National Republican Congressional Committee

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February 8, 2010

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

Re: Comments on Notice of Proposed Rulemaking Regarding Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events

VIA E-MAIL: SolicitationShays3@fec.gov

Dear Ms. Rothstein,

The following comments are submitted on behalf of the National Republican Congressional Committee (NRCC) in response to Notice 2009-26 (Notice of Proposed Rulemaking Regarding Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events).

The NRCC has an interest in these proceedings because its members are incumbent members of Congress who are regularly approached by state and local party committees, candidates and non-federal PACs for fundraising assistance, and it is within this context that the NRCC submits these comments.

In its recent decision, the D.C. Circuit provided an explanation of the meaning of 2 U.S.C. § 441i(e)(3) in *Shays* v. *FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). Federal candidates and officeholders are prohibited from soliciting "soft money" under 2 U.S.C. §§ 441i(e)(1)(A) and (B), but they may still "attend, speak, or be a featured guest at" a party fundraising event. Furthermore, the court explained that Section 441i(e)(3) "merely clarifies" that attending, speaking, or being a featured guest at such an event is not – in and of itself – an impermissible solicitation. We encourage the Commission to apply this basic proposition to all contexts, and to attempt to create a single, consistent set of rules to govern Federal candidate and officeholder participation in all non-Federal fundraising events. *Shays III* should be read as generally conforming Federal candidate and officeholder participation in State, district and local political party committees' non-Federal fundraising events with the approach the Commission has already taken with respect to non-Federal fundraising events conducted under 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62.

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I. Alternative 1

We agree that proposed 11 C.F.R. § 300.64(a) accurately reflects the *Shays III* court's opinion. Nevertheless, the proposed language still leaves many questions unanswered, and we believe the public will be best served if the Commission addresses these questions.

According to the NPRM, "Alternative 1 does not attempt to extend or limit the advice given in Advisory Opinions 2003-03 (Cantor) and 2003-36 (Republican Governor's Association)." 74 Fed. Reg. 64,016, 64,019 (Dec. 7, 2009). It is unclear to us what this means. Does this language indicate that no part of *Cantor* or *RGA* would be applicable to the State, district or local party fundraising event context? If the Commission adopts Alternative 1, it should clearly state whether the *Cantor/RGA* regime, or parts thereof, is applicable to State, district and local party fundraising events.

For example, under Alternative 1, would a Federal candidate or officeholder be permitted to make a general solicitation of funds at a State party fundraising event if the relevant state law allowed contributions that are impermissible under Federal law (Virginia or New York, for example)? If the Commission considers such general solicitation to be problematic, could it be cured with an oral or written *Cantor* disclaimer? In other words, is the Commission's response to Question 1.b in *Cantor* now applicable to the State party context under Alternative 1?

Similarly, we do not believe that proposed 11 C.F.R. § 300.64(b) provides adequate guidance regarding the parameters of Federal candidate and officeholder appearances in pre-event publicity. Under proposed subsection (b), the Commission simply confirms that a Federal candidate or officeholder may appear on pre-event publicity. Left unsaid is that such an appearance has been treated as an "implied" or "imputed" solicitation of funds by the Federal candidate or officeholder under 2 U.S.C. § 441i(e)(1)(B) and 11 C.F.R. § 300.62. Some of these issues were raised in Advisory Opinion 2007-11 (California Republican Party), although the Commission was unable to answer two of the requestors' three questions. Without further guidance, these questions will undoubtedly arise again.

We strongly urge the Commission to clearly explain when pre-event publicity distributed by the sponsoring party committee becomes a solicitation by the featured Federal candidate or officeholder, and what, if any, disclaimers may be used to clarify that the Federal candidate or officeholder is not soliciting any impermissible funds. (We acknowledge that both Alternatives 2 and 3 offer clear explanations, although they are vastly different in approach.)

The Commission should expressly link (and limit) any conception of pre-event publicity solicitations to the definition of "to solicit" found at 11 C.F.R. § 300.2(m), and recommit itself to its own statement in *Cantor* that "the scope of a covered person's potential liability under section 441i(e)(1) and section 300.62 must be determined by his or her own speech and actions in asking for funds or those of his or her agents, but not by the speech or actions of another person outside his or her control." *See* Advisory Opinion 2003-03 (Cantor).

In light of the foregoing statement from *Cantor*, the Commission should also recognize that the "imputed" solicitation concept of *Cantor* and its progeny does not appear anywhere in Commission regulations, is not readily apparent from the plain language of the statute or regulations, and has caused considerable confusion over the years among those subject to Commission oversight, including one of BCRA's primary authors and sponsors. To the extent the Commission is able to use this rulemaking to establish clear ground rules for pre-event publicity and solicitations, we urge it to do so.

The Commission should also take this opportunity to make clear that simply being listed as a "special guest" or "featured speaker" (or any other similar term) on pre-event publicity for a fundraising event, even if authorized or consented to, does not amount to a solicitation by the "featured guest." (The same should also be true if the Federal candidate or officeholder is listed with no title at all.) If a Federal candidate or officeholder may "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party," it makes no sense that this fact should not be noted on the invitations to the event.

Alternative 1 is also silent with respect to non-candidate, non-party fundraising events such as a legislative caucus committee or a state PAC such as the state "leadership PAC" of a legislator.[1] This absence of rules from the Commission has caused much confusion among the regulated community and should also be addressed.

II. Alternatives 2 and 3

Generally speaking, and before commenting on the particulars of Alternatives 2 and 3, we note our support for the Commission's attempts to provide a more comprehensive set of rules for Federal candidate and officeholder participation in non-federal fundraising events. In our view, Alternative 2 is worthy of adoption (with minor modifications) because it offers a clear set of rules without breaking dramatically from the entirety of the Commission's post-BCRA approach to these issues.

1. Scope: "In connection with any election for Federal office or any non-Federal election"

Both Alternatives 2 and 3 are limited in scope to non-federal fundraising events held "in connection with any election for Federal office or any non-Federal election." This limitation is entirely appropriate in light of the language of 2 U.S.C. § 441i(e)(1). However, the Commission has not been particularly successful in its attempts to define the contours of that provision.

In Advisory Opinion 2003-12 (Flake), the Commission determined that funds raised in connection with a state ballot referendum were "in connection with a non-Federal election," although subsequent opinions suggest that the analysis used in *Flake* may no longer command majority support.

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[1] We assume that State and local candidate events would continue to be governed by 11 C.F.R. § 300.62 under Alternative 1.

In Advisory Opinion 2005-10 (Berman/Doolittle), the Commission did not produce an analysis supported by four votes, and was unable to determine whether a state ballot measure was an "election" or something else. Chairman Thomas believed that a state ballot measure qualified as "any election" under Section 441i(e)(1). Commissioners Toner and Mason believed that a state ballot measure did not qualify as "any election" under that same section. Commissioners Weintraub and McDonald withdrew their support for the analysis in *Flake* (while still supporting its result), and explained that they now believed that the particular ballot measures at issue in Advisory Opinion 2005-10 were *not* "in connection with any election" for purposes of Section 441i(e)(1) because (i) they were being voted on in an odd-year (meaning the Federal candidates and officeholders involved were not on the ballot), and (ii) the Federal candidates and officeholders had not established, maintained, financed, or controlled the ballot measure committees, the ballot measures. Thus, when the Commission last squarely considered state ballot measures, it split three ways on whether they were "in connection with an election." One Commissioner said "yes," two said "no," and two said "sometimes."

Similarly, in Advisory Opinion 2007-28 (McCarthy-Nunes), the Commission was unable to determine whether a redistricting-related ballot initiative committee was "in connection with an election" for purposes of Section 441i(e)(1).

The Commission has also wrestled with fundraising for legal defense funds (in Advisory Opinion 2003-15 (Majette)) and recount efforts (in Advisory Opinion 2006-24 (NRSC/DSCC)), concluding that the former is not "in connection with an election," while the latter is.

Thus, while we agree that the non-federal fundraising rules are limited in scope to efforts that are "in connection with any election for Federal office or any non-Federal election," there seems to be little utility in incorporating the phrase into any new regulations. The scope of BCRA's fundraising restrictions is evident from the statute (at 2 U.S.C. § 441i(e)), and the Commission itself has not demonstrated that it has a full and clear understanding of the phrase.

2. Alternative 2

Alternative 2 has the tremendous benefit of creating a single, consistent set of rules for Federal candidate and officeholder participation in *all* non-Federal fundraising events.

The approach to pre-event publicity taken by Alternative 2 is workable, although we would prefer a framework that does not presuppose that consenting to appear on someone else's solicitation as a featured guest imputes the solicitation to the featured guest. We agree that if a Federal candidate or officeholder takes some action beyond simply consenting to appear on an invitation as a featured guest, that the Federal candidate or officeholder may make a solicitation. For example, signing a fundraising letter is properly treated as a solicitation by the Federal candidate or officeholder. However, if the Commission must retain the foregoing presupposition, we see no reason why a Federal candidate or officeholder should not be able to expressly limit an imputed solicitation with a *Cantor*-style disclaimer indicating that the Federal candidate or officeholder is either not soliciting any funds or is only soliciting federally-permissible funds.

Alternative 2 also recognizes that Federal candidates and officeholders sometimes participate in non-federal fundraising events without ever soliciting any funds themselves. The Commission previously faced this issue in MUR 5712 (McCain/Schwarzenegger), but found resolving that case extremely difficult, largely because (in our view) the existing *Cantor* framework does not recognize that a Federal candidate or officeholder may, in fact, participate without ever making any solicitation. Alternative 2 would correct this inherent limitation of *Cantor*. In the context of MUR 5712, under Alternative 2, it would be permissible for Senator McCain to appear on pre-event publicity for a non-federal fundraising event benefiting Governor Schwarzenegger, where the publicity is not expressly limited to federally-permissible funds, as long as the solicitation is clearly made by and attributable to Governor Schwarzenegger. A disclaimer on the pre-publicity indicating that no funds are being solicited by Senator McCain would ensure that Senator McCain does not violate 2 U.S.C. § 441i(e). (It is unclear from the NPRM if a statement such as "the solicitation for funds is being made only by Californians for Schwarzenegger" would *also* be required.)

3. Alternative 3

We strongly urge the Commission to reject Alternative 3. It goes far beyond what the court ordered in *Shays III* and would mark a sharp break with the Commission's BCRA-era approach to these issues.

The *Shays III* court concluded that "section (e)(3) merely clarifies that despite the statute's ban on soliciting soft money, federal candidates may still 'attend, speak, or be a featured guest' at state party events where soft money is raised, *which the statute might otherwise be read as forbidding*" (emphasis added). The Commission should conform any regulation adopted in the course of this rulemaking to what the *Shays III* court clearly held, and disregard its speculation, which is what the italicized language in the foregoing sentence constitutes. What the *Shays III* court held is that Federal candidates and officeholders may attend, speak, or be a featured guest at a State, district or local party committee fundraising event, but they may not solicit soft money at such events. First and foremost, any revised 11 C.F.R. § 300.64 must reflect this determination. To the extent that 11 C.F.R. § 300.64 is revised beyond this, it should be revised in a way that is consistent with the basic elements of the Commission's prior treatment of non-federal fundraising events conducted under 11 C.F.R. § 300.62.

Federal candidates and officeholders have relied on *Cantor* since it was issued in early 2003. It is perhaps the most significant BCRA advisory opinion insofar as it has almost single-handedly structured how Federal candidates and officeholders interact with and support state and local candidates. *RGA* has similarly impacted how Federal candidates and officeholders interact with non-party, non-federal committees. No court, including the court in *Shays III*, has issued any ruling suggesting that either *Cantor* or *RGA* misinterpreted BCRA's restrictions and prohibitions. Thus, there is no compelling reason to cast these opinions aside and force the regulated community to once again undergo a fundamental restructuring.

We take issue with the generalization made in the discussion of Alternative 3 regarding the purpose of including Federal candidates and officeholders at state and local candidate events. *See* 74 Fed. Reg. at 64,023 ("Federal candidates and officeholders are often included at

fundraising events for the specific purpose of drawing more donors (and more donations to the events.") and 64,024 (referring to "the premise that Federal candidates and officeholders lend their names to publicity for fundraising events for one reason: to help raise funds."). In our experience, "drawing more donors" is simply not the sole "specific purpose" of, or "one reason" for, including a Federal candidate or officeholder at a fundraising event. There are, in fact, any number of reasons why a Federal candidate or officeholder might wish to participate in such an event, including:

- to generate media coverage for either the event sponsor or him- or herself;
- to demonstrate party solidarity;
- to distance yourself from your own party;
- to have a platform from which to speak;
- to generate excitement or enthusiasm for a candidate or cause;
- to demonstrate personal support for a particular candidate or cause; and
- to have the opportunity to interact with attendees at such events, who are often party local activists.

Regardless of why a Federal candidate or officeholder might participate in a non-federal fundraising event, the proposal that he or she "may not consent to the use of his or her name or likeness in publicity for non-party, non-Federal events" is highly problematic. As noted above, this proposal would overturn portions of *Cantor* and *RGA* with which the regulated community has grown accustomed. And it would do so on the grounds that such consent to appear on an invitation is an "implicit" solicitation. Including the language "with Special Guest Senator Jane Doe" on a fundraising invitation – even with Senator Jane Doe's consent – is hardly a "clear message" from Senator Jane Doe "asking, requesting, or recommending that another person make a contribution." *See* 11 C.F.R. § 300.2(m).[2] Rather, we think that such an invitation, when viewed in its full context, would be "reasonably construed" as a solicitation by the sponsoring entity, not Senator Jane Doe. But if this is a "solicitation" under 11 C.F.R. § 300.2(m), it is certainly more passive in nature than any of the examples provided.

Furthermore, if it is deemed a "solicitation" any time a Federal candidate or officeholder consents to appear on pre-event publicity as a "featured guest" when that publicity contains a solicitation of funds, how can it not also be a "solicitation" for that same Federal candidate or officeholder to consent to appear, and then actually appear and speak, at the event itself, where funds are being solicited and raised? In its discussion of Alternative 3, the NPRM asserts, "So long as a Federal candidate or officeholder can attend or speak at a non-party, non-Federal fundraising event without soliciting funds outside the limitations and prohibitions of the Act, the Commission is not proposing to prohibit such attendance and speech." 74 Fed. Reg. at 64,024. Why not? The Federal candidate or officeholder has *consented* to attend and speak at an event at which non-federal funds are raised. By doing so, he has places his imprimatur on the event and its fundraising efforts, which is essentially the same reasoning behind imputing the solicitation in the pre-event publicity context. It makes no sense that a solicitation would be imputed with

[2] The most recent *Explanation and Justification* of 11 C.F.R. § 300.2(m) (definition of "to solicit") indicates that "[a]bsent a requirement that a communication contains a clear message asking, requesting, or recommending that another person provide funds or something of value, such a statement might be inappropriately captured by the definition of 'to solicit.'" 71 Fed. Reg. 13,926, 13,928 (March 20, 2006).

respect to the written publicity, but not with respect to the event itself. In neither case is the Federal candidate or officeholder himself or herself *actually making* a solicitation, but in one instance it is treated as a solicitation, while in the other it is not. Alternative 3 is internally inconsistent.

As a practical matter, the obvious result of Alternative 3 is that event planners for virtually any non-profit entity will simply divide information about an event that includes a Federal candidate or officeholder speaker into separate mailings. It is nearly incomprehensible that the Commission would contemplate requiring non-federal entities to double or triple their printing and postage costs when they organize events simply for the sake of complying with formalistic regulations that allow a certain result, but only if the path taken to that result is the least efficient one available. Under Alternative 3, at least two separate mailings would be required – one announcing the event and indicating that a Federal candidate or officeholder is speaking, and a second mailing soliciting funds and RSVPs. It should be immediately apparent that the FEC is on the wrong track any time it finds itself considering regulations that so obviously place form above substance.

We also strongly discourage the Commission from transforming "featured guest" into a legal term of art. There is simply no need for the Commission to create another regulatory morass. This should be plainly evident from the related questions posed in the NPRM, including "Should a person be considered a featured guest even though the word 'featured' is not used?" and "Can a person be a 'guest' if the person is a usual attendee or a member of the group hosting the event?" We have the same concerns about any Commission attempt to define the term "fundraising event."

In our view, it is entirely clear that the Commission has no "statutory authority to restrict Federal candidates and officeholders from attending or speaking at non-party, non-Federal fundraisers, if they do not ask for funds outside the limitations and prohibitions of the Act." If a Federal candidate or officeholder does not, herself or himself, actually "ask for" (by which we assume the NPRM means "solicit") impermissible funds, that candidate or officeholder does not violate 2 U.S.C. § 441i(e). No other provision of FECA or BCRA could reasonably be construed to limit a Federal candidate's or officeholder's ability to attend and speak at any event he or she chooses.

III. General Concern Applicable to Alternatives 1 – 3

With respect to each Alternative, language in the NPRM indicates that the revised rule to be located at 11 C.F.R. § 300.64 would apply to certain events at which non-federal funds "*are raised.*" For example, the NPRM states that "Alternative 1 would . . . provide that: (1) Federal candidates and officeholders may attend, speak, or be featured guests at State, district, and local party committee fundraising events at which funds outside the limitations and prohibitions of the Act or Levin funds ***are raised*** . . ." (emphasis added). NPRM, 74 Fed. Reg. at 64,019. This language is repeated in the proposed language for the Alternative 1 version of 11 C.F.R. § 300.64(a).

Similarly, the scope of Alternatives 2 and 3 is described as being limited to "those fundraising events at which funds outside the limits and prohibitions of the Act, or Levin funds, ***are raised***, even if Federal funds are also raised at the event" (emphasis added). *Id.* at 64,020. Again, this language is repeated in the Alternative 2 and Alternative 3 versions of 11 C.F.R. § 300.64(a).

We believe this emphasis on events at which non-Federal funds ***are raised*** misstates the real issue. 2 U.S.C. § 441i(e) is concerned solely with the behavior of Federal candidates and officeholders. It places restrictions on such persons' ability to "solicit, receive, direct, transfer, or spend" certain funds, but it does not restrict the behavior of others. The use of the passive voice phrase "*are raised*" alters this framework, although we do not believe the Commission necessarily intends to do so. The Commission should use language that makes clear that any version of 11 C.F.R. § 300.64 applies to events for which non-Federal funds ***are solicited***. A Federal candidate or officeholder may not have any control over what funds are actually raised at an event.

For example, suppose Federal candidate Smith is the featured guest at a fundraising event for State candidate Jones. All solicitations made in connection with the event are limited strictly to individuals, and to $1,000. We believe that everyone would agree that Federal candidate Smith may lawfully participate as described, that the event is limited to Federally-permissible funds, and that no special disclaimers are required on any pre-event publicity or at the event itself. However, at the event, Generous Donor X decides completely on her own that she will contribute $50,000 to State candidate Jones, and this is lawful under relevant state law. The event has just become an event at which non-federal funds ***are raised***, but no one has actually solicited any non-federal funds, and no portion of 2 U.S.C. § 441i(e) has been violated. In circumstances such as these, the new rules proposed at 11 C.F.R. § 300.64 should not be triggered. Rather, the triggering event(s) should be the acts of solicitation. The funds actually raised are irrelevant under the statute. We do not consider this a novel or new approach to these matters, and in practice, this is how the Commission has approached these issues in the past.

We appreciate the opportunity to provide comments in this matter, and are available for testimony on March 10, 2010, should the Commission wish to hear from us.

Sincerely,

/S/

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