October 28, 2005

By Electronic Mail

Mr. Brad C. Deutsch
Assistant General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Comments on Notice 2005–24: Definitions of "Solicit" and "Direct"

Dear Mr. Deutsch:

These comments are submitted jointly by the Campaign Legal Center, Democracy 21, and the Center for Responsive Politics in response to the Commission's Notice of Proposed Rulemaking ("NPRM") 2005–24, published at 70 Fed. Reg. 56599 (September 28, 2005), seeking comment on proposed changes to its rule defining the terms "solicit" and "direct" under 11 C.F.R. § 300.2.

For the reasons set forth below, we urge the Commission to:

- Adopt the proposed definition of "to solicit" presented in section II-A of the NPRM, incorporating the "conduct" element proposed in section II-C of the NPRM;

- Reject the alternative proposals regarding the definition of "to solicit" presented in section II-B of the NPRM;

- Qualify the examples of communications that *would not* constitute solicitation, presented in section II-D of the NPRM, to reflect the elements of context and conduct incorporated into the revised definition of "to solicit"; and

- Adopt a modified version of the proposed definition of "to direct" presented in section III of the NPRM.

The three commenters request the opportunity to testify at the hearing on this rulemaking, scheduled for November 14–15, 2005.

I. BCRA's Legislative History, Structure and Purpose Make Clear That the Definitions of "Solicit" and "Direct" are Critical to Preventing Circumvention of the Soft Money Ban.

The Bipartisan Campaign Reform Act of 2002 (BCRA) amended the Federal Election Campaign Act (FECA) by adding new restrictions and prohibitions on national party, federal candidate, and federal officeholder use of funds not in compliance with FECA's amount limitations, source prohibitions, and reporting requirements (*i.e.*, "soft money" or "non-federal funds). The linchpin of this BCRA soft-money ban is its broad command that national parties, federal candidates, and federal officeholders may not "solicit" or "direct" such funds.

The national party soft money ban provides that a national political party committee "may not solicit, receive, or direct to another person a contribution . . . or any thing of value, or spend any funds, that are not subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. § 441i(a)(1).

Federal law further provides that a "national, State, district, or local party committee of a political party . . . shall not solicit any funds for, or make any direct donations to" a section 501(c) organization that makes expenditures in connection with a federal election, or to certain section 527 organizations. 2 U.S.C. § 441i(d).

Finally, a federal candidate or officeholder shall not "solicit, receive, direct, transfer, or spend funds in connection with an election for Federal office . . . unless the funds are subject to the limitations, prohibitions, and reporting requirements of the Act"; and shall not solicit, receive, direct, transfer, or spend funds in connection with any election other than an election for Federal office" unless the funds are in compliance with FECA's amount limitations and source prohibitions. 2 U.S.C. § 441i(e)(1).

According to BCRA's sponsors, this soft money ban was the heart of the legislation. Senator McCain stated: "The soft money ban is the centerpiece of this bill. Our legislation shuts down the soft money system, prohibiting all soft money contributions to the national political parties from corporations, labor unions, and wealthy individuals." 147 Cong. Rec. S2446 (daily ed. Mar. 19, 2001). Senator McCain later explained:

> We are prohibiting Federal officeholders, candidates, and their agents from soliciting funds in connection with an election, unless such funds are from sources and in amounts permitted under Federal law. The reason is to deter any possibility that solicitations of large sums from corporations, unions, and wealthy private interests will corrupt or appear to corrupt out Federal Government or undermine our political system with the taint of impropriety.

148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002). Congressman Shays echoed this sentiment:

> The basic rule in the bill is that federal candidates and officials cannot raise non-federal (or soft) money donations . . . . Thus, the rule for solicitations by federal officeholders or candidates for party committees is simple: federal candidates and

officeholders cannot solicit soft money funds for any party committee — national, state, or local.

148 Cong. Rec. H408 (daily ed. Feb. 13, 2002). Likewise, Senator Feingold made Congressional intent clear, stating: "The bottom line of our legislation is, we have to get rid of this party soft money that is growing exponentially." 147 Cong. Rec. S2611 (daily ed. Mar. 21, 2001). Additionally, Senator Levin described at length the corrupting effect of soft money contributions and the need to prohibit solicitation of such funds. 147 Cong. Rec. S3246–49 (daily ed. Apr.2, 2001). Senator Levin announced:

> Passage of McCain-Feingold will bring an end to solicitations and contributions of hundreds of thousands of dollars in exchange for access to people in power — "lunch with the committee chairman of our choice for $50,000," "time with the President for $100,000," "participation in a foreign trade mission with Government officials for $50,000."

Id. at S3246. Opponents of BCRA likewise recognized the soft money ban as a core provision of the legislation. Senator Hatch acknowledged: "The primary provision of McCain-Feingold essentially bans soft money by making it unlawful for national political party committees and federal candidate to solicit or receive any funds not subject the hard money limitations of the Federal Election Campaign Act." 147 Cong. Rec. S3240 (daily ed. Apr. 2, 2001).

Congress understood that the longstanding limit on contributions received by a federal officeholder had proven to be an ineffective means of preventing real and apparent corruption. Federal candidates and officeholders circumvented the contribution limit by soliciting unlimited soft money contributions for their political parties. For this reason, through adoption of BCRA, Congress imposed restrictions on candidate, officeholder and party committee *solicitation* and *direction* of contributions.

II. The Supreme Court in *McConnell* Upheld BCRA's Soft Money Solicitation Restrictions As Necessary to Reinforce And Prevent Circumvention of BCRA's Soft Money Ban.

Plaintiffs in *McConnell v. FEC*, 540 U.S. 93 (2003), challenged on constitutional grounds the BCRA Title I soft money provisions. The Supreme Court upheld these provisions in every respect. *See id.* at 142–189. The Court began by describing the corruptive threat of the soft money system, noting pervasive candidate *solicitation* of soft money:

> Not only were . . . soft-money contributions often designed to gain access to federal candidates, but they were in many cases solicited by the candidates themselves. Candidates often directed potential donors to party committees and tax-exempt organizations that could legally accept soft money. For example, a federal legislator running for reelection solicited soft money from a supporter by advising him that even though he had already "'contributed the legal maximum'" to the campaign committee, he could still make an additional contribution to a

joint program supporting federal, state, and local candidates of his party. Such solicitations were not uncommon.

The solicitation, transfer, and use of soft money thus enabled parties and candidates to circumvent FECA's limitations on the source and amount of contributions in connection with federal elections.

Id. at 125–26 (footnotes omitted).

The Court described Title I of BCRA as "Congress' effort to plug the soft-money loophole." *Id.* at 133. The Court described the national party soft money ban as the "cornerstone" of Title I, and the soft money restrictions applicable to state parties and candidates as necessary to reinforce and prevent circumvention of the national party soft money ban. *Id.* Of particular relevance to this rulemaking, the *McConnell* Court found that BCRA's soft money provisions show:

"due regard for the reality that solicitation is characteristically intertwined with informative and perhaps persuasive speech seeking support for particular causes or for particular views." *Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 632, 100 S. Ct. 826, 63 L.Ed.2d 73 (1980). The fact that party committees and federal candidates and officeholders must now ask only for limited dollar amounts or request that a corporation or union contribute money through its PAC in no way alters or impairs the political message "intertwined" with the solicitation. And rather than chill such solicitations, as was the case in *Schaumburg,* the restriction here tends to increase the dissemination of information by forcing parties, candidates, and officeholders to solicit from a wider array of potential donors.

Id. at 139–40 (internal citation omitted).

Plaintiffs in *McConnell* explicitly challenged as unconstitutionally overbroad BCRA's prohibition on national parties' soliciting and directing soft money. The Court rejected this claim, finding:

The reach of the solicitation prohibition, however, is limited. It bars only solicitations of soft money by national party committees and by party officers in their official capacities. The committees remain free to solicit hard money on their own behalf, as well as to solicit hard money on behalf of state committees and state and local candidates. . . .

This limited restriction on solicitation follows sensibly from the prohibition on national committees' receiving soft money. The same observations that led us to approve the latter compel us to reach the same conclusion regarding the former. A national committee is likely to respond favorably to a donation made at its request regardless of whether the recipient is the committee itself or another entity.

Id. at 157–58 (footnote omitted).

The *McConnell* Court also upheld against constitutional challenge BCRA's prohibition on party committee solicitation and direction of soft money to certain section 501(c) and 527 organizations as an "entirely reasonable" means of preventing circumvention of the political party soft money ban. *Id.* at 174. The Court reasoned:

> The history of Congress' efforts at campaign finance reform well demonstrates that "candidates, donors, and parties test the limits of the current law." *Colorado II,* 533 U.S., at 457, 121 S. Ct. 2351. Absent the solicitation provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates. All of the corruption and appearance of corruption attendant on the operation of those fundraising apparatuses would follow. Donations made at the behest of party committees would almost certainly be regarded by party officials, donors, and federal officeholders alike as benefiting the party as well as its candidates. Yet, by soliciting the donations to third-party organizations, the parties would avoid FECA's source and amount limitations, as well as its disclosure restrictions.

Id. at 174–75 (footnote omitted). The Court continued: "Experience under the current law demonstrates that Congress' concerns about circumvention are not merely hypothetical. Even without the added incentives created by Title I, national, state, and local parties already solicit unregulated soft-money donations to tax-exempt organizations for the purpose of supporting federal electioneering activity." *Id.* at 176. The Court concluded that the solicitation restriction of section 441i(d) is "closely drawn to prevent political parties from using tax-exempt organizations as soft-money surrogates. Though phrased as an absolute prohibition, the restriction does nothing more than subject contributions solicited by parties to FECA's regulatory regime, leaving open substantial opportunities for solicitation and other expressive activity in support of these organizations." *Id.* at 177.

Finally, the *McConnell* Court examined the federal candidate soft money solicitation restrictions of section 441i(e) and found the "restrictions on solicitations are justified as valid anticircumvention measures." *Id.* at 182. The Court explained:

> Large soft-money donations at a candidate's or officeholder's behest give rise to all of the same corruption concerns posed by contributions made directly to the candidate or officeholder. Though the candidate may not ultimately control how the funds are spent, the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself. Without some restriction on solicitations, federal candidates and officeholders could easily avoid FECA's contribution limits by soliciting funds from large donors and restricted sources to like-minded organizations engaging in federal election activities. As the record demonstrates, even before the passage of BCRA, federal candidates and officeholders had already begun soliciting donations to state and local parties, as

> well as tax-exempt organizations, in order to help their own, as well as their party's, electoral cause. . . . The incentives to do so, at least with respect to solicitations to tax-exempt organizations, will only increase with Title I's restrictions on the raising and spending of soft money by national, state, and local parties.

Id. at 182–83. The Court concluded that the soft money solicitation restrictions of section 441i(e) "address[] these concerns while accommodating the individual speech and associational rights of federal candidates and officeholders." *Id.* Accordingly, the Court upheld section 441i(e) against the *McConnell* plaintiffs First Amendment challenge. *Id.* at 184.

III. The Commission's First Rulemaking Defining the Terms "Solicit" and "Direct"

In May 2002, the Commission published NPRM 2002–7, seeking comment on proposed rules regarding "Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money," including a definition for the term "To Solicit or Direct." 67 Fed. Reg. 35654 (May 20, 2002). The Campaign Legal Center, Democracy 21 and the Center for Responsive Politics each submitted written comments on the notice.[1] NPRM 2002–7 proposed to define the term "To Solicit or Direct" as follows:

> *To solicit or direct* means to request or suggest or recommend that another person make a contribution or donation, including through a conduit or intermediary, to a candidate, a political committee, or a political organization described in 26 U.S.C. 527 or a tax-exempt organization described in 26 U.S.C. 501(c). A solicitation does not include merely providing information or guidance as to the requirements of applicable law.

67 Fed. Reg. at 35681.

On June 17, 2002, the Commission's General Counsel published proposed final rules for NPRM 2002–7, including proposed definitions for the terms "to solicit" and "to direct." FEC Agenda Document No. 02–44, *available at* http://www.fec.gov/agenda/agendas2002/mtgdoc02-44.pdf. Like the NPRM, the proposed final rule appropriately defined "to solicit" to mean "to request or suggest or recommend." *Id.* at 258. The proposed final rule defined "to direct" to mean "to provide the name of a candidate, political committee or organization to a person who has expressed an interest in making a contribution . . . ." *Id.* In the proposed Explanation and Justification ("E&J"), the general counsel explained:

> [T]he Commission has previously indicated that activity that does not constitute a specific asking may nevertheless constitute a solicitation, with the key element appearing to be an attempt to persuade a person to make a contribution, where

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[1] *See* Comments of the Campaign and Media Legal Center on Notice 2002-7 (May 29, 2002); Comments of Common Cause and Democracy 21 on Notice 2002-7 (May 29, 2002); Comments of the Center for Responsive Politics on Notice 2002-7 (May 29, 2002).

that person has not otherwise indicated a specific willingness to do so. Given this longstanding interpretation, which is consistent with the plain meaning of a solicitation, the final rules indicate that "to solicit" means "to request or suggest or recommend that another person make a contribution . . . ."

Id. at 92.

Nevertheless, at its June 19, 2002 open meeting, the Commission rejected the advice of the general counsel and amended the proposed definitions of both "to solicit" and "to direct" so as to narrow their application to only those instances where an "ask" is made.

On July 29, 2002, the Commission published its final rules defining the terms "solicit" and "direct." *See* Final Rules and Explanation and Justification for Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064 (July 29, 2002). *See also* 11 C.F.R. §§ 300.2(m) and (n). Despite the Commission's dramatic narrowing of both definitions, the Commission provided little explanation in the E&J for the final rules. *See id.* at 49086–87.

IV. *Shays v. FEC* Decisions

In *Shays v. FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004), *aff'd,* 414 F.3d 76 (D.C. Cir. 2005) (pet. for reh'g *en banc* denied Oct. 21, 2005), the principal House sponsors of BCRA challenged, *inter alia*, the two regulations defining "solicit" and "direct" at 11 C.F.R. §§ 300.2(m) and (n).

A. The Federal District Court in *Shays* Invalidated Definitions of "Solicit" and "Direct" on *Chevron* Two Grounds

The district court began its analysis by reviewing the BCRA provisions incorporating the terms "solicit" and "direct." *Shays*, 337 F. Supp. 2d at 73. The court noted that, several months after the Commission promulgated rule 300.2(m), defining "solicit," the Commission explained that, "[b]y using the term 'ask,' the Commission defined 'solicit' to require some affirmative verbalization or writing, thereby providing members of Congress, candidates and committees with an understandable standard." Final Rules and Explanation and Justification for Contribution Limitations & Prohibitions, 67 Fed. Reg. 69928, 69942 (Nov. 19, 2002); *Shays*, 337 F. Supp. 2d at 74.

The district court found that the statutory term "solicit" is ambiguous and concluded, consequently, that the Commission's definition of "solicit" survives so-called *Chevron* step one analysis. *Id.* at 75. Turning to the Commission's definition of the term "direct," the court noted that the Commission "provided no dictionary definition that supports equating the term 'direct' with 'ask,'" *id.* at 76, but nonetheless found the statutory term to be ambiguous and held that the Commission's definition survives *Chevron* step one analysis. *Id.*

The district court then turned to *Chevron* step two analysis of the Commission's definition of "direct," in order to determine whether the Commission's definition "is based on a permissible construction of the statute." *Id.* at 76. The court found that the FEC's definition of

"direct" is not a permissible construction of the term as it is found in BCRA. The court explained: 'First, as discussed *supra,* the FEC's definition of the term 'direct' as meaning 'to ask' is a definition foreign to every dictionary brought before this Court. It is difficult to deem a construction permissible when it does not comport with any definition of the statutory term." *Id.* The court further held that the Commission's definition of "direct" to mean "to ask" "is not only out of line with the dictionary definition and common understanding of 'direct,' but also renders the term superfluous, providing another reason for finding that the Commission's construction is impermissible and entitled to no deference under the *Chevron* analysis." *Id.* at 77 (footnote omitted).

Having invalidated the Commission's definition of "direct" under *Chevron* step two analysis, the court then turned to the definition of "solicit." The court began by noting that:

> one of the dictionary definitions of the word ["solicit"] is "to ask," which makes the Commission's construction permissible on its face under *Chevron* step two. However, the Court also asks at this stage whether "the Commission's interpretation of ["solicit"] is reasonable 'in light of the language, legislative history, and policies of the statute.'"

Id. at 78 (quoting *Republican Nat'l Comm. v. Federal Election Commission,* 76 F.3d 400, 406 (D.C. Cir. 1996). The court continued:

> Given that the aim of the statutory provision is "to put a stop" to the national political parties' involvement with nonfederal money, as well as the danger of corruption and the appearance of corruption that arose from that interaction in the past, it is clear to the Court that Congress intended that the term "solicit" would cover conduct beyond "ask[ing]" for nonfederal donations to be given to other entities.

Id. The court explained further:

> The purpose of Title I of BCRA is to divorce national political parties, as well as candidates for federal office and federal officeholders, from the nonfederal money business. To permit such individuals and entities to funnel nonfederal money into different organizations by simply not "asking" the donors to do so, but using more nuanced forms of solicitation, would permit conduct that would render the statute largely meaningless.

Id. at 79. The court concluded:

> These facts make it is clear that Congress intended for "solicit" to encompass more than just affirmative oral or written requests for nonfederal donations, and that to permit the term "solicit" to be limited by the Commission's definition would "unduly compromise[ ] the Act's purposes" and "create the potential for gross abuse." *Orloski,* 795 F.2d at 164, 165. The Court observes that if Congress

had intended to cover only express requests for nonfederal donations, it could have used the word "ask" in the statute.

Id. (footnotes omitted).

Having found the Commission's definitions of both "solicit" and "direct" invalid under *Chevron* analysis, the district court concluded by noting that the Commission has, in the context of corporation and labor organization fundraising, defined the term "solicit" more broadly without creating vagueness concerns, and expressed its confidence that the Commission could likewise do so in the soft money context. *Id.* at 80.

B. The D.C. Circuit Court of Appeals in *Shays* Invalidated Definitions of "Solicit" and "Direct" on *Chevron* One Grounds

The Commission appealed the district court's decision with regard to the definitions of "solicit" and "direct." *See Shays*, 414 F.3d 76, 102–07 (D.C. Cir. 2005). Like the district court, the D.C. Circuit began its analysis by acknowledging that "one of BCRA's main objectives is to shut down the so-called 'soft money' system whereby political parties employed funds outside FECA's controls to finance political activities related to federal elections." *Id.* at 102. The court explained that the Commission has defined both "solicit" and "direct" to mean "to ask," and reasoned that "[w]hether this interpretation is reasonable depends on the meaning of 'ask.'" *Id.* at 103. In proceeding with its inquiry, the court assumed the "regulations mean what the FEC's official explanation says they do, i.e., that the FEC definitions require an explicit direct request for money — an interpretation FEC counsel refused to disavow at oral argument." *Id.* at 105.

The Court of Appeals explained that while the district court had invalidated the definitions of "solicit" and "direct" under *Chevron* step two analysis, the Court of Appeals was locating its holding under *Chevron* step one analysis. *Id.* The court reasoned:

> Here, even setting context aside, we think "solicit" (if not also "direct") more naturally connotes an indirect request than does "ask," at least in the narrow sense of "asking" that the FEC's rule employs. To give an example, a charity brochure on starving children might well "solicit" though it doesn't "ask" in the sense of "calling for an answer." *Cf. Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223, 112 S. Ct. 2447, 120 L.Ed.2d 174 (1992) (considering it "evident" that the term "solicitation of orders" "includes, not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order").

Id. The court concluded: "we find the FEC's narrow interpretation of that term (as well as "direct") implausible." *Id.* The court continued forcefully:

> The FEC's definitions fly in the face of this purpose because they reopen the very loophole the terms were designed to close. Under the Commission's interpretation, candidates and parties may not spend or receive soft money, but apart from that restriction, they need only avoid explicit direct requests. Instead,

> they must rely on winks, nods, and circumlocutions to channel money in favored directions — anything that makes their intention clear without overtly "asking" for money. Simply stating these possibilities demonstrates the absurdity of the FEC's reading. Whereas BCRA aims to shut down the soft money system, the Commission's rules allow parties and politicians to perpetuate it, provided they avoid the most explicit forms of solicitation and direction.

Id. at 106.

The Court of Appeals pointed to two further considerations as evidence that the FEC's definitions violate Congressional intent. First, the court noted that whereas Congress explicitly replaced *Buckley*'s "magic words" standard with "more robust standards for communication oriented towards elections," the FEC employed a "magic words"-like approach to defining "solicit" and "direct." *Id.* The court reasoned:

> If imaginative advertisers are able to make their meaning clear without employing express terms like "vote for" and "vote against," savvy politicians will surely be able to convey fundraising desires without explicitly asking for money. We see little reason why Congress would have written BCRA to allow the latter practice while stamping out the former.

Id.

Second, the Court of Appeals, like the district court, noted that the Commission has long construed the term "solicit," in the context of corporate and labor organization fundraising, as covering indirect requests. This background reinforced the court's sense "that Congress anticipated a similarly broad construction of that term here." *Id.* The Court of Appeals concluded:

> For all these reasons, we hold that Congress has clearly spoken to this issue and enacted a prohibition broader than the one the FEC adopted. In context, BCRA's terms "solicit" and "direct" cover indirect requests. Because the FEC's rule, according to the Commission's own explanation, does not, we shall affirm its invalidation.

Id. at 107.

V. Definition of "To Solicit" (11 C.F.R. § 300.2(m))

The Commission proposes a revised definition of the term "to solicit," as well as several alternative definitions. We support the Commission's proposed definition, with modifications discussed below. We oppose the alternative definitions set forth in the NPRM.

A. Proposed Revised Definition of "To Solicit"

In order to comply with the district and appellate court decisions in *Shays*, the Commission has proposed to revise the definition of "to solicit" to read as follows:

> For the purposes of part 300, to *solicit* means to ask, suggest, or recommend that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether it is to be made or provided directly or through a conduit or intermediary. A solicitation is a written or oral communication, whether explicit or implicit, construed as a reasonable person would understand it in context. A solicitation does not include merely providing information or guidance as to the requirement of particular law.

67 Fed. Reg. at 56606. By so defining the term:

> the Commission seeks to clarify that to "solicit" covers not only communications that *explicitly and directly* request contributions or donations, but also communications that *implicitly or indirectly* attempt to motivate another person to make a contribution or donation and also covers all such communications regardless of whether they use certain "magic words."

67 Fed. Reg. at 56600 (emphasis in original).

Under this revised definition, the Commission maintains that "[a] solicitation must involve an affirmative verbalization (whether written or oral)," and "a communication is a solicitation only if a reasonable person would understand the communication to be asking another person to make a contribution or donation." *Id.* The Commission emphasizes in the NPRM that "the reasonable person standard is an objective test that does not turn on subjective interpretations of a communication," and explains further that "focusing on the plain meaning of the words used in the communication as reasonably understood leaves the person making the communication with substantial control over whether the communication comes within the definition of 'solicit.'" *Id.* at 56601.

We support this proposed definition of "to solicit" — *with the addition of the "conduct" element proposed by the Commission in section II-C of the NPRM (discussed below).* The proposal, as modified, would comply with the district and appellate court decisions in *Shays* by properly effectuating congressional intent, reducing opportunities for circumvention of BCRA's soft money ban, and reducing the actuality and appearance of corruption. As noted in the NPRM, the Commission's proposed employment of a "reasonable person" standard to interpret the plain meaning of the words used will provide sufficient guidance to candidates, political committees and their agents.

The Commission notes that the "solicit" definition's list of verbs, "ask, suggest, or recommend," is "not intended to be comprehensive but, . . . is merely intended to make clear that 'to solicit' encompasses both direct and indirect requests for contributions or donations." 67 Fed. Reg. at 56601. The Commission seeks comment on whether additional terms should be

added to the definition, or whether one or more of the terms included in the proposed definition should be removed. *Id.* The verbs "ask, suggest, or recommend" sufficiently illustrate the types of direct and indirect communication that fall within the scope of BCRA's soft money restrictions.

B. Alternative Proposals

In addition to the specific definitional language proposed in section II-A of the NPRM, the Commission proposes five alternatives. For the reasons set forth below, we oppose adoption of all five alternatives.

1. Eliminate "Reasonable Person" Standard From Proposed Definition

As its first alternative, the Commission seeks comment on whether to modify the proposed definition of "to solicit" described above by not including an explicit "reasonable person" standard. This alternative would revise the second sentence of the proposed definition above to provide that "a solicitation is a written or oral communication, whether explicit or implicit." 67 Fed. Reg. at 56601.

Eliminating the "reasonable person" standard would arguably convert the regulation from an objective test to an intent-based test, adding ambiguity to the definition and unnecessarily complicating enforcement of BCRA's soft money solicitation restrictions. Eliminating the "reasonable person" standard would provide alleged violators of BCRA's soft money solicitation restrictions with the opportunity to argue — no matter how unreasonable the argument — that they did not intend to solicit soft money, and that their lack of intent absolves them of any guilt. For these reasons, we do not believe this alternative would comply with the court's decision in *Shays* and we oppose this alternative.

2. Eliminate Verbs "Suggest" and "Recommend" From Proposed Definition

As a second alternative, the Commission seeks comment on whether, instead, to retain the current definition of "to solicit," including only the verb "to ask" and omitting the verbs "suggest" and "recommend," and to modify the current definition to make clear that the regulation applies to both explicit and implicit requests. Furthermore, alternative two would eliminate the "reasonable person" standard from the proposed modified definition. 67 Fed. Reg. at 56601.

We strongly oppose this alternative. "Solicit" does not mean simply to "ask," but instead more generally denotes "to seek eagerly or actively," "to seek to affect," "to induce or persuade," and "to try to find, obtain, or acquire."[2] "Ask," by contrast, is commonly understood to

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[2] Webster's Third New International Dictionary 2169 (2002); 15 Oxford English Dictionary 966 (2d ed. 1989); *see also* Black's Law Dictionary 1398 (7th ed. 1999) (defining "solicitation" as, *inter alia*, "seeking to obtain something"); *see, e.g., Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 477 (1992) (relying on dictionary definition to discern "natural reading" of statute and "normal meaning" of operative term).

encompass only those communications in which the speaker "call[s] upon for an answer" or "put[s] a question about."[3] In using "solicit" rather than "ask," Congress expressed its intent to capture within BCRA's scope not only communications that involve an express request to "please give," but also those with more subtle diction that, consistent with the plain meaning of "solicit," suggest, encourage, induce, recommend, or urge a contribution of money.[4]

Alternative two wholly fails to comply with the court order in *Shays*. The district court in *Shays* found it clear that that "Congress intended that the term 'solicit' would cover conduct beyond 'ask[ing]' for nonfederal donations to be given to other entities." 337 F. Supp. 2d at 78. The district court explained further: "To permit . . . individuals and entities to funnel nonfederal money into different organizations by simply not 'asking' the donors to do so, but using more nuanced forms of solicitation, would permit conduct that would render the statute largely meaningless." *Id.* at 79. The district court concluded:

> These facts make it clear that Congress intended for "solicit" to encompass more than just affirmative oral or written requests for nonfederal donations, and that to permit the term "solicit" to be limited by the Commission's definition would "unduly compromise[ ] the Act's purposes" and "create the potential for gross abuse." *Orloski,* 795 F.2d at 164, 165. The Court observes that if Congress had intended to cover only express requests for nonfederal donations, it could have used the word "ask" in the statute.

Id. (footnotes omitted).

The court in *Shays* ordered the Commission to rewrite its definition of "solicit" to encompass communications beyond those which "ask" for contributions. For these reasons, we do not believe this alternative would comply with the court's decision in *Shays* and we oppose this alternative.

3. Retain Current Definition, But Revise E&J

As a third alternative, the Commission proposes to not change the current definition of "solicit" at all but, instead, merely revise the rule's E&J to clarify that the current definition embodies the following two principles: in order to qualify as a solicitation, "a communication (1) must involve an affirmative verbalization (whether written or oral) and (2) must be reasonably

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[3] Webster's Third New International Dictionary 128 (2002); *see also* 1 Oxford English Dictionary 687 (2d ed. 1989) ("[t]o call for an answer"; "to put a question to"; "to question"); Random House Dictionary of the English Language 123 (2d ed. 1987) ("to put a question to; to inquire of").

[4] *See* Webster's Third New International Dictionary 128 (2002) (noting that "solicit, in modern use" and in contrast to "ask," "commonly means no more than calling attention to one's wants or desires"); *see especially Wis. Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992) (Scalia, J.) (ordinary meaning of "solicitation" "includes, *not just explicit verbal requests . . ., but also any speech or conduct that implicitly invites*" the desired result; thus, "a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in 'solicitation' *even if he does not come right out and ask* the retailer to buy some") (emphasis added).

understood in context to be asking another person to make a contribution or donation." 67 Fed. Reg. at 56601.

For the reasons stated above regarding alternative two, we strongly oppose this third alternative of merely rewriting the E&J for the invalidated rule. Both the district court and the court of appeals in *Shays* found the current definition of "solicit" to be impermissible under *Chevron* analysis. The courts' decisions were based not on the inadequacy of the Commission's E&J for the rule but, rather, on the inadequacy of the definitional language itself — specifically, the definition's limited application to communications that "ask" for a soft money donation.

The district court in *Shays* found that the existing definition "unduly compromise[s] the Act's purposes" and "create[s] the potential for gross abuse." *Shays*, 337 F. Supp. 2d at 79. The district court further observed that "if Congress had intended to cover only express requests for nonfederal donations, it could have used the word 'ask' in the statute." *Id.*

The court of appeals found that the Commission's current definitions of "solicit" and "direct" "fly in the face" of Congress' purposes for enacting the BCRA soft money ban. *Shays*, 414 F.3d at 106. The court of appeals further found that the current definition of "solicit" allows candidates and parties to "rely on winks, nods, and circumlocutions to channel money in favored directions — anything that makes their intention clear without overtly 'asking' for money." *Id.* According to the court of appeals, "[s]imply stating these possibilities demonstrates the absurdity of the FEC's reading" of the statutory term "solicit." *Id.* The court of appeals concluded: "Congress has clearly spoken to this issue and enacted a prohibition broader than the one the FEC adopted. In context, BCRA's terms 'solicit' and 'direct' cover indirect requests. Because the FEC's rule, according to the Commission's own explanation, does not, we shall affirm its invalidation." *Id.* at 107.

As plainly stated by the district and appellate courts in *Shays*, the current regulation defining "solicit," 11 C.F.R. § 300.2(m), is impermissibly narrow. The Commission's proposal to merely revise the E&J for the current rule fails to address the concerns of the district and appellate courts. For these reasons, we do not believe this alternative would comply with the court decisions in *Shays* and we oppose this alternative.

4. Adopt a Rule Narrower Than Current Invalidated Rule, Limited to Explicit Requests For Contributions

As a fourth alternative, the Commission asks whether, in the event the Commission prevails in its requested *en banc* rehearing before the court of appeals, it should adopt a definition "that limits solicitations to explicit requests for contributions or donations." 67 Fed. Reg. at 56601.

First, we note that the Commission's request for rehearing *en banc* in *Shays* has been denied, so the premise of this alternative is moot. Beyond that, alternative four proposes a definition of "solicit" even narrower than the current definition invalidated in the *Shays* litigation. For the reasons articulated by the district and appellate courts in the *Shays* litigation — namely, that both the plain and intended meaning of the statutory term "solicit" is broader

than the current definitional term "ask" — we oppose alternative four's further narrowing of the term "solicit." The fourth alternative definition of "solicit" would undermine the purpose, intent and plain meaning of Congress' soft money solicitation restrictions and would constitute an impermissible construction of the statute. For these reasons, we do not believe this alternative would comply with the court decisions in *Shays* and we oppose this alternative.

5. No Definition for "To Solicit"

The Commission's fifth alternative proposal is to repeal the current definition of "to solicit" at 300.2(m), and provide no replacement definition for the term — allowing the meaning of the term to "develop on a case-by-case basis through the advisory opinion and enforcement processes." 67 Fed. Reg. at 56602. The NPRM notes that several Commission regulations concerning corporate and labor organization activity use the terms "solicit" and "solicitation" without defining them. *Id.*

We oppose adoption of this alternative. The Commission has before it a proposed revised definition of "solicit" that would not only comport with the *Shays* court order, but would also provide valuable guidance to the regulated community and to the Commission itself for interpretation and enforcement of BCRA's soft money solicitation restrictions. Although, as recognized by the district and appellate courts in *Shays*, the term "solicit" has a commonly understood broad meaning, we see no reason the Commission should refrain from codifying this broad meaning through adoption of the definition proposed in this rulemaking.

C. Conduct

The Commission notes in the NPRM that the court of appeals in *Shays* found that "solicitations include indirect requests through conduct such as 'winks and nods.'" 67 Fed. Reg. at 56602 (quoting *Shays*, 414 F.3d at 104–05). The Commission further notes that:

> while the proposed definition retains the principle that a solicitation must involve an affirmative verbalization, it also takes into account the context in which the communication is made. Thus, words that would not by their plain meaning convey a solicitation, may in some contexts be reasonably understood as one when, for example, they are accompanied by "winks and nods." Similarly, words that *would* by their plain meaning normally be understood as a solicitation, may not constitute one when taken in context, for example, when the words are used as part of a joke or parody.

Id. "The Commission seeks comment on whether, in determining if a communication is a solicitation, it is appropriate to consider the non-verbal context of that communication." *Id.*

As recognized by the appellate court in *Shays*, solicitation includes not only verbal expressions, but also non-verbal expressions (*e.g.*, winks and nods). For this reason, BCRA, as interpreted by the appellate court, requires not only that the Commission consider the non-verbal context in which verbal communication occurs, but also that the Commission explicitly include in the definition of "to solicit" the "conduct" element proposed in the NPRM (discussed below).

If the Commission includes the non-verbal aspects of a communication in its definition of "to solicit," the Commission asks whether federal candidates, officeholders and committees will have adequate notice of the range of statements and actions that are covered by the definition. 67 Fed. Reg. at 56602. Given the commonly understood broad meaning of the term "solicit" — combined with the Commission's employment of a "reasonable person" standard and the Commission's guidance to the regulated community through this rulemaking — candidates, officeholders, and committees will have adequate notice of the scope of BCRA's restrictions on solicitation.

The Commission asks whether it should modify its proposed definition of "to solicit" by "including solicitations conveyed largely through conduct." 67 Fed. Reg. at 56602. This modification would result in a definition that would read, in operative part, as follows: "a solicitation is a written or oral communication or conduct, whether explicit or implicit, construed as a reasonable person would understand it in context." *Id.* We believe BCRA, as interpreted by the district and appellate courts in *Shays*, requires the inclusion of conduct in the definition of "to solicit." The inclusion of conduct in the definition of "to solicit" is necessary to prevent circumvention of the Act, as well as actual or apparent corruption.

The Commission explicitly seeks comment regarding the applicability of a conduct element in the context of a federal candidate or officeholder's appearance at nonfederal fundraising events. 67 Fed. Reg. at 56602. The Commission cites the three advisory opinions it has issued on this matter, Ad. Ops. 2003–03, 2003–05 and 2003–36, noting that the Commission has permitted attendance and participation by federal candidates and officeholders at fundraising events for nonfederal funds held by nonfederal candidates and political organizations, so long as the solicitations included, or were accompanied by, a disclaimer adequately indicating that the federal candidate or officeholder was only asking for federally permissible funds. 67 Fed. Reg. at 56602.

The first of these advisory opinions, Ad. Op. 2003–03, establishes a framework for applying BCRA's soft money restrictions to federal candidate and officeholder participation in state and local candidate fundraising events — but does so using the now-invalidated, impermissibly narrow definition of "to solicit." The latter two opinions, Ad. Ops. 2003–05 and 2003–36, employ this same invalidated framework in the context of professional association and 527 organization fundraisers, respectively. The Commission requests comment on "whether these advisory opinions, allowing attendance and limited participation at such functions, subject to various restrictions and disclaimer requirements, struck the proper balance." 67 Fed. Reg. at 56602.

In Ad. Op. 2003–03, the Commission said:

> By defining "to solicit" and "to direct" as "to ask," the regulations establish that a Federal candidate will not be held liable for soliciting funds in violation of section 441i(e) or section 300.62 of the regulations merely by virtue of attending or participating in any manner in connection with a fundraising event at which non-Federal funds are raised.

We believe these advisory opinions were incorrect to the extent that they concluded that a federal officeholder's "participating in any manner" in a fundraising event is *per se* not solicitation. For instance, "participation" at a nonfederal fundraiser, when publicized as a "featured guest," should constitute a solicitation, subject to the disclaimer requirements. We generally approve of the disclaimer framework established by the Commission in Ad. Op. 2003–03, based on the facts and circumstances that have existed and been considered by the Commission to date.[5]

D. Examples of Solicitations

The Commission notes in the NPRM that it has issued several advisory opinions explaining what would or would not constitute a solicitation of contributions to a corporation's separate segregated fund. *See* 67 Fed. Reg. 56603 (citing Ad. Ops. 2003–14, 2000–07, 1999–06, 1991–03, 1988–02, 1983–38, 1982–65, and 1979–13). The Commission characterizes these advisory opinions as:

> generally conclud[ing] that the mere publication of the activities conducted by an SSF was not in and of itself a solicitation if the publication did not encourage the recipient of the message to support the SSF, or if the information conveyed in the message did not facilitate the making of contributions to the SSF.

67 Fed. Reg. at 56603. Drawing on these advisory opinions and the principles expressed in them, the Commission is considering whether to include in either the rule itself, or in the E&J for the rule, specific examples of types of communications that *would* and *would not* constitute solicitations.

The proposed list of examples of communications that *would* constitute solicitations would be helpful in providing guidance to candidates and political committees, and should be incorporated into the final rule, subject to the modifications suggested below. The ninth example of communications that *would* constitute solicitations should specify that providing an addressed envelope and a reply card allowing contributors to select the dollar amount of their contribution or donation to the candidate, political party committee or organization is always a solicitation, regardless of the content of the written communication, because it already constitutes facilitation of the making of a contribution under 11 C.F.R. § 114.2(f)(2)(ii). The list of examples of communications that *would* constitute solicitations should also specify that providing the address of a Web page that is specifically dedicated to facilitating the making of contributions or

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[5] The Commission could not agree on whether use of a federal candidate's name in a position not specifically related to fundraising (*e.g.*, "honorary chair") on a solicitation not signed by the federal candidate necessitates the inclusion of a disclaimer. As stated in our written comments on draft Ad. Op. 2003–03, we believe any authorized use of a federal candidate's or officeholder's name in a written fundraising solicitation should constitute a solicitation subject to the restrictions of 2 U.S.C. § 441i(e)(1) (and thus to the disclaimer requirements) — regardless of whether the federal candidate or officeholder signs the solicitation. *See* Comments of the Campaign Legal Center on Draft Advisory Opinion 2003–03, 2 (April 22, 2003); Comments of Common Cause and Democracy 21 on Draft Advisory Opinion 2003–03, 2 (April 22, 2003); Comments of the Center for Responsive Politics on Draft Advisory Opinion 2003–03, 1 (April 22, 2003); *available at* http://www.fec.gov/aos/2003AOs.shtml.

donations online, or a phone number that is specifically dedicated to facilitating the making of contributions or donations, would always constitute a solicitation.

Regarding the list of examples of communications that *would not* constitute solicitations, the Commission should be certain to describe the context in which the hypothetical communications occur, making clear that the proposed examples are not solicitations, in part, because the communications are not made at a fundraising event or in the context of a written general solicitation (*e.g.*, a fundraising letter by a 527 organization raising funds for state political activity but incorporating endorsements by federal officeholders). Elements of conduct and context may make the difference between a communication that is and is not a solicitation. As noted above, *federal candidate or officeholder participation in a nonfederal fundraising event (other than a state, district or local party fundraising event) as, e.g., a "featured guest," should be deemed a solicitation by that candidate.* Similarly, any federal candidate or officeholder participation in a nonfederal fundraising direct mail campaign should be deemed a solicitation by that candidate.

As a general matter, differences between solicitations by federal candidates to the general public and solicitations by a SSF to corporate employees or labor organization members are not so significant as to make inappropriate the application of the principles derived from the SSF advisory opinions to the candidate solicitation context.

E. Corporate and Labor Organization Activity

The Commission seeks comment regarding whether it should leave the term "to solicit" undefined in the regulations governing corporate and labor organization activity or, in the alternative, incorporate this NPRM's proposed definition of "to solicit" into the corporate and labor organization regulations in 11 C.F.R. part 114. Although the corporate and labor organization regulations in 11 C.F.R. part 114 might benefit from promulgation of a rule defining "to solicit" in that context, promulgation of such a rule has not been ordered by the district court in *Shays*. Given the large number of rules ordered to be rewritten by the district court in *Shays*, and the small number of rules that have yet been rewritten, we think the Commission need not promulgate a rule on corporate and labor organization solicitation at this time.

F. Foreign Nationals

We urge the Commission to continue its practice of using the same definition of "to solicit" for the regulations regarding both nonfederal funds and the foreign national prohibitions, rather than promulgating a new definition for the context of FECA's foreign national prohibitions at this time.

VI. Definition of "To Direct" (11 C.F.R. § 300.2(n))

In response to the court order in *Shays* invalidating the Commission's current definition of "to direct," the Commission proposes to revise 11 C.F.R. § 300.2(n) by defining "to direct" to mean:

> to guide a person who has expressed an intent to make a contribution, donation, transfer of funds, or otherwise provide anything of value, by identifying a candidate, political committee or organization, for the receipt of a contribution, donation, transfer of funds, or thing of value. The contribution, donation, transfer, or thing of value may be made or provided directly or through a conduit or intermediary.

67 Fed. Reg. at 56604.

This proposed revision replaces the current definition's verb "to ask," with the more appropriate verb "to guide." Unlike the current definition of "to direct," which is subsumed under the definition of "to solicit" and therefore rendered superfluous, this proposed definition of "to direct" applies to distinctly different actions than the proposed definition of "to solicit." Under the proposed definition of "to direct":

> The act of direction would consist of providing the contributor with the identity of an appropriate recipient for the contribution or donation. These actions are not covered by the term "to solicit" because soliciting, under both the current and the proposed definition, is an attempt to motivate a person to contribute or donate, but would not apply to a person who merely provides information about possible recipients to another person who has already expressed intent to contribute or donate.

67 Fed. Reg. at 56604.

We believe that the phrase "who has expressed an intent" should be deleted from the proposed definition. Including that phrase in the definition impermissibly narrows it to apply only when the person receiving the direction has affirmatively stated a prior intent to make a contribution. Further, the proposed definition with the limitation included is contrary to the district court's opinion in *Shays*. The court found the phrase "to guide" was a permissible definition of the statutory term "to direct," but in so doing, the court did not limit the application of the term only to situations where an affirmative statement of intent to contribute has already been made. *See Shays*, 337 F. Supp. 2d at 76.

The proposed definition, as so modified by deleting the expression-of-intent requirement, would reduce the opportunities for circumvention of BCRA's soft money restrictions and provide sufficient guidance to candidates and political committees.

The Commission seeks comment on whether providing a person who has expressed intent to contribute or donate with a long list of candidates or committees constitutes direction. The Commission specifically asks whether there is "a point at which a list might identify so many candidates, political committees, or organizations from which the person may choose that the list would no longer constitute 'direction.'" 67 Fed. Reg. at 56605. Any provision of a list of candidates or committees for the purpose of guiding a contribution should be deemed "direction."

As an alternative to the proposed definition, the Commission is considering leaving the term "to direct" undefined. We oppose doing so. The Commission has before it an acceptable definition of "to direct" that will provide clarity and guidance to aid the regulated community's compliance with, and the Commission's enforcement of, BCRA's soft money restrictions. We see no reason the Commission should forego adopting the proposed definition in this rulemaking, and there is no reason to define the term "solicit" but not define the term "direct."

Finally, it would be inconsistent with the purposes and intent of BCRA, and fail to comply with the statute, to limit the definition of "direct" to the standards of the Commission's earmarking regulations — which have been interpreted to require some form of control over the funds. Such a definition is far too narrow a restriction to impose on Congressional language that broadly prohibits federal candidates and party committees from participating in the raising or spending of nonfederal funds. Furthermore, as noted in the NPRM, a definition of "to direct" that parallels the earmarking provisions would be subsumed under the definition of "to solicit" and, consequently, would not comply with the court order in *Shays*.

VII. Conclusion

For the reasons set forth above, we urge the Commission to adopt, with the recommended amendments set forth above, the proposed regulations defining "to solicit" and "to direct," in order to comply with the district court decision in *Shays* and to preserve the integrity of BCRA's restrictions on federal candidate and party committee use of soft money.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*	*/s/ Lawrence M. Noble*
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