

June 3, 2005

By Electronic Mail

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

**Re: Comments on Notice 2005-12: State, District and Local
Party Committee Payment of Certain Salaries and Wages**

Dear Ms. Dinh:

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 2005-12, published at 70 Fed. Reg. 23072 (May 4, 2005), seeking comment on proposed changes to its rule regarding state, district and local party committee payment of certain salaries and wages under 11 C.F.R. §§ 106.7 and 300.33(c)(2). Specifically, the Commission seeks comment on the appropriate mix of Federal and non-Federal funds that state party committees must use to pay the salaries and wages of employees who spend some of their compensated time, but not more than 25 percent per month, on Federal-related activity ("25 percent or less" employees).

For the reasons set forth below, we support the rule proposed in the NPRM to establish 25 percent as the fixed minimum percentage of Federal funds that a state, district or local party committee must use to pay the salaries, wages and fringe benefits of employees who spend some of their compensated time, but not more than 25 percent per month, on Federal-related activity. See 11 C.F.R. §§ 106.7(c), 106.7(d)(1) (proposed). We oppose the alternative options of treating salaries and wages for these employees as administrative expenses subject to the allocation rules of 11 C.F.R. § 106.7(d)(2), or establishing an allocation percentage directly proportional to the amount of compensated time these employees spend on Federal-related activities.

If the Commission decides to hold a hearing on this matter, all three commenters request the opportunity to testify.

I. BCRA's Legislative History, Purpose and Structure Make Clear That State Party Committees Are Prohibited From Paying For Federal-Related Activity With Non-Federal Funds

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), prohibits national party committees from soliciting, receiving, or

directing soft money. 2 U.S.C. § 441i(a). Similarly, FECA provides: “[A]n amount that is expended or disbursed for Federal election activity by a state, district, or local committee of a political party . . . shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act.” 2 U.S.C. § 441i(b)(1). The Act contains a limited exception for certain Federal election activities that a state party committee may finance in part with so-called Levin funds. 2 U.S.C. § 441i(b)(2).

The Act defines “Federal election activity” to include: voter registration activity within 120 days of a Federal election; voter identification, get-out-the-vote activity, or generic campaign activity in connection with an election in which a Federal candidate appears on the ballot; public communications that promote, attack, support or oppose a clearly identified Federal candidate; and services provided by a state, district or local party committee employee who spends more than 25 percent of her compensated time during a month on activities in connection with a Federal election. 2 U.S.C. § 431(20)(A).

Congress’s overriding purpose in enacting the state party soft money restrictions was to avoid further circumvention of the Federal campaign finance laws. One of BCRA’s principal sponsors said that in closing the soft money loophole, Congress took “a balanced approach which addresses the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties,” while “not attempt[ing] to regulate State and local party spending where this danger is not present, and where State and local parties engage in *purely non-Federal activities*.” 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (emphasis added). Congress carefully crafted the contours of the definition of “Federal election activity” to cover only those activities that “in the judgment of Congress . . . clearly affect Federal elections” and left unregulated “activities that affect purely non-Federal elections.” 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

Congress included in the definition of “Federal election activity” “services provided . . . by an employee of a State, district, or local committee of a political party who spends more than 25 percent of [his or her] compensated time . . . on activities in connection with a Federal election.” 2 U.S.C. § 431(20)(A)(iv). In doing so, Congress certainly was aware that, under longstanding Commission regulations, employees spending 25 percent or less of their time on Federal-related activities had been subject to allocation rules.

BCRA was clearly intended to *strengthen* protections in the law against the use of non-Federal funds in Federal elections. Congress strengthened these protections, for example, by requiring the salaries and wages of state party employees who spend more than 25 percent of their time on Federal-related activities to be paid *entirely* with Federal funds, not with an allocated mixture of Federal and non-Federal funds, as they had been prior to BCRA.

Nowhere does BCRA provide or suggest that other activities that were also required to be allocated under pre-BCRA Commission regulations—such as payment of state party employees spending 25 percent or less of their time on activities in connection with Federal elections—should not continue to be allocated and, instead, should be financed entirely with soft money. Commission staff made this point explicitly at a 2002 open meeting, explaining, “there is nothing in BCRA that expressly contemplates that the Commission would drop its long-standing practice

of requiring the allocation between federal and nonfederal accounts.” June 19, 2002 Open Meeting Tr. at 351.

The language, statutory structure and legislative history of BCRA make clear that state party committees are prohibited by BCRA from paying employees to engage in Federal campaign activity with non-Federal funds, even if those employees do so less than 25 percent of their time.

II. The Supreme Court in *McConnell* Upheld BCRA’s Prohibition On State Party Use of Soft Money For Federal Election Activity

BCRA’s prohibition on national political party use of soft money was challenged and upheld by the Supreme Court in *McConnell v. FEC*, 540 U.S. 93 (2003). The Court stated, “[b]oth common sense and the ample [court] record” confirmed Congress’ belief that “large *soft money* contributions to national party committees have a corrupting influence or give rise to the appearance of corruption.” 540 U.S. at 145 (emphasis in original). The Court reasoned:

[T]he FEC’s allocation regime has invited widespread circumvention of FECA’s limits on contributions to parties for the purpose of influencing federal elections. Under this system, . . . donors have been free to contribute substantial sums of soft money to the national parties, which parties can spend for the specific purpose of influencing a particular candidate’s federal election.

Id. The Court concluded: “The Government’s strong interests in preventing corruption, and in particular the appearance of corruption, are thus sufficient to justify subjecting all donations to national parties to the source, amount, and disclosure limitations of FECA.” *Id.* at 156.

The Court likewise upheld BCRA’s prohibition on state and local party committee use of soft money to fund Federal election activity, as a permissible means of preventing “wholesale evasion” of the national party soft money ban “by sharply curbing state committees’ ability to use large soft-money contributions to influence federal elections.” *Id.* at 161. According to the Court: “Because voter registration, voter identification, GOTV, and generic campaign activity all confer substantial benefits on federal candidates, the funding of such activities creates a significant risk of actual and apparent corruption.” *Id.* at 168. The Court concluded that BCRA’s prohibition on state party soft money expenditures for federal election activity “is a reasonable response to that risk.” *Id.*

The same obviously would be true of work done by state party employees who spend time working on activities in connection with Federal elections – those activities would “confer substantial benefits” on federal candidates as well, and the funding of those activities thus raises the same risks of corruption.

The Supreme Court in *McConnell* explicitly found that Congress’ interest in preventing circumvention of BCRA’s soft money ban “justifies the requirement that state and local parties spend federal funds to pay the salary of any employee spending more than 25% of his or her

compensated time on activities in connection with a federal election.” *Id.* at 170. The Court reasoned, “In the absence of this provision, a party might use soft money to pay for the equivalent of a full-time employee engaged in federal electioneering, by the simple expedient of dividing the federal workload among multiple employees.” *Id.* at 171.

In short, the Supreme Court in *McConnell* recognized that soft money contributions to political party committees pose a serious threat of real and apparent political corruption; that the soft money loophole was created by flawed FEC allocation rules; and that Congress was constitutionally empowered to close the soft money loophole by prohibiting political party use of soft money to fund Federal election activity and by strengthening the allocation requirements for party activity related to Federal elections.

III. The Proposed Regulation Establishing a 25% Fixed Minimum Allocation Best Comports With BCRA’s Soft Money Prohibition and the *Shays* Court Decision

The general BCRA prohibition on state party use of soft money in connection with Federal elections includes a prohibition on state party use of soft money to pay employees for their work in connection with Federal elections. The salaries and wages of state party employees who spend more than 25 percent of their compensated time performing activities in connection with a Federal election must be paid entirely with Federal funds. The salaries and wages of state party employees who spend 25 percent or less of their compensated time performing activities in connection with a Federal election should continue to be allocated between Federal and non-Federal funds, as they were prior to BCRA.

Nevertheless, the Commission in 2002 adopted a regulation permitting state, district and local party committees to use entirely soft money to pay the salaries and wages of state party employees who spend 25 percent or less of their compensated time performing Federal election activities.

In May 2002, the Commission published NPRM 2002-7, seeking comment on proposed rules regarding state, district and local party committee payment of salaries and wages. 67 Fed. Reg. 35654, 35665 (May 20, 2002). Although the NPRM explained that the proposed allocation regulation would “require that the salaries of those employees who spend 25% or less of their time in a given month on activities in connection with a Federal election be allocated between the committee’s Federal and non-Federal accounts[,]” 67 Fed. Reg. at 35665 (emphasis added), the actual language of proposed 300.33(a)(1) provided that state, district and local parties “may allocate” such salaries. 67 Fed. Reg. 35684 (emphasis added). Further, the NPRM explicitly raised a question as to whether “State, district and local party committees should be permitted to pay the salaries of employees who spend 25% or less of their time on Federal election activity with non-Federal funds, rather than be required to allocate those payments.” 67 Fed.Reg. at 35665.

In written comments submitted in response to NPRM 2002-7, Democracy 21 opposed the proposed regulatory language, stating:

We strongly disagree with the fundamental premise of the proposed regulation—that currently allocable activities need not continue to be allocated under BCRA, or may be allocated at the option of the state party. This premise is set forth in proposed sections 300.33(a)(1) and (2), which state that “administrative costs” of state party committees and salaries of employees who spend less than 25 percent of their time on Federal activities “may” continue to be allocated. . . .

Instead of saying that such costs “may” be allocated, the regulation should say that these costs “must” be allocated. The regulation should not permit these expenses to be paid entirely with non-Federal funds.

All such costs are allocable under current pre-BCRA law, and nothing in BCRA modifies this allocation requirement. The BCRA was clearly intended to strengthen the protections in the law against the use of non-Federal funds in Federal elections.

[N]othing in the BCRA provides that other, currently allocable activities should not continue to be allocated. The BCRA is explicit in how the current allocation system is to be changed and strengthened. Nowhere does it provide that currently allocable activities should become activities that can be funded entirely with non-Federal money.

Comments of Democracy 21 on Notice 2002-7 (May 29, 2002) at 39-40 (emphasis in original).

The Center for Responsive Politics likewise submitted written comments to the 2002 NPRM. Responding directly to the Commission’s query as to whether state and local party committees should be allowed to pay the salaries of employees below 25% entirely with non-Federal funds, the Center replied:

No. They should be required to allocate these expenses between their Federal and non-Federal accounts using fixed percentages. There is no justification for allowing the salaries of employees who undertake some Federal election activities to have all of their salary paid for with non-Federal funds, since BCRA requires that all Federal election activity be paid for with Federal funds.

Comments of the Center for Responsive Politics on Notice 2002-7 (May 29, 2002) at 18. The Center further commented that the fixed percentages used for allocation “should be set at a point that ensures that no non-Federal funds are used to pay for Federal election activity.” *Id.*

On June 17, 2002, the Commission’s general counsel issued a proposed final rule requiring state, district and local party committees to use either all Federal funds or an allocated mixture of Federal and non-Federal funds to pay the salaries of employees who spend 25% or less of their time working in connection with a Federal election. *See* Agenda Document No. 02-44 at 234-235 (proposed 11 C.F.R. § 106.7(c)(1)). The general counsel explained briefly that

“[p]aragraph 106.7(c) sets out costs that must be either paid totally from Federal accounts or allocated by State, district, and local party committees between their Federal and non-Federal accounts. These costs include salaries . . . [and] [t]his provision applies only to employees who spend 25% or less of their compensated time in connection with Federal elections.” *Id.* at 56. The general counsel noted, in the context of explaining the required allocation of general administrative costs by state and local party committees, “that nothing in BCRA or the legislative history suggests that Congress intended the Commission to abandon its longstanding allocation requirement for these expenses.” *Id.* at 58.

The Commission, however, materially altered the rule as proposed by the general counsel. The final rules adopted in sections 106.7(c)(1), 106.7(d)(1)(i) and 300.33(c)(2) permit state, district and local party committees to use entirely non-Federal funds to pay the salaries and wages of employees who spend 25 percent or less of their compensated time on activity in connection with a Federal election. 67 Fed. Reg. at 49078, 49118, 49126 (July 29, 2002).

Thus, contrary to both the intent stated in the original NPRM and the final rules recommended by the general counsel, the rules adopted by the Commission explicitly authorize state, district and local party committees to use entirely soft money to pay the salaries and wages of some employees working in connection with a Federal election.

Section 300.33(c)(2) was challenged in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004) *appeal pending* No. 04-5352 (D.C. Cir). The *Shays* plaintiffs argued that employees spending 25 percent or less of their compensated time on Federal election activity should be paid from funds allocated between Federal and non-Federal funds. The court found the plaintiffs’ approach to be “clearly more consistent with Congress’ overall scheme of requiring Federal election activities to be paid for with federal funds.” *Id.* at 114. The court continued, “It is clear to the Court that [the challenged Commission regulation] does compromise the Act’s purposes of preventing circumvention of its national party committee nonfederal money ban and stemming the flow of nonfederal money into activities that impact federal elections.” *Id.*

The district court noted that the Supreme Court in *McConnell* upheld the BCRA provision requiring state parties to use entirely Federal funds to pay salaries of employees spending more than 25 percent of their time on Federal election activity “to prevent circumvention of [the soft money ban] by ‘dividing the federal workload among multiple employees.’” *Id.* (quoting *McConnell*, 540 U.S. at 170-71). Relying on the Supreme Court’s analysis in *McConnell*, the district court in *Shays* concluded:

In the absence of restrictions on those employees spending less than 25 percent of their time on Federal election activity, there is nothing to prevent the circumvention from occurring, albeit among more employees. *It is clear that this change to the regulation “create[s] the potential for gross abuse,”* and therefore cannot stand.

Shays v. FEC, 337 F. Supp. 2d at 114 (emphasis added) (internal citation omitted) (quoting *Orloski v. FEC*, 795 F.2d 156, 165 (D.C. Cir. 1986).

The district court in *Shays* held section 300.33(c)(2) invalid under *Chevron* step two analysis, on the grounds that it compromises the purposes and creates the potential for gross abuse of BCRA and, thus, constitutes an impermissible construction of the statute. *Shays v. FEC*, 337 F. Supp. 2d at 114. See also *Chevron v. NRDC*, 467 U.S. 837, 843 (1984) (establishing the two-step so-called *Chevron* analysis).

This rulemaking follows the district court's invalidation of section 300.33(c)(2) in *Shays*, and the court's remand to the Commission for further action consistent with the court's opinion. The NPRM for this rulemaking acknowledges that state party committees are required under FECA to use at least some Federal funds to pay for the salaries and wages of "25 percent or less" employees. 70 Fed. Reg. at 23073. The Commission proposes a new rule to comply with the court's order, but also discusses two alternative approaches as well.

The Commission's proposed rule establishes a fixed 25 percent Federal funds allocation minimum for state party committee payment of salaries of "25 percent or less" employees. This rule would ensure that only Federal funds are used to finance Federal election activity. We strongly urge the Commission to adopt this proposed rule, which best comports with BCRA's soft money prohibition and the district court's decision in *Shays*.

Setting a flat allocation ratio for such spending also has the significant advantage of providing a clear and readily administered rule. This will minimize the burdens on state parties to comply with the rule, and on the Commission to enforce it.

The NPRM also proposes two alternatives to the fixed 25 percent minimum approach. One alternative – treating salaries and wages for these employees as administrative expenses subject to the allocation ratios in 11 C.F.R. § 106.7(d)(2) – is unacceptably flawed because it would allow state party committees to use soft money to pay a portion of the salary of such employees during any year in which a Presidential candidate is not on the ballot. Under section 106.7(d)(2), state party committees are required to allocate only 21 percent of administrative expenses to their Federal account in any even year (and the preceding year) in which a Senate candidate, but no Presidential candidate, is on the ballot. Further, in any even year (and the preceding year) in which neither a Presidential nor a Senate candidate appears on the ballot, state party committees are required to allocate only 15 percent of administrative expenses to their Federal account.

Thus, under this alternative "administrative costs" allocation approach, as much as 10 percent of the salary of a state party employee who spends 25 percent of his or her time engaged in activities in connection with a Federal election could be funded with soft money. As such, this alternative approach does not comport with BCRA's soft money prohibition and is clearly inconsistent with "Congress' overall scheme of requiring Federal election activities to be paid for with federal funds." *Shays v. FEC*, 337 F. Supp. 2d at 114.

Finally, the Commission proposes as another alternative establishing an allocation percentage directly proportional to the amount of compensated time these employees spend on Federal-related activities in a given month. While this alternative allocation method would in principle comport with BCRA's soft money prohibition and with the district court's opinion in

Shays, we do not support this alternative because it is unnecessarily complicated and difficult to enforce. Whereas the proposed rule to establish a 25 percent Federal funds fixed minimum would serve as an easily understood, easily monitored and easily administered guarantee against the use of non-Federal funds to finance Federal-related activity, this proposed alternative would require burdensome monitoring of a party committee's monthly log, kept pursuant to 11 C.F.R. § 106.7(d)(1), and monthly recalculation of allocation ratios for each employee, in order to reach the same result.

IV. Fringe Benefits

The Commission also seeks comment on whether the allocation method chosen by the Commission for salaries and wages should likewise be applied to committee payments for the costs of employee fringe benefits. The Commission makes specific reference to its discussion of this issue in a 2003 advisory opinion.

In Ad. Op. 2003-11, a committee sought advice on whether it was required to allocate its costs of paying fringe benefits to employees spending 25 percent or less of their time on Federal-related activity as "administrative expenses," using a mixture of Federal and non-Federal funds. The Commission concluded that the costs of fringe benefits fall into the category of compensated time and advised the committee it could use exclusively non-Federal funds to pay for the benefits.

We agree with the Commission's conclusion in Ad. Op. 2003-11 that the costs of fringe benefits fall into the category of compensated time, but for the reasons set forth above, we disagree with the holding of the opinion that a party committee could use all non-Federal funds to pay for such benefits.

The Commission now seeks comment on whether the rules should be amended to permit, but not require, state parties to use the same allocation methods for fringe benefits as are used for salaries and wages, instead of allocating fringe benefits as administrative costs.

We urge the Commission to make clear that cost of fringe benefits falls into the category of compensated time, and to require that such fringe benefit costs be paid in the same manner as salaries and wages. Specifically, the Commission should require the cost of fringe benefits of state party employees who spend more than 25 percent of their time on Federal election activities to be paid entirely with Federal funds. The cost of fringe benefits of state party employees who spend 25 percent or less of their time on Federal-related activities should be paid according to the 25 percent Federal funds fixed minimum allocation method.

We oppose the alternative of allowing state party committees to use the administrative expense allocation ratios in section 106.7(d)(2) for the payment of such fringe benefits, as doing so would enable state parties to use non-Federal funds to pay a portion of the costs of benefits of employees spending 25 percent of their time on Federal-related activity during any year in which a Presidential candidate is not on the ballot.

V. Allocation of Fundraising Costs and Advisory Opinion 2004-12

In a matter unrelated to the district court's *Shays* decision on the payment of salaries and wages, the Commission seeks comment on whether section 106.7(c)(4) should be revised, consistent with Ad. Op. 2004-12, to make clear that Federal funds raised by a state party committee at an event where both non-Federal and Federal funds are raised, and where the costs of the event are properly allocated between Federal and non-Federal accounts using the "funds received" method pursuant to section 106.7(d)(4), may be used to fund Federal election activity.

We oppose this revision of section 106.7(c)(4). Given that the NPRM fails to suggest specific proposed language for the revision, it is difficult to comment with specificity on the proposed change. However, we believe that the existing regulation properly captures one of the essential elements of BCRA: to provide for clear separation between hard money and soft money for the funds to be used by state parties for Federal election activities.

The current regulation is also consistent with, and mandated by, 2 U.S.C. § 441i(c), which provides:

An amount spent by a person described in subsection (a) or (b) [*i.e.*, a state party] to raise funds that are used, *in whole or in part*, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions and reporting requirements of this Act.

(Emphasis added). The plain language of this provision supports the requirement of section 106.7(c)(4) – that when a state party raises funds to be used for Federal election activities, it must spend only hard money to raise those funds. Paying for the costs of a fundraiser with an allocated mixture of hard and soft money may be permissible under Commission allocation regulations as a general matter, but the clear meaning of section 441i(c) is that the hard money so raised cannot then be used for Federal election activities.

The statutory provision requires that hard money – and only hard money – be used to pay the costs of a fundraiser if the funds therein raised are to be used "in part" to pay for Federal election activity. Accordingly, where a state party intends to use hard money to pay for Federal election activity, the costs of the fundraiser where that money is raised cannot be paid for with an allocated mixture of hard and soft money, but must be paid for entirely with hard money. Section 106.7(c)(4) properly implements this statutory requirement, and any alteration of this requirement would be in derogation of the statute.

For this reason, we oppose any change to section 106.7(c)(4).

VI. Conclusion

For the reasons set forth above, we urge the Commission to adopt proposed replacement rules 11 C.F.R. §§ 106.7(c)(1), (d)(1), and 300.33(c)(2) establishing a fixed 25 percent Federal minimum funding for state party employees who spend 25 percent or less of their time on Federal activities, and to reject the alternative proposals. We further urge the Commission to

clarify that the costs of employee fringe benefits should be paid in the same manner as salaries and wages, either paid entirely with Federal funds or according to the proposed 25 percent Federal funds fixed minimum allocation method. Finally, regarding the allocation of fundraising costs, we oppose any changes to 11 C.F.R. § 106.7(c)(4).

We appreciate the opportunity to submit these comments.

Sincerely,

/s/ Fred Wertheimer

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