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To <feashays3@fec.gov>, <arothstein@fec.gov>
cc
bcc
Subject FEA Follow Up Comment

Ms. Rothstein –

Please find attached our follow up comment. If you have any questions, please contact the RNC Counsel's Office at (202) 863-8638.

Thank you!

Brandi Zehr
Associate Counsel
Republican National Committee



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RON NEHRING

CHAIRMAN
California Republican Party

CHAIRMAN
RNC State Chairmen's Committee

January 6, 2010

VIA EMAIL

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

RE: Comments on Proposed Rulemaking on Federal Election Activity

Dear Ms. Rothstein:

On behalf of the Republican State Chairmen's Committee of the Republican National Committee ("RNC") and the California Republican Party ("CRP"), I write to follow up regarding the Commission's hearing held December 16, 2009 on the Notice of Proposed Rulemaking: Definition of Federal election activity, 74 Fed. Reg. 53674 (Oct. 20, 2009), which proposes expanding the definitions of "voter registration activity" and "get-out-the-vote activity."¹ I thank the Commission for allowing me to testify at its hearing and appreciate the opportunity to provide further comments. I wish to briefly highlight three key points.

I. Voter Registration and GOTV Are Narrowly Defined in the Political Community

At the hearing, I noticed a troubling disconnect between what Washington considers to be voter registration and GOTV and how the political process actually operates at the state and local level. This chasm applies to both the content and the form of the communication. As I emphasized at the hearing, what we in the political community regard as voter registration and GOTV does not include persuasive

¹ The CRP and the RNC are parties to ongoing litigation challenging many points of law that are related to the issues at hand. The proposals advanced in my written comment and testimony, and this follow up comment, address our recommendations should the Commission decline to await further judicial guidance in the pending litigation before adopting new regulations with respect to voter registration and GOTV.

communications because such communications are ineffective at getting citizens to register to vote or to turn voters out at the polls. Party committees make persuasive communications in order to sway public opinion about a candidate or issue, and we certainly do not make a practice of turning out voters that are not yet persuaded. Similarly, we rarely, if ever, use non-personalized means of communication such as newspaper, television and radio ads because these simply do not work for registration and GOTV efforts.

II. No Evidence That Vast Expansions of Definitions Are Justified

The panelist representing Democracy 21 and the Campaign Legal Center – the only two commenters who supported the expansive proposed rules and, as far as I know, the only ones who do not work for or with political party and campaign committees on grassroots activities – did not even attempt in their comments or their testimony to provide actual evidence that the vast expansions of the FEA definitions in the proposed rules, as opposed to more limited expansions, are justified. In neither my capacity as Chairman of the CRP nor in my discussions with other state party chairs as Chairman of the RNC State Chairmen’s Committee have I seen an iota of such evidence, and I highly doubt it exists. In my experience, candidates and officeholders have been far more interested in raising money for their own campaigns, even when that fundraising is subject to hard money limits, than in raising soft money for state party grassroots activity. That’s why even under the existing rules, there has been little danger of corruption or the appearance of corruption and why the panelists who support broad definitions could offer no evidence of it. I hope the Commission will recognize this reality and adopt rules whose extent is proportional to the very limited threat of corruption or the appearance thereof and that do not go beyond what is required by the statute and the courts.

III. Clarification Regarding Proposed Time and Space Ratio

At the hearing, several Commissioners expressed a desire for clarification of what constitutes “active” versus “mere” encouragement as well as our proposed time and space ratio. The two concepts are related, the latter being a possible brightline rule to distinguish the former. In our opinion, the FEA definitions should only include active encouragement. This includes all types of activities that have a substantial voter registration or GOTV component. Mere encouragement is distinctly different because the activities would have only an incidental or minor voter registration or GOTV component. Most political communications have a passive voter registration or GOTV reference, yet could hardly be considered GOTV.

Drawing a clear line between active and mere encouragement is nearly impossible using words, although active encouragement is similar to facilitation – the standard proposed by several of the Democratic commenters and panelists. Instead of trying to describe the difference qualitatively, we suggest that the Commission adopt a time and space ratio to determine whether an activity or communication is “mere” or “active” encouragement (or whatever terms the Commission deems appropriate), and, thus, whether it is FEA. Under a time and space ratio, if a communication or activity has voter registration or GOTV references amounting to more than “X” percent – such as one-third or 50 percent – then it would be considered FEA. A 50 percent approach would be conceptually similar to the Democratic Legislative Campaign Committee’s “primarily aimed at” standard. In other words, a communication that constitutes more than half persuasion is a nonfederal public communication. Since the time and space ratio is already a tool in other areas of federal campaign finance law, committees understand and have practical experience with the ratio. It is much easier for the regulated community to deal with concrete terms – even if it involves counting words, measuring space, or timing images – than to deal with abstract and nebulous definitions. To make the process even easier, the Commission could list examples of voter registration and GOTV references that must be counted toward “X” percent.

The following hypotheticals illustrate the time and space ratio’s application:

1. A local party committee would like to send a tri-fold self-mailer that includes two panels advocating for several county board candidates because of their stance on property taxes. The other four panels constitute a voter registration form that can be torn off and mailed in. Since a significant portion of the direct mail piece – 67 percent, which would likely be more than “X” percent – contains voter registration material, the communication is FEA and must be entirely paid for with federal funds.
2. A state party committee would like to make robocalls urging voters to support the party’s candidate for governor. The script is sixty seconds in length, and the last sixteen seconds remind listeners to vote the following Tuesday, inform them of the poll hours, and tell them their polling location. Under the proposed regulations, this would be FEA because it contains more than just the date of the election. Under a time and space ratio safe harbor, it may or may not be considered FEA depending on what percentage the Commission would set. With a 50 percent threshold, the activity would not be GOTV, because only 27 percent of the communication (16 seconds out of 60) contains a GOTV reference. If the GOTV reference in the script was twice as long – 32 seconds – then it would

constitute more than 50 percent and the entire communication would be considered FEA.

IV. Conclusion

Again, I thank the Commission for the opportunity to testify and to submit follow up comments. Although each commenter and panelist has proposed a different approach, all but two of us have urged the Commission to reach the same conclusion by crafting regulations that federalize only the activity necessary to satisfy the *Shays III Appeal* court's decision and leave purely nonfederal activity nonfederal.

Respectfully submitted,



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