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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2005 APR 22 P 2:43

MEMORANDUM

APR 22 2005

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

Anthony T. Buckley *ATB*
Attorney

AGENDA ITEM
For Meeting of: 04-28-05

SUBMITTED LATE

SUBJECT: Draft Notice of Proposed Rulemaking on State Party Payment of Salaries and Wages

Attached is a draft Notice of Proposed Rulemaking ("NPRM") that revisits how State, district, and local party committees must pay the salaries and wages of employees who spend 25 percent or less of their compensated time in a month on Federal-related activities, in order to comply with 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

1 **FEDERAL ELECTION COMMISSION**

2 **11 CFR Parts 106 and 300**

3 **[NOTICE 2005->]**

4 **State, District, and Local Party Committee Payment of Certain Salaries and Wages**

5
6 **AGENCY:** Federal Election Commission.

7 **ACTION:** Notice of Proposed Rulemaking.

8 **SUMMARY:** The Federal Election Commission is seeking comment on proposed
9 changes to regulations regarding payments by State, district or local
10 party committees for salaries and wages of employees who spend 25
11 percent or less of their compensated time in a month on Federal
12 election activity and activity in connection with Federal elections.
13 Currently, these committees may use funds whose only restriction is
14 that they comply with State law. The proposed changes would require
15 these expenses to be paid using at least some Federal funds, consistent
16 with the ruling of the United States District Court for the District of
17 Columbia in Shays v. Federal Election Commission. The Commission
18 is appealing this ruling to the D.C. Circuit. In the interim, the
19 Commission is initiating this rulemaking. The Commission has not
20 made any final decision on the issues presented in this rulemaking.
21 Further information is provided in the supplementary information that
22 follows.

1 **DATES:**

Comments must be received on or before [INSERT DATE 30 DAYS
2 AFTER THE DATE OF PUBLICATION IN THE FEDERAL
3 REGISTER]. If the Commission receives sufficient requests to testify,
4 it may hold a hearing on the proposed rules. Anyone wishing to testify
5 at the hearing must file written comments by the due date and must
6 include a request to testify in the written comments.

7 **ADDRESSES:**

All comments must be in writing, addressed to Ms. Mai T. Dinh, and
8 submitted in either electronic, facsimile, or hard copy form.

9 Commenters are strongly encouraged to submit comments
10 electronically to ensure timely receipt and consideration. Electronic
11 comments must be sent to either StatePartyWages@fec.gov or
12 submitted through the Federal eRegulations Portal at
13 <www.regulations.gov>. If the electronic comments include an
14 attachment, the attachment must be in the Adobe Acrobat (.pdf) or
15 Microsoft Word (.doc) format. Faxed comments must be sent to (202)
16 219-3923, with hard copy follow-up. Hard copy comments and hard
17 copy follow-up of faxed comments must be sent to the Federal Election
18 Commission, 999 E Street, N.W., Washington, D.C. 20463. All
19 comments must include the full name and postal service address of the
20 commenter or they will not be considered. The Commission will post
21 comments on its website after the comment period ends. If the
22 Commission decides a hearing is necessary, the hearing will be held in

1 the Commission's ninth floor meeting room, 999 E Street N.W.,
2 Washington, D.C.

3 **FOR FURTHER**
4 **INFORMATION**
5 **CONTACT:**

Ms. Mai T. Dinh, Assistant General Counsel, or Mr. Anthony T.
6 Buckley, Attorney, 999 E Street, NW, Washington, DC 20463,
7 (202) 694-1650 or (800) 424-9530.

8 **SUPPLEMENTARY**

9 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155,

10 116 Stat. 81 (March 27, 2002), contained extensive and detailed amendments to the Federal
11 Election Campaign Act of 1971, as amended (the "Act"), 2 U.S.C. 431 *et seq.* Under BCRA,
12 State, district and local party committees ("State party committees") must pay the salaries and
13 wages of employees who spend more than 25 percent of their compensated time per month on
14 Federal election activity and activities in connection with a Federal election (collectively
15 "Federal-related activities") entirely with Federal funds.¹ 2 U.S.C. 431(20)(A)(iv) and
16 441i(b)(1). However, BCRA is silent on what type of funds State party committees must use to
17 pay the salaries and wages of employees who spend some, but not more than 25 percent, of their
18 compensated time per month on Federal-related activities. In 2002, the Commission
19 promulgated 11 CFR 106.7(c)(1) and (d)(1)(i), and 300.33(c)(2) to address salaries and wages for
20 both types of employees. Under these rules, State party committees may pay the salaries or
21 wages of employees who spend 25 percent or less of their compensated time each month on these
22 activities entirely with funds that comply with State law. *Id.*

¹ "Federal funds" are funds that are subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. 11 CFR 300.2(g).

1 In Shays v. Federal Election Commission, 337 F.Supp.2d 28 (D.D.C. 2004), appeal
2 docketed, No. 04-5352 (D.C. Cir. Sept. 28, 2004) (“Shays”), the district court considered a
3 challenge to the portion of the regulations that permits State party committees to use all non-
4 Federal funds to pay the salaries and wages of employees who spend 25 percent or less of their
5 time each month on Federal-related activities. The district court recognized that the
6 Commission’s interpretation of 2 U.S.C. 431(20)(A)(iv) and 441i(b)(1), as promulgated in 11
7 CFR 300.33(c)(2), is a permissible reading of these statutory sections under step one of Chevron
8 because Congress had not directly spoken on this issue.² Shays at 113-114. The district court
9 also determined that it could not conclude that the Commission’s regulation was a facially
10 impermissible interpretation of BCRA. Shays at 114. However, the district court determined
11 that the regulation compromised BCRA’s “purposes of preventing circumvention of its national
12 party committee non-Federal money ban and stemming the flow of non-Federal money into
13 activities that impact Federal elections” by permitting State party committees to divide “the
14 Federal workload among multiple employees.” Shays at 114 (citing McConnell v. Federal
15 Election Commission, 540 U.S. 93, 124 S.Ct. 619, 676 (2003)). The district court found that
16 “the regulation ‘creates the potential for gross abuse’” and remanded section 300.33(c)(2) to the

² The district court described the first step of the Chevron analysis, which courts use to review an agency’s regulations: “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.’” See Shays, at 51 (quoting Chevron, U.S.A., Inc. v. Natural Res. Def. Council, 467 U.S. 837, 842-43 (1984)).

1 Commission for further action consistent with its opinion. Shays at 114 (citing Orloski v.
2 Federal Election Commission, 795 F.2d 156, 165 (D.C. Cir. 1986)).³

3 Implicit in the district court’s decision is that State party committees are required under
4 BCRA and FECA to use at least some Federal funds to pay for the salaries and wages of those
5 employees who spend some of their compensated time, but not more than 25 percent per month,
6 on Federal-related activity. Thus, the Commission is issuing this Notice of Proposed
7 Rulemaking (“NPRM”) to determine the appropriate mix of Federal and non-Federal funds that
8 State party committees must use to pay the salaries and wages for these employees.

9 One approach would be to adopt an allocation method that would establish a fixed
10 minimum percentage that a State party committee would be required to allocate to its Federal
11 account. A fixed minimum percentage provides committees with a bright-line rule that is easy to
12 understand and administer. The proposed rule below reflects this approach. Section 106.7(c)(1)
13 would be amended to set forth two methods by which State party committees could pay the
14 salaries and wages for employees who spend 25 percent or less of their compensated time in a
15 month on Federal-related activity. Paragraph (c)(1)(i) would state that State party committees
16 could pay for such salaries and wages with funds from their Federal account. Paragraph (c)(1)(ii)
17 would state that such salaries and wages could also be allocated between the committee’s Federal

³ 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 rules regarding payments by State, district or local party committees for salaries and wages of employees who spend 25 percent or less of their compensated time in a month on Federal-related activity creates the potential for great abuse of BCRA. 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.

1 and non-Federal accounts under section 106.7(d)(1)(i). Section 106.7(d)(1)(i) would be amended
2 to require State party committees to allocate at least 25 percent of the salaries and wages for
3 employees who spend 25 percent or less of their compensated time on Federal-related activities
4 to their Federal account.⁴ Non-Federal funds used to pay the remaining portion of salaries and
5 wages would still be required to comply with State law.

6 The Commission has two reasons for proposing 25 percent as the fixed minimum
7 percentage. Because these employees would not spend more than 25 percent of their
8 compensated time on Federal-related activities, a minimum allocation percentage that is
9 25 percent would ensure that State party committees would use Federal funds to pay for the
10 compensated time spent on Federal-related activity. In addition, prior to BCRA, salaries and
11 wages of State party committees' employees were considered administrative expenses that were
12 allocated based on ballot composition. See former 11 CFR 106.5(d) (repealed 2002). In the
13 Final Rules and Explanation and Justification for Prohibited and Excessive Contributions; Non-
14 Federal Funds or Soft Money, 67 FR 49064 (July 29, 2002), the Commission repealed 11 CFR
15 106.5(d) and replaced it with an allocation method for administrative expenses that were fixed
16 percentages, depending upon whether there were Presidential or Senatorial candidates on the
17 ballot for a two-year election cycle. See 11 CFR 106.7(d)(2). However, employees' salaries and
18 wages are no longer considered administrative expenses. Rather than treating them as
19 administrative expenses and requiring State party committees to use different allocation ratios
20 every two years, the 25 percent allocation ratio in the proposed rule represents the average of the

⁴ Under the proposed rules, salaries of employees who spend no time in a given month on Federal-related activities could continue to be paid entirely with funds that comply with State law.

1 four allocation ratios used for administrative expenses, and should roughly approximate the
2 average annual allocated expenses for salaries and wages over the same period.

3 Nevertheless, in the alternative, the Commission seeks comment on returning to treating
4 salaries and wages for these employees as administrative expenses subject to the allocation ratios
5 in 11 CFR 106.7(d)(2). The Commission is also seeking suggestions for other fixed minimum
6 percentages and the basis for the suggested fixed minimum percentages.

7 Another alternative method, which is not reflected in the proposed rule, would be to
8 establish an allocation percentage that is directly proportional to the amount of compensated time
9 these employees spend on Federal-related activities in a given month. Under this approach, the
10 percentage of Federal funds that a State party committee must use to pay for these salaries and
11 wages would be no less than the percentage of compensated time these employees spend on
12 Federal-related activities in relation to all compensated time in a given month. The remaining
13 salaries and wages could be paid for with non-Federal funds, provided that the funds comply with
14 State law. The log that each State, District or local party committee maintains pursuant to
15 section 106.7(d)(1) would allow committees to determine the percentage of an employee's time
16 that must be compensated using Federal funds.

17 The proposed rules also include conforming changes to current 11 CFR 300.33(c)(2).
18 That paragraph would be amended to state that salaries and wages for employees who spend 25
19 percent or less of their compensated time per month on Federal-related activities may be
20 allocated in accordance with 11 CFR 106.7(c) and (d)(1)(i).

21 The Commission also seeks comment on whether the methods for allocating salaries and
22 wages should be applied to fringe benefits of employees. In Advisory Opinion 2003-11, a State
23 party committee sought guidance on paying the costs of fringe benefits (medical, dental, and

1 prescription drug insurance coverage; coverage for short-term disability (wage loss) and long-
2 term disability insurance benefits; coverage for life insurance benefit; and employer matching
3 contributions to the 401(k) retirement plan) for employees who spent 25 percent or less of their
4 compensated time per month on Federal-related activity. The committee had allocated such costs
5 based on the allocation method used for administrative expenses, which required a mixture of
6 Federal and non-Federal funds, rather than based on the allocation method used for salaries and
7 wages, which would have allowed for the use of all non-Federal funds. The Commission
8 concluded amounts spent on fringe benefits fall into the category of compensated time, and thus
9 concluded that the State party committee could use all non-Federal funds to pay for the fringe
10 benefits.

11 The Commission now seeks comment on whether the rules should be amended to permit,
12 but not require, State, district and local party committees to use the same allocation rules for
13 fringe benefits as are used for salaries and wages, instead of allocating fringe benefits as
14 administrative costs. See also Advisory Opinion 2004-12.

15 In Advisory Opinion 2004-12, the Commission determined that a State party committee
16 may pay for Federal election activity with Federal funds raised at events where the costs of such
17 events had been paid for with a combination of Federal and non-Federal funds through the use of
18 the “funds received” method under 11 CFR 106.7(d)(4). See 11 CFR 106.7(c)(4). A narrow
19 interpretation of current section 106.7(c)(4) may suggest that when there is an event at which
20 Federal and non-Federal funds are being raised, and the costs of the event are properly allocated
21 between the Federal and non-Federal accounts according to the funds received method, the
22 Federal money raised at the event cannot be used to pay for any Federal election activity. This
23 interpretation would require a State party committee to differentiate its Federal funds depending

1 on their intended use, a requirement that the Commission has not historically adopted. Because
2 the Commission wishes to make clear that it has not adopted this interpretation, it is seeking
3 comment on whether current 11 CFR 106.7(c)(4) should be revised, consistent with AO 2004-12,
4 to clarify that Federal funds raised at an event where both non-Federal and Federal funds are
5 raised, and the costs of the event are allocated according to the funds received method, may be
6 used for Federal election activity. The Commission also seeks comment as to whether this
7 approach is consistent with BCRA.

8 The Commission seeks comment on all the issues identified in this NPRM as well as the
9 proposed rule.

10 **Certification of No Effect Pursuant to 5 U.S.C. 605(b)**

11 **[Regulatory Flexibility Act]**

12 The Commission certifies that the attached proposed rule, if promulgated, would not have
13 a significant economic impact on a substantial number of small entities. The basis for this
14 certification is that the organizations affected by this proposed rule are State, district, and local
15 party committees, which are not “small entities” under 5 U.S.C. 601. These not-for-profit
16 committees do not meet the definition of “small organization” which requires that the enterprise
17 be independently owned and operated and not dominant in its field. 5 U.S.C. 601(4). State
18 political party committees are not independently owned and operated because they are not
19 financed and controlled by a small identifiable group of individuals, and they are affiliated with
20 the larger national political party organizations. In addition, the State political party committees
21 representing the Democratic and Republican parties have a major controlling influence within the
22 political arena of their State and are thus dominant in their field. District and local party
23 committees are generally considered affiliated with the State committees and need not be

1 considered separately. To the extent that any State party committees representing minor political
2 parties might be considered “small organizations,” the number affected by this proposed rule is
3 not substantial.

4

5 **List of Subjects**

6 11 CFR Part 106

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

9 11 CFR Part 300

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

12

1 For reasons set out in the preamble, Subchapters A and C of Chapter 1 of title 11 of the
2 Code of Federal Regulations would be amended to read as follows:

3 **PART 106 – ALLOCATIONS OF CANDIDATE AND COMMITTEE ACTIVITIES**

4 1. The authority citation for part 106 would continue to read as follows:

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

6 2. Paragraphs (c)(1) and (d)(1) of Section 106.7 would be revised to read as follows:

7 **§ 106.7 Allocation of expenses between Federal and non-Federal accounts by party**
8 **committees, other than for Federal election activities.**

9 * * * * *

10 (c) Costs allocable by State, district, and local party committees between Federal and non-
11 Federal accounts.

12 (1) Salaries and wages. State district, and local party committees must pay For the
13 salaries and wages from funds that comply with State law for employees who
14 spend 25% or less of their compensated time in any given month on Federal
15 election activity or activity in connection with a Federal election. ~~See 11 CFR~~
16 300.33(e)(2). , State, district, and local party committees must either:

17 (i) Pay for such salaries and wages with funds from their Federal account; or

18 (ii) Allocate such salaries and wages between their Federal and non-Federal
19 accounts in accordance with paragraph (d)(1)(i) of this section.

20 * * * * *

1 (d) Allocation percentages, ratios, and record-keeping.

2 (1) Salaries and wages. Committees must keep a monthly log of the percentage of
3 time each employee spends in connection with a Federal election. Allocations of
4 salaries and wages shall be undertaken as follows:

5 (i) For sSalaries and wages for employees who spend 25% or less of their
6 compensated time in a given month on Federal election activities or on
7 activities in connection with a Federal election, the committee shall be
8 allocate at least 25% of such salaries and wages to a Federal account. Any
9 portion of salaries and wages not allocated to a Federal account must be
10 paid from funds that comply with State law.

11 * * * * *

12 **PART 300 – NON-FEDERAL FUNDS**

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

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

15 2. Paragraph (c)(2) of Section 300.33 would be revised to read as follows:

16 **§ 300.33 Allocation of costs of Federal election activity.**

17 * * * * *

18 (c) Costs of Federal election activity not allocable by State, district, and local party
19 committees. The following costs incurred by State, district, and local party committees
20 and organizations must be paid only with Federal funds:

21 * * * * *

22 (2) Salaries and wages. Salaries and wages for employees who spend more
23 than 25% of their compensated time in a given month on Federal election

1 activity or activities in connection with a Federal election must not be
2 allocated between or among Federal, non-Federal, and Levin accounts.
3 Only Federal funds may be used. (Salaries and wages for employees who
4 spend 25% or less of their compensated time in a given month on Federal
5 election activity or activities in connection with a Federal election ~~shall be~~
6 ~~paid from funds that comply with State law~~ may be allocated in
7 accordance with 11 CFR 106.7(c) and (d)(1)(i).

8 * * * * *

11 _____
12 Scott E. Thomas
13 Chairman
14 Federal Election Commission
15

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