, voter registration activity includes, but is not limited to, any of the following:
> (A) Urging, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, potential voters to register to vote;
> (B) Preparing and distributing information about registration and voting;
> (C) Distributing voter registration forms or instructions to potential voters;
> (D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms; or
> (E) Submitting a completed voter registration form on behalf of a potential voter.
> (ii) A speech or event is not voter registration activity solely because it includes an exhortation to register to vote that is incidental to the speech or event, such as:
> (A) "Register and make your voice heard";
> (B) "Don't forget to register to vote";
> (C) "Register by September 5th"; or
> (D) "Don't forget to register to vote by next Wednesday."

NPRM 2009-22, 74 Fed. Reg. at 53680.

[7] The Commission proposes defining "GOTV activity" as follows:

> (3) *Get-out-the-vote activity* means encouraging or assisting potential voters to vote.
> (i) Except as provided in paragraph (a)(3)(ii) of this section, get-out-the-vote activity includes, but is not limited to, any of the following:
> (A) Informing potential voters, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, about:
> (*1*) The date of an election;
> (*2*) Times when polling places are open;
> (*3*) The location of particular polling places;
> (*4*) Early voting or voting by absentee ballot; or
> (B) Offering to transport, or actually transporting, potential voters to the polls.
> (ii) A speech or event is not get-out-the-vote activity solely because it includes an exhortation to vote that is incidental to the speech or event, such as:

53677. In short, the Commission proposes to expand the current definitions of these terms to include encouraging voters to register to vote, or to vote.

The Commission explains in the NPRM that these proposed definitions are "intended to close the 'two distinct loopholes' in the current definitions that were identified by the *Shays III Appeal* court as allowing the use of non-Federal funds in connection with Federal elections." 74 Fed. Reg. at 53677. The Commission further explains:

> The proposed definitions would eliminate the requirement that voter registration activity and GOTV activity must actually assist persons in registering to vote or in the act of voting. Instead, the proposed definitions cover both activities that encourage voting or voter registration, as well as activities that actually assist potential voters in voting or registering to vote.
>
> Similarly, the proposed definitions would eliminate the requirement that voter registration activity and GOTV activity be conducted by "individualized means." The proposed definitions cover both activities targeted towards individual persons and activities directed at groups of persons—for example, mass mailings, all electronically dialed telephone calls (or, as they are commonly known, "robocalls"), or radio advertisements—so long as they encourage or assist voting or voter registration.

Id.

The Commission seeks comment on whether the proposed definitions adequately address the concerns articulated by the Circuit Court in *Shays III*. *Id.*

Our comment, in a word, is yes. The proposed definitions of "voter registration activity" and "GOTV activity" do adequately address the concerns articulated by the Circuit Court. The proposed definitions of these terms provide sufficient guidance as to which activities are covered and which are not. The proposed regulations do, in fact, close the "two distinct loopholes" identified by the Circuit Court in *Shays III*.

> (A) "Your vote is very important";
> (B) "Don't forget to vote";
> (C) "Don't forget to vote on November 4th"; or
> (D) "Your vote is very important next Tuesday."
>
> (iii) Get-out-the-vote activity does not include a public communication that refers solely to one or more clearly identified candidates for State or local office, but does not refer to a clearly identified Federal candidate, and notes the date of the election, such as:
> (A) A broadcast advertisement stating "Vote Smith for mayor on November 4th"; or
> (B) A mailer sent to at least 500 persons stating "Get out and show your support for State Delegate Jones next Tuesday."

NPRM 2009-22, 74 Fed. Reg. at 53680.

The Commission's proposed definitions of "voter registration activity" and "GOTV activity" each provide a non-exhaustive list of examples of activities that fall within the definitions. *See supra*, at notes 8 and 9. The Commission asks:

> By providing these examples, does the proposal make clear that the definitions of voter registration activity and GOTV activity would not require actual assistance? Would the examples help State, district, and local party committees distinguish activities that are covered under the proposed definitions from activities that are not covered? Do the examples clarify any potential ambiguities in the general definition?

74 Fed. Reg. at 53677. We support the inclusion of these non-exhaustive lists of examples in the regulatory definitions. Providing these examples makes clear that the definitions of "voter registration activity" and "GOTV activity" do not require actual assistance. And the examples will help State, district, and local party committees distinguish activities that are covered under the proposed definitions from activities that are not covered.

A. "Exhortations" Exemption

The Commission further proposes to include in the new definitions an exemption for "'speeches' or 'events' that include exhortations to vote or to register to vote that are incidental to the speech or event." *Id.* "The exemption would be limited to exhortations made during a speech or at an event, such as a rally. It would not apply to exhortations made by any other means or in any other forum, such as robocalls, mailers, or television and radio advertisements." *Id.* at 53677-78. Further, the Commission's proposed exemption "would apply only if an exhortation to vote or to register to vote is incidental to the speech or event." *Id.* at 53678.

The Commission seeks comment on this proposal and asks whether the proposed regulatory language properly establishes the scope of the proposed exemption, and whether it is appropriate to limit the exemption to cover only those exhortations that are incidental to a speech or event. *Id.*

We do not oppose this proposed exemption and we believe that it is entirely appropriate, as the *Shays III* Circuit Court indicated, to limit the exemption to cover only those exhortations that are incidental to a speech or event.

The Commission further asks whether it is "proper to limit application of the exemption to incidental exhortations made at speeches and events, or should other communications be included as well," and suggests the possibility of allowing the exemption to cover "direct mailings, robocalls, radio and television advertisements, and all other 'communications' that contain incidental exhortations to vote or to register to vote." *Id.*

We object to the broadening of the proposed exemption to include direct mailings, robocalls, radio and television advertisements, and all other communications. The *Shays III* Circuit Court was abundantly clear that it would be permissible to exempt "routine or spontaneous speech-ending exhortations without opening a gaping loophole permitting state

parties to use soft money to saturate voters with unlimited direct mail and robocalls that unquestionably benefit federal candidates." *Shays III*, 528 F.3d at 931. Whereas spontaneous statements made at a live event may warrant an exemption, scripted communications planned in advance warrant no such exemption.

The Commission asks, "[w]ould allowing a broader exemption potentially allow communications that affect Federal elections to be funded with non-Federal funds, contrary to BCRA's purpose?" The answer to this question is obviously yes—the expansion of the proposed exemption beyond incidental exhortations at a speech or event to include printed and other forms of scripted communication would, in our view, violate BCRA and run afoul of the Circuit Court decision in *Shays III*.

B. Exclusion of Communications Relating to State and Local Elections

The Commission proposes to exclude from the definition of "GOTV activity" a "public communication that refers solely to one or more clearly identified candidates for State or local office and notes the date of the election." NPRM 2009-22, 74 Fed. Reg. at 53678. The Commission explains that this proposal:

> would ensure that the expansion of the GOTV activity definition . . . does not, in effect, render meaningless the statutory definition of "Federal election activity," which specifically does not include amounts disbursed or expended for "a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii).'' 2 U.S.C. 431(20)(B)(i); 11 CFR 100.24(c)(1).

NPRM 2009-22, 74 Fed. Reg. at 53678.

We object to this exclusion as proposed. Indeed, it is the exclusion itself that threatens to "render meaningless" the definition of "Federal election activity" because the exception, as drafted, swallows the rule.

The statute makes clear that a particular communication does not constitute Federal election activity only if both of two things are true: the communication refers solely to a state or local candidate and also the communication does not meet the definition of voter registration or GOTV activity. Therefore, simply the fact that a communication refers solely to a State or local candidate is not sufficient to satisfy the exemption, if the communication otherwise constitutes GOTV or voter registration activity. In other words, the key issue is not whether the communication refers solely to a non-federal candidate, but rather whether the communication is GOTV or voter registration activity. If it is GOTV or voter registration activity, it is not eligible for the exemption, even if it refers only a state or local candidate.

By contrast, the Commission's proposal would remove from the definition of "GOTV activity" any communication that refers solely to a candidate for State or local office and includes the date of the election—no matter how overtly the communication serves as GOTV or voter registration activity. Thus, imagine a mass mailing of more than 500 pieces that says:

> We urge all Democrats to get out to vote on November 4 between the hours of 6 am and 6 pm at your polling station at ___ so you can support candidates like Mayor Smith. If you need a ride to the polls, call us at xxx-xxxx.

Under the Commission's proposed rule, this would not be considered Federal election activity because it is a public communication that refers only to a non-federal candidate and notes the date of the election. But this type of communication is in the heartland of what Congress and the courts consider to be GOTV activity, and it therefore does <u>not</u> qualify for the exemption in the statute a 2 U.S.C. § 431(20)(B)(i).

In other words, the Commission's proposed regulatory exclusion does not sufficiently take into account the statutory exclusion's limitation to communication that <u>does not fall within the definition of "Federal election activity"</u> at 2 U.S.C. § 431(20)(A)(i) and (ii). While the particular examples set forth in the proposed regulation may qualify for the statutory exclusion, the proposed rule itself that defines the test for the exclusion is far too broad, and would essentially exempt from regulation any public communication that solely refers to non-federal candidates. Because the proposed exclusion is so broad, it would directly contravene the plain language of the statute and is therefore impermissible.

C. Advisory Opinion 2006-19

The Commission asks whether, in light of the *Shays III* Circuit Court decision, the Commission must explicitly supersede, in whole or in part, Advisory Opinion 2006–19. As explained above, the Circuit Court made clear in *Shays III* that Advisory Opinion 2006-19 interpreted and applied BCRA's Federal election activity restrictions in an impermissibly broad manner. For this reason, the Commission should explicitly supersede Advisory Opinion 2006-19 in its entirely and should do so in the E&J to be issued in this rulemaking. The Commission should explain in the E&J that the advisory opinion had impermissibly applied an "individualized information" requirement to BCRA's restrictions on GOTV activity and that no such "individualized information" requirement exists under the Commission's new regulation.

D. Voter Identification and GOTV Activity in Connection with a Non-Federal Election

The Commission notes in NPRM 2009-22 that it is considering making permanent an interim rule adopted by the Commission in 2006, which revised the definition of "in connection with an election in which a candidate for Federal office appears on the ballot" to exclude what the Commission (incorrectly) characterizes as "purely non-Federal voter identification and GOTV activity." 74 Fed. Reg. at 53679 (citing Interim Final Rule on Definition of Federal Election Activity, 71 Fed. Reg. 14357 (Mar. 22, 2006)).

In 2002, the Commission defined "in connection with an election in which a candidate for Federal office appears on the ballot" to mean:

> The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

11 C.F.R. § 100.24(a)(1)(i).

The Commission states in NPRM 2009-22 that this "definition did not, however, account for municipalities, counties, and States that conducted separate, non-Federal elections within the 'in connection with an election' time windows" and that, consequently, Federal election activity in connection with these elections are subject to BCRA's restrictions.

Relying on this rationale, the Commission in 2006, through promulgation of an interim rule, added a new paragraph to section 100.24 to exclude from the definition of "in connection with an election in which a candidate for Federal office appears on the ballot" voter identification or GOTV activities that are "in connection with a non-Federal election that is held on a date separate from a date of any Federal election" and that refer exclusively to: "(1) Non-Federal candidates participating in the non-Federal election, provided the non-Federal candidates are not also Federal candidates; (2) ballot referenda or initiatives scheduled for the date of the non-Federal election; or (3) the date, polling hours and locations of the non-Federal election." 11 CFR § 100.24(a)(1)(iii)(A)(1)–(3). By its own terms, the interim rule expired on September 1, 2007. *See* 11 CFR § 100.24(a)(1)(iii)(B).

In this rulemaking, the Commission proposes making this now-expired exemption from BCRA's Federal election activity requirements permanent by adding a new section 100.24(c)(5), "which would exclude from the definition of 'Federal election activity' any voter identification activities or GOTV activities that are 'solely in connection with a non-Federal election held on a date separate from any Federal election.'" 74 Fed. Reg. at 53679.

The Campaign Legal Center and Democracy 21 have on three prior occasions filed comments with the Commission opposing such an exemption and the underlying rationale. We filed comments opposing such an exemption during the post-*Shays I* rulemaking in June 2005. *See* Comments of Campaign Legal Center, Democracy 21 and the Center for Responsive Politics on Notice 2005-13 (June 3, 2005).[8] We filed comments in May 2006 opposing the interim rule described above. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2006-7 (May 22, 2006).[9] And we filed comments in July 2007 in response to NPRM 2007-14, which proposed making permanent the interim rule described above. *See* Comments of Campaign Legal Center and Democracy 21 on Notice 2007-14 (July 9, 2007).[10]

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[8] *Available at* http://www.fec.gov/pdf/nprm/fea_definition/comm_02.pdf.

[9] *Available at* http://www.fec.gov/pdf/nprm/fea_definition/comm_11.pdf.

[10] *Available at* http://www.fec.gov/pdf/nprm/fea_definition/2007/CLC_Dem21.pdf.

We once again reiterate our opposition to this exemption.

As explained in Part I, above, and in our three prior comments on this issue, federal law prohibits national party committees from soliciting, receiving, or directing soft money, *see* 2 U.S.C. § 441i(a), and, further provides: "[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act." 2 U.S.C. § 441i(b)(1).

Congress defined "Federal election activity" to include, *inter alia*, voter identification and GOTV activity. 2 U.S.C. § 431(20)(A)(ii). The proposed exemption at issue here would apply to these two categories of Federal election activity.

Also as detailed in Part I, above, the legislative history, unmistakable purpose and statutory structure of BCRA make clear that the definition of "Federal election activity" is critical to preventing circumvention of the soft money ban and should not be further narrowed by the Commission's administrative interpretations. Further, as explained in Part II, above, BCRA's prohibition on state and local party committee use of soft money to fund Federal election activity was upheld by the Supreme Court in *McConnell*.

The *McConnell* Court concluded that because voter identification and GOTV "confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." 540 U.S. at 168. The Court found BCRA's prohibition on state party soft money expenditures for these activities to be "a reasonable response to that risk." *Id*.

Nevertheless, the Commission now proposes a rule that "would exclude from the definition of 'Federal election activity' any voter identification activities or GOTV activities that are 'solely in connection with a non-Federal election held on a date separate from any Federal election.'" 74 Fed. Reg. at 53679.

"The proposed rule under consideration is based on the premise that voter identification and GOTV activity for non-Federal elections held on a different date from any Federal election will have no effect on subsequent Federal elections." *Id.* This premise, however, is badly flawed. The Commission's definitions of both "voter identification" and "GOTV activity" (including both the current definition of "GOTV activity" and the definition proposed in NPRM 2009-22) include certain activities, but are not limited to those activities.[11] As a result of this expansive "including, but not limited to" language in the definitions of "voter identification" and

[11] This expansive definitional approach makes good sense where the regulatory goal is enforcing restrictions (*e.g.*, the FEA soft money ban) and preventing evasion of those restrictions. Such an expansive definitional approach has an opposite and undesirable effect where the regulatory goal is creating an exemption to generally-applicable restrictions. Whereas there is no incentive for a party to claim that its activities constitute "voter identification" or GOTV when the consequence is application of the soft money ban, there is a strong incentive for a party to make such a claim when the consequence is qualification for the proposed exemption for state and local election "voter identification" or GOTV.

"GOTV activity," the definitions overlap with the regulatory definition of "generic campaign activity."[12]

Consequently, although the proposed rule does not on its face apply to "generic campaign activity," the proposed rule will nevertheless exempt "generic campaign activity" so long as the public communication in question can be characterized as GOTV activity under the Commission's expansive definition of the term. For example, a phone bank script or mass mailing could be dedicated principally to promoting or opposing a party—activity that clearly meets the definition of "generic campaign activity"—but also include an incidental reference to the date of the upcoming local election, bringing the communication within the scope of the GOTV definition and qualifying the communication for the exemption proposed in this rulemaking.

Further, activities conducted in conjunction with the local election—such as voter identification—could well have an enduring value that the party could draw on again in a few weeks in conjunction with the federal election. The voters identified in conjunction with the non-federal election could easily be a valuable list for the party to use again on the date of the federal election. Yet the Commission's proposed exemption would allow those voter identification activities to be funded entirely with soft money, notwithstanding their subsequent value to the party's efforts in conjunction with the following federal election. Indeed, the Commission's proposed rule licenses state and local parties to fund with soft money as much voter identification activity as they can manage to conduct in conjunction with the non-federal election, and then draw on the benefit of that activity in conjunction with the subsequent federal election. This is licensing a path to evasion of the BCRA rules.

The Commission states in NPRM 2009-22 that the "proposed exclusion would be narrowly drawn and not apply to activities that are also in connection with a Federal election." 74 Fed. Reg. at 53679. Yet the examples provided above show how this will not necessarily be the case.

The clear language of BCRA prohibits state, district and local party committees from using soft money to fund Federal election activity. The proposed rule exception unduly compromises BCRA's state and local party soft money ban established by 2 U.S.C. §§ 441i(b)(1) and 431(20), and undermines Congress' intent to prevent the circumvention of the national party soft money ban.

As the Supreme Court noted in *McConnell* with regard to the state party soft money ban: "Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption." *McConnell*, 540 U.S. at 168. The Court found BCRA's prohibition on state party soft money expenditures for Federal election activity to be "a reasonable response to that risk." *Id.*

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[12] "Generic campaign activity means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate." 11 C.F.R. § 100.25.

This proposed rule potentially carves several months out of every federal election year, in which state and local party committees will be permitted by the Commission to freely spend soft money in a manner that could subsequently influence federal elections. For this reason, the proposed rule, as well as the now-expired interim rule, constitutes an impermissible construction of the statute.

VI. Conclusion

For the reasons set forth above, we urge the Commission to adopt, with the recommended changes set forth above, the proposed regulations defining "voter registration activity" and "GOTV activity," in order to comply with the Circuit Court decision in *Shays III* and to preserve the integrity of BCRA's ban on state and local party use of soft money to influence federal elections.

We appreciate the opportunity to submit these comments.

Sincerely,

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