February 8, 2010

By Electronic Mail (SolicitationShays3@fec.gov)

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

Re: Comments on Notice 2009-26: Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events

Dear Ms. Rothstein:

These comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to the Commission's Notice of Proposed Rulemaking (NPRM) 2009-26, published at 74 Fed. Reg. 64016 (December 7, 2009), seeking comment on proposed revisions to its regulations regarding participation by federal candidates and officeholders at nonfederal fundraising events under 11 C.F.R. § 300.64.

For the reasons we set forth below, we support Alternative 1 as the best means of complying with the D.C. Circuit Court's decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*").

The Campaign Legal Center requests the opportunity to testify at the hearing to be held in this rulemaking.

I. Background

As noted in the NPRM, the Bipartisan Campaign Reform Act of 2002 ("BCRA") provides that federal candidates and officeholders may not "solicit, receive, direct, transfer or spend" funds unless the funds comply with the amount limitations and source prohibitions of the Federal Election Campaign Act ("FECA"). *See* 2 U.S.C. § 441i(e)(1); *see also* NPRM 2009-26, 74 Fed. Reg. at 64017. Notwithstanding this restriction, BCRA also states that federal candidates and officeholders are permitted to "attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party." 2 U.S.C. § 441i(e)(3).

Despite clear congressional intent to prohibit—and clear statutory language prohibiting—federal candidate and federal officeholder soft money fundraising in connection with state and local elections, the FEC in its 2002 rulemaking to implement these provisions:

> [C]oncluded that Section 441i(e)(3) was a total exemption from the general solicitation ban. Under the Commission's regulation, Federal candidates and officeholders were permitted to attend, speak, and appear as featured guests at State, district, and local party committee fundraising events "without restriction or regulation."

See NPRM 2009-26, 74 Fed. Reg. at 64017; *see also* Final Rules and Explanation and Justification on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49108 (July 29, 2002); *see also* 11 C.F.R. § 300.64.

Section 300.64 of the Commission's rules was challenged in *Shays III*, and the U.S. Court of Appeals for the D.C. Circuit invalidated the regulation, concluding that the FEC-created regulatory exemption from the general soft money solicitation ban "allows what BCRA directly prohibits." *Shays III*, 528 F.3d at 933. The D.C. Circuit Court explained:

> Contrary to the Commission's position, section 441i(e)(3)—"a candidate or an individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party"—does nothing to make the statute's prohibition on soft-money solicitations ambiguous. Rather, 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. … Reading section 441i(e)(3) as allowing solicitation in light of the clear differences between it and other sections of the statute that expressly allow solicitation "inverts the usual canon that when Congress uses different language in different sections of a statute, it does so intentionally."

Id. at 933-34 (quoting *Fla. Pub. Telecomms. Ass'n v. FCC*, 54 F.3d 857, 860 (D.C.Cir.1995)).

The Commission proposes three alternative amendments to its regulations to comply with the *Shays III* decision.

II. Alternative 1 is the Simplest, Most Straightforward Means of Complying with the *Shays III* Decision.

Alternative 1 would, "[f]irst and foremost," delete paragraph (b) of 11 C.F.R. § 300.64. It is that paragraph which allows Federal candidates and officeholders to speak at State, district, and local party committee fundraising events without restriction or regulation. *See* NPRM 2009-26, 74 Fed. Reg. at 64019. By deleting it, the revised rule would make clear that the general prohibition on soft money solicitation applies to state party committee fundraising events.

This is further clarified by the other changes proposed in Alternative 1. It would amend the introductory paragraph of Section 300.64 to provide that:

> A Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including, but not limited to, a fundraising event at which funds outside the limits and prohibitions of the Act or Levin funds are raised. Federal candidates and individuals holding Federal office who solicit, receive, direct, transfer, or spend funds at any such fundraising event shall only do so in accordance with 11 CFR 300.31(e)(2), 300.61, and 300.62.

Id. at 64025 (Alternative 1 Proposed 11 C.F.R. § 300.64(a)).

Finally, Alternative 1 would retain the second paragraph of the current rule, 11 C.F.R. § 300.64(a), which allows state, district or local committees of a political party to "advertise, announce, or otherwise publicize" that a federal candidate will attend, speak, or be a featured guest at a fundraising event. *Id.* (Alternative 1 Proposed 11 C.F.R. § 300.64(b)). With respect to such publicity, the Commission makes clear in the NPRM that:

> [T]he purpose of this paragraph is to clarify that State parties are free to advertise, announce or otherwise publicize, including in pre-event invitations, a Federal candidate or officeholder's attendance, speaking, being a featured guest at a State, district, or local party committee fundraising event <u>as long as that publicity does not constitute a solicitation of funds outside the limits and prohibitions of the Act</u> by the Federal candidate or officeholder.

NPRM 2009-26, 74 Fed. Reg. at 64019-20. The Commission further makes clear that

> Although the text of the rule would not address whether Federal candidates and officeholders may serve on "host committees" for a party fundraising event at which funds outside the prohibitions and limitations of the Act are raised or may sign or otherwise make a solicitation in connection with a party fundraising event at which such funds are raised, such activities would continue to be prohibited.

Id. at 64020.

We support Alternative 1 as the simplest, most straightforward means of complying with the *Shays III* decision and effectively implementing 2 U.S.C. § 441i(e)(3).

III. Alternatives 2 and 3 Are Both Permissible Means of Complying with the *Shays III* Decision.

By contrast to Alternative 1, Alternatives 2 and 3 apply not only to federal candidate participation in state, district and local party fundraising events, but also to federal candidate participation in any other nonfederal fundraising events. The broader scope of regulatory amendment in Alternatives 2 and 3 is not required by the *Shays III* decision, but we do not oppose it.

We do take this opportunity, however, to state our opposition to the Commission's Advisory Opinion 2005-10, in which the Commission opined that a federal officeholder's solicitation in connection with a state ballot measure election is not a solicitation "in connection with any election other than an election for Federal office" under 2 U.S.C. § 441i(e)(1)(B)—and, therefore, is not subject to BCRA's soft money ban. Advisory Opinion 2005-10 conflicts with the plain meaning of the statute and with common sense. A state ballot measure election is an "election." Advisory Opinion 2005-10 should be superseded by clear statement either in the regulation that results from this rulemaking, or in the accompanying Explanation and Justification.[1]

Alternative 2 would treat federal candidate participation in all nonfederal fundraising events identically—permitting federal candidates to attend, speak, or be a featured guest at such events, but prohibiting such candidates from soliciting nonfederal funds. Under Alternative 2, the Commission employs the reasoning and conclusions of Advisory Opinions 2003-03 (Cantor) and 2003-36 (Republican Governors Association) to provide guidance to candidates as to how they might participate in such events, as well as the publicity for such events, without violating the general prohibition on their solicitation of nonfederal funds. In short, Alternative 2 would permit federal candidates to use written or oral disclaimers to limit the scope of their solicitations at events where nonfederal funds are being raised by others. Further, Alternative 2 would permit federal candidates to authorize the use of their names in publicity materials for such events, so long as (1) the publicity materials do not contain a solicitation for nonfederal funds, or (2) in the event that the publicity materials do contain a solicitation for nonfederal funds, the federal candidate is not identified as serving in a position specifically related to fundraising and the solicitation is accompanied by a statement that the federal candidate is not making the solicitation. *See* NPRM 2009-26, 74 Fed. Reg. at 64025 (Alternative 2 Proposed 11 C.F.R. § 300.64). We do not oppose Alternative 2.

In contrast to Alternative 2, Alternative 3 does not treat federal candidate participation in all nonfederal fundraising events identically. Instead, Alternative 3 differentiates federal candidate participation in state, district and local party committee fundraising events from such candidate's participation in other nonfederal fundraising events. The Commission explains:

> When a Federal candidate or officeholder allows his or her name to be used to increase the number of donors and amount of donations, that helps to raise funds—potentially funds outside the limitations and prohibitions of the Act. Participating in non-Federal fundraisers in this way would constitute an implicit ask, request, or recommendation that individuals attend and donate funds as part of the fundraising event, and thus would be prohibited for Federal candidates and officeholders to the extent the event seeks to raise funds outside the limitations and prohibitions of the Act.
>
> Under this reading, 2 U.S.C. 441i(e)(3) does, indeed, provide a limited exception to the Act's fundraising restrictions—specifically, for Federal candidates and

[1] For a more thorough explanation of our opposition to Advisory Opinion 2005-10, *see* Comments of the Campaign Legal Center on Advisory Opinion Request 2005-10 (July 27, 2005), *available at* http://saos.nictusa.com/saos/searchao?SUBMIT=ao&AO=188&START=413230.pdf.

> officeholders who appear as featured guests at non-Federal fundraising events for State, district, or local party committees. Importantly, given 2 U.S.C. 441i(e)(3)'s specific focus on only State, district, and local party committee events, this exception would not extend to other election-related non-Federal fundraising events. As such, proposed paragraph (b)(1)(i) of Alternative 3 provides that a Federal candidate or officeholder may attend, speak, or be a featured guest at a State, district or local party fundraiser. By contrast, proposed paragraph (c) provides that a Federal candidate or officeholder may attend a non-party, non-Federal fundraising event and speak at such an event (so long as the speech does not itself constitute a solicitation), but may not consent to the use of his or her name or likeness in publicity for non-party, non-Federal events. This aspect of the proposal is intended to prohibit activities by Federal candidates and officeholders in connection with non-Federal fundraising events that constitute the solicitation of funds outside the limits and prohibitions of the Act, which would violate the Act.

NPRM 2009-26, 74 Fed. Reg. at 64023 (emphasis added).

NPRM 2009-26 suggests that, in the Commission's view, the principal difference between Section 300.64 as proposed in Alternatives 2 and 3 seems to be as follows. Under Alternative 2, a federal candidate could authorize the entity holding the fundraiser to identify that candidate in pre-event publicity materials, so long as the federal candidate was not identified as serving in a fundraising capacity and a disclaimer were included to make clear that the federal candidate was not soliciting nonfederal funds. Under Alternative 3, by contrast, a federal candidate simply "may not consent to the use of his or her name or likeness in publicity for non-party, non-Federal events," *id.*, under the theory that any such publicity material would constitute an implicit solicitation for nonfederal funds.

Although it is not discussed in the NPRM, we note that the proposed regulatory language for Alternative 3 omits the proposed language in Alternative 2 pertaining to the use of disclaimers by federal candidates at fundraising events to make clear such candidates are not soliciting nonfederal funds. In the event that the Commission adopts Alternative 3, the Commission should make clear either in the regulation or in the Explanation and Justification that such a disclaimer is required in order to prevent the solicitation of nonfederal funds.

We do not oppose the broader restrictions on federal candidate participation in nonfederal fundraising event publicity that would result from the adoption of Alternative 3—*i.e.*, the establishment of a presumption by the Commission that federal candidate participation in nonfederal fundraising event publicity constitutes a solicitation—but nor do we believe that the statute requires such a distinction between different types of nonfederal fundraising events. As the D.C. Circuit Court noted in *Shays III*, 2 U.S.C. § 441i(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." *Shays v. FEC*, 528 F.3d at 933. Put differently, Section 441i(e)(3) "merely clarifies" that attending, speaking, or being a featured guest at an event does not, in itself, constitute a "solicitation" of nonfederal funds. The statute is silent as to whether a candidate's

authorization to be identified in publicity materials for a nonfederal fundraising event, in itself, constitutes a "solicitation" of nonfederal funds.

In short, we think Alternative 1 is the best and clearest way to respond to the *Shays III* decision. If the Commission determines to reject Alternative 1, we have no strong objection to either Alternative 2 or 3, and we believe that either Alternative would represent a permissible policy choice by the Commission.

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer	*/s/ J. Gerald Hebert*
Fred Wertheimer Democracy 21	J. Gerald Hebert Paul S. Ryan Campaign Legal Center

Donald J. Simon
Sonosky, Chambers, Sachse
Endreson & Perry LLP
1425 K Street, NW – Suite 600
Washington, DC 20005

Counsel to Democracy 21

Paul S. Ryan
The Campaign Legal Center
215 E Street, NE
Washington, DC 20002

Counsel to the Campaign Legal Center