

January 6, 2010

By Electronic Mail (FEAShays3@fec.gov & arothstein@fec.gov)

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

Re: Supplemental Comments on Notice 2009-22: Definition of “Federal Election Activity”

Dear Ms. Rothstein:

These supplemental comments are submitted jointly by the Campaign Legal Center and Democracy 21 in response to two specific questions asked by Commissioners at the December 16 hearing held in connection with Notice of Proposed Rulemaking (NPRM) 2009-22—one pertaining to examples of “voter registration activity” and “get-out-the-vote (GOTV) activity” and the other pertaining to a hypothetical scenario about local political party “GOTV activity.”

I. Examples of “Voter Registration Activity” and “GOTV Activity”

Commissioner Hunter asked whether the illustrative, non-exhaustive lists of examples of “voter registration activity” at proposed 11 C.F.R. § 100.24(a)(2)(i)¹ and of “GOTV activity” at proposed 11 C.F.R. § 100.24(a)(3)(i)² should, in the final rule, be made exhaustive lists of what

¹ Under proposed 11 C.F.R. § 100.24(a)(2)(i):

- [V]oter registration activity includes, but is not limited to, any of the following:
- (A) Urging, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, potential voters to register to vote;
 - (B) Preparing and distributing information about registration and voting;
 - (C) Distributing voter registration forms or instructions to potential voters;
 - (D) Answering questions about how to complete or file a voter registration form, or assisting potential voters in completing or filing such forms; or
 - (E) Submitting a completed voter registration form on behalf of a potential voter.

² Under proposed 11 C.F.R. § 100.24(a)(3)(i):

- [G]et-out-the-vote activity includes, but is not limited to, any of the following:
- (A) Informing potential voters, whether by mail (including direct mail), in person, by telephone (including robocalls), or by any other means, about:
 - (1) The date of an election;

constitutes “voter registration activity” and “GOTV activity.” Commissioner Hunter elaborated by asking whether witnesses could provide the Commission with examples of activities that should be covered by the “voter registration activity” and “GOTV activity” regulations, but that are not covered by the lists of examples in the NPRM.

The lists of examples should remain illustrative and non-exhaustive. Under the proposed rule, the definition of “voter registration activity” at 11 C.F.R. § 100.24(a)(2)—*i.e.*, “encouraging or assisting potential voters in registering to vote”—serves as the operative legal test for what constitutes “voter registration activity.” Similarly, under the proposed rule, the definition of “GOTV activity” at 11 C.F.R. § 100.24(a)(3)—*i.e.*, “encouraging or assisting potential voters to vote”—serves as the operative legal test for what constitutes “GOTV activity.” These umbrella definitions should be retained in the final rule, and the Commission in the future should apply these tests to determine whether or not specific activity is “voter registration activity” or “GOTV activity.”

The Commission should not attempt to anticipate and list every possible specific form of activity that might meet the umbrella definitions of “voter registration activity” and “GOTV activity,” although the illustrative examples are helpful to understanding the umbrella definitions. To limit the scope of the definitions to just the listed examples would supplant the umbrella definition in its entirety and instead make the lists of examples the operative law. Such an approach puts too much burden on the lists of examples and invites creative circumvention of the law.

For example, while the umbrella definition of “voter registration activity”—“encouraging or assisting potential voters in registering to vote”—would include driving people to the county clerk’s office for them to fill out voter registration forms, such activity does not appear to be encompassed by any of the examples of “voter registration activity” included in proposed 11 C.F.R. § 100.24(a)(2). One might argue that such activity does fall within the example “assisting potential voters in completing or filing such forms,” but this is not entirely clear. It is entirely possible that the Commission and/or members of the regulated community would interpret this example as only encompassing activities directly related to the completion and handling of voter registration forms—not to facilitation of potential voter access to such forms. What is clear is that such activity constitutes “assisting potential voters in registering to vote” and, therefore, correctly falls within the scope of regulation under the umbrella definition.

As another example, while the umbrella definition of “GOTV activity”—“encouraging or assisting potential voters to vote”—would include activities assisting voters with mailing completed ballots in jurisdictions that permit voting by mail, none of the examples of “GOTV activity” included in proposed 11 C.F.R. § 100.24(a)(3)(i) include activities related to voting by mail. The “GOTV activity” examples include only informing voters about election details and transporting voters to the polls. The “GOTV examples” do not include assisting voters with obtaining vote-by-mail ballots or casting such ballots.

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- (2) Times when polling places are open;
 - (3) The location of particular polling places;
 - (4) Early voting or voting by absentee ballot; or
 - (B) Offering to transport, or actually transporting, potential voters to the polls.

A regulation restricting the umbrella definitions of “voter registration activity” and “GOTV activity” to the scope of the examples would likely thus exclude from regulation activities at the edges of the examples and activities that lawyers will undoubtedly argue do not fall within the language of the examples, even if such activities are clearly included within the language of the umbrella definitions. This problem will not be solved by adding to the list of examples those activities discussed above, for it is nearly impossible—if not impossible—for the Commission to anticipate every possible fact pattern and every possible example that could fall within the scope of the umbrella test.

It is common for the Commission’s regulations to use the construct of “includes, but not limited to” in listing examples of the coverage of a term. In fact, this phraseology is used in all of the following regulations: 11 C.F.R. §§ 2.4(a)(2), 2.4(b)(1)(i), 6.103(e)(1)(ii), 100.24(a)(2), 100.24(a)(3), 100.94(b), 100.94(c), 100.155(b), 100.155(c), 103.3(b)(1), 300.2(m)(1)(i), 9004.9(d)(1)(i), 9008.10(g)(4), 9034.5(c)(1) and 9420.2(1)(ii). By contrast, a search of the Commission’s regulations for the phrase “includes only” yields zero results.

For instance, the Commission’s definition of the term “to solicit,” at 11 C.F.R. § 300.2(m), gives illustrative examples of “statements [that] constitute solicitations,” *id.* at 300.2(m)(2), but does not purport to list every communication that would constitute a solicitation—nor would it be sensible or practical to try to do so. While the illustrative examples help to interpret and apply the umbrella definition of “to solicit,” it is the umbrella definition that controls, and statements that meet the umbrella definition but are not described by the list of examples nonetheless constitute solicitations. It is a practical impossibility for the Commission to anticipate and list every possible form of solicitation. So too, it is a practical impossibility for the Commission to anticipate and list every possible form of “voter registration activity” or “GOTV activity.”

We urge the Commission to continue its longstanding, common-sense approach to promulgating regulations with illustrative, non-exhaustive lists of examples.

II. Local Party “GOTV Activity” Hypothetical

Commissioner McGahn asked whether a hypothetical scenario along the following lines should be covered by the “Federal election activity” rules: A local Republican Party has a candidate on the ballot for a city council seat. On the same ballot appears an incumbent Democratic Member of the U.S. House of Representatives running for re-election unopposed. There are no U.S. Senate or Presidential candidates on the ballot. Should the local Republican Party’s “GOTV activity” in connection with the election be regulated by Federal law?³

The Federal Election Campaign Act (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), provides: “[A]n amount that is expended or disbursed for Federal

³ The transcript of the December 16 hearing is not yet available on the Commission’s Web site. This description in these supplemental comments of the hypothetical scenario posed by Commissioner McGahn is based on the recollection of Paul Ryan, who testified at the hearing on behalf of the Campaign Legal Center.

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 activity that a state party committee may finance with an allocated mixture of hard money and so-called “Levin funds.” 2 U.S.C. § 441i(b)(2).

The Act defines “Federal election activity” to include, *inter alia*, “voter identification, get-out-the-vote activity, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot (regardless of whether a candidate for State or local office also appears on the ballot)[.]” 2 U.S.C. §§ 431(20)(A)(i) and (ii) (emphasis added).

These statutory provisions apply without question to Commissioner McGahn’s hypothetical scenario. In that scenario, the local Republican Party’s city council candidate will appear on the ballot along with a candidate for Federal office (*i.e.*, the incumbent Democratic candidate for the U.S. House of Representatives). It is clear, therefore, under the plain language of the statute, that the local Republican Party’s “GOTV activity” is “in connection with an election in which a candidate for Federal office appears on the ballot.” The statute is explicit in deeming this to be “Federal election activity,” regardless of whether a candidate for State or local office also appears on the ballot.

Where a statute is crystal clear—as is the case here—the Commission has no discretion or authority to ignore it. The Commission’s job is to enforce the statute as drafted by Congress, not try to second-guess whether Congress could have or should have drafted the statute more narrowly. In Commissioner McGahn’s example, the GOTV drive by the Republican Party might bring a large number of voters to the polls who would then write in a Republican name to oppose the Democratic congressional candidate. To be sure, such a write-in campaign is not likely to defeat the Democratic candidate, but it could undermine the scope or perception of the Democratic candidate’s victory and in that way influences a Federal election. It is possible that Congress envisioned such a scenario when drafting the statute. In any event, Congress chose to draw a bright line rule that if a Federal candidate is on the ballot, “GOTV activity” constitutes “Federal election activity.” The Commission should adhere to the bright line drawn by Congress and not open the door to making subjective guesses as to when Congress might not want its rule to apply.

If the Commission believes the statute’s regulation of the activities in Commissioner McGahn’s hypothetical scenario is inappropriate or overbroad, the Commission’s recourse is to include in its annual legislative recommendations a suggestion that Congress narrow the scope of the statute. It is up to Congress then to decide whether to do so. In the meantime, it is not the Commission’s job to ignore the statute as currently written, or decide it will not enforce a clear statutory provision that the Commission thinks Congress should have written more narrowly.

We appreciate the opportunity to submit these supplemental comments.

Sincerely,

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