



FEDERAL ELECTION COMMISSION
Washington, DC 20463

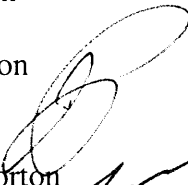
FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463


2005 JUN 20 P 4: 38


MEMORANDUM


JUN 20 2005


TO: The Commission

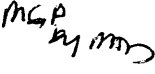
THROUGH: James A. Pehrkon
Staff Director 

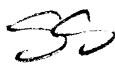
FROM: Lawrence H. Norton
General Counsel 

Rosemary C. Smith 
Associate General Counsel

Mai T. Dinh 
Assistant General Counsel

Robert M. Knop 
Attorney

Margaret G. Perl 
Attorney

Stacey Shin 
Legal Intern

AGENDA ITEM
For Meeting of: 06-23-05

SUBMITTED LATE

SUBJECT: Explanation and Justification for 11 CFR 300.64 (Candidate Solicitation at State, District, and Local Party Fundraising Events)

Attached, for Commission consideration, is a revised Explanation and Justification for 11 CFR 300.64 (Candidate Solicitation at State, District, and Local Party Fundraising Events). This Explanation and Justification would replace the Commission's previous Explanation and Justification for 11 CFR 300.64, 67 FR 49064, 49107 (July 29, 2002), in light of the decision of the United States District Court for the District of Columbia in *Shays v. FEC*, 337 F. Supp. 2d 28 (D.D.C. 2004), appeal pending No. 04-5352 (D.C. Cir.).

Recommendation:

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

Attachment

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

FEDERAL ELECTION COMMISSION

11 CFR Part 300

[Notice 2005 - XX]

Candidate Solicitation at State, District, and Local Party Fundraising Events

AGENCY: Federal Election Commission.

ACTION: Revised Explanation and Justification.

SUMMARY: The Federal Election Commission is publishing a revised Explanation and Justification for its rule regarding appearances by Federal officeholders and candidates at State, district, and local party fundraising events under the Federal Election Campaign Act of 1971, as amended ("FECA"). The rule, which is not being amended, contains an exemption permitting Federal officeholders and candidates to speak at State, district, and local party fundraising events "without restriction or regulation." These revisions to the Explanation and Justification conform to the decision of the U.S. District Court for the District of Columbia in Shays v. FEC. Further information is provided in the supplementary information that follows.

EFFECTIVE DATE: [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

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

Ms. Mai T. Dinh, Assistant General Counsel, Mr. Robert M. Knop,
Attorney, or Ms. Margaret G. Perl, Attorney, 999 E Street, N.W.,
Washington, D.C., 20463, (202) 694-1650 or (800) 424-9530.

6 **SUPPLEMENTARY**

7 **INFORMATION:** The Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L.
8 107-155, 116 Stat. 81 (2002), limits the amounts and types of funds that can be raised in
9 connection with Federal and non-Federal elections by Federal officeholders and
10 candidates, their agents, and entities directly or indirectly established, financed,
11 maintained, or controlled by, or acting on behalf of Federal officeholders or candidates
12 (“covered persons”). See 2 U.S.C. 441i(e). Covered persons may not “solicit, receive,
13 direct, transfer or spend” non-Federal funds in connection with an election for Federal,
14 State, or local office except under limited circumstances. See 2 U.S.C. 441i(e); 11 CFR
15 part 300, subpart D.

16 Section 441i(e)(3) of FECA states that “notwithstanding” the prohibition on
17 raising non-Federal funds, including Levin funds, in connection with a Federal or non-
18 Federal election in section 441i(b)(2)(C) and (e)(1), “a candidate or an individual holding
19 Federal office may attend, speak, or be a featured guest at a fundraising event for a State,
20 district, or local committee of a political party.” Id. During its 2002 rulemaking to
21 implement this provision, the Commission considered competing interpretations of this
22 provision. The Commission decided to promulgate rules at 11 CFR 300.64(b) construing
23 the statutory provision to permit Federal officeholders and candidates to attend, speak,
24 and appear as featured guests at fundraising events for a State, district, and local
25 committee of a political party (“State party”) “without restriction or regulation.” See

1 Final Rules on Prohibited and Excessive Contributions: Non-Federal Funds or Soft
2 Money, 67 FR 49064, 49108 (July 29, 2002).

3 In Shays v. FEC, the district court held that the Commission’s explanation and
4 justification for the fundraising provision in 11 CFR 300.64(b) did not satisfy the
5 reasoned analysis requirement of the Administrative Procedure Act, 5 U.S.C. 553 (2000)
6 (“APA”). See 337 F. Supp. 2d 28, 93 (D.D.C. 2004), appeal pending No. 04-5352 (D.C.
7 Cir.). The court held, however, that the regulation did not necessarily run contrary to
8 Congress’s intent in creating the fundraising exemption, was based on a permissible
9 construction of the statute, and did not “unduly compromise[] the Act’s purposes.” Id. at
10 90-92 (finding the regulation survived Chevron review).¹ The Commission did not
11 appeal this portion of the district court decision.

12 To comply with the district court’s order, the Commission issued a Notice of
13 Proposed Rulemaking to provide proposed revisions to the explanation and justification
14 for the current rule in section 300.64. See Notice of Proposed Rulemaking on Candidate
15 Solicitation at State, District and Local Party Fundraising Events, 70 FR 9013, 9015 (Feb.
16 24, 2005) (“NPRM”). As an alternative to providing a new explanation and justification

¹ 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)). In the second step of the Chevron analysis, the court determines if the agency interpretation is a permissible construction of the statute which does not “unduly compromise” FECA’s purposes by “creat[ing] the potential for gross abuse.” See Shays at 91, citing Orloski v. FEC, 795 F.2d 156, 164-65 (D.C. Cir. 1986) (internal citations omitted).

1 for the current rule, the NPRM also proposed revisions to current section 300.64 that
2 would prohibit Federal officeholders and candidates from soliciting or directing non-
3 Federal funds when attending or speaking at State party fundraising events. See id. at
4 9015-16. The NPRM sought public comment on both options.

5 The public comment period closed on March 28, 2005. The Commission received
6 eleven comments from sixteen commenters in response to the NPRM, including a letter
7 from the Internal Revenue Service stating “the proposed explanation and the proposed
8 rules do not pose a conflict with the Internal Revenue Code or the regulations
9 thereunder.” The Commission held a public hearing on May 17, 2005 at which six
10 witnesses testified. The comments and a transcript of the public hearing are available at
11 http://www.fec.gov/law/law_rulemakings.shtml under “Candidate Solicitation at State,
12 District and Local Party Fundraising Events.” For the purposes of this document, the
13 terms “comment” and “commenter” apply to both written comments and oral testimony
14 at the public hearing.

15 The commenters were divided between those supporting the current exemption in
16 section 300.64 and those supporting the alternative proposed rule. Several commenters
17 urged the Commission to retain the current exemption as a proper interpretation of 2
18 U.S.C. 441i(e)(3). One commenter argued that section 441i(e)(3) created a total
19 exemption because Congress knew that State and local parties requested Federal
20 officeholders and candidates to speak at these fundraisers to increase attendance, but that
21 these appearances do not create any quid pro quo contributions for the speaker. Some
22 commenters stressed the importance of the relationship between Federal and State

1 candidates and stated that the current exemption properly recognizes the need for Federal
2 officeholders and candidates to participate in State party fundraising events.

3 Some commenters viewed the alternative proposed rule requiring a candidate to
4 avoid “words of solicitation” as problematic because it would necessitate Commission
5 review of speech at such events. These commenters asserted that the alternative rule
6 would cause Federal officeholders and candidates to refuse to participate in State party
7 fundraising events for fear that political rivals will attempt to seize on something in a
8 speech as an impermissible solicitation. One commenter noted that Federal officeholders
9 and candidates, who are attending State party fundraisers, are expected to thank attendees
10 for their past and continued support for the State party, and without a complete
11 exemption, such a courtesy could be treated as a solicitation.

12 Another commenter noted that party committees and campaign staff have worked
13 hard over the past two years doing training, following Commission meetings and
14 advisory opinions, and absorbing enforcement cases as they have developed. Another
15 commenter noted that State parties have already had to adjust their fundraising practices
16 during the 2004 election cycle to comply with BCRA. Two commenters argued that
17 further regulatory changes at this point would only increase the costs of compliance and
18 fundraising for State parties that already operate on a small budget.

19 In contrast, some commenters supported the alternative proposed rule that would
20 bar Federal candidates and officeholders from soliciting non-Federal funds when
21 appearing and speaking at State party fundraising events. Some commenters argued that
22 the Shays opinion, while upholding section 300.64 under Chevron, criticized the
23 Commission’s interpretation as “likely contraven[ing] what Congress intended . . . as well

1 as . . . the more natural reading of the statute" (Quoting Shays, 337 F.S Supp. 2d at
2 91.) Thus, these commenters argued that the structure of section 441i(e) as a whole, as
3 well as the specific wording of section 441i(e)(3), when compared to the exceptions for
4 candidates for State and local office and certain tax-exempt organizations (sections
5 441i(e)(2) and (e)(4), respectively), demonstrate that section 441i(e)(3) should not be
6 construed as a total exemption from the soft money solicitation prohibitions.

7 Accordingly, these commenters argued that the legislative history of BCRA better
8 supports the interpretation in the alternative proposed rule. These commenters also
9 argued that the Commission's proposed Explanation and Justification did not sufficiently
10 address the district court's concern as to why the Commission believed that monitoring
11 speech at State party fundraising events is more difficult or intrusive than in other
12 contexts where solicitations of non-Federal funds are almost completely barred. Shays,
13 337 F.S Supp. 2d at 93. Finally, these commenters noted that Federal officeholders and
14 candidates should be able to distinguish speaking from "soliciting," as they are required
15 to do in other situations such as charitable activity governed by the Senate Ethics Rules
16 or political activity regulated by the Federal Hatch Act, 5 U.S.C. 7323, and could
17 properly tailor their speeches to comply with the alternative proposed rule.

18 The Commission has decided, after carefully weighing the relevant factors, to
19 retain the current exemption in section 300.64 permitting Federal officeholders and
20 candidates to attend, speak, or be featured guests at State party fundraising events without
21 restriction or regulation. The reasons for this decision are set forth below in the revised
22 explanation and justification for current section 300.64.

23

1 **Explanation and Justification**

2 11 CFR 300.64 - Exemption for Attending, Speaking, or Appearing as a Featured Guest
3 at Fundraising Events.

4

5 11 CFR 300.64(a)

6 The introductory paragraph in 11 CFR 300.64 restates the general rule from the
7 statutory provision in section 441i(e)(3): “[n]otwithstanding the provisions of 11 CFR
8 100.24, 300.61 and 300.62, a Federal candidate or individual holding Federal office may
9 attend, speak, or be a featured guest at a fundraising event for a State, district, or local
10 committee of a political party, including but not limited to a fundraising event at which
11 Levin funds are raised, or at which non-Federal funds are raised.”

12 The Commission clarifies in section 300.64(a) that State parties are free within
13 the rule to publicize featured appearances of Federal officeholders and candidates at these
14 events, including references to these individuals in invitations. However, Federal
15 officeholders and candidates are prohibited from serving on “host committees” for a party
16 fundraising event at which non-Federal funds are raised or from signing a solicitation in
17 connection with a party fundraising event at which non-Federal funds are raised, on the
18 basis that these pre-event activities are outside the statutory exemption in section
19 441i(e)(3) permitting Federal candidates and officeholders to “attend, speak, or be a
20 featured guest” at fundraising events for State, district, or local party committees.

21

22

1 11 CFR 300.64(b)

2 In promulgating 11 CFR 300.64(b), the Commission construes 2 U.S.C.
3 441i(e)(3) to exempt Federal officeholders and candidates from the general solicitation
4 ban, so that they may attend and speak “without restriction or regulation” at State party
5 fundraising events. The Commission bases this interpretation on Congress’s inclusion of
6 the “notwithstanding paragraph (1)” phrase in section 441i(e)(3), which suggests
7 Congress intended the provision to be a complete exemption. See Cisneros v. Alpine
8 Ridge Group, 508 U.S. 10, 18 (1993) (“[T]he Courts of Appeals generally have
9 ‘interpreted similar “notwithstanding” language... to supercede all other laws, stating that
10 a clearer statement is difficult to imagine.’”) (internal citation omitted).

11 Although some commenters argue that section 441i(e)(3) of FECA does not
12 permit solicitation because Congress did not include the word “solicit” in that exception,
13 the Shays court stated: “[w]hile it is true that Congress created carve-outs for its general
14 ban in other provisions of BCRA utilizing the term ‘solicit’ or ‘solicitation,’ see 2 U.S.C.
15 441i(e)(2), (4), these provisions do not conflict with the FEC’s reading of Section (e)(3).”
16 See Shays, 337 F.S Supp. 2d at 90; see also Shays at 89 (“However, as Defendant
17 observes, ‘if Congress had wanted to adopt a provision allowing Federal officeholders
18 and candidates to attend, speak, and be featured guests at state party fundraisers but
19 denying them permission to speak about soliciting funds, Congress could have easily
20 done so.’”).

21 Furthermore, construing section 441i(e)(3) to be a complete exemption from the
22 solicitation restrictions in section 441i(e)(1) gives the exception content and meaning
23 beyond what section 441i(e)(1)(B) already permits. Section 441i(e)(1)(A) establishes a

1 general rule against soliciting non-Federal funds in connection with a Federal election.
2 Section 441i(e)(1)(B) permits the solicitation of non-Federal funds for State and local
3 elections as long as those funds comply with the amount limitations and source
4 prohibitions of the Act. In contrast to assertions by commenters that without section
5 441i(e)(3) candidates would not be able to attend, appear, or speak at State party events
6 where soft money is raised, the Commission has determined that under section
7 441i(e)(1)(B) alone, Federal officeholders and candidates would be permitted to speak
8 and solicit funds at a State party fundraiser for the non-Federal account of the State party
9 in amounts permitted by FECA and not from prohibited sources. See Advisory Opinions
10 2003-03, 2003-05 and 2003-36. Section 441i(e)(3) carves out a further exemption within
11 the context of State party fundraising events for Federal officeholders and candidates to
12 attend and speak at these functions “notwithstanding” the solicitation restrictions
13 otherwise imposed by 441i(e)(1). Interpreting section 441i(e)(3) merely to allow
14 candidates and officeholders to attend or speak at a State party fundraiser, but not to
15 solicit funds without restriction, would render it largely superfluous because Federal
16 candidates and officeholders may already solicit up to \$10,000 per year in non-Federal
17 funds from non-prohibited sources for State parties under section 441i(e)(1)(B).

18 The Commission agrees with one commenter who stated that the “more natural”
19 interpretation of 2 U.S.C. 441i(e)(3) is that found in current section 300.64. The
20 Commission also believes that such an interpretation is more consistent with legislative
21 intent. Section 300.64(b) effectuates the careful balance Congress struck between the
22 appearance of corruption engendered by soliciting sizable amounts of soft money, and
23 preserving the legitimate and appropriate role Federal officeholders and candidates play

1 in raising funds for their political parties. Just as Congress expressly permitted these
2 individuals to raise and spend non-Federal funds when they themselves run for non-
3 Federal office (see 2 U.S.C. 441i(e)(2)), and to solicit limited amounts of non-Federal
4 funds for certain 501(c) organizations (see 2 U.S.C. 441i(e)(4)), Congress also enacted 2
5 U.S.C. 441i(e)(3) to make clear that Federal officeholders and candidates could continue
6 to play a role at State party fundraising events at which non-Federal funds are raised.
7 The limited nature of this statutory exemption embodied in 11 CFR 300.64 is evident in
8 that it does not permit Federal officeholders and candidates to solicit non-Federal funds
9 for State parties in written solicitations, pre-event publicity or through other fundraising
10 appeals. See 11 CFR 300.64(a).

11 The commenters also stressed the importance of the unique relationship between
12 Federal officeholders and candidates and their State parties. They emphasized that these
13 party fundraising events mainly serve to energize grass roots volunteers vital to the
14 political process.

15 By definition, the primary activity in which persons attending or speaking at State
16 party fundraising events engage is raising funds for the State parties. It would be
17 contrary to BCRA's goals of increasing integrity and public faith in the campaign process
18 to read the statute as permitting Federal officeholders and candidates to speak at
19 fundraising events, but to treat only some of what they say as being in furtherance of the
20 goals of the entire event. As one commenter noted regarding Federal candidate
21 appearances at State party fundraising events, "the very purpose of the candidate's
22 invited involvement—or at least a principal one—is to aid in the successful raising of
23 money. So there is little logic, and undeniably the invitation to confusion, in allowing

1 candidates to speak and appear in aid of fundraising purposes, while insisting that the
2 candidate’s speech be free of apparent fundraising appeals.” Determining what specific
3 words would be merely “speaking” at such an event without crossing the line into
4 “soliciting” or “directing” non-Federal funds raises practical enforcement concerns. See
5 11 CFR 300.2(m) (definition of “to solicit”) and 300.2(n) (definition of “to direct”). A
6 regulation that permitted speaking at a party event, the central purpose of which is
7 fundraising, but prohibited soliciting, would require candidates to perform the difficult
8 task of teasing out words of general support for the political party and its causes from
9 words of solicitation for non-Federal funds for that political party. As the U.S. Supreme
10 Court stated in Buckley v. Valeo:

11 [W]hether words intended and designed to fall short of invitation would miss that
12 mark is a question both of intent and of effect. No speaker, in such
13 circumstances, safely could assume that anything he might say upon the general
14 subject would not be understood by some as an invitation. In short, the
15 supposedly clear-cut distinction between discussion, laudation, general advocacy,
16 and solicitation puts the speaker in these circumstances wholly at the mercy of the
17 varied understanding of his hearers and consequently of whatever inference may
18 be drawn as to his intent and meaning.

19 Buckley v. Valeo, 424 U.S. 1, 43 (1976); see also Village of Schaumburg v. Citizens for
20 a Better Environment, 444 U.S. 620, 632 (1980) (noting that “solicitation is
21 characteristically intertwined with informative and perhaps persuasive speech seeking
22 support for particular causes or for particular views”); Thomas v. Collins, 323 U.S. 516,
23 534-35 (1945) (stating that “[g]eneral words create different and often particular

1 impressions on different minds. No speaker, however careful, can convey exactly his
2 meaning, or the same meaning, to the different members of an audience ... [I]t blankets
3 with uncertainty whatever may be said. It compels the speaker to hedge and trim”);
4 Grayned v. City of Rockford, 408 U.S. 104, 116 (1972) (holding that “[t]he nature of a
5 place, ‘the pattern of its normal activities, dictate the kinds of regulations of time, place
6 and manner that are reasonable.’ ... The crucial question is whether the manner of
7 expression is basically incompatible with the normal activity of a particular place at a
8 particular time.”).

9 A complete exemption in section 300.64(b) that allows Federal officeholders and
10 candidates to attend and speak at State party fundraising events without restriction or
11 regulation avoids these significant concerns. A number of commenters noted the
12 potential impact of these concerns if the Commission did not retain current 11 CFR
13 300.64(b). For example, one commenter “strongly urge[d] the Commission not to adopt
14 a ‘speak but don’t solicit’ rule. As noted in the NPRM itself, such a rule would ‘require
15 candidates to tease out’ appropriate words from inappropriate ones.” This commenter
16 further stated that he “also fear[s] the outcome if a ‘middle ground’ is adopted, wherein
17 federal officeholders and candidates could attend fundraisers but not use words that might
18 be deemed solicitation for money. This would, first and foremost, open up a whole new
19 battleground in politics, as every statement made by a Congressman at his party’s
20 Jefferson/Jackson day (or Lincoln Day) dinner will be scrutinized to see if it complies
21 with requirements.” Another commenter noted that current 11 CFR 300.64 “applies only
22 to the speeches that a Federal officeholder or candidate may give at a State or local party
23 event. It reflects the practical realities of these events. As a featured speaker, an

1 officeholder is expected to thank the attendees for their past and continued support of the
2 party. Without the current exemption, this common courtesy might well be treated as a
3 violation of the ban on the solicitation of non-Federal funds. The Commission would
4 then be placed in the position of determining whether a normal and expected expression
5 of gratitude or request for support crosses some indeterminate line and violates the law.”
6 Another commenter urged the Commission to retain the current regulation so that Federal
7 officeholders and candidates would not be exposed to “legal jeopardy” because the
8 proposed alternative rule would leave “too much opportunity for someone to second
9 guess and misinterpret a speech made at this type of event.” The same commenter stated
10 that the Commission is faced with the question of whether or not to adopt a rule “that
11 allows candidates and officeholders to be placed at the mercy of those who would
12 misinterpret or mischaracterize the speech they give.”

13 At the hearing, the Commission explored a number of scenarios involving a
14 Federal officeholder or candidate speaking at a party fundraising event. The discussion
15 illustrates the difficulty for not only the Commission, but also Federal officeholders and
16 candidates, in parsing speech under the alternative proposed rule. For example, when
17 asked whether statements like “I’m glad you’re here to support the party,” and “thank
18 you for your continuing support of the party,” constitute solicitation, the commenters who
19 favor the alternative proposed rule could not give definitive answers. They
20 acknowledged that the word “support” may be construed as a solicitation when spoken at
21 a fundraising event but not when spoken at other types of events. Likewise, commenters
22 who favored the current rule expressed uncertainty as to whether these phrases would be
23 construed as solicitations when spoken at a fundraising event.

1 The commenters disagreed as to whether a Federal officeholder or candidate
2 delivering a speech under a banner hung by the State party reading “Support the 2005
3 State Democratic ticket tonight” would be construed as impermissible solicitation unless
4 explicit disclaimers were included in the speech. Some commenters noted that even a
5 “pure policy” speech, otherwise permissible at a non-fundraising event, could constitute
6 an impermissible solicitation in the context of a State party fundraising event. Finally,
7 many commenters could not provide a clear answer as to whether a policy speech that
8 included a statement of support for the “important work” of the State party chairman on a
9 particular issue (such as military base closures in the state) could be construed as an
10 impermissible solicitation. In each of these examples the commenters stated that an
11 analysis of the particular facts and circumstances surrounding the speech would be
12 required in order to determine whether a speech would be solicitation. However, the
13 commenters analyzed the facts and circumstances differently, and when presented with
14 the same facts and circumstances, they could not come to agreement on whether the
15 speech was a solicitation.

16 The inability of the commenters to provide clear answers to these scenarios
17 demonstrates how parsing speech at a State party fundraising event is more difficult than
18 in other contexts and why it would be especially intrusive for the Commission to enforce
19 the alternative proposed rule. As illustrated during the discussion at the hearing and
20 observed by one of the commenters, whether a particular message is a solicitation may
21 depend on the person hearing the message – what one person interprets as polite words of
22 acknowledgement may be construed as a solicitation by another person. The likelihood
23 of this misinterpretation occurring increases at a State party fundraising event because of

1 the Federal officeholders' and candidates' unique relationship to, and special
2 identification with, their State parties.

3 The Commission believes that the alternative rule would, as a practical matter,
4 make the statutory exception at 2 U.S.C. 441i(e)(3) for appearances at State and local
5 party fundraising events a hollow one. Given that the Federal officeholder's appearance
6 would be, by definition, at a fundraising event, it would be exceedingly easy for opposing
7 partisans to file a facially plausible complaint that the candidate or Federal officeholder's
8 words or actions at the event constituted a "solicitation." In such circumstances, the
9 Commission believes that Federal officeholders and candidates would be reluctant to
10 appear at State party fundraising events, as doing so would risk complaints, intrusive
11 investigations, and possible violations based on general words of support for the party.

12 Some commenters argued that Federal officeholders and candidates should be
13 able to distinguish between permissible speech and an impermissible solicitation under
14 the alternative rule because Federal employees are already required to make such
15 judgments when involved in political activity pursuant to the Hatch Act. See 5 U.S.C.
16 7323; 5 CFR 734.208(b). Under the Hatch Act and its implementing regulations, a
17 Federal employee "may give a speech or keynote address at a political fundraiser...as
18 long as the employee does not solicit political contributions." See 5 CFR 734.208,
19 Example 2. However, there are significant differences between the requirements of the
20 Hatch Act and the Commission's regulations which make it much easier for Federal
21 employees to know which words are words of solicitation under the Hatch Act scheme,
22 than under the alternative proposed rule.

1 Although the Hatch Act restriction appears similar to the proposed alternative rule
2 banning Federal officeholders and candidates from soliciting money when speaking at
3 State party fundraising events, the Hatch Act is a narrower standard that provides clear
4 guidance to speakers to distinguish permissible speech. First, the implementing
5 regulations for the Hatch Act contain a narrow definition of “solicit” meaning “to request
6 expressly” that another person contribute something. See 5 CFR 734.101. Thus, for
7 example, the Hatch Act regulations explain that an employee may serve as an officer or
8 chairperson of a political fundraising organization so long as they do not personally
9 solicit contributions, see 5 CFR 734.208, Example 7, while Federal officeholders and
10 candidates may not serve in such capacity under 2 U.S.C. 441i(e) and 11 CFR 300.64.
11 Moreover, in order to violate the Hatch Act, a Federal employee must “knowingly”
12 solicit contributions – a higher standard than that employed in FECA and Commission
13 regulations. Thus, a Federal employee would not be penalized for unintentionally
14 crossing the line into “solicitation” under the Hatch Act, whereas the alternative proposed
15 rule would reach situations where the Federal officeholder or candidate speech could be
16 construed as an impermissible solicitation, regardless of the speaker’s knowledge or
17 intent.

18 A commenter cited the Senate Ethics Manual explaining Rule 35 of the Senate
19 Code of Official Conduct, arguing that Federal officeholders and candidates know how to
20 ask for money and avoid asking for money. The Senate rule targets solicitation of gifts
21 from registered lobbyists and foreign agents and applies to situations not analogous to
22 State party fundraising events. Rule 35 prohibits Senators and their staff from soliciting
23 charitable donations from registered lobbyists and foreign agents but makes an exception,

1 among others, for a fundraising event attended by fifty or more people. Thus, at a
2 fundraising event attended by fifty or more people, including registered lobbyists and
3 foreign agents, senators do not need to be concerned that their speech soliciting charitable
4 donations is an impermissible solicitation of a gift under Rule 35.

5 Many commenters stressed the need for Federal officeholders and candidates to
6 have clear notice regarding what speech would be allowable at these State party
7 fundraising events, as the unwary could unintentionally run afoul of a more restrictive
8 rule. A complete exemption in section 300.64(b) that allows Federal officeholders and
9 candidates, in these limited circumstances, to attend and speak at State party committee
10 fundraising events without restriction or regulation, including solicitation of non-Federal
11 or Levin funds, avoids these concerns and the practical enforcement problems they entail.
12 The exemption provides a straightforward, clear rule that Federal officeholders and
13 candidates may easily comprehend and that the Commission may practically administer.
14 It also fully complies with the plain meaning of BCRA.

15 Furthermore, as noted above, current 11 CFR 300.64 is carefully circumscribed
16 and only extends to what Federal candidates and officeholders say at the State party
17 fundraising events themselves. The regulation tracks the statutory language by explicitly
18 allowing Federal candidates and officeholders to attend fundraising events and in no way
19 applies to what Federal candidates and officeholders do outside of State party fundraising
20 events. Specifically, the regulation does not affect the prohibition on Federal candidates
21 and officeholders from soliciting non-Federal funds for State parties in fundraising
22 letters, telephone calls, or any other fundraising appeal made before or after the
23 fundraising event. Unlike oral remarks that a Federal candidate or officeholder may

1 deliver at a State party fundraising event, when a Federal candidate or officeholder signs
2 a fundraising letter or makes any other written appeal for non-Federal funds, there is no
3 question that a solicitation has taken place that is restricted by 2 U.S.C. 441i(e)(1).
4 Moreover, it is equally clear that such a solicitation is not within the statutory safe harbor
5 at 2 U.S.C. 441i(e)(3) that Congress established for Federal candidates and officeholders
6 to attend and speak at State party fundraising events.

7 Finally, there does not appear to be evidence of corruption or abuse under the
8 current rule that dictates a change in Commission regulations. Commenters both
9 favoring and opposed to the regulation in its current form agreed that there is no evidence
10 that the operation of this exemption in the past election cycle in any way undermined the
11 success of BCRA cited by its Congressional sponsors. Congress specifically allowed
12 Federal candidates and officeholders to attend and speak at State party fundraising
13 events. The statute permits attendance where non-Federal funds are being raised, and
14 policing what may be said in both private and public conversations with donors at such
15 events does little to alleviate actual or apparent corruption. One commenter pointed out
16 that most of these fundraising events require a contribution to the State party as the cost
17 of admission, and do not present a significant danger of corruption from solicitation at the
18 event itself by speakers. As one commenter noted, “it is difficult to identify any
19 regulatory benefit to be derived by additional restrictions on what a candidate might say
20 to an audience that already has chosen to attend and contribute [when] without any overt
21 solicitation, the candidate’s appearance at the event already makes clear the importance
22 that she attaches to the party’s overall campaign efforts.” The Commission agrees with
23 the commenters that additional restrictions on what a candidate may say once at the

1 fundraising event provides little, if any, anti-circumvention protection since, as one
2 commenter noted in oral testimony, “the ask has already been made...The people are
3 already there. They are motivated to be there” and the funds have already been received
4 by the party committee before the Federal candidate and officeholder speaks at the
5 fundraising event. A commenter observed, “most political events I am familiar with
6 involve the raising of funds as a condition of admission as opposed to a solicitation at an
7 event.” Another commenter stated that “in most instances the money for the event has
8 already been raised. Therefore, the candidate or officeholder’s appearance and speech
9 [are] not a solicitation.”

10 Another commenter noted that most of these fundraising events are small-dollar
11 events targeted at grass roots volunteers where donations are usually less than \$100, and
12 do not include corporations or single-interest groups. An additional commenter stated
13 that “Congress knew that state and local party committees request officeholders speak at
14 party events to increase attendance and the party’s yield from the event. It was also
15 aware that speeches at these events are unlikely of themselves to foster the quid pro quo
16 contributions that the law seeks to curb.” Thus, many of these events already comply
17 with amount limitations and source prohibitions for solicitation under section
18 441i(e)(1)(B). In contrast, other commenters asserted that there was a potential for abuse
19 if Federal candidates and officeholders make phone calls from the event asking donors
20 for non-Federal funds, or gather together a group of wealthy donors and label it a “State
21 party fundraising event” in order to benefit from the exemption in section 300.64.
22 However, in response to Commission questioning at the hearing, no commenter could
23 point to any reports of such activity in the past election cycle. If the Commission detects

1 evidence of abuse in the future, the Commission has the authority to revisit the regulation
2 and take action as appropriate, including an approach targeted to the specific types of
3 problems that are actually found to occur.

4

5 **Additional Issues**

6 1. Other Fundraising Events

7 In the NPRM, the Commission sought public comment regarding certain advisory
8 opinions issued by the Commission permitting attendance and participation by Federal
9 officeholders and candidates at events where non-Federal funds would be raised for State
10 and local candidates or organizations, subject to various restrictions and disclaimer
11 requirements. See NPRM at 9015; Advisory Opinions 2003-03, 2003-05, and 2003-36.
12 Some commenters stated that the analysis in those advisory opinions was correct and
13 consistent with BCRA's exceptions permitting Federal officeholders and candidates to
14 raise money for State and local elections within Federal limits and prohibitions under
15 section 441i(e)(1)(B). One commenter noted that these advisory opinions were based on
16 the Commission's regulation at 11 CFR 300.62, which was not challenged in the Shays
17 litigation and need not be reexamined here. Another commenter urged the Commission
18 to incorporate the holdings of these advisory opinions into its regulations so that Federal
19 officeholders and candidates could continue to rely on them. One commenter also
20 suggested that any additional restrictions beyond the disclaimers required in these
21 advisory opinions would raise constitutional concerns. In contrast, other commenters
22 asserted that these advisory opinions were incorrect and that the Commission should

1 supersede them with a regulation that completely bars attendance at soft money
2 fundraising events that are not hosted by a State party.

3 The Commission continues to believe that these advisory opinions were correctly
4 decided as to the application of 2 U.S.C. 441i(e)(1)(B) and 11 CFR 300.62 to the
5 activities described by the requestors. The Commission does not believe it is necessary
6 to initiate a rulemaking to address the issues in Advisory Opinions 2003-03, 2003-05, and
7 2003-36. These advisory opinions may continue to be relied upon by those involved in
8 a specific activity that is indistinguishable in all its material aspects from the activities in
9 these advisory opinions.

10 2. Levin Funds

11 The Commission also sought comment on how it should interpret 2 U.S.C.
12 441i(b)(2), (e)(1), and (e)(3) in light of language from Shays stating that Levin funds are
13 “funds ‘subject to [FECA’s] limitations, prohibitions, and reporting requirements.’” See
14 NPRM at 9016. Most comments regarding this inquiry opposed any interpretation of
15 these provisions that would allow Federal officeholders and candidates to solicit Levin
16 funds without restriction, with some commenters noting that the Commission has
17 consistently referred to Levin funds as non-Federal funds, including in recent final rules
18 published in 2005. However, one commenter stated that Federal officeholders and
19 candidates should be allowed to raise Levin funds. This issue of interpretation was
20 relevant only to the alternative approach proposed in the NPRM. Because the

21

1 Commission has decided to retain its rule in section 300.64 with a revised explanation
2 and justification, the Commission need not further address this question of statutory
3 interpretation.

4

5

6

7

8

9

10

11

12

13

DATED: _____
BILLING CODE: 6715-01-U

Scott E. Thomas
Chairman
Federal Election Commission