



# Federal Register

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**Monday,  
July 29, 2002**

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## **Part II**

# **Federal Election Commission**

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**11 CFR Parts 100, et al.**

**Prohibited and Excessive Contributions:  
Non-Federal Funds or Soft Money; Final  
Rule**

**FEDERAL ELECTION COMMISSION**

**11 CFR Parts 100, 102, 104, 106, 108, 110, 114, 300, and 9034**

[Notice 2002–11]

**Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money**

**AGENCY:** Federal Election Commission.

**ACTION:** Final rules and transmittal of regulations to Congress.

**SUMMARY:** The Federal Election Commission is revising its rules relating to funds raised, received, and spent by party committees under the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”). The revisions are based on the Bipartisan Campaign Reform Act of 2002 (“BCRA”), which adds to the Act new restrictions and prohibitions on the receipt, solicitation, and use of certain types of non-Federal funds, which are commonly referred to as “soft money.” BCRA and the revised rules prohibit national parties from raising or spending non-Federal funds. They also permit State, district, and local party committees to fund certain “Federal election activity,” including certain voter registration and get-out-the-vote (“GOTV”) drives, with money raised pursuant to new limitations, prohibitions, and reporting requirements under BCRA, or with a combination of funds subject to various requirements of the Act and BCRA. They also address fundraising by Federal and non-Federal candidates and Federal officeholders on behalf of political party committees, other candidates, and non-profit organizations. Further information is contained in the Supplementary Information that follows.

**DATES:** The effective date is November 6, 2002, except for 11 CFR 106.7(a) which is effective January 1, 2003.

**FOR FURTHER INFORMATION CONTACT:** Mr. John C. Vergelli, Acting Assistant General Counsel; or Attorneys Mr. Anthony T. Buckley, Mr. Jonathan M. Levin, Ms. Dawn Odrowski, Ms. Anne A. Weissenborn, 999 E Street, NW., Washington, DC 20463, (202) 694–1650 or (800) 424–9530.

**SUPPLEMENTARY INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Public Law 107–155, 116 Stat. 81 (March 27, 2002), contains extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended (“FECA” or the “Act”), 2 U.S.C. 431 *et seq.* This is the first of a series of rulemakings the

Commission is undertaking this year in order to meet the rulemaking deadlines set out in BCRA. These rules address BCRA’s new limitations on party, candidate, and officeholder solicitation and use of non-Federal funds.<sup>1</sup>

Section 402(c)(2) of BCRA establishes a 90-day deadline for the Commission to promulgate these rules. Since BCRA was signed into law on March 27, 2002, the 90-day deadline was June 25, 2002.<sup>2</sup> The Commission promulgated these rules on June 22, 2002. The new rules will take effect on November 6, 2002, the day following the November 2002 general election, except rules that take effect after the transition period. 2 U.S.C. 431 note.

Because of the extremely tight deadline for promulgating these rules, the Commission adhered to a shorter-than-usual timeline for receiving and considering public comments. The Notice of Proposed Rulemaking (“NPRM”) on which these rules are based was published in the **Federal Register** on May 20, 2002. 67 FR 35654 (May 20, 2002). Comments were received from the Alliance for Justice; the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”); the American Federation of State, County, and Municipal Employees (“AFSCME”); the Association of State Democratic Chairs (“ASDC”); Dr. Peter Bearse; the California Republican Party; the Campaign and Media Legal Center; the Center for Responsive Politics (“CRP”) and FEC Watch (joint comment); Common Cause and Democracy 21 (joint comment); the Connecticut Republican State Central Committee; the Democratic National Committee (“DNC”), the Democratic Senatorial Campaign Committee (“DSCC”) and the Democratic Congressional Campaign Committee (“DCCC”) (joint comment); Development Strategies Corporation; Benjamin L. Ginsberg, Esq.; Ms. Janice P. Johnson; the Latino Coalition and

<sup>1</sup> Future rulemakings will address: (1) Electioneering communications and issue ads; (2) coordinated and independent expenditures; (3) the so-called “millionaires” amendment, which increases contribution limits for congressional candidates facing self-financed candidates on a sliding scale, based on the amount of personal funds the opponent contributes to his or her campaign; (4) the increase in contribution limits; and (5) other new and amended provisions, including contribution prohibitions and reporting. This last rulemaking will address contributions by minors, foreign nationals, and U.S. nationals; inaugural committees; fraudulent solicitations; disclaimers; personal use of campaign funds; and civil penalties. BCRA’s impact on national nominating conventions will be addressed in a separate rulemaking.

<sup>2</sup> BCRA’s deadline for promulgation of the remaining rules is 270 days after the date of enactment, or December 22, 2002.

National Taxpayer Network, Inc. (joint comment); the Michigan Democratic Party (“MDP”); Mindshare Internet Campaigns L.L.C.; the NAACP National Voter Fund (“NAACP NVF”); the National Republican Congressional Committee (“NRCC”); OMB Watch; Senators John S. McCain and Russell D. Feingold, and Representatives Christopher Shays and Marty Meehan (joint comment), and a supplemental comment from Senator McCain; Representative Bob Ney; Norman D. Petrick; and the Republican National Committee (“RNC”).

The Commission held a public hearing on the NPRM on June 4 and 5, 2002, at which it heard testimony from representatives of the ASDC; the AFL-CIO; the Campaign and Media Legal Center; Common Cause and Democracy 21; CRP and FEC Watch; the DNC, DSCC and DCCC; the Latino Coalition and the Taxpayer Network, Inc.; NAACP NVF; the MDP; the RNC, the RNCC, and the Republican State Chairmen; and Mr. Ginsberg. Please note that, for purposes of this document, the terms “commenter” and “comment” cover both written comments and oral testimony at the public hearing.

Under the Administrative Procedures 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 30 calendar days before they take effect. The final rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money were transmitted to Congress on July 16, 2002.

## Explanation and Justification

### I. Terminology

Because the term “soft money” is used by different people to refer to a wide variety of funds under different circumstances, the Commission is using the term “non-Federal funds” in the final rules rather than the term “soft money.” BCRA does not use the term “soft money” except in the heading of Title I and the headings within Title IV. Nonetheless, the Commission sought comment on whether use of the term “soft money” would in some instances be preferable.

Not all commenters addressed this issue, and several of those who did not address the issue used the term “soft money” throughout their comments. Most of those who addressed this question, however, urged the Commission to use the terms “Federal funds” and “non-Federal funds” in

place of what they characterized as the often-misunderstood term “soft money.” One commenter urged the Commission to use the terms “regulated” and “unregulated” funds, arguing that the terms “Federal” and “non-Federal” funds are also confusing. However, the terms “Federal” and “non-Federal” have been used by the Commission for many years throughout the rules and are thus familiar to those active in this area. See, for example, 11 CFR 102.5 (“Federal” and “non-Federal” accounts); 11 CFR 106.5 (“Federal” and “non-Federal” disbursements). The terms “regulated” and “unregulated” could also be subject to different interpretations. Moreover, non-Federal funds are regulated by State law. The Commission is, therefore, using the terms “Federal” and “non-Federal” throughout the text of the regulations and the accompanying Explanation and Justification.

## II. The Statutory Framework

The Act limits the amount that individuals can contribute to candidates, political committees, and political parties for use in Federal elections. 2 U.S.C. 441a. The Act also prohibits corporations and labor organizations from contributing their general treasury funds for these purposes. 2 U.S.C. 441b. Contributions from national banks, 2 U.S.C. 441b(a); government contractors, 2 U.S.C. 441c; foreign nationals, 2 U.S.C. 441e; and minors, new 2 U.S.C. 441k, as enacted by BCRA; as well as contributions made in the name of another, 2 U.S.C. 441f; are also prohibited. These strictures regulate what is often referred to as “hard money,” or Federal funds.

Some donations that do not meet the FECA hard money requirements, for example, corporate and labor organization general treasury contributions, may not be used for Federal elections, and are referred to as non-Federal funds. Non-Federal funds may not be used for the purpose of influencing any election for Federal office. Funds raised that are used by State or local parties or State or local candidates on non-Federal elections are governed by State or local law. Prior to BCRA’s revisions, the FECA permitted national party committees, Federal candidates, and officeholders to raise money not subject to some of the Act’s source limitations and prohibitions. Beginning November 6, 2002, under BCRA, national party committees “may not solicit, receive, or direct to another person a contribution, donation, or transfer of funds or any other thing of value, or spend any funds, that are not subject to the limitations, prohibitions,

and reporting requirements of this Act.” 2 U.S.C. 441i(a).

BCRA also requires State, district, and local political party committees to pay for “Federal election activities,” which is a new term introduced and defined by BCRA, 2 U.S.C. 431(20), with entirely Federal funds or, in some cases, a mix of Federal funds and a new type of non-Federal funds, which the rules call “Levin funds.” These two provisions are related in that the latter is intended to prevent evasion of the former. A State, district, or local political party committee may not evade the restrictions in BCRA by receiving funds transferred from a national party committee and spending those funds on Federal election activity. A State, district, or local party committee must spend Federal and Levin funds it raises itself on these activities. See 148 Cong. Rec. H408–409 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

As discussed below, these new and revised rules partially supersede the following advisory opinions relating to preemption as to party office buildings: Advisory Opinions 2001–12, 2001–1, 1998–8, 1998–7, 1997–14, 1993–9, 1991–5, and 1986–40. Other advisory opinions may no longer be relied upon to the extent they conflict with BCRA. Further guidance will be forthcoming in future advisory opinions and rulemakings.

## III. Part 100—Scope and Definition

### 11 CFR 100.14 Definition of “State Committee, Subordinate Committee, District, or Local Committee”

Several provisions of BCRA refer to “State, district, and local committees of a political party.” See, e.g., the “Levin Amendment,” 2 U.S.C. 441i(b)(2). In the NPRM, the Commission pointed out that the terms “State committee,” “subordinate committee,” and “party committee,” are already defined in the regulations, although “district committee” and “local committee” are not. 11 CFR 100.14, 100.5(e)(4); see also 2 U.S.C. 431(15).

In paragraph (a) of section 100.14, status as a State committee is determined by reference to the party bylaws or State law. This provision, which did not draw comment, allows the regulation to cover those States in which party committee status is a matter of State law and those in which it is a matter of party bylaws.

The proposed regulation published in the NPRM provided, in paragraphs (a), (b), and (c), with regard to “State committees,” “subordinate committees,” and “district or local committees,” respectively, that an

organization must be “part of the official party structure” and be “responsible for the day-to-day operation of the political party” to meet the definition. Three commenters, including the principal Congressional sponsors of BCRA, objected to this conjunctive requirement. These commenters collectively believe that limiting the definition to organizations that are part of the “official party structure” will open the door to purportedly “unofficial” party organizations that would be able to avoid BCRA’s requirement while “manifestly engaged in party operations.” Instead, they propose a disjunctive definition, which would provide that a party organization meets the respective definitions if it is part of the official party structure or responsible for the day-to-day operation of the party. The Commission has concluded that requiring a committee to be part of the official party structure before it satisfies the regulatory definition is an important safeguard, ensuring that BCRA’s provisions sweep only as far as necessary to accomplish its ends. The Commission also believes that its definition of “subordinate committee of a State, district, or local committee,” which includes any organization that is directly or indirectly established, financed, maintained, or controlled by the State, district, or local committee fully addresses the sponsor’s regulatory concerns in this area.

Paragraph (b) is a new provision defining “district or local committee.” (This provision was labeled paragraph (c) in the NPRM, while subordinate committees were covered by paragraph (b). In the final rules, the Commission has covered subordinate committees in paragraph (c). This reordering of paragraphs within section 100.14 reflects the priority given to district and local party committees in BCRA.) This definition largely parallels paragraph (a) but for political subdivisions below the State level, and encompasses those political party committees that do not necessarily operate formally under the “control or direction” of the State party committee. In the final rules, the Commission has deleted the phrase, “including an entity that is directly or indirectly established, financed, maintained, or controlled by the district or local committee.”

The principal Congressional sponsors of BCRA commented that the words, “under State law,” as they appeared in the NPRM, are redundant given the preceding reference to “operation of State law.” The Commission agrees, and has deleted the redundant words in the final rule.

Three commenters objected to adding language, "as determined by the Commission," in paragraph (b) of section 100.14. An association of State party officials stated, referring to paragraph (b), "there should be no discretion left to the Commission to decide whether a particular organization is a local party committee." A national party committee described status as a local committee as a "quintessential State and local" issue. The Commission has not included the phrase, "as determined by the Commission," in paragraph (b) of section 100.14.

With regard to subordinate committees, in paragraph (c) of section 100.14, the phrase, "as determined by the Commission," which was included in the proposed regulation published in the NPRM, has not been included in the final rules. The Commission has concluded that this language, which refers to the availability of the advisory opinion process, is not appropriate with regard to committees other than State committees, whose status as State party committees, as determined by the Commission, makes them eligible for higher contribution limits and permits them to make coordinated expenditures under FECA. The principal Congressional sponsors of BCRA commented that, as proposed in the NPRM, this definition did not, but should, include within the definition an entity that is directly or indirectly established, financed, maintained, or controlled by the subordinate committee. The Commission has included such a provision in paragraph (c) of section 100.14 of the final rules.

#### *11 CFR 100.24 Definition of "Federal Election Activity"*

Many of the operative provisions of Title I of BCRA use the term "Federal election activity" ("FEA"). See, e.g., 2 U.S.C. 441i(b)(1), (2), 2 U.S.C. 441i(d). Congress defined the term at 2 U.S.C. 431(20). The Commission is adopting new regulation 11 CFR 100.24 to implement the statutory definition.

The definition of FEA proposed in the NPRM drew numerous comments urging divergent interpretations of key statutory terminology. Many of these comments focused on four important phrases that are used in the statutory definition at 2 U.S.C. 431(20). In light of these comments, the Commission has revised the regulation proposed in the NPRM by adding a new first paragraph, 11 CFR 100.24(a), which defines these four terms for the purposes of the rest of the regulation and for use in part 300 of chapter 1 of Title 11. These terms are "voter registration activity" (see 2 U.S.C. 431(20)(A)(i)), "in connection

with an election in which a candidate for Federal office appears on the ballot," "get-out-the-vote activity" ("GOTV"), and "voter identification" (see 2 U.S.C. 431(20)(A)(ii)).

#### *A. Elections in Which Federal Candidates "Appear on the Ballot"*

The statutory definition of FEA provides that certain activities are FEA if they are "in connection with an election in which a candidate for Federal office appears on the ballot." 2 U.S.C. 431(20)(A)(ii). Congress clearly intended to establish certain periods of time in which no candidates for Federal office appear on the ballot. The NPRM requested comment as to how to interpret this statutory provision. Several commenters, including the principal Congressional sponsors of BCRA, urged the Commission to construe this phrase to mean "starting at the beginning of a two-year Federal election cycle, except in states holding regularly scheduled state elections in odd-numbered years." These commenters argued that this approach is "consistent with the Commission's current practice with respect to allocation of generic voter drive and administrative expenses," and comports with the plain meaning of the statute.

In contrast, two commenters, a national party committee and a labor organization, urged the Commission to pick a date certain, January 1 of even-numbered years, to identify the time-frame that is "in connection with an election in which a candidate for Federal office appears on the ballot." The commenters commended this approach as "practical" and "reasonable." One of these commenters suggested that the concept of even-numbered Federal election years is already familiar, and that party activities are "more diverse" in odd-numbered years, in that they are more focused on local and State activities. The Commission notes that a large number of State and local elections take place in odd-numbered years (e.g., mayoral elections in some large cities). Activities in connection with such elections are presumably not "conducted in connection with an election in which a candidate for Federal office appears on the ballot," even under the most expansive reading of the statute.

A civil rights organization urged the Commission to interpret the term, "in connection with an election in which a candidate for Federal office appears on the ballot," to mean that period of time beginning on the day on which a Federal candidate is actually certified for the ballot in a given jurisdiction.

This commenter argues this interpretation is the plainest possible reading of the statute. This civil rights organization also cautioned that an overly broad definition of when a candidate "appears on the ballot" would unduly hamper their legitimate fundraising efforts, and thus impede many, if not all, of their non-partisan GOTV efforts. A Latino rights group and a taxpayers' organization suggested that the Commission interpret the statutory term to mean the earliest date on which a Federal candidate could qualify for the ballot in a given jurisdiction.

Paragraph (a)(1) of 11 CFR 100.24 defines "in connection with an election in which a candidate for Federal office appears on the ballot" to mean two specific periods of time. The first begins on the earliest filing deadline for access to the primary election ballot for Federal candidates, as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year. This time period ends on the date of the general election, up to and including the date of any general runoff. This definition of "in connection with an election in which a candidate for Federal office appears on the ballot" closely tracks the statutory language of 2 U.S.C. 431(20)(A)(ii) by tying the definition to the actual date that Federal candidates appear on the ballot. Although this definition may result in all fifty States having different time-periods in which "a candidate for Federal office appears on the ballot," for purposes of the Act, there will be only one relevant date in any particular State. Thus, this is not at all burdensome on State and local party committees, who are the primary actors affected by this clause, especially since many of these committees must already pay attention to State dates in order to file certain pre-election reports with the Commission. Finally, this definition harmonizes the rule for regularly scheduled Federal elections and special elections for Federal office held outside normal election time frames. (See next paragraph.)

The second time-frame that is "in connection with an election in which a candidate for Federal office appears on the ballot" occurs in odd-numbered years in which a special election for a Federal office occurs. Paragraph (a)(1)(ii) prescribes that the period beginning on the date the special election date is set and ending on the day of the special election is considered to be "in connection with an election in which a candidate for Federal office appears on the ballot."

### B. Voter Registration Activity

BCRA does not define “voter registration activity,” as that term is used in the statutory definition of “Federal election activity,” although “voter registration activity” is “Federal election activity” only when it is conducted 120 days or fewer before a regularly scheduled Federal election. 2 U.S.C. 431(20)(A)(i). Paragraph (a)(2) of section 100.24, in the final rules, defines voter registration activity to encompass individualized contact for the specific purpose of assisting individuals with the process of registering to vote. The definition in paragraph (a)(2) also includes the costs of printing and distributing voter registration information, such as registration forms, and voting information, for example, pamphlets of similar materials explaining the voter-registration process.

The Commission has expressly rejected an approach whereby merely encouraging voter registration would constitute Federal election activity. The regulation requires concrete actions to assist voters, rather than mere exhortation. A more expansive definition would run the risk that 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, would be swept into the extensive reporting and filing requirements mandated under Federal law.

### C. Get-Out-the-Vote

Based upon the comments received in response to the rules proposed in the NPRM, the testimony at the public hearing, and its own analysis of BCRA, the Commission has concluded that it must define GOTV in a manner that distinguishes the activity from ordinary or usual campaigning that a party committee may conduct on behalf of its candidates. Stated another way, if GOTV is defined too broadly, the effect of the regulations would be to federalize a vast percentage of ordinary campaign activity.

The Commission received several comments on this topic. A State political party and an association of State party officials argued that the timing (i.e., relative to the election) should not be relevant to determining whether an activity is GOTV. Rather, both commenters suggested that GOTV “should refer to actual communications with voters for the purpose of encouraging them to vote.” Two public interest groups agreed that timing relative to the election is not relevant to

determining whether an activity is GOTV. Neither group, however, suggests an actual definition of the term. The Congressional sponsors “strongly disagree with the suggestion that \* \* \* voter contacts may constitute [GOTV] only if they occur ‘on Election day or shortly before.’ Contacting voters to encourage voting is [GOTV] whenever it occurs.” A labor organization suggested that timing is relevant, and urged that the Commission’s definition of GOTV be limited to activities that occur on election day.

In the final rules, at 11 CFR 100.24(a)(3), the Commission adopts a definition of “GOTV activity” as “contacting registered voters \* \* \* to assist them in engaging in the act of voting.” This definition is focused on activity that is ultimately directed to *registered* voters, even if the efforts also incidentally reach the general public. Second, GOTV has a very particular purpose: assisting registered voters to take any and all necessary steps to get to the polls and cast their ballots, or to vote by absentee ballot or other means provided by law. The Commission understands this purpose to be narrower and more specific than the broader purposes of generally increasing public support for a candidate or decreasing public support for an opposing candidate.

Paragraph (a)(3) provides a list of two examples of get-out-the-vote activity that is intended to assist in applying the regulation to particular factual situations. The first example, in paragraph (a)(3)(i), is activity whereby an individual is provided specific information on voting within 72 hours of an election, such as the date of the election, the location of polling places, and the hours the polls are open. The second example, in paragraph (a)(3)(ii), is offering to transport or actually transporting voters to the polls.

The regulation explicitly excludes “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 state or local candidates.” Similar to the exclusion for voter identification discussed below, this exclusion keeps State and local candidates’ grassroots and local political activity a question of State, not Federal law. Interpreting the statute to extend to purely State and local activity by State and local candidates would potentially bring into the Federal regulatory scheme thousands of State and local candidates that are currently outside the Federal system. The Commission declines to undertake such a vast federalization of

State and local activity without greater direction from Congress.

In the NPRM, the Commission posed several questions as to how the term “get-out-the-vote” activity should be interpreted in the statute. Among the issues raised was whether there should be an exception for “non-partisan” GOTV. In their comment, the principal Congressional sponsors of BCRA strongly opposed a non-partisan exception as “flatly inconsistent with BCRA.” They argued that the plain language of the statute does not permit such an exception. Three other commenters, all of whom are public interest groups, make the same general argument. These commenters, and the Congressional sponsors, each opposed regulations that might contemplate “non-partisan” voter-drive activities by party committees and candidates, which one of the commenters labeled as “oxymoronic.”

In contrast, one commenter, a non-profit corporation, urged the Commission to adopt a “non-partisan exception” for non-profit organizations that engage in non-partisan voter-drive activities such as GOTV and voter registration. This group noted that the proposed regulations would restrict fundraising on behalf of a non-profit by political party committees and Federal candidates if the non-profit spent money for FEA. It contended that, if the Commission fails to distinguish between partisan and non-partisan voter-drive activities, the efforts of legitimate, non-partisan groups to encourage voting will be hampered, perhaps fatally, in the case of some organizations. This commenter also argued that the Commission should create a “safe harbor” to allow political party committees and Federal candidates to raise funds on behalf of section 501(c)(3) organizations that legally engage in non-partisan voter-drive activities.

In Title I of BCRA, Congress expressly addressed party fundraising for tax-exempt organizations. Congress specifically provided that national, State, district, and local political party committees “shall not solicit any funds for, or make or direct any donations to” section 501(c) organizations that spend money on Federal election activity. 2 U.S.C. 441i(d)(1). The Commission does not discern, from the plain language of section 441i(d)(1), any authority to craft a regulatory exception to the definition of FEA that would modify the effect of section 441i(d)(1). This conclusion is supported by the fact that Congress did provide a limited exception for fundraising by Federal candidates on behalf of 501(c) organization that engage in FEA. See 2 U.S.C. 441i(e)(4)(B)

(which provides that a Federal candidate is permitted to raise up to \$20,000 per calendar year from individuals for a section 501(c) organization, even if the organization engages in certain FEA.) Clearly, Congress could have crafted a non-partisan exception, but did not do so with regard to party committees' GOTV drives. Therefore, the Commission declines to adopt a "non-partisan" exception in 11 CFR 100.24 with regard to the definition of FEA.

In the NPRM, the Commission solicited comments as to whether there should be a *de minimis* exception allowing a certain, nominal amount of GOTV related to a Federal election that would nonetheless not render these activities as FEA. The principal Congressional sponsors of BCRA and a public interest group commented that there is no basis in the statute for a *de minimis* exception, and that such an exception "would be contrary to the plain meaning of the statute." A labor organization, a national party, and a State political party committee support the inclusion of a *de minimis* exception. The State party committee suggests a \$5,000 exception, so that "informal and occasional GOTV and grassroots activities do not invoke the full force of federal regulations." One of the labor organizations asserts the exception would prevent the regulation from having a "strict liability" aspect. The Commission declines to adopt a *de minimis* exception in 11 CFR 100.24.

#### D. Slate Cards, Sample Ballots, and Other Exempt Activities

In the NPRM, the Commission specifically sought comment as to the use of printed slate cards, sample ballots, palm cards, and similar listings of three or more candidates in the context of GOTV. The Commission also sought comment about the larger issue of the relationship of "exempt activities" to "Federal election activities." 67 FR 35656.

The term "exempt activities" refers to three types of spending by State and local party organizations, each of which is excluded from the statutory definitions of contribution and expenditure in 2 U.S.C. 431(8) and (9). That is, a payment by a State or local party organization for an exempt activity is not a "contribution," within the meaning of the Act, to a candidate benefited by the activity, nor an "expenditure," within the meaning of the Act, by the party organization.

Slate cards are one type of exempt activity. A payment for the "costs of preparation, display, or mailing or other distribution . . . with respect to a printed

slate card or sample ballot, or other printed listing, of 3 or more candidates for any public office," is not a contribution or expenditure. The exclusion does not apply to spending for displaying the slate card "on broadcast stations, or in newspapers, magazines, or similar types of general public political advertising." 2 U.S.C. 431(8)(B)(v) (contribution); 2 U.S.C. 431(9)(B)(iv) (expenditure). See also 11 CFR 100.7(b)(9), 100.8(b)(10). Note that the exemption extends to the costs of a mass mailing of the slate card.

"The original intent of the slate card amendment was to allow parties to print slate cards, sample ballots, etc., to educate voters and encourage straight party voting without being subject to the disclosure provisions and contribution and expenditure limitations in Federal law." H.R. Rep. No. 93-1239, at 142 (1974) (House Committee on Administration Report on the Federal Election Campaign Act Amendments of 1974) (Supp. View of Rep. Frenzel). Other statements in the legislative history tend to confirm this view of the intent behind the provision. See, e.g., H.R. Rep. No. 93-1438, at 65 (1974) (Conference Report on Federal Election Campaign Act Amendments of 1974) (intent of provision "is to allow State and local parties to educate the general public as to the identity of the candidates of the party.")

Several commenters have addressed the relationship between FEA and exempt activities, including slate cards. One State party committee commented that it understands BCRA to have "clearly redefined all such \* \* \* activities as Federal election activities that must be funded entirely by hard money." The principal Congressional sponsors of BCRA commented that slate cards, sample ballots, and palm cards should be included in GOTV. With regard to the larger issue of the relationship between all exempt activities and FEA, the principal sponsors urged that if an activity constitutes FEA, then it must be treated as such. A public interest group argues that "federal election activity subsumes all previously allocable expenses," with certain exceptions not relevant here.

In a joint comment, a national party committee and two Congressional campaign committees advocated the opposite conclusion: "Congress did not leave any suggestion in the legislative history that these important exceptions were somehow overridden \* \* \* by BICRA." These commenters argued that the Commission's current treatment of exempt activities is consistent with BCRA because BCRA focuses on "soft money" spending for "issue

advertising," whereas exempt activities are, by definition, at the grassroots level. Thus, they conclude, "exempt activities should not be deemed to be 'Federal election activity,' and that the costs of exempt activities should continue to be allocated between Federal and non-Federal funds," by which they mean non-Federal funds other than Levin funds. Another national party committee, a State party committee, and a labor organization made essentially the same points, agreeing that the definition of Federal election activity should exclude exempt activities.

The Commission does not interpret the Act, as amended by BCRA, to permit blanket conclusions about the relationship of exempt activities and FEA, in the sense of asserting that all exempt activities are necessarily now FEA, or *vice versa*. It is clear that not all exempt activities are FEA. For example, voter registration activities undertaken by a State or local political party on behalf of the Presidential ticket more than 120 days before a regularly scheduled election is an exempt activity under 2 U.S.C. 431(8)(B)(xii) and (9)(B)(ix), but not a Federal election activity. 11 CFR 100.24(b)(1). It is also clear that some activities satisfy one of the definitions of exempt activities and simultaneously satisfy one of the definitions of FEA. For example, voter registration activities undertaken by a State or local political party on behalf of the Presidential ticket fewer than 120 days before a regularly scheduled election satisfy both the definition of exempt activity and of Federal election activity. 2 U.S.C. 431(8)(B)(xii), (9)(B)(ix), and 20(A)(i).

In cases where a given activity undertaken by a State, district, or local political party committee is both an exempt activity and a Federal election activity, the issue is how it may or must be paid for. On this point, BCRA and the Commission's pre-BCRA regulations appear to be in conflict. Under BCRA, as interpreted in these final rules, if the activity is deemed a FEA, it must be paid for with Federal funds, Levin funds, or with an allocated mix of Federal and Levin funds. See 11 CFR 300.32(b). Under the Commission's pre-BCRA regulations, if the activity is deemed an exempt activity that is combined with non-Federal activity it may be paid for with an allocated mix of Federal and non-Federal funds. 11 CFR 100.7(b)(9), (15), (17), 100.8(b)(10), (16), (18), and 106.5(a)(2)(iii). See *Common Cause v. Federal Election Com'n*, 692 F.Supp. 1391, 1394-1396 (D.D.C. 1987). The *Common Cause* case directly addressed two of the three categories of exempt activities:

campaign materials used by volunteers (see 11 CFR 100.7(b)(15) and 100.8(b)(16)) and voter registration and GOTV activities on behalf of the Presidential ticket (see 11 CFR 100.7(b)(17) and 100.8(b)(18)), establishing that allocation of payments for these activities between Federal and non-Federal funds was properly a matter for the Commission to address in its regulations. *Common Cause*, 692 F.Supp. at 1396. While not directly addressed in *Common Cause*, the allocation of the costs of slate cards is also addressed in the Commission's regulations, but not in FECA. Compare 2 U.S.C. 431(8)(B)(v) and (9)(B)(iv) (which does not specifically provide for allocation) with 11 CFR 100.7(b)(9) and 100.8(b)(10) (which provides for allocation).

Since the Commission's regulations may not override the Act, as amended by BCRA, if an activity undertaken by a State, district, or local political party committee simultaneously constitutes both exempt activity and Federal election activity, that activity must now be paid for as a Federal election activity, not as an exempt activity.

The Commission emphasizes, however, that payments by a State, district, or local political party committee for an activity that is within one of the exempt activity categories remains excluded from the definitions of "contribution" and "expenditure." That is, the conclusion explained in the preceding paragraph goes only to how the activity must be paid for, not to characterizing the payment as a contribution or expenditure under the Act.

With these considerations in mind, the Commission sees no valid reason to handle slate cards differently from any other type of exempt activity with regard to the definition of Federal election activity. If a State, district, or local political party committee uses slate cards as part of GOTV activity, or in a public communication that promotes or supports, or attacks or opposes a Federal candidate, then the committee must pay for the costs of these slate cards as a Federal election activity (see 2 U.S.C. 431(20)(A)(ii), (iii)), although these payments are excluded from the definition of "expenditure." On the other hand, if a State, district, or local political party committee uses slate cards mentioning Federal and non-Federal candidates in the course of campaigning that does not constitute Federal election activity, then it may allocate the costs of these slate cards between Federal and non-Federal funds.

#### E. Voter Identification

In BCRA, Congress included "voter identification" within the definition of "Federal election activity." 2 U.S.C. 431(20)(A)(ii). In the NPRM, the Commission sought comment as to whether the proposed definition was too narrowly or broadly crafted, and, in the alternative, what activities should be incorporated into the definition of "voter identification." A consortium of non-profit groups expressed concern that the term "voter identification" could be read too broadly by encompassing "efforts to identify the shared interests of individuals for non-electoral purposes." They urged the Commission to restrict the definition to "activities designed primarily to identify the political preferences of individuals in order to influence their voting." Similarly, a State political party commented that the definition in the proposed regulation was "far too broad and instead should be defined to include only activity that involved actual contact of voters, by phone, in person or otherwise, to determine their likelihood of voting generally or their likelihood of voting for a specific Federal candidate." This State party committee specifically urged that the final definition exclude the costs of "acquisition or enhancement of a list of voters, or the acquisition of publicly available demographic information regarding these voters," arguing that such functions are properly treated as administrative expenses because they are part of the party's "fundamental functions." Several national party committees offered essentially similar views. A labor organization commented that "voter identification" should be defined as telephone calls or canvassing "to identify voters for other Federal election activities," and agreed that gathering data about voters should be excluded. Another labor organization commented that "voter identification" should be limited to determining voter intent with regard to specific Federal candidates only.

In contrast, the principal Congressional sponsors of BCRA commented that "voter identification" should include all activities designed to determine registered voters, likely voters, or voters indicating a preference for a specific candidate or party." They also commented that voter identification efforts should not be excluded simply because no mention is made of a Federal candidate. A public interest group commented that "voter identification" includes "all efforts to identify voters, even if done in the name of state and local candidates."

With regard to the Commission's question, posed in the NPRM, about distinguishing voter identification from GOTV, the principal Congressional sponsors commented that the distinction "makes no difference" because both types of activity are covered under the same provision of BCRA (see 2 U.S.C. 431(20)(A)(ii)). A public interest group urged the Commission not to limit voter identification to efforts to identify voters for other Federal election activities, arguing that only a "tortured reading" of the statute allows [GOTV] activity to modify "voter identification." A labor union disagreed, arguing that only voter identification for the purposes of GOTV should be included. Another public interest group argued against distinguishing the two activities according to proximity in time to the election. (See previous discussion under the discussion of GOTV.)

The Commission requested comments as to whether the regulations should include a *de minimis* exception to voter identification activities. One labor union requested that there be a *de minimis* exception, particularly to allow for the maintenance and development of voter files during non-election years. Both the Congressional sponsors and a public interest group argued that such an exception would be contrary to the plain language and intent of BCRA.

In paragraph (a)(4) of section 100.24, the Commission adopts a definition of "voter identification" that includes the costs of "creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting or likelihood of voting for specific candidates." The Commission notes that "voter identification" is one of the types of Federal election activity that will occur only during those times when a candidate for Federal office appears on the ballot. See 11 CFR 100.24(a)(1).

The Commission recognizes that even during the period when a Federal candidate appears on the ballot, the act of acquiring a voter list in and of itself does not constitute voter identification. Committees have a number of reasons for acquiring voter lists, including fundraising and off-year party building activities. Such activity, on its face, does not constitute "voter identification" with respect to the statute, as there lacks a nexus between the activity and the statutory language that contemplates activity "in connection with an election in which a candidate appears on the ballot."

The final rule excludes from the definition certain voter identification undertaken by groups or associations of State or local candidates or

officeholders, solely in reference to State or local candidates. The Commission included this exclusion because it finds it implausible that Congress intended to federalize State and local election activity to such an extent without any mention of the issue during the floor debate for BCRA. BCRA makes voter identification a subset of Federal election activity, and the regulatory implications of engaging in Federal election activity are significant. For the Commission to exercise its discretion so as to sweep within Federal regulation candidates for city council, or the local school board, who join together to identify potential voters for their own candidacies, the Commission would require more explicit instruction from Congress.

#### *F. Definition of "Federal Election Activity"*

Paragraph (b) of section 100.24 defines Federal election activity. Paragraph (b)(1) implements 2 U.S.C. 431(20)(A)(i) by including voter registration activity during the period that begins on the date that is 120 calendar days before the date of a regularly scheduled Federal election. "Special elections" are not "regularly scheduled," and therefore excluded from the definition. Paragraph (b)(2) of section 100.24 implements 2 U.S.C. 431(20)(A)(ii) by including with the definition of Federal election activity voter identification, GOTV, and generic campaign activity when they are conducted in connection with an election in which a Federal candidate appears on the ballot.

11 CFR 100.24(b)(3) follows new 2 U.S.C. 431(20) by providing that a public communication that refers to a clearly identified candidate for Federal office would constitute "Federal election activity" that must be paid for with entirely Federal funds if the communication promotes, supports, attacks, or opposes any candidate for that Federal office. This is true even if a candidate for State or local office is also mentioned or identified. "Public communication" is defined in proposed 11 CFR 100.26, discussed below. Public communications falling within this category of the definition of "Federal election activity" extend beyond communications expressly advocating a vote for or against a candidate.

11 CFR 100.24(b)(4) implements 2 U.S.C. 431(20)(A)(iv) by providing that Federal election activity includes services provided during any month by an employee of a State, district, or local committee of a political party who spends over 25% of that individual's compensated time on activities in

connection with a Federal election. There were no comments on this definition. A number of issues involving employees are discussed below in the Explanation and Justification for section 300.33. The Commission has concluded that the statute is clear on its face, and therefore paragraph (b)(4) follows that statutory language without additional interpretation.

#### *G. Activities Excluded From the Definition of "Federal Election Activity"*

In BCRA, Congress specifically excluded certain activities from the definition of Federal election activity. 2 U.S.C. 431(20)(B). Activities falling within one of the exceptions may be paid for with entirely non-Federal funds. 11 CFR 100.24(c) implements these statutory exceptions. Paragraphs (c)(1) through (c)(4) of section 100.24 parallel the statutory exclusions at 2 U.S.C. 431(20)(B)(i) through (iv).

Paragraph (c)(1) excludes a public communication that refers solely to one or more clearly identified State or local candidates, and does not promote or support, or attack or oppose, a clearly identified candidate for Federal office, provided that the public communication is not a voter registration activity, or GOTV, or voter identification. 2 U.S.C. 431(20)(B)(i). As an example of the application of this paragraph, this exception does not apply to a telephone bank on the day before an election where there is a Federal candidate on the ballot and where GOTV phone calls are made to over 500 voters, even if the calls only refer to a State or local candidate. 2 U.S.C. 431(20)(B)(i); *see* 11 CFR 100.24(b)(2).

Paragraph (c)(2) excludes a contribution to a State or local candidate, provided that the contribution is not designated to pay for voter registration activity, voter identification, GOTV, generic campaign activity, a public communication promoting or supporting, or attacking or opposing, a clearly identified Federal candidate, or employee services as set forth in paragraphs (b)(1) through (b)(4) of section 100.24. 2 U.S.C. 431(20)(B)(ii). In the final rules, the Commission has added a reference to employee services as set forth in paragraph (b)(4) for the sake of completeness.

Paragraph (c)(3) excludes the costs of State, district, or local political conventions, meetings, or conferences. The principal Congressional sponsors of BCRA commented that this approach was too broad, in that it included "a meeting or conference," whereas the statutory provision it implemented, 2 U.S.C. 431(20)(B)(iii), refers only to

"conventions." These commenters failed to note, however, that meetings or conferences do not fall within the statutory definition of Federal election activity, and this remains true whether the Commission explicitly states it or not. Therefore, paragraph (c)(3) excludes the costs of a State, district, or local convention, meeting or conference. 2 U.S.C. 431(20)(B)(iii). The principal Congressional sponsors otherwise supported paragraphs (c)(1) through (c)(4).

Paragraph (c)(4) excludes the costs of grassroots campaign materials that name or depict only State and local candidates. 2 U.S.C. 431(20)(B)(iv). The list of examples of such materials in paragraph (c)(4) includes certain items not mentioned in the statute. The Commission received no comments objecting to the additional items.

In the version of the regulation published in the NPRM, the Commission included two additional exceptions that it has subsequently determined should not be listed as exceptions to the definition of Federal election activity in paragraph (c). These provisions would have covered voter registration activity at any time other than the period of time that is within 120 days of a regularly scheduled Federal election, and GOTV and voter identification in elections in which no Federal candidate appears on the ballot. While these activities are not Federal election activities, under certain circumstances payments for these activities must be allocated between Federal funds and non-Federal funds. *See* 11 CFR 106.5. In this regard, these two types of activities differ from the activities described in paragraphs (c)(1) through (c)(4) of section 100.24, which always may be paid for with entirely non-Federal funds. Therefore, the Commission has removed these two provisions from the final regulation.

#### *11 CFR 100.25 Definition of "Generic Campaign Activity"*

Section 100.25 implements the statutory definition of "generic campaign activity," which has been added to the Act by BCRA. "Generic campaign activity" is defined in BCRA as campaign activity "that promotes a political party and does not promote a candidate or non-Federal candidate." 2 U.S.C. 431(21).

Generic campaign activity is a form of Federal election activity when it takes place in connection with an election in which a candidate for Federal office appears on the ballot. 11 CFR 100.24(b)(2)(ii). The Commission is defining "in connection with an election in which a candidate for



Federal office appears on the ballot” to include special elections fitting that description. 11 CFR 100.24(a)(1). Therefore, generic campaign activity may, in principle, occur in connection with a special election in which a candidate for Federal office appears on the ballot, provided, of course, that the elements of the definition are otherwise satisfied. An association of State party officials commented favorably on this approach. A public interest group pointed out that Advisory Opinion 1998–9, which was issued to a State party committee, addressed a special election in which only one Federal office was at stake, and thus only one candidate of the party on the ballot. The Commission opined that under such circumstances a candidate was clearly identified, and allocable “generic activities” by the party under pre-BCRA 11 CFR 106.5(a)(2)(iv) were thus not possible with regard to that special election. The final regulation is consistent with the reasoning of Advisory Opinion 1998–9 in defining “generic campaign activity.”

The final regulation elaborates on the statute by including within the definition of “generic campaign activity” those activities that oppose a political party without opposing a specific candidate. A labor organization commented that the regulation impermissibly goes beyond the statute by including activities in opposition to another party. In the Commission’s experience, however, such activities in opposition to another party implicitly promote the party undertaking the activities, and are thus properly included in the definition. A national party committee also argued against the approach taken in the proposed regulation, characterizing it as “confusing” because it is framed in terms of promoting and opposing the party, which “unnecessarily clouds the distinction of voter registration and GOTV activities.” This commenter would have the Commission define “generic campaign activity” as an “activity that promotes or opposes the particular party’s ticket, without mentioning or referring to candidates by name.” The Commission believes most of these concerns are addressed in the definitions of voter registration activity and GOTV at 11 CFR 100.24(a)(2) and (3), respectively. Also, the distinction drawn by the commenter, that is, between promoting the party and promoting the party’s ticket, is limited in practical application. Whether an activity is characterized as voter registration, GOTV, or generic campaign activity, it is treated as a Federal

election activity when conducted in certain relation to a Federal election, *see* 100.24(b)(1) and (2), and is, in each case, a Federal election activity on which Levin funds may be spent, *see* 11 CFR 300.32(b)(1).

In the version of the regulation proposed in the NPRM, “generic campaign activity” would have been defined as a “campaign activity” that promotes or opposes a political party but not a candidate. In the final rules, the definition instead refers to a “public communication” that promotes or opposes a political party but not a candidate. The Commission made this change to ensure that the definition encompasses only the external activities of a political party committee, that is, activities targeted to the public. This interpretation is also consistent with the plain meaning of the statutory provision, since it is difficult to envision how a campaign activity could effectively promote or oppose a political party without it taking the form of a public communication. This interpretation is also consistent with Advisory Opinion 1998–9, which dealt with numerous campaign activities that involved public communications.

In the final rules, the Commission has added the words “clearly identified” to qualify the phrase, “Federal candidate or a non-Federal candidate.” The intent of this addition is to remove ambiguity from the definition.

In the NPRM, the Commission sought comment on the extent, if any, to which the exclusions for exempt activities in 11 CFR 100.7(b)(9), (15), and (17) and 100.8(b)(8), (10), and (16), should apply to the definition of “generic campaign activity.” A public interest group commented that “exempt activities should not be excluded from the definition of ‘generic campaign activity.’” An association of State party officials commented that there appears to be no overlap between exempt activities and generic campaign activities since the former, “by definition, reference a clearly identified Federal candidate,” while the latter, by definition, may not.

The Commission understands two of the categories of exempt activities, slate cards (*see* 11 CFR 100.7(b)(9) and 100.8(b)(8)) and voter registration on behalf of the Presidential ticket (*see* 11 CFR 100.7(b)(17) and 100.8(b)(16)), to have no applicability to payments for generic campaign activity. This is so because these two types of exempt activities, by their nature, promote one or more candidates, and activities that promote a candidate are outside the scope of the definition of generic campaign activity. The remaining

category of exempt activity—payments for certain campaign materials used by party volunteers (*see* 11 CFR 100.7(b)(15) and 100.8(b)(10))—may in certain circumstances also qualify as generic campaign activity under 11 CFR 100.25. If the campaign materials used by the volunteers promote only the party, and do not promote a candidate, then this activity would be both exempt and a generic campaign activity. A public interest group included an essentially similar analysis of this point in their comment.

#### *11 CFR 100.26 Definition of “Public communication”*

BCRA amends 2 U.S.C. 431 by adding a new definition for the term “public communication.” BCRA defines “public communication” to include communications by broadcast, cable, satellite, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising.

The Commission did not include the Internet as a form of “general public political advertising” in proposed 11 CFR 100.26 because this provision of BCRA does not refer to the Internet. The Commission, however, sought comment as to whether the definition of “public communication” in proposed 11 CFR 100.26 should include or exclude communications provided through the use of World Wide Web sites available to the public, widely distributed electronic mail, or other uses of the Internet, such as “Webcasts” or the transmission of high-quality voice, graphics, or video advertisements.

Many commenters addressed this issue. A national political party, an association of State party officials, an LLC that provides technical services to campaigns, a State political party, a public interest group, and a labor union urged the Commission not to include the Internet in the definition of “public communication.” Four commenters pointed to the lack of inclusion of the Internet in the list of modes of public communications, noting that Congress had had an opportunity to include the Internet in this definition, but declined to do so.

A number of commenters argued that the Internet provides a low cost way for parties and other interested persons to disseminate their message widely, and the Commission should not attempt to regulate their doing so. The commenter who provides technical services to campaigns wrote, “[the Internet] is an open, decentralized platform on which every user has the capacity to reach literally every other user. Candidates

and interest groups can and do use this medium to engage in meaningful, two-way dialogue \* \* \*. Congress did not include other forms of two-way dialogue such as candidate forums, rallies, debates, or other events that are open to the public.”

The same commenter noted the practical impossibility in fashioning restrictions on Internet communications given the rapidly changing environment: “Although the Internet itself has been in existence since the early 1970s, it is only recently that the medium has emerged in the mainstream \* \* \* Internet technology continues to evolve, and so does its application.”

Other commenters were strongly opposed to the exclusion of the Internet from the media classified as public communications. The principal Congressional sponsors of BCRA and three public interest groups who support campaign finance reform argued that failure to include the Internet in this definition could carve out an exception for a widespread and growing form of political advertising. A public interest group echoed the words of the Congressional sponsors: “A broad *per se* exclusion of that nature would be inadvisable because it could permit state and local party entities to exploit rapidly developing technology and new communications media to re-create or prolong the current soft money system.”

The Commission has considered the issue of Internet communication, both in the context of this rulemaking, as well as in previous rulemakings and the advisory opinion process. The Commission concludes that excluding the Internet from the definition of “public communication” is consistent with the plain meaning of the statute, consistent with Congress’ decision not to include the Internet in the statutory definition of “public communication,” and is the best policy decision with regard to implementation of BCRA.

The Commission is convinced that the exclusion is appropriate from the perspective of statutory construction because the Internet is excluded from the list of media that constitute public communication under the statute. BCRA does not reference the “Internet” or “electronic mail” in this section, although Congress used the terms “Internet,” “website,” and “World Wide Web address” in other sections of BCRA. *See*, for example, 2 U.S.C. 434 note, enacted by BCRA section 201 (Federal Communications Commission to compile and maintain on its website information the FEC may need to carry out Title 2, Subtitle A, of BCRA, relating to electioneering communications); 2 U.S.C. 438a, as enacted by BCRA section

502 (Commission to maintain a website of election reports). Congress has also used the terms “Internet” and “electronic mail” in other statutes and distinguished them from “telecommunications services.” *See* Communications Decency Act of 1996, 47 U.S.C. § 230(f)(1) (defining “Internet”) and 231(e)(4) (including “electronic mail” and excluding “telecommunications services” from definition of “Internet access service”). BCRA does reference “any other form of general public political advertising” in the definition of “public communication.” General language following a listing of specific terms, however, does not evidence Congressional intent to include a separate and distinct term that is not listed, such as the Internet. *See* Sutherland Statutes and Statutory Construction, section 47; 17 *Ejusdem generis*, Vol. 2A (6th ed. 2000). It is also noted that there is no indication in the legislative history that Congress contemplated including the Internet in the definition of public communication.

Perhaps most important, there are significant policy reasons to exclude the Internet as a public communication. The Commission fails to see the threat of corruption that is present in a medium that allows almost limitless, inexpensive communication across the broadest possible cross-section of the American population. Unlike media such as television and radio, where the constraints of the medium make access financially prohibitive for the general population, the Internet is by definition a bastion of free political speech, where any individual has access to almost limitless political expression with minimal cost. As one public interest group who favors campaign finance reform argued: “There are good policy reasons for leaving the Internet out of the definition, as it is cheap and widely available. Internet communications are not part of the campaign finance problem, and should not be regulated as such unless Congress specifically mandates it.”

#### 11 CFR 100.27 Definition of “Mass Mailing”

BCRA amends 2 U.S.C. 431 by adding a new definition of the term “mass mailing” at section 431(23). This definition, which is set out in new 11 CFR 100.27, includes any mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. For the reasons explained in the Explanation and Justification for 11 CFR 100.26, the term “mass mailing” excludes

communications sent over the Internet. It also excludes “electronic mail.” *Cf.* 47 U.S.C. 231(e)(4) (“electronic mail” is included in the definition of “Internet access service”).

The term “substantially similar” is also used in the Commission’s disclaimer regulations at 11 CFR 110.11(a)(3). When the disclaimer rules were adopted in 1995, the Commission explained that technological advances now permit what is basically the same communication to be personalized to include the recipient’s name, occupation, geographic location, and similar variables. Communications are considered “substantially similar” for purposes of the disclaimer rules if they would be the same but for such individualization. *See Explanation and Justification for Regulations on Communications Disclaimer Requirements*, 60 FR 52069, 52070 (Oct. 5, 1995). The Commission proposed in the NPRM that the term “substantially similar” in 11 CFR 100.27 have the identical meaning.

Several commenters expressed the view that this definition of “substantially similar” is too narrow as applied to mass mailings. They pointed out, for example, that the sponsoring group could change an internal sentence every 490 letters and thereby escape coverage under this definition. Also, many communications are largely identical but contain a separate paragraph addressing a targeted group, such as retired teachers or those with a particular hobby. The Commission has therefore revised the final rules to state that communications are considered substantially similar for purposes of this section if they include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient’s name, occupation, or geographic location.

#### 11 CFR 100.28 Definition of “Telephone Bank”

BCRA amends 2 U.S.C. 431 by adding a new definition of the term “telephone bank” at section 431(24). This definition, which is set out in new 11 CFR 100.28, includes more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. A telephone bank does not include electronic mail sent over telephone lines. *See* 47 U.S.C. 231(e)(4) (distinguishing “electronic mail” from “telecommunications services”). Nor does it include Internet communications transmitted over telephone lines, for the reasons discussed above in the Explanation and Justification for 11 CFR 100.26.

The Commission also proposed addressing the meaning of “substantially similar” in the text of the rules. See discussion of 11 CFR 100.27, above. As with the definition of “mass mailing,” discussed above, several commenters urged the Commission to broaden the definition of “substantially similar” contained in the proposed rules. They pointed out that, even more so than with mass mailings, phone conversations, even those where the caller is using a prepared script, are likely to vary somewhat from call to call. The Commission accordingly has revised the language of section 100.28 as proposed in the NPRM to provide that, consistent with the definition of “mass mailing” contained in section 100.27, communications are considered substantially similar for purposes of section 100.28 if they include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient’s name, occupation, or geographic location.

#### **IV. Part 102—Registration, Organization, and Recordkeeping by Political Committees**

##### *11 CFR 102.5 Organizations Financing Political Activity in Connection With Federal and Non-Federal Elections, Other Than Through Transfers and Joint Fundraisers: Accounts and Accounting*

This section continues to set out requirements for accounts or accounting methods that must be established and maintained by organizations, including political committees, that fund activities in connection with Federal elections and non-Federal elections. The section has, however, been revised in several respects. 2 USC 441i(a) expressly prohibits national party committees from raising and spending non-Federal funds. Paragraph 102.5(c) addresses the application of this section to national party committees, while corresponding changes have been made to other portions of 11 CFR 102.5 to clarify that various provisions are now applicable to only State, district, and local party committees and organizations. While this section will continue to apply to all these party committees between November 6, 2002 and December 31, 2002, after the latter date, national party committees will no longer be covered by its provisions.

Paragraph (a)(1) remains largely unchanged except for the addition of language clarifying that State, district, and local party committees are the party organizations covered in these provisions, the addition of certain citations to other regulatory provisions,

including 11 CFR part 300, and the separate discussions of administrative expenses incurred by party committees and by other political committees that are not party committees.

Paragraph (a)(2) is revised to require committees to meet at least one of the three listed conditions for depositing contributions into their Federal accounts. The purpose of this regulation is to assure that funds placed in this account are from contributors who know the intended use of their contributions, and the Commission believes that this purpose can be fulfilled by means of either contributor designations, solicitations for express purposes, or solicitations or notifications that inform contributors that their contributions are subject to the prohibitions and limitations of the Act.

New paragraph (a)(3) addresses the new category of “Levin funds” created by BCRA to be used by State, district, and local party committees for certain Federal election activity. These funds are subject to certain prohibitions and limitations pursuant to 11 CFR 300.31 and may be used by these party committees to pay allocable shares of particular Federal election activities under particular circumstances, including voter registration, voter identification, get-out-the-vote and generic campaign activities. See also 11 CFR 100.24 and 11 CFR 300.32(b) and 300.33.

The NPRM proposed requiring State, district, and local party committees to establish separate Levin accounts. Responses to the NPRM from the principal Congressional sponsors of BCRA urged retention of this requirement; however, several other responses, in particular those from party committees, requested the Commission to make such separate accounts an option rather than a requirement. One commenter stated that “although it would seem generally prudent to establish separate ‘Levin accounts,’ imposing such a requirement in the regulations would be problematic,” noting that some States prohibit party committees from establishing more than one depository account. In light of these concerns, and because BCRA’s statutory provisions do not mandate the creation of separate Levin accounts, revised paragraphs (a)(3)(i) and (ii) set out generally two alternative methods of accounting for Levin funds: a separate Levin account and the use of a reasonable accounting method approved by the Commission that will permit the committee to demonstrate that funds received and disbursed by the party committee in its existing non-Federal

account meet the requirements of the Act as amended by BCRA. Paragraph (a)(3)(ii) also requires those party committees electing not to establish a separate Levin account to maintain records of funds used for Levin activities and to make these records available to the Commission upon request. Party committees intending to undertake activities pursuant to 11 CFR 300.32(b) are urged to consult 11 CFR 300.30(c) for more detailed rules regarding alternative required accounts and accounting methods.

A comment submitted in response to the NPRM expressed concern that the draft regulations could have been construed as allowing Federal candidates and officeholders to solicit funds that would be excessive or prohibited under Federal law, if the solicitation being used stated that the funds would be used for a non-Federal purpose. To address this concern, paragraph (a)(4) has been added to emphasize that the restrictions on solicitations by Federal candidates and Federal officeholders in 11 CFR 300.31(e) and 11 CFR part 300, subpart D, apply to solicitations for State, district, and local party committees.

The final rules also include a new paragraph (a)(5) that clarifies the permissibility of State, district, and local party committees and organizations creating separate allocation accounts to be used for funding Levin activities that are allocable between Federal and Levin funds pursuant to 11 CFR 300.33 and for funding other activities allocable between a committee’s Federal and non-Federal funds pursuant to 11 CFR 106.7. See also the Explanation and Justification below for new 11 CFR 106.7 and for new 11 CFR 300.33.

11 CFR 102.5(b) addresses organizations that are not political committees. Pursuant to paragraph (b)(1), when such organizations make contributions and expenditures or payments for exempt activities under 11 CFR 100.7(b)(9), (15), and (17) and 100.8(b)(10), (16), and (18), they must maintain records of the related receipts and disbursements and must make those records available to the Commission upon request. These organizations must also be able to demonstrate through a reasonable accounting method that funds used to make contributions, expenditures, and payments for exempt activities meet the requirements of the Act.

Paragraph (b)(2) of 11 CFR 102.5 applies to those State, district, and local party organizations that are not political committees but that wish to undertake Federal election activities pursuant to

11 CFR 300.32(b). Pursuant to 11 CFR 102.5(b)(2)(i) and (ii), these party organizations are given a choice of accounting methods: establishment of a separate Levin account or use of a reasonable accounting method approved by the Commission that will permit the organization to demonstrate that permissible funds from its existing accounts were used for permissible activities. They must also make their records of funds received and expended for these activities available to the Commission upon request. Party organizations that intend to undertake activities pursuant to 11 CFR 300.32(b) are urged to consult 11 CFR 300.30(c) for more detailed rules regarding alternative required accounts and accounting methods.

*11 CFR 102.17 Joint Fundraising by Committees Other Than Separate Segregated Funds*

The ban on national party non-Federal fundraising affects the Commission's joint fundraising rules at 11 CFR 102.17. The Commission is, therefore, adding introductory language to this section, advising readers that "[n]othing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities." Part 300 is discussed below.

**V. Part 104—Reports by Political Committees**

*11 CFR 104.8 and 104.9 Uniform Reporting of Receipts and Disbursements*

As of November 6, 2002, BCRA prohibits national committees of political parties and entities directly or indirectly established, financed, maintained, and controlled by them, including their subordinate committees, from raising and spending non-Federal funds. BCRA further requires that national party committees, including subordinate committees thereof, dispose of all non-Federal funds by December 31, 2002 in accordance with 11 CFR 300.12, and report the disposition of those funds pursuant to section 300.13. Since national party committees will no longer maintain non-Federal accounts, including office building and facility accounts, the national party non-Federal account reporting rules at 11 CFR 104.8(e) and (f), and 11 CFR 104.9(c), (d) and (e) will no longer be necessary. Therefore, the final rules covering receipts by non-Federal accounts at 11 CFR 104.8(e) and (f), and disbursements

in the form of transfers to State and local party committees at 11 CFR 104.9(e), have been amended so that they apply to reports covering non-Federal account activity through December 31, 2002. In contrast, the final rules governing disbursements of non-Federal funds at 11 CFR 104.9(c) and (d) are amended to remain in effect for reports covering activity on or before March 31, 2003, rather than December 31, 2002 as provided in the NPRM. This change is prompted by the Commission's decision to permit national party committees to refund to donors by December 31, 2002 any excess non-Federal funds as provided in 11 CFR 300.12(c) and (d). Any refund checks not cashed by February 28, 2003, must be disgorged to the United States Treasury by March 31, 2003. Consequently any such disgorgements must be reported in disclosure reports covering activity through that date.

*11 CFR 104.10 Reporting by Separate Segregated Funds and Nonconnected Committees of Expenses Allocated Among Candidates and Activities*

Section 104.10 of the pre-BCRA regulations addressed the reporting of expenses that are allocated among more than one clearly identified candidate (paragraph (a)) and expenses that are allocated among specific types of mixed Federal/non-Federal activities by political party committees and by separate segregated funds and nonconnected committees (paragraph (b)). However, allocation with respect to certain mixed party activities has changed as a result of BCRA, notably in the introduction of the use of Levin funds. Some of the activity that was allocable under former 11 CFR 106.5 (allocation of mixed Federal/non-Federal activities by party committees) is now Federal election activity under certain circumstances. In addition, most of the categories are now allocated according to specified percentages. Moreover, the use of non-Federal funds by national party committees has been eliminated.

In view of these new circumstances, the rules for reporting of allocable expenses are being divided into three sections: 11 CFR 104.10 applies to political committees that are separate segregated funds or nonconnected committees; new 11 CFR 104.17 applies to payments allocated between the Federal and non-Federal accounts of State, district, and local party committees; and new 11 CFR 300.36 covers payments allocated by those party committees between Federal funds and Levin funds, pursuant to 11 CFR 300.32(b)(1) and 300.33.

Pre-BCRA section 104.10(a), which addressed payments entailing combined expenditures and disbursements on behalf of more than one clearly identified Federal and non-Federal candidate, is being changed very little at this point. Paragraph (a) is being amended to specify that it applies only to separate segregated funds and nonconnected committees, and to delete references to section 106.5(g) (now section 106.7(f)), which addresses non-Federal to Federal transfers made by party committees for the purpose of mixed payments.

Similar changes are being made to paragraph (b) of section 104.10. In view of the removal of party committees from this section, other adjustments are being made. In the discussion of itemization of allocated disbursements for administrative and generic voter drive expenses, the references to the Senate and House campaign committees of a political party are being deleted from paragraph (b)(1)(i) and (ii). In paragraph (b)(1)(ii), the specific reference to the types of committees using the funds expended method is being deleted because all committees addressed in this regulation would use the funds expended method for those two allocation categories. References to exempt activities are also deleted because those exemptions do not apply to the activities of separate segregated funds and nonconnected committees.

The only specific comments received on section 104.10 were general expressions of support from the principal Congressional sponsors of BCRA and two commenters on behalf of State party committees. Consequently, the final rules follow the proposed rules, except for two small reversions back to the pre-BCRA regulation. Instead of citing to 11 CFR 106.1 specifically as the regulation providing instructions on allocation for candidate support, the revised citation is to 11 CFR part 106 because 11 CFR 106.4 is applicable to the allocation of polling costs.

*11 CFR 104.17 Reporting of Allocable Expenses by Party Committees*

As indicated in the Explanations and Justifications for 11 CFR 104.10 and 106.1, pre-BCRA section 104.10 has been divided into two sections for the reporting of allocable payments. Section 104.10 now addresses reporting of allocable expenses by separate segregated funds and non-connected committees. Section 104.17, which had been a reserved section prior to the enactment of BCRA, now addresses reporting of allocable expenses by party committees.

Paragraph (a) of new section 104.17 addresses allocation of the support of candidates, including Federal and non-Federal candidates, by national party committees and by State, district, and local party committees. As indicated below, national party committees must use all Federal funds, while State, district, and local party committees may use a mixture of Federal and non-Federal funds under certain circumstances. Paragraph (b) of this section addresses the reporting of the allocation of expenditures and disbursements for mixed Federal/non-Federal activities that are not Federal election activities undertaken by State, district, and local party committees. These include, for example, administrative costs and the costs of exempt activities that do not fall within the definition of Federal election activity. Reporting requirements with regard to specific Federal election activities allocable between Federal and Levin funds pursuant to 11 CFR 300.33 are addressed separately in 11 CFR 300.36.

The NPRM included proposed 11 CFR 104.17(a) to address payments on behalf of more than one clearly identified candidate, including payments that entail an expenditure on behalf of one or more Federal candidates and a disbursement on behalf of one or more non-Federal candidates. The NPRM explained that all such payments must be made with Federal funds and must be reported.

Proposed paragraphs (a)(1) and (a)(2) provided for the use of a unique identifying title or code for each program or activity conducted on behalf of more than one candidate and for the retention of records in accordance with 11 CFR 104.14. These requirements were in pre-BCRA 11 CFR 104.10.

The Commission sought comments on the proposed requirement that a State, district, or local party use only Federal funds for the combined payments on behalf of clearly identified Federal and clearly identified non-Federal candidates. As indicated in the Explanation and Justification of 11 CFR 106.1, a number of commenters noted that materials and communications that refer to both Federal and non-Federal candidates, but are not public communications and do not otherwise meet the definition of Federal election activity, should continue to be subject to allocation based on the time or space devoted to each candidate. Other commenters asserted that only Federal funds could be used.

The final rule in 11 CFR 104.17 clarifies the issue as to the use of Federal funds. Paragraph (a) makes clear

that, where a national party committee makes a payment that consists of both an expenditure on behalf of a Federal candidate and a disbursement on behalf of a non-Federal candidate, the amounts attributed to each candidate must be disclosed, but only a Federal account may be used.

Paragraph (a) changes the approach taken in the NPRM with respect to State, district, and local party committees, which, unlike national party committees, may have non-Federal accounts under BCRA. The application of the new Federal election activity provisions of BCRA means that many disbursements by State, district, and local party committees mentioning Federal candidates that in the past were allocable between Federal and non-Federal accounts pre-BCRA must now be paid solely with Federal funds. There will still be, however, other payments entailing expenditures by State, district, and local party committees on behalf of Federal candidates and disbursements by these committees on behalf of non-Federal candidates that will not be Federal election activities; these will continue to be allocable between Federal and non-Federal accounts.

Accordingly, paragraph (a)(1) in the final rule generally follows pre-BCRA 11 CFR 104.10(a)(1), including the retention of the requirement of unique identifying titles or codes. All report entries that reflect the same allocable program or activity will share the same title or code to better track the particular program or activity. The use of unique identifiers for other various categories of mixed party activities is discussed below.

Paragraphs (a)(2) and (a)(3) of 11 CFR 104.17 follow pre-BCRA 11 CFR 104.10 with a minor citation change. Paragraph (a)(2) includes reporting of transfers to allocation accounts, which did not appear in either paragraph (a) or (b) of proposed 11 CFR 104.17. Proposed paragraph (a)(2), addressing recordkeeping, is re-numbered as (a)(4) in the final rules.

Section 104.17(b) in the NPRM addressed the reporting of all allocations of disbursements for activities of State, district, and local party committees, including disbursements for allocable Federal election activities, i.e., certain activities eligible to be paid in part with Levin funds pursuant to 11 CFR 300.33. For purposes of clarity, the final rule covers only the reporting of disbursements for allocable party activities that are not Federal election activities. The reporting of allocable Federal election activities is subject to the rules in 11 CFR 300.36.

Section 104.17(b) establishes that State, district, and local party committees that have set up Federal and non-Federal accounts, including any allocation accounts being used to make disbursements for allocable activities, must report all payments that are allocated pursuant to 11 CFR 106.7.

Paragraph (b)(1)(i) requires statements by State, district, and local party committees in their initial reports at the beginning of a calendar year of the percentages the committee will use for payments to be allocated between Federal and non-Federal accounts for specific categories of party activity. Paragraph (b)(1)(ii) requires a statement of the category for each allocable disbursement and the total amounts spent that year for each category. These requirements are similar to those contained in the pre-BCRA regulations.

With regard to a requirement of unique identifiers in the reports of allocable activities, the NPRM asked for comments as to whether such identifying codes would be useful. The principal Congressional sponsors of BCRA in their comments left this decision to the Commission, although they stated that identifying codes would be of "significant utility in greater specificity in reporting." Two of the comments from party committees argued against such a requirement, arguing that the purpose of the codes in the past had been to distinguish among activities that had differing allocation ratios and that use of the same allocation ratio made the codes unnecessary.

The final rule at paragraph (b)(1)(iii) of 11 CFR 104.17 requires party committees to assign unique identifiers to certain allocable activities, excluding allocable administrative costs. This requirement follows requirements in the pre-BCRA regulations at 11 CFR 104.10(b)(2) with regard to the reporting of the direct costs of fundraising and the costs of exempt activities. Paragraph (b)(1)(iii) also specifies that unique identifying titles or codes are not required for salaries and wages under 11 CFR 106.7(c)(1) because salaries and wages are not allocable.

The Commission recognizes that, as noted by certain party committees in their comments, the rules will now require use of the same set of percentages in a given year for almost all allocable party activity categories, thereby weakening one of the previous rationales for using unique identifiers for some categories of activities. Such identifying mechanisms are, however, still needed to enable reviewers of a party committee's reports, including members of the public, to track

accurately the specific transactions involved in a particular allocable activity. It is significant that party committees frequently make many disbursements to the same vendor for differing purposes and that a number of vendors may be paid for similar activities. Thus, the Commission is requiring that certain allocable activities or programs carry a unique identifying title or code. The Commission has also concluded that, while unique identifiers for administrative costs would be of some utility, it will continue the practice of not requiring them in order to avoid imposing an additional administrative burden on party committees. All entries of disbursements to pay for an allocated program or activity must include a reference to the unique identifier, if an identifier is required for that allocation category. In addition, each reporting entry of a transfer (from the non-Federal account to the Federal or allocation account) for a program or activity must include a reference to the unique identifier, if an identifier is required for that allocation category.

Paragraph (b)(2) of 11 CFR 104.17 addresses the reporting of transfers from the non-Federal to the Federal account, or from both accounts into the allocation account, of funds to be used for allocable expenses. As did the pre-BCRA rules, this paragraph requires memo entries on reports as to the allocable expenses for which the transfer is being made and the date of the transfer. If more than one activity is covered by a transfer, the report must itemize the amounts designated for each category of expense. The Commission received no comments on this provision.

Section 104.17(b)(3)(i) sets out the details required in the reporting of disbursements for allocable activity by State, district, and local committees of political parties.

Section 104.17(b)(3)(ii) addresses the reporting of State, district, and local party disbursements for activity that is allocable between a committee's Federal and Levin funds by referring the reader to the requirements of 11 CFR 300.36.

Section 104.17(b)(4) requires the retention of all documents supporting allocations of expenditures and disbursements for three years, consistent with FECA.

## **VI. Part 106—Allocations of Candidate and Committee Activities**

### *11 CFR 106.1 Allocation of Expenses Between Candidates*

Pre-BCRA 11 CFR 106.1 addressed the allocation of expenditures and/or

disbursements among more than one candidate. Paragraph (a)(1) set out the general rule for allocation of an expenditure made on behalf of more than one clearly identified Federal candidate. It also addressed allocation of a payment involving both an expenditure made on behalf of one or more clearly identified Federal candidates and a disbursement on behalf of one or more non-Federal candidates. The proposed regulation in the NPRM added language indicating that a party committee must use only Federal funds for both kinds of situations, not just the first one. This was based on proposed 11 CFR 300.33(c)(1), which stated that only Federal funds could be used for activities that referred to a Federal candidate. It was also based on BCRA and proposed 11 CFR 100.24(a)(3), which provided that only Federal funds may be used for a public communication that refers to a clearly identified Federal candidate and that promotes, attacks, supports, or opposes the candidate (regardless of whether a non-Federal candidate is also mentioned).

The NPRM divided pre-BCRA section 104.10, which addressed reporting of allocation by nonconnected committees and separate segregated funds, as well as by party committees, into two sections: 11 CFR 104.10 for nonconnected committees and separate segregated funds, and 11 CFR 104.17 for party committees. In view of this rearrangement, the proposed rules in paragraph (a)(2) of section 106.1 added a reference to 11 CFR 104.17(a) to cover party committee reporting. In addition, the pre-BCRA rules addressing allocation among Federal and non-Federal candidates was modified in the NPRM to delete the citation to party committee transfer procedures. This was premised on the position that such payments had to be made entirely with Federal funds.

The NPRM proposed no changes to pre-BCRA paragraphs (b), (c), and (d) of 11 CFR 106.1. Paragraph (e) is a signpost to the sections that address allocation of specific types of mixed Federal/non-Federal activity, other than expenditures and/or disbursements on behalf of clearly identified candidates. The NPRM proposed to delete from this paragraph a reference to 11 CFR 106.5, to add a reference to 11 CFR 300.33, and to amend the list of allocation categories to conform to other proposed regulations, including a deletion of exempt activities.

The NPRM narrative asked whether the proposed requirement that a State, district, or local party committee use

only Federal funds for all payments made on behalf of both clearly identified Federal and clearly identified non-Federal candidates is appropriate under BCRA. The NPRM also asked for comments on, and discussed whether exempt party activities<sup>3</sup> for both Federal and non-Federal candidates (i.e., entailing disbursements for Federal candidates that were exempt from the definition of contribution or expenditure) still exist as an allocable category after passage of BCRA.

Three commenters on behalf of party committees stated that not every activity that mentions a clearly identified Federal candidate must be paid for exclusively with Federal funds. They argued that materials and communications that refer to both Federal and non-Federal candidates but are not public communications and do not otherwise meet the definition of Federal election activity should continue to be subject to allocation based on time or space devoted to the Federal and non-Federal candidates as under the pre-BCRA regulations. One of these commenters also argued that the costs of "non-communicative activities" that result in an in-kind contribution and donation to Federal and non-Federal candidates respectively should continue to be allocable between Federal and non-Federal accounts.

The principal Congressional sponsors of BCRA stated that BCRA required the proposed result for such payments by State, district, and local party committees. Another commenter referred to several specific provisions in BCRA to support the view that only Federal funds can be used for the payment on behalf of both a Federal and non-Federal candidate: (1) 2 U.S.C. 441i(b)(1), which provides that costs for Federal election activity shall be paid for with Federal funds; and (2) 2 U.S.C. 441i(b)(2)(A) and (B), which allow for allocation of some Federal election activities but not when the activity refers to a clearly identified Federal candidate. A third commenter agreed that national party committees must use only Federal funds for payments involving both expenditures on behalf of a Federal candidate and disbursements on behalf of a non-Federal candidate but did not comment on State, district, or local party committees.

The comments on the relationship of Federal election activities to exempt activities are summarized in the

<sup>3</sup> For discussion of exempt activities, see Explanation and Justification for 11 CFR 100.24, above; see also 2 U.S.C. 431(B)(v), (ix), and (xi), and 431(9)(B)(iv), (viii), and (ix).

Explanation and Justification of 11 CFR 100.24, above. Some commenters concluded that exempt activities should not be included within Federal election activity at all or that many exempt activities are not redefined as Federal election activity. Thus, they concluded that there are a number of exempt activities that are not Federal election activity. Others believe that exempt activities are nearly or completely subsumed by, or redefined as, Federal election activity. Within both groups, there was a variety of opinion as to the precise relationship.

The final rule at 11 CFR 106.1 has been changed from the proposed regulation with respect to the use by a party committee of both Federal and non-Federal funds for a payment that is an expenditure on behalf of a clearly identified Federal candidate and a disbursement on behalf of a clearly identified non-Federal candidate. Any such payment that is for a Federal election activity requires the use of Federal funds only, as set out in 11 CFR 106.1(a)(2). The final rule, in paragraph (a)(2), also includes references to other sections to the effect that payments for Federal election activities that are also attributable to clearly identified candidates are subject to new 11 CFR 300.33 and that the allocation among the particular candidates must be reported, in accordance with 11 CFR 104.17(a).

However, a payment that is not for Federal election activities but that is an expenditure on behalf of a clearly identified Federal candidate and also a disbursement on behalf of a clearly identified non-Federal candidate is either allocable between Federal and non-Federal accounts or payable with Federal funds only. Hence, the last sentence of proposed paragraph (a)(1), indicating that only Federal funds can be used, is deleted from the final rules. In addition, the final rule does not include language from proposed paragraph (a)(2) to the effect that only separate segregated funds and nonconnected committees may make a payment that includes an expenditure of Federal funds on behalf of a Federal candidate and a disbursement on behalf of a non-Federal candidate. Moreover, the reference to party committee transfer procedures for allocable expenses is added back into paragraph (a)(2).

Paragraph (a)(1) of the final rule includes also the appropriate method for attributing expenditures and disbursements among candidates in the case of a phone bank. This method is derived from pre-BCRA 11 CFR 106.5(e) (re-numbered 11 CFR 106.7), which addressed Federal/non-Federal

allocation in the analogous situation of exempt activities. This method, which has provided guidance for allocation of expenditures and disbursements for direct candidate support, is no longer in the new regulations after December 31, 2002 for other mixed party activities. Therefore, the regulations at 11 CFR 106.1 directly address phone banks.

Federal election activity includes some of the activities that also meet the definition of exempt activities. As indicated in the Explanation and Justification of 11 CFR 100.24, a Federal election activity that, pre-BCRA, would have been allocable as an exempt activity, is now a Federal election activity covered by the allocation rules at 11 CFR 300.33. Under 11 CFR 106.7, however, exempt activities still exist as an allocable category of expenses in a number of situations. Hence, a complete list of particular allocable costs other than those addressed in 11 CFR 106.1 should include exempt activities. The final rule at 11 CFR 106.1(e) does not list individual allocation categories but still serves as a signpost to sections addressing the allocation of mixed Federal/non-Federal or mixed Federal/Levin payments.

Exempt party activities also relate to section 106.1 as follows. If an activity supporting clearly identified Federal and non-Federal candidates is a Federal election activity and is not also an exempt activity, the portion of the payment attributable to each Federal candidate is an expenditure for that candidate, and may constitute an in-kind contribution, an independent expenditure, or a coordinated expenditure. If the payment is for a Federal election activity that is also an exempt activity, the amounts are exempted from the definition of "expenditure" or "contribution." Although the expense must be paid for entirely with Federal funds, only the amounts that are attributable to the Federal candidates or Federal elections (but using the new percentages in 11 CFR 106.7) count toward the political committee registration threshold at 2 U.S.C. 431(4)(C) for local party committees, which is more than \$5,000 in exempt activity payments. See 11 CFR 100.5(c) and the Explanation and Justification for 11 CFR 100.24(a) and 11 CFR 300.36(a).

#### *11 CFR 106.5 Allocation of Expenses Between Federal and Non-Federal Activities by National Party Committees*

The NPRM proposed amending 11 CFR 106.5 to explain the allocation rules for State, district, and local party committees. Proposed paragraph (a) also stated that because national party

committees would no longer be able to raise and spend non-Federal funds, they would no longer be able to allocate their expenses between their Federal and non-Federal accounts. See 67 FR 35679. While this is true after December 31, 2002, national party committees will be able to spend non-Federal funds for limited purposes during the transition period of November 6, 2002, through December 31, 2002. For discussion of the transition period, see the Explanation and Justification for 11 CFR 300.12, below. The Commission realizes that the regulations need to contain allocation rules for national party committees during this transition period. Therefore, the final rules include several technical amendments to section 106.5 to make it applicable solely to national party committees and only during the transition period. The current allocation rules remain unchanged for national party committees. The final rules that apply to State, district, and local party committees, set out in proposed 11 CFR 106.5, are being designated as new 11 CFR 106.7 in the final rules. See below.

Consistent with this reorganization, the word "national" is placed before "party committees" in several places in 11 CFR 106.5, including the title of the section, to clarify that this section only applies to national party committees. A title is added to paragraph (a)(1) for consistency because all other paragraphs under paragraph (a) have titles. Paragraphs (a)(2)(iii), (d), and (e) are removed and reserved because they apply to State, district, and local party committees. Paragraph (h) is added to be a sunset provision. Paragraph (h) states that section 106.5 only applies during the transition period and will no longer be effective after December 31, 2002.

#### *11 CFR 106.7 Allocation of Expenses Between Federal and Non-Federal Accounts by Party Committees, Other Than for Federal Election Activities*

Section 106.7 sets forth rules governing the allocation of certain expenses between the Federal and non-Federal accounts of political parties. Much of new section 106.7 covers topics formerly addressed in pre-BCRA 11 CFR 106.5. The final rules addressing allocation of expenditures and disbursements at 11 CFR 106.7 and 11 CFR 300.33 separate between the two sections respectively those activities that are not "Federal election activity" and those that are. This reorganization is based in large part upon the need to clarify in the rules the relationship between "exempt activities" and "Federal election activities," particularly given certain timing

parameters involved in the sub-set of Federal election activities that may be paid in part with Levin funds. See 11 CFR 300.32 and 300.33. Therefore, 11 CFR 106.7 addresses allocation of expenses for all State, district, and local party activity that falls outside the definition of Federal election activity, which are allocable between Federal and non-Federal accounts. In contrast, 11 CFR 300.33 addresses the allocation of those types of Federal election activity that may be allocated between Federal and Levin accounts.

#### *A. Allocable Activities That Are Not FEA*

The content of 11 CFR 106.7(a) and (b) remains much the same as the NPRM, when it was designated 11 CFR 106.5(a) and (b), although new language has been added to emphasize that these provisions address activities other than Federal election activities. These paragraphs state the general principles that after December 31, 2002: (1) National party committees are no longer permitted to raise and spend non-Federal funds,<sup>4</sup> and thus are unable to allocate expenses between Federal and non-Federal accounts; and (2) State, district, and local party committees that make expenditures and disbursements for activities other than Federal election activities in connection with both Federal and non-Federal elections must either use only Federal funds for these purposes or must establish separate Federal and non-Federal accounts and allocate expenditures between or among those accounts.

The prohibitions on national party committee use of non-Federal funds has resulted in the complete elimination of pre-BCRA 11 CFR 106.5(b) and (c). Thus, the provisions in new 11 CFR 106.7(b) through (f) only apply to State, district, and local party committees, and do not apply to national party committees.

#### *B. Salaries and Wages*

Paragraph 106.7(c) addresses costs that must be either paid totally from Federal accounts or allocated by State, district, and local party committees between their Federal and non-Federal accounts. Under paragraph (c)(1), however, State, district, and local party committees must pay entirely with funds that comply with State law the salaries and wages of employees who spend 25% or less of their compensated time on Federal election activity or an activity in connection with Federal elections. The inclusion of "wages" is

intended to include hourly employees. The compensation of other employees who spend more time on Federal election activity or activity in connection with Federal elections is addressed in paragraph (d)(1)(ii) and new 11 CFR 300.33. BCRA defines "Federal election activity" to include the cost of all services provided by an employee in any month in which the individual spends more than 25% of his or her compensated time on activities in connection with a Federal election. 2 U.S.C. 431(20)(A)(iv). This federalizes a high proportion of salary payments that were previously paid for with an allocation of Federal and non-Federal dollars. By requiring the salaries and wages related to many activities that are primarily, or even entirely, State or local in their orientation to be paid for with Federal funds, when the amount of time spent on them exceeds 25%, Congress clearly expressed its desire to federalize these costs. By implication, Congress appears to have concluded that salaries for employees spending 25% or less of their time on activities in connection with a Federal election or on Federal election activities do not have to be paid from any mix of Federal funds. Thus, this new regulation in 11 CFR 106.7(c) is in accord with Congressional intent, and it comports with Congress's expectation that the Commission would develop allocation regulations for Federal election activity paid for in part with Levin funds.

The proposed regulations at 11 CFR 300.33(b)(1) would have required State, district, and local party committees to keep time records for all employees, the purpose being to provide documentation for allocation purposes. The NPRM set out three possible alternative methods by which a committee could collect such documentation. In response to the NPRM, a State party committee asserted that time sheets would be "burdensome," that written certifications by employees would be "equally impractical," but that a tally sheet kept by the employer would be "more reasonable." The same commenter nonetheless urged the Commission not to require any particular method of documentation. For the reasons noted by the commenters, the final rule at 11 CFR 106.7(d)(1) requires only that a monthly log be kept of the percentage of time each employee spends in connection with a Federal election.

#### *C. Administrative Costs*

One category of allocable expenses in 11 CFR 106.7 is "administrative costs." Under paragraph (c)(2), these costs

cover administrative expenses except for employee salaries and wages. The final rule requires allocation of these costs between a party committee's Federal and non-Federal accounts, unless they can be attributed to a clearly identified Federal candidate, in which case they are totally Federal costs to be paid with Federal funds.

A number of the comments received in response to the NPRM argued that, because BCRA does not address administrative costs, State, district, and local party committees should be able to pay them totally out of their non-Federal accounts. One commenter representing a State party emphasized the many State and local elections and ballot initiatives with which his party is involved as compared to the number of Federal elections. Other commenters, however, including the principal Congressional sponsors of BCRA, argued that BCRA was never intended to change the allocations required by the pre-BCRA regulations, and that administrative costs should continue to be allocable between Federal and non-Federal accounts.

While the Commission recognizes that non-Federal activity consumes a large portion of State party time and finances, there is no doubt that Federal candidates benefit from such party committees' efforts to reach and motivate potential voters. The Commission also agrees that nothing in BCRA or the legislative history suggests that Congress intended the Commission to abandon its longstanding allocation requirement for these expenses. Therefore, the final rules continue to require allocation of administrative costs under a simplified allocation method discussed below.

#### *D. Exempt Activities*

Under the Act, as amended by BCRA, how the costs of voter registration, voter identification, get-out-the-vote ("GOTV") and other campaign activities that may promote or oppose a political party without promoting or opposing a candidate are allocated depends on whether such activities come within the definition of "Federal election activity" or not. See 11 CFR 100.24(a), (b). Numerous commenters focused upon the relationship between the provisions in FECA and in the Commission's regulations that exempt certain party activities from the definitions of "contribution" and "expenditure" and the provisions in BCRA establishing "Federal election activities" as a general category, and activities for which Levin funds may be used. The comments and the Commission's determinations in this regard are discussed in the Explanation

<sup>4</sup> The actual ban on this activity takes effect on November 6, 2002.



and Justification for 11 CFR 100.24 defining "Federal election activity."

The final rules in 11 CFR 106.7(c)(3) set out the permitted allocations of costs for categories of party expenditures and disbursements for activities that are exempt party activities but are not Federal election activities. The party committee must either pay the costs of this activity from its Federal account or allocate the costs between its Federal and non-Federal accounts.

#### E. Fundraising Costs

11 CFR 106.7(c)(4) addresses the direct costs of a fundraising program or event when the State, district, or local party committee is raising both Federal and non-Federal funds for itself. The NPRM indicated that all *direct* fundraising costs must be paid from a Federal account, while other fundraising-related costs not directly related to particular fundraising programs or events could be allocated between Federal and non-Federal accounts as administrative costs.

There was no consensus among the public comments addressing this topic. The principal Congressional sponsors of BCRA supported the proposed rules that would have required entirely Federal funds to be used for these purposes. A public interest group and a party committee urged the Commission to continue to use the previous funds received method for allocating these fundraising costs. Two party committees urged allocation of only those fundraising costs that are directly associated with a particular fundraising program or event.

The Commission observes that BCRA requires the use by State, district, and local party committees of funds "subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(c). Thus, the Commission has concluded that not only Federal funds, but Levin funds as well, may be used to raise funds that are used, in whole or in part, for Federal election activities. See 11 CFR 300.33(c)(3). Non-Federal funds may not be used. The reasons for this conclusion are set out in greater details in the Explanation and Justification for 11 CFR 300.32 below.

With regard to fundraising purposes other than Federal election activity, the final rule at 11 CFR 106.7(c)(4) permits the direct costs of fundraising to be allocated between Federal and non-Federal funds, provided that none of the proceeds so raised will ever be used for Federal election activities. In addition, the rule requires the segregation of the proceeds in bank accounts that are never used for Federal election activity. Paragraph (c)(4) specifies that direct

costs of fundraising include the solicitation costs and the costs of planning and administering a particular fundraising event or program.

#### F. Certain Voter Drive Activities

11 CFR 106.7(c)(5), which did not appear in the version of the regulation published in the NPRM, addresses expenses, other than salaries and wages, for voter-drive activities and other party committee activities that are not candidate-specific and that do not qualify as Federal election activities. These may include, for example, certain voter identification, GOTV, or other activities that do not promote or oppose a Federal candidate or non-Federal candidate, and that do not qualify as Federal election activities because they are not in connection with an election in which a Federal candidate appears on the ballot. See 11 CFR 100.24(a)(1) and (b)(2). Paragraph (c)(5) provides that the costs of such activities may be allocated between the Federal and non-Federal accounts of the State, district, or local party committee.

#### G. Allocation Percentages and Recordkeeping

One goal of the final rule is to assure that activities deemed allocable are not paid for with a disproportionate amount of non-Federal funds. Another goal is to simplify the allocation process, in particular by establishing formulas that do not vary from State to State. Therefore, in lieu of the State-by-State ballot composition ratios for administrative costs and generic campaign activity and in lieu of the time or space method applied to exempt State activities, which were required by the pre-BCRA regulations, the rules at 11 CFR 106.7(d)(2) and (3) establish fixed percentages for all States for certain activities. The percentages vary only in terms of whether or not a Presidential campaign and/or a Senate campaign is to be held in a particular election year.

In the NPRM, the Commission set out proposed required allocation percentages for the Federal shares of salaries and other compensation paid employees who spend 25% or less of their time on Federal elections, for administrative expenses, and for exempt party activities that are not Federal election activities. For the reasons explained above, the Commission has decided that no salaries and wages are to be allocated. With regard to administrative costs and exempt activities, State, district, and local party committees must allocate no less than the following amounts to their Federal

accounts during the following years (and in the preceding year):

(i) Presidential only election year—28% of costs

(ii) Presidential and Senate election year—36% of costs

(iii) Senate only election year—21% of costs

(iv) Non-Presidential and Non-Senate election year—15% of costs.

These figures were derived by taking averages of the ballot composition-based allocation percentages reported by State party committees in four groupings of States selected for their diversities of size and geographic location and for the particular elections held in each State in 2000 and 2002. The groupings were: (1) Six States (Alabama, Colorado, Illinois, New Hampshire, Oklahoma, and Oregon) in which there was a Presidential but no Senate campaign in 2000; (2) 10 States (California, Delaware, Georgia, Florida, Michigan, New York, North Dakota, Texas, Vermont, and Wyoming) in which there were both a Presidential campaign and a Senate campaign in 2000; (3) six States (Delaware, Georgia, Michigan, Oklahoma, Texas, and Wyoming) in which there will be a Senate campaign in 2002; and (4) six States (California, Florida, New York, North Dakota, Vermont, and Washington) in which there will be no Senate campaign in 2002.

In 2000, the Federal percentages for the two parties in six States with only a Presidential campaign ranged from 20% to 33.33%, with an average of 28%, while the Federal percentages for the two parties in ten States which held both Presidential and Senate campaign that year ranged from 30% to 43%, with an average of 36%. In 2002, the Federal percentages for the two parties in six States with a Senate campaign ranged from 20% to 25%, with an average of 21%, while the Federal percentages for the two parties in six States with no Senate campaign ranged from 11.11% to 16.67%, with an average of 15%. The rules apply the average percentages in each of the four groupings of States to all 50 States.

One comment on the proposed rules from a public interest organization addressed the Commission's proposed fixed percentages by providing two alternatives to the Commission's figures. The first alternative would have set a flat 33% requirement for Federal shares of what the commenter termed "Levin expenditures" (see 11 CFR 300.33) and for allocable costs other than administrative costs in odd-numbered years or in non-Presidential election years, and a flat 40% requirement for Federal shares of these same categories

of activities in Presidential election years. This alternative would also have required a 25% allocation for administrative costs in all years. The commenter based these percentages on what were termed "the current assumption" as to what State party committees spend in certain years.

The second alternative urged by this commenter adopted the Commission's calculations, but called for the use of the higher percentages in the sample States for what the response termed "Levin spending" and for voter registration outside the 120 day period before an election, plus the average percentages for non-Levin expenses such as administrative costs. The commenter also urged the Commission to be clear that its allocation percentages apply to a two-year election cycle, not just to the year of a Federal election.

The comment submitted on behalf of the principal Congressional sponsors of BCRA with regard to fixed allocation percentages was very similar to that of the public interest organization's response cited above in that, as one alternative approach, it called for at least a 33% Federal allocation of what it termed "Levin activities" and of voter registration activities outside the 120 period before an election, plus 25% Federal allocations for administrative expenses. It also called for 40% Federal allocations of Levin activities and of voter registration activities that are not Federal election activities in Presidential election years. This alternative assumed the application of the percentages to two-year Federal election cycles. As a second alternative, this commenter also agreed to use of the Commission's percentages for administrative costs in a two year cycle, but urged the application over that cycle of the highest, not the average, Federal percentages for what it termed "Levin activities and voter registration activities that are not 'Federal election activity' \* \* \* ." Another comment from a public interest organization also called for use of the highest percentages in the identified States, not the average percentages.

The comments received from party committees with regard to fixed percentages for Federal allocations ranged from support for the Commission's position to giving party committees a choice at the beginning of each cycle between the proposed formula and ballot composition ratios.

The final rules at 11 CFR 106.7(d) include the phrase, "and in the preceding year," to clarify that the allocation formula in this section apply to both years of a Federal election cycle.

With regard to the amounts of the fixed minimum Federal allocations, the final rules adopt the percentages contained in the NPRM because they represent averages of actual allocation ratios used in specific States at specific times, not assumptions as to possible State, district, and local party behavior in the future. These percentages represent a clear, bright line test intended to be more easily understood and applied than the previous regulations, consistent with statutory intent. As noted above, the percentages apply throughout a two-year cycle—i.e., from January 1st of odd-numbered years through December 31st of even-numbered years.

#### H. Allocable Fundraising Costs

The NPRM sought comment as to whether costs of fundraising, other than fundraising for Federal election activities, should be allocated under the "funds received" method in previous 11 CFR 106.5(f). Two commenters, a political party organization and a public interest organization, supported the idea of using the "funds received" method for fundraising where the funds raised are not used for Federal election activity.

The Commission has decided to continue the use of the "funds received" method for allocating direct costs of fundraising. This is set out in a new 11 CFR 106.7(d)(4). Under this method, the State, district, or local party committee must allocate based on the ratio of funds received into the Federal account to the total receipts for the fundraising program or event. The ratio must be estimated prior to each such program or event based upon a reasonable prediction and, as provided in the rule, subsequent adjustments must be made, if necessary. New 11 CFR 106.7(e)(4) clarifies that fundraising costs for Federal election activities are governed by new 11 CFR 300.32.

#### I. Non-Allocable Costs

Section 106.7(e) sets out those activities that are not allocable between Federal and non-Federal accounts. Paragraph (e)(1) requires that a payment for any activity that refers only to one or more candidates for Federal office must not be allocated between Federal and non-Federal accounts. These costs must be paid for entirely with funds from a Federal account. Paragraphs (e)(2) and (3) indicate that employee salaries and wages under certain conditions must not be allocated between Federal and non-Federal accounts, but must be paid for entirely with non-Federal funds.

#### J. Transfers

Section 106.7(f), which addresses transfers to pay for allocable activities, is similar to the proposed rule, with the addition of language providing for allocation accounts as an alternative to the use of Federal accounts for initial payments of allocable expenditures and disbursements. This provision tracks for the most part the language and requirements of pre-BCRA 11 CFR 106.5(g). No comments addressed the continuation of this requirement. Reimbursements from a non-Federal account to a Federal account must take place within a specified number of days. The continuation of these timing provisions will ensure that party committees need not change this aspect of their operations.

Section 106.7(f)(2)(ii), like former 11 CFR 106.5(g)(2)(B)(iii), explains that any payment outside this time frame, absent the need for an advance payment of a reasonably estimated amount, could result, depending on the circumstances, in a loan of non-Federal funds to the Federal account and a violation of the Act. No commenters addressed this provision.

### VII. Part 108—Filing Copies of Reports and Statements With State Officers

#### 11 CFR 108.7 Effect of State Law

Section 108.7 addresses Federal preemption of State law based on 2 U.S.C. 453(a) and its legislative history. Paragraph (c) lists the types of State laws that are not preempted or superseded by the Act and the regulations. BCRA amended the Act at 2 U.S.C. 453(b), providing for the application of State law to the use of non-Federal funds for the purchase or construction by a State or local party of its office building. Federal preemption continues to exist when Federal funds are used. This amendment is implemented in new section 300.35. Paragraph (c) of section 108.7 is therefore being amended to include the application of State law to the use of non-Federal funds for the purchase or construction of a State or local party office building in accordance with 11 CFR 300.35.

### VIII. Part 110—Contribution and Expenditure Limitations and Prohibitions

#### 11 CFR 110.1 Contributions by Persons Other than Multicandidate Political Committees

BCRA amended 2 U.S.C. 441a(a)(1) to raise the amount that individuals may donate to State committees of political parties from \$5,000 to \$10,000 in any

calendar year. New 11 CFR 110.1(c)(5) incorporates this increased contribution limitation, which is effective January 1, 2003. The principal Congressional sponsors of BCRA included in their comment an emphasis upon the fact that this is an increase in the limitation on Federal funds. No other comments on this provision were received.

### IX. Part 114—Corporate and Labor Organization Activity

#### 11 CFR 114.1 Definitions

The pre-BCRA text of 11 CFR 114.1(a)(2)(ix) follows the repealed statutory provision as to the purchase or construction by a national or State party committee of an office facility. It is therefore being deleted and replaced with an annotated cross-reference to new 11 CFR 300.35 which describes how the purchase or construction of an office building by a State or local party committee may be funded. A national committee's office building must be purchased or constructed only with Federal funds. See new section 300.10. The texts of the regulations currently at 11 CFR 100.7(b)(12) and 100.8(b)(13), which are similar to the pre-BCRA text of section 114.1(a)(2)(ix), are the subject of a separate rulemaking. See *Notice of Proposed Rulemaking*, 67 FR 40881 (June 14, 2002).

### X. Part 300—Non-Federal Funds

#### 11 CFR 300.1 Scope and Effective Date, and Organization

The bulk of the new rules that address non-Federal funds of political party committees are contained in 11 CFR part 300. Section 300.1 addresses the scope of new part 300, sets forth the effective date of the provisions contained in the new part, and outlines the organization of the new part. Specifically, paragraph (a) of section 300.1 states that new part 300 implements changes to the FECA enacted by Title I of BCRA. It also notes that nothing in part 300 is intended to alter the definitions, restrictions, liabilities, and obligations imposed by sections 431–455 of Title 2 of the United States Code or in the regulations prescribed thereunder in 11 CFR parts 100–116.

The effective date of BCRA, except where otherwise stated, is November 6, 2002. See 2 U.S.C. 431 note, section 402(a). Consistent with BCRA, paragraph (b) of section 300.1 states that part 300 takes effect on November 6, 2002, except for the following: (1) Where otherwise stated in part 300; (2) subpart B of part 300 relating to State, district, and local party committees does not apply with respect to runoff

elections, recounts, or election contests resulting from elections held prior to November 6, 2002; (3) the increase in individual contribution limits to State party committees as set forth in proposed 11 CFR 110.1(c)(5) applies to contributions made on or after January 1, 2003; and (4) national parties must spend any remaining non-Federal funds received before November 6 and in their possession on that date before January 1, 2003, subject to the transition rules set forth in proposed 11 CFR 300.12.

Finally, paragraph (c) of section 300.1 explains that part 300 is organized into five subparts, with each subpart addressing a specific category of persons affected by BCRA. Subpart A of part 300 prescribes rules pertaining to national party committees; subpart B prescribes rules pertaining to State, district, and local party committees and organizations; subpart C addresses rules affecting certain tax-exempt organizations; subpart D prescribes rules pertaining to Federal candidates and Federal officeholders; and subpart E prescribes rules pertaining to State and local candidates. In addition, BCRA requires changes in other parts of Title 11 of the *Code of Federal Regulations*, which are also addressed in this rulemaking. One commenter supported the provisions of this section. The final rules follow the proposed rules, with the exception of minor revisions to clarify the scope of each subpart.

#### 11 CFR 300.2 Definitions

A. 11 CFR 300.2(a) Definition of “501(c) organization that makes expenditures or disbursements in connection with a Federal Election”

New 11 CFR 300.2(a) defines a 501(c) organization “that makes expenditures or disbursements in connection with a Federal election.” BCRA prohibits national and State party committees, their officers and agents, and certain entities associated with them, from soliciting any funds for, or making or directing any donations to, 501(c) organizations that fit this definition.

The NPRM sought comments on whether the definition of 501(c) organizations affected by the prohibition on party fundraising and donations should contain a temporal requirement so that this prohibition is not overbroad and does not encompass, for example, an organization that made expenditures and disbursements in connection with a Federal election many years ago but has not done so recently and does not plan to do so in the future.

Commenters were in general agreement that a temporal requirement was a good idea. Several commenters

suggested that the prohibition should encompass organizations that have made expenditures and disbursements in connection with a Federal election during the past three election cycles, or six years. Other commenters stated that the definition was overbroad without a temporal requirement but offered no suggestion for a specific time frame.

The final rule at 11 CFR 300.2(a) defines a 501(c) organization “that makes expenditures or disbursements in connection with a Federal election” as one that plans to make such expenditures or disbursements, including for Federal election activity, within the current election cycle or plans to pay a debt incurred in a prior election cycle for making such expenditures or disbursements. Because BCRA uses the present tense in referring to affected 501(c) organizations, the Commission believes that the prohibition on party fundraising should only apply to Section 501(c) organizations that undertake such spending within the current two-year election cycle. The definition in new 11 CFR 300.2(a) also includes organizations that plan to pay debts incurred in a prior election cycle for such expenditures or disbursements. This will prevent, for example, an organization from certifying that it does not plan to make expenditures or disbursements in connection with a Federal election in the current 2-year election cycle, if it receives donations or fundraising assistance from a party committee and uses those funds to pay off debt incurred for such expenditures or disbursements relating to a prior election cycle.

The proposed definition in the NPRM would have also delineated the types of activity that constitute expenditures or disbursements in connection with a Federal election. One commenter expressed support for this proposed rule. The final rule does not, however, set out specific activities that constitute such expenditures or disbursements. Federal election activity is defined at new 11 CFR 100.24 so that one component of the definition is clear. Moreover, the Commission believes that advisory opinions and closed enforcement matters provide guidance as to what constitutes activities in connection with a Federal election. Attempting to include specific activities in the definition in 11 CFR 300.2(a) might result in an overbroad definition.

B. 11 CFR 300.2(b) Definition of “Agent”

Many of the prohibitions and restrictions of BCRA apply to a principal entity, such as a political party

committee or a candidate, and to the "agents" of such principals where they act on behalf of those principals. See, e.g., 2 U.S.C. 441i(a)(1), (2); 2 U.S.C. 441i(b)(1); 2 U.S.C. 441i(e)(1). Congress did not define the term, "agent," in BCRA. In the NPRM, the Commission proposed a regulatory definition framed in terms of "a person who has actual express oral or written authority" to act on behalf of a principal. This definition would have defined "actual authority" as "instructions, either oral or written," from the principal. The Commission solicited comments on several aspects of this proposed definition, such as the potential applicability of the definition to volunteers, whether the principal's actual knowledge of the putative agent's activities is relevant, and the potential applicability of the concept of apparent authority.

The Commission received many comments on the proposed definition of agent. Several commenters found the proposed definition "too narrow." One described the requirement that an agent's authority must be actual and express to be a "loophole that would utterly swallow the rule," arguing that in the "real world" fundraising is accomplished largely through agents without express authority in a "technical" or "legal" sense. The principal Congressional sponsors of BCRA commented that the proper definition of "agent" is critical to prevent evasion of the "soft-money" prohibitions at the center of Title I of BCRA. The definition, they believe, should encompass "anyone who has an agency relationship under common law," including apparent authority. The principal Congressional sponsors and a public interest group commented that the new definition should not be narrower than the definition of agent currently used by the Commission in regulating independent expenditures. See 11 CFR 109.1(b)(5). The sponsors also commented that the Commission should not exclude volunteers and vendors *per se*. A public interest group also urged the Commission to include apparent authority within the definition. This group argued that "bestowing" a title or position on an individual implies that the individual is working on behalf of the principal who bestowed the title or position.

In contrast, other commenters, comprised of national and State political party committees and labor organizations, applauded the proposed rule's conjunctive requirement that the agent's authority must be actual and express. Three national party committees commented that the definition should be further limited to

individuals with "substantive decision-making authority." Many of these commenters stressed that the Commission should consider two issues in implementing the regulatory definition of "agent." The first issue is the nature of an agent's "individual liability" for his or her own actions. The second issue is the perceived "vicarious liability" of the principal. With regard to the first issue, several commenters, including a State party committee, an association of State party officials, and several national party committees, suggested the Commission use 11 CFR 109.1(b)(5) as a model for the new definition, presumably modified to provide that authority must be actual and express. Regarding the second issue, several commenters urged the Commission to give full effect to a requirement that the agent must be acting on behalf of the principal before the principal incurs liability derived from the agent's actions. Two labor organizations commented that the principal's derivative liability should not extend beyond activities the agent has been specifically authorized to conduct. Two national party committees commented that the final definition must impose liability only when a principal exercises actual control over the actions of the agent, arguing that it would be unfair to impose liability for actions beyond the principal's control. Another commenter, a State party committee, framed its suggestion in terms of limiting a principal's liability to actions taken by an agent on the principal's "explicit instructions."

The final rules define "agent" for purposes of Title I of BCRA as "any person who has actual authority, either express or implied." The final rules make clear that the definition of "agent" is limited to those individuals who have actual authority, express or implied, to act on behalf of their principals and does not apply to individuals who do not have any actual authority to act on their behalf, but only "apparent authority" to do so. The final regulation thus differs from the regulation proposed in the NPRM. The Commission makes this change for reasons articulated by the United States Supreme Court. In *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989) the High Court held that the defining of statutory terms should be guided by "settled meaning under \* \* \* the common law \* \* \* unless the statute otherwise dictates." In this regard, the Commission notes that under the common law of agency, an "agent's authority may be actual or apparent." *Moriarty v. Glueckert Funeral Home*,

*Ltd.*, 155 F.3d 859, 865–866 (7th Cir. 1998) (quoting Restatement (Second) of Agency, 26). But the Supreme Court has made it equally clear that not every nuance of agency law should be incorporated into Federal statutes where full incorporation is not necessary to effect the statute's underlying purpose. See *Faragher v. City of Boca Raton*, 524 U.S. 775, 802 n.3 (1998) (The "obligation is not to make a pronouncement of agency law in general or to transplant [the Restatement (Second) of Agency into a Federal statute, but] is to adapt agency concepts to the [statute's] practical objectives.")

For these reasons, the definition of "agent" in the final regulation does not incorporate apparent authority. "[A]pparent authority to do an act is created as to a third party by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency, 27. As has been noted by commenters, apparent authority is largely a concept created to protect innocent third parties who have suffered monetary damages as a result of reasonably relying on the representations of individuals who purported to have, but did not actually have, authority to act on behalf of principals. Unlike other legislative areas, such as consumer protection and anti-fraud legislation, BCRA does not affect individuals who have been defrauded or have suffered economic loss due to their detrimental reliance on unauthorized representations. Rather, the Commission interprets Title I of BCRA to use agency concepts to prevent evasion or avoidance of certain prohibitions and restrictions by individuals who have actual authority and who do act on behalf of their principals. In this light, apparent authority concepts are not necessary to give effect to BCRA.

It is necessary, however, to define "agent" to include implied and express authority in order to fully implement Title I of BCRA. Otherwise, agents with actual authority would be able to engage in activities that would not be imputed to their principals so long as the principal was careful enough to confer authority through conduct or a mix of conduct and spoken words. The comments and testimony received by the Commission perhaps reveal some confusion about the term "implied authority." Implied authority is a form of actual authority. *Moriarty, supra*, 155 F.3d at 865–866 (7th Cir. 1998) (quoting Restatement (Second) of Agency, 26)

(actual authority may be express or implied). Implied authority should not be confused with apparent authority, which is a distinct concept. Restatement (Second) of Agency, 8, cmt a. It is well settled that whether an agent has implied authority is within the control of the principal. Thus, the Commission emphasizes that a principal may not be held liable, under an implied actual authority theory, unless the principal's own conduct reasonably causes the agent to believe that he or she had authority. For example, a party committee cannot be held liable for the actions of a rogue or misguided volunteer who purported to act on behalf of the committee, unless the committee's own written or spoken word, or other conduct, caused the volunteer to reasonably believe that the committee desired him or her to so act. Once an agent has actual authority, however, "[u]nless otherwise agreed, authority to conduct a transaction includes authority to do acts which are incidental to it, usually accompany it, or are reasonably necessary to accomplish it." Restatement (Second) of Agency, 35; see *U.S. v. Flemmi*, 225 F.3d 78, 85 (1st Cir. 2000).

Title I of BCRA refers to "agents" in order to implement specific prohibitions and limitations with regard to particular, enumerated activities on behalf of specific principals. The final regulation limits the scope of the definition accordingly in paragraphs (b)(1) through (b)(4). Each provision in paragraphs (b)(1) through (b)(4) is tied to a specific provision in Title I of BCRA that relies on agency concepts to implement a specific prohibition or limitation. The Commission emphasizes that, under the Commission's final regulation, a principal cannot be held liable for the actions of an agent unless (1) the agent has actual authority, (2) the agent is acting on behalf of his or her principal, and (3) the agent is engaged in one of the specific activities described in paragraphs (b)(1) through (4).

Paragraph (b)(1) limits a national party committee's liability to an agent's authorized actions with regard to two activities. The first is soliciting, directing, or receiving any contribution, donation, or transfer of funds on behalf of the national party committee. 2 U.S.C. 441i(a)(1), (2). The second is soliciting funds for, or making or directing donations to, section 501(c) and 527 organizations. 2 U.S.C. 441i(d).

Paragraph (b)(2) limits the liability of State, district, or local political party committees to the actions of an agent who has actual authority in four particular areas. The first is to make

expenditures or disbursements of any funds for Federal election activity on behalf of the State, district or local party committee. 2 U.S.C. 441i(b)(1). The second is to transfer, or to accept a transfer of, funds to make expenditures or disbursements for Federal election activity on behalf of the State, district or local party committee. 2 U.S.C. 441i(b)(2)(B)(iv). The third is to engage in joint fundraising activities on behalf of the State, district or local party committee with any person if any part of the funds raised are used, in whole or in part, to pay for Federal election activity. 2 U.S.C. 441i(b)(2)(C). The fourth is to solicit funds for, or to make or direct donations to, section 501(c) and 527 organizations. 2 U.S.C. 441i(d).

Paragraph (b)(3) limits the liability of a Federal candidate to the actions of an agent who has actual authority to solicit, receive, direct, transfer, or spend funds in connection with any election on behalf of the Federal candidate. 2 U.S.C. 441i(e)(1). The Commission notes that the exception to 2 U.S.C. 441i(e)(1)'s general rule found in paragraph (e)(2) of that section also applies to agents of such Federal candidates who are or were State or local candidates.

Paragraph (b)(4) applies to State candidates, and limits their liability to actions taken by their agents who have actual authority to spend funds for public communications on their behalf. 2 U.S.C. 441i(f).

Under the Commission's final rules defining "agent," a principal can only be held liable for the actions of an agent when the agent is acting on behalf of the principal, and not when the agent is acting on behalf of other organizations or individuals. Specifically, it is not enough that there is some relationship or contact between the principal and agent; rather, the agent must be acting on behalf of the principal to create potential liability for the principal. This additional requirement ensures that liability will not attach due solely to the agency relationship, but only to the agent's performance of prohibited acts for the principal. In light of the foregoing, it is clear that individuals, such as State party chairmen and chairwomen, who also serve as members of their national party committees, can, consistent with BCRA, wear multiple hats, and can raise non-Federal funds for their State party organizations without violating the prohibition against non-Federal fundraising by national parties.

C. 11 CFR 300.2(c) Definition of "Directly or Indirectly Established, Financed, Maintained, or Controlled"

11 CFR 300.2(c) defines "directly or indirectly establish, finance, maintain, or control," a term that is used in several provisions of BCRA. The term appears in BCRA in the context of national party committees (see 2 U.S.C. 441i(a)(2)), of State, district, and local political party committees (see, e.g., 2 U.S.C. 441i(b)(2)(B)(iii)), and of Federal candidates and Federal officeholders (see, e.g., 2 U.S.C. 441i(e)(1)). The phrase "established, financed, maintained, or controlled," without the modifier "directly or indirectly," was already used in the anti-proliferation provisions of the FECA and in the Commission's "affiliation" regulation. See 2 U.S.C. 441a(a)(5); 11 CFR 100.5(g), and 110.3.

Paragraph (c)(1) of section 300.2 enumerates the persons to whom the regulation applies, and employs the shorthand "sponsor" to refer collectively to these persons. A public interest group commented that the regulation should apply to national, as well as to State, district, and local political party committees. Accordingly, given that the term, "directly or indirectly established, financed, maintained, or controlled," is applied to national party committees in 2 U.S.C. 441i(a)(2), the Commission is incorporating this suggestion in the final regulation. Another commenter suggested that agents should be included in the description of the term "sponsor," rather than addressed in another part of the rule. The final rules also adopt this suggestion. In paragraph (c)(1), the statutory concept of "indirect" establishment, financing, maintenance, or control is addressed by including actions taken by a sponsor's agents on behalf of the sponsor.

The version of 11 CFR 300.2(c) proposed in the NPRM defining the term "directly or indirectly establish, finance, maintain, or control" included factors that extended beyond the affiliation provisions of 11 CFR 100.5(g). Several commenters, including an association of State party officials, several national party committees, and two State party committees, objected to this portion of the regulation proposed in the NPRM, and suggested uniformly that the final regulation should be based solely upon the existing affiliation regulation in 11 CFR 100.5(g), which one commenter described as "relatively well-established and well-understood." A Latino rights group and a taxpayers' organization concurred with this approach. In addition, a civil rights

organization stated that the regulation proposed in the NPRM was “not only vague as to provide no practical guidance, but also is likely to deem entities as being ‘controlled’ by a party committee when the BCRA never intended to reach such entities.” On the other hand, two public interest groups supported the Commission’s proposed use of factors extending beyond the reach of 11 CFR 100.5(g), one of whom argued that Congress used the term, “directly or indirectly established, financed, maintained, or controlled,” in several contexts to “make it clear that Congress wanted to move beyond the current affiliation rules.”

The Commission has concluded that the affiliation factors laid out in 11 CFR 100.5(g) properly define “directly or indirectly established, financed, maintained, or controlled” for purposes of BCRA. Therefore, in paragraph (c)(2), the affiliation factors found at 11 CFR 100.5(g)(4)(ii) have been recast in the terminology demanded by the BCRA context. Paragraphs (c)(2)(i) through (x) of section 300.2 generally correspond to paragraphs (g)(4)(ii)(A) through (J) of section 100.5. This change in terminology, for example, substituting “entity” for “committee,” and “sponsor” for “sponsoring organization,” recognizes that affiliation concepts are being applied in a different context. Besides the changes in terminology, the words “and otherwise lawfully” have been added to the phrase about joint fundraising in paragraphs (c)(2)(vii) and (viii) of section 300.2(c). This addition is intended to preclude any confusion that might arise between these provisions and the joint fundraising restrictions in subpart B of part 300.

In the NPRM, the Commission sought comment on whether this regulation should be based on the actions and activities of entities occurring solely after November 6, 2002, the effective date of BCRA. The Commission considered taking this course of action to prevent a retroactive application of BCRA or, specifically, to prevent the actions and activities of entities before November 6, 2002, that are legal under current law from creating potential legal liability based on the new requirements of BCRA, which do not take effect until after November 5, 2002. The Commission also asked, alternatively, whether there should be a rebuttable presumption that entities organized before a given date are not directly or indirectly established by a sponsor, provided that the sponsor and the entity are not affiliated. 67 FR 35658.

The principal Congressional sponsors of BCRA and two public interest groups

opposed these options. The principal Congressional sponsors stated, “There is nothing in the statutory language that permits the term \* \* \* to apply only to entities established after the effective date of the Act \* \* \*.” Such a rebuttable presumption, they continued, would “create an obvious loophole for organizations established or controlled by members of Congress that are currently raising soft money.” One of the public interest groups commented that “grandfathering” existing entities would “effectively prop the [soft-money] loophole open.” The other public interest group opposing this idea said: “This would, as a practical matter, allow the activity sought to be regulated by BCRA to continue on an unregulated basis through the preexisting entity.”

A non-profit organization commented that the Commission should not apply the new regulation to existing entities that may have been directly or indirectly established, financed, maintained, or controlled by a sponsor because, “otherwise, the rule would go against any conceivable precept of the BCRA having an effective date after the 2002 general elections.” This organization asserted, “the only relevant question \* \* \* is whether an entity is controlled by a sponsor after the effective date of BCRA.” This organization supported the idea of a rebuttable presumption. Several party committees urged the Commission to apply the regulation if there is affiliation “on or after the effective date of BCRA.” Notably, a civil rights organization concluded that “the only relevant question for the purposes of BCRA is whether an entity is controlled by a sponsor after the effective date of BCRA.” The civil rights organization further stated that “we agree with the Commission’s suggestion that there should be a rebuttable presumption that entities ‘organized’ before a given date are not directly or indirectly established by a sponsor. [To proceed otherwise] would go against any conceivable precept of the BCRA having an effective date after the 2002 elections.”

For the foregoing reasons, the Commission has concluded that BCRA should not be interpreted in a manner that penalizes people for the way they ordered their affairs before the effective date of BCRA. This will help ensure that BCRA is not enforced in a retroactive manner with respect to activities that were legal when performed. Therefore, the Commission has added, in the final rules, a new paragraph (c)(3). The paragraph, under the heading, “safe harbor,” provides that on or after November 6, 2002 (the effective date of BCRA), an entity shall not be deemed to

be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities’ actions and activities solely after November 6, 2002, they satisfy the requirements of 11 CFR 300.2(c). The Commission notes that financing, within the meaning of this definition, presents special considerations. Therefore, with regard to financing, paragraph (c)(3) provides that if an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of 11 CFR 300.2(c). If funds received from another entity prior to November 6, 2002, are spent by the recipient entity on or after that date, that fact will be relevant to a determination under section 300.2(c).

In the NPRM, the Commission sought comment as to whether there should be an exception for a *de minimis* level of funding by a sponsor. 67 FR 35659. Only one commenter, a State party committee, supported this idea and suggested \$5,000 for this purpose. The Commission has not included a *de minimis* exception in the final regulation. Such an exception does not square with the overall, situation-specific approach of the regulation, which is to weigh factors such as “[w]hether a sponsor or its agent provides funds or goods in a significant amount or on an ongoing basis to the entity” “in the context of the overall relationship between sponsor and the entity.” See 11 CFR 300.2(c)(2), (c)(2)(vi). Nor does a *de minimis* exception appear to be supported by the plain language of the statute.

Paragraph (c)(4) (which was labeled (c)(2) in the version of the regulation proposed in the NPRM) provides a mechanism for a sponsor or an entity to request a determination by the Commission through the advisory opinion process that the sponsor is no longer deemed to finance, maintain, or control an entity, even if the sponsor established the entity. There have been several changes from the version of the regulation published in the NPRM. In paragraph (c)(4)(i), the Commission has clarified that the requestor of an advisory opinion must demonstrate that the entity is not directly or indirectly financed, maintained, or controlled by the sponsor. Under paragraph (c)(4)(ii) of the final rules, the requestor must demonstrate that all material connections between the sponsor and

the entity have been severed for two years.

The Commission notes that nothing in paragraph (c)(4) should be construed to require any given entity that has not directly or indirectly established, financed, maintained, or controlled another entity to obtain a determination to that effect before the two entities may operate independently of each other. Therefore, in the final rules, the Commission has added a new paragraph (c)(4)(iii), which provides that nothing in section 300.2(c) should be construed to require entities that are separate organizations on November 6, 2002, to obtain an advisory opinion to operate separately from one another.

#### D. 11 CFR 300.2(d) Definition of "Disbursement"

Both FECA and BCRA use the term "disbursement," but do not provide a definition. The NPRM contained a proposed definition of "disbursement" as "any purchase or payment made by a political committee or organization that is not a political committee." One commenter pointed out that this term should not be limited to payments by political parties or organizations, since it covers spending by individuals or entities that do not constitute political parties or organizations. *See, for example, 2 U.S.C. 441i(b)(1), which refers to disbursements by (among others) "an association or similar group of candidates \* \* \* or of individuals."* The Commission, therefore, is revising the proposed definition in the final rule to clarify that it covers purchases and payments by a political party or other person, including an organization that is not a political committee, that is nevertheless subject to FECA or BCRA.

#### E. 11 CFR 300.2(e) Definition of "donation"

In BCRA, Congress uses but does not define the term "donation." The Commission proposed in the NPRM to define a "donation," in 11 CFR 300.2(e), as a payment, gift, subscription, loan, advance, deposit, or anything of value given to a non-Federal candidate, party committee, 501(c) organization, or 527 organization, but not including a contribution or transfer.

Comments were sought on specifically excluding from "donation" some of the exemptions to "contribution" set forth in existing 11 CFR 100.7(b). The comments were split on this approach.

The Commission did not include these exemptions, or any others, in the final rule, because donations in many cases will be essentially a matter of State law, and thus the inclusion or

exclusion of certain payments should be left to State campaign finance law. For example, in the Levin Amendment, donations of Levin funds must be in accordance with State law, with one Federal limitation: a \$10,000 amount limitation per year per donor. 2 U.S.C. 441i(b)(2)(B)(iii). The Commission believes States should be free to craft their own exemptions to donations of Levin funds, subject only to the \$10,000 overall limitation imposed by BCRA.

Several commenters asked the Commission to specifically incorporate additional exemptions, such as money spent for redistricting, election recounts, FECA civil penalties, and legal defense funds. The exemption for recounts is addressed in the Commission's current rules at 11 CFR 100.7(b)(20); as are payments for civil penalties, *cf. 11 CFR 9034.4(b)(4)*. The Commission's interpretations on the raising and spending of funds for the purposes of redistricting were done in the context of Advisory Opinions that interpreted the terms "contribution" and "expenditure." *See Advisory Opinions 1990-23 and 1982-37*. The question of legal defense funds implicates not only the definition of "contribution," but also the Commission's personal use regulations at 11 CFR 113.1(g) in the case of a candidate legal defense fund. With respect to legal defense funds or any other legal expenses incurred by national party committees, the Commission does not interpret the broad language of 2 U.S.C. 441i(a) to permit the receipt or use of any non-Federal funds for such purposes.

As with the exemptions in 11 CFR 100.7(b), discussed above, State laws may address each of these payments in a variety of different ways. In addressing these issues, the Commission does not believe it is appropriate to require States to follow the Commission's precedents, which were established to implement the specific, detailed provisions of the FECA regarding "contributions" and "expenditures" for the purpose of influencing Federal elections. Moreover, to do so could present issues involving the preemption of State law.

Several commenters suggested that the definition of "donation" be expanded to include anything of value given to a "person," to conform with the use of this term in 11 CFR 300.10, 300.11, 300.37, 300.50, and 300.51. The Commission has made this change to 11 CFR 300.2(e), given the broad statutory reach of the term "donation" in 2 U.S.C. 441i(a)(1). The Commission has also deleted the reference to "transfers," because those are covered elsewhere in these rules. *See 11 CFR 300.34*.

#### F. 11 CFR 300.2(f) Definition of "Federal Account"

Paragraph (f) of section 300.2 defines "Federal account" as an account at a campaign depository that contains funds to be used in connection with a Federal election. The term "financial depository institution" proposed in the NPRM has been changed to the more accurate term "campaign depository." *See 2 U.S.C. 432(h) and 11 CFR 103.2*.

Some commenters asked the Commission to include in this definition the requirement that only Federal funds and funds transferred for the purpose of paying the non-Federal share of allocated expenditures may be deposited into these accounts. This topic is treated elsewhere in the Commission's rules and in this rulemaking. *See 11 CFR 103.3, 106.5(g), 300.30, and 300.33*.

#### G. 11 CFR 300.2(g) Definition of "Federal Funds"

Paragraph (g) of section 300.2 defines "Federal funds" to mean funds that comply with the limitations, prohibitions, and reporting requirements of the FECA. The Commission received no comments regarding this definition.

#### H. 11 CFR 300.2(h) Definition of "Levin Account"

Section 300.2(h) defines "Levin account" as an account established by a State, district, or local committee of a political party pursuant to 11 CFR 300.30 for purposes of making expenditures or disbursements for Federal election activity or non-Federal activity (subject to State law) under 11 CFR 300.32(b). The Commission revised the definition proposed in the NPRM to clarify that these accounts must be established at a campaign depository in accordance with 2 U.S.C. 432(h).

The NPRM raised substantive questions on the operation of these accounts. The comments that addressed these questions are discussed in connection with 11 CFR 300.30, below.

#### I. 11 CFR 300.2(i) Definition of "Levin Funds"

As explained above, BCRA's Levin Amendment provides that State, district, and local political party committees may spend certain non-Federal funds for Federal election activities if those funds comply with certain requirements. 2 U.S.C. 441i(b)(2)(A)(ii). Thus, these funds are unlike Federal funds, which are fully subject to the Act's requirements, and unlike ordinary non-Federal funds because they are subject to certain additional requirements under BCRA.

Section 300.2(i) defines these funds as "Levin funds," with the intention that "Levin funds" become a definite, unambiguous reference to such funds. The Commission has slightly modified the definition proposed in the NPRM for streamlining purposes, but has made no substantive changes.

One commenter requested that the Commission use a "functionally descriptive" term, such as "specially allocated," for these funds, rather than the name of their legislative sponsor. It proved difficult, however, to draft a term that clearly and unambiguously includes these funds, while excluding all others. For that reason, the Commission has retained the term "Levin funds" in the final rules.

Two commenters suggested that the definition should include the limits on the use of the term "Levin funds" found at 2 U.S.C. 441i(b)(2)(A). These restrictions go to the use of the funds, and are implemented in 11 CFR 300.32, to which the definition in 11 CFR 300.2(i) already expressly refers. Therefore, these restrictions are not repeated in this definitional paragraph.

**J. 11 CFR 300.2(j) Definition of "Non-Federal Account"**

Section 300.2(j) defines "non-Federal account" as an account that contains funds to be used in connection with a State or local election or allocable expenses under 11 CFR 106.7, 300.30, or 300.33. The term "financial depository institution" proposed in the NPRM has been deleted because non-Federal accounts are not required to comply with 2 U.S.C. 432(h).

Consistent with the revisions to 11 CFR 106.7 discussed above, the definition has been expanded to include accounts used for payment of certain allocable activities. The account may also serve as a depository for Levin funds, provided that the committee complies with the requirements of 11 CFR 300.30, below.

No commenters addressed this paragraph.

**K. 11 CFR 300.2(k) Definition of "Non-Federal Funds"**

This section defines "non-Federal funds" as funds that are not subject to the limitations and prohibitions of the Act. No commenters addressed this definition.

**L. 11 CFR 300.2(m) and (n) Definitions of "To Solicit," and "To Direct"**

The NPRM proposed a definition of "to solicit or direct" a contribution or donation, which would be located at 11 CFR 300.2(m). The proposed definition included a request, suggestion, or

recommendation to make a contribution or donation, including those made through a conduit or intermediary. The Commission's final rule defines "to solicit" as "to ask another person to make a contribution or donation, or transfer of funds, or to provide anything of value, including through a conduit or intermediary." Similarly, the Commission defines "to direct" as "to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary."

Comment was sought as to whether the proposed definition was too broad or narrow, as well as to whether the term "direct" in BCRA should be interpreted to follow the earmarking rules regarding contributions directed through a conduit or intermediary under 2 U.S.C. 441a(a)(8). Comment was also sought as to whether the passive providing of information in response to an unsolicited request for information should be specifically excluded from this definition.

Two commenters, a labor organization and a public interest organization, expressed qualified support for the proposed rule. The labor organization stated that it concurred with the proposed rule, and that it particularly endorsed the express acknowledgment that the mere provision of information or guidance as to applicable legal requirements does not fall within the statutory language. The public interest organization stated that the proposed rule was "generally consistent" with the letter and spirit of BCRA. For purposes of clarity, it suggested that the proposed rule be revised to read: "Merely providing information or guidance as to the requirements of applicable law is not a solicitation."

In contrast, five commenters argued that the proposed rule was too vague or broad. A group representing certain State parties stated that the phrase "request, suggest and recommend" is an invitation for endless Commission investigation. This commenter urged that "solicit" be limited to an explicit request that a person make a contribution. This commenter also supported including examples in the Explanation and Justification of what is not soliciting or directing. Likewise, national party political organizations asserted that the final rule should not contain a reference to "suggestion" because that is too vague a term, and compels inquiry into whether a communication conveys a sense, or

creates an impression, of a solicitation. These commenters believed BCRA's rules should be clearer. This group further urged that clear exclusions should be provided, such as for inquiries into positions or issues, as well as political speech or commentary to an audience who may respond with contributions in the absence of an express request for them.

Another commenter, a public interest organization, stated that "ambiguous standards" such as "suggest[ion]" or "series of conversations" will merely lead to confusion. This commenter suggested that the Commission look to past advisory opinions for guidance. Similarly, a State and a national political party argued that "request, suggest and recommend" is unconstitutionally vague and potentially overbroad, as it would involve an investigation into what a person meant in a series of conversations, and would thus chill political speech. A Latino rights group and a taxpayers' organization commented that in light of the "severe restrictions now imposed by BCRA," there need to be "clear definitive guidelines" in this area. Specifically, the Latino rights group and the taxpayers' organization argued that "[a]mbiguous standards such as 'suggestion' or a 'series of conversations' which taken together constitute a request for a contribution or donation, but which do not do so individually' will lead to more confusion and allegations of violations." Several party committee commenters argued that solicitation should be confined to an explicit request that an entity make a contribution.

Three commenters argued that the proposed rule was too lenient. One public interest organization stated that the discussion should include scenarios where a person suggests where a contributor, who has already decided to make a contribution, should send their contribution. This commenter read the proposed rule as confining itself to candidates, committees and nonprofits, and suggested it should also apply to solicitations from individuals, partnerships, labor organizations, and corporations. Another public interest organization agreed with the first point of the previous response. The sponsors of BCRA stated that the proposed definition failed to capture the plain meaning of the words and to effectuate the central goal of the law. They supported the position regarding suggestions to already-willing contributors. These commenters read the proposed rule in the same manner as the public interest organization, as if



it only applies to candidates, committees and nonprofits. They stated that, "certain provisions in the Act apply to soliciting contributions from any 'person,' which would obviously include individuals and corporations." They urged that the rule be modified to reflect this.

The Commission has determined that the concepts of "to solicit" and "to direct" embody different activity, and they thus should be separately defined. Accordingly, 11 CFR 300.2(m) defines "to solicit," and 11 CFR 300.2(n) contains the definition of "to direct." Both definitions include "transfer of funds" and "anything of value" in addition to "contribution" and "donation," because the phrases "transfer of funds" and "anything of value" or "any other thing of value" appear several times *in seriatim* with "contribution" and "donation" in applicable rules. See, e.g., 11 CFR 300.2(b)(1)(i).

Comments were sought as to whether the concept of soliciting should apply to a series of conversations which, when taken together, constitute a request for contributions or donations. BCRA's sponsors and several public interest organizations supported applying the definition to a series of conversations if, when taken as a whole, they are consistent with a solicitation, stating that, otherwise, restrictions will be easily circumvented. One group of national political party organizations opposed applying the rule to a series of conversations, stating that it would involve heavy government involvement in deciphering political speech and that the Commission should look only at express statements.

The Commission does not believe it is appropriate to promulgate a regulation that would require examination of a private conversation to impute intent when the conversation is not clear on its face. The Commission is concerned that the ability to impute intent could lead to finding a violation when the individual who made the comment may have had no intention whatever of soliciting a contribution. Such a result is not dictated by BCRA's statutory language, and would raise constitutional concerns.

For the reasons set forth above, the Commission is not defining "to solicit" in terms of a series of conversations.

Regarding the definition of the term "to direct," the Commission sought comment as to whether it should be interpreted to follow earmarking rules under 2 USC 441a(a)(8). A group of State party leaders supported limiting "to direct" to the definition at 11 CFR 110.6(b)(2), as did one of the national

political parties. One of the public interest organizations opposed this approach, stating that this was inconsistent with BCRA and far too narrow an approach. None of the commenters explained their criticisms in detail.

This issue of the meaning of "to direct" is also tied to another question asked by the Commission: whether the passive providing of information in response to an unsolicited request for information should be specifically excluded in this definition. Two commenters, a public interest organization and the sponsors, felt that the Commission should not exclude providing information if that information includes the names of organizations to which contributions can be made. One commenter, a national political party, said that such information should be excluded, because any other approach would be unworkable and would lead to endless accusations and investigations.

The Commission concludes that a precise definition in this context is necessary to avoid vague and overbroad application of the term. Therefore, the regulation defines "to direct" as "to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value."

The final rules in 11 CFR 300.2(m) and (n) each include a statement indicating that merely providing information or guidance as to the requirements of particular law is not solicitation or direction. Each rule confines itself to defining the term as it appears in part 300 of the Commission's regulations.

#### M. 11 CFR 300.2(o) Definition of "Individual Holding Federal Office"

New section 300.2(o), which parallels 11 CFR 100.4 (definition of "Federal office") and 11 CFR 113.1(c) (definition of "Federal officeholder"), has been added for the reader's convenience. Consistent with those sections and 2 U.S.C. 431(3), it states that "individual holding Federal office" means an individual elected to or serving in the office of President or Vice President of the United States; or a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress of the United States. It does not, however, include officeholders who are appointed to positions such as the secretaries of departments in the executive branch, or other positions that are not filled by election.

### Subpart A—National Party Committees

#### 11 CFR 300.10 General Prohibitions on Raising and Spending Non-Federal Funds

BCRA prohibits national party committees from raising and spending non-Federal funds, that is, funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act. See 2 U.S.C. 441i(a). The Commission is placing the regulations that address this prohibition in a new part of the Code of Federal Regulations, 11 CFR part 300, subpart A. In addition to this new subpart, the Commission is amending several sections of its current rules to conform to these prohibitions. See Explanation and Justification for 11 CFR 102.5 and 106.5.

Paragraph (a) of new section 300.10 tracks the language of BCRA, which prohibits national party committees from soliciting, receiving, or directing to another person "a contribution, donation, or transfer of funds or any other thing of value," or spending funds that are not subject to the Act's prohibitions, limitations, and reporting requirements. Accordingly, as of November 6, 2002, BCRA's effective date, national party committees must not receive or solicit or direct to another person contributions or donations from corporations, labor organizations or other prohibited sources, and must not receive or solicit or direct to another person contributions or donations from individuals and others that exceed the amount limitations of the Act. Additionally, after a brief transition period set forth in 11 CFR 300.12, discussed below, all expenditures and disbursements made by a national party committee, including donations to State and local candidates and donations and transfers to State party committees, must be made with funds that comply with the limitations, prohibitions, and reporting requirements of the Act.

BCRA's ban on the raising and spending of non-Federal funds by national party committees has widespread application. Tracking the language in 2 U.S.C. 441i(a)(1) and (2), 11 CFR 300.10(a) and (c) provide that the ban on raising and spending non-Federal funds also applies to the national congressional campaign committees (currently, the Democratic Senatorial Campaign Committee, the National Republican Senatorial Committee, the Democratic Congressional Campaign Committee, and the National Republican Congressional Committee), to officers and agents acting on behalf of a national party committee or a national congressional campaign committee, and

to any entities directly or indirectly established, financed, maintained, or controlled by either. As noted by one of BCRA's congressional co-sponsors during the congressional debate, "[t]he provision is intended to be comprehensive at the national party level. Simply put, the national parties and anyone operating on behalf of them are not to raise or spend, nor to direct or control, soft money." 148 Cong. Rec. H408-409 (daily ed. February 13, 2002) (statement of Rep. Shays).

Thus, under BCRA and 11 CFR 300.10, a Federal candidate or a Federal officeholder acting on behalf of a national congressional campaign committee must not solicit or direct to any person funds from corporations or labor organizations, or funds from individuals or entities in amounts that exceed the Act's contribution limits.

Section 300.10(a)(3) makes clear that national parties cannot raise, spend, or direct to another person Levin funds. See 2 U.S.C. 441i(b)(2)(A) and (B) and 11 CFR 300.31, discussed below.

Section 300.10(b) tracks the statutory language at 2 U.S.C. 441i(c). It provides that national parties and others covered by section 300.10(a) must use only Federal funds to finance Federal election activity.

The NPRM noted that the Commission would address in a subsequent rulemaking whether BCRA bans national party committees, and their officers and agents, from directing non-Federal funds to a host committee for a national party convention in light of the statutory language that they are not permitted to direct non-Federal funds to other persons. See 2 U.S.C. 441i(a)(1). In comments submitted to the NPRM, BCRA's sponsors stated that since BCRA prohibits national parties and their agents from soliciting or directing non-Federal funds to any person, they could not raise or direct non-Federal funds to host committees. 2 U.S.C. 431(11) of FECA defines "person" to include "a committee \* \* \* or any other organization or group of persons \* \* \*." It has also been suggested that no further rulemakings are necessary, as a host committee would be treated as any other 501(c) organization under the Act. The Commission has decided that the sponsor's interpretation of BCRA and additional issues concerning BCRA's effect on conventions will be addressed, if necessary, in a future rulemaking on national party conventions.

Virtually all of the commenters opined that the definition of "agent" was critically important to many of BCRA's provisions, including 11 CFR 300.10.

The breadth of the national party non-Federal funds prohibition is limited in 2 U.S.C. 441i(a)(2) and in 11 CFR 300.11(c) to the extent that the prohibition applies to officers and agents "acting on behalf" of national parties. This limiting construction appears in other Federal statutes and indeed, in some State campaign finance laws. The Commission also has decided to limit the definition of "agent" to those individuals who have actual authority to act on behalf of their principals. See Explanation and Justification for 11 CFR 300.2(b) above.

Several party committee commenters expressed the view that, despite BCRA's broad prohibition on national parties' raising and spending non-Federal funds, the Commission should consider a rule that would permit national parties to continue to maintain non-Federal accounts devoted specifically to support State and local candidates as long as funds raised for such an account meet the source and contribution limits of the Act. The party committees' position is based on the NPRM's discussion of "leadership PACs" maintained by Federal candidates and on statements made by a principal BCRA sponsor during the Senate debate. 148 Cong. Rec. S2140 (daily ed. February 20, 2002) (statement of Senator McCain).

Specifically, Senator McCain interpreted 2 U.S.C. 441i(e)(1)(A) and (B) (see 11 CFR 300.61 and 300.62) to permit a Federal candidate or officeholder to raise funds for both a Federal and non-Federal account of a leadership PAC, provided that the funds raised for the non-Federal account met the source and contribution limits of the Act. The party committees' comments specifically referenced another statement made by Senator McCain suggesting that an officeholder could solicit a donation up to the Act's contribution limits for the non-Federal account of a leadership PAC, even if the donor had already contributed to the PAC's Federal account. The application of these statutory provisions to leadership PACs and candidate PACs is discussed below. See Explanation and Justification for 11 CFR 300.62. Regardless of the application of BCRA to leadership PACs and candidate PACs under 2 U.S.C. 441i(e)(1), however, the plain language of the ban on national party non-Federal fundraising at 2 U.S.C. 441i(a) cannot be plausibly construed to allow party committees to continue to raise non-Federal funds for any purpose. The language is broad in prohibiting a national party committee from soliciting, receiving, or directing to another person "a contribution,

donation, or transfer of funds or any other thing of value" or spending funds that are not subject to the Act's limitation, prohibitions, and reporting requirements. A separate "non-Federal" account, even if it contained funds that complied with the prohibitions of the Act, would not contain funds complying with the amount limitations of the Act, if for example, individuals gave \$20,000 per year to a national party's account and also gave another \$20,000 to the party's "non-Federal" account as suggested by the party committee commenters.

The legislative history supports this statutory interpretation. As noted above, a primary sponsor of BCRA in the House specifically explained the national party non-Federal funds ban as follows: "The soft money provisions of the Shays-Meehan bill regarding the national political parties operate in a straightforward way. The national parties are prohibited entirely from raising or spending any soft money \* \* \* The purpose of these provisions is simple: to put the national parties entirely out of the soft money business." 148 Cong. Rec. H408 (daily ed. February 13, 2002) (statement of Rep. Shays). According to Congressman Shays, the prohibition "covers all activities of the national party committees, even those that might appear to affect only non-federal elections." Shays further explained the reason for the ban: "Because the national parties operate at the national level, and are inextricably intertwined with Federal officeholders and candidates, who raise money for the national party committees, there is a close connection between the funding of the national parties and the corrupting dangers of soft money on the federal political process." *Id.* at H409.

In addition, a comment by one of BCRA's principal sponsors stated that Congress' intent was absolutely clear that BCRA prohibits national party committees from raising, spending or directing non-Federal funds. He further pointed out that an amendment that would have allowed party committees to continue to raise "soft money" subject to limits on the amounts and purposes failed. The Commission notes that a House amendment that would have continued to permit national parties to raise non-Federal funds for certain activities in amounts not exceeding \$20,000 per year per person was defeated. See 148 Cong. Rec. H459-H465 (daily ed. February 13, 2002).

Finally, the party committee commenters also maintained that the Commission should define the term "donation," which is not defined in BCRA, to exclude funds received by

national party committees for certain purposes such as funds provided for redistricting, legal expense funds, and the payment of civil penalties for violations of the Act. The parties argued that the Commission has, over time, recognized these activities as wholly exempt from the reach of FECA.

As discussed in the Explanation and Justification for the definition of "donation" at 300.2(e), the plain language of BCRA, supported by the legislative history, indicates that the ban on national party raising and spending non-Federal funds was intended to be broad, prohibiting a party from raising, receiving, or directing to another person "a contribution, donation or transfer of funds, or *any other thing of value*" or spending "*any funds*" that are not subject to the Act's limitations, prohibitions, and reporting requirements (emphasis added). Consequently, neither 11 CFR 300.10 nor the definition of "donation" in 11 CFR 300.2(e) contains a sweeping exclusion of donations that would permit national parties to raise funds for these purposes under any and all circumstances. See the Explanation and Justification for 11 CFR 300.2(e) (definition of "donation").

#### *11 CFR 300.11 Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations*

BCRA prohibits national party committees, their officers and agents, and entities directly or indirectly established, financed, maintained, or controlled by them from raising any funds for, or making or directing any donations to, certain tax-exempt organizations. 2 U.S.C. 441i(d). BCRA's prohibition on this type of donor and fundraising activity extends only to tax-exempt organizations with a political purpose or that conduct activities in connection with a Federal election. Specifically, this prohibition extends to organizations exempt from taxation under 26 U.S.C. 501(c) that "[make] expenditures or disbursements in connection with an election for Federal office (including expenditures or disbursements for Federal election activity)." *Id.* (Organizations formed under 26 U.S.C. 501(c) are referred to as "501(c) organizations" below.) The ban also extends to political organizations exempt from taxation under 26 U.S.C. 527 (referred to as "section 527 organizations" below). These entities are defined in the Internal Revenue Code as parties, committees, associations, funds, or other organizations organized and operated primarily to directly or indirectly accept contributions and make expenditures

for the "exempt function" of influencing or attempting to influence the selection, nomination, election or appointment of an individual to a Federal, State, or local public office, political organization office, or election of Presidential and Vice Presidential electors. 26 U.S.C. 527(e)(1) and (2). BCRA excludes from the prohibition certain section 527 organizations as discussed below.

The regulations implementing this provision are set forth in new 11 CFR 300.11. A parallel provision of this regulation, 11 CFR 300.50, and others affecting tax-exempt organizations that appear elsewhere in part 300, have been placed together in subpart C for the convenience of those interested in locating rules pertaining to fundraising and donations to tax-exempt organizations.

Section 300.11 as proposed closely tracked the language of BCRA. The final rule has taken into account comments received on questions posed in the NPRM, as discussed below. The Commission also notes that since 11 CFR 300.37 contains a comparable provision applicable to State, district, and local party committees, the discussion below also applies to those entities unless otherwise indicated.

#### A. General Prohibition

Paragraphs (a)(1) and (2) of the final rules in section 300.11 remain unchanged from the proposed rule except for minor language changes to the description of national congressional campaign committees to conform with other formulations of the phrase.

Paragraph (a)(3) of the final rules implements BCRA's prohibition on national party committee fundraising for, and donating to, a section 527 organization unless the organization is a "political committee," a State or local party committee, or an authorized committee of a State or local candidate. In the context of a parallel provision in 11 CFR 300.37 applicable to State, district, and local party committees, the NPRM asked whether "political committee" should mirror the definition of that term in 2 U.S.C. 431(4), which would encompass only organizations that make contributions and expenditures in connection with Federal elections, or whether the term should be interpreted to also encompass State-registered political committees that support only State and local candidates.

As discussed in the Explanation and Justification for 11 CFR 300.37, commenters supported a broader interpretation of "political committee" in the context of donations by State and

local party committees. None of the commenters addressed this issue in the context of the national party prohibition, however. The Commission concludes that the broad prohibition applicable to national party fundraising and spending in 2 U.S.C. 441i(a) (see 11 CFR 300.10) prevents a broader construction of "political committee" in 11 CFR 300.11. Thus, 2 U.S.C. 441i(a) prohibits national party committees from soliciting or directing to another person "a contribution, donation or transfer of funds or any other thing of value" or spending any funds that are not subject to the limitations, prohibitions and reporting requirements of the Act. Funds solicited or directed by a national party committee to a State-registered section 527 organization are not subject to the reporting requirements of the Act. Accordingly, in the final rules, paragraph (a)(3)(i) of 11 CFR 300.11 prohibits national party committees from soliciting funds for, or making donations to a section 527 "political committee" unless the organization is a "political committee" as defined in 11 CFR 100.5.

Paragraph (b) of 11 CFR 300.11, which describes the other persons and entities to whom the prohibition applies, remains unchanged from the proposed rule. The NPRM asked whether the final rule should provide examples of the types of persons and entities covered by this provision, and sought specific examples that might illuminate the scope of this provision. Although many commenters expressed approval for including examples as to who is covered by the provision, none provided specific examples. The final rule does not include specific examples.

The NPRM also sought comments on whether the regulations should contain a temporal requirement so that the prohibition on national and State party fundraising and donations to non-profits is appropriately circumscribed and does not encompass, for example, an organization that made expenditures and disbursements in connection with a Federal election many years ago but has not done so recently and does not plan to do so in the future. After further consideration, the Commission has determined that a temporal requirement is unnecessary because the statutory language, "makes expenditures and disbursements \* \* \*" is in the present tense. Thus, the final rules do not contain a temporal requirement. The definition of a 501(c) organization "that makes expenditures and disbursements in connection with a Federal election" at 11 CFR 300.2(a) encompasses an organization's activities in the current two-year election cycle only. See the

Explanation and Justification of 11 CFR 300.2(a) for further discussion.

One non-profit organization urged the Commission to exclude 501(c)(3) organizations from the party committee fundraising/donation prohibition. This commenter argued that because 501(c)(3) organizations are required by tax law to undertake only election-related activity that cannot benefit any particular candidate or party, they should not be subject to the prohibition. However, the plain language of BCRA applies to all 501(c) organizations that make disbursements or expenditures in connection with Federal elections, including expenditures and disbursements for Federal election activity. Financing certain voter registration and GOTV activities are considered Federal election activities under BCRA and new 11 CFR 100.24. Moreover, even nonpartisan voter registration and GOTV activities are capable of having an impact on Federal elections. Indeed, BCRA's co-sponsors specifically indicated in their comments that nonpartisan voter registration drives or GOTV activities were not intended to be excluded from the definition of Federal election activity. The Commission notes that this provision does not prohibit non-profit organizations from undertaking any type of voter registration or GOTV activities. Because Congress clearly could have excluded 501(c)(3) organizations from this provision but chose not to do so, the final rules do not include any such exclusion or exemption.

#### B. Safe Harbor Provisions

The NPRM asked whether a safe harbor provision should be provided so that a national or State party committee and others affected by the prohibition may raise funds for or make donations to a section 501(c) or a section 527 organization if they take certain steps to ensure that the organization is not one that falls within the prohibition. The NPRM listed examples of possible safe harbors such as requiring party committees to: (1) Obtain and examine a 501(c) organization's application for tax-exempt status or annual IRS Form 990 returns to determine whether the organization has reported making, or indicates plans to make, expenditures or disbursements in connection with a Federal election, or (2) with respect to current or planned activity, obtain and examine a certification from the organization that indicates it does not make, or plan to make, such expenditures.

The commenters agreed that the regulations should provide a safe harbor for national and State party committees.

The commenters split, however, on what the safe harbor should be. The primary sponsors of BCRA and one public interest group suggested that section 501(c) and section 527 organizations be required to file sworn certifications with the Commission, enforceable under 18 U.S.C. 1001, upon which a party committee could rely in determining whether it could solicit funds for, or make or direct donations to, such organizations. The sponsors of BCRA urged that party committees be held strictly liable for any violations of the Act if, in the absence of such a certification, an organization misrepresents itself.

Without addressing the concept of a safe harbor, another public interest group commented that a party committee should be required to obtain a sworn certification from a section 501(c) or a section 527 organization for whom it wishes to solicit or to whom it wishes to donate or direct funds.

Several party committee commenters expressed approval for a safe harbor that would permit a party committee to obtain and rely on applications for tax-exempt status or IRS Form 990 returns to determine whether it could permissibly fundraise for, or donate to, a tax-exempt organization. One commenter suggested that party committees be given a choice between obtaining certifications or relying upon publicly available tax documents. A labor organization argued that the regulations should not require party committees to investigate non-profits it wishes to donate to or assist. Rather, this commenter urged that the Commission adopt specific language that a party committee could use, presumably in a cover letter, when it makes a donation to a 501(c) to serve as a safe harbor "from prosecution." The commenter suggested that the party committee merely be required to state to the section 501(c) organization that any funds it donated cannot be used for activities that would "constitute an expenditure in a Federal election."

In considering how to implement these BCRA provisions, the Commission has concluded that a safe harbor is an appropriate way to help ensure that party committees, and others to whom 11 CFR 300.11 and 300.37 apply, comply with the Act. The Commission believes that requiring a 501(c) organization to file a certification with the Commission would be burdensome. However, requiring party committees and others covered by this provision to obtain a written certification from an official with knowledge of an organization's activities is the best way to ensure that the party committee or

other person has information as to whether a particular organization engages in certain election-related activities. IRS Form 990s may not clearly show whether an organization has undertaken specific election-related activities. Moreover, these forms do not provide information on current activities. Accordingly, new paragraph (c) of the final rule provides that a party committee may obtain and rely upon a certification from a section 501(c) organization to determine whether it may permissibly raise funds for, or make or direct donations to, the organization.

New paragraph (d) of the final rule sets forth specific criteria a certification must include. These criteria are: (1) That the certification is a signed written statement by an officer or other authorized representative with knowledge of the organization's activities; (2) that the certification states that, within the current two-year election cycle, the organization has not made, and does not intend to make, expenditures or disbursements in connection with an election for Federal office (including for Federal election activity); and (3) that the certification states that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior two-year election cycle. The Commission believes that a requirement that the certification be sworn to is unnecessary and that a certification is sufficiently reliable if it is made in writing by an official of a tax-exempt organization with knowledge of the organization's activities. Moreover, requiring that the certification contain a statement that an organization does not intend to pay Federal-election related debts from a prior cycle will help ensure that the prohibition is not evaded.

New paragraph (e) states that a certification cannot be relied upon if a national party committee, its officers or agents, or others covered by the prohibition has actual knowledge that the certification is false.

Finally, the NPRM sought comments on whether it would be considered "directing" a donation if a party committee responded to an unsolicited request for information about organizations that share a party's political, social, or philosophical goals. Commenters who addressed this point stated that sharing such information would be permissible. One party commenter opined that it would be unconstitutional to try to prohibit this sharing of information as well as

difficult to enforce. A public interest group commenter noted that responding to such requests was permissible but would amount to "directing" a donation if the donor's request or the party's response was in connection with a proposed "or potential" donation.

The Commission agrees that a rule prohibiting this type of information-sharing is not necessary to enforce BCRA and would create significant constitutional concerns. Therefore, new paragraph (f) of the final rules states that it is not prohibited for a national party or its agents to respond to a request for information about a tax-exempt group that shares the party's political or philosophical goals.

#### 11 CFR 300.12 Transition Rules

One of the BCRA amendments to the FECA prohibits national party committees from raising and spending non-Federal funds after November 5, 2002, the effective date of BCRA.<sup>5</sup> 2 U.S.C. 431 note. BCRA, however, created a transition period between November 6, 2002 and December 31, 2002, that permits national party committees to spend non-Federal funds in their accounts as of November 5, 2002, for certain expenses and debts. The rules governing the use of non-Federal funds by national party committees, including national congressional campaign committees, during this transition period are set forth in 11 CFR 300.12.

#### A. Permissible Uses of Excess Non-Federal Funds During the Transition Period

Paragraph (a) of section 300.12 describes the two permissible uses of funds in a national committee's non-Federal accounts, other than an office building or facility account, as of November 5, 2002. They are: (1) To retire outstanding non-Federal debts or non-Federal obligations incurred solely in connection with an election held before November 6, 2002; or (2) to pay non-Federal expenses or retire outstanding non-Federal debts or obligations incurred solely in connection with any run-off election, recount, or election contest resulting from an election held prior to November 6, 2002. BCRA expressly provides that, subject to the restrictions incorporated into paragraph (b) of 11 CFR 300.12, these non-Federal funds must be used solely for the two enumerated purposes and must be spent before January 1, 2003. 2 U.S.C. 431 note.

<sup>5</sup> The raising and spending of non-Federal funds by State, district, and local committees or organizations are addressed in 11 CFR part 300, subpart B, discussed below.

The NPRM sought comments on whether the use of the word "solely" in the enumeration of the permissible uses of non-Federal funds in paragraph (a) during the transition period precluded permitting any funds remaining thereafter to be disgorged to the United States Treasury or donated to a charitable organization. The Commission received several comments on this issue as well as suggestions for other permissible uses under paragraph (a).

The commenters split on whether the Commission should permit remaining non-Federal funds in any non-Federal account to be donated to charity. BCRA's sponsors and one public interest group stated that BCRA provides no statutory basis for transferring any non-Federal funds as of November 6, 2002, to non-profit organizations and doing so could undermine a central purpose of the law which is to prohibit national party non-Federal funds from being used in the 2004 elections. Since charitable organizations under section 170 include section 501(c)(3) organizations, the sponsors pointed out that there is a potential that any donated funds could be used for Federal election purposes in the next election. Section 501(c)(3) organizations are permitted to engage in voter registration, get-out-the-vote activities, and other activities defined as "Federal election activities" in BCRA.

The sponsors suggested, instead, that any funds remaining in a national party committee's non-Federal accounts be either disgorged to the United States Treasury or refunded to donors on a *pro rata* basis. Another commenter concurred with this suggestion, pointing out that because the statutory language only permitted specific uses during the transition period, any funds remaining thereafter must be disgorged or refunded.

On the other hand, other commenters believed that permitting donations to at least some charitable organizations was permissible. A public interest group commented that the Commission could require disgorgement or permit donations to charitable organizations as long as the charitable organization is not one that the national parties would be prohibited from donating to under 11 CFR 300.10(b). A commenter from a non-profit organization maintained that BCRA should be construed to permit national parties to use any non-Federal funds remaining after payment of non-Federal election-related debts for any purpose currently permitted under FECA. According to this commenter such a construction is warranted because BCRA is silent as to the

disposition of funds during the transition period after permissible debts are paid under paragraph (a) of 11 CFR 300.12, and only specific uses are prohibited in paragraph (b). The commenter further stated that the rules should permit national parties to transfer non-Federal funds remaining after non-Federal debt is paid to 501(c) organizations because these organizations are required to engage in non-partisan charitable or social welfare activity under tax law. None of the party committee commenters addressed this issue.

The final rules address the disposal of excess non-Federal funds in new paragraph (c), discussed below. Other minor changes made to paragraph (a) in the final rules include: the word "only" has been changed to "solely" to better track the language used in BCRA and a reference to paragraph (e) has been deleted. Changes in the organization of 11 CFR 300.12 are discussed below.

#### B. Prohibited Uses of Non-Federal Funds After November 5, 2002

BCRA provides that the permissible uses of non-Federal funds enumerated in paragraph (a) are subject to certain restrictions. The final rules at 11 CFR 300.12(b) set forth these restrictions. Specifically, paragraph (b) states that national party committees will no longer be able to use non-Federal funds for any of the following activities after November 5, 2002: (1) To pay any expenditure as defined in 2 U.S.C. 431(9); (2) to retire outstanding debts or obligations that were incurred for any expenditure; or (3) to defray the costs of the construction or purchase of any office building or facility. The final rules track the language in the proposed rules. The Commission did not receive any comments concerning this paragraph, other than those pertaining to building funds, which are discussed below.

#### C. Disposal of Remaining Non-Federal Funds

New paragraph (c) provides that any non-Federal funds remaining after payment for permissible debts and obligations described in paragraph (a) must be either disgorged to the United States Treasury or returned by check to the donors by December 31, 2002. This approach gives effect to the use of the word "solely" in 2 U.S.C. 431 note, and to the legislative intent to prohibit national party non-Federal money from being used in future Federal elections. The Commission did not adopt the suggestion that refunds must be made to contributors on a *pro rata* basis. National party committees have the

option of making these refunds on a last-in, first-out (LIFO) or first-in, first-out (FIFO) basis. Paragraph (c) further provides that all refund checks not cashed by donors by February 28, 2003 must be disgorged to the United States Treasury by March 31, 2003. The latter provision ensures that the national party committees do not make use of any uncashed refund checks. Requiring either disgorgement to the United States Treasury or refunds to donors is consistent with the Commission's practice in enforcement matters when a contributor has made, and a political committee has accepted, funds prohibited under the Act.

#### D. National Party Committee Office Building or Facility Accounts

BCRA treats non-Federal funds contained in national party building fund accounts more stringently than non-Federal funds in the national party committees' other non-Federal accounts. Under current law, funds in a national party building fund account may be used only for the purchase or construction of the national party committees' office building or facility. Beginning November 6, 2002, however, any funds remaining in a national party building fund account must not be used for the purchase or construction of any office building or facility. *See* 2 U.S.C. 431 note. Consequently, the Commission proposed requiring that funds on deposit in any party office building or facility account be disgorged to the United States Treasury or donated to a organization described in 26 U.S.C. 170(c) no later than December 31, 2002.

As discussed above, although some commenters suggested that national party committees be permitted to donate the remaining non-Federal funds to a charitable organization, other commenters noted that such organizations include organizations exempt under 26 U.S.C. 501(c)(3) which could result in non-Federal funds making their way into future Federal elections since 501(c)(3) organizations may engage in Federal election activity such as voter registration and get-out-the-vote activities. For this reason, the final rule in 11 CFR 300.12(d) follows the approach taken in paragraph (c) for disposal of excess non-Federal funds: Paragraph (d) requires that non-Federal funds remaining in national party building and office facility accounts on November 6, 2002 be disgorged or refunded to donors by December 31, 2002. As in paragraph (c), any refund checks not cashed by donors by February 28, 2003, must be disgorged to the United States Treasury by March 31, 2003.

Additionally, in their comments, the sponsors pointed out that while the proposed rule only prohibited excess building funds from being used to construct or purchase a national party office building, the statutory language prohibits the use of such funds to defray construction or purchase costs for "any" office building or facility. *See* 2 U.S.C. 431 note. Paragraph (d) of the final rules also incorporates this change.

#### E. Application

The final rule at 11 CFR 300.12(e) clarifies that the transition rules apply to officers and agents acting on behalf of a national party committee or a national congressional campaign committee, and to entities that are directly or indirectly established, financed, maintained, or controlled by a national party committee or a national congressional campaign committee. The Commission did not receive any comments relating to this provision. The final rule follows the proposed rule at 300.12(c) except that it has been redesignated as paragraph (e).

#### F. Allocation and Payment of Expenses During the Transition Period

Section 300.12(f) clarifies that the allocation rules applicable to national party non-Federal and Federal accounts in revised 11 CFR 106.5 remain in effect during the transition period. No comments addressed this provision. The final rules in paragraph (f) are identical to proposed paragraph (d).

#### 11 CFR 300.13 Reporting

BCRA requires national party committees, including national congressional campaign committees, and any subordinate committee of either, to report all receipts and disbursements during regular reporting periods. 2 U.S.C. 434(e). New 11 CFR 300.13(a) tracks the statutory language.

The NPRM sought comment on whether this provision of BCRA was intended to require reporting by existing entities that currently are not required to report and sought the identity of any such entities. The primary sponsors of BCRA commented that the term "subordinate committee" was intended to ensure that any new committees created by the national party committees would file required reports for all receipts and disbursements. The sponsors further stated that this provision requires existing entities that are subordinate to the national parties to report all of their receipts and disbursements whether or not they are required to do so under current law. The sponsors and several other public interest group commenters identified

the College Democrats and College Republicans as subordinate committees of the national parties. None of the party committee commenters addressed this point.

Although neither BCRA nor FECA contains a definition of a "subordinate committee" of a national political party, the phrase is used in 2 U.S.C. 441a(a)(4). That provision states that limitations on contributions do not apply to transfers between and among political committees that are national, State, district, or local committees of the same political party "including any subordinate committee thereof." In Advisory Opinion 1976-112, the Commission concluded that Democrats Abroad was a subordinate committee of the Democratic National Committee for purposes of 2 U.S.C. 441a(a)(4). The advisory opinion noted that the group was "an organization of American citizens living overseas who support the basic principles of the National Democratic Party," had a central office in London, and local clubs in several countries that anticipated reaching political committee status. The Commission concluded that Democrats Abroad functioned as a part of the official structure of the Democratic Party and represented the Democratic Party to Americans living in foreign countries. Factors relied upon in this conclusion included: the group held fundraisers, the proceeds of which were donated to the DNC; the Democratic Party charter authorized a voting delegate from the group to participate at the 1976 party convention; the Call to Convention gave the group three votes to be cast by six delegates elected by group members in accordance with the rules of the party's Compliance Review Commission; the group was allowed representation on the Standing Committee of the Democratic Party; and the group functioned as a party committee by participation in voter registration and GOTV drives for the Democratic Party in 1976. The Commission specifically rejected the conclusion that Democrats Abroad was the equivalent of a State party committee based on the statutory definitions of "State committee" and "State."

Based on the prior construction of the term in Advisory Opinion 1976-112, the Commission concludes that a "subordinate committee" of a national party committee is one that is affiliated with, and participates in, the official party structure of the national party committee. As applied to a particular group, whether an organization is a subordinate committee of a national party is a factual determination. Based on the broad legislative intent to

prohibit national parties from raising and spending non-Federal funds, however, the Commission further concludes that a subordinate committee for purposes of 11 CFR 300.13(a) is an entity that is directly or indirectly established, financed, maintained, or controlled by a national committee of a political party.

Since national party committees and entities directly or indirectly established, financed, maintained, or controlled by them cannot solicit, receive, direct, or spend non-Federal funds as of November 6, 2002, and must dispose of all funds in their non-Federal accounts as of December 31, 2002, 11 CFR 300.13(b) requires national party committees and their subordinate committees to file termination reports for all non-Federal accounts, whether or not a subordinate committee was required to file disclosure reports under FECA prior to BCRA. Paragraph (b) of the final rule also takes into consideration the Commission's determination that excess non-Federal funds must be either refunded to donors or disgorged to the United States Treasury. If a national party committee does not issue refund checks, the national party committee must file a termination report for all non-Federal accounts, including building fund accounts by January 31, 2003. If a national party committee issues refund checks to donors, it must file a termination report covering the period ending March 31, 2003 disclosing the refunds and the disgorgement of any refund checks not cashed by February 28, 2003.

Paragraph (c) of § 300.13 makes clear that the reporting regulations at 11 CFR 104.8 and 104.9 applicable to non-Federal accounts, including building funds, will remain in effect during the transition period. Paragraph (c)(2) provides that reporting requirements at 11 CFR 104.9(c) and (d) covering disbursements from non-Federal account and building fund accounts remain in effect for reports covering the period through March 31, 2003. In contrast, under paragraph (c)(1), the reporting requirements at 11 CFR 104.8(e) and (f), covering receipts of non-Federal and building fund accounts and 11 CFR 104.9(e) covering non-Federal account transfers to State party committees, remain in effect only until December 31, 2002.

#### **Subpart B—State, District, and Local Party Committees and Organizations**

##### *11 CFR 300.30 Accounts*

Under proposed 11 CFR 300.30 in the NPRM, State, district, and local party

organizations would have been required to maintain certain separate Levin accounts in depositories if they paid for the costs of voter registration within a fixed time period or for certain voter identification, GOTV, and generic campaign activity pursuant to 11 CFR 100.24 and 300.32(b)(1). Several of the comments received in response to the NPRM agreed with the proposal that all State, district, and local party committees and organizations be required to maintain separate Levin accounts, no matter the organization's size, level of activity and political committee status, if they desired to undertake certain Federal election activities pursuant to 11 CFR 300.32(b). Other comments raised directly or indirectly the issue of whether the Commission should or even could require such accounts, particularly in light of laws in certain States either limiting the number of non-Federal accounts that a State party organization may hold or, more often, requiring numerous such accounts for varying purposes. It was also argued that the number of non-Federal accounts held by a party committee or party organization is a State, not a Federal issue.

The final rules do not require a separate Levin account. Instead, State, district, and local party organizations that decide to undertake activities pursuant to 11 CFR 300.32(b) may deposit Levin funds in either a separate Levin account or their non-Federal account. If a committee's non-Federal account also functions as its Levin account, it must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that it has sufficient Levin funds to cover the non-Federal share of any disbursement it makes for allocable Federal election activity.

The Commission recognizes that some States already require multiple accounts, while a few may prohibit more than one account for all activity. Most importantly, the Commission is very aware of, and concerned about, the complexities of FECA as amended by BCRA, and wants to provide party organizations with procedural flexibility to facilitate compliance with the substantive conditions and restrictions arising from the Levin Amendment.

The NPRM proposed a requirement that, in order for donations to be placed in a Levin account, either the solicitations for the donations must have expressly stated that donations will be subject to the special limitations and prohibitions of section 300.31, or there must have been an express

designation to the Levin account by the donors. Several commenters objected to these requirements, arguing that they are not in BCRA and would be unnecessary, inappropriate, and could make it difficult for State, district and local party committees to engage in bona fide Levin activities. The Commission agrees, and the final rules contain no such requirement.

Paragraph (a) provides an overview of the section and specifies that 11 CFR 300.30 applies to any State, district, or local committee or organization of a political party that has receipts or makes disbursements for Federal election activity, whether or not such committee is a political committee under 11 CFR 100.5.

Paragraph (b) describes the requirements for four different types of accounts: Federal accounts, Levin accounts, non-Federal accounts, and allocation accounts. Paragraph (b)(1) provides for the use of non-Federal accounts by State, district, and local party committees, to the extent permitted by State law, and lists the provisions under which non-Federal funds may be used in connection with Federal elections. Paragraph (b)(2) provides for an account solely for Levin funds, and references 11 CFR 300.31 and 300.32(b), which track the statutory requirements for raising Levin funds and disbursing Levin funds, respectively.

Paragraph (b)(3)(i) requires that only contributions permissible under the Act be deposited into a State, district, or local party committee's Federal account, even when such funds may be used in connection with both Federal and non-Federal elections. It also provides a cross-reference to 11 CFR 103.3, which explains the procedure for dealing with impermissible funds. Paragraph (b)(3)(ii) describes the information that must be provided to or received from contributors regarding contributions deposited in a Federal account. Paragraph (b)(3)(iii) requires that only Federal accounts or allocation accounts be used to make disbursements, contributions, or expenditures in connection with Federal elections. This procedure tracks the longstanding requirements at 11 CFR 106.5 for transfers to Federal accounts or to allocation accounts for shared Federal and non-Federal activity.

Paragraph (b)(3)(iv) provides that, when a Federal rather than an allocation account is to be used to make allocable expenditures, the initial payment must be made from the Federal account with timely reimbursements from other accounts involved in a transaction. Paragraph (b)(3)(v) prohibits transfers

into a party committee's Federal account from other accounts of the same party committee or from other party committees or party organizations to pay for Federal election activity, except as permitted by 11 CFR 300.30(b)(3)(iv), 300.33, and 300.34. The language of this paragraph in the NPRM has been changed to better track the requirements of BCRA.

The NPRM requested comments on whether the Commission should continue to permit the use of allocation accounts for purposes of making allocable expenditures. The consensus of those responding to this question was in the affirmative. Therefore, a new paragraph (b)(4) is being added expressly permitting the establishment of such allocation accounts in lieu of making all allocated expenditures from a Federal account and setting out the requirements for the use of such allocation accounts. Paragraphs (b)(4)(i) and (ii) state that only certain funds may be deposited in each allocation account, depending upon whether the purpose of the account is to make expenditures and disbursements that have been allocated between a party committee's Federal and non-Federal accounts or to make expenditures and disbursements that have been allocated between its Federal and Levin accounts. This rule is necessitated by the requirements in BCRA that define the specific funds that can and cannot be used for such activities. Paragraph (b)(4)(iii) requires that, once allocation accounts are established, they must be used for all allocable expenses so long as the accounts are maintained. Pursuant to paragraph (b)(4)(iv) and (v), only the amount needed to meet the allocable share of expenses may be transferred into these allocation accounts and no funds from these accounts may be transferred out to other accounts.

Paragraph (c) provides three different options for paying for Federal election activity. Paragraph (c)(1) requires that one or more Federal account be established, which would need to be used to pay for Federal election activity that is not allocable, as well as to pay the Federal portion of Federal election activity that is allocable. Paragraph (c)(1) also allows Federal funds to be used in non-Federal elections, provided that the contributors of the Federal funds have been informed that their contributions will be subject to the limitations and prohibitions of the Act and provided that the disbursements are reported pursuant to section 300.36. The phrase "subject to State law" has been added in response to a comment on the NPRM.

Paragraph (c)(2) provides the option of having at least three separate accounts: one or more Federal, Levin, and non-Federal accounts.

Paragraph (c)(3) provides that if a committee opts not to have a separate Levin account, but instead uses its non-Federal account for depositing and disbursing Levin funds, the committee must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that the committee has sufficient Levin funds on hand to cover disbursements for Levin activity.

Paragraph (d) requires all party organizations to keep records and to make them available to the Commission upon request.

#### *11 CFR 300.31 Receipt of Levin Funds*

In BCRA, Congress placed several restrictions on how State, district, and local political party committees raise Levin funds. New 11 CFR 300.31 implements these statutory restrictions. Paragraph (a) states as a general proposition a key point in the statute: a State, district, or local political party committee that spends Levin funds must raise those funds solely by itself. 2 U.S.C. 441i(b)(2)(B)(iv).

Paragraphs (b) and (c) of section 300.31 elaborate on the statutory requirement that Levin funds must be raised from donations that comply with the laws of the State in which the State, district, or local party committee is organized. 2 U.S.C. 441i(b)(2)(B)(iii). Paragraph (b) states this as a general requirement. More specifically, paragraph (c) clarifies the status of donations from sources that are permitted under State law, but prohibited by the Act. A prime example is donations from corporations and labor organizations. Under 2 U.S.C. 441b of the Act, "[i]t is unlawful \* \* \* for any corporation whatever, or any labor organization, to make a contribution or expenditure in connection with any election" for Federal office. 2 U.S.C. 441b(a). Under the campaign finance laws of several States, however, donations by corporations or labor organizations to political party committees are legal. Section 300.31(c) clarifies that in such States, a political party committee may solicit and accept donations of Levin funds from corporations and labor organizations, subject to the other conditions of the Act. (Of course, if donations from corporations or labor organizations to a political party committee are illegal in a State, political party committees in that State would

not be able to accept Levin fund donations from those sources.)

Three commenters expressed concern that section 300.31(c), as published in the NPRM, could be misinterpreted to allow donations from foreign nationals. One of these commenters suggested adding the phrase, "other than 2 U.S.C. 441e," after the word "chapter." Although the sweeping nature of the 2 U.S.C. 441e as amended by BCRA seems to preclude the possibility that a donation by a foreign national to a party committee could be lawful under any State law, the Commission has revised paragraph (c) of section 300.31 as suggested.

The principal Congressional sponsors commented that paragraph (c) should not be misinterpreted to allow a donation of Levin funds to a State, district, or local political party committee from a person established, financed, maintained, or controlled by a person forbidden from providing Levin funds to the committee. The Commission has addressed this concern in paragraphs (e) and (f) of section 300.31. (See discussion below.)

Paragraph (d), in general, addresses amount limitations on donations of Levin funds to a State, district, or local party committee. In the Levin Amendment, Congress placed a \$10,000 per calendar year per donor limitation on donations to a State, district, and local political party committee to be used as Levin funds. This statutory amount limitation applies to a person, including "any person established, financed, maintained, or controlled by such person." 2 U.S.C. 441i(b)(2)(B)(iii). Paragraph (d)(1) clarifies that this is an aggregate limit per recipient committee (i.e., the aggregate limit applies separately to each party committee) and, therefore, a person may contribute to an unlimited number of State, district, and local committees of a political party. See discussion of 11 CFR 300.31(d)(3), below. Paragraph (d)(1) did not draw comment. In the NPRM, the Commission sought comment on whether its current "affiliation" regulation (11 CFR 100.5(g)) would appropriately determine whether a person is "established, financed, maintained, or controlled," within the meaning of this paragraph. The Commission received no comments on this point. The Commission, in this rulemaking, is adopting 11 CFR 300.2(c), which is based on 11 CFR 100.5(g), which should be applied to determine whether certain persons share a \$10,000 per year per committee contribution amount limitation under paragraph (d)(1).



Paragraph (d)(2) addresses those cases in which State law imposes an amount limitation on donations to a State, district, or local party committee that differs from the amount limitation in 2 U.S.C. 441i(b)(2)(B)(iii) and paragraph (d)(1). Paragraph (d)(2) strikes a balance between respect for State law and protecting the integrity of the Levin Amendment amount limitation. It makes clear that lower State law amount limitations prevail over the \$10,000 limitation in the Levin Amendment, but that the Levin Amendment \$10,000 limit controls where State law amount limitations exceed \$10,000. There were no public comments on paragraph (d)(2).

Paragraph (d)(3) of section 300.31 addresses the question of whether State, district, and local committees of the same political party are affiliated for purposes of applying the donation amount limitation as set forth in paragraphs (d)(1) and (d)(2) of section 300.31. *See generally* 11 CFR 110.3. The paragraph clarifies that such committees are not considered affiliated only for the purpose of determining compliance with paragraph (d)(1). *See* 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays).

The last sentence of paragraph (d)(3) is intended to make clear that there is no limit to the number of State, district, and local committees to which a person may donate Levin funds. The phrase "individually or together with" in paragraph (d)(3) is intended to clarify that the amount limitations in paragraphs (d)(1) and (d)(2) apply collectively to the amounts donated to a particular party committee by a person and by any entities established, financed, maintained, or controlled by such person.

Three commenters discussed paragraph (d)(3). A national party committee supported the provision. Another commenter suggested that there should be a "rebuttable presumption" of affiliation of party organizations "at the same political or geographic unit" in order to prevent a possible proliferation of party organizations each with its own \$10,000 per donor limit. The legislative history indicates, however, that Congress contemplated the possibility of such a proliferation of party committees and chose to address it by imposing a ban on transfers of Levin funds between party committees rather than by affiliating the committees under a single contribution limit. 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002) (statement of Rep. Shays); *see* 2 U.S.C. 441i(b)(2)(B)(iv). Therefore, the Commission has not adopted this suggestion.

As mentioned above in the discussion of paragraph (a) of section 300.31, a key point made in the statute is that expenditures and disbursements of Levin funds by a State, district, or local political party committees must be "made solely from funds raised by the \* \* \* committee which makes such expenditure or disbursement \* \* \*." 2 U.S.C. 441i(b)(2)(B)(iv). Congress elaborated on this fundamental requirement by specifically providing that Levin funds must not be "solicited, received, directed, transferred, or spent by or in the name of" a national committee of a political party, including a national Congressional campaign committee, or a Federal candidate or individual holding Federal office. 2 U.S.C. 441i(b)(2)(C)(i). This statutory prohibition extends to an agent acting on behalf of a national party committee or a candidate or Federal officeholder, and to any entity that is directly or indirectly established, financed, maintained, or controlled by a national party committee or a candidate or Federal officeholder. 2 U.S.C. 441i(a)(2), and (e)(1); *see* 2 U.S.C. 441i(b)(2)(C).

Paragraph (e) of section 300.31 implements these specific statutory restrictions. Paragraph (e)(1) provides that a State, district, or local political party committee must not "accept or use" as Levin funds any funds "solicited, received, directed, transferred or spent" by a national committee of a political party, including a national Congressional campaign committee. Paragraph (e)(2) extends the same prohibition to funds "solicited, received, directed, transferred or spent" by a Federal candidate or officeholder. Two commenters pointed out that paragraphs (e)(1) and (e)(2), as published in the NPRM, did not consistently or expressly refer to agents of, or to entities directly or indirectly established, financed, maintained, or controlled by, national party committees and Federal candidates and officeholders. The prohibition in paragraph (e)(1) has been revised in the final regulation to extend explicitly to agents of, and to entities directly or indirectly established, financed, maintained, or controlled by, national party committees and by Federal candidates and officeholders. Similarly, paragraph (e)(2) has been revised to refer expressly to agents of Federal candidates and officeholders.

Confusion could arise about the relationship of the Commission's long standing joint fundraising regulation, 11 CFR 102.17, and the restrictions imposed in paragraphs (e)(1) and (e)(2) of section 300.31. Therefore, both paragraphs (e)(1) and (e)(2) explicitly

provide that 11 CFR 102.17 does not permit joint fundraising of Levin funds by a State, district, or local political party committee, and a national party committee or a Federal candidate or officeholder. Paragraph (e)(1) also clarifies that a State, district, or local political party committee may jointly raise, under 11 CFR 102.17, Federal funds not to be used for Federal election activity.

Congress specifically addressed other joint fundraising of Levin funds by providing that a State, district, or local political party committee must not use as Levin funds any amounts "solicited, received, or directed through fundraising activities conducted jointly by two or more State, local, or district committees of any political party or their agents." 2 U.S.C. 441i(b)(2)(C)(ii). This prohibition extends across State lines. *Ibid.* New paragraph (f) implements this statutory prohibition against joint fundraising of Levin funds by more than one State, district, or local committee of a political party, including such parties from more than one State. Paragraph (f) also clarifies that nothing in BCRA forbids two or more State, district, or local political party committees from jointly raising Federal funds that are not to be used for Federal election activity.

The provisions of paragraphs (e)(1), (e)(2), and (f) of section 300.31 regarding joint fundraising drew several comments. A national party committee suggested that the Commission clarify that these joint fundraising prohibitions extend only to Levin funds. In response, the Commission emphasizes that the section heading and the language in the introduction to paragraph (e) explicitly limit the scope of these provisions to "Levin funds." Similarly, the Commission emphasizes that paragraph (f) explicitly refers to "Levin funds."

One commenter approved of the scope of joint fundraising provisions of paragraphs (e)(1), (e)(2), and (f), stating that the joint fundraising prohibition should extend beyond particular "events" to all fundraising activities for Levin funds that are conducted jointly. Conversely, three commenters, a national party committee, a State party committee, and an association of State party officials, urged the Commission to limit the reach of the joint fundraising prohibition in paragraphs (e)(1), (e)(2), and (f) to "specific joint fundraising events," in contrast to joint fundraising "activities." They urge that such joint fundraising "activities" for Levin funds should be permitted. In support, they quote Rep. Shays, who said, "joint fundraisers between state committees or state and local committees are not

permitted \* \* \* The joint fundraising prohibition will prevent a single fundraiser for multiple state and local party committees." 148 Cong. Rec. H410 (daily ed. Feb. 13, 2002). These commenters apparently have focused upon Rep. Shays' use of the term "single fundraiser," which they seem to interpret to mean a dinner, a speech, or similar "event." Presumably, a fundraising "activity," such as a direct mail campaign, would be permitted under the commenters' suggested interpretation. In response, the Commission notes that statements by any member of Congress during the floor debate should not be used to contradict the plain language of the statute. BCRA itself broadly refers to "fundraising activities conducted jointly" by State, district, or local political party committees. 2 U.S.C. 441i(b)(2)(C)(ii) (emphasis added). In addition, the specific statement made by Rep. Shays, referring to a "single fundraiser," could easily encompass either a dinner or a specific direct mail campaign.

In the final rules, the Commission has added as a separate paragraph (g) a rule stated in the NPRM as the final sentence of paragraph (f). Paragraph (g), under the heading "Safe harbor," provides that the use of a common vendor by more than one State, district, or local political party committees does not constitute joint fundraising within the meaning of section 300.31. In the version of the regulation published in the NPRM (then in paragraph (f)), the rule would have provided that the use of a common vendor would not, by itself, be deemed joint fundraising. The Commission revised this language in order to provide a "bright-line" rule. The principal Congressional sponsors of BCRA, responding to the NPRM, agreed with this provision in principle, but noted that use of a common vendor may, in some circumstances, be a means of carrying out actual 'joint fundraising' schemes. The sponsors urged the Commission to be "highly attentive" to this practice.

#### 11 CFR 300.32 Expenditures and Disbursements

11 CFR part 300, subpart B, generally addresses expenditures and disbursements of Federal funds and of Levin funds for Federal election activities. 11 CFR 300.32 specifically addresses both kinds of spending by a State, district, or local political party committee, and clarifies that BCRA does not affect spending of non-Federal funds for purely State or local activity. 11 CFR 300.32 also implements part of 2 U.S.C. 441i(b)(1), which requires that an

association or similar group of candidates for State or local office, or an association of State or local officeholders, must make expenditures or disbursements for Federal election activity solely with Federal funds.

In the NPRM, the Commission solicited comments about the term, "association or similar group of candidates for State or local office, or an association of State or local officeholders," specifically asking whether it should be further defined in the regulations, and if so, about examples of such associations or groups to include in the final regulations. The Commission received no comments on this point, nor did the Commission receive any other comments about paragraph (a)(1).

Paragraph (a)(1) requires that an association or similar group of candidates for State or local office, or an association of State or local officeholders, must make expenditures or disbursements for Federal election activity solely with Federal funds. Paragraph (a)(2) makes clear that the general rule in BCRA is that a State, district, or local political party committee spending on Federal election activity must use Federal funds for that spending, except as provided in 2 U.S.C. 441i(b)(1). The Commission received no comments regarding this provision.

Paragraphs (a)(3) and (a)(4) address how State, district, or local party committees must pay the costs of raising funds used to pay for Federal election activities. In BCRA, Congress required that spending by a State, district, or local committee of a political party "to raise funds that are used, in whole or in part, for expenditures and disbursements for a Federal election activity shall be made from funds subject to the limitations, prohibitions, and reporting requirements of this Act." 2 U.S.C. 441i(c). As published in the NPRM, paragraphs (a)(3) and (a)(4) sought to implement section 441i(c) as it applied to Federal funds raised for Federal election activity and Levin funds raised for Federal election activity, respectively.

In the NPRM, the Commission sought comment about section 441i(c) with regard to Levin funds. In particular, the Commission sought comment on (1) whether proposed paragraph (a)(4) could be limited to the direct costs (see pre-BCRA 11 CFR 106.5(a)(2)(ii)) of raising Levin funds; and (2) whether the costs of fundraising for Levin funds could be allocated between a party committee's Federal and non-Federal accounts under the "funds received" method. See pre-BCRA 11 CFR 106.5(f). Comments were also sought as to

whether, generally, greater specificity should be provided in proposed section 300.32 as to the nature of fundraising costs in this section. 67 FR 35664.

The Commission received several comments about paragraphs (a)(3) and (a)(4). The principal Congressional sponsors of BCRA and a public interest group suggested that both paragraphs (a)(3) and (a)(4) should be clarified by including the statutory language, "in whole or in part." The Commission has included this suggestion in the final regulation. The added language better conforms the scope of the regulation to the scope of the statute.

Another commenter suggested that both paragraphs (a)(3) and (a)(4) should be limited to the direct costs of raising funds to be spent for Federal election activity, in contrast to the regulation proposed in the NPRM, which would have covered all costs of fundraising. The Commission has included this suggestion in the final rules. The purposes of 2 U.S.C. 441i(c) are adequately served by regulating only the direct costs of raising funds for Federal election activity. This limitation also avoids unnecessary confusion about allocation of administrative costs in the fundraising context in that covering the direct costs of fundraising is consistent with the Commission's longstanding regulation of fundraising costs. Given this change in the final regulation, the Commission has imported language from its pre-BCRA allocation regulation describing what constitutes direct costs.

A public interest group supported paragraph (a)(4) of the NPRM, while a State party committee objected to paragraph (a)(4) to the extent that it forbids a State, district, or local political party committee from spending Levin funds to raise Levin funds. This commenter suggests that Levin funds are subject to the limitations, prohibition, and reporting requirements of the Act, as specified in 2 U.S.C. 441i(c).

The Commission notes that 2 U.S.C. 441i(b)(2)(A), which addresses the use of Levin funds for certain Federal election activity, refers to "amounts which are not subject to the limitations, prohibitions, and reporting requirements of this Act (other than any requirements of this subsection)." Although that statutory phrase is somewhat incomplete, in that it omits any reference to the reporting requirements for Levin activity that are found in a different section of the Act (2 U.S.C. 434(e)), it is nonetheless a recognition that Levin funds are subject to requirements of the Act.

Yet even without this phrase, the Commission would find that Levin

funds are subject to the limitations and prohibitions found in the Act at 2 U.S.C. 441i(b)(2), and the reporting requirements found in the Act at 2 U.S.C. 434(e)(2)(A). The Commission notes that 2 U.S.C. 441i(b)(2)(B) places a \$10,000 limit on Levin funds donated to any one State, district, or local committee of a political party, which is greater than the amount limitation for contributors to authorized committees under 2 U.S.C. 441a(a)(1)(A), but less than the amount limitation for contributors to national committees under 2 U.S.C. 441a(a)(1)(B). The Commission finds that even though there are different amount limitations that apply to different contexts in the Act, that does not cause any of those limitations to not be limitations "of the Act." Similarly, 2 U.S.C. 441i(b)(2)(B) and 441i(b)(2)(C)—which, among other things, prohibit the use of Levin funds for activity that refers to a Federal candidate and prohibit the receipt of Levin funds raised by other party committees—contain different prohibitions than other sections of the Act (*see, e.g.*, 2 U.S.C. 441b), but are prohibitions "of the Act" nonetheless. And finally, reporting requirements under the Act can vary depending on the amount and nature of the receipt or disbursement, as well as on the nature of the entity that is receiving and disbursing the amount at issue. *See* 2 U.S.C. 434. The same variables apply to the reporting requirements for funds raised and disbursed for Federal election activity. *See* 2 U.S.C. 434(e). In light of the statutory limitations, prohibitions and reporting requirements to which Levin funds are subject, the Commission concludes that State, district, and local party committees or organizations may spend Levin funds to raise Levin funds.

Paragraph (b) of section 300.32 lists the types of activities for which a State, district, or local political party committee may spend Levin funds. Paragraph (b)(1) spells out the two kinds of Federal election activity for which Levin funds may be spent, *see* 2 U.S.C. 441i(b)(2)(A), and provides that such spending must be made subject to the conditions set out in paragraph (c) of section 300.32. The principal Congressional sponsors of BCRA suggested that the word "only" be included to preclude any possible misinterpretation of the provision. The Commission has adopted this suggestion in the final regulation.

Paragraph (b)(2) of section 300.32, as proposed in the NPRM, drew several comments. A national party committee and a State party committee supported the provision. The principal

Congressional sponsors of BCRA and a public interest group expressed concern that paragraph (b)(2) could be misinterpreted to allow spending of Levin funds for the Federal election activities described in 2 U.S.C. 431(20)(A)(iii) and (iv). In response to this concern, the Commission has added the language, "other than the Federal election activities defined in 11 CFR 100.24(b)(3) and (4)," which implement section 431(20)(A)(iii) and (iv).

As published in the NPRM, paragraph (b)(2) of section 300.32 would have allowed a State, district, or local political party committee to spend Levin funds for any purposes allowed by State law, and would have also provided that such spending was not subject to paragraph (c) (*see* below). The principal Congressional sponsors of BCRA expressed concern that the latter provision could be misinterpreted to allow fundraising and unallocated spending of Levin funds otherwise forbidden in other regulations. The Commission agrees. Therefore, the final rule, paragraph (b)(2), exempts spending of Levin funds for purposes permissible under State law from only paragraphs (c)(1) and (c)(2) of section 300.32 because those two paragraphs are specifically focused on spending for Federal election activities. As revised, the final rule subjects all spending of Levin funds to paragraphs (c)(3) and (c)(4). The heading for paragraph (c) has been changed slightly in the final rule to conform with this change.

While the Levin Amendment permits the spending of Levin funds for the purposes set out in paragraphs (b)(1) and (2), it places restrictions and conditions on that spending when it is for Federal election activity. Paragraph (c) sets out in one place important restrictions and conditions that are stated in different sections of BCRA. Paragraph (c)(1) implements the restriction that the Federal election activity paid for partly with Levin funds must not refer to a clearly identified Federal candidate. *See* 2 U.S.C. 441i(b)(2)(B)(i). Paragraph (c)(2) implements the restriction that the Federal election activity paid for partly with Levin funds must not be for any broadcast, cable, or satellite communications, other than a communication that refers solely to a clearly identified candidate for State or local office. *See* 2 U.S.C. 441i(b)(2)(B)(ii). Paragraph (c)(3) ties together the provisions of this regulation with 11 CFR 300.31, which covers the raising of Levin funds. Paragraph (c)(4) requires allocable Federal election activity (*i.e.*, voter registration, voter identification, GOTV, or generic

campaign activity that does not refer to a clearly identified Federal candidate and is not a broadcast, cable, or satellite communication) that exceeds in the aggregate \$5,000 in a calendar year to be paid for either entirely with Federal funds, or with a combination of Federal funds and Levin funds pursuant to the allocation percentages set forth in 11 CFR 300.33. Disbursements that aggregate \$5,000 or less in a calendar year for this restricted category of Federal election activity may be paid for entirely with Federal funds, entirely with Levin funds, or pursuant to the allocation percentages set forth in 11 CFR 300.33.

In implementing 2 U.S.C. 441i(b)(2)(A), the Commission chose to permit a greater amount of Levin funds to be used when disbursements for allocable Federal election activity do not exceed in the aggregate \$5,000 in a calendar year for several reasons. First, the Commission notes that the reporting requirements for Federal election activity contain an exception for activity below \$5,000 in the aggregate in a calendar year. *See* 2 U.S.C. 434(e)(2)(A). While that exception applies to aggregate receipts and disbursements, rather than just aggregate disbursements, it does suggest that Congress did not take a rigid approach to low levels of Federal election activity. Second, the Commission is particularly sensitive to the nature of the Federal election activity to which this provision applies: Grassroots activities for which references to Federal candidates are prohibited. There is a far weaker nexus between Federal candidates and this category of Federal election activity than other types of Federal election activity for which Levin funds are prohibited. Finally, the Commission notes that \$5,000 is only half of what any single donor may donate (subject to State law) to each and every State, district, and local party committee under 2 U.S.C. 441i(b)(2), so there is no danger that allowing a committee to use entirely Levin funds for allocable Federal election activity that aggregates \$5,000 or less in a calendar year will somehow lead to circumvention of the amount limitations set forth in 2 U.S.C. 441i(b)(2). The distinction in paragraph (c)(4) between allocable Federal election activity below \$5,000 and allocable Federal election activity above \$5,000 reflects these considerations.

Paragraph (d) serves as a clarifying reminder that spending of non-Federal funds by a State, district, or local political party committee for State or local political activity, including the raising of non-Federal funds, remains a matter of State law. In response to

several comments, the Commission is making two minor clarifications to this paragraph in the final rules. First, the paragraph heading has been changed to refer to "activities," rather than "funds," as it read in the NPRM, to be more descriptive of the actual subject of the paragraph. Second, the first sentence of the paragraph now refers to spending "Federal, Levin, or non-Federal" funds to conform this paragraph with paragraph (b)(2) of section 300.32.

*11 CFR 300.33 Allocation of Costs of Federal Election Activity*

The final regulations in this section address only the allocations of expenditures and disbursements by State, district, and local party committees for Federal election activity, pursuant to the requirements of BCRA. The requirements for allocations by these committees of other categories of expenditures and disbursements that are not Federal election activity are to be found at 11 CFR 106.7. This division of rules represents an attempt to clarify how different categories of activities are addressed with regard to allocation, depending upon their nature, timing and, in certain instances, the presence or absence of a Federal candidate on the ballot, i.e., whether they come or do not come within the definition of "Federal election activity" at 11 CFR 100.24. Provisions at proposed 11 CFR 300.33 that addressed activities not within the definition of Federal election activity now appear in new 11 CFR 106.7. See also the Explanation and Justification for 11 CFR 106.7.

Section 441i(b)(1) of Title 2, United States Code, states that State, district, and local party committees must make all disbursements and expenditures for Federal election activity with Federal funds, with one exception. This requirement holds even when the expenses involved are also related to activities in connection with non-Federal elections. The exception to the required use of Federal funds in connection with Federal election activity involves certain activities to be paid in part with Levin funds, pursuant to 2 U.S.C. 441i(b)(2).

Section 441i(b)(2)(A) permits State, district, and local party committees, under certain conditions, to use Levin funds from a Levin or non-Federal account for particular categories of activity, including voter registration, voter identification, get-out-the-vote ("GOTV"), and generic campaign activities during the time periods when they constitute Federal election activity. These funds must have been received by a party committee pursuant to specific limitations, and are to be used to meet

expenses related to voter registration activity that takes place within 120 days of a Federal election and/or expenses related to voter identification, GOTV activities, and generic campaign activities that are conducted when a Federal candidate appears on the ballot. Such activities must not refer to a clearly identified candidate for Federal office. Section 441i(b)(2)(A) permits the use of Levin funds for these purposes "to the extent that" the costs of the activities are allocated. Levin funds may also be used for non-Federal purposes permissible under State law. See 11 CFR 300.32(b)(2).

Paragraphs 300.33(a)(1) and (2) of the proposed regulations, which addressed the costs of salaries and wages paid to employees who spend less than 25% of their time in connection with Federal elections and of other administrative costs, are being replaced by new 11 CFR 106.7(c)(1) and (d)(1) for the reasons explained in the Explanation and Justification for that section.

In the final rules, 11 CFR 300.33(a) addresses costs that may be allocated between Federal and Levin funds. Paragraphs (a)(1) and (a)(2) represent a division of the proposed rule into two parts, the first addressing voter registration within 120 days of the date of an election and the second the costs of voter identification, GOTV, and generic campaign activities occurring during time periods when they constitute Federal election activity. The relevant time periods for the latter categories of activity are set out at 11 CFR 100.24(a)(1). Both paragraphs (a)(1) and (a)(2) are subject to 11 CFR 300.32(c), which permits committees to fund these activities entirely with Levin funds only when the disbursements for the activities do not exceed \$5,000 in the aggregate in a calendar year.

Paragraph (b) of section 300.33 sets out fixed minimum amounts of Federal funds to be required for the Federal portions of costs of the specified activities for which allocation between Federal and Levin funds is permissible. One goal of the allocation rules is to assure that activities deemed allocable are not paid for with a disproportionate amount of Levin funds. Another goal is to simplify the allocation process, in particular by establishing formulas that do not vary from State to State and that do not require measurements of time or space. Therefore, in lieu of the State-by-State ballot composition ratios for generic campaign activity and in lieu of the time or space method applied to exempt State party activities in the pre-BCRA regulations, the rules establish a fixed formula for all States that would vary only in terms of whether or not a

Presidential campaign and/or a Senate campaign is to be held in a particular election year.

In the NPRM, the Commission set out allocation percentages for the Federal shares of the allocable Federal election activities described in paragraph (a). The final rules at 11 CFR 300.33(b)(1) through (4) use the same minimum Federal percentages. Thus, State, district, and local party committees and organizations must allocate no less than the following amounts to their Federal accounts:

(i) Presidential only election year—28% of costs

(ii) Presidential and Senate election year—36% of costs

(iii) Senate only election year—21% of costs

(iv) Non-Presidential and Non-Senate election year—15% of costs.

As with the percentages used in 11 CFR 106.7 for the allocation of activities that are not Federal election activities, the percentages for those allocable Federal election activities that may be paid for in part with Levin funds were derived by taking averages of the ballot composition-based allocation percentages reported by State party committees in four groupings of States selected for their diversities of size and geographic location and for the particular elections held in each State in 2000 and 2002. The groupings were: (1) Six States (Alabama, Colorado, Illinois, New Hampshire, Oklahoma, and Oregon) in which there was a Presidential but no Senate campaign in 2000; (2) ten States (California, Delaware, Georgia, Florida, Michigan, New York, North Dakota, Texas, Vermont, and Wyoming) in which there were both a Presidential campaign and a Senate campaign in 2000; (3) six States (Delaware, Georgia, Michigan, Oklahoma, Texas, and Wyoming) in which there will be a Senate campaign in 2002; and (4) six States (California, Florida, New York, North Dakota, Vermont, and Washington) in which there will be no Senate campaign in 2002.

In 2000, the Federal percentages for the two parties in six States with only a Presidential campaign ranged from 20% to 33.33%, with an average of 28%, while the Federal percentages for the two parties in the ten States that held both Presidential and Senate campaigns that year ranged from 30% to 43%, with an average of 36%. In 2002, the Federal percentages for the two parties in six States with a Senate campaign ranged from 20% to 25%, with an average of 21%, while the Federal percentages for the two parties in six States with no Senate campaign ranged from 11.11% to

16.67%, with an average of 15%. The rules apply the average percentages in each of the four groupings of States to all 50 States.

As discussed in the Explanation and Justification for 11 CFR 106.7, one comment on the NPRM from a public interest organization addressed the Commission's proposed fixed percentages by providing two alternatives to the Commission's figures. The first alternative would have set a flat 33% requirement for Federal shares of what the response termed "Levin expenditures" and for allocable costs other than administrative costs in odd-numbered years or in non-Presidential election years, and a flat 40% requirement for Federal shares of these same categories of activities in Presidential election years. The commenter based these percentages on what was termed "the current assumption" as to what State party committees spend in certain years.

The second alternative posed by the same commenter adopted the Commission's calculations, but called for the use of the higher percentages in the sample States for what the response termed "Levin spending" and for voter registration outside the 120 day period before an election, plus the average percentages for certain non-Levin expenses. The commenter also urged the Commission to apply the allocation percentages to a two-year election cycle, not just to the year of a Federal election.

The comment submitted on behalf of the principal Congressional sponsors of BCRA with regard to fixed allocation percentages was very similar to that of the public interest organization's response cited above in that, as one alternative approach, it called for at least a 33% Federal allocation of what it termed "Levin activities" and of voter registration activities outside the 120 day period before an election. It also called for 40% Federal allocations of Levin activities and of voter registration activities that are not Federal election activities in Presidential election years. This alternative urged the application of the percentages to two-year Federal election cycles. As a second alternative, this commenter also agreed to use of the Commission's percentages for administrative costs in a two year cycle, but urged the application over that cycle of the highest, not the average, Federal percentages for what it termed "Levin activities" and voter registration activities that are not 'Federal election activity'. \* \* \* Another comment from a public interest organization also called for use of the highest percentages in the identified States, not the average percentages.

Comments on the NPRM received from party committees with regard to fixed percentages for Federal allocations ranged from support for the Commission's position to giving party committees a choice at the beginning of each cycle between the proposed formula and ballot composition ratios.

The final rules at paragraph 300.33(b) retain the fixed percentage approach to allocation proposed in the NRPM and adopt the percentages proposed in the NPRM to disbursements for Federal election activities. As discussed above, disbursements for salaries and wages, and allocations of administrative costs, are addressed at 11 CFR 106.7. The final rules at 11 CFR 300.33(b) also contain additional language to clarify that the allocation percentages must be used for activities that occur within the time periods described in 11 CFR 100.24, time periods that establish when specific activities are to be treated as "Federal election activity" under BCRA. The time periods differ between voter registration on the one hand and voter identification, GOTV, and generic campaign activities on the other. See 11 CFR 100.24(a) and (b). As explained in the Explanation and Justification for 11 CFR 100.24, the complete two-year cycle approach urged by some commenters has not been adopted for Federal election activities.

With regard to the amounts of the fixed minimum Federal allocations, the Commission has retained the percentages contained in the NPRM because they represent averages of actual allocation ratios used in specific States at specific times, not assumptions of State, district, and local party behavior. The Explanation and Justification for 11 CFR 106.7 explains the basis for this approach in greater detail.

Paragraphs (c)(1) and (2) of section 300.33 set out the categories of Federal election activity costs that must not be allocated between Federal funds and Levin funds. These categories include: (1) The costs of public communications as defined at 11 CFR 100.26, which must be paid with all Federal funds, and (2) the costs of salaries and wages for employees who spend more than 25% of their compensated time in a month on activities in connection with a Federal election, which must also be paid entirely with Federal funds. The costs of salaries and wages for employees that spend 25% or less of their compensated time in a month on activities in connection with a Federal election must be paid entirely with non-Federal funds that comply with State law. See 11 CFR 106.7(c)(1). This approach to salaries and wages is

explained more fully in the Explanation and Justification for 11 CFR 106.7.

Section 300.33(c)(3) requires that the *direct* costs of raising funds for Federal election activities be paid solely from the party committee's Federal funds, pursuant to 2 U.S.C. 441i(e), or with Levin funds. The Explanation and Justification for 11 CFR 106.7 and 300.32 explain the reasons for this approach. The proposed rules had indicated that non-Federal funds could be used in certain limited fundraising situations involving non-Federal activity. This language has been deleted from the final rules for the reasons explained in the accompanying Explanation and Justification for 11 CFR 106.7.

Paragraph 300.33(d) addresses transfers of Levin funds from a State, district, or local party committee's Levin account or from its non-Federal account to its Federal account or to an allocation account to meet the Levin fund portion of the costs of allocable expenditures made pursuant to 2 U.S.C. 441i(b)(2). The final rule largely tracks pre-BCRA 11 CFR 106.5(g) by requiring that reimbursements from a Levin account or from a non-Federal account to a Federal account or to an allocation account take place within a specified number of days. New paragraph (d), like former 11 CFR 106.5(g)(2)(B)(iii), states that any payment outside this time frame, absent the need for an advance payment of a reasonably estimated amount, could result, depending upon the circumstances, in a loan to the Federal account and a violation of the Act. No commenters addressed this provision.

#### 11 CFR 300.34 Transfers

As explained above, the Levin Amendment permits spending on certain Federal election activities subject to restrictions and conditions, one of which is that the spending must be allocated between Levin funds and Federal funds. 2 U.S.C. 441i(b)(2)(A)(i), (ii). A State, district, or local committee must raise by itself all money spent under the Levin Amendment. 2 U.S.C. 441i(b)(2)(B)(iv). Congress expressly stated that a State, district, or local committee must not use as Levin funds "any funds provided to such committee" by certain enumerated entities. These entities are: any other State, district, or local committee; any national political party committee; any agent of a political party committee; and any entity directly or indirectly established, financed, maintained, or controlled by a political party committee. 2 U.S.C. 441i(b)(2)(B)(iv)(I) through (IV). By the plain language of these provisions, these restrictions

extend to the Federal funds component of the disbursement allocated between Levin funds and Federal funds. See 148 Cong. Rec. H410 (daily ed. February 13, 2002) (Rep. Shays).

This provision of the Levin Amendment could cause confusion given the pre-existing rule that party committees of the same political party may transfer Federal funds among themselves without limit on amount. See 11 CFR 102.6(a)(1)(ii).<sup>6</sup> Paragraph (a) of section 300.34 makes clear that 11 CFR 102.6(a)(1)(ii) does not override the Levin Amendment as to transfers of Federal funds. Specifically, the committee must not use such transferred Federal funds to pay the Federal portion of Federal election activity. A State party committee and an association of State party officials commented that this provision about transferred Federal funds should apply only to transferred Federal funds "earmarked" for spending under the Levin Amendment by the transferring committee. The Commission has not adopted this suggestion in the final rules. Congress, at 2 U.S.C. 441i(b)(2)(B)(iv), specifically bars a State, district, or local committee spending Federal funds (and Levin funds) for Federal election activity from using transferred funds. How a transferring committee may or may not characterize the transfer is irrelevant to this prohibition.

In response to the NPRM, a public interest group noted that a State, district, or local political party committee's Federal account may commingle Federal funds raised by the committee itself, which are eligible for spending for Federal election activities, and transferred Federal funds, which are not so eligible. This commenter suggested that the Commission should require party committees to use "a reasonable and industry-accepted accounting method" to ensure that they have sufficient self-raised, non-transferred Federal funds to cover expenditures for Federal election activities as the expenditures are made. The Commission has responded to this suggestion in the final rules. Paragraph (a) of section 300.34 is organized into two paragraphs. Paragraph (a)(1) contains the language published in the NPRM, without change. Paragraph (a)(2) provides that a State, district, or local political party committee must demonstrate through a reasonable

accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that its Federal account has sufficient Federal funds raised by the committee itself to make a given disbursement of Federal funds for Federal election activity. Paragraph (a)(2) alternatively permits, but does not require, a State, district, or local political party committee to establish a separate Federal account to use for spending on Federal election activities, and into which it deposits only Federal funds it has raised by itself.

The principal Congressional sponsors of BCRA commented that 11 CFR 300.34 should not be interpreted to forbid a State, district, or local political party committee from using Federal funds raised lawfully on its behalf by a Federal or State candidate or officeholder as long as the funds are contributed directly to the party committee. The Commission agrees with the sponsors' interpretation, and emphasizes that 11 CFR 300.34 applies to transfers of funds from the persons described in paragraphs (b)(1) and (b)(2).

The final sentence of paragraph (a)(1) states as a positive requirement that a State, district, or local political party committee that spends Levin funds must raise the Federal funds component of those funds by itself. As already mentioned above, the Levin Amendment imposes this fundraising requirement. 2 U.S.C. 441i(b)(2)(B)(iv).

The Levin Amendment specifically forbids particular transfers of Levin funds; that is, a State, district, or local party committee may not use as Levin funds any funds transferred to it by certain persons. 2 U.S.C. 441i(b)(2)(B)(iv)(I) through (IV). 11 CFR 300.34(b)(1) and (b)(2) implement these transfer prohibitions by expressly identifying these persons to, and from, which transfers must not be made.

Paragraph (c) of section 300.34 cross-refers to 11 CFR 300.30, which sets forth the permissible account structures for Levin funds, and 11 CFR 300.33, in which are the rules for allocation transfers between the accounts of a given State, district, or local political party committee.

#### *11 CFR 300.35 Office Buildings*

BCRA repealed 2 U.S.C. 431(8)(B)(viii), which had exempted from the definition of contribution any donation of money or anything of value, or loan, to a national or State party committee that is specifically designated to "defray any cost for construction or purchase of any office

facility not acquired for the purpose of influencing the election of any candidate in any particular election for Federal office." In subsequent technical amendments, however, Congress enacted 2 U.S.C. 453(b), which states: "Notwithstanding any other provision of this Act, a State or local committee of a political party may, subject to State law, use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building for such State or local committee." 2 U.S.C. 453(b).

New section 300.35 addresses three areas in implementing 2 U.S.C. 453(b). Paragraphs (a) and (b) provide for the application of State law to the source and use of funds, and provide that Federal law will not preempt the application of State law with respect to the use of non-Federal funds and Levin funds, but that Federal law will preempt State law if Federal funds are used.

Paragraph (c) specifically allows a party committee to lease space in its office building to others with conditions on the deposit of funds into a Federal or non-Federal account. Finally, paragraph (d) addresses the transitional requirements for the current State party office building funds established under the repealed statutory section.

#### A. Application of State Law

A principal sponsor of the technical amendments described the party office building provision as "[r]especting the primacy of State law in financing State and local party buildings." 148 Cong. Rec. S2339 (daily ed. March 22, 2002) (statement of Sen. McConnell). A principal sponsor of BCRA described the proposal as providing that Federal law would no longer allow a State or local party committee to receive non-Federal donations to purchase or construct an office building where such donations violated State law, that State law governs the receipt and disbursement of non-Federal donations used by State or local parties for such purposes, and that there is no "required match consisting of Federal contributions." 148 Cong. Rec. S2143-2144 (daily ed. March 20, 2002) (statement of Sen. Feingold).

The final rule at paragraph (a) of new section 300.35 provides that a State or local party committee may spend either Federal funds or non-Federal funds that are not subject to the limitations, prohibitions, or disclosure provisions of the Act, so long as such funds are not contributed or donated by a foreign national. If non-Federal funds are used, they are subject to State law. If Federal funds are used, they are subject to

<sup>6</sup>The Commission emphasizes that revisions to section 102.6(a) regarding transfers may be forthcoming in a future rulemaking to implement changes to 2 U.S.C. 441a(d) made by BCRA. The present discussion and this rulemaking extend only to Title I of BCRA. Pub L. 107-155, March 27, 2002.

Federal law. The paragraph also incorporates language from the repealed statute and deleted regulations to the effect that the exemptions from Federal limits and prohibitions are based on the building not being purchased or constructed for the purpose of any particular Federal candidacy, but, rather, for the functioning of the party, which entails the support of most or all of the party's candidates over a number of years. The purchase or construction of the building to assist the campaign of a particular Federal candidate would entail the use of impermissible funds in a manner contrary to the basic purpose of the Federal law.

Paragraph (b) explains the coverage of State law with respect to non-Federal funds or Levin funds received by a State or local party that are spent for the purchase or construction of its office building. Other than with respect to donations by foreign nationals, Federal law would not preempt State law as to the source of non-Federal funds, State restrictions on the use of those funds (i.e., the State can prohibit or limit the use of funds with respect to the purchase or construction), or the reporting of the receipt and disbursement of those funds. In addition, Levin funds (which also exclude foreign national funds) may be used for purchase or construction, subject to State law.

The application of State law to the use of non-Federal funds is derived directly from the wording of 2 U.S.C. 453(b) and from Congressional statements. Commission advisory opinions have addressed the question of whether the repealed contribution exemption, which permitted donations to a building fund from such Federally impermissible sources as corporations, preempted State law prohibitions on the use of such funds for campaign purposes. Advisory Opinions 2001-12, 1998-8, 1998-7, 1997-14, 1993-9, 1991-5, and 1986-40. The Commission stated in these opinions that: (1) Congress decided not to place restrictions on the subject even though it could have determined that the purchase of the facility was for the purpose of influencing a Federal election; (2) Congress took the affirmative step of deleting the receipt and disbursement of funds for such activity from the proscriptions of the Act; and (3) there is no indication that Congress intended to limit the preemptive effect to some allocable portion of the purchase costs. New section 300.35 supersedes these Commission advisory opinions to the extent that they might pertain to Federal preemption with respect to use of funds from a State (and now local) party

committee's non-Federal account for the purchase or construction of its office building. For example, corporate donations and donations that are excessive under Federal law, and that are in a non-Federal account, may be used for the purchase or construction of a State party office building where State law permits, and if State law forbids corporate donations and donations in excess of a particular amount, Federal law would not preempt the application of State law prohibiting the use of funds from a party committee's non-Federal account.

Although receipts and disbursements from the non-Federal accounts must comply with State law, section 300.35 does not contemplate that the Commission would take enforcement action against a party committee for violating State law with respect to the purchase or construction of its office building. Such an action is the State's responsibility. Moreover, although section 300.35 does not require the establishment of a separate bank account or book account for the receipt and disbursement of non-Federal funds for purchase or construction of the office building, Federal law does not preempt a State law requirement to establish such an account.

Paragraphs (a) and (b) of the proposed rules in the NPRM differed from the final rules. They were revised, in part, in response to public comments. Proposed paragraph (a) did not refer to the prohibition on contributions or donations from foreign nationals. In addition, paragraphs (a) and (b) provided that if the party committee used funds from the Federal account, Federal law would not preempt State law as to the permissibility of the disbursements and as to the source of funds where State law establishes additional limits or prohibitions.

Several commenters remarked on the provisions in proposed paragraphs (a) and (b) relating to the application of State law. Two commenters representing party committees expressed the concern that, with respect to the use of Federal account funds, Federal law would not supersede a State law that would further limit or prohibit contributions. They stated that this could conceivably prevent a party committee from using 100 percent Federal funds to pay for a building. They asserted that there is no support in the BCRA legislative history for this proposition, and that BCRA's intent was simply to allow State and local parties to pay for their buildings entirely with non-Federal funds and would not require them to use non-Federal funds.

Three comments, including one from the four principal sponsors of BCRA, stated that the provisions regarding application of State law should not be read to allow for the use of contributions or donations by foreign nationals to pay for the purchase or construction of the party office buildings. They indicated that BCRA was not intended to allow for such funds to be used. Two of those commenters recommended that these rules should make this prohibition clear.

As indicated above, the final rules reflect commenter input on both of these issues. The Commission notes that the exemption from Federal preemption at section 453(b) refers to the use of "exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act," subject to State law. It did not extend non-preemption to Federal funds. The Commission concurs with those commenters who interpret BCRA as allowing use of funds from the committee's non-Federal account, so long as they complied with State law, but as not subjecting funds from the committee's Federal account to State law. Hence, funds in the Federal account (that are lawful under Federal law) may be used, even if they are not in compliance with the limitations and prohibitions of State law.

The final rules in paragraphs (a) and (b) also reflect the comments on the explicit inclusion of a ban on the use of funds contributed or donated by foreign nationals, and incorporate such a ban. The prohibition at 2 U.S.C. 441e is so sweeping and explicit (including an explicit prohibition of donations "to a committee of a political party") that it would be difficult to read the intent of BCRA as allowing for the use of such funds by a party committee for those activities. One of BCRA's principal sponsors stated that BCRA "prohibits foreign nationals from making any contribution to a committee of a political party or any contribution in connection with federal, state or local elections \* \* \* This clarifies that the ban on contributions [by] foreign nationals applies to soft money donations." 148 Cong. Rec. S1994 (daily ed. March 18, 2002) (statement of Senator Feingold). See also *United States v. Kanchanalak*, 192 F.3d 1037 (D.C. Cir. 1999). This ban also applies to any in-kind contribution or donation by a foreign national such as a direct payment to a seller, builder, or other vendor for purchase or construction.

Paragraphs (a) and (b) of the final rules include technical changes to state more clearly than the proposed rule that

the pertinent funds include funds that are in the accounts but were not received specifically for the purchase or construction, as well as funds specifically received for that purpose. In addition, the sentence in paragraph (a) discussing the application of State law is changed to conform to other parts of the regulation emphasizing that this exemption is meant to apply only to a State or local committee paying for its own building.

#### B. Proposals Excluded From the Final Rule

The proposed rule included two paragraphs, (c) and (d), which are not included in the final rule. Proposed paragraph (c) would have defined "purchase or construction of an office building" by defining the individual terms, "office building," "purchase," and "construction." The terms were defined to explicitly include and exclude certain items or actions. The proposed definition of "office building," particularly as it pertained to the explicit exclusion of certain items, would have treated the use of the term "building" in 2 U.S.C. 453(b), instead of the term "facility" in the repealed exemption, as signifying a Congressional intent to narrow the scope of the covered costs. Recent advisory opinions stated that expenses that were "capital expenditures" under the Internal Revenue Code would be payable by the building fund (as opposed to business expenses). These opinions have been interpreted to allow building fund payments to purchase office equipment, furniture, and similar items. See Advisory Opinions 2002-12, 2001-01, and 1998-7; see also 26 CFR 1.263(a)-(1) and 1.263(a)-(2).

Proposed exclusions explicitly listed in the draft definitions of "purchase" and "construction" were drawn from exclusions specified in previous Commission advisory opinions (in those aspects of the opinions that did not pertain to Federal preemption). The NPRM narrative for these definitions also included examples of what would and would not constitute "construction." Proposed paragraph (d) would have stated that an expense that did not fit within the definition of "purchase or construction of an office building" would be an allocable administrative cost unless it fell within another category, such as a support of a Federal candidate.

The Commission sought comment on whether the proposed definition of "building" should include, rather than explicitly exclude, items such as office equipment, machinery, or furniture. More generally, the Commission sought

comment on whether BCRA's use of the term "building" instead of "facility" contemplated a narrowing of the range of expenses falling within the exemption.

Three commenters representing party committees asserted that BCRA did not intend the change in terminology from "facility" to "building" to represent a change in the expenses covered by the exemption. One commenter noted that the McCain-Feingold bill as passed by the Senate in 2001 eliminated the building fund exemption for national and State parties and also provided that "Federal election activity" would specifically not include "the cost of constructing or purchasing an office facility or equipment for a State, district, or local committee." An amendment adopted by the House eliminated a transition provision allowing national party committees to spend building fund donations raised prior to the effective date of the new law, and that amendment also eliminated the language as to the purchase of an office facility or equipment. The commenter characterized the technical amendment now in effect as merely a restoration of the deleted provision on the State and local office facility or equipment, noting that one of BCRA's principal sponsors characterized this as a non-substantive amendment.

One of the party committee commenters urged the Commission to continue to use principles from the Internal Revenue Code "such that capital expenditures would be allowed from the building fund (subject to state law) and ongoing expenses would not." Two of the party committee commenters maintained that the question of narrowing the definition is a moot point because they believe that if certain costs were not deemed to be within the definition, they would be classified as administrative costs and should be payable with 100% non-Federal funds.

In contrast, three comments, including one from the principal sponsors, maintained that the change from "facility" to "building" indicated a Congressional intent to narrow the scope of the exemption and that items such as office equipment, machinery, or furniture should not be included within the exemption. They agreed with the proposed definition of "office building." The sponsors also stated that it was their intent that administrative expenses related to office buildings should be allocable between Federal and non-Federal accounts or Federal and Levin accounts.

The Commission also sought comment on whether more examples should be included in the sub-

definitions of "purchase" or "construction," or whether the advisory opinion process would best suit that purpose. Specifically, it asked whether payments for a long-term lease with an option to purchase the rented building should be included within the definition of purchase. One commenter stated that, to avoid abuses, the Commission should establish a bright line rule that treats purchases as falling within the exemption and leases as administrative expenses.

The final rule does not include the proposed definitions of "office building," "purchase," or "construction," or the proposed allocation provision. The Commission does not view section 453(b) as evidence of any Congressional intent to narrow or otherwise change the scope of the activities (from that of the repealed exemption) for which building fund monies may be donated or spent. Specifically, the Commission concludes that BCRA does not supercede or in any way displace the Commission's various advisory opinions regarding building fund activities as applied to State, district or local political party committees. Accordingly, those advisory opinions remain in force and effect. The Commission believes that State and local party committees needing information as to the scope of the costs covered can receive guidance from the Commission's previous advisory opinions.

#### C. Leasing a Portion of the Office Building to Others

Paragraph (c) of the final rule allows a State or local party committee to lease a portion of its office building to others at the usual and normal rental charge. The sources of funds will determine the account in which the rent revenues can be deposited.

This provision did not appear in the NPRM. The Commission requested comments, however, on whether a party that owned an entire office building would also be able to lease space in the building to others at fair market rates in order to generate income. The Commission also sought comments on whether the sources of the funds used to purchase or construct the office building should govern or guide the Commission in the determination of the lawful uses of such income.

One commenter, speaking on behalf of party committees, stated that party committees should be permitted to rent space in their office buildings to State and local candidates regardless of the source of funds used to purchase the buildings. The comment from the principal sponsors of BCRA stated that



BCRA permits a party committee to generate income by leasing parts of its building and describes how to determine whether the funds may be deposited in a Federal or non-Federal account. Specifically, a purchase in whole or in part with non-Federal funds would require the deposit of rental income into the non-Federal account to be used only for non-Federal purposes. Rental income generated from a building purchased solely with Federal funds may be deposited in the committee's Federal account only if all the revenues collected comply with the limitations, prohibitions, and reporting requirements of the Act.

The Commission has concluded that the source of funds used to construct or purchase the building must determine where the rental revenues may be deposited. If only Federal funds were used, the revenues may be deposited in the Federal account. If any non-Federal funds were used, the revenues must be deposited in a non-Federal account, provided that State law permits. These requirements ensure that the committee's Federal account is not indirectly funded (through rental payments) by donations that do not meet the requirements of the Act, such as corporate donations.

Consistent with the jurisdiction of State law over non-Federal accounts, the rule provides that the revenue received by the non-Federal account must comply with State law. The rental amounts deposited in the Federal account would have to be disclosed as an "other receipt," pursuant to 11 CFR 104.3(a)(4)(vi). The Commission notes that the purchase or rental of a committee asset is considered a contribution, unless excepted through the advisory opinion process with respect to specific types of assets or particular circumstances (e.g., isolated sales of specific committee assets developed or purchased for the committee's own use, rather than for fundraising, and campaign equipment and leftover supplies of an authorized committee wishing to terminate). See, e.g., Advisory Opinions 1992-24, 1991-34, 1990-26, 1989-4, and 1986-14; see also 11 CFR 100.7(a)(2). Commission advisory opinions have also interpreted the regulations to allow a committee to invest its funds and to treat the interest, dividends, or other returns on the investment (under particular circumstances) as "other receipts." See Advisory Opinions 1999-8, 1989-6, and 1986-18. The Commission views the leasing of portions of the building as the equivalent of obtaining income through the investment of committee assets or funds. Under particular circumstances,

such leasing out may also be viewed as an isolated sale of a unique committee asset purchased for the committee's own use. Hence, the payment of rent for office building space to the party committee at the usual and normal charge is not a contribution. If the tenant pays rent in excess of the usual and normal charge and the rent is deposited in the Federal account, then the amount in excess would be a contribution and reportable as such. An excess payment from a corporate tenant would be in violation of 2 U.S.C. 441b. See Advisory Opinions 1992-24 and 1990-26.

#### D. Transitional Provisions for State Party Building or Facility Account

The final rule at 11 CFR 300.35(d) addresses office building accounts set up by State party committees under repealed 2 U.S.C. 431(8)(B)(viii). The regulation states that up to and including November 5, 2002, such accounts may accept funds that are "designated for the purchase or construction of an office building." The rule then states that, starting on November 6, 2002, the funds in the account may not be used for Federal account or Levin account purposes but may be used for any other non-Federal purposes as permitted by State law.

The NPRM differed from the final rule in two respects. Like the final rule, the proposed rule provided that, up until November 5, 2002, a State party committee could accept funds into the account, but then indicated that the funds in the account could only be used for the construction or purchase of an office building or facility. In place of the language on the use of the funds in the account, the final rule states that it applies to funds "designated for the purchase or construction of an office building." Both the final rule and the proposed rule provide that, starting on November 6, 2002, the funds are not useable for Federal account or Levin account purposes but may be used for any other non-Federal purposes, as permitted by State law. However, the proposed rule also would have provided that the funds would be subject to specific paragraphs of the proposed rule, including the definitional paragraph that is now deleted.

Two commenters from the party committees criticized the NPRM version of the transitional provisions, stating that unlike the national party building and facility fund transition provisions in BCRA, there is no BCRA provision covering the spending of funds by the already existing State party office facility fund. One of those commenters criticized the State law limitation on the

use of the funds from the account once BCRA goes into effect, noting that the funds had been lawfully raised under the exemption in the repealed statutory section.

The final rule as to the use of building fund accounts prior to the effective date of BCRA is not meant to deviate from any current permissible uses of those accounts. As to the use of those accounts after the effective date, the regulation was written to conform the treatment of the funds in the accounts established under the repealed statutory section with BCRA and still allow their use for election purposes. As unlimited non-Federal funds, they could not be used for Federal account or Levin account purposes. As such, however, they may be used for non-Federal purposes, and the Commission also recognizes the control by State law over the permissibility of such funds.

#### 11 CFR 300.36 Reporting Federal Election Activity; Recordkeeping

BCRA establishes certain reporting requirements for State, district, and local committees that are political committees and that finance Federal election activities. See 2 U.S.C. 434(e)(2). This requirement for these political committees extends generally to all receipts and disbursements for Federal election activities if the aggregate amount of receipts and disbursements for such activity is \$5,000 or more per calendar year, 2 U.S.C. 434(e)(2)(A), and specifically extends to receipts and disbursements of Levin funds. 2 U.S.C. 434(e)(2)(B). These requirements added by BCRA are in addition to the existing FECA requirements to report expenditures of Federal funds under 2 U.S.C. 434. See also 11 CFR part 104.

Paragraph (a) of new section 300.36 applies to two types of entities. The first is a State, district, or local political party committee that has not qualified as a political committee under 2 U.S.C. 431(4) or 11 CFR 100.5. The second is an association or similar group of candidates for State or local office or of individuals holding State or local office (see 2 U.S.C. 441i(b)(1)) that has not qualified as a political committee under 11 CFR 100.5. In the NPRM, the Commission sought comments as to what, if any, reporting requirements an association or similar group of candidates for, or holders of, State and local office may have under 2 U.S.C. 434(e)(2) if it is not a political committee. The Commission received one comment, from a public interest group, which suggested that the result should depend on whether the association or similar group has attained

political committee status under 11 CFR 100.5. The Commission has concluded that such an association or similar group that has not qualified as a political committee has no reporting requirements under 2 U.S.C. 434(e)(2) because that section, by its own terms, applies to "political committees." The Commission further concludes such an association or similar group is in a position analogous to a political party organization that is not a political committee under 11 CFR 100.5 to the extent both engage in Federal election activity. Therefore, in the final rules, such an association or similar group that has not qualified as a political committee under 11 CFR 100.5 must comply with paragraph (a) of section 300.36.

Paragraph (a) recognizes that neither type of organization has reporting requirements under BCRA because it is not a political committee. *See* 2 U.S.C. 434(e)(2). Under paragraph (a)(1), both types of organizations must demonstrate through a reasonable accounting method that they have sufficient Federal funds on hand to pay the required Federal portion of the costs of Federal election activity under 11 CFR 300.32 and 300.33. Paragraph (a)(1) also requires each type of organization to keep records of Federal receipts and disbursements and to make those records available to the Commission upon request. A State party committee and an association of State party officials commented in support of paragraph (a)(1), to the extent that it applies to political party committees.

A national party committee commented in opposition to proposed paragraph (a)(2), which would have required a payment for Federal election activity to be treated as an expenditure, regardless of whether it qualified as an expenditure under the statutory definition. *See* 2 U.S.C. 431(9). This commenter objected to characterizing a payment of Federal funds for Federal election activity as an expenditure "even if such activity does not reference any Federal candidate." A State party committee and an association of State party officials made very similar comments, citing Advisory Opinion 1999-4. The State party committee characterizes this advisory opinion as "rul[ing] that only disbursements that influence a specific Federal election count towards the dollar thresholds in [11 CFR 100.5(c)]." The State party committee's primary concern is that "thousands" of local and district committees not currently required to register and file reports with the Commission will be required to do so. One of the commenters stated that the

Commission has "effectively acknowledged" in paragraph (a)(1) of section 300.36 that "Congress did not intend first-dollar disclosure of" Federal election activity spending. Conversely, a public interest group commented in support of this paragraph.

Paragraph (a)(2) clarifies that a payment of Federal funds or Levin funds for the costs of Federal election activity does not constitute an expenditure for purposes of determining whether or not a State, district, or local political party committee, or an association or similar group of candidates for State or local office or of individuals holding State or local office, becomes a political committee, under 11 CFR 100.5, unless the payment otherwise qualifies as an expenditure under 2 U.S.C. 431(9). Paragraph (a)(2) also states that a payment of Federal funds for the costs of Federal election activity that refers to a clearly identified Federal candidate and that meets the definition of "exempt activities" (*see* 11 CFR 100.8(b)(10), (16), and (18)) is to be treated as a payment for exempt activities for the purposes of determining political committee status under 2 U.S.C. 431(4)(C) and 11 CFR 100.5(c).

Paragraph (b) of section 300.36 applies to State, district, and local political party committees, and to an association or similar group of State and local candidates and officeholders, that disburse Federal funds for Federal election activities and that have qualified as political committees under 11 CFR 100.5. The heading of paragraph (b)(1) is revised from the version of the regulation published in the NPRM. The new heading makes clear that paragraph (b)(1) applies to State, district, and local political party committees that have qualified as political committees and that have less than \$5,000 in total receipts and disbursements for Federal election activity (*see* 2 U.S.C. 434(e)(2)(A)), and to an association or similar group of candidates for State or local office or of individuals holding State or local office at all times.

Paragraph (b)(1) provides that such committees must report all receipts and disbursements of Federal funds for all or part of the costs of Federal election activity. Paragraph (b)(1) goes on to state that this requirement applies even if the committee has less than \$5,000 of aggregate receipts and disbursements for Federal election activity. *See* 2 U.S.C. 434(e)(2)(A). A national party committee and a State party committee commented in opposition to the requirement of itemization of Federal receipts for Levin activity, because "Federal receipts will be used fungibly for multiple purposes."

The Commission points out that Federal receipts are not fungible, as far as spending for Federal election activity goes, to the extent that receipts include transfers from other party committees. A State, district, or local committee must not use transferred funds for Federal election activity spending. 2 U.S.C. 441i(b)(2)(B)(iv). Moreover, Congress has specifically required itemization of these receipts. 2 U.S.C. 434(e)(3). The final sentence of 11 CFR 300.36(b)(1) provides that a disbursement of Federal funds or Levin funds for Federal election activity will not be deemed an expenditure and reported as such, unless it satisfies the definition of expenditure in 2 U.S.C. 431(9).

In the final rules, the Commission has corrected an inadvertent omission that appeared in the version of paragraph (b)(1) of section 300.36 published in the NPRM. The words "receipts and" have been inserted before the word "disbursement" in the second sentence. The preamble of 11 CFR 300.36(b)(1) correctly discussed the paragraph, referring to "receipts and disbursements." 67 FR 35671. The Commission has also deleted an unnecessary and potentially confusing introductory clause in one of the sentences in this paragraph.

Paragraph (b)(2) implements the broader reporting provisions of 2 U.S.C. 434(e)(2)(A) and (B) with regard to State, district, and local political party committees. The heading of this paragraph has been revised from the version of the regulation published in the NPRM. The change is intended to make clear that this paragraph applies to State, district, and local political party committees that are political committees and that have \$5,000 or more of total receipts and disbursements for Federal election activity. 2 U.S.C. 434(e)(2)(A) and (B). Paragraph (b)(2) does not apply to an association or similar group of State and local candidates and officeholders that disburses Federal funds for Federal election activities because such groups are not authorized to raise and spend Levin funds, and thus may not allocate disbursements for Federal election activity between Federal funds and Levin funds. *See* 2 U.S.C. 441i(b)(2), which applies only to party committees. These committees always report under part 104 of Title 11 because they may have no Levin funds to report pursuant to paragraph (a), discussed above.

The first sentence of paragraph (b)(2) states the basic rule that all receipts and disbursements for Federal election activity must be reported if the political committee has an aggregate of \$5,000 or more of such receipts and

disbursements in a calendar year. The second sentence makes it clear that this basic reporting rule extends to Levin funds used for Federal election activity.

Paragraphs (b)(2)(i) through (iv) have been revised, or added, since the version of the regulation published in the NPRM. As published in the NPRM, the regulation would have referred the reader to 11 CFR 104.17(b) to identify important elements of information that must be reported under this section 300.36. Instead, paragraphs (b)(2)(i) through (iv), as adopted in the final rules, state these requirements expressly, for the convenience of the reader. These requirements generally parallel the requirements adopted in 11 CFR 104.17(b) with certain modifications appropriate to the context of expenses allocated among Federal election activities.

Paragraph (b)(2)(i) pertains to disclosure of the methods State, district, or local committees use to report allocating expenses for Federal election activity between Federal funds and Levin funds. Paragraph (b)(2)(i)(A) of section 300.36 specifies that a committee must state the allocation percentages for Federal election activity disbursements that are used in its reports. This paragraph includes a specific cross-reference to 11 CFR 300.33(b), where these allocation percentages for Federal election activity are set out.

Paragraph (b)(2)(i)(B) of section 300.36 requires the committee to report which allocable category of Federal election activity a given allocated disbursement falls into. In paragraph (b)(2)(i)(B), the reference to allocable category of Federal election activity means the type of Federal election activity as defined in 11 CFR 100.24 (e.g., voter registration activity as defined in section 100.24(b)(1), or voter identification as defined in section 100.24(b)(2)(i)). Note that expenses for certain categories of Federal election activity are not allocable between Federal funds and Levin funds (e.g., public communications that promote or support, or attack or oppose, a clearly identified Federal candidate under 11 CFR 100.24(b)(3)). See 11 CFR 300.33(a).

Paragraph (b)(2)(ii) pertains to reporting of allocation transfers between a Levin or non-Federal account and a Federal account, or among a Levin or non-Federal account, a Federal account, and a designated allocation account for allocated Federal election activity. All transfers related to a category of Federal election activity must identify that category. Paragraph (b)(2)(iii) specifies the elements of information that must be reported for an allocated disbursement

for Federal election activity, including the name and address of the payee, the date of the payment, and the purpose of the payment. This paragraph also sets out itemization requirements for disbursements covering more than one program or activity. Paragraph (b)(2)(iv) covers itemization of disbursements of more than \$200. 2 U.S.C. 434(e)(3).

Paragraph (b)(3) alerts the reader to the rules for reporting payments allocated between Federal funds and non-Federal funds that are not covered in paragraph (b)(2). As explained above, paragraph (b)(2) applies only to payments for Federal election activity allocated between Federal funds and Levin funds under 11 CFR 300.33. The reporting regulation for payments allocated between Federal funds and non-Federal funds are contained in 11 CFR 104.17. For example, section 104.17 addresses reporting of administrative expenses.

Paragraph (c)(1) implements BCRA's new requirement for monthly filing by party committees that come under new section 434(e) of the Act. 2 U.S.C. 434(e)(4). This is accomplished by referring to the Commission's existing regulation specifying monthly reporting, e.g., 11 CFR 104.5(c)(3).

In the NPRM, the Commission sought comments on the applicability of the \$50,000 annual threshold for electronic filing to receipts and disbursements for Federal election activities. See 11 CFR 104.18. The Commission received two comments. An association of State party officials opposed applying receipts and disbursements for Federal election activities toward the electronic filing threshold because these "will also be disclosed on the party committee's regularly filed reports." The Commission notes that this comment, while true, could be applied to any committee with regard to electronic filing. A public interest group commented that receipts and disbursements for Federal election activity should apply to the electronic filing threshold.

Consistent with 2 U.S.C. 434(a)(11), paragraph (c)(2) of section 300.36 provides that contributions and expenditures of Federal funds for Federal election activity apply to the \$50,000 threshold for mandatory electronic filing. When determining whether a receipt of Federal funds for Federal election activities is a contribution, the Commission's regulation at 11 CFR 100.7, including the exclusions in paragraph (b) of that section, must be applied. Similarly, when determining whether a disbursement of Federal funds for Federal election activity is an

expenditure, the Commission's regulation at 11 CFR 100.8, including the exclusions in paragraph (b) of that section, must be applied. The Commission discerns no reason why a contribution or expenditure should be treated differently for this purpose simply because it is related to a Federal election activity. The Commission emphasizes that this provision does not apply to receipts and disbursements of Levin funds for Federal election activity, and does not apply to receipts and disbursements that are not "contributions" or "expenditures" as defined by the FECA.

Finally, paragraph (d) of section 300.36 supports the disclosure provisions outlined above by adding a recordkeeping requirement. Paragraph (d) refers to the Commission's existing regulation on recordkeeping, 11 CFR 104.14. This requirement is necessary to ensure that sufficient documentation exists to ensure compliance with the disclosure provisions of BCRA.

#### *11 CFR 300.37 Prohibitions on Fundraising for and Donating to Certain Tax-Exempt Organizations*

BCRA prohibits State, district, and local party committees, their officers and agents acting on their behalf, and entities directly or indirectly established, maintained, financed, or controlled by them, from soliciting any funds for, or making or directing any donations to certain tax exempt organizations engaged in certain election-related activity. 2 U.S.C. 441i(d). Except as discussed below, the ban on State party fundraising for tax-exempt organizations at new 11 CFR 300.37 mirrors the provision applicable to the prohibition on national party committee fundraising for these organizations at new 11 CFR 300.11. See Explanation and Justification for 11 CFR section 300.11 above for a discussion of comments received in response to specific questions raised in the NPRM.

Paragraph (a)(3) implements BCRA's prohibition on State party committee fundraising for, and donations to, a section 527 organization unless the organization is a "political committee," a State or local party committee, or an authorized committee of a State or local candidate. The NPRM asked whether the term "political committee" in 11 CFR 300.37 should mirror the definition of that term in 2 U.S.C. 431(4), which would encompass only organizations that make contributions and expenditures in connection with Federal elections or whether it should be interpreted to also encompass State-registered political committees that support only State and local candidates.

BCRA's cosponsors stated that it would be in keeping with the intent of BCRA to permit State, district, and local party committees "to make a non-federal donation to a section 527 organization registered as a State PAC as long as such a State PAC does not make expenditures and disbursements in connection with an election for Federal office, including expenditures and disbursements for Federal election activity." Several party committee commenters and at least one public interest group agreed with this approach. One public interest commenter disagreed, stating that permitting State and local party committees to fundraise for, or donate to, State political committees "would be contrary to the letter and spirit of BCRA."

Accordingly, in the final rules, new paragraph (a)(3)(iv) of section 300.37 permits a State, District or local party committee to solicit funds for, or donate to, a political committee registered under State law that supports only State or local candidates and does not make expenditures or disbursements in connection with an election for Federal office, including expenditures and disbursements for Federal election activity. The Commission agrees with the sponsors and other commenters that this new paragraph is consistent with the major purpose of BCRA—to prohibit non-Federal funds from being used in connection with Federal elections. As long as the section 527 organization for which funds are being raised exclusively supports non-Federal candidates and does not finance activities that could benefit Federal candidates, such as get-out-the-vote activities in connection with an election in which a Federal candidate appears on the ballot, BCRA's intent is preserved.

As discussed in the Explanation and Justification for 11 CFR 300.11, a safe harbor provision has been added at 11 CFR 300.37(c). Because 11 CFR 300.37(a) permits State, district and local party committees to solicit funds for, or donate funds to, section 527 organizations that are State-registered political committees and that meet certain other requirements, paragraph (c)(2) of the final rules contains an additional safe harbor provision applicable to those organizations. This safe harbor is similar to the safe harbor provision applicable to section 501(c) organizations in paragraph (c)(1). The safe harbor provides that a State, district, and local party committee may obtain and rely upon a certification from certain section 527 organizations to determine whether such organizations

fall outside the fundraising/donations prohibition.

Paragraph (d) of 11 CFR 300.37 sets forth the criteria for the certification for both 501(c) organizations and certain section 527 organizations. This paragraph for the most part tracks the criteria for certifications by section 501(c) organizations set forth in 11 CFR 300.11(d). See Explanation and Justification for 11 CFR 300.11. Additionally, paragraph (d)(1) of 11 CFR 300.37 provides that in the case of a section 527 organization that is a State-registered political committee pursuant to paragraph (a)(3)(iv), the certification is a written statement signed by the committee treasurer. As the individual who oversees expenditures of a political committee, the treasurer has knowledge of the types of activities undertaken by the organization. The remaining certification requirements are identical to those for section 501(c) organizations.

New paragraphs (e) and (f) of 11 CFR 300.37 mirror the provisions in 11 CFR 300.11(e) and (f) as applied to State, district, and local party committees and other covered persons rather than national party committees. See Explanation and Justification for 11 CFR 300.11.

#### Subpart C—Tax-exempt Organizations

For the convenience of readers interested in locating rules pertaining to fundraising and donations to tax-exempt organizations, subpart C of new part 300 combines in a single place the prohibitions on national, State, district, and local party committee donations to, and fundraising for, certain 501(c) and 527 tax-exempt organizations and the rules governing fundraising by Federal candidates and officeholders for 501(c) organizations.

The proposed rules for 11 CFR 300.50 (national party prohibition) and 11 CFR 300.51 (State party prohibition) were identical to proposed 11 CFR 300.11 (national party prohibition) and proposed 11 CFR 300.37 (State party prohibition), respectively.

The final rule at 11 CFR 300.50 (national party prohibition) is identical to the final rule at 11 CFR 300.11; the final rule at 11 CFR 300.51 (State party prohibition) is identical to the final rule at 11 CFR 300.37; and the final rule at 11 CFR 300.52 (regulations governing Federal candidate and officeholder solicitations for 501(c) organizations) is identical to the final rule at 11 CFR 300.65. The Explanation and Justification for 11 CFR 300.11, 300.37 and 300.65 apply to 11 CFR 300.50, 300.51 and 300.52, respectively.

#### Subpart D—Federal Candidates and Officeholders

##### 11 CFR 300.60 Scope

BCRA places limits on the amounts and types of funds that can be raised by Federal candidates and officeholders for both Federal and State candidates. See 2 U.S.C. 441i(e). The Commission is placing the regulations that address these limitations in 11 CFR part 300, subpart D.

Section 300.60 explains that these restrictions apply to Federal candidates and officeholders, their agents, and entities directly or indirectly established, maintained, or controlled by, or acting on behalf of, any such candidate(s) or officeholder(s). As defined in 2 U.S.C. 431(3) and existing 11 CFR 100.4, "Federal office" means the elective office of President or Vice President of the United States, Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States. There is a similar definition of "Federal officeholder" in 11 CFR 113.1(c). As noted above, the Commission is adding a comparable definition at 11 CFR 300.2(o). Persons covered by the restrictions in this subpart may not "solicit, receive, direct, transfer or spend" non-Federal funds unless certain requirements are satisfied, and subject to certain exceptions explained below.

No comments were received on this section.

##### 11 CFR 300.61 Federal Elections

Section 300.61 as proposed in the NPRM prohibited any Federal candidate or officeholder, his or her agent, or any person described in section 300.60, above, from soliciting, receiving, directing, transferring, or spending non-Federal funds in connection with an election for Federal office, including funds for any Federal election activity described in 11 CFR 100.24, discussed above. 2 U.S.C. 441i(e)(1)(A). One commenter urged the Commission to construe this language to prohibit a candidate only from raising non-Federal funds that would eventually benefit the candidate's own campaign. Because the Commission does not find support in the statutory language for this approach, it is not incorporating this recommendation.

The principal sponsors of BCRA asked the Commission to include "disburse" in the list of specified actions, so as to clarify that a person described in 11 CFR 300.60 must use Federal funds when disbursing funds in connection with an election for Federal office. The Commission appreciates the desire for uniformity between sections

300.61 and 300.62, discussed below; and also notes that drawing a distinction between funds that are “spent” and funds that are “disbursed” for certain purposes could prove problematic. Accordingly, it is adding “disburse” to the list of covered activities in section 300.61.

#### 11 CFR 300.62 Non-Federal Elections

BCRA also prohibits any Federal candidate or officeholder, his or her agent, or any other person described in § 300.60, from raising, receiving, directing, transferring, or spending or disbursing funds in connection with any non-Federal election, unless the funds are not in excess of the amounts permitted with respect to contributions to candidates and political committees and are not from sources prohibited by the Act from making contributions in connection with Federal elections. 2 U.S.C. 441i(e)(1)(B).

The NPRM limited this restriction to Federal funds subject to the limitations and prohibitions of the Act. One comment requested the Commission to remove the term “Federal” from this definition, to make it cover all funds that are subject to the limitations and prohibitions of the Act. The Commission is making this change, which is consistent with the statutory language; and is making additional changes to further parallel the statutory language.

In discussing proposed 11 CFR 300.61 and 300.62, the NPRM stated that these prohibitions encompassed “leadership PACs” and “candidate PACs” because they are entities “directly or indirectly established, financed, maintained, or controlled by” Federal candidates and/or officeholders as defined in 11 CFR 300.2(c). Generally, “leadership PACs” and “candidate PACs” are political organizations set up by congressional leaders and other Federal candidates and officeholders, in part, as a way to support other candidates’ campaigns. Although candidate PACs and leadership PACs are not specifically mentioned, the legislative history indicates that 2 U.S.C. 441i(e)(1) is intended to prohibit Federal officeholders and candidates from soliciting any funds for these committees that do not comply with FECA’s source and amount limitations. *See* 148 Cong. Rec. S2140 (Daily ed. March 20, 2002) (statement of Sen. McCain). Consequently, the NRPM stated that Federal candidates and officeholders and their leadership and candidate PACs must not solicit, receive, direct, transfer, or spend funds for such a PAC’s Federal or non-Federal account unless the funds complied with

the Act’s source and limitations requirements.

The comments of the national party committees construed the NPRM statements, in light of statements made in the Senate debates, to mean that a person could contribute \$5,000 to the Federal account of a “leadership” PAC and could donate an additional \$5,000 to the non-Federal account of the same committee. These commenters expressed support for such an interpretation of the proposed rules and further argued that the national party ban on raising and spending non-Federal funds found at 2 U.S.C. 441i(a) should be construed similarly. As noted elsewhere, the Commission believes that the plain language of 2 U.S.C. 441i(a) prevents such an interpretation as to the national party committees. No other commenters addressed this point in their written comments, although some commenters testified that the statutory language could be interpreted either to permit solicitations of \$5,000 each for a Federal and non-Federal account of a leadership PAC in light of the floor statements, or not to permit such PACs to have non-Federal accounts at all. Another commenter argued that the statutory language did not include the term “non-Federal accounts,” but instead permitted a Federal officeholder to solicit, receive, direct and spend funds “in connection with non-Federal elections.”

The Commission notes first that the definition of an entity “directly or indirectly established, financed, maintained, or controlled” is being modified in the final rules from the definition contained in the proposed rule at section 300.2(c). The final rule defines this phrase by incorporating the affiliation factors set forth at 11 CFR 100.5(g)(4)(ii). Consequently, 11 CFR 300.62, permitting solicitations and spending for funds “in connection with” a non-Federal election applies to a candidate PAC or leadership PAC to the extent that the PAC comes within the new definition of 11 CFR 300.2(c). Secondly, in discussing BCRA’s restrictions on the solicitation and spending of non-Federal funds by Federal candidates and officeholders, the co-sponsors stated that these provisions were part of a “system of prohibitions and limitations on the ability of Federal officeholders and candidates, to raise, spend and control soft money” in order “to stop the use of soft money as a means of buying influence and access with Federal officeholders and candidates.” *See* 148 Cong. Rec. S2139 (Daily ed. March 20, 2002) (statement of Sen. McCain). In light of this purpose, the Commission

notes that new 11 CFR 300.62 permits Federal candidates and officeholders to solicit, receive, direct, transfer, spend, or disburse funds in connection with Federal and non-Federal elections only from sources permitted under the Act and only when the combined amounts solicited and received from any particular person or entity do not exceed the amounts permitted under the Act’s contribution limits and are not from prohibited sources. In other words, a Leadership PAC that comes within the definition of 11 CFR 300.2(c) can raise up to a total of \$5,000 from any particular person or entity, regardless of whether the funds are contributed to the PAC’s Federal account, donated to its non-Federal account, or allocated between the two. In addition, the Commission agrees with commenters who pointed out that 11 CFR 300.62 does not permit Federal candidates and officeholders, their agents and entities established, financed, maintained, or controlled by them to solicit, receive, direct, transfer, spend, or disburse non-Federal funds for Federal elections.

#### 11 CFR 300.63 Exception for Non-Federal Candidates

An exception to the fundraising prohibition applies when a Federal candidate or Federal officeholder is a candidate for State or local office. 2 U.S.C. 441i(e)(2). Such candidates may raise and spend non-Federal funds for their State campaign, as long as their activities are consistent with State law and refer only to their status as a State or local candidate, to other candidates for that same office, or both. This exception is reflected in new 11 CFR 300.63. Please note that if a State or local candidate is simultaneously a candidate for Federal office, he or she must raise and spend only Federal funds in connection with the Federal campaign. No comments addressed this provision.

#### 11 CFR 300.64 Exemption for Attending, Speaking, or Appearing as a Featured Guest at Fundraising Events

BCRA contains an exemption from the fundraising prohibition for Federal candidates and officeholders who attend, speak, or appear as a featured guest at a State, district, or local party committee fundraising event. 2 U.S.C. 441i(e)(3). The NPRM sought comment on how to construe and implement this exemption, particularly in light of the separate general prohibition on Federal candidates and officeholders soliciting non-Federal funds in connection with an election for Federal, State, or local office. The NPRM sought comment on the provision in light of Sen. McCain’s

explanation in the Senate debate that Federal candidates and officeholders “cannot solicit soft money funds, funds that do not comply with Federal contribution limits and source prohibitions, for any party committee—national, State, or local.” 148 Cong. Rec. S2139 (daily ed. March 20, 2002) (statement of Sen. McCain). The Commission initially sought comment on a rule proposing that, while such individuals could attend, speak, or be a featured guest at a State or local party fundraising event, they could not say anything that could be construed as soliciting or otherwise seeking non-Federal funds. In the alternative, the NPRM sought comment on whether the fundraising event provision was a total exemption from the general solicitation ban, whereby Federal candidates and officeholders and their agents may attend and speak freely at such events. The phrase “featured guest” strongly suggests that State, district, or local party committees may publicize in advance that a Federal candidate or officeholder will be attending and speaking at an event, and the Commission sought comments on whether this means that Federal candidates and officeholders may be referred to in invitation materials for the event, or appear as members of a host committee, or be honored at the event.

The Commission received a range of comments on these issues. Some advocated a restrictive approach, arguing that any other construction would undercut the fundraising prohibition. Others noted that it could be almost impossible for a Federal candidate or officeholder not to become involved in at least indirect fundraising, such as thanking people in a rope line for their support, by virtue of the fact that they are appearing and speaking at a fundraising event, which the statutory exemption expressly permits. Some claimed that monitoring every word the speaker said could turn the Commission into “speech police,” raising First Amendment concerns. U.S. CONST. amend. I (“Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*”). Also, the fact that a candidate or officeholder is to be honored at an event implies that his or her name or picture may appear prominently on invitations, flyers, and other material distributed in connection with the event.

The Commission has decided to construe the statutory exemption permitting Federal candidates and officeholders to attend, speak, and appear as a featured guest at State, district or local party committee fundraising events without regulation or

restriction. This conclusion is compelled by the plain language of the section and the structure of the section within BCRA. The structure of the statute requires the Commission to construe the provision as a total exemption to the solicitation prohibition, applicable to Federal candidates and officeholders, when attending and speaking at party fundraising events, because the statutory section is styled as such. To conclude otherwise would require the Commission to read the restrictions itemized in the general prohibition into a statutory exemption that clearly and unambiguously excludes those restrictions by its own terms. It would also require the Commission to regulate and potentially restrict what candidates and officeholders say at political events, which is contrary to the plain meaning of the statutory exemption and would raise serious constitutional concerns. Accordingly, candidates and officeholders are free under the rule to speak at such functions without regulation or restriction. In addition, as several commenters urged, State, district, and local party committees are free within the rule to publicize featured appearances of Federal candidates and officeholders at these events, including references to these individuals in invitations. The Commission concludes, however, that Federal candidates and officeholders are prohibited from serving on “host committees” for a party fundraising event or from personally signing a solicitation in connection with a State, local, or district party fundraising event, on the basis that these pre-event activities are outside the permissible activities described above flowing from a Federal candidate’s or officeholder’s appearance or attendance at the event. The rule, consistent with the statute, places no restriction on the speech of Federal candidates and individuals holding Federal office at these fundraising events.

#### *11 CFR 300.65 Exceptions for Certain Tax-Exempt Organizations*

In 2 U.S.C. 441i(e)(1), BCRA prohibits candidates and officeholders from soliciting, receiving, directing, transferring, or spending funds unless the funds meet the source and amount restrictions of the Act. *See also* new 11 CFR 300.61 and 11 CFR 300.62. BCRA creates two exceptions from that general rule in 2 U.S.C. 441i(e)(4): (1) It allows candidates, officeholders, and individuals who are agents acting on behalf of either to make general solicitations, without source or amount restrictions for a 501(c) organization unless the “principal purpose” of the

organization is to conduct certain Federal election activity, specifically voter registration, voter identification, GOTV activities, or generic campaign activity, so long as the solicitation is not to obtain funds in connection with a Federal election; and (2) it permits Federal candidates and officeholders, and individuals who are agents acting on their behalf, to make a solicitation explicitly to obtain funds for a 501(c) organization whose principal purpose is to conduct Federal election activity as described above or for a 501(c) organization to conduct these activities provided that only individuals are solicited for no more than \$20,000 per calendar year. The final rule at 11 CFR 300.65 implements these exceptions for Federal candidate and officeholder solicitations for 501(c) organizations. It mirrors the final rule at 11 CFR 300.52 contained in subpart C, discussed above.

In response to the NPRM, BCRA’s principal sponsors and a public interest group stated that the proposed rule at 11 CFR 300.52(a)(1) (mirrored in 300.65(a)(1)) could be interpreted to prohibit candidate/officeholder solicitations that were not meant to be prohibited. The proposed rules stated that a Federal candidate or officeholder may make a general solicitation on behalf of a 501(c) organization without regard to source or amount restrictions “only if the solicitation does not specify how the funds will or should be spent,” if the solicitation is not for a 501(c) organization whose principal purpose is to conduct certain enumerated Federal election activity, and if the solicitation is not for that enumerated Federal election activity. These commenters expressed concern that the proposed regulation could be erroneously interpreted as prohibiting Federal candidates or officeholders from making a general or specific solicitation, without source or amount limitations, for an organization such as the Red Cross, which engages in no “electoral activities” whatsoever. BCRA’s principal sponsors also argued that this provision could be interpreted to prohibit specific solicitations, without source or amount limitations, for a 501(c) organization whose principal purpose is not to engage in Federal election activity, but who nonetheless engages in some election activity, provided that the solicitation is not for activity in connection with an election. The sponsors argued that the final rules should permit such specific solicitations. The examples given by the sponsors to illustrate this point included a specific solicitation for the

NAACP College Fund or the NRA firearms training program, even though the NAACP and the NRA engage in certain election activity.

The Commission agrees that 11 CFR 300.65 should not be misinterpreted to prohibit candidates, officeholders, or their agents from soliciting funds for a 501(c) organization that engages in no election activity, such as the Red Cross. Accordingly, the final rule at 11 CFR 300.65 addresses the commenters' concerns by more specifically setting forth the circumstances under which Federal candidates, officeholders, and their agents can make general solicitations on behalf of 501(c) organizations, without regard to source or limitation, and by setting forth in paragraph (b) the circumstances under which they can make specific, limited solicitations to individuals to obtain funds to carry out certain Federal election activities.

In response to a question in the NPRM regarding the scope of the term "agent" in 2 U.S.C. 441i(e), the sponsors stated that it was their intent that the restrictions on candidate/officer holder solicitations apply to an agent "acting on behalf of" either. Accordingly, the final rule states throughout that it applies to an individual who is an agent "acting on behalf of" a Federal candidate or officeholder. BCRA's sponsors and the same public interest commenter also pointed out that proposed 11 CFR 300.52(b)(2) (mirrored in proposed 11 CFR 300.65(b)(2)) did not make clear that the specific solicitations permitted for Federal election activity or organizations principally engaged in such activities applies only to 501(c) organizations and not to other tax exempt organizations, such as section 527 organizations. The Commission agrees. Accordingly, the introductory language in the final rule specifically states that the requirements for solicitations in the rule apply to 501(c) organizations.

Paragraph (c) of the final rule enumerates the specific types of Federal election activity for which a Federal candidate or officeholder can make specific solicitations and incorporates the definitions of those activities at 11 CFR 100.24(a). Because BCRA permits limited solicitations only for specific Federal election activities, new paragraph (d) of the final rule makes clear that solicitations are not permitted for other election activities, including Federal election activity such as public communications promoting or opposing clearly identified Federal candidates. See 11 CFR 100.24(b)(3).

In response to questions raised in the NPRM, BCRA's principal sponsors, a

public interest group, and a non-profit organization agreed that 11 CFR 300.65 should include a safe harbor provision for Federal candidates, officeholders, and their agents, similar to the one for party committees in 11 CFR 300.11 and 11 CFR 300.37. Accordingly, new paragraph (e) provides that a Federal candidate, officeholder, or agent acting on behalf of either, may obtain and rely upon a certification from a section 501(c) organization in determining the scope of the permissible solicitations they may make on behalf of the organization. Paragraph (e) also sets forth the requirements for such a certification: the certification is a written statement signed by an officer or other authorized representative of the organization with knowledge of the organization's activities; the certification states the organization's principal purpose is not to conduct election activities, including Federal election activities described in paragraph (c) of this section; and the certification states that the organization does not intend to pay debts incurred in a prior election cycle for expenditures and disbursements made in connection with an election for Federal office (including for Federal election activity).

A non-profit organization raised several concerns about the restrictions on Federal officeholders soliciting for 501(c) organizations. First, the non-profit group maintained that the regulations should create a presumption that the principal purpose of any 501(c) organization is not to conduct election activity because "under federal tax law, no 501(c) organization may conduct partisan electoral activity as its primary purpose." The commenter was concerned that requiring a candidate or officeholder to verify whether or not an organization engages in election activity as its principal purpose will "result in an unnecessary chilling effect on their assistance" to 501(c) organizations. The commenter was also concerned that IRS Form 990 tax returns and other tax forms mentioned in the NPRM as possible ways to determine an organization's activities or principal purpose would not provide a candidate or officeholder with the necessary information. Second, the commenter urged that any definition of "principal purpose" be based on a multi-year average of an organization's expenditures for Federal election activity to more accurately capture an organization's actual level of electoral activity, which necessarily occurs closer to elections. Finally, the group urged that the regulations include a safe harbor permitting candidates and

officeholders to appear at a Section 501(c) organization's fundraiser or convention as long as no solicitations are made for funds for election activities, or alternatively, for any funds.

Determining whether a particular organization's principal purpose is to conduct election activities, such as voter registration or GOTV, is a fact-based determination that must be made as to a particular organization. Thus, creating a presumption that the principal purpose of any 501(c) organization is not to engage in election activity is inappropriate and could conflict with IRS determinations. As for including a definition of "principal purpose" that is based on a multi-year average of an organization's election expenditures, the Commission lacks sufficient information to establish a particular percentage or average at this time. Finally, the Commission notes that the general and specific solicitations contemplated in 11 CFR 300.65 may take place at a fundraising event conducted by the 501(c) organization.

The Commission agrees with the commenter that IRS Form 990s may not clearly indicate whether or not an organization engages in specific election activities. Therefore, the safe harbor provision in the final rule does not require a Federal candidate or office holder to obtain or rely upon such forms.

As for the concern that Federal candidates and officeholders will be chilled from assisting 501(c) organizations in fundraising, the safe harbor provided in paragraph (e) is intended to ease concerns as to inadvertent violations of the Act, as amended by BCRA. On the other hand, new paragraph (f) of the final rules makes clear that a Federal candidate, Federal officeholder, or individual agents acting on behalf of either may not rely upon a certification obtained from an organization if the individual has actual knowledge that the certification is false. This provision is identical to the provisions applicable to party committees in 11 CFR 300.11 and 300.37.

## **Subpart E—State and Local Candidates**

### *11 CFR 300.70 Scope*

Subpart E implements two provisions of BCRA regarding State and local candidates. 2 U.S.C. 441i(f)(1), (2). Section 300.70 explains that this subpart applies to any candidate for State or local office, individual holding State or local office, or an agent acting on behalf of any such candidate or individual. 2 U.S.C. 441i(f)(1). For example, the subpart applies to an

individual holding Federal office who is a candidate for State or local office. It does not, however, apply to an association or similar group of candidates for State or local office, or of individuals holding State or local office, because they are not addressed in this section of BCRA. The Commission received no comments on this section.

**11 CFR 300.71 Federal Funds Required for Certain Communications**

BCRA prohibits State and local candidates and officeholders from funding certain public communications with non-Federal funds. 2 U.S.C. 441i(f)(1). This prohibition is contained in new 11 CFR 300.71. The prohibition on use of non-Federal funds encompasses *public communications* that refer to a clearly identified candidate for Federal office, if the communication promotes, supports, attacks, or opposes any candidate for that Federal office, regardless of whether the communication expressly advocates voting for or against any candidate. See 2 U.S.C. 431(20)(A)(iii). The section contains a cross reference to section 11 CFR 100.26, which defines the new term *public communication* for purposes of the Act. State and local candidates and officeholders may, however, use Federal funds for these public communications.

No commenters addressed this section.

**11 CFR 300.72 Federal Funds Not Required for Certain Communications**

BCRA contains an exception to the prohibition on the use of Federal funds for certain public communications that permits State and local candidates and officeholders to use non-Federal funds for public communications that refer to Federal candidates but do not promote, support, attack, or oppose any candidate for Federal office. 2 U.S.C. 441i(f)(2). This exception is set forth at new 11 CFR 300.72. Section 300.72 follows the statutory language.

**XI. Part 9034—Entitlements**

**11 CFR 9034.8 Joint Fundraising**

The ban on national party non-Federal fundraising affects the Commission's joint fundraising rules under the Presidential Primary Matching Payment Act at 11 CFR 9034.8. The Commission is, therefore, adding introductory language to this section, advising readers that "[n]othing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring

Federal funds for Federal election activities."

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

The Commission certifies that the attached proposed rules, if promulgated, will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that the national, State, and local party committees of the two major political parties are not small entities under 5 U.S.C. 601, and the number of other small entities to which the rules would apply is not substantial.

**List of Subjects**

**11 CFR Part 100**

Elections.

**11 CFR Part 102**

Political committees and parties, reporting and recordkeeping requirements.

**11 CFR Part 104**

Campaign funds, political committees and parties, reporting and recordkeeping requirements.

**11 CFR Part 106**

Campaign funds, political committees and parties, political candidates.

**11 CFR Part 108**

Elections, reporting and recordkeeping.

**11 CFR Part 110**

Campaigns, political parties and committees.

**11 CFR Part 114**

Business and industry, elections, labor.

**11 CFR Part 300**

Campaign funds, nonprofit organizations, political committees and parties, political candidates, reporting and recordkeeping requirements.

**11 CFR Part 9034**

Campaign funds, reporting and recordkeeping requirements.

For reasons set out in the preamble, Chapter I 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(a)(11), 438(a)(8).

2. Section 100.14 is revised to read as follows:

**§ 100.14 State committee, subordinate committee, district, or local committee (2 U.S.C. 431(15)).**

(a) *State committee* means the organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure and is responsible for the day-to-day operation of the political party at the State level, including an entity that is directly or indirectly established, financed, maintained, or controlled by that organization, as determined by the Commission.

(b) *District or local committee* means any organization that by virtue of the bylaws of a political party or the operation of State law is part of the official party structure, and is responsible for the day-to-day operation of the political party at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State.

(c) *Subordinate committee of a State, district, or local committee* means any organization that at the level of city, county, neighborhood, ward, district, precinct, or any other subdivision of a State or any organization under the control or direction of the State committee, and is directly or indirectly established, financed, maintained, or controlled by the State, district, or local committee.

3. Sections 100.24, 100.25, 100.26, 100.27, and 100.28 are added to read as follows:

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

(a) As used in this section, and in part 300 of this chapter,

(1) *In connection with an election in which a candidate for Federal office appears on the ballot* means:

(i) The period of time beginning on the date of the earliest filing deadline for access to the primary election ballot for Federal candidates as determined by State law, or in those States that do not conduct primaries, on January 1 of each even-numbered year and ending on the date of the general election, up to and including the date of any general runoff.

(ii) In an odd-numbered year, the period beginning on the date on which the date of a special election in which a candidate for Federal office appears on the ballot is set and ending on the date of the special election.

(2) *Voter registration activity* means contacting individuals by telephone, in person, or by other individualized means to assist them in registering to vote. Voter registration activity



includes, but is not limited to, printing and distributing registration and voting information, providing individuals with voter registration forms, and assisting individuals in the completion and filing of such forms.

(3) *Get-out-the-vote activity* means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. Get-out-the-vote activity shall not include any communication by an association or similar group of candidates for State or local office or of individuals holding State or local office if such communication refers only to one or more State or local candidates. Get-out-the-vote activity includes, but is not limited to:

(i) Providing to individual voters, within 72 hours of an election, information such as the date of the election, the times when polling places are open, and the location of particular polling places; and

(ii) Offering to transport or actually transporting voters to the polls.

(4) *Voter identification* means creating or enhancing voter lists by verifying or adding information about the voters' likelihood of voting in an upcoming election or their likelihood of voting for specific candidates. This paragraph shall not apply to an association or similar group of candidates for State or local office or of individuals holding State or local office if the association or group engages in voter identification that refers only to one or more State or local candidates.

(b) As used in part 300 of this chapter, *Federal election activity* means any of the activities described in paragraphs (b)(1) through (b)(4) of this section.

(1) Voter registration activity during the period that begins on the date that is 120 calendar days before the date that a regularly scheduled Federal election is held and ends on the date of the election. For purposes of voter registration activity, the term "election" does not include any special election.

(2) The following activities conducted in connection with an election in which one or more candidates for Federal office appears on the ballot (regardless of whether one or more candidates for State or local office also appears on the ballot):

(i) Voter identification.

(ii) Generic campaign activity, as defined in 11 CFR 100.25.

(iii) Get-out-the-vote activity.

(3) A public communication that refers to a clearly identified candidate for Federal office, regardless of whether a candidate for State or local election is also mentioned or identified, and that

promotes or supports, or attacks or opposes any candidate for Federal office. This paragraph applies whether or not the communication expressly advocates a vote for or against a Federal candidate.

(4) Services provided during any month by an employee of a State, district, or local committee of a political party who spends more than 25 percent of that individual's compensated time during that month on activities in connection with a Federal election.

(c) *Exceptions. Federal election activity* does not include any amount expended or disbursed by a State, district, or local committee of a political party for any of the following activities:

(1) A public communication that refers solely to one or more clearly identified candidates for State or local office and that does not promote or support, or attack or oppose a clearly identified candidate for Federal office; provided, however, that such a public communication shall be considered a Federal election activity if it constitutes voter registration activity, generic campaign activity, get-out-the-vote activity, or voter identification.

(2) A contribution to a candidate for State or local office, provided the contribution is not designated to pay for voter registration activity, voter identification, generic campaign activity, get-out-the-vote activity, a public communication, or employee services as set forth in paragraphs (a)(1) through (4) of this section.

(3) The costs of a State, district, or local political convention, meeting or conference.

(4) The costs of grassroots campaign materials, including buttons, bumper stickers, handbills, brochures, posters, and yard signs, that name or depict only candidates for State or local office.

**§ 100.25 Generic campaign activity (2 U.S.C. 431(21)).**

*Generic campaign activity* means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate.

**§ 100.26 Public communication (2 U.S.C. 431(22)).**

*Public communication* means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.

**§ 100.27 Mass mailing (2 U.S.C. 431(23)).**

*Mass mailing* means a mailing by United States mail or facsimile of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. A mass mailing does not include electronic mail or Internet communications. For purposes of this section, *substantially similar* includes communications that include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location.

**§ 100.28 Telephone bank (2 U.S.C. 431(24)).**

*Telephone bank* means more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. A telephone bank does not include electronic mail or Internet communications transmitted over telephone lines. For purposes of this section, *substantially similar* includes communications that include substantially the same template or language, but vary in non-material respects such as communications customized by the recipient's name, occupation, or geographic location.

4. Sections 100.29 through 100.50 are added and reserved.

5. Sections 100.1 through 100.50 are designated as subpart A—General Definitions.

**PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)**

6. The authority citation for part 102 continues to read as follows:

**Authority:** 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

7. Section 102.5 is revised to read as follows:

**§ 102.5 Organizations financing political activity in connection with Federal and non-Federal elections, other than through transfers and joint fundraisers: Accounts and Accounting.**

(a) *Organizations that are political committees under the Act, other than national party committees.*

(1) Each organization, including a State, district, or local party committee, that finances political activity in connection with both Federal and non-Federal elections and that qualifies as a political committee under 11 CFR 100.5 shall either:

(i) Establish a separate Federal account in a depository in accordance with 11 CFR part 103. Such account shall be treated as a separate Federal

political committee that must comply with the requirements of the Act including the registration and reporting requirements of 11 CFR parts 102 and 104. Only funds subject to the prohibitions and limitations of the Act shall be deposited in such separate Federal account. See 11 CFR 103.3. All disbursements, contributions, expenditures, and transfers by the committee in connection with any Federal election shall be made from its Federal account, except as otherwise permitted for State, district, and local party committees by 11 CFR part 300 and paragraph (a)(5) of this section. No transfers may be made to such Federal account from any other account(s) maintained by such organization for the purpose of financing activity in connection with non-Federal elections, except as provided by 11 CFR 300.33, 300.34, 106.6(c), and 106.7(f). Administrative expenses for political committees other than party committees shall be allocated pursuant to 11 CFR 106.6 between such Federal account and any other account maintained by such committee for the purpose of financing activity in connection with non-Federal elections. Administrative expenses for State, district, and local party committees are subject to 11 CFR 106.7 and 11 CFR part 300; or

(ii) Establish a political committee that shall receive only contributions subject to the prohibitions and limitations of the Act, regardless of whether such contributions are for use in connection with Federal or non-Federal elections. Such organization shall register as a political committee and comply with the requirements of the Act.

(2) Only contributions meeting any of the conditions set forth in paragraphs (a)(2)(i), (ii), or (iii) of this section may be deposited in a Federal account established under paragraph (a)(1)(i) of this section, see 11 CFR 103.3, or may be received by a political committee established under paragraph (a)(1)(ii) of this section:

(i) Contributions designated for the Federal account;

(ii) Contributions that result from a solicitation which expressly states that the contribution will be used in connection with a Federal election; or

(iii) Contributions from contributors who are informed that all contributions are subject to the prohibitions and limitations of the Act.

(3) State, district, and local party committees that intend to expend Levin funds raised pursuant to 11 CFR 300.31 for activities identified in 11 CFR 300.32(b)(1) must either:

(i) Establish one or more separate Levin accounts pursuant to 11 CFR 300.30(c)(2); or

(ii) Demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that whenever such organization makes a payment that organization has received sufficient funds subject to the limitations and prohibitions of the Act or the requirements of 11 CFR 300.30(c)(1) or (3) to make such payment. Such organization shall keep records of amounts received or expended under this paragraph and, upon request, shall make such records available for examination by the Commission.

(4) Solicitations by Federal candidates and Federal officeholders for State, district, and local party committees are subject to the restrictions in 11 CFR 300.31(e) and 11 CFR part 300, subpart D.

(5) State, district, and local party committees and organizations may establish one or more separate allocation accounts to be used for activities allocable pursuant to 11 CFR 106.7 and 11 CFR 300.33.

(b) *Organizations that are not political committees under the Act.*

(1) Any organization that makes contributions, expenditures, and exempted payments under 11 CFR 100.7(b)(9), (15) and (17) and 11 CFR 100.8(b)(10), (16) and (18), but that does not qualify as a political committee under 11 CFR 100.5, must keep records of receipts and disbursements and, upon request, must make such records available for examination by the Commission. The organization must demonstrate through a reasonable accounting method that, whenever such an organization makes a contribution or expenditure, or payment, the organization has received sufficient funds subject to the limitations and prohibitions of the Act to make such contribution, expenditure, or payment.

(2) Any State, district, or local party organization that makes payments for certain Federal election activities under 11 CFR 300.32(b) must either:

(i) Establish one or more Levin accounts pursuant to 11 CFR 300.30(b) into which only funds solicited pursuant to 11 CFR 300.31 may be deposited and from which payments must be made pursuant to 11 CFR 300.32 and 300.33. See 11 CFR 300.30(c)(2)(i); or

(ii) Demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or

approved by the Commission) that whenever such organization makes a payment that organization has received sufficient funds subject to the limitations and prohibitions of the Act or the requirements of 11 CFR 300.31 to make such payment. Such organization shall keep records of amounts received or expended under this paragraph and, upon request, shall make such records available for examination by the Commission. See 11 CFR 300.30(c)(2)(ii).

(3) All such party organizations shall keep records of deposits to and disbursements from such Federal and Levin accounts, and upon request, shall make such records available for examination by the Commission.

(c) *National party committees.* Between November 6, 2002, and December 31, 2002, paragraphs (a) and (b) of this section apply to national party committees. After December 31, 2002, national party committees are prohibited from raising and spending non-Federal funds. Therefore, this section does not apply to national party committees after December 31, 2002.

8. Section 102.17 is amended by adding introductory language to paragraph (a) to read as follows:

**§ 102.17 Joint fundraising by committees other than separate segregated funds.**

(a) *General.* Nothing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities.

\* \* \* \* \*

**PART 104—REPORTS BY POLITICAL COMMITTEES (2 U.S.C. 434)**

9. The authority citation for part 104 continues to read as follows:

**Authority:** 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8), 438(b), 439a.

10. Section 104.8 is amended by revising paragraphs (e) and (f) to read as follows:

**§ 104.8 Uniform reporting of receipts.**

\* \* \* \* \*

(e) For reports covering activity on or before December 31, 2002, national party committees shall disclose in a memo Schedule A information about each individual, committee, corporation, labor organization, or other entity that donates an aggregate amount in excess of \$200 in a calendar year to the committee's non-Federal account(s). This information shall include the donating individual's or entity's name,

mailing address, occupation or type of business, and the date of receipt and amount of any such donation. If a donor's name is known to have changed since an earlier donation reported during the calendar year, the exact name or address previously used shall be noted with the first reported donation from that donor subsequent to the name change. The memo entry shall also include, where applicable, the information required by paragraphs (b) through (d) of this section.

(f) For reports covering activity on or before December 31, 2002, national party committees shall also disclose in a memo Schedule A information about each individual, committee, corporation, labor organization, or other entity that donates an aggregate amount in excess of \$200 in a calendar year to the committee's building fund account(s). This information shall include the donating individual's or entity's name, mailing address, occupation or type of business, and the date of receipt and amount of any such donation. If a donor's name is known to have changed since an earlier donation reported during the calendar year, the exact name or address previously used shall be noted with the first reported donation from that donor subsequent to the name change. The memo entry shall also include, where applicable, the information required by paragraphs (b) through (d) of this section.

11. Section 104.9 is amended by revising paragraphs (c), (d), and (e) to read as follows:

**§ 104.9 Uniform reporting of disbursements.**

\* \* \* \* \*

(c) For reports covering activity on or before March 31, 2003, national party committees shall report in a memo Schedule B the full name and mailing address of each person to whom a disbursement in an aggregate amount or value in excess of \$200 within the calendar year is made from the committee's non-Federal account(s), together with the date, amount, and purpose of such disbursement, in accordance with paragraph (b) of this section. As used in this section, *purpose* means a brief statement or description as to the reasons for the disbursement. See 11 CFR 104.3(b)(3)(i)(A).

(d) For reports covering activity on or before March 31, 2003, national party committees shall report in a memo Schedule B the full name and mailing address of each person to whom a disbursement in an aggregate amount or value in excess of \$200 within the calendar year is made from the committee's building fund account(s),

together with the date, amount, and purpose of such disbursement, in accordance with paragraph (b) of this section. As used in this section, *purpose* means a brief statement or description as to the reasons for the disbursement. See 11 CFR 104.3(b)(3)(i)(A).

(e) For reports covering activity on or before December 31, 2002, national party committees shall report in a memo Schedule B each transfer from their non-Federal account(s) to the non-Federal accounts of a State or local party committee.

12. Section 104.10 is revised to read as follows:

**§ 104.10 Reporting by separate segregated funds and nonconnected committees of expenses allocated among candidates and activities.**

(a) *Expenses allocated among candidates.* A political committee that is a separate segregated fund or a nonconnected committee making an expenditure on behalf of more than one clearly identified candidate for Federal office shall allocate the expenditure among the candidates pursuant to 11 CFR part 106. Payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates shall also be allocated pursuant to 11 CFR part 106. For allocated expenditures, the committee shall report the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each Federal candidate. If a payment also includes amounts attributable to one or more non-Federal candidates, and is made by a political committee with separate Federal and non-Federal accounts, then the payment shall be made according to the procedures set forth in 11 CFR 106.6(e), but shall be reported pursuant to paragraphs (a)(1) through (a)(4) of this section, as follows:

(1) *Reporting of allocation of expenses attributable to specific Federal and non-Federal candidates.* In each report disclosing a payment that includes both expenditures on behalf of one or more Federal candidates and disbursements on behalf of one or more non-Federal candidates, the committee shall assign a unique identifying title or code to each program or activity conducted on behalf of such candidates, shall state the allocation ratio calculated for the program or activity, and shall explain the manner in which the ratio was derived. The committee shall also summarize the total amounts attributed to each candidate, to date, for each joint program or activity.

(2) *Reporting of transfers between accounts for the purpose of paying expenses attributable to specific Federal and non-Federal candidates.* A political committee that pays allocable expenses in accordance with 11 CFR 106.6(e) shall report each transfer of funds from its non-Federal account to its Federal account or to its separate allocation account for the purpose of paying such expenses. In the report covering the period in which each transfer occurred, the committee shall explain in a memo entry the allocable expenses to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one program or activity, the committee shall itemize the transfer, showing the amounts designated for each program or activity conducted on behalf of one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates.

(3) *Reporting of allocated disbursements attributable to specific Federal and non-Federal candidates.* A political committee that pays allocable expenses in accordance with 11 CFR 106.6(e) shall also report each disbursement from its Federal account or its separate allocation account in payment for a program or activity conducted on behalf of one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates. In the report covering the period in which the disbursement occurred, the committee shall state the full name and address of each person to whom the disbursement was made, and the date, amount, and purpose of each such disbursement. If the disbursement includes payment for the allocable costs of more than one program or activity, the committee shall itemize the disbursement, showing the amounts designated for payment of each program or activity conducted on behalf of one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates. The committee shall also report the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each Federal candidate, and the total amount attributed to the non-Federal candidate(s). In addition, the committee shall report the total amount expended by the committee that year, to date, for each joint program or activity.

(4) *Recordkeeping.* The treasurer shall retain all documents supporting the committee's allocation on behalf of specific Federal and non-Federal candidates, in accordance with 11 CFR 104.14.

(b) *Expenses allocated among activities.* A political committee that is a separate segregated fund or a nonconnected committee and that has established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate between those accounts its administrative expenses and its costs for fundraising and generic voter drives according to 11 CFR 106.6, and shall report those allocations according to paragraphs (b) (1) through (5) of this section, as follows:

(1) *Reporting of allocation of administrative expenses and costs of generic voter drives.*

(i) In the first report in a calendar year disclosing a disbursement for administrative expenses or generic voter drives, as described in 11 CFR 106.6(b), the committee shall state the allocation ratio to be applied to these categories of activity according to 11 CFR 106.6(c), and the manner in which it was derived.

(ii) In each subsequent report in the calendar year itemizing an allocated disbursement for administrative expenses or generic voter drives:

(A) The committee shall state the category of activity for which each allocated disbursement was made, and shall summarize the total amount spent by the Federal and non-Federal accounts that year, to date, for each such category.

(B) The committees shall also report in a memo entry the total amounts expended in donations and direct disbursements on behalf of specific State and local candidates, to date, in that calendar year.

(2) *Reporting of allocation of the direct costs of fundraising.* In each report disclosing a disbursement for the direct costs of a fundraising program, as described in 11 CFR 106.6(b), the committee shall assign a unique identifying title or code to each such program or activity, shall state the allocation ratio calculated for the program or activity according to 11 CFR 106.6(d), and shall explain the manner in which the ratio was derived. The committee shall also summarize the total amounts spent by the Federal and non-Federal accounts that year, to date, for each such program or activity.

(3) *Reporting of transfers between accounts for the purpose of paying allocable expenses.* A political committee that pays allocable expenses in accordance with 11 CFR 106.6(e) shall report each transfer of funds from its non-Federal account to its Federal account or to its separate allocation account for the purpose of paying such expenses. In the report covering the period in which each transfer occurred,

the committee shall explain in a memo entry the allocable expenses to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one activity, the committee shall itemize the transfer, showing the amounts designated for administrative expenses and generic voter drives, and for each fundraising program, as described in 11 CFR 106.6(b).

(4) *Reporting of allocated disbursements.* A political committee that pays allocable expenses in accordance with 11 CFR 106.6(e) shall also report each disbursement from its Federal account or its separate allocation account in payment for a joint Federal and non-Federal expense or activity. In the report covering the period in which the disbursement occurred, the committee shall state the full name and address of each person to whom the disbursement was made, and the date, amount, and purpose of each such disbursement. If the disbursement includes payment for the allocable costs of more than one activity, the committee shall itemize the disbursement, showing the amounts designated for payment of administrative expenses and generic voter drives, and for each fundraising program, as described in 11 CFR 106.6(b). The committee shall also report the total amount expended by the committee that year, to date, for each category of activity.

(5) *Recordkeeping.* The treasurer shall retain all documents supporting the committee's allocated disbursements for three years, in accordance with 11 CFR 104.14.

13. Part 104 is amended by adding § 104.17 to read as follows:

**§ 104.17 Reporting of allocable expenses by party committees.**

(a) *Expenses allocated among candidates.* A national party committee making an expenditure on behalf of more than one clearly identified candidate for Federal office must report the allocation between or among the named candidates. A national party committee making expenditures and disbursements on behalf of one or more clearly identified Federal candidates and on behalf of one or more clearly identified non-Federal candidates must report the allocation among all named candidates. These payments shall be allocated among candidates pursuant to 11 CFR part 106, but only Federal funds may be used for such payments. A State, district, or local party committee making expenditures and disbursements for Federal election activity as defined at 11 CFR 100.24 on behalf of one or

more clearly identified Federal and one or more clearly identified non-Federal candidates must make the payments from its Federal account and must report the allocation among all named candidates. A State, district, or local party committee making expenditures and disbursements on behalf of one or more clearly identified Federal and one or more clearly identified non-Federal candidates where the activity is not a Federal election activity may allocate the payments between its Federal and non-Federal account and must report the allocation among all named candidates. For allocated expenditures, the committee must report the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each candidate. If a payment also includes amounts attributable to one or more non-Federal candidates, and is made by a State, district, or local party committee with separate Federal and non-Federal accounts, and is not for a Federal election activity, then the payment shall be made according to the procedures set forth in 11 CFR 106.7(f), but shall be reported pursuant to paragraphs (a)(1) through (a)(4) of this section, as follows:

(1) *Reporting of allocation of expenses attributable to specific Federal and non-Federal candidates.* In each report disclosing a payment that includes both expenditures on behalf of one or more Federal candidates and disbursements on behalf of one or more non-Federal candidates, the committee must assign a unique identifying title or code to each program or activity conducted on behalf of such candidates, state the allocation ratio calculated for the program or activity, and explain the manner in which the ratio applied to each candidate was derived. The committee must also summarize the total amounts attributed to each candidate, to date, for each program or activity.

(2) *Reporting of transfers between accounts for the purpose of paying expenses attributable to specific Federal and non-Federal candidates.* A State, district, or local party committee that pays allocable expenses in accordance with 11 CFR 106.7(f) shall report each transfer of funds from its non-Federal account to its Federal account or to its separate allocation account for the purpose of paying such expenses. In the report covering the period in which each transfer occurred, the State, district, or local party committee shall explain in a memo entry the allocable expenses to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one

program or activity, the State, district, or local party committee must itemize the transfer, showing the amounts designated for each program or activity conducted on behalf of one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates.

(3) *Reporting of allocated disbursements attributable to specific Federal and non-Federal candidates.* A State, district, or local committee that pays allocable expenses in accordance with 11 CFR 106.7(f) shall also report each disbursement from its Federal account or its separate allocation account in payment for a program or activity conducted on behalf of one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates. In the report covering the period in which the disbursement occurred, the State, district, or local party committee shall state the full name and address of each person to whom the disbursement was made, and the date, amount, and purpose of each such disbursement. If the disbursement includes payment for the allocable costs of more than one program or activity, the committee shall itemize the disbursement, showing the amounts designated for payment of each program or activity conducted on behalf of one or more clearly identified Federal candidates and one or more clearly identified non-Federal candidates. The State, district, or local party committee must also report the amount of each in-kind contribution, independent expenditure, or coordinated expenditure attributed to each Federal candidate, and the total amount attributed to the non-Federal candidate(s). In addition, the State, district, or local party committee must report the total amount expended by the committee that year, to date, for each joint program or activity.

(4) *Recordkeeping.* The treasurer of a State, district, or local party committee must retain all documents supporting the committee's allocations on behalf of specific Federal and non-Federal candidates, in accordance with 11 CFR 104.14.

(b) *Allocation of activities that are not Federal election activities.* A State, district, or local committee of a political party that has established separate Federal and non-Federal accounts, including related allocation accounts, under 11 CFR 102.5 must report all payments that are allocable between these accounts pursuant to the allocation rules in 11 CFR 106.7. Disbursements for activities that are allocable between Federal and Levin accounts, including related allocation

accounts, must be reported pursuant to 11 CFR 300.36.

(1) *Reporting of allocations of expenses for activities that are not Federal election activities.*

(i) In the first report in a calendar year disclosing a disbursement allocable pursuant to 11 CFR 106.7, a State, district, or local committee shall state and explain the allocation percentages to be applied to each category of allocable activity (e.g., 36% Federal/64% non-Federal in Presidential and Senate election years) pursuant to 11 CFR 106.7(d).

(ii) In each subsequent report in the calendar year itemizing an allocated disbursement, the State, district, or local party committee shall state the category of activity for which each allocated disbursement was made, and shall summarize the total amounts expended from Federal and non-Federal accounts, or from allocation accounts, that year to date for each such category.

(iii) In each report disclosing disbursements for allocable activities as described in 11 CFR 106.7, the State, district, or local party committee shall assign a unique identifying title or code to each such program or activity, and shall state the applicable Federal/non-Federal percentage for any direct costs of fundraising. Unique identifying titles or codes are not required for salaries and wages pursuant to 11 CFR 106.7(c)(1), or for other administrative costs allocated pursuant to 11 CFR 106.7(c)(2).

(2) *Reporting of transfers between the accounts of State, district, and local party committees and into allocation accounts for allocable expenses.* A State, district, or local committee of a political party that pays allocable expenses in accordance with 11 CFR 106.7 shall report each transfer of funds from its non-Federal account to its Federal account, or each transfer from its Federal account and its non-Federal account into an allocation account, for the purpose of payment of such expenses. In the report covering the period in which each transfer occurred, the State, district, or local party committee must explain in a memo entry the allocable expenses to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one activity, the State, district, or local party committee must itemize the transfer, showing the amounts designated for each category of expense as described in 11 CFR 106.7.

(3) *Reporting of allocated disbursements for certain allocable activity that is not Federal election activity.*

(i) A State, district, or local committee of a political party that pays allocable expenses in accordance with 11 CFR 106.7 shall report each disbursement from its Federal account for allocable expenses, or each payment from an allocation account for such activity. In the report covering the period in which the disbursement occurred, the State, district, or local committee shall state the full name and address of each individual or vendor to which the disbursement was made, the date, amount, and purpose of each such disbursement, and the amounts allocated to Federal and non-Federal portions of the allocable activity. If the disbursement includes payment for the allocable costs of more than one activity, the State, district, or local party committee must itemize the disbursement, showing the amounts designated for payments of particular categories of activity as described in 11 CFR 106.7. The State, district, or local party committee must also report the total amount paid that calendar year to date for each category of allocable activity.

(ii) A State, district, or local committee of a political party that pays allocable expenses from a Federal account and a Levin account in accordance with 11 CFR 300.33 shall report disbursements from those accounts according to the requirements of 11 CFR 300.36.

(4) *Recordkeeping.* The treasurer of a State, district, or local party committee must retain all documents supporting the committee's allocations of expenditures and disbursements for the costs and activities cited at paragraph (b) of this section, in accordance with 11 CFR 104.14.

## **PART 106—ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

14. The authority citation for part 106 continues to read as follows:

**Authority:** 2 U.S.C. 438(a)(8), 441a(b), 441a(g).

15. Section 106.1 is amended by revising paragraphs (a)(1), (a)(2), and (e) to read as follows:

### **§ 106.1 Allocation of expenses between candidates.**

(a) *General rule.*

(1) Expenditures, including in-kind contributions, independent expenditures, and coordinated expenditures made on behalf of more than one clearly identified Federal candidate shall be attributed to each such candidate according to the benefit reasonably expected to be derived. For

example, in the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates. In the case of a fundraising program or event where funds are collected by one committee for more than one clearly identified candidate, the attribution shall be determined by the proportion of funds received by each candidate as compared to the total receipts by all candidates. In the case of a phone bank, the attribution shall be determined by the number of questions or statements devoted to each candidate as compared to the total number of questions or statements devoted to all candidates. These methods shall also be used to allocate payments involving both expenditures on behalf of one or more clearly identified Federal candidates and disbursements on behalf of one or more clearly identified non-Federal candidates.

(2) An expenditure made on behalf of more than one clearly identified Federal candidate shall be reported pursuant to 11 CFR 104.10(a) or 104.17(a), as appropriate. A payment that also includes amounts attributable to one or more non-Federal candidates, and that is made by a political committee with separate Federal and non-Federal accounts, shall be made according to the procedures set forth in 11 CFR 106.6(e) or 106.7(f), but shall be reported pursuant to 11 CFR 104.10(a) or 104.17(a). If a State, district, or local party committee's payment on behalf of both a Federal candidate and a non-Federal candidate is for a Federal election activity, only Federal funds may be used for the entire payment. For Federal election activities, the provisions of 11 CFR 300.33 and 104.17(a) will apply to payments attributable to candidates.

\* \* \* \* \*

(e) State, district, and local party committees, separate segregated funds, and nonconnected committees that make mixed Federal/non-Federal payments for activities other than an activity entailing an expenditure for a Federal candidate and disbursement for a non-Federal candidate, or that make mixed Federal/Levin fund payments, shall allocate those expenses in accordance with 11 CFR 106.6, 106.7, or 300.33, as appropriate.

16. Section 106.5 is revised to read as follows:

**§ 106.5 Allocation of expenses between federal and non-federal activities by national party committees.**

(a) *General rules.*

(1) *Disbursements from Federal and non-Federal accounts.* National party committees that make disbursements in connection with Federal and non-Federal elections shall make those disbursements entirely from funds subject to the prohibitions and limitations of the Act, or from accounts established pursuant to 11 CFR 102.5. Political committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to this section. Organizations that are not political committees but have established separate Federal and non-Federal accounts under 11 CFR 102.5(b)(1)(i), or that make Federal and non-Federal disbursements from a single account under 11 CFR 102.5(b)(1)(ii), shall also allocate their Federal and non-Federal expenses according to this section. This section covers:

(i) General rules regarding allocation of Federal and non-Federal expenses by party committees;

(ii) Percentages to be allocated for administrative expenses and costs of generic voter drives by national party committees;

(iii) Methods for allocation of administrative expenses, costs of generic voter drives, and of fundraising costs by national party committees; and

(iv) Procedures for payment of allocable expenses. Requirements for reporting of allocated disbursements are set forth in 11 CFR 104.10.

(2) *Costs to be allocated.* National party committees that make disbursements in connection with Federal and non-Federal elections shall allocate expenses according to this section for the following categories of activity:

(i) Administrative expenses including rent, utilities, office supplies, and salaries, except for such expenses directly attributable to a clearly identified candidate;

(ii) The direct costs of a fundraising program or event including disbursements for solicitation of funds and for planning and administration of actual fundraising events, where Federal and non-Federal funds are collected by one committee through such program or event; and

(iii) [Removed and reserved]

(iv) Generic voter drives including voter identification, voter registration, and get-out-the-vote drives, or any other activities that urge the general public to register, vote or support candidates of a particular party or associated with a particular issue, without mentioning a specific candidate.

(b) *National party committees other than Senate or House campaign committees; fixed percentages for allocating administrative expenses and costs of generic voter drives.*

(1) *General rule.* Each national party committee other than a Senate or House campaign committee shall allocate a fixed percentage of its administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, to its Federal and non-Federal account(s) each year. These percentages shall differ according to whether or not the allocable expenses were incurred in a presidential election year. Such committees shall allocate the costs of each combined Federal and non-Federal fundraising program or event according to paragraph (f) of this section, with no fixed percentages required.

(2) *Fixed percentages according to type of election year.* National party committees other than the Senate or House campaign committees shall allocate their administrative expenses and costs of generic voter drives according to paragraphs (b)(2) (i) and (ii) as follows:

(i) *Presidential election years.* In presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their Federal accounts at least 65% each of their administrative expenses and costs of generic voter drives.

(ii) *Non-presidential election years.* In all years other than presidential election years, national party committees other than the Senate or House campaign committees shall allocate to their Federal accounts at least 60% each of their administrative expenses and costs of generic voter drives.

(c) *Senate and House campaign committees of a national party; method and minimum Federal percentage for allocating administrative expenses and costs of generic voter drives.*

(1) *Method for allocating administrative expenses and costs of generic voter drives.* Subject to the minimum percentage set forth in paragraph (c)(2) of this section, each Senate or House campaign committee of a national party shall allocate its administrative expenses and costs of generic voter drives, as described in paragraph (a)(2) of this section, according to the funds expended method, described in paragraphs (c)(1)(i) and (ii) as follows:

(i) Under this method, expenses shall be allocated based on the ratio of Federal expenditures to total Federal and non-Federal disbursements made by the committee during the two-year

Federal election cycle. This ratio shall be estimated and reported at the beginning of each Federal election cycle, based upon the committee's Federal and non-Federal disbursements in a prior comparable Federal election cycle or upon the committee's reasonable prediction of its disbursements for the coming two years. In calculating its Federal expenditures, the committee shall include only amounts contributed to or otherwise spent on behalf of specific federal candidates. Calculation of total Federal and non-Federal disbursements shall also be limited to disbursements for specific candidates, and shall not include overhead or other generic costs.

(ii) On each of its periodic reports, the committee shall adjust its allocation ratio to reconcile it with the ratio of actual Federal and non-Federal disbursements made, to date. If the non-Federal account has paid more than its allocable share, the committee shall transfer funds from its Federal to its non-Federal account, as necessary, to reflect the adjusted allocation ratio. The committee shall make note of any such adjustments and transfers on its periodic reports, submitted pursuant to 11 CFR 104.5.

(2) *Minimum Federal percentage for administrative expenses and costs of generic voter drives.* Regardless of the allocation ratio calculated under paragraph (c)(1) of this section, each Senate or House campaign committee of a national party shall allocate to its Federal account at least 65% each of its administrative expenses and costs of generic voter drives each year. If the committee's own allocation calculation under paragraph (c)(1) of this section yields a Federal share greater than 65%, then the higher percentage shall be applied. If such calculation yields a Federal share lower than 65%, then the committee shall report its calculated ratio according to 11 CFR 104.10(b), and shall apply the required minimum Federal percentage.

(3) *Allocation of fundraising costs.* Senate and House campaign committees shall allocate the costs of each combined Federal and non-Federal fundraising program or event according to paragraph (f) of this section, with no minimum percentages required.

(d) [Reserved].

(e) [Reserved].

(f) *National party committees; method for allocating direct costs of fundraising.*

(1) If Federal and non-Federal funds are collected by one committee through a joint activity, that committee shall allocate its direct costs of fundraising, as described in paragraph (a)(2) of this section, according to the funds received

method. Under this method, the committee shall allocate its fundraising costs based on the ratio of funds received into its Federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its Federal and non-Federal revenue from that program or event, and shall be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event shall be allocated according to this estimated ratio.

(2) No later than the date 60 days after each fundraising program or event from which both Federal and non-Federal funds are collected, the committee shall adjust the allocation ratio for that program or event to reflect the actual ratio of funds received. If the non-Federal account has paid more than its allocable share, the committee shall transfer funds from its Federal to its non-Federal account, as necessary, to reflect the adjusted allocation ratio. If the Federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-Federal to its federal account to reflect the adjusted allocation ratio within the 60-day time period established by this paragraph. The committee shall make note of any such adjustments and transfers in its report for any period in which a transfer was made, and shall also report the date of the fundraising program or event that serves as the basis for the transfer. In the case of a telemarketing or direct mail campaign, the date for purposes of this paragraph is the last day of the telemarketing campaign, or the day on which the final direct mail solicitations are mailed.

(g) *Payment of allocable expenses by committees with separate Federal and non-Federal accounts.*

(1) *Payment options.* Committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) or (b)(1)(i) shall pay the expenses of joint Federal and non-Federal activities described in paragraph (a)(2) of this section according to either paragraph (g)(1)(i) or (ii), as follows:

(i) *Payment by Federal account; transfers from non-Federal account to Federal account.* The committee shall pay the entire amount of an allocable expense from its Federal account and shall transfer funds from its non-Federal account to its Federal account solely to

cover the non-Federal share of that allocable expense.

(ii) *Payment by separate allocation account; transfers from Federal and non-Federal accounts to allocation account.*

(A) The committee shall establish a separate allocation account into which funds from its Federal and non-Federal accounts shall be deposited solely for the purpose of paying the allocable expenses of joint Federal and non-Federal activities. Once a committee has established a separate allocation account for this purpose, all allocable expenses shall be paid from that account for as long as the account is maintained.

(B) The committee shall transfer funds from its Federal and non-Federal accounts to its allocation account in amounts proportionate to the Federal or non-Federal share of each allocable expense.

(C) No funds contained in the allocation account may be transferred to any other account maintained by the committee.

(2) *Timing of transfers between accounts.*

(i) Under either payment option described in paragraphs (g)(1)(i) or (ii) of this section, the committee shall transfer funds from its non-Federal account to its Federal account or from its Federal and non-Federal accounts to its separate allocation account following determination of the final cost of each joint Federal and non-Federal activity, or in advance of such determination if advance payment is required by the vendor and if such payment is based on a reasonable estimate of the activity's final cost as determined by the committee and the vendor(s) involved.

(ii) Funds transferred from a committee's non-Federal account to its Federal account or its allocation account are subject to the following requirements:

(A) For each such transfer, the committee must itemize in its reports the allocable activities for which the transferred funds are intended to pay, as required by 11 CFR 104.10(b)(3); and

(B) Except as provided in paragraph (f)(2) of this section, such funds may not be transferred more than 10 days before or more than 60 days after the payments for which they are designated are made.

(iii) Any portion of a transfer from a committee's non-Federal account to its Federal account or its allocation account that does not meet the requirements of paragraph (g)(2)(ii) of this section shall be presumed to be a loan or contribution from the non-Federal account to a Federal account, in violation of the Act.

(3) *Reporting transfers of funds and allocated disbursements.* A political committee that transfers funds between accounts and pays allocable expenses according to this section shall report each such transfer and disbursement pursuant to 11 CFR 104.10(b).

(h) *Sunset provision.* This section applies from November 6, 2002, to December 31, 2002. After December 31, 2002, see 11 CFR 106.7(a).

17. Section 106.7 is added to part 106 to read as follows:

**§ 106.7 Allocation of expenses between Federal and non-Federal accounts by party committees, other than for Federal election activities.**

(a) National party committees are prohibited from raising or spending non-Federal funds. Therefore, these committees shall not allocate expenditures and disbursements between Federal and non-Federal accounts. All disbursements by a national party committee must be made from a Federal account.

(b) State, district, and local party committees that make expenditures and disbursements in connection with both Federal and non-Federal elections for activities that are not Federal election activities pursuant to 11 CFR 100.24 may use only funds subject to the prohibitions and limitations of the Act, or they may allocate such expenditures and disbursements between their Federal and their non-Federal accounts. State, district, and local party committees that are political committees that have established separate Federal and non-Federal accounts under 11 CFR 102.5(a)(1)(i) shall allocate expenses between those accounts according to paragraphs (c) and (d) of this section. Party organizations that are not political committees but have established separate Federal and non-Federal accounts, or that make Federal and non-Federal disbursements from a single account, shall also allocate their Federal and non-Federal expenses according to paragraphs (c) and (d) of this section. In lieu of establishing separate accounts, party organizations that are not political committees may choose to use a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) pursuant to 11 CFR 102.5 and 300.30.

(c) *Costs allocable by State, district, and local party committees between Federal and non-Federal accounts.*

(1) *Salaries and wages.* State, district, and local party committees must pay salaries and wages from funds that comply with State law for employees who spend 25% or less of their time in

any given month on Federal election activity or activity in connection with a Federal election. See 11 CFR 300.33(c)(2).

(2) *Administrative costs.* State, district, and local party committees may either pay administrative costs, including rent, utilities, office equipment, office supplies, postage for other than mass mailings, and routine building maintenance, upkeep and repair, from their Federal account, or allocate such expenses between their Federal and non-Federal accounts, except that any such expenses directly attributable to a clearly identified Federal candidate must be paid only from the Federal account.

(3) *Exempt party activities that are not Federal election activities.* State, district, and local party committees may pay expenses for party activities that are exempt from the definitions of contribution and expenditure under 11 CFR 100.7(b)(9), (15), or (17), and 100.8(b)(10), (16), or (18), that are conducted in conjunction with non-Federal activity, and that are not Federal election activities pursuant to 11 CFR 100.24, from their Federal accounts, or may allocate these expenses between their Federal and non-Federal accounts.

(4) *Certain fundraising costs.* State, district, and local party committees may allocate the direct costs of certain fundraising programs or events between their Federal and non-Federal accounts provided that none of the proceeds from the activities or events will ever be used for Federal election activities. The proceeds of fundraising allocated pursuant to this paragraph must be segregated in bank accounts that are never used for Federal election activity. Direct costs of fundraising include disbursements for the planning and administration of specific fundraising events or programs.

(5) *Voter-drive activities that do not qualify as Federal election activities and that are not party exempt activities.* Other than for salaries and wages as described in paragraph (c)(1) of this section, expenses for voter identification, voter registration, and get-out-the-vote drives, and any other activities that urge the general public to register or vote, or that promote or oppose a political party, without promoting or opposing a candidate or non-Federal candidate, that do not qualify as Federal election activities and that are not exempt party activities, must be paid with Federal funds or may be allocated between the committee's Federal and non-Federal accounts.

(d) *Allocation percentages, ratios, and record-keeping.*

(1) *Salaries and wages.* Committees must keep a monthly log of the percentage of time each employee spends in connection with a Federal election. Allocations of salaries and wages shall be undertaken as follows:

(i) Salaries and wages paid for employees who spend 25% or less of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election shall be paid from funds that comply with State law.

(ii) Salaries and wages paid for employees who spend more than 25% of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must be paid only from a Federal account. See 11 CFR 300.33(c)(2), and paragraph (e)(2) of this section.

(2) *Administrative costs.* State, district, and local party committees that choose to allocate administrative expenses may do so subject to the following requirements:

(i) *Presidential election years.* In any even year in which a Presidential candidate, but no Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 28% of administrative expenses to their Federal accounts.

(ii) *Presidential and Senate election year.* In any even year in which a Presidential candidate and a Senate candidate appear on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 36% of administrative expenses to their Federal accounts.

(iii) *Senate election year.* In any even year in which a Senate candidate, but no Presidential candidate, appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 21% of administrative expenses to their Federal account.

(iv) *Non-Presidential and non-Senate year.* In any even year in which neither a Presidential nor a Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 15% of administrative expenses to their Federal account.

(3) *Exempt party activities and voter drive activities that are not Federal election activities.* State, district, and local party committees that choose to allocate expenses for exempt activities conducted in conjunction with non-Federal activities and voter drive activities, that are not Federal election activities, must do so subject to the following requirements:



(i) *Presidential election years.* In any even year in which a Presidential candidate, but no Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 28% of these expenses to their Federal accounts.

(ii) *Presidential and Senate election year.* In any even year in which a Presidential candidate and a Senate candidate appear on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 36% of these expenses to their Federal accounts.

(iii) *Senate election year.* In any even year in which a Senate candidate, but no Presidential candidate, appears on the ballot, and in the preceding year, State, district, and local party committees must allocate at least 21% of these expenses to their Federal account.

(iv) *Non-Presidential and non-Senate year.* In any even year in which neither a Presidential nor a Senate candidate appears on the ballot, and in the preceding year, State, district, and local party committee must allocate at least 15% of these expenses to their Federal account.

(4) *Fundraising for Federal and non-Federal accounts.* If Federal and non-Federal funds are collected by a State, district, or local party committee through a joint fundraising activity, that committee must allocate its direct fundraising costs using the funds received method and according to the following procedures:

(i) The committee must allocate its fundraising costs based on the ratio of funds received into its Federal account to its total receipts from each fundraising program or event. This ratio shall be estimated prior to each such program or event based upon the committee's reasonable prediction of its Federal and non-Federal revenue from that program or event, and must be noted in the committee's report for the period in which the first disbursement for such program or event occurred, submitted pursuant to 11 CFR 104.5. Any disbursements for fundraising costs made prior to the actual program or event must be allocated according to this estimated ratio.

(ii) No later than the date 60 days after each fundraising program or event from which both Federal and non-Federal funds are collected, the committee shall adjust the allocation ratio for that program or event to reflect the actual ratio of funds received. If the non-Federal account has paid more than its allocable share, the committee shall transfer funds from its Federal to its

non-Federal account, as necessary, to reflect the adjusted allocation ratio. If the Federal account has paid more than its allocable share, the committee shall make any transfers of funds from its non-Federal to its Federal account to reflect the adjusted allocation ratio within the 60-day time period established by this paragraph. The committee shall make note of any such adjustments and transfers in its report for any period in which a transfer was made, and shall also report the date of the fundraising program or event that serves as the basis for the transfer. In the case of a telemarketing or direct mail campaign, the date for purposes of this paragraph is the last day of the telemarketing campaign, or the day on which the final direct mail solicitations are mailed.

(e) *Costs not allocable by State, district, and local party committees between Federal and non-Federal accounts.* The following costs incurred by State, district, and local party committees shall be paid only with Federal funds:

(1) Disbursements for State, district, and local party committees for activities that refer only to one or more candidates for Federal office must not be allocated. All such disbursements must be made from a Federal account.

(2) *Salaries and wages.* Salaries and wages for employees who spend more than 25% of their compensated time in a given month on activities in connection with a Federal election must not be allocated. All such disbursements must be made from a Federal account. See 11 CFR 300.33(c)(2).

(3) *Federal election activities.* Activities that are Federal election activities pursuant to 11 CFR 100.24 must not be allocated between Federal and non-Federal accounts. Only Federal funds, or a mixture of Federal funds and Levin funds, as provided in 11 CFR 300.33, may be used.

(4) *Fundraising Costs.* Expenses incurred by State, district, and local party committees directly related to programs or events undertaken to raise funds to be used, in whole or in part, for activities in connection with Federal and non-Federal elections that are Federal election activities pursuant to 11 CFR 100.24 must not be allocated between Federal and non-Federal accounts. Except as provided in 11 CFR 300.32(a)(4), all such disbursements must be made from a Federal account.

(f) *Transfers between accounts to cover allocable expenses.* State, district, and local party committees may transfer funds from their non-Federal to their Federal accounts or to an allocation account solely to meet allocable

expenses under this section and only pursuant to the following requirements:

(1) *Payments from Federal accounts or from allocation accounts.*

(i) State, district, and local party committees must pay the entire amount of an allocable expense from their Federal accounts and transfer funds from their non-Federal account to the Federal account solely to cover the non-Federal share of that allocable expense; or

(ii) State, district, or local party committees may establish a separate allocation account into which funds from its Federal and non-Federal accounts may be deposited solely for the purpose of paying the allocable expenses of joint Federal and non-Federal activities.

(2) *Timing.*

(i) If a Federal or allocation account is used to make allocable expenditures and disbursements, State, district, and local party committees must transfer funds from their non-Federal to their Federal or allocation account to meet allocable expenses no more than 10 days before and no more than 60 days after the payments for which they are designated are made from a Federal or allocation account, except that transfers may be made more than 10 days before a payment is made from the Federal or allocation account if advance payment is required by the vendor(s) and if such payment is based on a reasonable estimate of the activity's final costs as determined by the committee and the vendor(s) involved.

(ii) Any portion of a transfer from a committee's non-Federal account to its Federal or allocation account that does not meet the requirement of paragraph (f)(2)(i) of this section shall be presumed to be a loan or contribution from the non-Federal account to the Federal or allocation account, in violation of the Act.

#### **PART 108—FILING COPIES OF REPORTS AND STATEMENTS WITH STATE OFFICERS (2 U.S.C. 439)**

18. The authority citation for part 108 continues to read as follows:

**Authority:** 2 U.S.C. 434(a)(2), 438(a)(8), 439, 453.

19. Section 108.7 is amended by revising paragraphs (c)(4) and (c)(5) and adding paragraph (c)(6) to read as follows:

#### **§ 108.7 Effect on State law (2 U.S.C. 453).**

\* \* \* \* \*

(c) \* \* \*

(4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses;

(5) Candidate's personal financial disclosure; or

(6) Application of State law to the funds used for the purchase or construction of a State or local party office building to the extent described in 11 CFR 300.35.

**PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS**

20. The authority citation for part 110 continues to be read as follows:

**Authority:** 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d(a)(8), 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h.

21. Section 110.1 is amended by adding new paragraph (c)(5) to read as follows:

**§ 110.1 Contributions by persons other than multicandidate political committees**

(2 U.S.C. 441a(a)(1)).

\* \* \* \* \*

(c) \* \* \*

(5) On or after January 1, 2003, no person shall make contributions to a political committee established and maintained by a State committee of a political party in any calendar year that, in the aggregate, exceed \$10,000.

\* \* \* \* \*

**PART 114—CORPORATE AND LABOR ORGANIZATION ACTIVITY**

22. The authority citation for part 114 continues to read as follows:

**Authority:** 2 U.S.C. 431(8)(B), 431(9)(B), 432, 434(a)(11), 437d(a)(8), 438(a)(8), 441b.

23. Section 114.1 is amended by revising paragraph (a)(2)(ix) to read as follows:

**§ 114.1 Definitions.**

(a) \* \* \*

(2) \* \* \*

(ix) Donations to a State or local party committee used for the purchase or construction of its office building are subject to 11 CFR 300.35. No exception applies to contributions or donations to a national party committee that are made or used for the purchase or construction of any office building or facility; or

\* \* \* \* \*

24. Subchapter C consisting of part 300 is added to Chapter I to read as follows:

**SUBCHAPTER C—BIPARTISAN CAMPAIGN REFORM ACT OF 2002—(BCRA) REGULATIONS**

**PART 300—NON-FEDERAL FUNDS**

Sec.

300.1 Scope, effective date, and organization.

300.2 Definitions.

**Subpart A—National Party Committees**

300.10 General prohibitions on raising and spending non-Federal funds (2 U.S.C. 441; (a) and (c)).

300.11 Prohibition on fundraising for and donating to certain tax-exempt organizations (2 U.S.C. 441; (d)).

300.12 Transition rules.

300.13 Reporting (2 U.S.C. 431 note and 434 (e)).

**Subpart B—State, District, and Local Party Committees and Organizations**

300.30 Accounts.

300.31 Receipt of Levin funds.

300.32 Expenditures and disbursements.

300.33 Allocation of costs of Federal election activity.

300.34 Transfers.

300.35 Office buildings.

300.36 Reporting Federal election activity; recordkeeping.

300.37 Prohibitions on fundraising for and donating to certain tax-exempt organizations (2 U.S.C. 441i (d)).

**Subpart C—Tax-Exempt Organizations**

300.50 Prohibited fundraising by national party committees (2 U.S.C. 441i(d)).

300.51 Prohibited fundraising by State, district, and local party committees (2 U.S.C. 441i(d)).

300.52 Fundraising by Federal candidates and Federal officeholders (2 U.S.C. 441i(e)(4)).

**Subpart D—Federal Candidates and Officeholders**

300.60 Scope (2 U.S.C. 441i (e)(1)).

300.61 Federal elections (2 U.S.C. 441i (e)(1)(A)).

300.62 Non-Federal elections (2 U.S.C. 441i (e)(1)(B)).

300.63 Exception for State party candidates (2 U.S.C. 441i (e)(2)).

300.64 Exemption for attending, speaking, or appearing as a featured guest at fundraising events (2 U.S.C. 441i (e)(3)).

300.65 Exceptions for certain tax-exempt organizations (2 U.S.C. 441i (e)(1) and (4)).

**Subpart E—State and Local Candidates**

300.70 Scope (2 U.S.C. 441i (f)(1)).

300.71 Federal funds required for certain public communications (2 U.S.C. 441i(f)(1)).

300.72 Federal funds not required for certain communications (2 U.S.C. 441i(f)(2)).

**Authority:** 2 U.S.C. 434(e), 438(a)(8), 441a(a)(i), 441i, 453.

**§ 300.1 Scope and effective date, and organization.**

(a) *Introduction.* This part implements changes to the Federal Election Campaign Act of 1971, as amended ("FECA" or the "Act"), enacted by Title I of the Bipartisan Campaign Finance Reform Act of 2002 ("BCRA"). Public Law 107-155. Unless expressly stated to

the contrary, nothing in this part alters the definitions, restrictions, liabilities, and obligations imposed by sections 431 to 455 of Title 2, United States Code, or regulations prescribed thereunder (11 CFR parts 100 to 116).

(b) *Effective dates.*

(1) Except as otherwise specifically provided in this part, this part shall take effect on November 6, 2002. However, subpart B of this part shall not apply with respect to runoff elections, recounts, or election contests resulting from elections held prior to such date. See 11 CFR 300.12 for transition rules applicable to subpart A of this part.

(2) The increase in individual contribution limits to State committees of political parties, as described in 11 CFR 110.1(c)(5), shall apply to contributions made on or after January 1, 2003.

(c) *Organization of part.* Part 300, which generally addresses non-Federal funds and closely related topics, is organized into five subparts. Each subpart is oriented to the perspective of a category of persons facing issues related to non-Federal funds.

(1) Subpart A of this part prescribes rules pertaining to national party committees, including general non-Federal funds prohibitions, fundraising, and donation prohibitions with regard to certain tax-exempt organizations, transition rules as BCRA takes effect, and reporting.

(2) Subpart B of this part pertains to State, district, and local political party committees and organizations. Subpart B of this part focuses on "Levin Amendment" to BCRA; office buildings; and fundraising and donation prohibitions with regard to certain tax-exempt organizations.

(3) Subpart C of this part addresses non-Federal funds from the perspective of tax-exempt organizations, setting out rules about prohibited fundraising for certain tax-exempt organizations by national party committees, State, district, and local party committees, and Federal candidates and officeholders.

(4) Subpart D of this part includes regulations pertaining to soliciting non-Federal funds from the perspective of Federal candidates and officeholders in Federal and non-Federal elections; including exceptions for those who are also State candidates and exemptions for those attending, speaking, and appearing as featured guests at fundraising events, or who solicit for certain tax-exempt organizations.

(5) Subpart E of this part focuses on State and local candidates, including regulations about using Federal funds for certain public communications, and

exceptions for entirely non-Federal communications.

(6) For rules pertaining to convention and host committees, see 11 CFR part 9008.

### § 300.2 Definitions.

(a) *501(c) organization that makes expenditures or disbursements in connection with a Federal election.* A 501(c) organization that makes expenditures or disbursements in connection with a Federal election as that term is used in 11 CFR 300.11, 300.37, 300.50, and 300.51 includes an organization that, within the current election cycle, plans to:

(1) Make expenditures or disbursements in connection with an election for Federal office including for Federal election activity; or

(2) Pay a debt incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(b) *Agent.* For the purposes of part 300 of chapter I, agent means any person who has actual authority, either express or implied, to engage in any of the following activities on behalf of the specified persons:

(1) In the case of a national committee of a political party:

(i) To solicit, direct, or receive any contribution, donation, or transfer of funds; or,

(ii) To solicit any funds for, or make or direct any donations to, an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted an application for determination of tax exempt status under 26 U.S.C. 501(a)), or an organization described in 26 U.S.C. 527 (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(2) In the case of a State, district, or local committee of a political party:

(i) To expend or disburse any funds for Federal election activity; or

(ii) To transfer, or accept a transfer of, funds to make expenditures or disbursements for Federal election activity; or

(iii) To engage in joint fundraising activities with any person if any part of the funds raised are used, in whole or in part, to pay for Federal election activity; or

(iv) To solicit any funds for, or make or direct any donations to, an organization that is described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a) (or has submitted

an application for determination of tax exempt status under 26 U.S.C. 501(a)), or an organization described in 26 U.S.C. 527 (other than a political committee, a State, district, or local committee of a political party, or the authorized campaign committee of a candidate for State or local office).

(3) In the case of an individual who is a Federal candidate or an individual holding Federal office, to solicit, receive, direct, transfer, or spend funds in connection with any election.

(4) In the case of an individual who is a candidate for State or local office, to spend funds for a public communication (see 11 CFR 100.26).

(c) *Directly or indirectly establish, maintain, finance, or control.*

(1) This paragraph (c) applies to national, State, district, and local committees of a political party, candidates, and holders of Federal office, including an officer, employee, or agent of any of the foregoing persons, which shall be referred to as "sponsors" in this section.

(2) To determine whether a sponsor directly or indirectly established, finances, maintains, or controls an entity, the factors described in paragraphs (c)(2)(i) through (x) of this section must be examined in the context of the overall relationship between sponsor and the entity to determine whether the presence of any factor or factors is evidence that the sponsor directly or indirectly established, finances, maintains, or controls the entity. Such factors include, but are not limited to:

(i) Whether a sponsor, directly or through its agent, owns controlling interest in the voting stock or securities of the entity;

(ii) Whether a sponsor, directly or through its agent, has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures;

(iii) Whether a sponsor, directly or through its agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity;

(iv) Whether a sponsor has a common or overlapping membership with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;

(v) Whether a sponsor has common or overlapping officers or employees with the entity that indicates a formal or ongoing relationship between the sponsor and the entity;

(vi) Whether a sponsor has any members, officers, or employees who were members, officers or employees of the entity that indicates a formal or ongoing relationship between the sponsor and the entity, or that indicates the creation of a successor entity;

(vii) Whether a sponsor, directly or through its agent, provides funds or goods in a significant amount or on an ongoing basis to the entity, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17, and otherwise lawfully;

(viii) Whether a sponsor, directly or through its agent, causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17, and otherwise lawfully;

(ix) Whether a sponsor, directly or through its agent, had an active or significant role in the formation of the entity; and

(x) Whether the sponsor and the entity have similar patterns of receipts or disbursements that indicate a formal or ongoing relationship between the sponsor and the entity.

(3) *Safe harbor.* On or after November 6, 2002, an entity shall not be deemed to be directly or indirectly established, maintained, or controlled by another entity unless, based on the entities' actions and activities solely after November 6, 2002, they satisfy the requirements of this section. If an entity receives funds from another entity prior to November 6, 2002, and the recipient entity disposes of the funds prior to November 6, 2002, the receipt of such funds prior to November 6, 2002 shall have no bearing on determining whether the recipient entity is financed by the sponsoring entity within the meaning of this section.

(4) *Determinations by the Commission.*

(i) A sponsor or entity may request an advisory opinion of the Commission to determine whether the sponsor is no longer directly or indirectly financing, maintaining, or controlling the entity for purposes of this part. The request for such an advisory opinion must meet the requirements of 11 CFR part 112 and must demonstrate that the entity is not directly or indirectly financed, maintained, or controlled by the sponsor.

(ii) Notwithstanding the fact that a sponsor may have established an entity within the meaning of paragraph (c)(2) of this section, the sponsor or the entity

may request an advisory opinion of the Commission determining that the relationship between the sponsor and the entity has been severed. The request for such an advisory opinion must meet the requirements of 11 CFR part 112, and must demonstrate that all material connections between the sponsor and the entity have been severed for two years.

(iii) Nothing in this section shall require entities that are separate organizations on November 6, 2002 to obtain an advisory opinion to operate separately from each other.

(d) *Disbursement*. *Disbursement* means any purchase or payment made by:

(1) A political committee; or

(2) Any other person, including an organization that is not a political committee, that is subject to the Act.

(e) *Donation*. For purposes of part 300, *donation* means a payment, gift, subscription, loan, advance, deposit, or anything of value given to a person, but does not include contributions.

(f) *Federal account*. *Federal account* means an account at a campaign depository that contains funds to be used in connection with a Federal election.

(g) *Federal Funds*. *Federal funds* mean funds that comply with the limitations, prohibitions, and reporting requirements of the Act.

(h) *Levin account*. *Levin account* means an account at a campaign depository established by a State, district, or local committee of a political party pursuant to 11 CFR 300.30, for purposes of making expenditures or disbursements for Federal election activity or non-Federal activity (subject to State law) under 11 CFR 300.32.

(i) *Levin funds* mean funds that are raised pursuant to 11 CFR 300.31 and are or will be disbursed pursuant to 11 CFR 300.32.

(j) *Non-Federal account* means an account that contains funds to be used in connection with a State or local election or allocable expenses under 11 CFR 106.7, 300.30, or 300.33.

(k) *Non-Federal funds* mean funds that are not subject to the limitations and prohibitions of the Act.

(l) [Reserved].

(m) *To solicit*. For the purposes of part 300, *to solicit* means to ask that another person make a contribution, donation, transfer of funds, or otherwise provide anything of value, whether the contribution, donation, transfer of funds, or thing of value, is to be made or provided directly, or through a conduit or intermediary. A solicitation does not include merely providing

information or guidance as to the requirement of particular law.

(n) *To direct*. For the purposes of part 300, *to direct* means to ask a person who has expressed an intent to make a contribution, donation, or transfer of funds, or to provide anything of value, to make that contribution, donation, or transfer of funds, or to provide that thing of value, including through a conduit or intermediary. Direction does not include merely providing information or guidance as to the requirement of particular law.

(o) *Individual holding Federal office*. *Individual holding Federal office* means an individual elected to or serving in the office of President or Vice President of the United States; or a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress of the United States.

#### Subpart A—National Party Committees

##### **§ 300.10 General prohibitions on raising and spending non-Federal funds (2 U.S.C. 441i(a) and (c)).**

(a) *Prohibitions*. A national committee of a political party, including a national congressional campaign committee, must not:

(1) Solicit, receive, or direct to another person a contribution, donation, or transfer of funds, or any other thing of value that is not subject to the prohibitions, limitations and reporting requirements of the Act;

(2) Spend any funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act; or

(3) Solicit, receive, direct, or transfer to another person, or spend, Levin funds.

(b) *Fundraising costs*. A national committee of a political party, including a national congressional campaign committee, must use only Federal funds to raise funds that are used, in whole or in part, for expenditures and disbursements for Federal election activity.

(c) *Application*. This section also applies to:

(1) An officer or agent acting on behalf of a national party committee or a national congressional campaign committee; and

(2) An entity that is directly or indirectly established, financed, maintained, or controlled by a national party committee or a national congressional campaign committee.

##### **§ 300.11 Prohibitions on fundraising for and donating to certain tax-exempt organizations (2 U.S.C. 441i(d)).**

(a) *Prohibitions*. A national committee of a political party, including a national

congressional campaign committee, must not solicit any funds for, or make or direct any donations to the following organizations:

(1) An organization that is described in 26 U.S.C. 501(c) and exempt from taxation under section 26 U.S.C. 501(a) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity;

(2) An organization that has submitted an application for tax-exempt status under 26 U.S.C. 501(c) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity; or

(3) An organization described in 26 U.S.C. 527, unless the organization is:

(i) A political committee under 11 CFR 100.5;

(ii) A State, district, or local committee of a political party; or

(iii) The authorized campaign committee of a State or local candidate;

(b) *Application*. This section also applies to:

(1) An officer or agent acting on behalf of a national party committee, including a national congressional campaign committee;

(2) An entity that is directly or indirectly established, financed, maintained, or controlled by a national party committee, including a national congressional campaign committee, or an officer or agent acting on behalf of such an entity; or

(3) An entity that is directly or indirectly established, financed, maintained, or controlled by an agent of a national, State, district, or local committee of a political party, including a national congressional campaign committee.

(c) *Determining whether a section 501(c) organization makes expenditures or disbursements in connection with Federal elections*. In determining whether a section 501(c) organization is one that makes expenditures or disbursements in connection with a Federal election, including expenditures or disbursements for Federal election activity, pursuant to paragraphs (a)(1) and (2) of this section, a national committee of a political party, including a national congressional campaign committee, or any other person described in paragraph (b) of this section, may obtain and rely upon a certification from the organization that satisfies the criteria described in paragraph (d) of this section.

(d) *Certification*. A national committee of a political party, including

a national congressional campaign committee, or any person described in paragraph (b) of this section, may rely upon a certification that meets all of the following criteria:

(1) The certification is a signed written statement by an officer or other authorized representative of the organization with knowledge of the organization's activities;

(2) The certification states that within the current election cycle, the organization has not made, and does not intend to make, expenditures or disbursements in connection with an election for Federal office (including for Federal election activity); and

(3) The certification states that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(e) If a national committee of a political party or any person described in paragraph (b) of this section has actual knowledge that the certification is false, the certification may not be relied upon.

(f) It is not prohibited for a national party or its agent to respond to a request for information about a tax-exempt group that shares the party's political or philosophical goals.

#### § 300.12 Transition rules.

(a) *Permissible uses of excess non-Federal funds.* Non-Federal funds received before November 6, 2002, by a national committee of a political party, including a national congressional campaign committee, and in its possession on that date, must be used before January 1, 2003. Subject to the restrictions in paragraph (b) of this section, such funds may be used solely as follows:

(1) To retire outstanding debts or obligations that were incurred solely in connection with an election held prior to November 6, 2002; or

(2) To pay expenses, retire outstanding debts, or pay for obligations incurred solely in connection with any run-off election, recount, or election contest resulting from an election held prior to November 6, 2002.

(b) *Prohibited uses of non-Federal funds.* Non-Federal funds received by a national committee of a political party, including a national congressional campaign committee, before November 6, 2002, and in its possession on that date, may not be used for the following purposes:

(1) To pay any expenditure as defined in 2 U.S.C. 431(9);

(2) To retire outstanding debts or obligations that were incurred for any expenditure; or

(3) To defray the costs of the construction or purchase of any office building or facility.

(c) Any non-Federal funds remaining after payment of debts and obligations permitted in paragraph (a) of this section must be either disgorged to the United States Treasury, or returned by check to the donors, no later than December 31, 2002. Any refund checks not cashed by February 28, 2003 must be disgorged to the United States Treasury by March 31, 2003.

(d) *National party committee office building or facility accounts.* Before November 6, 2002, a national committee of a political party, including a national congressional campaign committee, may accept funds into its party office building or facility account, established pursuant to repealed 2 U.S.C. 431(8)(B)(viii), and may use the funds in the account only for the construction or purchase of an office building or facility. After November 5, 2002, the national party committees may no longer accept funds into such an account and must not use such funds for the purchase or construction of any office building or facility. Funds on deposit in any party office building or facility account on November 6, 2002, must be either disgorged to the United States Treasury or returned by check to the donors no later than December 31, 2002. Any refund checks not cashed by February 28, 2003 must be disgorged to the United States Treasury by March 31, 2003.

(e) *Application.* This section also applies to:

(1) An officer or agent acting on behalf of a national party committee or a national congressional campaign committee; and

(2) An entity that is directly or indirectly established, financed, maintained, or controlled by a national party committee or a national congressional campaign committee.

(f) *Treatment of Federal and non-Federal accounts during transition period.* The following provisions applicable to the allocation of, and payment for, expenses between Federal and non-Federal accounts of national party committees shall remain in effect between November 6 and December 31, 2002: 11 CFR 106.5(a),(b), (c), (f) and (g).

#### § 300.13 Reporting (2 U.S.C. 431 note and 434(e)).

(a) *In general.* The national committee of a political party, any national congressional campaign committee of a political party, and any subordinate

committee of either, shall report all receipts and disbursements during the reporting period.

(b) *Termination report for non-Federal accounts.* Unless a committee described in paragraph (a) of this section issues refund checks to donors as permitted by 11 CFR 300.12(c), each committee described in paragraph (a) of this section must file a termination report disclosing the disposition of funds in all non-Federal accounts and building fund accounts by January 31, 2003. Each committee that issues refund checks to donors must file a termination report covering the period ending March 31, 2003 disclosing the disposition of any refund checks not cashed by February 28, 2003, as required by 11 CFR 300.12(c) and (d).

(c) *Transitional reporting rules.*

(1) The reporting requirements covering receipts in 11 CFR 104.8(e) and (f) and disbursements in 11 CFR 104.9(e) for national party committee non-Federal accounts and building fund accounts shall remain in effect for the reports covering activity between November 6 and December 31, 2002.

(2) The reporting requirements covering disbursements in 11 CFR 104.9(c) and (d) for national party committee non-Federal accounts and building fund accounts shall remain in effect for the reports covering activity between November 6, 2002 and March 31, 2003.

#### Subpart B—State, District, and Local Party Committees and Organizations

##### § 300.30 Accounts

(a) *Scope and introduction.* This section applies to State, district, or local committees or organizations of a political party, whether or not the committee is a political committee under 11 CFR 100.5, that have receipts or make disbursements for Federal election activity. Paragraph (b) of this section describes and explains the types of accounts available to a political party committee or organization covered by this section. Paragraph (c) of this section sets out the account structure that must be maintained by a political party committee or organization covered by this section.

(b) *Types of accounts.* Each State, district, and local party organization or committee that has receipts or makes disbursements for Federal election activity must establish one or more of the following types of accounts, pursuant to paragraph (c) of this section.

(1) *Non-Federal accounts.* The funds deposited into this account are governed by State law. Disbursements, contributions, and expenditures made wholly or in part in connection with

Federal elections must not be made from any non-Federal account, except as permitted by paragraph (c)(3)(ii) of this section, 11 CFR 102.5(a)(4), 11 CFR 106.7(d)(1)(i), 11 CFR 300.33 and 11 CFR 300.34.

(2) *Levin account.* The funds deposited into this account must comply with 11 CFR 300.31. Such funds may be used for the categories of activities described at 11 CFR 300.32(b).

(3) *Federal account.* Federal accounts may be used for the deposit of contributions and the making of expenditures pursuant to the following conditions:

(i) Only contributions that are permissible pursuant to the limitations and prohibitions of the Act may be deposited into any Federal account, regardless of whether such contributions are for use in connection with Federal or non-Federal elections. See 11 CFR 103.3 regarding impermissible funds.

(ii) Only contributions solicited and received pursuant to the following conditions may be deposited in a Federal account:

(A) Contributions must be designated by the contributors for the Federal account;

(B) The solicitation must expressly state that contributions may be used wholly or in part in connection with a Federal election; or

(C) The contributor must be informed that all contributions are subject to the limitations and prohibitions of the Act.

(iii) All disbursements, contributions, and expenditures made wholly or in part by any State, district, or local party organization or committee in connection with a Federal election must be made from either:

(A) A Federal account, except as permitted by 11 CFR 300.32; or

(B) A separate allocation account (see paragraph (b)(4) of this section).

(iv) If all payments in connection with a Federal election, including payments for Federal election activities, are to be made from a Federal account, expenditures and disbursements for costs that are allocable pursuant to 11 CFR 106.7 or 11 CFR 300.33 must be made from the Federal account in their entirety, with the shares of a non-Federal account or of a Levin account being transferred to the Federal account pursuant to 11 CFR 106.7 and 11 CFR 300.33.

(v) No transfers may be made to a Federal account from any other account(s) maintained by a State, district, or local party committee or organization from any other party organization or committee at any level for the purpose of financing activity in

connection with Federal elections, except as provided by paragraph (b)(3)(iv) of this section or 11 CFR 300.33 and 300.34.

(4) *Allocation accounts.* At the discretion of the party committee or organization, separate allocation accounts may be established for purposes of making allocable expenditures and disbursements.

(i) Only funds from the party organization's or committee's Federal and non-Federal accounts may be deposited into an allocation account used to make allocable expenditures and disbursements for activities in connection with Federal and non-Federal elections.

(ii) Only funds from the party organization's or committee's Federal account and Levin funds from its non-Federal or Levin account(s) may be deposited into an allocation account used to make allocable expenditures and disbursements for activities undertaken pursuant to 11 CFR 300.32(b).

(iii) Once a party organization or committee has established a separate allocation account for activities in connection with Federal and non-Federal elections and a separate account for activities undertaken pursuant to 11 CFR 300.32(b), all allocable expenses must be paid from the appropriate allocation account for as long as that account is maintained.

(iv) The party organization or committee must transfer to the appropriate allocation account funds from its Federal and non-Federal or Levin accounts in amounts proportionate to the Federal, non-Federal and Levin shares of each allocable expense pursuant to 11 CFR 106.7 and 11 CFR 300.33. The transfers must be made pursuant to 11 CFR 300.33 and 300.34.

(v) No funds contained in an allocation account may be transferred to any other account maintained by the party committee or organization.

(vi) For reporting purposes, all allocation accounts must be treated as Federal accounts.

(c) *Required account or accounts.* Each State, district, and local party organization or committee that has receipts or makes disbursements for Federal election activity must establish its accounts in accordance with paragraphs (c)(1), or (c)(2), or (c)(3) of this section.

(1) One or more Federal accounts in a campaign depository, in accordance with 11 CFR part 103, which must be treated as a separate political committee and be required to comply with the requirements of the Act including the

registration and reporting requirements of 11 CFR part 102 and part 104. State, district, and local party organizations or committees may choose to make non-Federal disbursements, subject to State law, and disbursements for Federal election activity from a Federal account provided that such disbursements are reported pursuant to 11 CFR 104.17 and 11 CFR 300.36, and provided that contributors of the Federal funds so used were notified that their contributions were subject to the limitations and prohibitions of the Act.

(2) Establish at least three separate accounts in depositories as follows—

(i) One or more Federal accounts;

(ii) One or more Levin accounts; and

(iii) One or more Non-Federal accounts.

(3) Establish two separate accounts in depositories as follows:

(i) One or more Federal accounts, and;

(ii) An account that must function as both a Non-Federal account and a Levin account. If such an account is used, the State, district, and local party must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that whenever such organization makes a disbursement for activities undertaken pursuant to 11 CFR 300.32(b), that organization had received sufficient contributions or Levin funds to make such disbursement.

(d) *Recordkeeping.* All party organizations or committees must keep records of deposits into and disbursements from such accounts, and, upon request, must make such records available for examination by the Commission.

#### **§ 300.31 Receipt of Levin funds.**

(a) *General rule.* Levin funds expended or disbursed by any State, district, or local committee must be raised solely by the committee that expends or disburses them.

(b) *Compliance with State law.* Each donation of Levin funds solicited or accepted by a State, district, or local committee of a political party must be lawful under the laws of the State in which the committee is organized.

(c) *Donations from sources permitted by State law but prohibited by the Act.* If the laws of the State in which a State, district, or local committee of a political party is organized permit donations to the committee from a source prohibited by the Act and this chapter, other than 2 U.S.C. 441e, the committee may solicit and accept donations of Levin funds from that source, subject to paragraph (d) of this section.

(d) *Donation amount limitation.*

(1) *General rule.* A State, district, or local committee of a political party must not solicit or accept from any person (including any entity established, financed, maintained, or controlled by such person) one or more donations of Levin funds aggregating more than \$10,000 in a calendar year.

(2) *Effect of different State limitations.* If the laws of the State in which a State, district, or local committee of a political party is organized limit donations to that committee to less than the amount specified in paragraph (d)(1) of this section, then the State law amount limitations shall control. If the laws of the State in which a State, district, or local committee of a political party is organized permit donations to that committee in amounts greater than the amount specified in paragraph (d)(1) of this section, then the amount limitations in paragraph (d)(1) of this section shall control.

(3) *No affiliation of committees for purposes of this paragraph.* For purposes of determining compliance with paragraph (d) of this section only, State, district, and local committees of the same political party shall not be considered affiliated. Subject to the amount limitations specified in paragraphs (d)(1) and (d)(2) of this section, a person (including any entity directly or indirectly established, financed, maintained, or controlled by such person) may donate without additional limitation to each and every State, district, and local committee of a political party.

(e) *No Levin funds from a national party committee or a Federal candidate or officeholder.* A State, district, or local committee of a political party disbursing Levin funds pursuant to 11 CFR 300.32 must not accept or use for such purposes any donations or other funds that are solicited, received, directed, transferred, or spent by or in the name of any of the following persons:

(1) A national committee of a political party (including a national congressional campaign committee of a political party), any officer or agent acting on behalf of such a national party committee, or any entity that is directly or indirectly established, financed, maintained, or controlled by such a national party committee.

Notwithstanding 11 CFR 102.17, a State, district, or local committee of a political party must not raise Levin funds by means of joint fundraising with a national committee of a political party, any officer or agent acting on behalf of such a national party committee, or any entity that is directly or indirectly established, financed, maintained, or

controlled by such a national party committee. Nothing in this section shall be construed to prohibit a State, district, or local committee of a political party from jointly raising, under 11 CFR 102.17, Federal funds not to be used for Federal election activity with a national committee of a political party, or its agent, or any entity directly or indirectly established, financed, maintained, or controlled by such a national party committee.

(2) A Federal candidate, or an individual holding Federal office, or an agent of a Federal candidate or officeholder, or an entity directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more Federal candidates or individuals holding Federal office. Notwithstanding 11 CFR 102.17, a State, district, or local committee of a political party must not raise Levin funds by means of joint fundraising with a Federal candidate, an individual holding Federal office, or an entity directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more candidates or individuals holding Federal office. A Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party at which Levin funds are raised. See 11 CFR 300.64.

(f) *Certain joint fundraising prohibited.* Notwithstanding 11 CFR 102.17, a State, district, or local committee of a political party must not raise Levin funds by means of any joint fundraising activity with any other State, district, or local committee of any political party, the agent of such a committee, or an entity directly or indirectly established, financed, maintained, or controlled by such a committee. This prohibition includes State, district, and local committees of a political party organized in another State. Nothing in this section shall be construed to prohibit two or more State, district, or local committees of a political party from jointly raising, under 11 CFR 102.17, Federal funds not to be used for Federal election activity.

(g) *Safe Harbor.* The use of a common vendor for fundraising by more than one State, district, or local committee or a political party, or the agent of such a committee does not constitute joint fundraising within the meaning of this section.

**§ 300.32 Expenditures and disbursements.**(a) *Federal funds.*

(1) An association or similar group of candidates for State or local office, or an

association or similar group of individuals holding State or local office, must make any expenditures or disbursements for Federal election activity solely with Federal funds.

(2) Except as provided in this part, a State, district, or local committee of a political party that makes expenditures or disbursements for Federal election activity must use Federal funds for that purposes, subject to the provisions of this chapter.

(3) State, district, and local party committees that raise Federal funds to be used, in whole or in part, for Federal election activities must pay the direct costs of such fundraising only with Federal funds. The direct costs of a fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

(4) State, district, and local party committees that raise Levin funds to be used, in whole or in part, for Federal election activity must pay the direct costs of such fundraising with either Federal or Levin funds. The direct costs of a fundraising program or event include expenses for the solicitation of funds and for the planning and administration of actual fundraising programs and events.

(b) *Levin funds.* A State, district, or local committee of a political party may spend Levin funds in accordance with this part on the following types of activity:

(1) Subject to the conditions set out in paragraph (c) of this section, only the following types of Federal election activity:

(i) Voter registration activity during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; and

(ii) 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) Any use that is lawful under the laws of the State in which the committee is organized, other than the Federal election activities defined in 11 CFR 100.24(b)(3) and (4). A disbursement of Levin funds under this paragraph need not comply with paragraphs (c)(1) and (c)(2) of this section, except as required by State law.

(c) *Conditions and restrictions on spending Levin funds.*

(1) The Federal election activity for which the disbursement is made must

not refer to a clearly identified candidate for Federal office.

(2) The disbursement must not pay for any part of the costs of any broadcasting, cable, or satellite communication, other than a communication that refers solely to a clearly identified candidate for State or local office.

(3) The disbursement must be made from funds raised in accordance with 11 CFR 300.31.

(4) The disbursements for allocable Federal election activity that exceed in the aggregate \$5,000 in a calendar year may be paid for entirely with Federal funds or may be allocated between Federal funds and Levin funds according to 11 CFR 300.33. Disbursements for Federal election activity that may be allocated and that aggregate \$5,000 or less in a calendar year may be paid for entirely with Federal funds, entirely with Levin funds, or may be allocated between Federal funds and Levin funds according to 11 CFR 300.33.

(d) *Non-Federal activities.* A State, district, or local committee of a political party that makes disbursements for non-Federal activity may make those disbursements from its Federal, Levin, or non-Federal funds, subject to the laws of the State in which it is organized. A State, district, or local party committee that engages in fundraising for solely non-Federal funds may pay the costs related to such fundraising from any account, subject to State law, including a Federal account.

**§ 300.33 Allocation of costs of Federal election activity.**

(a) *Costs of Federal election activity allocable by State, district, and local party committees and organizations.*

(1) *Costs of voter registration.* Subject to the conditions of 11 CFR 300.32(c), State, district, and local party committees and organizations may allocate disbursements or expenditures, except salaries and wages for employees, between Federal funds and Levin funds for voter registration activity, as defined in 11 CFR 100.24(a)(2), that takes place during the period that begins on the date that is 120 days before the date of a regularly scheduled Federal election and that ends on the date of the election, provided that the activity does not refer to a clearly identified Federal candidate.

(2) *Costs of voter identification, get-out-the-vote activity, or generic campaign activities within certain time periods.* Subject to the conditions of 11 CFR 300.32(c), State, district, and local party committees and organizations may allocate disbursements or expenditures,

except salaries and wages for employees, between Federal funds and Levin funds for voter identification, get-out-the-vote activity, or generic campaign activities, as defined in 11 CFR 100.24(a)(3) and (4) and 11 CFR 100.25, that are conducted in connection with an election in which a candidate for Federal office is on the ballot and within the time periods set forth in 11 CFR 100.24(a)(1), provided that the activity does not refer to a clearly identified Federal candidate.

(b) *Allocation percentages.* State, district, and local party committees and organizations that choose to allocate between Federal funds and Levin funds their expenditures and disbursements, except for salaries and wages, in connection with activities described in paragraph (a) of this section that take place within the time periods set forth in 11 CFR 100.24(a)(1) or paragraph (a) of this section must allocate the following minimum percentages to their Federal funds:

(1) *Presidential election years.* If a Presidential candidate, but no Senate candidate appears on the ballot, State, district, and local party committees and organizations must allocate at least 28% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(2) *Presidential and Senate election year.* If a Presidential candidate and a Senate candidate appear on the ballot, State, district, and local party committees and organizations must allocate at least 36% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(3) *Senate election year.* If a Senate candidate, but no Presidential candidate, appears on the ballot, State, district, and local party committees and organizations must allocate at least 21% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(4) *Non-Presidential and non-Senate year.* If neither a Presidential nor a Senate candidate appears on the ballot, State, district, and local party committees and organizations must allocate at least 15% of expenses for activities described in paragraph (a) of this section to their Federal funds.

(c) *Costs of Federal election activity not allocable by State, district, and local party committees.* The following costs incurred by State, district, and local party committees and organizations must be paid only with Federal funds:

(1) *Public communications.* Expenditures for public communications as defined in 11 CFR 100.26 by State, district, and local party committees and organizations that refer

to a clearly identified candidate for Federal office and that promote, support, attack, or oppose any such candidate for Federal office must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used.

(2) *Salaries and wages.* Salaries and wages for employees who spend more than 25% of their compensated time in a given month on Federal election activity or activities in connection with a Federal election must not be allocated between or among Federal, non-Federal, and Levin accounts. Only Federal funds may be used. Salaries and wages for employees who spend 25% or less of their compensated time in a given month on Federal election activity or activities in connection with a Federal election shall be paid from funds that comply with State law.

(3) *Fundraising costs.* Disbursements for direct fundraising costs incurred by State, district, and local party committees and organizations for funds to be used, in whole or in part, for Federal election activity, including the activities described in paragraph (a) of this section, must not be allocated between or among Federal, non-Federal and Levin funds. Only Federal or Levin funds may be used.

(d) *Transfers between accounts to cover allocable expenses.* State, district, and local party committees and organizations may transfer Levin funds from their Levin or non-Federal accounts to their Federal accounts or to allocation accounts solely to meet expenses allocable pursuant to paragraphs (a)(1) and (2) of this section and only pursuant to the following methods:

(1) *Payments from Federal accounts or from allocation accounts.*

(i) If Federal accounts are used to make payments for allocable activities, State, district, and local party committees and organizations must pay the entire amount of allocable expenses from their Federal accounts and transfer Levin funds from their Levin or non-Federal accounts to their Federal accounts solely to cover the portions of the expenses for which Levin funds may be used; or

(ii) State, district, and local party committees and organizations may establish separate allocation accounts into which Federal funds and Levin funds may be deposited solely for the purpose of paying allocable expenses.

(2) *Timing.*

(i) If Federal or allocation accounts are used to make allocable expenditures and disbursements, State, district, and local party committees and organizations must transfer Levin funds



to their Federal or allocation accounts to meet allocable expenses no more than 10 days before and no more than 60 days after the payments for which they are designated are made from a Federal or allocation account, except that transfers may be made more than 10 days before a payment is made from the Federal or allocation account if advance payment is required by the vendor(s) and if such payment is based on a reasonable estimate of the activity's final costs as determined by the committee and the vendor(s) involved.

(ii) Any portion of a transfer of Levin funds to a party committee or organization's Federal or allocation account that does not meet the requirement of paragraph (d)(2)(i) of this section shall be presumed to be a loan or contribution from the Levin or non-Federal account to the Federal or allocation account, in violation of the Act.

#### **§ 300.34 Transfers.**

##### *(a) Federal funds.*

(1) Notwithstanding 11 CFR 102.6(a)(1)(ii), a State, district, or local committee of a political party must not use any Federal funds transferred to it from, or otherwise accepted by it from, any of the persons enumerated in paragraphs (b)(1) and (b)(2) of this section as the Federal component of an expenditure or disbursement for Federal election activity under 11 CFR 300.32. A State, district, or local committee of a political party must itself raise the Federal component of an expenditure or disbursement allocated between Federal funds and Levin funds under 11 CFR 300.32 and 300.33.

(2) A State, district, or local committee of a political party that makes an expenditure or disbursement of Federal funds for Federal election activities must demonstrate through a reasonable accounting method approved by the Commission (including any method embedded in software provided or approved by the Commission) that the Federal funds used to make the expenditure or disbursement do not include Federal funds transferred to the committee in violation of this section. Alternatively, a State, district, or local committee of a political party may establish a separate Federal account into which the committee deposits only Federal funds raised by the committee itself, and from which all expenditures or disbursement of Federal funds for Federal election activities are made.

(b) *Levin funds.* Levin funds must be raised solely by the State, district, or local committee of a political party that expends or disburses the funds. A State, district, or local committee of a political

party must not use as Levin funds any funds transferred or otherwise provided to the committee by:

(1) Any other State, district, or local committee of any political party, any officer or agent acting on behalf of such a committee, or any entity directly or indirectly established, financed, maintained or controlled by such a committee; or,

(2) The national committee of any political party (including a national congressional campaign committee of a political party), any officer or agent acting on behalf of such a committee, or any entity directly or indirectly established, financed, maintained, or controlled by such a committee.

(c) *Allocation transfers.* Transfers of Levin funds between the accounts of a State, district, or local committee of a political party for allocation purposes must comply with 11 CFR 300.30 and 11 CFR 300.33.

#### **§ 300.35 Office buildings.**

(a) *General provision.* For the purchase or construction of its office building, a State or local party committee may spend Federal funds or non-Federal funds that are not subject to the limitations, prohibitions, and disclosure provisions of the Act, so long as such funds are not contributed or donated by a foreign national. *See* 2 U.S.C. 441e. If non-Federal funds are used, they are subject to State law. An office building must not be purchased or constructed for the purpose of influencing the election of any candidate in any particular election for Federal office. For purposes of this section, the term *local party committee* shall include a *district party committee*.

(b) *Application of State law.* Non-Federal funds received by a State or local party committee that are spent for the purchase or construction of its office building are subject to State law as set forth in paragraphs (b)(1) and (2) of this section.

(1) *Non-Federal account.* If a State or local party committee uses non-Federal funds, Federal law does not preempt or supersede State law as to the source of funds used, the permissibility of the disbursements, or the reporting of the receipt and disbursement of such funds, except as provided in paragraph (a) of this section.

(2) *Levin funds.* Levin funds may be used for the purchase or construction of a State or local party committee office building, if permitted by State law.

(c) *Leasing a portion of the party office building.* A State or local party committee may lease a portion of its office building to others to generate income at the usual and normal charge.

If the building is purchased or constructed in whole or in part with non-Federal funds, all rental income shall be deposited in the committee's non-Federal account and used only for non-Federal purposes. Such rental income and its use must also comply with State law. If the building is purchased or constructed solely with Federal funds, the rental income may be deposited in the Federal account. The receipt of such funds shall be reported in compliance with 11 CFR 104.3(a)(4)(vi).

(d) *Transitional Provisions for State Party Building or Facility Account.* Up to and including November 5, 2002, the State committee of a political party may accept funds into its party office building or facility account, established pursuant to repealed 2 U.S.C. 431(8)(B)(viii), designated for the purchase or construction of an office building. Starting on November 6, 2002, the funds in the account may not be used for Federal account or Levin account purposes, but may be used for any non-Federal purposes, as permitted under State law.

#### **§ 300.36 Reporting Federal election activity; recordkeeping.**

(a) *Requirements for a State, district, or local committee of a political party, or an association or similar group of candidates for State or local office or of individuals holding State or local office, that is not a political committee.*

(1) A State, district, or local committee of a political party, or an association or similar group of candidates for State or local office or of individuals holding State or local office, that is not a political committee (*see* 11 CFR 100.5) must demonstrate through a reasonable accounting method that whenever it makes a payment of Federal funds or Levin funds (if it is permitted to spend Levin funds) for Federal election activity (*see* 11 CFR 300.32 and 300.33) it has received sufficient funds subject to the limitations and prohibitions of the Act to make the payment. Such an organization must keep records of amounts received or expended under this paragraph and, upon request, shall make such records available for examination by the Commission.

(2) Notwithstanding the foregoing, a payment of Federal funds or Levin funds for Federal election activity shall not constitute an expenditure for purposes of determining whether a State, district, or local committee of a political party, or an association or similar group of candidates for State or local office or of individuals holding State or local office, qualifies as a

political committee under 11 CFR 100.5, unless the payment otherwise qualifies as an expenditure under 2 U.S.C. 431(9). A payment of Federal funds for Federal election activity that refers to a clearly identified Federal candidate and that meets the criteria of 11 CFR 100.8(b)(10), (16), or (18) (*exempt activities*) shall be treated as a payment for exempt activity in accordance with all applicable provisions of this chapter, including, but not limited to, 11 CFR 100.5(c).

(b) *Requirements for a State, district, or local committee of a political party, or an association or similar group of candidates for State or local office or of individuals holding State or local office, that is a political committee.*

(1) *Requirements for a State, district, or local committee of a political party that has less than \$5,000 of aggregate receipts and disbursements for Federal election activity in a calendar year, and for an association or similar group of candidates for State or local office or of individuals holding State or local office at all times.* This paragraph applies to a State, district, or local committee of a political party that is a political committee, and that has less than \$5,000 of aggregate receipts and disbursements for Federal election activity in a calendar year; and, at all times, to an association or similar group of candidates for State or local office or of individuals holding State or local office that is a political committee (see 11 CFR 100.5). Such a party committee or association of candidates or officeholders must report all receipts and disbursements of Federal funds for Federal election activity, including the Federally allocated portion of a payment for Federal election activity. A disbursement of Federal funds or Levin funds for Federal election activity (see 11 CFR 300.32 and 300.33) by either such a party committee or association of candidates or officeholders shall not be deemed an expenditure and reported as such pursuant to 11 CFR part 104, unless the disbursement otherwise qualifies as an expenditure under 2 U.S.C. 431(9).

(2) *Requirements for a State, district, or local committee of a political party that has \$5,000 or more of aggregate receipts and disbursements for Federal election activity in a calendar year.* A State, district, or local committee of a political party that is a political committee (see 11 CFR 100.5) must report all receipts and disbursements made for Federal election activity if the aggregate amount of such receipts and disbursements is \$5,000 or more during the calendar year. The disclosure required by this paragraph must include

receipts and disbursements of Federal funds and of Levin funds used for Federal election activity.

(i) *Reporting of allocation of expenses between Federal funds and Levin funds.*

A State, district, or local committee of a political party that makes a disbursement for Federal election activity that is allocated between Federal funds and Levin funds (see 11 CFR 300.33) must report for each such disbursement:

(A) In the first report of a calendar year disclosing an allocated disbursement for Federal election activity, the committee must state the allocation percentages to be applied for allocable Federal election activity pursuant to 11 CFR 300.33(b).

(B) In each subsequent report in the calendar year itemizing an allocated disbursement for Federal election activity, the committee must state the category of Federal election activity (see 11 CFR 100.24(b)) for which each allocated disbursement was made, and must disclose the total amounts disbursed from Federal funds and Levin funds for that year to date for each such category.

(ii) *Reporting of allocation transfers.*

A committee that makes allocated disbursements for Federal election activities in accordance with 11 CFR 300.33(d) shall report each transfer of Levin funds from its Levin or non-Federal account, to its Federal account, and each transfer from its Federal account and its Levin or non-Federal account into an allocation account, for the purpose of making such disbursements. In the report covering the period in which each transfer occurred, the committee must explain in a memo entry the allocated disbursement to which the transfer relates and the date on which the transfer was made. If the transfer includes funds for the allocable costs of more than one category of Federal election activity, the committee must itemize the transfer, showing the amounts designated for each category.

(iii) *Reporting of allocated disbursements.* For each disbursement allocated between Federal funds and Levin funds, the committee must report the full name and address of each person to whom the disbursement was made, the date of the disbursement, amount, and purpose of the disbursement. If the disbursement is for the allocable costs of more than one category of Federal election activity, the committee must itemize the disbursement, showing the amounts designated for each category. The committee must also disclose the total amount disbursed from Federal funds

and Levin funds for Federal election activity that calendar year, to date, for each category of Federal election activity.

(iv) *Itemization.* The disclosure required by paragraph (b)(2) of this section must include, in addition to any other applicable reporting requirement of this chapter, the itemized disclosure of receipts and disbursements of \$200 or more to or from any person for Federal election activities.

(3) *Reporting of disbursements allocated between Federal funds and non-Federal funds, other than Levin funds.* A State, district, or local committee of a political party that makes a disbursement for costs allocable between Federal and non-Federal funds, other than the costs of Federal election activity that is allocated between Federal funds and Levin funds under 11 CFR 300.33, must comply with 11 CFR 104.17.

(c) *Filing.*

(1) *Schedule.* A State, district, or local committee of a political party, or an association or similar group of candidates for State or local office or of individuals holding State or local office, that must file reports under paragraph (b) of this section must comply with the monthly filing schedule in 11 CFR 104.5(c)(3).

(2) *Electronic filing.* Receipts of Federal funds for Federal election activity that constitute contributions under 11 CFR 100.7, and disbursements of Federal funds for Federal election activity that constitute expenditures under 11 CFR 100.8, apply when determining whether a political committee must file reports in an electronic format under 11 CFR 104.18.

(d) *Recordkeeping.* A State, district, or local committee of a political party, or an association or similar group of candidates for State or local office or of individuals holding State or local office, that must file reports under paragraph (b) of this section must comply with the requirements of 11 CFR 104.14.

**§ 300.37 Prohibitions on fundraising for and donating to certain tax-exempt organizations (2 U.S.C. 441i(d)).**

(a) *Prohibitions.* A State, district, or local committee of a political party must not solicit any funds for, or make or direct any donations to:

(1) An organization that is described in 26 U.S.C. 501(c) and exempt from taxation under section 26 U.S.C. 501(a) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity;

(2) An organization that has submitted an application for tax-exempt status under 26 U.S.C. 501(c) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity; or

(3) An organization described in 26 U.S.C. 527, unless the organization is:

(i) A political committee under 11 CFR 100.5;

(ii) A State, district, or local committee of a political party;

(iii) The authorized campaign committee of a State or local candidate; or

(iv) A political committee under State law, that supports only State or local candidates and that does not make expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity.

(b) *Application.* This section also applies to:

(1) An officer or agent acting on behalf of a State, district, or local committee of a political party;

(2) An entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee or a political party or an officer or agent acting on behalf of such an entity; or

(3) An entity that is directly or indirectly established, financed, maintained, or controlled by an agent of a State, district, or local committee of a political party.

(c) *Determining whether an organization makes expenditures or disbursements in connection with a Federal election.*

(1) In determining whether a section 501(c) organization is one that makes expenditures or disbursements in connection with a Federal election, including expenditures or disbursements for Federal election activity, pursuant to paragraphs (a)(1) and (2) of this section, a State, district, or local committee of a political party or any other person described in paragraph (b) of this section, may obtain and rely upon a certification from the organization that satisfies the criteria described in paragraph (d) of this section.

(2) In determining whether a section 527 organization is a State-registered political committee that supports only State or local candidates and does not make expenditures or disbursements in connection with an Federal election, including expenditures or disbursements for Federal election activity, pursuant to paragraph (a)(3)(iv)

of this section, a State, district, or local committee of a political party or any other person described in paragraph (b) of this section, may obtain and rely upon a certification from the organization that satisfies the criteria described in paragraph (d) of this section.

(d) *Certification.* A State, district, or local committee of a political party or any person described in paragraph (b) of this section may rely upon a certification that meets all of the following criteria:

(1) The certification is a signed written statement by an officer or other authorized representative of the organization with knowledge of the organization's activities or by the treasurer of the State-registered political committee described in paragraph (a)(3)(iv) of this section;

(2) The certification states that within the current election cycle, the organization or political committee has not made, and does not intend to make, expenditures or disbursements in connection with an election for Federal office (including for Federal election activity); and

(3) The certification states that the organization or political committee does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(e) If a State, district, or local committee of a political party or any person described in paragraph (b) of this section has actual knowledge that the certification is false, the certification may not be relied upon.

(f) It is not prohibited for a State, district, or local committee of a political party or its agents to respond to a request for information about a tax-exempt group that shares the party's political or philosophical goals.

### Subpart C—Tax-Exempt Organizations

#### § 300.50 Prohibited fundraising by national party committees (2 U.S.C. 441i(d)).

(a) *Prohibitions on fundraising and donations.* A national committee of a political party, including a national congressional campaign committee, must not solicit any funds for, or make or direct any donations to the following organizations:

(1) An organization that is described in 26 U.S.C. 501(c) and exempt from taxation under section 26 U.S.C. 501(a) and that makes expenditures or disbursements in connection with an election for Federal office, including

expenditures or disbursements for Federal election activity;

(2) An organization that has submitted an application for tax-exempt status under 26 U.S.C. 501(c) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity; or

(3) An organization described in 26 U.S.C. 527, unless the organization is:

(i) A political committee under 11 CFR 100.5;

(ii) A State, district, or local committee of a political party; or

(iii) The authorized campaign committee of a State or local candidate;

(b) *Application.* This section also applies to:

(1) An officer or agent acting on behalf of a national party committee, including a national congressional campaign committee;

(2) An entity that is directly or indirectly established, financed, maintained, or controlled by a national party committee, including a national congressional campaign committee, or an officer or agent acting on behalf of such an entity; or

(3) An entity that is directly or indirectly established, financed, maintained, or controlled by an agent of a national, State, district, or local committee of a political party, including a national congressional campaign committee.

(c) *Determining whether a section 501(c) organization makes expenditures or disbursements in connection with Federal elections.* In determining whether a section 501(c) organization is one that makes expenditures or disbursements in connection with a Federal election, including expenditures or disbursements for Federal election activity, pursuant to paragraphs (a)(1) and (2) of this section, a national committee of a political party, including a national congressional campaign committee, or any other person described in paragraph (b) of this section, may obtain and rely upon a certification from the organization that satisfies the criteria described in paragraph (d) of this section.

(d) *Certification.* A national committee of a political party, including a national congressional campaign committee, or any person described in paragraph (b) of this section, may rely upon a certification that meets all of the following criteria:

(1) The certification is a signed written statement by an officer or other authorized representative of the organization with knowledge of the organization's activities;

(2) The certification states that within the current election cycle, the organization has not made, and does not intend to make, expenditures or disbursements in connection with an election for Federal office (including for Federal election activity); and

(3) The certification states that the organization or political committee does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(e) *Reliance on false certification.* If a national committee of a political party or any person described in paragraph (b) of this section has actual knowledge that the certification is false, the certification may not be relied upon.

(f) *Requests for information.* It is not prohibited for a national party or its agent to respond to a request for information about a tax-exempt group that shares the party's political or philosophical goals.

**§ 300.51 Prohibited fundraising by State, district, or local party committees (2 U.S.C. 441i(d)).**

(a) *Prohibitions.* A State, district, or local committee of a political party must not solicit any funds for, or make or direct any donations to:

(1) An organization that is described in 26 U.S.C. 501(c) and exempt from taxation under section 26 U.S.C. 501(a) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity;

(2) An organization that has submitted an application for tax-exempt status under 26 U.S.C. 501(c) and that makes expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity; or

(3) An organization described in 26 U.S.C. 527, unless the organization is:

(i) A political committee under 11 CFR 100.5;

(ii) A State, district, or local committee of a political party;

(iii) The authorized campaign committee of a State or local candidate; or

(iv) A political committee under State law, that supports only State or local candidates and that does not make expenditures or disbursements in connection with an election for Federal office, including expenditures or disbursements for Federal election activity.

(b) *Application.* This section also applies to:

(1) An officer or agent acting on behalf of a State, district, or local committee of a political party;

(2) An entity that is directly or indirectly established, financed, maintained, or controlled by a State, district, or local committee or a political party or an officer or agent acting on behalf of such an entity; or

(3) An entity that is directly or indirectly established, financed, maintained, or controlled by an agent of a State, district, or local committee of a political party.

(c) *Determining whether an organization makes expenditures or disbursements in connection with a Federal election.*

(1) In determining whether a section 501(c) organization is one that makes expenditures or disbursements in connection with a Federal election, including expenditures or disbursements for Federal election activity, pursuant to paragraphs (a)(1) and (2) of this section, a State, district, or local committee of a political party or any other person described in paragraph (b) of this section, may obtain and rely upon a certification from the organization that satisfies the criteria described in paragraph (d) of this section.

(2) In determining whether a section 527 organization is a State-registered political committee that supports only State or local candidates and does not make expenditures or disbursements in connection with a Federal election, including expenditures or disbursements for Federal election activity, pursuant to paragraph (a)(3)(iv) of this section, a State, district, or local committee of a political party or any other person described in paragraph (b) of this section, may obtain and rely upon a certification from the organization that satisfies the criteria described in paragraph (d) of this section.

(d) *Certification.* A State, district, or local committee of a political party or any person described in paragraph (b) of this section may rely upon a certification that meets all of the following criteria:

(1) The certification is a signed written statement by an officer or other authorized representative of the organization with knowledge of the organization's activities or by the treasurer of the State-registered political committee described in paragraph (a)(3)(iv) of this section;

(2) The certification states that within the current election cycle, the organization or political committee has not made, and does not intend to make, expenditures or disbursements in

connection with an election for Federal office (including for Federal election activity); and

(3) The certification states that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(e) If a State, district, or local committee of a political party or any person described in paragraph (b) of this section has actual knowledge that the certification is false, the certification may not be relied upon.

(f) It is not prohibited for a State, district, or local committee of a political party or its agents to respond to a request for information about a tax-exempt group that shares the party's political or philosophical goals.

**§ 300.52 Fundraising by Federal candidates and Federal officeholders (2 U.S.C. 441i(e)(1)&(4)).**

A Federal candidate, an individual holding Federal office, and an individual agent acting on behalf of either may make the following solicitations of funds on behalf of any organization described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a), or an organization that has submitted an application for determination of tax-exempt status under 26 U.S.C. 501(c):

(a) *General solicitations.* A Federal candidate, an individual holding Federal office, or an individual agent acting on behalf of either, may make a general solicitation of funds, without regard to source or amount limitation, if:

(1) The organization does not engage in activities in connection with an election, including any activity described in paragraph (c) of this section; or

(2)(i) The organization conducts activities in connection with an election, but the organization's principal purpose is not to conduct election activities or any activity described in paragraph (c) of this section; and

(ii) The solicitation is not to obtain funds for activities in connection with an election or any activity described in paragraph (c) of this section.

(b) *Specific solicitations.* A Federal candidate, an individual holding Federal office, or an individual agent acting on behalf of either, may make a solicitation explicitly to obtain funds for any activity described in paragraph (c) of this section or for an organization whose principal purpose is to conduct that activity, if:

(1) The solicitation is made only to individuals; and

(2) The amount solicited from any individual does not exceed \$20,000 during any calendar year.

(c) *Voter registration, voter identification, get-out-the-vote activity and generic campaign activity.* This section applies to only the following types of Federal election activity:

(1) Voter registration activity, as described in 11 CFR 100.24(a)(2), during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; or

(2) The following activities conducted in connection with an election in which one or more Federal candidates appear on the ballot (*see* 11 CFR 100.24(a)(1)), regardless of whether one or more State candidates also appears on the ballot:

(i) Voter identification as described in 11 CFR 100.24(a)(4);

(ii) Get-out-the-vote activity as described in 11 CFR 100.24(a)(3); or

(iii) Generic campaign activity as defined in 11 CFR 100.25.

(d) *Prohibited solicitations.* A Federal candidate, an individual holding Federal office, and an individual who is an agent acting on behalf of either, must not make any solicitation on behalf of any organization described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a), or an organization that has submitted an application for determination of tax-exempt status under 26 U.S.C. 501(c) for any election activity other than a Federal election activity as described in paragraph (c) of this section.

(e) *Safe Harbor.* In determining whether a 501(c) organization is one whose principal purpose is to conduct election activities, including activity described in paragraph (c) of this section, a Federal candidate, an individual holding Federal office, or an individual agent acting on behalf of either, may obtain and rely upon a certification from the organization that satisfies the following criteria:

(1) The certification is a signed written statement by an officer or other authorized representative of the organization with knowledge of the organization's activities;

(2) The certification states that the organization's principal purpose is not to conduct election activities, including election activity described in paragraph (c) of this section; and

(3) The certification states that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(f) If a Federal candidate, an individual holding Federal office, or an individual agent acting on behalf of either has actual knowledge that the certification is false, the certification may not be relied upon.

#### Subpart D—Federal Candidates and Officeholders

##### § 300.60 Scope (2 U.S.C. 441i(e)(1)).

This subpart applies to:

(a) Federal candidates;

(b) Individuals holding Federal office (*see* 11 CFR 300.2(o));

(c) Agents acting on behalf of a Federal candidate or individual holding Federal office; and

(d) Entities that are directly or indirectly established, financed, maintained, or controlled by, or acting on behalf of, one or more Federal candidates or individuals holding Federal office.

##### § 300.61 Federal elections (2 U.S.C. 441i(e)(1)(A)).

No person described in 11 CFR 300.60 shall solicit, receive, direct, transfer, spend, or disburse funds in connection with an election for Federal office, including funds for any Federal election activity as defined in 11 CFR 100.24, unless the amounts consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of the Act.

##### § 300.62 Non-Federal elections (2 U.S.C. 441i(e)(1)(B)).

A person described in 11 CFR 300.60 may solicit, receive, direct, transfer, spend, or disburse funds in connection with any non-Federal election, only in amounts and from sources that are consistent with State law, and that do not exceed the Act's contribution limits or come from prohibited sources under the Act.

##### § 300.63 Exception for State party candidates (2 U.S.C. 441i(e)(2)).

Section 300.62 shall not apply to a Federal candidate or individual holding Federal office who is a candidate for State or local office, if the solicitation, receipt or spending of funds is permitted under State law; and refers only to that State or local candidate, to any other candidate for that same State or local office, or both. If an individual is simultaneously running for both Federal and State or local office, the individual must raise, accept, and spend only Federal funds for the Federal election.

##### § 300.64 Exemption for attending, speaking, or appearing as a featured guest at fundraising events (2 U.S.C. 441i(e)(3)).

Notwithstanding the provisions of 11 CFR 100.24, 300.61 and 300.62, a Federal candidate or individual holding Federal office may attend, speak, or be a featured guest at a fundraising event for a State, district, or local committee of a political party, including but not limited to a fundraising event at which Levin funds are raised, or at which non-Federal funds are raised. In light of the foregoing:

(a) State, district, or local committees of a political party may advertise, announce or otherwise publicize that a Federal candidate or individual holding Federal office will attend, speak, or be a featured guest at a fundraising event, including, but not limited to, publicizing such appearance in pre-event invitation materials and in other party committee communications; and

(b) Candidates and individuals holding Federal office may speak at such events without restriction or regulation.

##### § 300.65 Exceptions for certain tax-exempt organizations (2 U.S.C. 441i(e)(1) and (4)).

A Federal candidate, an individual holding Federal office, and an individual agent acting on behalf of either may make the following solicitations of funds on behalf of any organization described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a), or an organization that has submitted an application for determination of tax-exempt status under 26 U.S.C. 501(c):

(a) *General solicitations.* A Federal candidate, an individual holding Federal office or an individual agent acting on behalf of either, may make a general solicitation of funds, without regard to source or amount limitation, if:

(1) The organization does not engage in activities in connection with an election, including any activity described in paragraph (c) of this section; or

(2)(i) The organization conducts activities in connection with an election, but the organization's principal purpose is not to conduct election activities or any activity described in paragraph (c) of this section; and

(ii) The solicitation is not to obtain funds for activities in connection with an election or any activity described in paragraph (c) of this section.

(b) *Specific solicitations.* A Federal candidate, an individual holding Federal office, or an individual agent acting on behalf of either, may make a solicitation explicitly to obtain funds for any activity described in paragraph (c)

of this section or for an organization whose principal purpose is to conduct that activity, if:

(1) The solicitation is made only to individuals; and

(2) The amount solicited from any individual does not exceed \$20,000 during any calendar year.

(c) *Voter registration, voter identification, get-out-the-vote activity and generic campaign activity.* This section applies to only the following types of Federal election activity:

(1) Voter registration activity, as described in 11 CFR 100.24(a)(2), during the period that begins on the date that is 120 days before the date a regularly scheduled Federal election is held and ends on the date of the election; or

(2) The following activities conducted in connection with an election in which one or more Federal candidates appear on the ballot (see 11 CFR 100.24(a)(1)), regardless of whether one or more State candidates also appears on the ballot:

(i) Voter identification as described in 11 CFR 100.24(a)(4);

(ii) Get-out-the-vote activity as described in 11 CFR 100.24(a)(3); or

(iii) Generic campaign activity as defined in 11 CFR 100.25.

(d) *Prohibited solicitations.* A Federal candidate, an individual holding Federal office, and an individual who is an agent acting on behalf of either, must not make any solicitation on behalf of any organization described in 26 U.S.C. 501(c) and exempt from taxation under 26 U.S.C. 501(a), or an organization that has submitted an application for determination of tax-exempt status under 26 U.S.C. 501(c) for any election activity other than a Federal election activity as described in paragraph (c) of this section.

(e) *Safe Harbor.* In determining whether a 501(c) organization is one whose principal purpose is to conduct election activities, including activity described in paragraph (c) of this section, a Federal candidate, an individual holding Federal office, or an

individual agent acting on behalf of either may obtain and rely upon a certification from the organization that satisfies the following criteria:

(1) The certification is a signed written statement by an officer or other authorized representative of the organization with knowledge of the organization's activities;

(2) The certification states that the organization's principal purpose is not to conduct election activities, including election activities described in paragraphs (c) of this section.

(3) The certification states that the organization does not intend to pay debts incurred from the making of expenditures or disbursements in connection with an election for Federal office (including for Federal election activity) in a prior election cycle.

(f) If a Federal candidate, an individual holding Federal office, or an individual agent acting on behalf of either has actual knowledge that the certification is false, the certification may not be relied upon.

#### **Subpart E—State and Local Candidates**

##### **§ 300.70 Scope (2 U.S.C. 441i(f)(1)).**

This subpart applies to any candidate for State or local office, individual holding State or local office, or an agent acting on behalf of any such candidate or individual. For example, this subpart applies to an individual holding Federal office who is a candidate for State or local office. This subpart does not apply to an association or similar group of candidates for State or local office or of individuals holding State or local office.

##### **§ 300.71 Federal funds required for certain public communications (2 U.S.C. 441i(f)(1)).**

No individual described in 11 CFR 300.70 shall spend any funds for a public communication that refers to a clearly identified candidate for Federal office (regardless of whether a candidate for State or local office is also

mentioned or identified), and that promotes or supports any candidate for that Federal office, or attacks or opposes any candidate for that Federal office (regardless of whether the communication expressly advocates a vote for or against a candidate) unless the funds consist of Federal funds that are subject to the limitations, prohibitions, and reporting requirements of the Act. See definition of *public communication* at 11 CFR 100.26

##### **§ 300.72 Federal funds not required for certain communications (2 U.S.C. 441i(f)(2)).**

The requirements of section 11 CFR 300.71 shall not apply if the public communication is in connection with an election for State or local office, and refers to one or more candidates for State or local office or to a State or local officeholder but does not promote, support, attack, or oppose any candidate for Federal office.

#### **PART 9034—ENTITLEMENTS**

25. The authority citation for Part 9034 continues to read as follows:

**Authority:** 26 U.S.C. 9034 and 9039(b).

26. Section 9034.8 is amended by adding introductory language to paragraph (a) to read as follows:

##### **§ 9034.8 Joint fundraising.**

(a) *General.* Nothing in this section shall supersede 11 CFR part 300, which prohibits any person from soliciting, receiving, directing, transferring, or spending any non-Federal funds, or from transferring Federal funds for Federal election activities.

\* \* \* \* \*

Dated: July 16, 2002.

**Karl J. Sandstrom,**  
*Vice-Chairman, Federal Election Commission.*

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