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March 28, 2005

Ms. Mai T. Dinh
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Ms. Dinh:

These comments, on proposed rules governing candidate and officeholder support for state and local party fundraising events, are submitted on behalf of the Perkins Coie Political Law Group. Informed by experience with the issues raised in that Notice, including experience in the representation of parties and the officeholders and candidates they support, these comments do not, however, necessarily reflect the view of any client.

The Commission has the choice of explaining its original rule or changing it. Under that rule, a federal candidate, barred generally from the solicitation of nonfederal funds, may speak "without restriction or regulation" at a state and local party fundraising event. The allowance includes the simple benefits of the candidate's appearance at the event, which may be promoted in advance by the party with pre-event publicity. The Court in *Shays v. FEC*, 337 F. Supp. 2d 28, 93 (D.D.C. 2004), found that the exemption was permissible, within the agency's authority to promulgate, but it found wanting the agency's explanation of its decision to adopt this rule rather than another, more restrictive one.

No Basis for Changing the Rule. The agency should explain, not change, the rule. The exemption guided candidates and parties through the last cycle without any suggestion that it undermined the general solicitation restrictions. Quite the contrary: in recent months, those who supported BCRA's enactment, and now regularly contribute to its evaluation, have proclaimed it a major success. They have identified specifically the Act's success in severing the link between officeholders and the raising of large potentially "corruptive" contributions. Senators McCain and Feingold have written that:

> McCain-Feingold broke the link between big donors and legislative and executive branch policymaking. That alone was a very significant and far-reaching achievement that will pay dividends to the American people for years to come.

John McCain & Russ Feingold, C*ampaign Finance Law is Working*, CINCINNATI POST, June 2, 2004, at A9, *available at* http://www.cincypost.com/2004/06/02/guest060204.html; *see also* Anthony Corrado & Thomas E. Mann, *In the Wake of BCRA: An Early Report on Campaign Finance in the 2004 Elections*, 2 FORUM no. 2, art. 3 (2004). This success, as argued by those most critical of "loopholes" and other means of "circumvention," suggests no rationale basis or policy justification rescinding the exemption for candidate and officeholders appearances, including remarks, at state and local fundraising events.

To the extent that the Commission must supply an explanation, determined to have been previously absent or inadequate, it demonstrates in the Notice that it can do so. Congress provided an exemption for officeholders and candidates who "speak" at a fundraising event: an exemption for "speaking" is not compatible with a qualification that ostensibly permits the speech but then subjects it to exacting but vaguely delineated scrutiny for traces of illicit solicitation. The event at which the candidate speaks would be, after all, a fundraising event: the very purpose of the candidate's invited involvement—or at least a principal one—is to aid in the successful raising of money. So there is little logic, and undeniably the invitation to confusion, in allowing candidates to speak and appear in aid of fundraising purposes, while insisting that the candidate's speech be free of apparent fundraising appeals.

Adverse Effects of Change on Speech. Moreover, in adopting the original rule, the Commission rightly concluded that the terms of acceptable speech, distinguishing it from unacceptable solicitation, would be difficult to define. As the Commission formulates the point, "evaluating speech in the context of a party fundraising event raises First Amendment concerns where it is difficult to discern what specific words would be merely 'speaking' at such an event without crossing the line into soliciting or directing non-Federal funds." Candidate Solicitation at State, District, and Local Party Fundraising Events, 70 Fed. Reg. 9013, 9015 (proposed Feb. 24, 2005). Once a ruling calling for such a determination is adopted, the Commission will be unable to avoid the task it set for itself, which is one of poring over presentations at fundraising events for evidence of fundraising purpose. And pore over them, it will, for it is predictable that this proposed new qualification, as noted below, will provide a fresh source of encouragement for complaints and a new line of investigative activity for the Commission.

This result is troubling, but it is also self-defeating. A restriction such as the one under consideration will necessarily inhibit activity that Congress designed by exemption to allow. Candidates and officeholders will pause before accepting these events, or parties may pause before inviting them, and both parties and those invited to appear and speak will have to call upon lawyers to review scripts and assure that their fundraising appearances are legal. After all, they will be aware that the rule was changed by a lawsuit seeking to limit the scope and utility of the exemption, and they would have every reason to believe that in the wake of

a new rule inviting active regulatory oversight of these speeches, more legal attacks on these appearances would follow.

Costs of the Unnecessary Modification of BCRA Rules. As noted, the exemption has not been established as the source of mischief directed against the core purposes of the Act in the 2004 election cycle. In the meantime, this cycle of experience with the rule has been absorbed by the regulatory community, and a new rule, with all the uncertainties cited, would impose unnecessarily the significant additional costs of new training, reformulation of training materials, and the loss of a cycle of compliance experience with the current rule. These are significant costs, and they should be forced upon the regulated political community only where a substantial showing has been made that a new approach is necessary to achieve the core purposes of BCRA. This showing cannot, however, be made, for even the court in *Shays v. FEC* concluded that the rule in its present form did not threaten to undermine core purposes of the law under the *Chevron* standard. 337 F. Supp. 2d at 91.

Other Issues. The Commission's Notice invites comments on two other issues related to central one discussed here. It asks whether it should take this occasion to reconsider the parallel allowances it has made, by Advisory Opinion, for federal candidates and officeholders to appear and speak at other events at which nonfederal funds are raised. *See* Advisory Opinion 2003-36 (Jan. 12, 2004); Advisory Opinion 2003-03 (Apr. 29, 2003). The Commission should decline to reconsider these determinations because there is no demonstrated reason for it to do so. The Opinions are consistent with the BCRA's express grant of authority to federal candidates and officeholders to raise money, within federal limits, for state and local elections. They are written to guard against "solicitations" of soft money, such as by requiring candidates and officeholders to make clear that they cannot and do not ask for monies inconsistent with the federal "hard money" requirements. Other restrictions, such as the prohibition on candidates and officeholders serving on host committees or in fundraising positions, serve the same purpose. A change in these rules is not needed to address any demonstrated abuses or deficiencies in the guidance provided by these opinions. And it would be odd indeed to offer federal candidates and officeholders more leeway to raise soft money for party organizations, supposedly operating under their control or influence or as their conduits, than for organizations controlled by state candidates.

The Commission also asks whether it should carve out a special exemption for Levin fundraising at state and local party functions, on the grounds that, as the Court in *Shays* suggested, Levin funds are a form of "hard money," subject to federal statutory limits and disclosure requirements. *See* 70 Fed. Reg. at 9016. To the extent that the adoption of such an exemption would represent a kind of "middle ground," emboldening the Commission to proceed with a new speech-restrictive condition for state and local party event fundraising, it would be unwise. Far better would be a Commission decision to achieve the same result by leaving the current exemption in place. If, however, the Commission would consider more

generally liberalizing the involvement of federal officeholders and candidates in raising Levin funds, this approach would be a salutary one for state and local parties.

We appreciate the opportunity to comment on the Notice of Proposed Rulemaking on these issues, and we would ask also to be included in any list of witnesses should the Commission decide to hold a hearing following its review of the comments received.

Very truly yours,

Robert F. Bauer

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