not exempt from the provisions of the order as provided for in § 1250.348 thereof, shall be entitled to only one vote in the referendum.

(b) Proxy voting is not authorized, but an officer or employee of a corporate producer, or an administrator, executor, or trustee of a producing estate, or an authorized representative of any other entity may cast a ballot on behalf of such producer or estate. Any individual so voting in a referendum shall certify that such individual is an officer or employee of the corporate producer, or an administrator, executor, or trustee of the producing estate, or an authorized representative of such other entity, and that such individual has the authority to take such action. Upon request of the referendum agent, the individual shall submit adequate evidence of his authority.

(c) Each producer shall be entitled to cast only one ballot in the referendum.

§ 1250.203 Instructions.

The referendum agent shall conduct the referendum, in the manner herein provided, under supervision of the Administrator. The Administrator may prescribe additional instructions, not inconsistent with the provisions hereof, to govern the procedure to be followed by the referendum agent. Such agent shall:

(a) Determine the time of commencement and termination of the period of the referendum, and the time when all ballots must be received by the referendum agent.

(b) Determine whether ballots may be cast by mail, at polling places, at meetings of producers, or by any combination of the foregoing.

(c) Provide ballots and related material to be used in the referendum. Ballot material shall provide for recording essential information for ascertaining whether the person voting or on whose behalf the vote is cast, is an eligible voter, and the total volume of commercial eggs produced during a representative period.

(d) Give reasonable advance notice of the referendum:

(1) By utilizing available media or public information sources, without incurring advertising expense, to publicize the dates, places, method of voting, eligibility requirements, and other pertinent information. Such sources of publicity may include, but are not limited to, print and radio; and

(2) By such other means as the agent may deem advisable.

(e) Make available to producers instructions on voting, appropriate registration, ballot, and certification forms, and, except in the case of a referendum on the termination or continuance of an order, a summary of the terms and conditions of the order: Provided, that no person who claims to be qualified to vote shall be refused a ballot.

(f) If the ballots are to be cast by mail, cause all the material specified in paragraph (e) of this section to be mailed to each eligible producer whose name and address are known to the Secretary or the referendum agent.

(g) If the ballots are to be cast at polling places or meetings, determine the necessary number of polling or meeting places, designate them, announce the time of each meeting or the hours during which each polling place will be open, provide the material specified in paragraph (e) of this section, and provide for appropriate custody of ballot forms and delivery to the referendum agent of ballots cast.

(h) At the conclusion of the referendum, canvass the ballots, tabulate the results, and except as otherwise directed, report the outcome to the Administrator and promptly thereafter submit the following:

(1) All ballots received by the agent and appointees, together with a certificate to the effect that the ballots listed are all of the ballots cast and received by the agent and appointees during the referendum period;

(2) A tabulation of all challenged ballots deemed to be invalid; and

(3) A report of the referendum including a detailed statement explaining the method used in giving publicity to the referendum and showing other information pertinent to the manner in which the referendum was conducted.

§ 1250.204 Subagents.

The referendum agent may appoint any person or persons deemed necessary or desirable to assist the agent in performing such agent's functions of this subpart. Each individual so appointed may be authorized by the agent to perform, in accordance with the requirements herein set forth, any or all of the following functions (which, in the absence of such appointment, shall be performed by said agent):

(a) Give public notice of the referendum in the manner specified herein;

(b) Preside at a meeting where ballots are to be cast or as poll officer at a polling place;

(c) See the ballots and the aforesaid texts are distributed to producers and receive any ballots which are cast; and

(d) Record the name and address of each person casting a ballot with said subagent and inquire, as deemed appropriate, into the eligibility of such persons to vote in the referendum.

§ 1250.205 Ballots.

The referendum agent and subagents shall accept all ballots cast; but should they, or any of them, deem that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, and the results of any investigations made with respect thereto, and the disposition thereof. Invalid ballots shall not be counted.

§ 1250.206 Referendum report.

Except as otherwise directed, the Administrator shall prepare and submit to the Secretary a report on the results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to analysis of the referendum and its results.

§ 1250.207 Confidential information.

The ballots cast or the manner in which any person voted and all information furnished to, compiled by, or in the possession of the referendum agent shall be regarded as confidential. The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Order and the voter list shall be strictly confidential and shall not be disclosed.

Dated: September 3, 2010.

David R. Shipman,

Acting Administrator, Agricultural Marketing Service.

[FR Doc. 2010–22644 Filed 9–9–10; 8:45 am]

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FEDERAL ELECTION COMMISSION

11 CFR Part 100

[Notice 2010–18]

Definition of Federal Election Activity

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission is revising its rules as to the activities that constitute "Federal election activity" under the Federal Election Campaign Act of 1971, as amended. Specifically, these final rules modify the definitions of "voter registration activity" and "get-out-the-vote activity," in response to the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Shays* v. *FEC.*

DATES: These rules are effective on December 1, 2010.

FOR FURTHER INFORMATION CONTACT: Ms. Amy L. Rothstein, Assistant General Counsel, or Attorney Mr. David C. Adkins or Attorney Mr. Neven F. Stipanovic, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

SUPPLEMENTARY INFORMATION: The Bipartisan Campaign Reform Act of 2002 [1] ("BCRA") contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* ("the Act"). The Federal Election Commission ("Commission") is revising its regulations at 11 CFR 100.24 regarding "Federal election activity," including the definitions of the terms "voter registration activity" and "get-out-the-vote activity" ("GOTV activity"). The Court of Appeals for the District of Columbia Circuit found aspects of these rules invalid in *Shays* v. *Federal Election Commission,* 528 F.3d 914 (DC Cir. 2008) ("*Shays III*"). Accordingly, the Commission is revising its rules at 11 CFR 100.24 to comply with the *Shays III* decision.

Transmission of Final Rules to Congress

Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the **Federal Register** at least thirty calendar days before they take effect. The final rules that follow were transmitted to Congress on September 7, 2010.

Explanation and Justification

I. Background Information

A. BCRA

The Act, as amended by BCRA, and Commission regulations provide that a State, district, or local committee of a political party must pay for certain "Federal election activities" with either entirely Federal funds [2] or, in other instances, a mix of Federal funds and Levin funds.[3] *See* 2 U.S.C. 441i(b); 11 CFR 300.32. The Act identifies four types of activity that are subject to these funding restrictions, including "voter registration activity"—Type I Federal election activity—and GOTV activity—Type II Federal election activity. *See* 2 U.S.C. 431(20)(A)(i) and (ii), 441i(b); 11 CFR 100.24(a)(2) and (3).[4]

Application of BCRA's Federal election activity funding restrictions for Types I and II Federal election activity is conditioned upon the timing of the activity. Voter registration activity (Type I), for example, constitutes Federal election activity, and therefore is subject to BCRA's funding restrictions, only if it is conducted "120 days before the date a regularly scheduled Federal election is held." 2 U.S.C. 431(20)(A)(i). Similarly, voter identification, GOTV activity, and generic campaign activity are Federal election activity only if they are conducted "in connection with an election in which a candidate for Federal office appears on the ballot," a phrase that is defined in terms of a specific time window.[5] 2 U.S.C. 431(20)(A)(ii) and 11 CFR 100.24(a)(1).

In BCRA, Congress chose to restrict the funds which State, district, and local party committees could use for Federal election activity because it determined that these activities affect Federal elections. *See* 148 Cong. Rec. S2139 (daily ed. Mar. 20, 2002) (statement of Sen. McCain) (noting, for example, that "get-out-the-vote and voter registration drives * * * are designed to, and do have an unmistakable impact on both Federal and non-Federal elections").

Restrictions on the funding of Federal election activity by State, district, and local party committees are critical because they prevent evasion of BCRA's restrictions on the raising and spending of non-Federal funds by national party committees and Federal candidates and officeholders. *See* Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 65 (July 29, 2002) ("2002 Final Rule"). Indeed, in passing BCRA's Federal election activity provisions, Congress had in mind "the very real danger that Federal contribution limits could be evaded by diverting funds to State and local parties, which then use those funds for Federal election activity." *See* 148 Cong. Rec. S2138 (daily ed. Mar. 20, 2002) (statement of Sen. McCain).

The Supreme Court upheld BCRA's Federal election activity provisions in *McConnell* v. *FEC,* 124 S. Ct. 619, 670–77 (2003). The Court found that non-Federal funds given to State, district, and local party committees could have the same corrupting influence as non-Federal funds given to the national parties and therefore held that BCRA's Federal election activity restrictions were justified by an important government interest. *Id.* at 672–73. The Court held that BCRA's Federal election activity provisions were likely necessary to prevent "corrupting activity from shifting wholesale to state committees and thereby eviscerating [the Act]." *Id.* at 673.

In reaching its decision, the Court noted that BCRA regulated only "those contributions to state and local parties that can be used to benefit Federal candidates directly" and therefore posed the greatest threat of corruption. *Id.* at 673–74. As such, the Court found BCRA's regulation of voter registration activities, which "directly assist the party's candidates for federal office," and GOTV activities, from which Federal candidates "reap substantial rewards," to be permissible methods of countering both corruption and the appearance of corruption. *Id.* at 674; *see also id.* at 675 (finding that voter registration activities and GOTV activities "confer substantial benefits on federal candidates" and "the funding of such activities creates a significant risk of actual and apparent corruption," which BCRA aims to minimize).

B. Rulemakings

Although BCRA defines Federal election activity to include "voter registration activity" and "GOTV activity," it does not specifically define those underlying terms. *See* 2 U.S.C. 431(20)(A)(ii)–(iii). Accordingly, the Commission promulgated definitions of these terms.

1. 2002 Rulemaking

The Commission first promulgated definitions of "voter registration activity" and "GOTV activity" on July 29, 2002. *See* 2002 Final Rule, 67 FR at 49067. The 2002 Final Rule defined "voter registration activity" as "contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote." *Id.* at 49110. The Explanation and

[1] Public Law 107–155, 116 Stat. 81 (2002).

[2] "Federal funds" are funds subject to the limitations, prohibitions, and reporting requirements of the Act. *See* 11 CFR 300.2(g).

[3] "Levin funds" are funds raised and disbursed by State, district, or local party committees pursuant to certain restrictions. *See* 2 U.S.C. 441i(b); *see* also 11 CFR 300.2(i).

[4] In addition to GOTV activity, Type II Federal election activity also includes "voter identification" and "generic campaign activity." *See* 2 U.S.C. 431(20)(A)(ii); 11 CFR 100.24 and 100.25. Types III and IV Federal election activity are outside the scope of this rulemaking and are not discussed. They pertain to public communications that refer to a clearly identified Federal candidate and promote, support, attack or oppose a candidate for Federal office (Type III) and 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 (Type IV). Types I and II Federal election activity may be funded with a combination of Federal and Levin funds; Types III and IV Federal election activity must be funded entirely with Federal funds.

[5] Commission regulations define "in connection with an election in which a candidate for Federal office appears on the ballot" at 11 CFR 100.24(a)(1).

Justification ("E&J") accompanying the rule noted that the definition was limited to "individualized contact for the specific purpose of assisting individuals with the process of registering to vote." *Id.* at 49067. The Commission expressly rejected an approach whereby mere encouragement to register to vote would have constituted voter registration activity. The Commission was concerned that taking such an approach would result in "thousands of political committees and grassroots organizations that merely encouraged voting as a civic duty, who have never been subject to Federal regulation for such conduct, [being] swept into the extensive reporting and filing requirements mandated under Federal law." *Id.*

The Commission similarly defined "GOTV activity" in 2002 as "contacting registered voters by telephone, in person, or by other individualized means to assist them in engaging in the act of voting." *Id.* at 49111. In adopting this construction, the Commission sought to distinguish GOTV activity from "ordinary or usual campaigning," to avoid "federaliz[ing] a vast percentage" of the campaign activity that a State, district, or local party committee may conduct on behalf of its candidates. *Id.* at 49067. The Commission's definition focused on actions directed toward registered voters that had the particular purpose of "assisting registered voters to take any and all steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law." *Id.* The definition was not intended to cover activity aimed at "generally increasing public support for a candidate or decreasing public support for an opposing candidate." *Id.*

The Commission's 2002 definition of GOTV activity also expressly excluded "any communication by an association or similar group of candidates for State and local office or of individuals holding State or local office if such communication refers only to one or more [S]tate or local candidates," in order to keep "State and local candidates' grassroots and local political activity a question of State, not Federal, law." *Id.* The Commission declined to read BCRA as extending "to purely State and local activity by State and local candidates" and concluded that such "a vast federalization of State and local activity" required "greater direction from Congress." *Id.*

The Commission's 2002 definitions of voter registration activity and GOTV activity were challenged in *Shays* v. *FEC,* 337 F. Supp. 2d 28 (D.D.C. 2004) ("*Shays I*"). The district court held that the definition of "voter registration activity," which required actual assistance, was neither inconsistent with congressional intent nor an impermissible construction of BCRA. *See Shays I,* 337 F. Supp. 2d at 100 (applying *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837 (1984)). The court further held that the "exact parameters" of the regulatory definition were unclear and, therefore, it was unable to determine if the definition "unduly compromised" BCRA's purpose. *Id.* Nevertheless, the court found that the Commission's definition was promulgated without adequate notice and opportunity for comment, contrary to the Administrative Procedure Act, *see* 5 U.S.C. 553, and remanded the regulation to the Commission. *See Shays I,* 337 F. Supp. 2d at 100.

The court reached similar conclusions as to the definition of "GOTV activity," holding that the definition, which required actual assistance, was neither inconsistent with congressional intent nor an impermissible construction of BCRA. *Id.* at 103, 105 (applying *Chevron*). The court also concluded that there was "ambiguity as to what acts are encompassed by the regulation," which rendered the court unable to determine whether the definition of "GOTV activity" unduly compromised BCRA. *Id.* at 105. As it had with the definition of "voter registration activity," though, the court found that the Commission's definition was promulgated without adequate notice and opportunity for comment and remanded the regulation to the Commission. *See id.* at 106.

The court also found that the exemption from the GOTV activity definition for communications made by associations or groups of State or local candidates or officeholders ran contrary to Congress's clearly expressed intent. *See id.* at 104. The court found that BCRA provided no support for such an exemption, and it rejected all federalism concerns raised by the Commission in defense of the exemption, holding that "Congress was sensitive to federalism concerns in drafting BCRA" and that the Supreme Court in *McConnell* had rejected the general federalism challenge brought against BCRA's Federal election activity provisions. *Id.*

2. 2005 Rulemaking

The Commission commenced a rulemaking in 2005 to address the court's concerns, rather than appeal these aspects of *Shays I.* Following another notice and period for comment, the Commission promulgated definitions of "voter registration activity" and "GOTV activity" that were substantially similar to those promulgated in 2002. The final rules were accompanied by an E&J that sought to address many of the *Shays I* court's concerns. *See* Final Rules on Definition of Federal Election Activity, 71 FR 8926, 8928 (Feb. 22, 2006) ("2006 Final Rule").

The Commission's decision to leave unchanged the core aspects of the definitions of "voter registration activity" and "GOTV activity" was based on its continued concern that definitions which captured "mere encouragement[s]" would be "overly broad," were unnecessary "to effectively implement BCRA," and "could have an adverse impact on grassroots political activity." [6] Accordingly, the 2006 definitions were designed to encompass activities that actually registered persons to vote and resulted in voters going to the polls. *Id.* at 8928–29. Thus, the Commission sought to "regulate the funds used to influence Federal elections" and not "incidental speech." *Id.*

The Commission noted in its 2006 E&J that its regulations would not lead to the circumvention of the Act precisely because they captured "the use of non-Federal funds for disbursements that State, district, and local parties make for those activities that actually register individuals to vote." *Id.* Moreover, "many programs for widespread encouragement of voter registration to influence Federal elections would be captured as public communications under Type III [Federal election activity]." *Id.* The 2006 E&J also provided a nonexclusive list of examples of activity that would—and would not—constitute voter registration activity. *Id.*

C. Shays III

The revised definitions of voter registration activity and GOTV activity were challenged again in *Shays* v. *FEC,* 508 F. Supp. 2d. 10, 63–70 (D.D.C. 2007). Analyzing the definitions of "voter registration activity" and "GOTV activity," the district court noted that the Commission's 2006 E&J addressed only the most obvious instances of what was—and was not—covered activity but not the "vast gray area" of activities that State and local parties may conduct and that may benefit Federal candidates.

[6] The Commission did change other aspects of the GOTV activity definition in response to the *Shays I* court decision. The Commission removed from the definition of "GOTV activity" the exemption for communications by associations and groups of State or local candidates or officeholders. *See* 2006 Final Rule, 71 FR at 8931. The Commission also removed from the examples of GOTV activity the phrase "within 72-hours of an election," to clarify that the definition covered activity conducted more than 72 hours before an election. *See id.* at 8930–31.

Shays v. *FEC,* 508 F. Supp. 2d at 65, 69–70.

Regarding GOTV activities, in particular, the district court focused on Advisory Opinion 2006–19, issued to the Los Angeles County Democratic Party Central Committee, in which the Commission concluded that a local party committee's mass mailing and pre-recorded, electronically dialed telephone calls ("robocalls") to the party's registered voters would not constitute GOTV activity.[7] The district court stated that Advisory Opinion 2006–19 had announced a much narrower interpretation of the scope of GOTV activity than "might otherwise [have been] presumed on the face of the definition." *Id.* at 69.

The district court held that the Commission's failure to address these vast gray areas, and to explain whether activities falling within them would affect Federal elections, unduly compromised BCRA's purposes. *Id.* at 65–66, 69–70. Accordingly, the court remanded the definitions to the Commission. *Id.* at 70–71.

The Court of Appeals upheld the lower court's decision invalidating the Commission's definitions of "voter registration activity" and "GOTV activity," although on slightly different grounds. *See Shays* v. *FEC,* 528 F.3d 914, 931 (DC Cir. 2008). The Court of Appeals recognized that the Commission had discretion to promulgate definitions that left unaddressed large gray areas of activity and to fill them in later through enforcement actions and the advisory opinion process. *See Shays III,* 528 F.3d at 931.

Nevertheless, the Court of Appeals held that the Commission's definitions of "voter registration activity" and "GOTV activity" were deficient because they served to "create 'two distinct loopholes.'" *Id.* The flaws in both definitions were: (1) The "assist" requirements, which excluded efforts that "actively encourage people to vote or register to vote" and (2) the "individualized means" requirements, which excluded "mass communications targeted to many people," and had the effect of "dramatically narrowing which activities [were] covered" by the rules. *Id.* Accordingly, the Court of Appeals concluded that the definitions would "allow the use of soft money for many efforts that influence federal elections," which is directly counter to BCRA's purpose. *Id.*

The court rejected the Commission's justifications for the definitions—to exclude mere exhortations from coverage and to give clear guidance as to the scope of the rules—finding the Commission could craft definitions that exclude routine exhortations and that provided clear guidance to State, district, and local party committees in a way that is more consistent with BCRA. *Id.* at 932. Accordingly, the Court of Appeals remanded the regulations to the Commission.

In response to the court of appeal's decision, the Commission published a Notice of Proposed Rulemaking on October 20, 2009. *See* Notice of Proposed Rulemaking on the Definition of Federal Election Activity, 74 FR 53674 (Oct. 20, 2009) ("NPRM"). The NPRM proposed possible modifications to the definitions of "voter registration activity" and "GOTV activity," as well as a modification to the "exceptions" paragraph of the definition of "Federal election activity." The public comment period for the NPRM closed on November 20, 2009. The Commission received written comments from 14 commenters, including a comment from the Internal Revenue Service indicating that the proposed rules did not appear to present a conflict with the Internal Revenue Code or the regulations thereunder. The Commission held a public hearing on December 16, 2009, at which seven witnesses testified. After the hearing, the Commission accepted four supplemental comments expanding on issues raised during the hearing. All comments and a public transcript of the hearing are available at *http://www.fec.gov/law/law_rulemakings.shtml#FEAShays3.* For purposes of this document, the terms "comment" and "commenter" apply to both written comments and oral testimony at the public hearing.

These final rules define "voter registration activity" and "GOTV activity" for purposes of the Commission's Federal election activity regulations. These new definitions cover activities that urge, encourage, or assist potential voters to register to vote or to vote, regardless of whether the message is delivered individually or to a group of people via mass communication. Brief, incidental exhortations to register to vote or to vote are, however, exempt from the new definitions. Activities meeting these definitions must be paid for with Federal funds or with a mix of Federal and Levin funds, as appropriate. In addition, these final rules clarify that GOTV activity and voter identification conducted solely in connection with a non-Federal election are not subject to the Commission's Federal election activity funding restrictions, and provide that certain *de minimis* activities are not subject to the Federal election activity funding restrictions.

II. Final Rules

A. 11 CFR 100.24(a)(2)—Definition of "Voter Registration Activity"

To comply with the Court of Appeals' decision in *Shays III,* the Commission is revising the definition of "voter registration activity" at 11 CFR 100.24(a)(2). The Commission's new definition covers activities that assist, encourage, or urge potential voters to register to vote. The definition continues to cover contacting potential voters by individualized means but, as revised, it now also covers contacts directed to potential voters by any means to urge or encourage them to register to vote. As explained further below, the new definition excludes brief, incidental exhortations to register to vote, consistent with the court's decision.

1. 11 CFR 100.24(a)(2)(i)—Covered Activities

New paragraph (a)(2)(i) of 11 CFR 100.24 lists the activities that constitute voter registration activity. The new definition identifies the following activities as voter registration activity:

- Encouraging or urging potential voters to register to vote by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks, and messaging such as SMS and MMS), or by any other means (11 CFR 100.24(a)(2)(i)(A));
- Preparing and distributing information about registration and voting (11 CFR 100.24(a)(2)(i)(B));
- Distributing voter registration forms or instructions to potential voters (11 CFR 100.24(a)(2)(i)(C));
- Answering questions about how to complete or file a voter registration form (11 CFR 100.24(a)(2)(i)(D));
- Assisting potential voters in completing voter registration forms (11 CFR 100.24(a)(2)(i)(D));
- Submitting or delivering completed voter registration forms (11 CFR 100.24(a)(2)(i)(E));
- Offering or arranging to transport, or actually transporting, potential voters to a board of elections or county clerk's office for them to fill out voter

[7] The proposed communications would have been made four or more days before the election, would have informed recipients of the date of the election, would have urged them to vote for local, but not Federal, candidates, and would not have included additional information such as the hours and location of the individual voter's polling place. The Commission concluded that the communications would provide neither actual assistance nor sufficiently individualized assistance to constitute GOTV activity and that, as a result, the communications could be funded exclusively with non-Federal funds.

registration forms (11 CFR 100.24(a)(2)(i)(F)); and

• Any other activity that assists potential voters to register to vote (11 CFR 100.24(a)(2)(i)(G)).

Accordingly, the revised definition of "voter registration activity" covers the following examples: (1) Sending a mass mailing of voter registration forms; and (2) submitting completed voter registration forms to the appropriate State or local office handling voter registration.

The Commission received multiple comments on its proposal to expand the definition of voter registration activity to include encouraging potential voters to register to vote. Almost all the commenters agreed that expanding the definition in this manner would be responsive to the *Shays III* court. Commenters offered a range of opinions, though, on whether this expansion was *required* by the court's decision or if there was a narrower approach that might satisfy the court.

Two commenters stated that the Commission could not do "anything short of including encourage[ment]" in the definition and "still satisfy the concerns of the circuit court." In contrast, others that commented on this issue argued that a definition of voter registration activity that included activities that only encourage people to register to vote (regardless of the means) was unnecessary. Some commenters asserted that such a definition would subject to regulation all of the activities of State and local party committees, contrary to the intent of Congress.

Instead, the majority of commenters advocated for a narrower definition that would not apply to activities that, in their opinion, are not appropriately characterized as voter registration activity. Commenters suggested definitions covering only activities that *actively* encourage voter registration (which would be informed by a time/space analysis), that were *primarily aimed* at increasing voter registration, or that *facilitate* voter registration. Another commenter proposed a definition that would cover only activities understood by a "reasonable person engaged in political campaign management" to be voter registration activity. Multiple commenters wanted the Commission to adopt a definition of voter registration activity that would exclude "persuasion communications," which commenters characterized as communications that are intended to secure a vote for a specific candidate but that are not effective at mobilizing potential voters to register to vote.

If any of these narrower approaches proved under-inclusive, one commenter suggested that the Commission could subsequently amend its regulations. This approach, according to the commenter, was preferable to adopting a broad definition at the outset covering all activities that encourage potential voters to register to vote.

The Commission also received comments addressing its proposal to expand the definition of voter registration activity to include communications made by "any other means" that urge or encourage potential voters to register to vote. Two commenters thought that the court's decision did not require the Commission to adopt a definition covering all mass communications, and that the definition could simply be amended to cover certain specific activities, including phone banks and direct mail. Another commenter argued that the Commission should exempt from the definition of voter registration activity all Internet communications, stating that such communications are made at "virtually no cost." By contrast, one commenter asserted that the definition's "any other means" standard was not "inclusive enough" and that the definition should list "the multiple methods of electronic communication used today."

As discussed above, the *Shays III* court identified "two distinct loopholes" in the Commission's prior definitions of voter registration activity. *See Shays III,* 528 F.3d at 931–32. The court determined that these "two distinct loopholes"—which required that voter registration activity "assist" voters in registering to vote and that contacts with potential voters be "individualized"—conflicted with BCRA's purpose. *Id.* at 932. Moreover, the *Shays III* court suggested that the Commission's regulations should reach both efforts that "*encourage* people to vote or to register to vote" as well as "mass communications" that are directed to a significant number of people. *Id.* at 931. The Commission concludes that the definition of voter registration activity adopted in this rulemaking best addresses the court's concerns.

For these reasons, the Commission has decided not to adopt any of the other proposals suggested by the commenters. Whatever the individual merits of these proposals, in the current rulemaking the Commission is charged with adopting a definition of voter registration activity that addresses the "two distinct loopholes" identified by the *Shays III* court. Furthermore, many of the alternative proposals suggested by the commenters will not provide clear guidance to State and local party committees and could prove difficult for the Commission to administer and enforce.

The Commission has reorganized the definition of voter registration activity in section 100.24 in light of comments received. Whereas the proposed rule would have set forth a general definition of "voter registration activity" with a non-exhaustive list of examples, the new rule defines "voter registration activity" by providing a comprehensive list of covered activities. Notwithstanding this change in form, the new definition covers the same universe of activities as the definition proposed in the NPRM.

This change is responsive to commenters who indicated that the structure of the proposed definition was "confusing" and unhelpful. The Commission has concluded that the new definition, which lists both specific and general activities, provides clear and effective guidance while capturing those activities that Congress and the courts identified as being "voter registration activity."

2. 11 CFR 100.24(a)(2)(ii)—Brief, Incidental Exhortations

New paragraph (a)(2)(ii) of 11 CFR 100.24 states that an activity is not "voter registration activity" solely because it includes a brief exhortation to register to vote, so long as the exhortation is incidental to a communication, activity, or event. This exception from the definition of "voter registration activity" ensures that activities that are *not* otherwise voter registration activity do not become voter registration activity simply because they include a brief, incidental reminder to register to vote.

To qualify for the exception, the exhortation to register to vote must be both brief *and* incidental. Exhortations to register to vote that go on for many minutes of a speech, for example, or that occupy a large amount of space in a mailer are not brief and will not qualify for the exception. Similarly, exhortations, however brief, must also be incidental to the communication, activity or event. For example, a one-line exhortation to "Register to vote!" appearing at the end of a campaign flier would be incidental to the larger communication, whereas a communication stating only "Register to Vote by October 1st!" and containing no other text would not be incidental and, thus, would not come within the exception from the definition of "voter registration activity."

The exception applies to brief, incidental exhortations regardless of the forum or medium in which they are

made. The exception covers an exhortation offered in a speech at a rally, for example, as well as one appearing in an e-mail.

Two examples of activities that would be covered under the exception appear at new paragraphs (a)(2)(ii)(A) and (a)(2)(ii)(B) of 11 CFR 100.24. The first example is a mailer praising the public service record of a mayoral candidate and/or discussing the candidate's campaign platform. The mailer concludes by reminding recipients: "Don't forget to register to vote for [the mayoral candidate] by October 1st." The second example involves a phone call for a State party committee fundraising event. The call provides recipients with information about the event, solicits donations, and concludes by reminding the listener: "Don't forget to register to vote."

The new exception at 11 CFR 100.24(a)(2)(ii) differs in certain respects from the one proposed in the NPRM. The proposed exception would have applied only to incidental exhortations made during speeches or events, whereas the exception in the final rule applies to brief, incidental exhortations made in any communication or during any activity or event. Moreover, the proposed exception did not explicitly require that the exhortation be brief, although a brevity requirement was implicit in the proposal. Finally, the proposed exception included four examples of exhortations that would have qualified for the exception. The new exception includes only two examples, but they are more detailed than in the NPRM and, thus, provide better guidance regarding the intended application of the exception.

Several of the comments received on the exhortation exception were simply an extension of the comments on the scope and organization of the proposed definition of "voter registration activity" itself. One commenter, for example, indicated that the exception did not sufficiently narrow the definition of "voter registration activity" and would not appropriately protect "persuasion communications." Another commenter urged the Commission not to adopt the exhortation exception and, instead, simply to define voter registration activity as covering only activities that facilitate voter registration.

Other comments focused on the scope of the proposed exception. Specifically, commenters addressed whether the exception should be limited, as it was in the NPRM, to exhortations made during speeches and events, or whether it should also cover exhortations made in other contexts. Two commenters supported adopting the proposed exception, pointing out that the court's opinion specifically referenced only "routine or spontaneous speech-ending exhortations." Several commenters, though, believed that there was no reason to limit the exception by the medium in which the communication was delivered or the forum in which it was made. One of these commenters stated that "[n]othing in the court's decisions [could] reasonably be read to mean that exhortations are to be excluded only if made in a speech or at a rally but not if made by other means of communications." Another commenter pointed out that limiting the exception in this way would render it functionally meaningless, because parties rarely rely on speakers at rallies to encourage people to register to vote.

Two commenters discussed the proposed requirement in the NPRM that, to qualify for the exception, an exhortation be incidental to a speech or event. One commenter suggested that the Commission determine whether an exhortation is, in fact, incidental by engaging in a time/space analysis. Another commenter urged that the exhortation exception be further limited to only spontaneous communications and not cover communications that are scripted.

The Commission has considered the comments and has decided to adopt a somewhat broader exception than initially proposed. While the *Shays III* court required the Commission to adopt a more expansive definition of "voter registration activity," the court acknowledged that the Commission could exclude from the definition "routine or spontaneous speech-ending exhortations" and "mere exhortations * * * made at the end of a political event or speech." *Shays III,* 528 F.3d at 932.

The Commission agrees with those commenters who indicated that the exception should not be limited by medium or forum. To limit the exemption to exhortations made only at speeches or rallies would elevate form over substance and is not necessary to give effect to the court's opinion. The court did not require the Commission to create artificial distinctions between an incidental exhortation during a speech or rally and an incidental exhortation made in a written communication or telephone call conveying the same message.

This exception will not inoculate speeches or events that otherwise would meet the new definition of "voter registration activity." For example, a speech given sixty days before an election that devotes several minutes to providing listeners with information on how to register to vote would not qualify under the exception at new 11 CFR 100.24(a)(2)(ii). Instead, the exception is intended to ensure that communications that would not otherwise be voter registration activity do not become voter registration activity merely because they include a brief, incidental exhortation encouraging listeners to register to vote.

B. 11 CFR 100.24(a)(3)—Definition of "GOTV Activity"

To comply with the Court of Appeals' decision in *Shays III,* the Commission is revising the definition of "GOTV activity" at 11 CFR 100.24(a)(3). The Commission's revised definition covers activities that assist, encourage, or urge potential voters to vote. The definition continues to cover contacting potential voters by individualized means but, as revised, it now also covers contacting potential voters by any means to urge or encourage them to vote. As explained further below, the new definition excludes brief, incidental exhortations to vote, consistent with the court's decision.

1. 11 CFR 100.24(a)(3)(i)—Covered Activities

Revised paragraph (a)(3)(i) of 11 CFR 100.24 lists the activities that are GOTV activity. The revised definition identifies the following activities as GOTV activity:

- Encouraging or urging potential voters to vote (11 CFR 100.24(a)(3)(i)(A));
- Informing potential voters about times when polling places are open (11 CFR 100.24(a)(3)(i)(B)(1)), the location of polling places (11 CFR 100.24(a)(3)(i)(B)(2)), or early voting or voting by absentee ballot (11 CFR 100.24(a)(3)(i)(B)(3);
- Offering or arranging to transport voters to the polls, as well as actually transporting voters to the polls, is also GOTV activity (11 CFR 100.24(a)(3)(i)(C)); and
- All activities that assist potential voters to vote are GOTV activity (11 CFR 100.24(a)(3)(i)(D)).

These activities fall within the definition regardless of the means by which information is conveyed.

Accordingly, the revised definition of "GOTV activity" would cover the following examples: (1) Driving a sound truck through a neighborhood that plays a message urging listeners to "Vote next Tuesday at the Main Street community center"; and (2) making telephone calls (including robocalls) reminding the recipient of the times during which the polls are open on election day.

The Commission received multiple comments on its proposal to expand the definition of GOTV activity to include encouraging potential voters to vote. Many of those comments addressed together the proposed expansions of the definitions of "voter registration activity" and "GOTV activity." Those comments were discussed and addressed in the preceding section and are only briefly mentioned here. Other comments, though, focused on the proposed expansion of the definition of "GOTV activity" and are discussed below.

Almost all the commenters agreed that revising the definition of "GOTV activity" to include encouraging and urging potential voters to vote would be responsive to the *Shays III* court. Commenters offered a range of opinions, though, on whether this expansion was *required* by the court's decision or if there was a narrower approach that might satisfy the court.

Two commenters asserted that the Commission could not do "anything short of including encourage[ment]" in the definition and "still satisfy the concerns of the circuit court." Others that commented on this issue, by contrast, believed that a definition of "GOTV activity" that included activities that only encouraged people to vote (regardless of the means) is unnecessary. Some commenters were concerned that such a definition would subject to regulation all of the activities of State and local party committees, contrary to the intent of Congress.

Several commenters were particularly concerned that the proposed definition of "GOTV activity" would cover all candidate advocacy conducted by State, district, and local party committees, including advocacy focused solely on State and local candidates that makes no mention of a Federal candidate. As with the definition of "voter registration activity," commenters proposed narrowing the definition of "GOTV activity" to cover only activities that *actively encourage* or *facilitate* voting or that are *primarily aimed* at increasing voter turnout. Another commenter proposed a definition that would cover only activities understood by a "reasonable person engaged in political campaign management" to be "GOTV activity."

Some commenters also offered more specific suggestions regarding the definition of "GOTV activity." One commenter proposed defining "GOTV activity" as "activities directed toward encouraging voters who are identified as likely to support specific candidates to cast votes in an election in which federal candidates are on the ballot." Several commenters stressed the need to adopt a definition of "GOTV activity" that would exclude "persuasion communications," which the commenters characterized as communications that are intended to secure a vote for a specific candidate but that are not effective at mobilizing potential voters to vote.

In the event that any of these narrower approaches proved under-inclusive, one commenter suggested that the Commission could subsequently amend its regulations. This approach, according to the commenter, was preferable to adopting a broad definition at the outset covering all activities that encourage potential voters to vote.

The Commission also received comments addressing its proposal to revise the definition of "GOTV activity" to include communications urging or encouraging potential voters to vote made by "any other means." Two commenters thought that the court's decision did not require the Commission to adopt a definition covering all mass communications, and that the definition could simply be amended to cover certain specific activities, including phone banks and direct mail.

Another commenter thought that the Commission should exempt from the definition of "GOTV activity" all Internet communications, because such communications are made at "virtually no cost." In contrast, a different commenter thought that the definition's "any other means" standard was not "inclusive enough" and that the definition should list "the multiple methods of electronic communication used today."

As discussed above, the *Shays III* court identified "two distinct loopholes" in the Commission's prior definitions of GOTV activity. *See Shays III,* 528 F.3d at 931–32. The court determined that these "loopholes"—which required that GOTV activity "assist" voters in voting and that contacts with potential voters be "individualized"—conflicted with BCRA's purpose. *Id.* at 932. Moreover, the *Shays III* court suggested that the Commission's regulations should reach both efforts that "*encourage* people to vote or to register to vote" as well as "mass communications" that are directed to a significant number of people. *Id.* at 931. The Commission concludes that the definition of "GOTV activity" adopted in this rulemaking best addresses the court's concerns.

For these reasons, the Commission has decided not to adopt any of the other proposals suggested by the commenters. Whatever the individual merits of these proposals, in the current rulemaking the Commission is charged with adopting a definition of GOTV activity that addresses the "two distinct loopholes" identified by the *Shays III* court. Furthermore, many of the alternative proposals suggested by the commenters would prove difficult for the Commission to administer and enforce. Introducing qualifiers into the definition of "GOTV activity"—like "targeting," "active encouragement," or "primarily aimed"—may theoretically narrow the definition, but would require the Commission to make searching (and potentially burdensome) inquiries into the mechanics, decision-making, and intentions of State, district, and local party committees and associations of State or local candidates in order to enforce the law. In addition, such a vague definition would not provide clear guidance to State, district, and local party committees and associations of State or local candidates.

The Commission has reorganized the definition of "GOTV activity" in section 100.24 in light of comments received. Whereas the proposed rule would have set forth a general definition of "GOTV activity" with a non-exhaustive list of examples, the new rule defines "GOTV activity" by providing a comprehensive list of covered activities. Notwithstanding this change in form, the new definition covers the same universe of activities as the definition proposed in the NPRM.

This organizational change is responsive to commenters who indicated that the structure of the proposed definition was "confusing" and unhelpful. The Commission has decided that the revised definition, which lists both specific and general activities, provides clear and effective guidance while capturing those activities that Congress and the courts identified as being GOTV activity.

2. 11 CFR 100.24(a)(3)(ii)—Brief, Incidental Exhortations

New paragraph (a)(3)(ii) of 11 CFR 100.24 states that an activity is not GOTV activity solely because it includes a brief exhortation to register to vote, so long as the exhortation is incidental to a communication, activity, or event. Like the exception to the definition of "voter registration activity," this exception to the definition of "GOTV activity" ensures that activities that are *not* otherwise GOTV activity do not become GOTV activity simply because they include a brief, incidental reminder to vote.

The exception operates identically to the exhortation exception to the definition of "voter registration activity." To qualify for the exception, the

exhortation to vote must be both brief *and* incidental. Exhortations to vote that consume many minutes of a speech, for example, or that occupy a large amount of space in a mailer are not brief and will not qualify for the exception. Similarly, exhortations, however brief, must also be incidental to a communication, activity, or event. For example, a one-word reminder to "Vote!" appearing at the end of a mailer would be incidental to the larger communication, whereas a message in a mailer that stated only "Vote on Election Day!" or "Vote for Smith next Tuesday!" and contained no other text would not be incidental and, thus, would not be exempted from the definition of GOTV activity.

The exception applies to brief, incidental exhortations regardless of the forum or medium in which they are made. The exception covers an exhortation made at the end of a speech at a rally, for example, as well as one appearing at the end of an e-mail.

Two examples of activities that would be covered under the exception appear at new paragraphs (a)(3)(ii)(A) and (a)(3)(ii)(B) of 11 CFR 100.24. The first example is a mailer praising the public service record of a mayoral candidate and/or discussing the candidate's campaign platform. The mailer concludes by reminding recipients: "Vote [for the mayoral candidate] on November 4th." The second example involves a phone call for a State party committee fundraising event. The call provides recipients with information about the event, solicits donations, and concludes by reminding the listener: "Don't forget to vote on November 4th."

The new exception at 11 CFR 100.24(a)(3)(ii) differs in certain respects from the one proposed in the NPRM. The proposed exception would have applied only to incidental exhortations made during speeches or events, whereas the exception in the final rule applies to brief, incidental exhortations made in any communication or during any activity or event. Moreover, the proposed exception did not explicitly require that the exhortation be brief, although a brevity requirement was implicit in the proposal. Finally, the proposed exception included four examples of exhortations that would have qualified for the exception. The new exception includes only two examples, but they are more detailed than in the NPRM and, thus, provide better guidance regarding the intended application of the exception.

Several of the comments received on the exhortation exception were simply an extension of the comments on the scope and organization of the proposed definition of GOTV activity itself. One commenter, for example, indicated that the exception did not sufficiently narrow the definition of "GOTV activity" and would not appropriately protect "persuasion communications" that are "devoted to convincing a voter to vote for a particular candidate or party." Another commenter urged the Commission not to adopt the exhortation exception and, instead, simply define GOTV activity as covering only activities that facilitate voting. A different commenter suggested that the line between exhortation and encouragement existed where the communication or activity specifically urged a potential voter to vote. In the opinion of this commenter, a sign saying "Vote for Smith" would be an exhortation to vote, while a sign saying "Go Vote for Smith" would encourage voting and thus constitute GOTV activity.

Other comments focused on the scope of the proposed exception. Specifically, commenters addressed whether the exception should be limited, as it was in the NPRM, to exhortations made during speeches and events, or whether it should also cover exhortations made in other contexts. Two commenters supported adopting the proposed exception, pointing out that the court's opinion specifically referenced only "routine or spontaneous speech-ending exhortations." Several commenters, though, believed that there was no reason to limit the exception by the medium in which the communication was delivered or the forum in which it was made. One of these commenters stated that "[n]othing in the court's decisions [could] reasonably be read to mean that exhortations are to be excluded only if made in a speech or at a rally but not if made by other means of communications."

Two commenters addressed the proposed requirement in the NPRM that, to qualify for the exception, an exhortation be incidental to a speech or event. One commenter suggested that the Commission determine whether an exhortation is, in fact, incidental by engaging in a time/space analysis. Another commenter suggested that the exhortation exception be further limited to only spontaneous communications and not cover communications that are scripted.

The Commission has considered the comments and has decided to adopt a somewhat more expansive exception than initially proposed. While the *Shays III* court required the Commission to adopt a more expansive definition of GOTV, the court acknowledged that the Commission could exclude from the definition "routine or spontaneous speech-ending exhortations" and "mere exhortations * * * made at the end of a political event or speech." *Shays III,* 528 F.3d at 932.

The Commission agrees with those commenters who indicated that the exception should not be limited by medium or forum. To limit the exception to exhortations made only at speeches or rallies would elevate form over substance and is not necessary to give effect to the court's opinion. The court did not require the Commission to create artificial distinctions between an incidental exhortation during a speech or rally and an incidental exhortation made in a written communication or telephone call conveying the same message.

This exemption will not inoculate speeches or events that otherwise would meet the definition of "GOTV activity." For example, a speech given within the covered Federal election activity period that devotes several minutes to providing listeners with information on how and where to vote would not qualify under the exception at new 11 CFR 100.24(a)(3)(ii). Instead, the exception is intended to ensure that communications that would not otherwise be GOTV activity do not become GOTV activity merely because they include a brief, incidental exhortation to vote.

C. 11 CFR 100.24(c)(5) and (c)(6)—Voter Identification and GOTV Activity Solely in Connection With a Non-Federal Election

The new provisions at 11 CFR 100.24(c)(5) and (c)(6) restructure the combined provision proposed in the NPRM by addressing voter identification and GOTV activity in two separate provisions. New paragraph (c)(5) of 11 CFR 100.24 provides that certain voter identification that is conducted solely in connection with a non-Federal election that is held on a date within the Type II Federal election activity time periods, but on which no Federal election is held, and which is not used in a subsequent election in which a Federal candidate is on the ballot, is not subject to BCRA's Federal election activity funding restrictions.

New paragraph (c)(6) of 11 CFR 100.24 provides that certain GOTV activity that is conducted solely in connection with a non-Federal election that is held on a date within the Type II Federal election activity time periods, but on which no Federal election is held, is not subject to BCRA's Federal election activity funding restrictions, provided that any *communications made as part of such activity refer*

exclusively to: (1) Non-Federal candidates participating in the non-Federal election, if the non-Federal candidates are not also Federal candidates, (2) ballot referenda or initiatives scheduled for the date of the non-Federal election, or (3) the date, polling hours, and locations of the non-Federal election.

The Commission received several comments on the provision as proposed in the NPRM. Five commenters supported the provision, saying that it struck the proper balance and characterized it as "sensible." One commenter believed it was proper to exclude such activities from the Federal election activity funding restrictions because they do not directly benefit Federal candidates, which was the focus of the *McConnell* court in analyzing BCRA.

Many of these commenters also indicated that the proximity of an exclusively non-Federal election to a subsequent Federal election should have no bearing on the application of the provision. One commenter said that the proximity of the two types of elections was irrelevant because they involve different variables; the issues that inform voter identification and motivate voters in non-Federal elections are very different from those that inform and motivate in a Federal election. Accordingly, according to these commenters, voter identification and GOTV activity conducted for a non-Federal election is of little use in a subsequent Federal election.

In contrast, two commenters objected to the provision on the basis that it would allow activity that affected Federal elections to be funded with non-Federal funds contrary to BCRA's intent. According to these commenters, all voter identification and GOTV activity confer benefits on Federal candidates and, as such, these activities must be regulated to avoid the risk of actual or apparent corruption.

BCRA requires State, district, and local political party committees and organizations to finance Federal election activity with Federal funds, or, in some instances, with an allocated mix of Federal funds and Levin funds. 2 U.S.C. 441i(b); 11 CFR 300.33. One of the principal sponsors of BCRA described its Federal election activity provisions as 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).

BCRA does not require the Commission to regulate voter identification or GOTV activities by State, district, and local political party groups that are exclusively in connection with non-Federal elections. Many communities hold entirely non-Federal elections on dates that are separate from any election in which a Federal candidate appears on the ballot, but that nevertheless fall within the Type II Federal election activity time periods. *See, e.g. http://www.usmayors.org/elections/electioncitiesfall2010.pdf* (listing mayoral elections held in 2010) (last visited July 28, 2010). The Commission, therefore, is adopting exceptions in the final rule to distinguish better between voter identification and GOTV activities that are Federal election activity, and those activities that are not Federal election activity because they do not affect elections in which Federal candidates appear on the ballot.

D. 11 CFR 100.24(c)(7)—Activities Involving De Minimis Costs

New paragraph (c)(7) of 11 CFR 100.24 provides that *de minimis* costs associated with the following enumerated activities are not subject to the Federal election activity funding restrictions: (1) On the Web site of a party committee or association of State or local candidates, posting a hyperlink to a State or local election board's Web page containing information on voting or registering to vote; (2) on the Web site of a party committee or association of State or local candidates, enabling visitors to download a voter registration form or absentee ballot application; (3) on the Web site of a party committee or association of State or local candidates, providing information about voting dates and/or polling locations and hours of operation; and (4) placing voter registration forms or absentee ballot applications obtained from the board of elections at the office of a party committee or association of State or local candidates.

In the NPRM, the Commission asked generally whether the proposed definitions of "voter registration activity" and "GOTV activity" covered activity that Congress did not intend to regulate in BCRA and, if so, what those activities were.

In response, one commenter pointed out that under the expanded definitions of "voter registration activity" and "GOTV activity," "all the organizational activity of every county, every city, and every state committee is going to be brought into these regulations," since—on some level—organizing people to register to vote, and to vote, informs everything that party committees do. This commenter noted, for example, that State and local parties commonly post on their Web sites information on voter registration and voting but that the cost is "typically minimal and is folded into the general administrative costs of operating the committee." To the extent that this activity was covered as "voter registration activity" or "GOTV activity," all the operational costs would potentially need to be funded with Federal funds or a mix of Federal and Levin funds, as appropriate.

The Commission is mindful of the administrative complexities that State, district and local party committees, as well as associations of State and local candidates, would face in tracking the nominal, incidental costs of these activities. As recognized by the courts, agencies may promulgate *de minimis* exemptions to the statutes they administer on the basis that "Congress is always presumed to intend that pointless expenditures of effort be avoided." *Ass'n of Admin. Law Judges* v. *FLRA,* 397 F.3d 957, 961–62 (DC Cir. 2005). Although there are limits to this authority—*de minimis* exceptions are inappropriate for extraordinarily rigid statutes or when the regulatory costs of the exemption exceed its benefits—it is inherent in most statutory schemes. *Id.* at 962; *see Envtl. Def. Fund* v. *EPA,* 82 F.3d 451, 466 (DC Cir. 1996).

Accordingly, the Commission has decided to adopt new paragraph (c)(7) at 11 CFR 100.24 to make clear that certain activities are not subject to BCRA's Federal election activity funding restrictions. Such a *de minimis* exception is entirely appropriate in this context because many of the activities listed will involve no costs and, thus, already effectively fall outside the Federal election activity funding regulations. To the extent that the listed activities do involve *de minimis* costs, they are so small that—even aggregated over a long period of time—they would not result in any meaningful evasion of BCRA's soft money restrictions.

The Commission notes that this provision only covers *de minimis* costs associated with the enumerated activities; amounts that are not *de minimis,* which are incurred in connection with the enumerated activities, must still be paid for with Federal funds or a mix of Federal and Levin funds, as appropriate. In addition, the provision in paragraph (c)(7) does not cover *de minimis* costs associated with other activities. The costs associated with activities not enumerated, regardless of how small,

must also be paid for with Federal funds or a mix of Federal and Levin funds, as appropriate. Thus, the list of activities enumerated in the provision is exhaustive. Activities not listed are not covered, regardless of how closely related they are to the activities listed.

E. Additional Issues

1. Advisory Opinion 2006–19 (Los Angeles County Democratic Party Central Committee)

In *Shays III,* the Court of Appeals criticized Advisory Opinion 2006–19 (Los Angeles County Democratic Party Central Committee), in which the Commission concluded that letters and pre-recorded telephone calls encouraging certain Democrats to vote in an upcoming local election did not count as GOTV activity because the communications did not provide individualized assistance to voters. *See Shays III,* 528 F.3d at 932. The court held that this overly restrictive construction of the definition of "GOTV activity" was contrary to the statute. *See id.* The Commission is superseding Advisory Opinion 2006–19 because the conclusion of that advisory opinion, along with its reasoning, cannot be reconciled with the Commission's new definition of "GOTV activity."

2. Associations of State and Local Candidates and Officeholders

One commenter pointed out that the NPRM "refer[red] repeatedly to 'state, district or local party committees'" and referred "only incidentally to associations of state and local candidates and officeholders." The commenter noted that such associations are subject to the Federal election activity funding restrictions to the same extent as State, district, and local party committees.

The Commission agrees with the commenter that the new definitions of "voter registration activity" and "GOTV activity" apply equally to party committees and associations of State and local candidates, alike. Any disproportionate references to party committees in the NPRM—and in this E&J—do not reflect a determination by the Commission that the activities of associations of State and local candidates are less important or less likely to fall under the umbrella of Federal election activity established by Congress. Previous attempts to exempt the activities of associations of State and local candidates from the definition of "GOTV activity" were found to be contrary to BCRA, *see Shays I,* 337 F. Supp. 2d at 104, and the Commission is not revisiting that decision.

3. Communications Referencing Only State and Local Candidates

In the NPRM, the Commission proposed adding an exception to the definition of "GOTV activity" at 11 CFR 100.24(a)(3)(iii) for public communications that refer solely to one or more clearly identified candidates for State or local office and note the date of the election. The proposal was designed to ensure that the expansion of the GOTV activity definition required by the *Shays III* court would not, in effect, render meaningless the statutory definition of "Federal election activity," which specifically does not include amounts disbursed or expended for "a public communication that refers solely to a clearly identified candidate for State or local office, if the communication is not a Federal election activity described in subparagraph (A)(i) or (ii)." 2 U.S.C. 431(20)(B)(i); 11 CFR 100.24(c)(1).

Several commenters addressed the proposed "State and local communication" exception. Five commenters supported it. One stated that the exception would ensure that State and local parties are not deterred from supporting State and local candidates and that the benefits of the proposed exception "far outweigh the incidental effect [that the covered] activities may have on Federal elections." The same commenter thought that the exception should be expanded to cover State ballot initiatives, as well. Another commenter thought the exception properly excluded from the definition of "GOTV activity" those activities that are not "primarily aimed at facilitating the act of voting." A third commenter characterized the exception as a "common-sense implementation" of the statute that was particularly necessary in States in which local elections are frequently held.

In contrast, two other commenters urged the Commission to reject the proposed exception on the basis that it would "render meaningless" the definition of "GOTV activity" and would "swallow the rule." In particular, these commenters noted that the proposed exception left out a critical component of the statutory exception on which it was based: that the communications not otherwise meet the definition of "GOTV activity." As pointed out by the commenter:

> [T]he fact that a communication refers solely to a State or local candidate is not sufficient to satisfy the exemption, if the communication otherwise constitutes GOTV or voter registration activity. In other words, the key issue is not whether the communication refers solely to a non-federal candidate, but rather whether the communication is GOTV or voter registration activity. If it is GOTV or voter registration activity, it is not eligible for the exemption, even if it refers only to a state or local candidate.

The Commission is not adopting the "State and local communication" exception. The provisions at 2 U.S.C. 431(20)(B)(i) and 11 CFR 100.24(c)(1) remain and continue to exempt from the definition of Federal election activity public communications that refer solely to a clearly identified candidate for State or local office, which do not otherwise constitute voter registration activity, GOTV activity, generic campaign activity or voter identification within the applicable time periods.

Furthermore, the Commission notes that grassroots campaign materials, including buttons, bumper stickers, handbills, brochures, posters, and yard signs, which name or depict only State or local candidates, continue to be exempt from the definition of Federal election activity, provided that this grassroots materials exception shall not include materials that are distributed by mail. 2 U.S.C. 431(20)(B)(iv); 11 CFR 100.24(c)(4). As such, a yard sign exhorting readers to "Vote Smith for Mayor on September 15th!" or a handbill that encourages a reader to "Support your County Commissioner! Register by next Tuesday!" could be paid for entirely with non-Federal funds.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the organizations affected by this rule are State, district, and local party committees, which are not "small entities" under 5 U.S.C. 601. These not-for-profit committees do not meet the definition of "small organization," which requires that the enterprise be independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). State political party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals, and they are affiliated with the larger national political party organizations. In addition, the State political party committees representing the Democratic and Republican parties have a major controlling influence within the political arena of their State and are

thus dominant in their field. District and local party committees are generally considered affiliated with the State committees and need not be considered separately. To the extent that any State party committees representing minor political parties might be considered "small organizations," the number affected by this rule is not substantial.

List of Subjects in 11 CFR Part 100

Elections.

■ For the reasons set out in the preamble, subchapter A of chapter 1 of title 11 of the *Code of Federal Regulations* is amended as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

■ 1. The authority citation for 11 CFR part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, and 438(a)(8).

■ 2. Section 100.24 is amended by removing paragraph (a)(1)(iii), by revising paragraphs (a)(2) and (a)(3), and by adding paragraphs (c)(5), (c)(6) and (c)(7) to read as follows:

§ 100.24 Federal election activity (2 U.S.C. 431(20)).

(a) * * *

(2) *Voter registration activity.*

(i) Voter registration activity means:

(A) Encouraging or urging potential voters to register to vote, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means;

(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;

(E) Submitting or delivering a completed voter registration form on behalf of a potential voter;

(F) Offering or arranging to transport, or actually transporting potential voters to a board of elections or county clerk's office for them to fill out voter registration forms; or

(G) Any other activity that assists potential voters to register to vote.

(ii) Activity is not voter registration activity solely because it includes a brief exhortation to register to vote, so long as the exhortation is incidental to a communication, activity, or event. Examples of brief exhortations incidental to a communication, activity, or event include:

(A) A mailer praises the public service record of mayoral candidate X and/or discusses his campaign platform. The mailer concludes by reminding recipients, "Don't forget to register to vote for X by October 1st."

(B) A phone call for a State party fundraiser gives listeners information about the event, solicits donations, and concludes by reminding listeners, "Don't forget to register to vote."

(3) *Get-out-the-vote activity.*

(i) Get-out-the-vote activity means:

(A) Encouraging or urging potential voters to vote, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means;

(B) Informing potential voters, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by any other means, about:

(*1*) Times when polling places are open;

(*2*) The location of particular polling places; or

(*3*) Early voting or voting by absentee ballot;

(C) Offering or arranging to transport, or actually transporting, potential voters to the polls; or

(D) Any other activity that assists potential voters to vote.

(ii) Activity is not get-out-the-vote activity solely because it includes a brief exhortation to vote, so long as the exhortation is incidental to a communication, activity, or event. Examples of brief exhortations incidental to a communication, activity, or event include:

(A) A mailer praises the public service record of mayoral candidate X and/or discusses his campaign platform. The mailer concludes by reminding recipients, "Vote for X on November 4th."

(B) A phone call for a State party fundraiser gives listeners information about the event, solicits donations, and concludes by reminding listeners, "Don't forget to vote on November 4th."

* * * * *

(c) * * *

(5) Voter identification activity that is conducted solely in connection with a non-Federal election held on a date on which no Federal election is held, and which is not used in a subsequent election in which a Federal candidate appears on the ballot.

(6) Get-out-the-vote activity that is conducted solely in connection with a non-Federal election held on a date on which no Federal election is held, provided that any communications made as part of such activity refer exclusively to:

(i) Non-Federal candidates participating in the non-Federal election, if the non-Federal candidates are not also Federal candidates;

(ii) Ballot referenda or initiatives scheduled for the date of the non-Federal election; or

(iii) The date, polling hours, and locations of the non-Federal election.

(7) *De minimis* costs associated with the following:

(i) On the Web site of a party committee or an association of State or local candidates, posting a hyperlink to a state or local election board's web page containing information on voting or registering to vote;

(ii) On the Web site of a party committee or an association of State or local candidates, enabling visitors to download a voter registration form or absentee ballot application;

(iii) On the Web site of a party committee or an association of State or local candidates, posting information about voting dates and/or polling locations and hours of operation; or

(iv) Placing voter registration forms or absentee ballot applications obtained from the board of elections at the office of a party committee or an association of State or local candidates.

On behalf of the Commission.

Dated: September 7, 2010.

Matthew S. Petersen,

Chairman, Federal Election Commission.

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DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 71

[Docket No. 29334; Amendment No. 71–42]

Airspace Designations; Incorporation By Reference

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action amends Title 14 Code of Federal Regulations (14 CFR) part 71 relating to airspace designations to reflect the approval by the Director of the Federal Register of the incorporation by reference of FAA Order 7400.9U, Airspace Designations and Reporting Points. This action also explains the procedures the FAA will use to amend the listings of Class A, B, C, D, and E airspace areas; air traffic service routes;