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 cc <tduncan@fec.gov>

Subject Supplemental Comment on Federal Election Activity Rulemaking

<<DLCC Letter to FEC.pdf>> In response to the request made at the Commission's December 16 hearing on Federal Election Activity, attached please find supplemental comments on behalf of the Democratic Legislative Campaign Committee. These comments are also being sent by facsimile to the Office of General Counsel.

Very truly yours,

=B.

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## BY FACSIMILE AND ELECTRONIC MAIL

January 6, 2010

The Honorable Matthew S. Petersen  
Chairman  
Federal Election Commission  
999 E Street, N.W.  
Washington, DC 20463

**Re: Definition of Federal Election Activity**

Dear Chairman Petersen:

My client, the Democratic Legislative Campaign Committee, and I appreciate the opportunity to elaborate upon the testimony we presented to the Commission on December 16, 2009.

For associations of nonfederal officeholders and candidates – like the DLCC and its supported state legislative caucuses – the urgent question in this rulemaking is whether the Commission will define “get-out-the-vote” activity in a way that effectively erases the allowance Congress expressly made for supporting nonfederal candidates.

Here, the Commission is interpreting not one provision of the statute, but two. At stake is not just the reference to “get-out-the-vote” activity at 2 U.S.C. § 431(20)(A)(ii) – but also the exclusion for “a public communication that refers solely to a clearly identified candidate for state and local office, if the communication is not a Federal election activity ...” at § 431(20)(B)(i). The Commission has to reconcile these two provisions, for Congress plainly intended to leave alone broad efforts to promote state and local candidates.

The continued vibrancy of § 431(20)(B)’s exclusions is especially urgent for state legislative caucuses. If a public communication for a nonfederal candidate veers into get-out-the-vote activity, a party committee can pay for it with Levin funds – but a non-party caucus cannot. *See* 2 U.S.C. § 441i(b)(2). The availability of the Levin option led the Supreme Court to find that the Federal Election Activity restrictions were “closely drawn” to survive constitutional scrutiny.

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*McConnell v. FEC*, 540 U.S. 93, 169 (2003). To effectively write § 431(20)(B) out of the law would contravene Congressional intent and expose the statute to renewed Constitutional challenge.

The Commission can reconcile these two provisions by defining “get-out-the-vote activity” to mean activities directed toward encouraging voters who are identified as likely to support specific candidates to cast votes in an election in which federal candidates are on the ballot. The definition could require the Commission to consider objective factors, e.g.: (a) whether the activities are targeted to supporters of the sponsor’s preferred candidate; (b) the proximity of the activities to the date of the federal election;<sup>1</sup> and (c) whether the activities refer to voting beyond expressly advocating the preferred candidate’s election. The definition could make clear that a public communication expressly advocating the election of a nonfederal candidate and referring to the date of the election, by itself, would not qualify as get-out-the-vote activity.

This approach would have several advantages. It matches how get-out-the-vote activity is understood in the political community. Committees engage in GOTV not simply to promote candidates, but specifically to mobilize identified likely voters to go to the polls. It addresses the *Shays* court’s concern about the wholesale exclusion of communications that “encourage” people to vote. And it preserves the vitality of § 431(20)(B)’s exclusions, thus respecting Congressional intent and bolstering the rule against later challenge.

The Commission must respond to the holding of the *Shays* court. But it must also respect the Congressional design – and the unique role of state legislative caucuses, which are regulated by the law, but do not enjoy the Levin fund allowance.

<sup>1</sup> See *McConnell*, 540 U.S. at 169 (“Appropriately, in implementing this subsection, the FEC has categorically excluded all activity that takes place during the runup to elections when no federal office is at stake.”).

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We appreciate the opportunity to share our views again on this matter.

Very truly yours,

A handwritten signature in blue ink, appearing to read "B. G. Svoboda", with a stylized flourish at the end.

Brian G. Svoboda

cc: Vice Chair Bauerly  
Commissioner Hunter  
Commissioner McGahn  
Commissioner Walther  
Commissioner Weintraub  
Thomasenia Duncan, Esq., General Counsel