



FEDERAL ELECTION COMMISSION
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2005 MAR -3 P 2:01

March 3, 2005

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon *JAP*
Staff Director

FROM: Lawrence H. Norton *LHN*
General Counsel

Rosemary C. Smith *RCS*
Associate General Counsel

Mai T. Dinh *MTD*
Assistant General Counsel

Albert J. Kiss *AJK*
Attorney

SUBJECT: Final Rules and Explanation and Justification on Political Party
Committees Donating Funds to Certain Tax-Exempt Organizations and
Political Organizations

AGENDA ITEM

For Meeting of: 03-10-05

On December 9, 2004, the Commission published a Notice of Proposed Rulemaking ("NPRM"), entitled "Political Party Committees Donating Funds to Certain Tax-Exempt Organizations and Political Organizations." See 69 FR 71388 (Dec. 9, 2004). The NPRM proposed certain changes needed to conform the Commission's regulations in 11 CFR Part 300 to the decision of the Supreme Court in McConnell v. FEC, 540 U.S. 93, 174-181 (2003), which included a narrowing construction of BCRA section 101 (2 U.S.C. 441i(d)). Under this narrowing construction, party committees "remain free to make or direct donations of money to any tax-exempt organization that has otherwise been raised in compliance with FECA." Id. at 180-181.

After reviewing the comments and considering the issues presented in the NPRM, the Office of the General Counsel has prepared the attached Final Rules and Explanation and Justification for Commission consideration. The draft Final Rules are the same as the rules proposed in the NPRM, except that revised 11 CFR 300.37 and 300.51 explicitly encompass Levin funds, which are a type of non-Federal funds, and typographical errors in sections 300.37(b)(2) and 300.51(b)(2) are corrected.

Recommendation:

The Office of the General Counsel recommends that the Commission approve the attached Final Rules and Explanation and Justification for publication in the *Federal Register* and transmittal to Congress.

Attachment

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Part 300**

3 [Notice 2005 - >]

4 **Political Party Committees Donating Funds to**
5 **Certain Tax-Exempt Organizations and Political Organizations**

6
7 **AGENCY:** Federal Election Commission.

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

9 **SUMMARY:** The Federal Election Commission is revising its regulations governing
10 donations made or directed by national, State, district, and local political
11 party committees to certain tax-exempt organizations and political
12 organizations. The final rules allow these political party committees to
13 make or direct donations of Federal funds to certain 501(c) tax-exempt
14 organizations and certain 527 political organizations. These revisions
15 conform the Commission's rules to the decision of the U.S. Supreme
16 Court in McConnell v. Federal Election Commission, which included a
17 narrowing construction of section 101 of the Bipartisan Campaign Reform
18 Act of 2002. Further information is provided in the supplementary
19 information that follows.

20 **EFFECTIVE**
21 **DATE:**

The effective date for the revisions to 11 CFR 300.11, 300.37, 300.50 and
22 300.51 is [INSERT DATE 30 DAYS AFTER THE DATE OF
23 PUBLICATION IN THE FEDERAL REGISTER].

1 **FOR FURTHER**
2 **INFORMATION**
3 **CONTACT:**

Ms. Mai T. Dinh, Assistant General Counsel, or Mr. Albert J. Kiss,
Attorney, 999 E Street N.W., Washington, D.C. 20463, (202) 694-1650 or
(800) 424-9530.

6 **SUPPLEMENTARY**
7 **INFORMATION:**

8 Section 441i(d) of the Federal Election Campaign Act of 1971 (the "Act"), 2 U.S.C. 431
9 et seq., prohibits national, State, district and local political party committees from soliciting any
10 funds for, or making or directing donations to, two types of tax-exempt organizations ("tax-
11 exempt organizations that actively participate in Federal elections"). These consist of (1)
12 organizations described in 26 U.S.C. 501(c) that are exempt from tax under 26 U.S.C. 501(a) (or
13 that have submitted an application for determination of tax exempt status under section 501(a))
14 and that make expenditures or disbursements in connection with an election for Federal office
15 (including expenditures or disbursements for Federal election activity); and (2) political
16 organizations described in 26 U.S.C. 527 (other than a political committee, a State, district or
17 local committee of a political party, or the authorized campaign committee of a candidate for
18 State or local office). 2 U.S.C. 441i(d)(1) and (2). This statutory provision was added to the Act
19 by section 101 of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116
20 Stat. 81, 82-85 (2002).

21 In 2002, the Commission promulgated rules at 11 CFR 300.11, 300.37, 300.50, and
22 300.51 implementing 2 U.S.C. 441i(d). Explanation and Justification for Rules on Prohibited
23 and Excessive Contributions: Non-Federal Funds or Soft Money, 67 FR 49064, 49089-49091,
24 and 49105-49106 (July 29, 2002) ("Soft Money Final Rules"). Except for the title of each, the

1 final rule at 11 CFR 300.11 is identical to the final rule at 11 CFR 300.50, and the final rule at 11
2 CFR 300.37 is identical to the final rule at 11 CFR 300.51. Id. at 49106.

3 Subsequently, in McConnell v. Federal Election Commission, 540 U.S. 93, 174-178
4 (2003), the Supreme Court upheld 2 U.S.C. 441i(d)'s prohibitions on the solicitation of funds for
5 tax-exempt organizations that actively participate in Federal elections. The Supreme Court also
6 upheld restrictions on making and directing donations of non-Federal funds to such tax-exempt
7 organizations. Here, the Supreme Court stated that, “[a]bsent such a restriction, state and local
8 party committees could accomplish directly what the antisolicitation restrictions prevent them
9 from doing indirectly—namely, raising large sums of soft money to launder through tax-exempt
10 organizations engaging in federal election activities.” Id. at 178-179. However, the Supreme
11 Court stated that section 441i(d) raises overbreadth concerns “if read to restrict donations from a
12 party’s federal account—i.e., funds that have already been raised in compliance with FECA’s
13 source, amount and disclosure limitations.” Id. at 179. The Court found “no evidence that
14 Congress was concerned about, much less that it intended to prohibit, donations of money
15 already fully regulated by FECA” and concluded that “political parties remain free to make or
16 direct donations of money to any tax-exempt organization that has otherwise been raised in
17 compliance with FECA.” Id. at 180-181.

18 To conform its regulations to the Supreme Court’s decision in McConnell, the
19 Commission proposed modifying 11 CFR 300.11, 300.37, 300.50 and 300.51 to provide that
20 political party committees, while prohibited from soliciting funds for tax-exempt organizations
21 that actively participate in Federal elections, are now free to make or direct donations of Federal

1 funds to any tax-exempt organization.¹ The Notice of Proposed Rulemaking (“NPRM”) 1
2 containing this proposal was published in the Federal Register on December 9, 2004.
3 69 FR 71388 (Dec. 9, 2004). The public comment period closed on January 10, 2005. The
4 Commission received two written comments (both jointly submitted) in response to the NPRM.²
5 Both groups of commenters supported the proposed rules.

6 These final rules are the same as the rules proposed in the NPRM, except that revised
7 11 CFR 300.37 and 300.51 explicitly encompass Levin funds, which are a type of non-Federal
8 funds, and typographical errors in sections 300.37(b)(2) and 300.51(b)(2) are corrected.

9 Under the Administrative Procedure Act, 5 U.S.C. 553(d), and the Congressional Review
10 of Agency Rulemaking Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker
11 of the House of Representatives and the President of the Senate and publish them in the Federal
12 Register at least 30 calendar days before they take effect. The final rules that follow were
13 transmitted to Congress on _____, 2005.

14 **EXPLANATION AND JUSTIFICATION**

15 11 CFR 300.11 -- Prohibitions on fundraising for and donating to certain tax-exempt 16 organizations

17 Section 300.11 implements 2 U.S.C. 441i(d) by prohibiting national committees of a
18 political party from soliciting any funds for, or making or directing any donations to, tax-exempt
19 organizations that actively participate in Federal elections. To implement the Supreme Court’s
20 decision in McConnell, the Commission is amending paragraph (a) of 11 CFR 300.11 to allow

¹ “Federal funds” are funds that comply with the limitations, prohibitions, and reporting requirements of the Act. 11
CFR 300.2(g). “Non-Federal funds” are funds that are not subject to the limitations and prohibitions of the Act. 11
CFR 300.2(k).

² The comments are available at <http://www.fec.gov/register.html> under “Political Party Committees Donating
Funds to Certain Tax-Exempt Organizations and Political Organizations.”

1 national party committees to make or direct donations of Federal funds to tax-exempt
2 organizations that actively participate in Federal elections. Under the revised rule, national party
3 committees must not make or direct donations of non-Federal funds to such tax-exempt
4 organizations. This statutory and regulatory prohibition is consistent with 2 U.S.C. 441i(a) and
5 11 CFR 300.10(a), which more generally prohibit national party committees from spending
6 funds or directing to another person donations of funds not subject to the limitations, prohibitions
7 and reporting requirements of the Act. The prohibition on the solicitation of funds by national
8 party committees for tax-exempt organizations that actively participate in Federal elections
9 remains unchanged in section 300.11(a). The Commission is also making a technical
10 amendment to section 300.11(b)(3) by removing the reference to a State, district, or local party
11 committee, because only national party committees are the subject of section 300.11. Both
12 groups of commenters agreed with the Commission's proposed modifications to section 300.11.
13 The final rules for section 300.11 are identical to the proposed rules.

14
15 11 CFR 300.37 -- Prohibitions on fundraising for and donating to certain tax-exempt
16 organizations

17 Section 300.37 implements 2 U.S.C. 441i(d) by prohibiting State, district and local
18 committees of a political party from soliciting any funds for, or making or directing any
19 donations to, tax-exempt organizations that actively participate in Federal elections, similar to
20 the restrictions placed on national committees of a political party in 11 CFR 300.11. As
21 discussed above, restrictions on making or directing donations of Federal funds by these party
22 committees are unconstitutional under McConnell. Consequently, the Commission is revising
23 paragraph (a) of 11 CFR 300.37 to permit the use of Federal funds in this manner. Thus, revised

1 section 300.37(a) limits the prohibition on making or directing donations to donations of non-
2 Federal funds. The prohibition on soliciting funds for tax-exempt organizations that actively
3 participate in Federal elections remains in revised section 300.37(a).

4 Additionally, the NPRM sought comment on whether State, district and local party
5 committees should be allowed to make or direct donations of Levin funds to tax-exempt
6 organizations that actively participate in Federal elections if permitted by State law. State,
7 district and local party committees may use an allocable mix of Federal funds and Levin funds to
8 pay for certain types of Federal election activity, including voter registration activity during the
9 120 days preceding a regularly scheduled Federal election, and voter identification, get-out-the-
10 vote, and generic campaign activity that is conducted in connection with an election in which a
11 candidate for Federal office appears on the ballot. 2 U.S.C. 431(20), 441i(b)(1) and (2); 11 CFR
12 100.24; see also 300.32 and 300.33. State, district and local party committees may not use Levin
13 funds, or other non-Federal funds, for any public communication that promotes or supports or
14 attacks or opposes a clearly identified candidate for Federal office. 2 U.S.C. 441i(b)(1); 11 CFR
15 300.32(c).

16 In the Soft Money Final Rules, the Commission concluded that Levin funds are a “new
17 type of non-Federal funds.” 67 FR at 49065. The Commission found that Levin funds are
18 “unlike Federal funds, which are fully subject to the Act’s requirements, and unlike ordinary
19 non-Federal funds, because they are subject to certain additional requirements under BCRA.” Id.
20 at 49085. Levin funds are generally described as non-Federal funds; e.g., when presenting the
21 Levin amendment to Congress, the sponsor of the Levin amendment stated “this amendment will
22 allow the use of some non-Federal dollars by State parties for voter registration and get out the
23 vote ...” 147 Cong. Rec. S3124 (daily ed. Mar. 29, 2001) (Statement of Sen. Levin) [emphasis

1 added].³ Consequently, State, district and local party committees may deposit Levin funds in
2 their non-Federal account if they do not maintain a separate Levin account. 11 CFR
3 300.30(c)(3). Thus, Schedules H5 and H6 to FEC Form 3X and the related instructions treat
4 Levin funds as one type of non-Federal funds.

5 Both groups of commenters agreed with the Commission's proposed modifications to
6 section 300.37. One group of commenters supported the restriction on the donation of Levin
7 funds for several reasons. These commenters observed that the Supreme Court's statements
8 about BCRA provide "no basis to think that the [Supreme] Court was including Levin funds in
9 its reference to funds from a 'party's federal account.'" Second, the commenters relied on the
10 legislative history of section 441i(b)(2), which allows State parties to use only limited amounts
11 of non-Federal funds for voter registration and get-out-the-vote activities. Third, the commenters
12 noted the Commission's prior interpretation of section 441i(b)(2) in the Soft Money Final Rules,
13 where the Commission explicitly treated Levin funds as a new type of non-Federal funds.
14 Lastly, the commenters pointed to the danger that BCRA's Levin fund spending restrictions
15 could easily be circumvented if State, district and local party committees are allowed to make or
16 direct donations of Levin funds to tax-exempt organizations that actively participate in Federal
17 elections because such organizations are not subject to section 441i(b)'s spending restrictions.
18 Thus, these commenters find that "[t]he statutory language and legislative history of the Levin
19 amendment establish that Levin funds are most accurately characterized as non-Federal funds."

³ Similarly, in the Explanation and Justification for the regulations implementing the Levin Amendment, the Commission noted that "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 ..." 67 FR at 49085.

1 These commenters conclude that “Levin funds are not the kind of funds that the [Supreme] Court
2 [in McConnell] intended to permit state parties to donate or direct to tax exempt groups.”

3 The Commission concludes that, consistent with its previous treatment of Levin funds as
4 non-Federal funds, Levin funds may not be donated or directed to tax-exempt organizations that
5 actively participate in Federal elections. Levin funds are funds donated to State, district or local
6 party committees, in accordance with State law, from corporations, labor organizations, or other
7 “persons” in amounts up to \$10,000 per calendar year.⁴ 2 U.S.C. 441i(b)(2); 11 CFR 300.2(i).
8 There would be a danger of circumvention of BCRA’s soft money restrictions if State, district
9 and local party committees could donate corporate and labor union funds of up to \$10,000 per
10 donor to tax-exempt organizations that may use these funds for voter identification, voter
11 registration, get-out-the-vote and other activities, and for communications that promote, support,
12 attack or oppose Federal candidates, because State, district and local party committees may not
13 use Levin funds for Federal election activity that refers to a clearly identified Federal candidate,
14 and may not use Levin funds, or other non-Federal funds, for public communications that
15 promote or support or attack or oppose a clearly identified Federal candidate. 2 U.S.C.
16 441i(b)(1) and (b)(2)(B)(i); 11 CFR 300.32(c).

17 For these reasons, the final rules for section 300.37(a) are identical to the proposed rules,
18 except that the final rules explicitly include Levin funds as a type of non-Federal funds subject to
19 section 441i(d). The Commission is also correcting a typographical error in section
20 300.37(b)(2). The phrase “State, district or local committee or a political party” [emphasis
21 added] is revised to read “State, district or local committee of a political party” [emphasis
22 added].

⁴ Foreign nationals may not donate Levin funds. 2 U.S.C. 441e; 11 CFR 300.31(c).

1 11 CFR 300.50 -- Prohibited fundraising by national party committees

2 For the reason discussed above regarding the revision to section 300.11, the Commission
3 is revising paragraph (a) of 11 CFR 300.50 to specify that a national committee of a political
4 party may not make or direct donations of non-Federal funds to tax-exempt organizations that
5 actively participate in Federal elections. The prohibition on soliciting funds for these groups
6 remains in revised section 300.50(a). Similarly, the Commission is revising section 300.50(b)(3)
7 by removing the reference to a State, district, or local party committee, because only national
8 party committees are the subject of section 300.50. Both groups of commenters agreed with the
9 Commission's proposed modifications to section 300.50. The final rules for section 300.50 are
10 identical to the proposed rules.

11
12 11 CFR 300.51 -- Prohibited fundraising by State, district, or local party committees

13 For the reasons discussed above regarding the revision to section 300.37, the Commission
14 is revising paragraph (a) of 11 CFR 300.51 to specify that a State, district or local committee of a
15 political party may not make or direct donations of non-Federal funds, including Levin funds, to
16 tax-exempt organizations that actively participate in Federal elections. The prohibition on
17 soliciting funds for these groups remains in revised section 300.51(a).

18 Both groups of commenters agreed with the Commission's proposed modifications to
19 section 300.51. The final rules for section 300.51(a) are identical to the proposed rules, except
20 that the final rules state explicitly that Levin funds are non-Federal funds. The Commission is
21 also amending section 300.51(b)(2) to correct a typographical error. The phrase "State, district
22 or local committee or a political party" [emphasis added] is revised to read "State, district or
23 local committee of a political party" [emphasis added].

1 Other issues

2 One group of commenters urged the Commission to amend 11 CFR 102.17, 300.31(e)
3 and 300.31(f) regarding the use of jointly raised or transferred Federal funds for Federal election
4 activity by State, district and local party committees. These changes are beyond the scope of this
5 rulemaking.

6
7 **Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)**

8 The Commission certifies that the attached rules do not have a significant economic
9 impact on a substantial number of small entities for two reasons. First, the national, State,
10 district and local party committees of the two major political parties are not small entities under 5
11 U.S.C. 601 because they are not small businesses, small organizations or small governmental
12 jurisdictions. To the extent that other national, State, district and local party committees may fall
13 within the definition of "small entities," their numbers are not substantial. Second, the final rules
14 narrow the scope of restrictions applicable to national, State, district and local political party
15 committees, and thus do not have a significant economic impact on the affected entities.

16

17 **List of Subjects**

18 11 CFR Part 300

19 Campaign funds, Nonprofit organizations, Political committees and parties.

20

1 For the reasons set out in the preamble, the Federal Election Commission amends
2 subchapter C of chapter 1 of title 11 of the Code of Federal Regulations as follows:

3 **PART 300 – NON-FEDERAL FUNDS**

4 1. The authority citation for Part 300 continues to read as follows:

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

6 2. In section 300.11, the introductory text of paragraph (a) and paragraph (b)(3) are revised
7 to read as follows:

8 **§ 300.11 Prohibitions on fundraising for and donating to certain tax-exempt organizations**
9 **(2 U.S.C. 441i(d)).**

10 (a) Prohibitions. A national committee of a political party, including a national congressional
11 campaign committee, must not solicit any funds for, or make or direct any donations of non-
12 Federal funds to, the following organizations:

13 * * * * *

14 (b) * * *

15 (3) An entity that is directly or indirectly established, financed, maintained or
16 controlled by an agent of a national, ~~State, district or local~~ committee of a political
17 party, including a national congressional campaign committee.

18 * * * * *

19 3. In section 300.37, the introductory text of paragraph (a) and paragraph (b)(2) are revised
20 to read as follows:

21 **§ 300.37 Prohibitions on fundraising for and donating to certain tax-exempt organizations**
22 **(2 U.S.C. 441i(d)).**

1 (a) Prohibitions. A State; district or local committee of a political party must not solicit any
2 funds for, or make or direct any donations of non-Federal funds, including Levin funds, to:

3 * * * * *

4 (b) * * *

5 (2) An entity that is directly or indirectly established, financed, maintained or
6 controlled by a State, district or local committee ~~or~~ of a political party or an
7 officer or agent acting on behalf of such an entity; or

8 * * * * *

9 4. In section 300.50, the introductory text of paragraph (a) and paragraph (b)(3) are revised
10 to read as follows:

11 **§ 300.50 Prohibited fundraising by national party committees (2 U.S.C. 441i(d)).**

12 (a) Prohibitions on fundraising and donations. A national committee of a political party,
13 including a national congressional campaign committee, must not solicit any funds for, or make
14 or direct any donations of non-Federal funds to the following organizations:

15 * * * * *

16 (b) * * *

17 (3) An entity that is directly or indirectly established, financed, maintained or
18 controlled by an agent of a national, ~~State, district or local~~ committee of a political
19 party, including a national congressional campaign committee.

20 * * * * *

21 5. In section 300.51, the introductory text of paragraph (a) and paragraph (b)(2) are revised
22 to read as follows:

1 § 300.51 Prohibited fundraising by State, district, or local party committees (2 U.S.C.
2 441i(d)).

3 (a) Prohibitions. A State, district or local committee of a political party must not solicit any
4 funds for, or make or direct any donations of non-Federal funds, including Levin funds, to:

5 * * * * *

6 (b) * * *

7 (2) An entity that is directly or indirectly established, financed, maintained or
8 controlled by a State, district or local committee ~~or~~ of a political party or an
9 officer or agent acting on behalf of such an entity; or

10 * * * * *

11
12
13
14
15

Scott E. Thomas
Chairman
Federal Election Commission

16 DATED _____
17 BILLING CODE: 6715-01-U