

February 8, 2010

VIA ELECTRONIC MAIL

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Federal Election Commission
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Dear Ms. Rothstein,

The National Republican Senatorial Committee (“NRSC”) by and through counsel submit these comments in response to the Federal Election Commission’s (the “Commission”) Notice of Proposed Rulemaking Regarding Participation by Federal Candidates and Officeholders at Non-Federal Fundraising Events. See 74 Fed. Reg. 64016 (Dec. 7, 2009) (hereinafter “NPRM”). The NRSC hopes that the following comments will prove helpful to the Commission and respectfully requests that representatives of the NRSC be permitted to testify at the Commission’s hearing for this rulemaking proceeding.

I. INTRODUCTION

A. Background

The Bipartisan Campaign Reform Act of 2002 (“BCRA”) restricts the fundraising activities of federal candidates and officeholders¹ by prohibiting such persons from soliciting, receiving, directing, transferring, or spending funds in connection with federal and nonfederal elections outside the amount limitations, source prohibitions, and reporting requirements of the Federal Election Campaign Act of 1971, as amended (the “Act”). See 2 U.S.C. § 441i(e)(1)(A) and (e)(1)(B). BCRA, however, explicitly allowed federal candidates and officeholders to “attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party.” § 441i(e)(3).

Dating back to the first post-BCRA rulemakings in 2002, the Commission has sought to reconcile Section 441i(e)(3) with the general nonfederal funds solicitation ban that applies to federal candidates and officeholders. After much debate, and recognizing the constitutional interests at play, the Commission reasonably determined that Section 441i(e)(3) was a total exemption to the general nonfederal funds solicitation ban. See Explanation and Justification for Regulations on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49108 (July 29, 2002) (regulating candidate and officeholder speech “would raise serious constitutional concerns”). As such, the Commission’s regulations allowed federal candidates and

¹ This restriction also applies to the agents and entities directly or indirectly established, financed, maintained, controlled by, or acting on behalf of, any federal candidate or officeholder. See 2 U.S.C. § 441i(e)(1).

officeholders to not only “attend, speak, or be a featured guest” at state, district, and local party (“SDL party”) events, but to do so “without restriction or regulation.” See 11 C.F.R. § 300.64(b).

BCRA’s sponsors challenged the Commission’s regulations, but the District Court for the District of Columbia held that the regulation implementing Section 441i(e)(3) was not contrary to BCRA’s intent since Section 441i(e)(3) was ambiguous. Shays v. Fed. Election Comm’n, 337 F. Supp. 2d 28, 90 (D.D.C. 2004) (“Shays I”). The Shays I court did, however, find that the Commission’s explanation was inadequate and remanded the matter to the Commission for further clarification. The Commission commenced another rulemaking in 2005 and decided to leave the text of the regulation the same but provided further explanation and justification for the regulation. See generally Revised Explanation and Justification for Final Rules on Candidate Solicitation at State, District and Local Party Fundraising Events, 70 Fed. Reg. 37649 (June 30, 2005).

Through a series of advisory opinions, the Commission has since created rules regarding pre-event publicity, disclaimers, and the various roles that federal candidates and officeholders may play at nonfederal fundraising events. See generally Fed. Election Comm’n. Advisory Opinions 2003-03 (hereinafter “Cantor AO”); 2003-36 (hereinafter “Republican Governors Association AO”); 2007-11 (hereinafter “California State Party Committees AO”).

Nevertheless, BCRA’s sponsors again challenged the Commission’s implementing regulations in this area. Although the District Court for the District of Columbia upheld the regulations, the United States Court of Appeals for the District of Columbia Circuit rejected the Commission’s conclusion that Section 441i(e)(3) was a total exemption to the general nonfederal funds solicitation ban that applies to federal candidates and officeholders, holding that the Commission’s interpretation “allows what BCRA directly prohibits.” Shays v. Fed. Election Comm’n, 528 F.3d 914, 933 (D.C. Cir. 2008) (“Shays III Appeal”). The Shays III Appeal court concluded that “[c]ontrary to the Commission’s position,” Section 441i(e)(3) “does nothing to make the statute’s prohibition on soft-money solicitations ambiguous.” Id. Instead, it “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.” Id. The regulations were remanded to the Commission. Id.

Having failed to appeal, the Commission must now revise 11 C.F.R. § 300.64 in its regulations to comply with the Shays III Appeal decision. In doing so, the Commission has the opportunity to craft clear regulations with brightline rules and safe harbors that provide specific examples as to what federal candidates and officeholders may lawfully say and do in connection with SDL party and non-party events. The Commission can accomplish this key objective by:

- (1) adopting final regulations similar to Alternative 2 in the NPRM that address both SDL party and non-party fundraising events, applying the same standard to both;
- (2) rejecting Alternative 3 in the NPRM and the hairsplitting nature of its reasoning;
- (3) providing specific safe harbors identifying the particular kinds of speech and activities that federal candidates and officeholders may engage in at nonfederal fundraising events;

- (4) providing specific safe harbors for the required written and oral disclaimers that must be issued; and
- (5) providing specific safe harbors for the various “roles” that a federal candidate or officeholder may play in connection with nonfederal fundraising events.

B. The Final Regulations Should Address Both SDL Party and Non-Party Fundraising Events

Although the Shays III Appeal decision did not directly address the issue of federal candidate and officeholder participation in non-party, nonfederal events, nor the issue of pre-event publicity, the Commission’s final rules should “address [the] fuller spectrum” and provide clear, uniform guidance as to federal candidate and officeholder participation in all nonfederal fundraising events as well as the permissible pre-event publicity for such events. NPRM at 64020. Alternative 2 addresses all of these issues.

The Shays III Appeal decision strongly supports addressing both SDL party and non-party fundraising events by applying the same, uniform standard. That is, under the court’s holding, while a direct solicitation is prohibited, mere “attendance, speaking or being a featured guest” at a non-federal fundraising event does not constitute an unlawful non-federal solicitation. See Shays III Appeal at 933. As such, there is no logical distinction between such activity at a SDL non-federal and any other non-federal fundraising event. Put differently, the Shays III Appeal removed any distinction between party and non-party non-federal fundraising events when it held that the Commission’s “total exemption” interpretation was contrary to BCRA.

A uniform standard also makes practical sense. Compliance with a single standard is easier and, as such, the risks of chilling associational and speech rights related to attendance at a variety of fundraising events are reduced.

Finally, there is no basis for the Commission to craft two separate standards for SDL and all other non-federal events. To the extent that any such basis existed at all, the Commission should heed the dissolution by the Shays III Appeal of any legal distinction, and the practical considerations discussed above, and promulgate a single uniform standard.

C. The Commission Should Reject Alternative 3

The NRSC urges the Commission to reject Alternative 3 in the NPRM primarily because of its hairsplitting reasoning and inability to produce clear, brightline rules. It is highly problematic to try to craft regulations based on minute, situational differences. For example, the Commission asks:

- What does it mean to be a featured guest? See NPRM at 64023.
- Is there a difference between simply appearing on a list of attendees and being featured on such a list? Id.
- Is there a minimum number of attendees required to constitute a fundraising event? Id.

Alternative 3 also proposes that a federal candidate or officeholder may attend or speak at a nonfederal fundraising event, but only so long as no nonfederal solicitations are made at the event

and the federal candidate or officeholder's name or likeness does not appear in pre-event publicity. The Commission is essentially proposing that federal candidates and officeholders only be allowed to make surprise appearances at nonfederal fundraisers and that the sponsoring entities be legally barred from publicizing in advance the appearance of federal candidates or officeholders. Of course, in practical terms this would all but end federal candidate or officeholder appearances at such events.

Such an outcome fails to square with the Commission's own acknowledgment that participation in non-party, nonfederal fundraising events is "not specifically prohibited by the Act or [other] Commission regulations." Id. at 64024. Pre-event publicity does more than merely solicit funds, it informs invitees of the speech – the political information – they will hear, and from whom, if they attend the event. The Commission's assertion that "[f]ederal candidates and officeholders lend their names to publicity for fundraising events for one reason: to help raise funds," id., is incorrect – candidates or officeholders may do so for a variety of reasons. For example, a federal candidate or officeholder may lend his name or likeness to increase name recognition, support in-state individuals, or speak on an issue relevant to the group. When the Commission seeks to draw lines based upon the internal motivation of fundraisers and the reasoning of federal candidates and officeholders, complicated, confusing, and potentially unconstitutional rules result. The Commission should seek to avoid such a result here.

Alternative 3 is not "a generally workable standard that provides clear guidance to Federal candidates and officeholders," and the Commission should reject it. Id.

II. THE COMMISSION SHOULD CREATE SPECIFIC SAFE HARBORS FOR POLITICAL SPEECH AND ACTIVITIES THAT FEDERAL CANDIDATES AND OFFICEHOLDER MAY LAWFULLY ENGAGE IN AT NONFEDERAL FUNDRAISING EVENTS

Alternative 2's clear guidelines would be strengthened by the inclusion of specific safe harbors identifying particular statements that may be said and activities that may be engaged in as a matter of law by federal candidates and officeholders at nonfederal fundraising events and in pre-event publicity. Negative safe harbors alone are of limited use because they provide little guidance as to what actually may be said and done by federal candidates and officeholders. Affirmative safe harbors are much more helpful in facilitating legal compliance and removing uncertainty, and the NRSC urges the Commission to include a list of statements that federal candidates and officeholders may and may not make at all nonfederal fundraising events, as well as specific guidelines regarding pre-event publicity, in the final rule.

The Commission's current solicitation regulation at 11 C.F.R. § 300.2(m) includes a list of several specific examples of statements that do and do not constitute a solicitation. While these safe harbors are helpful, the affirmative safe harbors in the solicitation regulation – listing what federal candidates and officeholders may legally say – do not appear to relate to the fundraising event context and are, therefore, of limited assistance in trying to determine what federal candidates and officeholders may legally say at nonfederal fundraising events. See 11 C.F.R. § 300.2(m)(3) (identifying safe harbors outside of the fundraising event context). Section 300.2(m) does not

provide a brightline answer as to what constitutes a solicitation in a fundraising event setting, which is why the Commission should list affirmative safe harbors in this rulemaking proceeding.

A. Permissible Statements at Nonfederal Fundraising Events

Federal candidates and officeholders need clear guidance as to what they may and may not say throughout a nonfederal fundraising event. The NRSC strongly believes that the following statements are permissible and should be included as safe harbors in the Commission's regulations:

- "Thank you for your support tonight."
- "Thank you for supporting the party."
- "I appreciate your help/support/effort."
- "Thank you for being here tonight."
- "Thank you for your continuing support."
- "It is important to support the party."
- "Thank you for your financial support."

All of the above statements clearly are not solicitations, even in the fundraising context. None of the statements request future financial support and most are merely expressing general gratitude for the involvement of event attendees. One of the statements above does explicitly reference money, but "thank you for your financial support" should not be considered a solicitation because it is merely thanking donors for contributions that they have already made and is not a request for additional contributions. "Solicit" is, after all, a verb.

B. Permissible Pre-Event Publicity

Under 2 U.S.C. § 441i(e), federal candidates and officeholders clearly may not solicit nonfederal funds in pre-event publicity, but under the Commission's proposed rules in Alternative 2 in the NPRM a federal candidate or officeholder's name may appear in pre-event publicity where someone other than a federal candidate or officeholder solicits nonfederal funds. The Commission should strive to create a list of safe harbors providing specific examples as to what constitutes a solicitation by the federal candidate or officeholder and what constitutes a solicitation by someone other than the federal candidate or officeholder and in what manner a federal candidate or officeholder's name and/or likeness may lawfully be used in pre-event publicity. Specific language that may be used in pre-event publicity materials would be the most helpful in facilitating legal compliance.

The Commission has already concluded that the titles "featured speaker" and "honored guest" do not constitute solicitations and should find that similar language in pre-event publicity should also not be considered solicitations. See generally Cantor AO; Republican Governors Association AO. The NRSC strongly believes that the following phrases do not constitute solicitations and should be codified as pre-event publicity safe harbors in the Commission's regulations:

- "Featuring Senator X"
- "Senator X, Featured/Honored Guest"

- “Special Guest, Senator X”
- “Senator X invites you to attend”
- “Speech by Senator X”
- “Appearance by Senator X”
- “Photo Op with Senator X”
- “Reception with Senator X”

The language above all relates or is analogous to titles that the Commission has already approved in prior advisory opinions and the Commission should codify variations of this language as safe harbors in its regulations.

III. THE COMMISSION SHOULD PROVIDE SPECIFIC SAFE HARBORS FOR BOTH WRITTEN AND ORAL DISCLAIMERS

Federal candidate and officeholder participation at nonfederal fundraising events and in pre-event publicity is conditioned upon federal candidates and officeholders refraining from soliciting nonfederal funds. Disclaimers clearly stating that a federal candidate and officeholder is not soliciting nonfederal funds is an important component of federal candidate and officeholder participation and also an important component of the proposed rules in Alternative 2 in the NPRM. In its final regulations, the Commission should provide specific safe harbor oral and written disclaimers for federal candidates and officeholders to use when attending nonfederal fundraising events and in pre-event publicity.

A. Permissible Oral and Written Disclaimers at Nonfederal Fundraising Events

In previous advisory opinions, the Commission has concluded that federal candidates and officeholders may limit their solicitations to only federal funds by reciting an oral disclaimer or displaying a written one. See generally Cantor AO; Republican Governors Association AO. The proposed regulations in Alternative 2 in the NPRM only require that these disclaimers be “clear and conspicuous,” state that the federal candidate or officeholder is not seeking funds that are from prohibited sources under the Act or exceed the Act’s contribution limits, and that they not be difficult to read or hear or be easily overlooked. See NPRM at 64025. In order for federal candidates and officeholders to meaningfully participate in nonfederal fundraising events, more specific guidance is needed.

The Commission should include a safe harbor with specific language for both oral and written disclaimers. In Advisory Opinion 2003-03 (Cantor), the Commission concluded that the following statement constitutes an acceptable oral disclaimer: “I am only asking for up to \$X from individuals and I am not asking for corporate, labor, or minors’ funds.” Cantor AO at 6. Since the Commission has already concluded in prior advisory opinions that oral disclaimers are permissible, the Commission should codify this conclusion in the regulations as a safe harbor. Other examples of oral disclaimers that should be permissible are:

- “I am only soliciting federal funds.”

- “My involvement tonight should not be construed as a solicitation for nonfederal funds.”

The following written disclaimers should also be sufficient:

- “Senator X is only soliciting federal funds.”
- “Senator X is only soliciting funds from individuals in amounts up to \$X.”
- “Senator X is not seeking funds outside the limits and prohibitions of federal law.”

These disclaimers are variations of ones that the Commission already approved in Advisory Opinions 2003-03 (Cantor) and 2003-36 (Republican Governors Association) and should also be included as safe harbors in the regulations because they “expressly qualify or limit [the] request so that it is clear [the federal candidate or officeholder] is asking only for funds that comply with the Act’s amount limitations and source prohibitions.” Id.

In addition to providing specific language in the safe harbors, the Commission should also specify other contextual information. The safe harbor could state, for example, that an oral disclaimer is valid if it is read at any point during the federal candidate or officeholder’s speech at a fundraising event. The safe harbor for the written disclaimers that may alternatively be posted at events should also specify sign size, font size, and placement. For example, the Commission could decide that a 24” x 36” sign with 2” lettering can be posted on each of the four walls of the event room. Additionally or alternatively, the Commission could decide that table tents made out of a 5 ½” x 8 ½” sheet of paper folded in half with 12 point font lettering may be placed at each table. Regardless of what the Commission decides, it should provide as specific instructions as possible to federal candidates and officeholders in the final regulations.

B. Permissible Written Disclaimers in Pre-Event Publicity

When pre-event publicity contains a solicitation for nonfederal funds and uses the name or likeness of a federal candidate or officeholder, the Commission’s proposed regulations in Alternative 2 in the NPRM requires a “clear and conspicuous” disclaimer indicating that the nonfederal solicitation is not being made by the federal candidate or officeholder and references complying with the written disclaimer requirements in 11 C.F.R. § 110.11(c)(2). See NPRM at 64025. Again, the Commission should provide specific disclaimer language as a safe harbor in its regulations, such as “This does not constitute a solicitation by Senator X.” As with the posted written disclaimers at fundraising events, the Commission should specify font size and placement. For example, the Commission might specify that the disclaimer needs to be at least 10 point font, does not require a box, and must appear at the bottom of the material in which a solicitation is made.

IV. THE COMMISSION SHOULD PROVIDE SPECIFIC SAFE HARBORS FOR FUNDRAISING EVENT ROLES

Another common source of confusion for federal candidates and officeholders is determining what “roles” they may play or “titles” they may hold relating to nonfederal fundraising events. In its final regulations, the Commission should specifically state what roles or titles federal

candidates and officeholders may use or hold in connection with nonfederal fundraising events without making an illegal solicitation under 2 U.S.C. § 441i(e). In previous advisory opinions, the Commission concluded that the following roles and titles do not constitute solicitations and the agency should codify the following as safe harbors in its regulations:

- “Featured Guest” See Cantor AO; Republican Governors Association AO.
- “Honored Speaker” See Cantor AO; Republican Governors Association AO; California State Party Committees AO.

Similarly, the NRSC believes the following roles and titles to be variations of the “featured guest” and “honored speaker” roles that the Commission has already concluded do not constitute solicitations:

- “Special Guest”
- “Featured Speaker”
- “Honorary Chairperson”
- “Honorary Co-Host”

“Special guest” and “featured speaker” are closely related to titles that the Commission has previously approved. The term “honorary” in “honorary chairperson” and “honorary co-host” negates what otherwise might be a solicitation. “Honorary” roles are merely that – honorary – and those who bear such a title frequently have no actual involvement other than appearing at the event.

V. CONCLUSION

The NRSC appreciates the opportunity to provide these written comments and representatives of the NRSC look forward to testifying at the Commission’s hearing for this rulemaking proceeding.

Respectfully submitted,

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