



Republican National Committee

Counsel's Office

February 8, 2010

VIA ELECTRONIC MAIL

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

Re: Comments on NPRM Regarding Participation by Federal Candidates and
Officeholders at Non-Federal Fundraising Events, Fed. Reg. No. 233, 64016
(Dec. 7, 2009)

Dear Ms. Rothstein:

The Republican National Committee ("RNC") submits the following comments on the Notice of Proposed Rulemaking referenced above ("NPRM"). The NPRM proposes changes to the rules governing Federal candidates' and officeholders' participation in non-Federal fundraising events in accordance with the D.C. Circuit's Opinion in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"). We thank the Commission for the opportunity to comment in writing on this Proposed Rulemaking, and we request the opportunity to testify at the Commission's March 10, 2010 hearing.

I. Introduction

As the governing body of the Republican Party, the RNC works closely with state, district and local party committees throughout every election cycle to support candidates for state and local office. Every Republican state party chairman is a member of the RNC, and the state and local party committees form the backbone of our collective efforts to elect Republican candidates at every level of government. The Proposed Rulemaking does not bear directly on the

RNC, but it will have substantial consequences for Republican state parties and their affiliated district and local parties, and we write to represent their interests.

Federal candidates' and officeholders' participation at state and local party events, and state and local candidate events, has been an integral part of the fundraising effort for state and local parties and candidates for years. While the regulations at issue are primarily aimed at governing the activity of Federal candidates and officeholders, the Commission's final rule in this area will have very real financial, administrative and legal consequences for the ways in which state and local parties and candidates conduct their business trying to raise money and promote their message and candidates. Regulating too strictly would place a heavy administrative and financial burden on state and local parties and would chill grassroots political activity and speech.

Accordingly, we strongly urge the Commission to adopt rules that go no further than necessary under *Shays III* in restricting Federal candidate and officeholder participation at non-Federal fundraising events, and that offer precise guidance on the acceptable and legal bounds of their involvement. In particular we recommend that the Commission adopt rules that reflect the following principles:

- The rule governing pre-event publicity for non-Federal fundraising events is crucially important and, although not addressed in *Shays III*, is of much more practical significance than the rule regarding speaking at these events.
- A "solicitation" cannot be imputed based on motivation or based on the appearance of one's name in a communication.
- The rules must be sufficiently and appropriately tailored based on the government interest they aim to further.
- Clarity and workability are extremely important to state, district and local parties.
- The rules must comply with *Shays III* by prohibiting Federal candidate or officeholder solicitation of non-Federal money but must not go further by banning speech that does not constitute a solicitation.
- After *Shays III*, there is no basis for treating non-Federal non-party events differently than non-Federal party events.

We believe that Alternative 2 comes closest to reflecting these principles but requires some modification as discussed below.

II. The RNC Recommends Adoption of Alternative 2 with Modifications.

Alternative 2 provides the most comprehensive, workable and consistent set of standards for Federal candidate and officeholder involvement in non-Federal fundraising events. This Alternative correctly widens the scope of application to Federal candidate and officeholder participation in *all* non-Federal fundraising events without stepping outside the bounds of the *Shays III* court's decision. Moreover, although we have some suggestions regarding Alternative 2's approach to pre-event publicity, the RNC believes this Alternative's guidelines appropriately

aim to clarify and synchronize the guidance set forth in the Commission's previous advisory opinions and decisions on this issue.

A. *Alternative 2 Appropriately Addresses Non-Party Non-Federal Fundraising Events.*

It is practical and appropriate to fashion a revised 11 C.F.R. § 300.64 to apply to *all* non-Federal fundraising events because of the *Shays III* court's holding that 2 U.S.C. § 431i(e)(3) "merely clarifies" that Federal candidates may attend, speak or appear as featured guests at State, district and local party committee events without such activities constituting a "solicitation." *Shays III* at 933. If a *per se* solicitation does not result from a Federal candidate's or officeholder's speaking or being a featured guest at a state party fundraising event, one cannot automatically result from a Federal candidate's doing the same at a fundraising event for a state candidate. As long as a Federal candidate or officeholder does not solicit funds outside the limitations and prohibitions of the Act, it is beyond the Commission's statutory authority to limit Federal candidates and officeholders from attending, speaking or being featured guests at non-party, non-Federal fundraising events. Therefore, Alternative 2's scope of application to *all* non-Federal fundraising events is correct, and it is entirely in harmony with the *Shays III* court's holding that Section 431i(e)(3) merely clarifies, as opposed to substantively affecting, the scope of permissible solicitation.

B. *Alternative 2 Appropriately Takes Pre-Event Publicity Into Account.*

The time is ripe for the Commission to comprehensively address the issue of pre-event publicity, which Alternative 2 seeks to accomplish. Too many times the Commission has come out on different sides of the same issue, and now is the time for the Commission to codify clear and uniform guidelines for state and local parties on how to mention Federal candidates and officeholders in pre-event publicity for *all* non-Federal fundraising events. One needs to look no further than the Commission's decisions in two recent matters, MUR 5712 (McCain) and MUR 5935 (Gillibrand), to see the disparate treatment that Federal officeholders often receive for being listed on pre-event publicity for non-Federal fundraising events.

In MUR 5712, a solicitation was imputed to Senator John McCain for being listed as a "special guest" on pre-event publicity for a non-Federal fundraising event for Governor Arnold Schwarzenegger and the California Republican Party. Even though the publicity had included a clear and conspicuous disclaimer stating that Senator McCain was not soliciting any funds beyond the Federal limits, the Commission in 2007 found reason to believe Senator McCain had solicited funds outside the limitations and prohibitions of the Act. *See* MUR 5712, Certification, Feb. 23, 2007. In his dissent, Commissioner Hans von Spakovsky stated that although the Commission applied an analysis "consistent with Advisory Opinions 2003-3 (Cantor), 2003-36 (RGA), and 2003-37 (ABC)...the instructions in those Advisory Opinions are not as clear as my colleagues and OGC contend." MUR 5712, Statement of Reasons of Commissioner Hans von Spakovsky at 1. Commissioner von Spakovsky was correct; in 2009, when the Commission reconvened, it could not find probable cause to believe Senator McCain violated the Act, and it could not attain four votes to support the contention that a solicitation should be imputed to

Senator McCain solely because he was listed as a “special guest” on Schwarzenegger’s invitation.

Similarly, in MUR 5935, then-Congresswoman Kirsten Gillibrand was listed as a “special guest” on pre-event publicity for a fundraiser for a local candidate in New York that also contained a solicitation of funds outside the limitations and prohibitions of the Act on the same page. The publicity did not contain a disclaimer. The Commission did not find reason to believe that then-Representative Gillibrand had violated the Act. Although the Commission has not made public its Statement of Reasons in this Matter, the Commission clearly did not garner enough votes to support the idea that an illegal solicitation should be imputed to then-Representative Gillibrand merely by being listed as a “special guest” on the publicity, even though that publicity contained a \$2,500 solicitation.

These are merely two examples in which the Commission’s dispositions in matters involving pre-event publicity have come out inconsistently. Such inconsistent Commission advice and guidelines can only lead to confusion in the regulated community, and it can force less financially equipped state and local parties and candidates to avoid involving Federal candidates and officeholders in their fundraising events altogether. Alternative 2’s approach to pre-event publicity would provide much-needed clarity in this area of law.

C. The RNC Recommends Modifications to Provide More Clarity and to More Accurately Reflect the Dynamics of Party Fundraising.

The RNC supports the Commission’s general approach to pre-event publicity in proposed paragraph (c) of Alternative 2, but we offer several suggestions. First, we believe it is imperative that if the Commission is to adopt the guidelines set forth in proposed paragraph (c) regarding pre-event publicity, it should state explicitly somewhere in that paragraph that the Commission’s previous guidance in its series of advisory opinions (i.e. 2003-3, 2003-36, 2003-37, 2007-11) on this issue are no longer the correct standard. It should plainly state that previous guidance concerning Federal candidate and officeholder participation in pre-event publicity for *all* non-Federal fundraising events is superseded by paragraph (c).

Second, we believe that the Commission’s insistence that a Federal candidate’s or officeholder’s consent to being listed as serving on an event’s “host committee” would constitute a *per se* solicitation because that role is tied to fundraising is a contention not rooted in reality. It is a matter of semantics to say that a being an event’s “speaker,” “special guest,” or “honorary chairperson” would not be a solicitation and then say that serving on an event’s “host committee” is automatically a solicitation. A Federal candidate or officeholder who agrees to be on a host committee for a state party or state candidate fundraising event is rarely in our experience serving in a role involving solicitation of funds. Instead, Federal candidates and officeholders generally accept these positions as honorary positions, merely to make the events more attractive. Accordingly, we recommend that the Commission delete the proposal that serving on a “host committee” translates into a solicitation at proposed paragraph (c)(2)(i)(A) second sentence, and move serving on an event’s “host committee” to a non-solicitation role under (c)(2)(i)(B). We believe that there should be a *per se* solicitation attributed to a Federal

candidate or officeholder only if that Federal candidate or officeholder signs a solicitation as set forth in the first sentence of proposed paragraph (c)(2)(i)(A).

Third, unless a pre-event communication, whether or not it constitutes a solicitation, includes an ask, request or recommendation by the covered person that would qualify as a solicitation under 11 C.F.R. § 300.2(m), that person cannot be deemed to be soliciting.¹ Short of such an “ask,” no disclaimer stating that the covered person is not soliciting non-Federal funds should be required. Therefore, the final sentence of proposed paragraph (c)(2)(ii) should be deleted or replaced with a statement that no such disclaimer is required when the solicitation is made by someone other than the Federal candidate or officeholder.

III. Neither Alternative 1 Nor Alternative 3 Should Be Adopted.

A. Alternative 1 Complies with Shays III but is Inadequate.

Although the RNC believes that proposed 11 C.F.R. § 300.64(a) in Alternative 1 adequately captures the *Shays III* court’s opinion, Alternative 1 as a whole is insufficient for at least two reasons. First, Alternative 1 fails to address pre-event publicity. Second, it focuses solely on Federal candidate and officeholder participation in events for “state, district and local committees of political parties.” NPRM at 64,019 while wholly ignoring Federal participation in all other non-Federal fundraising events, i.e. fundraising events for state and local candidates, state PACs and state ballot initiatives.

The first fundamental deficiency of Alternative 1 is its failure to address the haziest but most important aspect of this area of law—that of pre-event publicity—which the Commission freely admits in this very NPRM “has not evolve[d] as clearly.” NPRM at 64,018. As discussed above, the Commission’s inconsistent guidance in its series of advisory opinions (2003-3 (Cantor), 2003-36 (Republican Governors Association), 2007-11 (California State Party Committees)) and rulings in several Matters Under Review on this issue have turned what should be a straightforward and commonplace practice into a legal conundrum that can only be navigated by experienced political law attorneys, and even then compliance remains a concern. State and local parties and candidates rarely have the financial resources necessary to hire election lawyers merely to determine whether a Federal candidate can be listed on their event invitations and if so, how.

Moreover, the lack of uniformity and consistency of the Commission’s current guidance in this area can only create uncertainty and trepidation for state and local parties. The ambiguities in the law and in the Commission’s guidance, as it exists now, deter state and local parties and candidates from involving Federal candidates and officeholders in their events

¹ We believe it would be advisable for the Commission to expand its exemplary list of communications that do not constitute a “solicitation” at 11 C.F.R. § 300.2(m)(3) to clarify that appearing in a pre-event communication that contains a solicitation does not necessarily constitute a solicitation with a new sub-paragraph such as: “(viii) A candidate consents to having his name used on an invitation, which contains a solicitation, and reply card for an event at which the candidate is a featured guest but does not sign the solicitation.”

altogether. This chilling effect not only damages state and local party fundraising but also limits their ability to communicate their message and to fully participate in the political process.

With respect to the omission of non-party non-Federal events, the Commission would be doing itself and the regulated community a disservice by not taking this opportunity to create uniformity and issue a rule designed to apply to all non-Federal fundraising events. After all, the *Shays III* court specifically stated that 2 U.S.C. § 431i(e)(3) “merely clarifies” that Federal candidates may attend, speak or appear as featured guests at State, district and local party committee events without such activities constituting a “solicitation.” *Shays III* at 933. The court reasoned that if Congress had intended for 2 U.S.C. § 441i(e)(3) to create an exception to the general solicitation ban, it would have done so explicitly, as it did in other provisions of Section 441i(e). *Id.* Because this provision is merely clarifying under *Shays III*, it neither expands nor narrows the prohibition on Federal candidate and officeholder solicitation of non-Federal money.

Therefore, the implementing regulation should clarify that Federal candidates and officeholders are not barred from doing at other non-Federal events that which they are allowed to do at non-Federal party events. It is inconsistent reasoning to conclude that a Federal candidate or officeholder can speak and be a featured guest at a state party fundraising event without it constituting a solicitation and then conclude that a Federal candidate’s playing the very same role at a fundraiser for a state candidate would constitute a solicitation. Alternative 1’s failure to embrace all non-Federal fundraising events in revised 11 C.F.R. § 300.64 would only serve to further complicate the legally acceptable bounds of Federal candidate and officeholder participation in such events.²

In light of the foregoing, although we believe that Alternative 1 would comply with the *Shays III* court’s decision, it is an insufficient revision as a whole. We strongly urge the Commission to reject Alternative 1 and adopt a rule that addresses Federal candidate and officeholder participation in non-Federal fundraising events as a whole, and one that comprehensively addresses the issue of pre-event publicity, such as that which we recommend above

B. Alternative 3 is Deficient in Several Significant Respects.

The RNC strongly urges the Commission to reject Alternative 3. We have serious reservations – both legal and practical – about this Alternative, a few of which we highlight here.

Although Alternative 3 addresses Federal candidate and officeholder participation in all non-Federal fundraising events, it does so by treating Federal candidate and officeholder participation in state and local party fundraising events in a dramatically different manner than it

² In addition, it would be illogical to have a potentially more restrictive regime for non-Federal candidate events than for party events since the relationship between non-Federal candidates and Federal candidates and officeholders is more attenuated than that between parties and Federal candidates and officeholders, especially since it is not even always the case that non-Federal and Federal candidates will appear on the ballot in the same year. Notwithstanding this potentially illogical situation, we believe that even if the Commission adopts Alternative 1, Federal candidates and officeholders will be allowed to speak and be featured guests at non-Federal non-party events, but there will be a chilling effect on such activity due to the incongruence in the rules.

treats all other non-Federal fundraising events. Alternative 3 would presumably limit Federal candidate and officeholder participation in such events to less than is currently permissible, and it would functionally eliminate Federal candidate and officeholder participation in pre-event publicity altogether. In doing so, the Commission would be rejecting the guidance upon which the regulated community has relied since 2003 and the *Cantor* advisory opinion. Such novel limitations would go beyond the scope of the D.C. Circuit's decision in *Shays III* and constitute an overreaching beyond the Commission's statutory power.

Moreover, Alternative 3's absolute ban on Federal candidates' and officeholders' participation in pre-event publicity for non-state and local party non-Federal fundraising events is internally inconsistent with its proposed rule allowing participation by Federal candidates' and officeholders' attendance and speech at those events. In addition, the prohibition is statutorily and constitutionally suspect. The Commission cannot be in the business of restricting Federal candidate or officeholder participation in pre-event publicity for those non-Federal events unless it is mandated by statute or if there is a risk of corruption through a *quid pro quo* arrangement. As the United States Supreme Court stated just last month, "[t]he hallmark of corruption is the financial *quid pro quo*: dollars for political favors." *Citizens United v. FEC*, 558 U.S. ___, slip op. at 43 (2010) (citing *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 497 (1985)).

In the case of Federal candidates or officeholders lending their name to pre-event publicity, there is no evidence that doing so will create such an impermissible *quid pro quo* arrangement. Federal candidates and officeholders, assuming they do not explicitly solicit any contributions outside the limitations and prohibitions of the Act, do not receive any money in exchange for their appearance on pre-event publicity or at the event. Rather, they agree to appear and be listed as featured guests or speakers at such events in order to assist state and local parties and candidates, as well as other non-Federal political entities, to do things such as raise money, communicate their message, and build grassroots excitement. They do not do so to financially benefit their own campaigns.

From a practical standpoint, the do's and don'ts of pre-event publicity are more important than those with respect to speaking at the event. It is quite rare for speakers at fundraising events to ask for money of attendees who presumably have already donated in response to pre-event publicity and as a precondition to attending the event. The solicitations take place before the event. Because Congress, whose Members undoubtedly were aware of how the fundraising process works with respect to such events, made clear that Federal candidates and officeholders could be "featured guest[s]," at these events, it could not have intended that featuring a Federal candidate in pre-event publicity could, without more, in any respect constitute a solicitation.³ We believe our suggestions reflect this important fact.

³ Likewise, the mere fact that a Federal candidate or officeholder's presence will be a "draw" that will increase attendance and funds raised is irrelevant to whether or not the Federal candidate or officeholder is deemed to be soliciting funds. Featured guests are intended to be draws; that's why they are featured. Similarly, prospective donors often are drawn to events because of the venue, entertainment, or even menu. That does not mean a venue owner, musical act, or even chef, could be deemed to be soliciting funds.

Furthermore, as Members of Congress surely also knew at the time of passage, much pre-event publicity takes place over the telephone.⁴ In our experience, it is exceedingly rare that invitations are not followed up with telephone calls from party employees, volunteers, or vendors. It is impossible to conceive that when such an individual calls a prospective donor to follow up on an invitation, referring to the Federal candidate or officeholder is off limits without a disclaimer saying the candidate or officeholder is not soliciting non-Federal funds. The recipient of the call would never have thought that the covered person – as opposed to the caller – was doing the soliciting.

IV. Conclusion

The RNC appreciates the opportunity to provide these written comments and looks forward to the upcoming hearing. We hope our perspective based on how state, district and local parties operate will be helpful to the Commission and that our comments and those of others will provide the Commission sufficient information to conclude that it need not and should not overly burden state, district and local parties as part of an unnecessary excursion beyond the scope of FECA and *Shays III*. We encourage the Commission instead to adopt clear, workable rules that will not have the effect of expanding the definition of “solicitation” beyond what Congress intended, thereby impermissibly encroaching on non-Federal state and local political speech and activity. Clear guidance that reflects the intent of Congress and that respects the role and activity of political parties would be a laudable outcome.

Sincerely,



John R. Phillippe Jr.
Chief Counsel

⁴ The interactive nature of telephone calls has the potential to raise complications not associated with printed communications. For example, under Alternative 3, if a state party employee calls an invitee and asks for a donation of non-Federal funds, not only is the caller prohibited from mentioning the “featured guest” in the first instance, but if the prospective donor asks, based on having received a “save the date” whether the featured guest will be there, the caller’s response presumably must be “I’m not allowed to say.” Equally ludicrous is that the caller could immediately call back and not ask for funds but now mention that the featured guest will be there. We could come up with countless examples of such scenarios, and it is clear to us that adoption of Alternative 3 would lead to confusing rules and less state and local political activity and speech.