AGENDA DOCUMENT NO. 05-04

FEDERAL ELECTION COMMISSION
Washington, DC 20463

January 21, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Rosemary C. Smith
Associate General Counsel

Brad C. Deutsch
Assistant General Counsel

Cheryl A.F. Hemsley
Attorney

SUBJECT: Notice of Proposed Rulemaking: *De Minimis* Exemption for the Disbursement of Levin Funds by State, District, and Local Party Committees

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that would make changes to the *De Minimis* Exemption for the disbursement of Levin funds by State, district, and local committees of political parties which are necessary to conform 11 CFR 300.32 to the district court's decision in Shays v. FEC, 337 F.Supp.2d 28 (D.D.C. 2004).

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached NPRM for publication in the *Federal Register*.

Attachment

FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2005 – >]

De Minimis Exemption for Disbursement of Levin Funds by State, District, and Local Party Committees

AGENCY: Federal Election Commission.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Federal Election Commission requests comments on proposed revisions to the Commission's regulations that establish a de minimis exemption allowing State, district, and local committees of a political party to pay for certain Federal election activity aggregating $5,000 or less in a calendar year entirely with Levin funds. In Shays v. FEC, the District Court held that the Commission's de minimis exemption was inconsistent with the statutory intent of the Bipartisan Campaign Reform Act and remanded the regulation to the Commission for further action consistent with the court's opinion. The Commission is appealing this ruling to the D.C. Circuit. In the interim, the Commission is initiating this rulemaking. No final decision has been made by the Commission on the issues presented in this rulemaking. Further information is provided in the supplementary information that follows.

DATES: Comments must be received on or before [INSERT DATE 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If the Commission receives sufficient requests to testify, it may hold a hearing on these proposed rules. Commenters wishing to testify at the hearing must so indicate in their written or electronic comments.

ADDRESSES: All comments should be addressed to Mr. Brad C. Deutsch, Assistant General Counsel, and must be submitted in either electronic or written form. Commenters are strongly encouraged to submit comments electronically to ensure timely receipt and consideration. Electronic mail comments should be sent to deminimis@fec.gov and may also be submitted through the Federal eRegulations Portal at www.regulations.gov. All electronic comments must include the full name, electronic mail address and postal service address of the commenter. Electronic mail comments that do not contain the full name, electronic mail address and postal service address of the commenter will not be considered. If the electronic mail comments include an attachment, the attachment must be in the Adobe Acrobat (.pdf) or Microsoft Word (.doc) format. Faxed comments should be sent to (202) 219-3923, with printed copy follow-up. Written comments and printed copies of faxed comments should be sent to the Federal Election Commission, 999 E Street, N.W., Washington, D.C.

20463. The Commission will post public comments on its Web site. If the Commission decides a hearing is necessary, the hearing will be held in the Commission's ninth floor meeting room, 999 E Street N.W., Washington, D.C.

FOR FURTHER INFORMATION CONTACT: Mr. Brad C. Deutsch, Assistant General Counsel, or Ms. Cheryl A.F. Hemsley, Attorney, 999 E Street N.W., Washington, D.C. 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION:

The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (March 27, 2002), contained extensive and detailed amendments to the Federal Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. 431 et seq. As amended by BCRA, subsection 441i(b)(1) of the Act, 2 U.S.C. 441i(b)(1), provides that State, district, and local political party committees must generally use Federal funds[1] to pay for Federal election activity ("FEA").[2] However, subsection 441i(b)(2) provides an exception for certain activities covered by Types 1 and 2 FEA, for which State, district, and local political party committees may allocate disbursements between Federal

[1] "Federal funds" are funds that comply with the limitations, prohibitions, and reporting requirements of the Act. See 11 CFR 300.2(g).

[2] The four types of FEA are: Type 1 - Voter registration activity during the period that begins on the date that is 120 days before a regularly scheduled Federal election is held and ends on the date of the election; Type 2 - 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; Type 3 - A public communication that refers to a clearly identified candidate for Federal office; and Type 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 his or her compensated time during that month on activities in connection with a Federal election. See 2 U.S.C. 431(20) and 11 CFR 100.24.

funds and Levin funds in accordance with allocation ratios as determined by the Commission.[3] 2 U.S.C. 441i(b)(2); see also 11 CFR 300.2(i), 300.32, and 300.33.

On July 29, 2002, the Commission promulgated regulations at 11 CFR Part 300 implementing BCRA's provisions concerning disbursements by State, district, and local party committees for FEA. See Final Rules and Explanation and Justification for Regulations on Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money, 67 FR 49064 (July 29, 2002) ("Soft Money E&J"). The regulations at 11 CFR 300.32(c)(4) require any State, district, or local committee of a political party that disburses more than $5,000 on allocable Type 1&2 FEA in a calendar year either to pay for such allocable FEA entirely with Federal funds or to allocate disbursements between Federal funds and Levin funds. The Commission also created a de minimis exemption for any State, district, or local party committee whose disbursements for allocable Type 1&2 FEA aggregate $5,000 or less in a calendar year (the "$5,000 Exemption"), permitting such committees to pay for these types of FEA entirely with Levin funds.

In the Soft Money E&J, the Commission stated three reasons for promulgating the $5,000 Exemption at 11 CFR 300.32(c)(4). First, the Commission noted that although BCRA requires State, district, and local political party committees to report all receipts and disbursements for FEA, the statute provides an exception for committees whose FEA receipts and disbursements aggregate less than $5,000 in a calendar year. See 2 U.S.C. 434(c)(2)(A). The Commission reasoned that the reporting exception suggests that

[3] Levin funds are a type of non-Federal funds raised only by State, district, and local political party committees. Levin funds are limited to donations of $10,000 per source per calendar year and are generally solicitable from sources otherwise prohibited by the Act (except from foreign nationals). Donations of Levin Funds, however, must be lawful under the laws of the State in which a committee is organized. See 2 U.S.C. 441i(b)(2)(B); see also 11 CFR 300.31 and 300.32(c). Types 1 and 2 FEA listed in note 2, above, are allocable between Federal and Levin funds, so long as the activities do not refer to a clearly identified Federal candidate ("allocable Type 1&2 FEA"). See 2 U.S.C. 441i(b)(2)(B)(i) and 11 CFR 300.32.

Congress did not take a rigid approach to low levels of FEA. Second, the Commission explained that it was particularly sensitive to the grassroots nature of allocable Type 1&2 FEA, stating that there is a far weaker nexus between Federal candidates and this category of FEA than the other types of FEA for which use of Levin funds is prohibited. Finally, the Commission noted that $5,000 is only half of what any single donor may donate to each and every State, district, and local political party committee under BCRA, so there is no danger that allowing a committee to use entirely Levin funds for allocable Type 1&2 FEA aggregating $5,000 or less in a calendar year would lead to circumvention of the $10,000 Levin fund donation limit in BCRA. See Soft Money E&J at 49097.

In Shays v. FEC, 337 F.Supp.2d 28, 114-117 (D.D.C. 2004), appeal filed, No. 04-5352 (D.C. Cir. Sept. 28, 2004) ("Shays"), the district court held that the $5,000 Exemption in 11 CFR 300.32(c)(4) was inconsistent with Congress's clear intent, as expressed in BCRA, to allow State, district, and local party committees to pay for allocable Type 1&2 FEA either solely with Federal funds or with funds allocated between Federal and Levin funds.[4] The court concluded that the $5,000 Exemption was not permissible, finding that "Congress clearly expressed its intent in BCRA's statutory language that all [FEA] pursued by state, local and district political party committees is to be paid for using federal funds, except for certain circumstances where such committees may use an 'allocated' ratio of federal and Levin funds." Shays at 116-17.

[4] "Under the Chevron analysis, a court first asks 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.'" Shays at 51 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

The court stated that for a regulatory de minimis exemption to stand, an agency has the burden of demonstrating that following the precise language of the statute would lead to "absurd or futile results," or that the failure to create a de minimis exemption would be "contrary to the primary legislative goal." Shays at 117 (quoting Environmental Defense Fund v. EPA, 82 F.3d 451, 466 (D.C. Cir. 1996) quoting, in turn, State of Ohio v. EPA, 997 F.2d 1520, 1535 (D.C. Cir. 1993)). The court addressed each of the Commission's reasons for adopting the $5,000 Exemption and found that the Commission had not met the burden of demonstrating that following the precise statutory language would lead to absurd or futile results and had not shown that the $5,000 Exemption comported with BCRA's purposes.[5] Shays at 117. The court then remanded the regulations to the Commission for further action consistent with its opinion. Shays at 130.

I. Proposed 11 CFR 300.32(c)(4) – Conditions and restrictions on spending Levin funds

Because the court found the $5,000 Exemption to be inconsistent with the statutory intent of 2 U.S.C 441i(b) and that the standards for upholding a de minimis exemption had not been met, the Commission proposes to delete the $5,000 Exemption from 11 CFR 300.32(c)(4). Paragraph (c)(4) of the proposed rule would require State, local, and district political party committees to pay for all allocable FEA either entirely with Federal funds or with an allocation of Federal and Levin funds pursuant to 11 CFR

[5] The Commission has filed an appeal with the U.S. Court of Appeals for the D.C. Circuit of certain aspects of the Shays decision, including the court's conclusion that the $5,000 Exemption is inconsistent with the statutory intent of 2 U.S.C 441i(b). The appeal is currently pending. In the event the Commission prevails on appeal, the Commission may terminate this rulemaking proceeding prior to adoption of final rules.

300.33. The Commission solicits comments on the proposed regulation. The Commission also invites comments on whether following the precise language of BCRA would lead to "absurd or futile results," absent promulgation of a de minimis exemption for disbursement of Levin funds by State, district, and local political party committees.

II. Alternative Proposal for 11 CFR 300.32(c)(4)

Although not reflected in the attached proposed rules, the Commission also seeks comments on whether 11 CFR 300.32(c)(4) should be revised to apply only to State, district, and local party committees with combined receipts and disbursements for FEA (whether allocable or not) that together aggregate to less than $5,000 in a calendar year. See 2 U.S.C. 434(e)(2)(A). If a de minimis exemption allowing for the exclusive use of Levin funds for allocable Type 1&2 FEA were to apply only to State, district, and local party committees with FEA receipts and disbursements aggregating less than $5,000 in a calendar year, the exemption would then apply only to those committees that are already statutorily exempt from having to report FEA under the exception contained in 2 U.S.C. 434(e)(2)(A). The Commission invites comment on whether adoption of this alternative proposal would comport with the statutory intent of 2 U.S.C 441i(b).

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, would not have a significant economic impact on a substantial number of small entities. The

basis for this certification is that the State, district, and local party committees of the two major political parties are not small entities under 5 U.S.C. 601 because they are not small businesses, small organizations, or small governmental jurisdictions. To the extent that other political party committees may fall within the definition of "small entities," their number is not substantial.

List of Subjects

11 CFR Part 300

Campaign funds, Nonprofit organizations, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

For the reasons set out in the preamble, the Federal Election Commission proposes to amend Subchapter C of Chapter I of Title 11 of the Code of Federal Regulations as follows:

PART 300-NON-FEDERAL FUNDS

1. The authority citation for Part 300 would continue to read as follows:

Authority: 2 U.S.C. 434(e), 438(a)(8), 441a(a), 441i, 453.

2. Section 300.32 would be amended by revising paragraph (c)(4) to read as follows:

§ 300.32 Expenditures and disbursements

* * * * *

(c) Conditions and restrictions on spending Levin funds.

* * *

(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.~~

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Scott E. Thomas
Chairman
Federal Election Commission

DATED _____

BILLING CODE: 6715-01-P